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The Place of Unilateral Acts in International Law: Understanding a (Non) Legal Concept

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by

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LIST OF ABBREVIATIONS

EEZ	Exclusive Economic Zone
EJIL	European Journal of International Law
EU	European Union
IAEA	International Atomic Energy Agency
ICC	International Criminal Court
ICJ	International Court of Justice
ICLQ	International and Comparative Law Quarterly
IGO	Intergovernmental Organization
ILC	International Law Commission
NATO	North Atlantic Treaty Organization
NPT	Treaty on the Non-Proliferation of Nuclear Weapons
PCIJ	Permanent Court of International Justice
PLO	Palestine Liberation Organization
VCLT	Vienna Convention on the Law of Treaties
UNCLOS	United Nations Convention on the Law of the Sea
UN	United Nations
UNSC	United Nations Security Council
US	United States
USSR	Union of Soviet Socialist Republics
WMD	Weapons of Mass Destruction

Chapter 1: Introduction

1. Introduction

This thesis answers the research question, "are unilateral acts legal?" This introduction defines this question by establishing the context and purpose for this study, by expanding on the research question asked, and by explaining the significance of this work. Additionally, this chapter delimits the scope of this work and establishes the parameters of the research. Lastly, this chapter outlines the organization of this thesis.

2. The Context and Purpose of this Thesis

On March 20, 2003 the US, and its coalition partners, including the United Kingdom, invaded Iraq.[1] Popular reports continually spoke of this invasion as "unilateral,"[2] so the term unilateral became, in a sense, shorthand for all the justifications advanced for the US led invasion. These justifications were complex and evolved over the course of the events that led up to the incursion into Iraq. First, the invasion of Iraq was justified as an act of preemptive self-defence. Second, the invasion of Iraq was defensible because Iraq was in defiance of UNSC Resolutions by possessing and making WMD. Consequently, military action was appropriate to enforce these resolutions. Third, the invasion of Iraq was warranted as a humanitarian act to bring democracy to the Iraqi people.

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[1] "Iraq Timeline: July 16, 1979 to January 31, 2004" The Guardian (London) available online at <http://www.guardian.co.uk/Iraq/page/0, 12438, 793802,00.html> accessed on 29 January 2009.

[2] See, for example, Kofi Annan, Secretary General of the United Nations who stated of the invasion of Iraq: "If the US and others were to go outside the Security Council and take unilateral action they would not be in conformity with the [UN] Charter."
K Annan as quoted in R Norton-Taylor, "Law Unto Themselves: A Large Majority of International Lawyers Reject the Government's Claim that UN Resolution 1441 Gives Legal Authority for an Attack on Iraq" The Guardian (London) available online at <http://www. guardian.co.uk/world/2003/mar/14/iraq.richardnortontaylor> accessed on 29 January 2009.
Further, British Cabinet Minister Robin Cook argued, when he resigned from the Government over the invasion of Iraq, that: "Britain is not a superpower. Our interests are best protected not by unilateral action, but by multilateral agreement and a world order governed by rules."
R Cook, "Why I Had to Leave the Cabinet" The Guardian (London) available online at <http://www.guardian.co.uk/politics/2003/mar18/foreignpolicy.labour1> accessed on 29 January 2009.
These two examples illustrate that the term "unilateral" was widely used, even by senior politicians, in reference to the 2003 invasion of Iraq.

The first justification of the invasion, preemptive self-defence, was initially advanced by President Bush in 2002; it became the official US policy of in the United States' National Security Strategy of 2002.[3] This non-binding policy document stated that US:

> ….will disrupt and destroy terrorist organizations by
> …defending the United States, the American people, and our interests at home and abroad by identifying and destroying the threat before it reaches our borders. While the United States will constantly strive to enlist the support of the international community, we will not hesitate to act alone, if necessary, to exercise our right of self-defense by acting pre-emptively against such terrorists, to prevent them from doing harm against our people and our country…[4]

In this policy the US expanded their definition of self-defence under international law to include preemptive action to prevent terrorism. This policy was a response to the belief, held by the US and other states, that Iraq possessed WMD, and had not hesitated to use them against their own people, particularly against the Kurdish people of Northern Iraq. Yoo, the Deputy Assistant Attorney General in the Office of Legal Council, United States Department of Justice, from 2001-2003,[5] explains the standard for preemptive self-defence established for the invasion of Iraq as follows:

> The use of force in anticipatory self-defence must be necessary and proportional to the threat. At least in the realm of WMD [weapons of mass destruction], rogue nations and international terrorism, however, the test for determining whether a threat is "imminent" to render the use of force necessary at a particular point has become more nuanced… Factors to be considered should now include the probability of an attack; the likelihood that this probability will increase, and therefore the need to take advantage of a limited window of opportunity; whether diplomatic alternatives are practical; and the magnitude of harm that could result from the threat... Applying the reformulated test to for using anticipatory self-defense to Iraq reveals that the threat of a WMD attack by Iraq, either directly or by Iraq's

[3] H Charlesworth, "Is International Law Relevant to the War in Iraq and Its Aftermath?" (Telstra Address, National Press Club, Canberra Australia, 29 October 2003) available online at <http://law.anu.edu.au/nissl/telstra_add.pdf> accessed on 29 January 2009.
[4] The White House, 'The National Security Strategy of the United States of America' (September 2002) at p 6 available online at <http://www.acq.osd.mil/ncbdp/nm/docs/Relevant%20Docs/national_security_strategy.pdf> accessed on 29 January 2009.
[5] See "Yoo Home," Boalt Hall School of Law, University of California, Berkley available online at < http://www.law.berkeley.edu/faculty/yooj/> accessed on 12 February 2009.

> support of terrorism, was sufficiently imminent to render the use of force necessary to protect the United States, its citizens and allies. [6]

The argument for preemptive self-defence was soon supplemented by a second argument that invasion of Iraq was warranted by Iraqi failure to implement UNSC Resolutions that required it to destroy its WMD.[7] This argument rested on the fact that earlier resolutions had demanded this disarmament, justifying invasion, and on the ambiguity of the UNSC resolutions involved in this debate. Yoo explains this argument as follows:

> Resolution 678 authorized members states "to use all necessary means to uphold and implement resolution 690 (1990) and all subsequent resolutions and to restore international peace and security in the area." One of the most important "subsequent relevant resolutions" was Resolution 687. Pursuant to resolution 678, the United States could use force not only to enforce Resolution 687's cease-fire, but also to restore "international peace and security" to the region. In Resolution 1441, the Security Council unanimously found that Iraq was in material breach of these earlier resolutions and its continued development of WMD programs, its support for terrorism, and its repression of the civilian population presented a strong ongoing threat to international peace and security. These findings triggered Resolution 678's authorization to use force in Iraq. Suspending the cease-fire and resuming hostilities in Iraq was an appropriate response to Iraq's material breaches of Resolution 687.[8]

The final rationale advanced for invading Iraq was humanitarian; some argued that the invasion of Iraq was necessary to bring democracy to the Iraqi people.[9] Each of these justifications was put forward and debated by politicians, academics and the popular press. However, the second justification – that invasion was authorized by UNSC Resolutions – appears to have been the ultimate justification of the coalition's invasion of Iraq in spite of the fact that this justification was not universally accepted.

Therefore, in 2003 the term unilateral act was commonly used to refer to a range of justifications for the US', and its coalition partners', actions in Iraq; actions that

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[6] J C Yoo, "International Law and the War in Iraq" Public Law and Legal Theory Research Series Paper No. 145 (2004) available online at < http://papers.ssrn.com/sol3/papers.cfm?abstract_id=492002> accessed on 12 February 2009.
[7] Charlesworth, "Is International Law Relevant" (n 3) at pp 3-4.
[8] Yoo "International Law" (n 6).
[9] Charlesworth "Is International Law Relevant" (n 3) at p 4.

were undertaken without support, or arguably approval, of any multilateral institution. In light of this range of justifications the precise meaning of a unilateral act was unclear, and the assessment of the legality of such acts was widely debated. Further, the debate over the invasion of Iraq was part of a wider trend in international law. The US had repeatedly acted in its preemptive self-defence before invading Iraq. Yoo notes incidents in Libya, Panama, Iraq, Afghanistan and Sudan.[10] Consequently, in 2003 unilateral action was a political policy of the US and had been so for many years. This made the question of the legality of unilateral acts both timely and important as the US, the world's most powerful actor, continued to assert that its unilateral actions were legal.

Additionally, unilateral acts have been part of the practice of countries other than the US. For example, Israel has engaged in at least three acts that can be considered unilateral: the bombing of the Osirak reactor in Iraq, and the withdrawals from Lebanon in 2000 and Gaza in 2005. When examined, these examples demonstrated the range of acts commonly termed "unilateral" as well as the difficulty in classifying these acts as "legal" as opposed to political acts.

The first example of a unilateral act by Israel was Osirak. In 1981, Israel, acting in response to what it believed was Iraqi pursuit of nuclear weapons, bombed the Osirak nuclear reactor at the Tuwaitha Research centre near Baghdad.[11] Israel argued that it had to act as Iraq would have been capable of possessing nuclear weapons by 1985, and therefore it was necessary for it to act unilaterally and preemptively to prevent this from occurring. States did not accept this argument; the bombing was condemned by both the Security Council and the General Assembly.[12] Thus, the unilateral act in this case referred to an action undertaken outside the unilateral framework in preemptive self-defence.

The second example was the Israeli withdrawal from Lebanon. In the late 1960s tensions between Israel and Lebanon began to rise. Nascent Palestinian liberation movements, including the Popular Front for the Liberation of Palestine and the PLO, began to use Lebanese territory as a hub.[13] These movements exacerbated rising internal divisions within Lebanon. These internal tensions led to a civil war that lasted from 1975 to 1990.[14] The first large scale Israeli intervention into Lebanese territory came in

[10] See Yoo, "International Law" (n 6).
[11] TM Franck, *Recourse to Use of Force: State Action Against Threats and Armed Attacks* (CUP, Cambridge, 2002) at p 105
[12] Franck, Recourse of Use of Force (n 11) at pp 105-106.
[13] "Timeline: Lebanon" BBC News available online at <www.bbc.co.uk> accessed on 7 December 2007.
[14] BBC, "Timeline: Lebanon" (n 13).

1978 when Israel invaded Lebanon. Israeli troops pushed north to the Litani River in response to Palestinian forays into Israeli territory.[15] This act provoked a response from the United Nations in the form of a Security Council Resolution, UNSC Resolution 425. This resolution called on Israel to withdraw from Lebanese territory.[16] It also established a peacekeeping mission to stabilize the area. Israel did not "withdraw" at this time but it did slowly hand over authority to a Christian Lebanese militia. This was the status quo until 1982, when the Israeli Ambassador to London was assassinated. The assassination was carried out by Palestinian movements based in Lebanon. This provoked Israel to invade Lebanon for the second time. By 1983 an Israeli withdrawal was agreed upon in exchange for a security buffer zone in South Lebanon. Most Israeli troops left Lebanon by 1985. Some troops remained to support the South Lebanon Army, a Christian militia that acted as an Israeli proxy. This was the status quo until 2000. Throughout this period there were Israeli air strikes on Lebanon-based movements, including Syrian/Iranian supported Hezbollah in Southern Lebanon. Israel suffered steady casualties in the Lebanese security zone, and civilian areas within northern Israel were targeted by rockets from Lebanon. As a result the Israeli understanding of the Lebanon war changed over time. By the late 1990s it was widely held by the Israeli public that the price of staying in Lebanon was no longer acceptable. Ehud Barak likely won the 1999 election in Israel because of his promise to withdraw from Lebanon.[17] This promise led to a cabinet vote on 5 March 2000 to unilaterally withdraw all troops from Lebanon.[18] The deadline for the withdrawal was set for July. The UN was informed by Letter to the Secretary General of Israeli intention to comply with UNSC Resolution 425.[19] The July deadline was advanced by six weeks. Hezbollah took advantage of the impending withdrawal to attack the vulnerable security zone. The South Lebanese Army was unable to withstand this onslaught, and so the final withdrawal was affected May 24, 2000.[20] Complete withdrawal and compliance with UNSC Resolution 425 was ultimately confirmed by the UN.[21]

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[15] BBC, "Timeline: Lebanon" (n 13).
[16] United Nations, "UN Security Council Resolution 425" available online at <www.israel-mfa.gov.il> accessed on 7 December 2007.
[17] "Q &A: Leaving Lebanon" BBC available online at <www.bbc.co.uk> accessed on 12 December 2007.
[18] BBC, "Timeline: Lebanon" (n 13).
[19] Ministry of Foreign Affairs, Israel, "Withdrawal from Lebanon" (17 April 2000) available online at <http://www.mfa.gov.il/MFA/MFAArchive/2000_2009/2000/4/Withdrawal+from+Lebanon.htm> accessed on 12 December 2007.
[20] BBC, "Timeline: Lebanon" (n 13).
[21] Secretary General, United Nations "Letter Dated 24 July 2000 from the Secretary General addressed to the President of the Security Council" UNSC UN Doc S/2000/731 available online at <http://domino.un.org/UNISPAL.NSF/b86613e7d92097880525672e007227a7/2e1e149a5c7c6b41852569b600724cff!OpenDocument> accessed on 12 December 2007.

This act illustrated the complex interplay between a unilateral act and its context that was also seen in justifications of the invasion of Iraq. This unilateral act was justified on three separate grounds: that Israel was responding to a UNSC Resolution that required withdrawal; that Israel was responding to the complex web of Lebanese internal politics; and that Israel was responding to the politics of the region including Palestinian Liberation movements, such as Hezbollah and others. Therefore, the justifications of the Israeli withdrawal from Lebanon were just as complex and open to interpretation as the justifications of the invasion of Iraq.

A third example of a unilateral act by Israel was the 2005 pullout from Gaza. This example revealed similar patterns to the Lebanon withdrawal. In 2003 Israel announced a new policy of "unilateral disengagement" from some of the territories it had occupied since 1967.[22] The policy focused on a unilateral withdrawal by Israel from the Gaza Strip and the Northern West Bank.[23] It entailed the dismantling of settlements established there and the removal of a military presence.[24] This policy was implemented between August and September 2005.[25] Settlements were dismantled and settlers were withdrawn. Israel maintained control over borders and air space in the Gaza Strip, and reached a deal with Egypt to monitor Gaza's Egyptian border.[26] In this example, Israel justified its actions through a public declaration of its unilateral intention to withdraw from some of the territories it had occupied since 1967. This declaration was public and presumably manifested a unilateral intention to be bound. Again, the justifications for this action were complex. Primarily this withdrawal was justified on internal grounds, as Prime Minister Sharon stated at the time.[27] However, Israel also justified this withdrawal as a show of good faith to the Palestinian people in solving their territorial disputes, and this act was also justified as an act of compliance with both United Nations Resolutions (such as UNSC Resolution 242),[28] and multilateral negotiation

[22] "Israel Palestinian Conflict" Reuters AlertNet <http://www.alertnet.org/db/crisisprofiles/IP_CON.htm?v=timeline> accessed on December 12, 2007.
[23] See for example, Prime Minister's Office, Israel "The Cabinet Resolution Regarding the Disengagement" available online at (6 June 2004) <www.mfa.gov.il> accessed on 12 December 2007.
[24] Cabinet Resolution (n 23).
[25] Reuters (n 22).
[26] Cabinet Secretary, Israel "Cabinet Communique" (11 September 2005) available online at <www.mfa.gov.il> accessed on 12 December 2007.
[27] "On this Day: 15 August 2005" BBC available online at <http://news.bbc.co.uk/onthisday/hi/dates/stories/august/15/newsid_4946000/4946550.stm> accessed on 4 March 2009.
[28] United Nations Resolution 242 (1967) available online at <http://daccessdds.un.org/doc/RESOLUTION/GEN/NR0/240/94/IMG/NR024094.pdf?OpenElement> accessed on 4 March 2009.

programs such as the Quartet's (US, European Union, Russia and the United Nations) "Roadmap" to peace in the Middle East.[29]

These acts all shared several characteristics. First, these actions were all commonly referred to as unilateral acts, and they were all undertaken without direct oversight of multilateral institutions. Second, the legality of each of these acts was widely debated. Further, the legality of these acts was contested in one of two ways. Either the legality of the action itself was questioned (as in Iraq or Osirak), or the legal nature of the act was never determined (as in cases like Sudan or Lebanon). Further, each of these acts was justified on multiple grounds, from humanitarian concerns to preemptive self-defence, from compliance with UN resolutions to internal concerns. No single justification seemed to prevail as various arguments were used at different points to either support or contest the legality of the unilateral act. These controversies over the legality of unilateral acts suggested questions about the concept of unilateral acts more generally. One question in particular seemed to emerge: Why was it so difficult to ascertain when a unilateral act is legal? This question suggested a gap in the doctrine between the claim of legality (or illegality) of a specific unilateral act and the ability to justify this claim. This question, and the gap it highlighted, indicated a fruitful avenue for further study. Consequently, the purpose of this study is to explain the gap between the claim that a unilateral act is legal or illegal and the ability to justify that claim in legal doctrine.

3. Problem Identification

The context of this thesis suggests a problem with identifying the legality of unilateral acts. The example of the 2003 invasion of Iraq illustrates that the term unilateral act often serves as a convenient catch-all phrase for competing explanations of an act undertaken without reference to multilateral institutions. In the case of Iraq, the competing justifications for invasion include preemptive self-defence, implementation of UNSC Resolutions (when the UN is refusing to act collectively) and humanitarian action. Each of these justifications indicates different requirements to determine

[29] See for example, "A Performance-Based Roadmap to a Two-State Solution to the Israeli-Palestinian Conflict" available online at <http://www.un.org/media/main/roadmap122002.html> accessed on 4 March 2009.

whether the invasion is legal or illegal. For example, the justification of preemptive self-defence requires an assessment of the meaning of the ban on use of force under Article 2(4) of the UN Charter, the exception to Article 2(4) for self-defence under Article 51 of the UN Charter, and the interpretation of self-defence under customary international law.[30] The second justification for the invasion is Iraqi possession of WMD, and their non-compliance with UNSC Resolutions requiring them to destroy these weapons.[31] While this justification appears to have been factually misguided, it is the primary justification for the invasion. Further, this justification is not uncontroversial. For example, Members of the Security Council, particularly France, vetoed a second UNSC Resolution that would have explicitly authorized use of force against Iraq.[32] The third justification of legality, humanitarian intervention, has been most prominently advanced by Prime Minister Blair of the United Kingdom, arguably in order to secure popular support for British participation in the invasion of Iraq. In his view the invasion of Iraq can be justified by the need to protect Iraqi civilians from a violation of their human rights.[33] The legality of this approach is also controversial as it challenges the notion of state sovereignty, a cornerstone principle of the international order. As Goodman notes, "[t]he legal status of humanitarian intervention poses a profound challenge to the future of global order"[34] Other critics go further and question whether the situation in Iraq should be categorized as a humanitarian intervention. Roth, of Human Rights Watch, argues that:

> Iraq failed to meet the test for intervention. Most important, the killing in Iraq at the time was not of the exceptional nature that would justify such intervention. In addition intervention was not the last reasonable option to stop Iraq atrocities. Intervention was not motivated primarily by humanitarian concerns. It was not conducted in a way that maximized compliance with international law."[35]

[30] See, for example, SD Murphy "Brave New World of US Responses to International Crime: The Doctrine of Preemptive Self-defence" (Symposium) (2005) 50 Vil L Rev 699 at p 3.
[31] R Wedgwood, "The Fall of Saddam Hussein: Security Council Mandates and Preemptive Self-defence" (2003) 97 AJIL 576.
[32] S Tharoor, Undesecretary General, Department of Public Information interviewed on World Chronicle, available online at <http://un.org/webcast/worldchronicle/trans900.pdf> accessed on 1 February 2009.
[33] J Hoagland, "Tony Blair Reflecting" Washington Post (6 March 2005) B7 available online at <www.washingtonpost.com> accessed 2 February 2009.
[34] See R Goodman, "Humanitarian Interventions and Pretexts for War" (2006) 100 AJIL 107 at p 107.
[35] K Roth, "War in Iraq Not a Humanitarian Intervention" available online at <www.hrw.org/legacy/wr2k/w/3/htm> accessed on 2 February 2009.

Consequently, examination of the three justifications for the invasion of Iraq indicates disagreement about both the substantive basis and the formal nature of this act. Well informed people disagree on this issue, raising profound questions about the very nature of unilateral acts more generally. This disagreement leads to the formulation of the problem this thesis investigates: "are unilateral acts legal?"

The problem of legality of unilateral acts becomes even more apparent when unilateral acts are examined in other contexts. For example, the Israeli bombing of Osirak was contested at the time, and yet it set a legal precedent for the US in its invasion of Iraq. Further, Israel's withdrawal from Lebanon in 2000 is commonly referred to as unilateral. However, like the invasion of Iraq, the withdrawal raises questions about the justification for the Israeli action. Is the withdrawal an act of compliance with UN resolutions? Or is it a response to political pressure? And do these various considerations impact on the withdrawal's legality? Similarly, Israel's 2005 withdrawal from Gaza in 2005 is called a unilateral act, but its legality is never clearly determined. These questions indicate problems with ascertaining the legality of unilateral acts and their use in international law. Consequently, this difficulty suggests a problem worthy of investigation: "are unilateral acts legal?"

4. Research Question

The previous section highlights the difficulty in determining the legality of unilateral acts. This problem leads to the following research question that is the focus of this thesis: "are unilateral acts legal?" To answer this question requires answering three further questions: First, what is the definition of unilateral acts? Second, what is the definition of legality? And third, do unilateral acts meet the definition of legality? The first question, the definition of unilateral acts, is addressed in Chapter 2: Background to Unilateral Acts and the second question, the definition of legality, is explored in Chapter 3: Method. The third question, do unilateral acts meet the definition of legality, forms the body of this thesis and is answered in Part 2. However, these questions are briefly outlined here in order to clearly define the research questions of this thesis.

The first sub-question, the definition of unilateral acts, is difficult to answer. The examples of the Iraq war, the bombing of Osirak, and the withdrawals from Lebanon and Gaza demonstrate that the term unilateral act is used to refer to a wide range of acts

of states. Consequently, unilateral acts can be defined broadly, based on the one similarity all these examples share: a unilateral act is an action that a state undertakes without reference to another state.[36] However, not all acts that meet this definition are clearly legal (or illegal). This too is evident from the examples of Iraq, Osirak, Lebanon and Gaza. Therefore, creating a definition of unilateral acts that encompasses all these types of acts, and criteria for their legality, is a difficult task. In fact, the problems with undertaking such a definition are highlighted in the recent work of the ILC on this topic.

The ILC is the creation of the United Nations. It fulfils the General Assembly's mandate of "…encouraging the progressive development of international law and its codification."[37] This mandate is set out in Article 13 of the Charter of the United Nations. To fulfil this mandate, the Commission is composed of Members who serve in their individual capacities. Topics considered for progressive development or codifications are often assigned a Special Rapporteur. The Special Rapporteur is entrusted with preparing detailed reports for consideration by the Plenary of the Membership. They delineate the topic and make proposals for its development. They work closely with a Drafting Committee on draft documents in their topic area. The Drafting Committee is entrusted with drafting and filling in the gaps in substance of the documents that they feel need to be considered by the Membership. The Commission may also create a Working Group, an "ad hoc" body of the plenary with specific powers assigned by the larger group. [38] The Members, Rapporteurs and Committees work together to produce draft documents available for UN or state approval.

The ILC proposed the topic of unilateral acts in 1996.[39] The next year the General Assembly passed a resolution formally inviting consideration of the feasibility of the topic.[40] This led the ILC to establish a Working Group to report on the "admissibility and feasibility" of the topic. The ILC considered the report of the Working Group on the topic and appointed a Special Rapporteur, Victor Rodriguez Cedeño. This led to an endorsement of the topic by the General Assembly, at which point unilateral acts were

[36] See, PM Dupuy, "The Place and Role of Unilateralism in Contemporary International Law" (2000) 11 EJIL 19 at p 20.
[37] The Charter of the United Nations, adopted 26 June 1945, entry into force 24 October 1945 UKTS 1946 No 67, Art 13 available online at <http://www.un.org/aboutun/charter/> accessed on 10 December 2007; See also ILC, "Introduction" available online at <http://untreaty.un.org/ilc/ilcintro.htm> accessed on 10 December 2007.
[38] See generally, ILC, "Introduction" available online at <. http://www.un.org/law/ilc/> accessed on 2 June 2009.
[39] See for example, ILC, Yearbook of the International Law Commission, 1996 (vol 1), UN Doc A/CN.4/Ser.A/1996, available online at <http://untreaty.un.org/ilc/publications/yearbooks/Ybkvolumes (e)/ILC_1996_v1_e.pdf> accessed on 10 December 2007.
[40] General Assembly, "Resolution Adopted by the General Assembly [On the Report of the Sixth Committee]" UN DOC UNGA A/Res/51/160 (30 January 1997) available online at <http://www.un.org/law/ilc/> accessed on 10 December 2007.

added to the Commission's program of work. This topic was then considered by the ILC until 2006.[41]

The ILC's work proceeded slowly and with considerable debate over the content of the concept. To provide an overview of this debate, the ILC's consideration of the topic from 2005 was most relevant; this was because in 2005 the Commission was at an impasse having not yet defined unilateral acts. This led the Commission to request that the Working Group present "preliminary conclusions or proposals on this topic."[42] These conclusions were presented the next year. The Members of the ILC subsequently debated, amended and approved a version of these conclusions as non-binding principles. They could not secure agreement on binding principles, or a definition of unilateral acts. As the ILC noted:

> Having examined the nine reports submitted by the Special Rapporteur and after extensive debates, the Commission believes it necessary to come to some conclusions on a topic, the difficulties and the value of which have both become apparent. Clearly, it is important for States to be in a position to judge with reasonable certainty whether and to what extent their unilateral conduct may bind them on the international plane.[43]

They continued in the next paragraph

> The Commission is aware, however, that the concept of a unilateral act is not uniform. On the one hand, certain unilateral acts are formulated in the framework and the basis of express authorization in international law, whereas others are formulated by States in exercise of their freedom to act on the international plane; in accordance with the Commission's previous decisions, only the latter have been examined by the Commission and its Special Rapporteur. On the other hand, in this second case, there exists a very wide spectrum of conduct covered by the designation "unilateral acts", and the differences among legal cultures partly account for the misunderstandings to which this topic has given rise as, for some, the concept of a juridical act necessarily implies an express manifestation of a will to be bound on the part of the author State, whereas for others any

[41] See for example ILC, Report on the Work of its Fifty-Eighth Session (2006) UN Doc UNGA Supplement No. 10 (A/61/10), Ch 8 at paras 160-166.
[42] ILC Report 2006 (n 41) at par 166.
[43] ILC Report 2006 (n 41) at par 173.

> unilateral conduct by the State producing legal effects on the international plane may be categorized as a unilateral act.[44]

The ILC acknowledged the difficulties in codifying this topic and confirmed that states were uncertain about when unilateral acts took legal effect. As a result they recognized that the concept was vast and not uniform. A brief analysis of principles they proposed expands on these difficulties.

The principles, called "Guiding Principles," tried to reconcile the contradictory definitions of a unilateral act. For example Guiding Principle 1 stated that

> Declarations publicly made and manifesting the will to be bound may have the effect of creating legal obligations. When conditions for this are met, the binding character of such declarations is based on good faith; States concerned may then take them into consideration and rely on them; such States are entitled to require that such obligations be respected.[45]

Principle 1 established three criteria for unilateral acts to have legal effect. These were: will, which was related to intention; the public nature of the statement; and the requirement that they are binding in good faith.

Other guiding principles elaborated details of these criteria. For example, Principle 2 addressed the capacity of states to enter into unilateral legal obligations. Principle 3 addressed the "circumstances" of the unilateral act. This principle challenged the autonomous nature of a unilateral act. An act was not unilateral if circumstances and reactions factored into its legal effect. Principle 4 discussed the persons who had authority to enter into unilateral acts on behalf of a state. Principle 5 clarified the form of unilateral declarations. They could be written or unwritten. Principle 6 confirmed that unilateral declarations may be *erga omnes*. This principle conflicted with principle 3, circumstances. In this instance an act could be made to the world at large. However, it also had to provoke a reaction by a specific state to become binding.

Principle 7 adopted the restrictive rules of interpretation outlined in the *Nuclear Tests cases*. Principle 8 confirmed that an act may not violate a peremptory norm. Principle 9 established that unilateral obligations were binding only on the state creating

[44] ILC Report 2006 (n 41) at par 174.
[45] ILC Report 2006 (n 41) at par 176.

the obligation. Principle 10 affirmed that unilateral acts were not arbitrarily revocable.[46] This last principle confirmed the requirement of revocability.

Each of these principles expanded on Principle 1 in some way but did not clarify the contradictory criteria established in Principle 1. These Principles were approved by the General Assembly and have become non-binding recommendations to states.

The difficulties the ILC faced in defining unilateral acts are reflected in confusion over these acts in major international law texts. The consensus among major international law textbooks is that unilateral acts are a "legal" category. However there is no agreement over where such acts fit into the doctrine of international law. Jennings and Watts in *Oppenheim* place the detailed discussion of unilateral acts in a chapter titled "on international transactions in general" in a subheading "transactions besides negotiation and treaties."[47] Brownlie places them in the chapter "Other transactions including agency and representation."[48] Conversely, Cassese discusses unilateral acts under his Part III "Creation and Implementation of International Legal Standards" in a chapter titled "other law making processes" in a section headed "unilateral acts as sources of obligation."[49] In contrast to these approaches Shaw places unilateral acts in his chapter on "sources." He considers these acts under a heading "Other possible sources of international law."[50] Alternatively, Kindred *et al* discuss unilateral acts in their chapter "creation and ascertainment of international law" as part of their treatment of treaties.[51] This approach is similar to the approach proposed by the Rodriguez Cedeño at the ILC.[52] Confusing the issue even further is Skubiszewski's cryptic approach. He remarks that although his analysis of this topic "…belongs to a larger portion of the book entitled "Sources of international law", a unilateral act of state does not constitute any source of that law."[53] Skubiszewski follows Bos who categorizes unilateral acts merely as a source of obligation.[54]

The confusion over the definition of unilateral acts stems from the lack of precision in the case law that the ILC and the texts are interpreting. These sources define unilateral as a category of legal obligation that is formalized by the ICJ in the

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[46] ILC Report 2006 (n 41) at par 177.
[47] Sir R Jennings & Sir A Watts (eds) *Oppenheim's International Law* (9th ed vol 1 Longman, Harlow 1996) at p 1187 ff.
[48] I Brownlie, Principles of Public International Law (5th ed Clarendon/OUP, Oxford 1998) at p 642 ff.
[49] A Cassese, International Law (2nd ed OUP, Oxford 2005) at p 184 ff.
[50] MN Shaw, *International Law* (4th ed CUP, Cambridge 1997) at p 95 ff.
[51] H Kindred *et al*, *International Law: Chiefly as Interpreted and Applied in Canada* (5th ed Emond Montgomery, Toronto 1993).
[52] See, for example, the discussion of the work of the ILC above and below.
[53] K Skubiszewski, "Unilateral Acts of States" in M Bedjaoui (ed) *International Law: Achievements and Prospects* (UNESCO/Martinus Nijhof, Paris/Dordrecht 1991) at p 221.
[54] Skubiszewski in Bedjaoui (n 53) at n 1.

Nuclear Tests cases,[55] paired ICJ decisions of 1974. This decision is discussed in detail in chapter 2, but for present purposes it is necessary to note that this decision is regarded as establishing the category of unilateral acts as a separate category of obligation in international law. Therefore, the criteria for unilateral acts established in this case are central to the definition of unilateral acts in this thesis. In this case the Court formalizes at least three criteria for a unilateral act to take legal effect: intention, autonomy and revocability. To be considered legal a state must undertake a unilateral act with the intention to create a legal obligation. This is the requirement of intention. Further, a unilateral act should not be undertaken for an exchange with another state or a *quid pro quo*. This is the requirement of autonomy. Lastly, once a state undertakes a unilateral act with the intention to be obligated by the act, the act is no longer revocable in good faith. This is the requirement of revocation.[56] Ostensibly, when an act meets these three criteria it is legally binding. Consequently, it is these criteria that are required for a unilateral act to have legal effect and it is these criteria that provide a basis for the assessment of legality of a unilateral act. However, in spite of these criteria the ILC and major international law texts have been unable to reach an agreed definition of a unilateral act. This thesis argues that when the criteria established in the *Nuclear Tests cases* are compared to the doctrine of international law it becomes clear that these criteria cannot define a category of legal obligation. This explains why it is so difficult to determine the legality of specific unilateral acts, such as Iraq, Osirak, Lebanon or Gaza.

Further, even if one can define unilateral acts, questions have been raised as to whether or not these acts can be considered legal acts. This requires clarifying what is meant by the term legal. The second sub-question is expanded on in Chapter 3, the chapter on method, but a brief overview of the definition of legality used in this work is provided here.

Legality is defined as the "quality or state of being legal,"[57] and to say that something is legal is to describe it as being "related to, based on, or required by the law" or possibly "permitted by law."[58] Therefore, to define a unilateral act as legal means that the act meets the requirements of law, that the act is subject to law in a manner the law

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[55] *Nuclear Tests Case (Australia v. France)* (Judgment) General List 58 [1974] ICJ Rep 253*; Nuclear Tests Case (New Zealand v. France)* (Judgment) General List 59 [1974] ICJ Rep 457; Following convention these decisions are collectively referred to as the Nuclear Tests cases; All references are to the Australia v. France decision unless otherwise noted.

[56] See generally, Nuclear Tests cases (n 55).

[57] *The Concise Oxford English Dictionary*, 12 ed, "Legality" available online at <www.oxfordreference.com> accessed on 4 February 2009.

[58] Concise OED, "Legal" (n 57).

recognizes, and so this thesis must define the requirements of law. In the context of unilateral acts this leads to the difficult question of whether the criteria for a unilateral act established in the *Nuclear Tests cases* meet the requirements of law.

Tamanaha notes that legal scholars and social scientists have debated the question "what is law" and have not reached agreement on the requirements of law.[59] One result of this lack of agreement is that any attempt to define law, and therefore legality, is merely theoretical, in the sense that it is "a supposition or system of ideas intended to explain something…"[60] Additionally, when a theory is applied to a practical problem it can be defined as a method for analysis.[61] Consequently, the answer to the research question "what is legality?" also provides a justification of the method used in this thesis. While the method used in this thesis is expanded on in Chapter 3, it is outlined briefly here.

Ratner and Slaughter identify seven "current methods" of international law: positivism, the New Haven school, international legal process, critical legal studies, international law/international relations, feminist jurisprudence, and law and economics.[62] To this list can be added natural law as one of the foundational methods of international law. However, of these methods, only critical legal studies provides an appropriate framework to answer the question, "what is legality." To justify this assertion one can begin with the classic debate between positivists and natural law theorists over the requirements of law. This debate peaked in the argument between positivist HLA Hart and his foil the natural law theorist LL Fuller.[63] However, Hart explicitly discusses the futility of this debate and of trying to define law more generally.[64] As Hart notes:

> [t[here are of course many other kinds of definition besides the very simple traditional form which we have discussed, but it seems clear, when we recall the character of the three main issues which we have identified as underlying the recurrent question, 'What is law?', that nothing concise enough to be recognized as a definition could provide an answer to it. [65]

[59] BZ Tamanaha, "A Non-Essentialist Version of Legal Pluralism" (2000) 27 Journal of Law and Society 296 at p 300. See also, B.Z. Tamanaha, "An Analytical Map of Social Scientific Approaches to the Concept of Law" (1995) 15 Oxford Journal of Legal Studies 501 at p 501.
[60] *Compact Oxford English Dictionary*, 'theory' available online at <www.askoxford.com> accessed on 2 April 2009.
[61] SR Ratner & A-M Slaughter, "Appraising the Methods of International Law: A Prospectus for Readers" (1999) 93 AJIL 291, at p 292.
[62] Ratner & Slaughter (n 61) at p 293.
[63] See B Bix, *Jurisprudence: Theory & Context* (3rd ed, Sweet & Maxwell, London, 2003) at p 3.
[64] See generally, HLA Hart, *The Concept of Law* (Clarendon, Oxford 1970).
[65] Hart (n 64) at p 15.

Having said that, though, he does then try to explain "a central set of elements" which are common to all these questions – his theory of positivism.[66] Conversely, Fuller "rejected legal positivism's distorted view of law as a 'one way projection of authority': the sovereign gives orders and the citizens obey."[67] Instead, he sees law as a product of its own internal morality.[68] These are clearly opposed approaches to defining law, although each definition is logically defensible and each definition is practically plausible. Further, neither of these definitions has uncontested support as "the" definition of law. Similarly, any definition of law advanced in this work is open to refutation and debate. This suggests that law is what Gallie calls "an essentially contested concept."[69] An essentially contested concept is a concept like art, or, as argued here, law, in which the core elements of the definition of the concept remain undefined.[70] Consequently, defining legality through the core concept of law seems only to lead to more questions than answers. Similarly, the New Haven school defines legality as the result of policy that is "empirical knowledge" aimed at a "purposive outcome" determined by the values of the legal system.[71] This method builds on a criticism of positivism, that it is insufficiently responsive to "real world" concerns in defining law. However, the New Haven school's reliance on "values" means that this method defines law in relation to predetermined preferences. As a result the New Haven school is similar to natural law methods. The values towards which the law is directed may be derived from empirical study but how these values are defined is not ultimately agreed. Therefore, this method is open to contestation.

The international legal process method is similar to the New Haven school in its focus on practical observation of international relations. However, unlike the New Haven school, international legal process focuses on "understanding how international law works."[72] Unfortunately, this focus on observation leads to criticism of this method for its lack of theoretical cohesion. The result of this "normative deficit"[73] is that

[66] Hart (n 64) at p 16.
[67] See Bix (n 63) at p 80-81.
[68] Bix (n 63) at p 84.
[69] WB Gallie, "Essentially Contested Concepts" (1956) Proceedings of the Aristotelian Society 167.
[70] Gallie (n 69) at p 182.
[71] R Falk, "Casting the Spell: The New Haven School of International Law" (1991) 104 Yale LJ 1991, at p 1992.
[72] ME O'Connell, "New International Legal Process" (1999) 93 AJIL 334 at p 334.
[73] O'Connell (n 72) at p 334.

international legal process cannot offer a comprehensive method for evaluating legality, as it has no cohesive explanation of "what legality is."

Alternatively, feminist jurisprudence, international law and international relations and law and economics methods are all interdisciplinary methods; they draw on insights from theories outside of the law -- feminist theory, international relations theory and economic theory -- to study legal phenomenon. Ratner and Slaughter observe that all of these methods believe they bring "rigor" to the analysis of law, although they suggest that the rigor they bring is contested; each method rejects other outside theories as "diversionary variables."[74] Consequently, these two strengths of interdisciplinary methods – their borrowing from other disciplines and their rigour -- also limit their usefulness for answering the question "what is legality" in two ways. First, the "borrowing" of methods from other disciplines makes it difficult for these disciplines to assess legality. As Ratner and Slaughter note, these methods often define legality in positivist terms (feminist jurisprudence excepted) and are thus susceptible to the same criticisms as positivist methods.[75] Second, even when these methods do have a unique definition of law, as in feminist jurisprudence, the definitions used lack sufficient specificity by which to assess legality. This is implied from the concern over the "rigour" of these methods as this debate is concerned with whether outside methods enhance or diminish the understanding of law. Lack of resolution of this argument points to a lack of specificity in the application of the theory of law in each method that makes it more difficult to answer the question "what is legality?". Therefore, the positivist, the natural law, the New Haven school, the international legal process and the interdisciplinary methods can all be excluded as methods of analysis in this thesis.

Unlike the other methods examined, critical legal studies methods can avoid a contestable definition of law while providing sufficient specificity with which to define and assess legality.[76] While critical legal studies is a diverse and amorphous method, certain strands of critical legal studies take an approach to law that "takes legal doctrine

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[74] Ratner & Slaughter (n 61) at p 299.
[75] Ratner & Slaughter (n 61) at p 299.
[76] See for example D Kennedy, "A Left Alternative to the Hart/KelsenTheory of Legal Interpretation" in D Kennedy, *Legal Reasoning: Collected Essays* (Davies, Aurora 2008) 153 at 163 available online at <http://www.duncankennedy.net> accessed on 4 February 2009.
Kennedy notes that

> the "possibly" dominant view in critical legal studies is that law is "an historical work product of jurists and judges who have pursued (some of the time; consciously or unconsciously) conflicting ideological projects, and second, as always but unpredictably subject by destabilization by future ideologically oriented work strategies.

Kennedy (n 76) at p 263.

seriously."[77] Hunt describes this version of critical legal studies as a "narrow" position "in which law is described by the internal understanding lawyers hold of their subject matter."[78] This type of critical legal studies accepts that lawyers hold a coherent internal understanding of law that is produced by their study of legal doctrine, without defining law explicitly. To explain further: if one understands doctrine as "2. That which is taught…b. esp. that which is taught or laid down as true concerning a particular subject or department of knowledge, as religion, politics, science, etc; a belief, theoretical opinion; a dogma tenet…,"[79] then the narrow version of critical legal studies allows for a doctrinal analysis of law without having to define law. It provides a way for law to explain what is "laid down as true" about its discipline based on the understanding of law that lawyers hold about their subject matter. Therefore, narrow critical legal studies methods answer both concerns that have emerged in the attempt to define legality: that legality cannot be defined by definitions of law; and that legality requires a way of determining what is legal from what is not legal.

As a result this thesis adopts the "narrow" critical legal studies method to define legality. Arguably, the two most prominent scholars to apply critical legal studies to international law, Kennedy[80] and Koskenniemi[81], both adopt this narrow approach. Kennedy and Koskeniemmi are both interested in the rhetorical patterns of legal arguments that lawyers adopt patterns that they argue structure international law. In other words, Kennedy and Koskenniemi examine the doctrine of international law. Further, this narrow version of critical legal studies is defined as a "structuralist" approach, since it does not attempt to define what law is, but to uncover the internal understandings – the doctrine - that structures law.

The structure of international law has been described in several ways by narrow critical legal studies scholars. For example, Koskenniemi argues that the doctrine of law is based on two concepts, apology and utopia.[82] However, Kennedy, in his original work on international legal structures, focuses on three areas of rhetoric which work together to provide "internal cohesiveness," a structure, to the doctrine of international law. He

[77] A Hunt, "A Theory of Critical Legal Studies" (1986) 6 Oxford J Legal Studies 1, at p 14.
[78] Hunt (n 77) at p 14.
[79] *Oxford English Dictionary Online*, "Doctrine" available online at <http://dictionary.oed.com> accessed on 23 July 2008.
[80] For example, Kennedy calls critical legal studies the study of international legal doctrine. See D Kennedy, *Of War and Law* (Princeton, Princeton 2006) at p X.
[81] M Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Reissue CUP, Cambridge, 2005) at p 1.
[82] Koskennimi, Apology (n 81).

identifies these as sources, substance and process[83] doctrines. Kennedy's doctrinal structure is adopted in this thesis. His method is preferred over Koskenniemi's for three reasons: First, Kennedy's structure corresponds closely to categories studied by critical legal scholars outside of international law. For example, in one of the earliest works of critical legal studies Kennedy examines the "form and substance" of private law adjudication.[84] Form in private law corresponds to sources doctrine in international law because form can be defined as "way in which a thing exists or appears"[85] Similarly, sources doctrine is concerned with the way in which the authority of international law is determined. To determine authority requires effectively establishing the way law must appear. Consequently the terms form and substance are used interchangeably. Second, Kennedy specifically identifies his structure by using terminology common in international texts.[86] This makes his approach accessible and persuasive as a measure of the internal structure of law. Third, he explicitly identifies his rhetorics as doctrines, and pursues a doctrinal analysis that corresponds to the definition of doctrine used in this thesis. Therefore, sources, substance and process are the doctrines that define law for the purposes of this thesis.

Each of the doctrines Kennedy identifies has a specific role in the structure of law. He notes that

> …sources doctrine is concerned with the origin and authority of international law – a concern it resolves by referring the reader to authorities constituted elsewhere. Process doctrine – the bulk of modern international public law—considers the participants and jurisdictional framework for international law independent of both the process by which international law is generated and the substance of its normative order. Substance doctrine seems to address issues of sovereign co-operation and conflict more directly.[87]

Therefore, sources are the way law must manifest itself to gain authority – the form international law must take. Substance refers to areas on which states agree to cooperate – that is the substance of law that has been given normative treatment.[88] Process refers

[83] D Kennedy *International Legal Structures* (Nomos, Baden Baden 1987) at p 8.
[84] D Kennedy, "Form and Substance in Private Law Adjudication" (1976) 89 Harvard Law Review 1685.
[85] Compact Oxford English Dictionary "Form" (n 60).
[86] Kennedy notes this comparison at the beginning of each section. See Kennedy, International Legal Structures (n 83) at pp 11 (n 1), 109 (n 1), 198 (n1).
[87] Kennedy, International Legal Structures (n 83) at p 8.
[88] Kennedy, International Legal Structures (n 83) at p 193.

to "the rules by which the game of international law is to be played." It refers to the processes by which substance is given form.[89] Consequently, a narrow CLS approach addresses different aspects of legality, its source, its substance and its process. Each of these doctrines is distinct and explains a different rhetoric of the structure of international law and, as will be developed further in chapter 3, it is the interplay of these doctrines that shapes the structure of international law.

This thesis defines legality through the method of the "narrow" version of critical legal studies. This method understands legality as the product of the internal understandings of the doctrine of law. More specifically, it understands that law is produced through the accepted "rhetorics", doctrines, of sources, substance and process. Through this structure this thesis can assess whether or not unilateral acts are considered legal, without having to define law itself. It is sufficient for unilateral acts to be considered legal if they can be integrated into the structure of law identified by the narrow school of critical legal studies. To reframe this statement and explain further: Legality occurs when an act is considered law. For purposes of this thesis, an act is considered law when it can be explained within the doctrine of international law. The doctrine of international law is, in turn, the way the discipline of law defines its own subject matter. According to the narrow version of critical legal studies, the doctrine of international law is a structure produced from an internal understanding of the discipline of law about the sources, substance and process of law. Consequently, unilateral acts can be considered legal if they can be explained within this structure.

The final sub-question identified in this thesis is: do unilateral acts meet the definition of legality? Based on the two sub-questions defined above, this question can be further refined to ask: do unilateral acts, as defined in the *Nuclear Tests cases*, meet the requirements of legality established by the doctrine of international law? Using the definition of legality established above it is hypothesized that unilateral acts, defined by the criteria established in the *Nuclear Tests cases* - intention, autonomy and revocability - do not meet the requirements of legality. This hypothesis is tested in Part 2, Chapters 4 through 6, of this thesis.

[89] Kennedy, International Legal Structures (n 83) at p 110.

5. Delimitation of the Scope and Assumptions

The research question, "are unilateral acts legal," is a broad and difficult question. As a result this question is further limited by three sub-questions. These questions are: First, what is the definition of unilateral acts? Second, what is the definition of legality? And third, do unilateral acts meet the definition of legality? Based on this formulation of the research question, the first limitation on the scope of this thesis is the definition of unilateral acts. For purposes of this thesis unilateral acts are defined by the criterion for unilateral acts established in the *Nuclear Tests cases*.[90] This limitation is necessary to establish parameters for the analysis in this thesis and it is defensible based on the literature.[91] However, this definition restricts the analysis in part 2 of this thesis to acts which can be analysed according to the established criteria. These criteria exclude some acts that are not multilateral but are not unilateral according to this definition. In particular this definition rules out certain categories of acts that otherwise seem to be unilateral: unilateral acts of retaliation under trade agreements, notifications required by treaties and humanitarian interventions by regional or multinational organizations. An example of the first type of act excluded is a trade sanction, an example of the second type of act is notification such as when a state deposits a treaty. An example of the third type of act is the NATO bombing of Kosovo which unlike the invasion of Iraq was undertaken by a multinational organization as opposed to states acting in coordination. These acts are excluded from the definition of unilateral acts because they do not manifest the autonomy required of a unilateral act according to the *Nuclear Tests cases*. Consequently, the definition of a unilateral act acts as a significant limitation on the scope of this thesis.

The second sub-question, the definition of legality, is a second limitation on the scope of this thesis. In order to assess whether unilateral acts are legal it is necessary to determine which acts possess the qualities of law. This makes it necessary to define these qualities. In the research question section, a brief justification is put forward for a specific definition of legality. This thesis examines the current methods of international law. It begins with theories that attempt to define the elements of law, natural law and positivism. However, these theories cannot agree on a definition of legality and this lack of agreement makes any definition put forward by these methods open to contestation

[90] Nuclear Tests cases (n 55) at paras 41-44, 46.
[91] This defence is outlined above but is analysed in detail in Chapter 3.

that proves difficult to defend. Therefore, three other methods are considered that do not define law, the New Haven school, International Legal process and Interdisciplinary methods. However, these methods are ultimately rejected because they lack clear criteria of law, criteria that are necessary for this thesis. As a result this thesis adopts a narrow version of critical legal studies to define legality, as this method avoids the difficulties of defining law and yet provides a structure within which to analyse legality. This is because this method of legality is doctrinal, and this means that it takes law seriously on its own terms. Second, a doctrinal method provides a structure within which this thesis can assess legality. It provides a specific response to the question of legality. Narrowing the scope of the thesis in this way allows the assessment of legality of unilateral acts to become a manageable comparison of the requirements of unilateral acts to the doctrine of international law. However, adopting this method is a significant limitation on the scope of the thesis, as it restricts the analysis of legality of unilateral acts not only to a doctrinal analysis, but to an analysis formed by a narrow critical legal studies method which sees law as the product of the doctrine of international law. Addressing these limitations is important in order to understand the scope of the analysis this thesis does undertake, a doctrinal analysis of the legality of unilateral acts. This examination leads directly to the following question: in spite of these limitations what is the significance of this study?

6. The Significance of this Thesis

This thesis emerges out of the context of the 2003 invasion of Iraq. This act is commonly referred to as unilateral and yet three different justifications are put forward for why this act is legal (or, conversely, these three justifications are rejected as illegal).

Therefore, this act is constantly referred to as unilateral and yet it is not clear that this claim has legal implications. A similar confusion over the meaning of legality is seen in the examples of Osirak and the withdrawals from Lebanon and Gaza. These examples highlight a gap between the assertion that an act is unilateral and the ability to assess the legal implications of these acts. This gap leads to the research question for this thesis: “are unilateral acts legal?”

This question is significant because context gives rise to a gap between the claim of legality and the ability to assess legality that has not been addressed

comprehensively. That is, the requirements of unilateral acts, defined as the requirements of unilateral acts established in the *Nuclear Tests cases*, have not been compared to the doctrine of international law, defined as a structure established by a narrow version of critical legal studies. Unilateral acts are examined in recent studies of the structure of international law, but they are not the focus of these examinations.[92] Further, there have been attempts to clarify the requirements of unilateral acts. For example, as noted above the ILC has recently completed a significant programmatic attempt to codify the doctrinal requirements of unilateral acts.[93] Therefore, there is significant examination in the literature of legality and there is significant study of the requirements of unilateral acts. However, this thesis contributes to the literature by comparing these two areas of study in a thesis that focuses exclusively on the legality of unilateral acts. Further, this thesis does so to address an apparent gap in understanding – the gap between the claim that unilateral acts are legal, and the ability to assess this legality in practice.

Resolving this question is both timely and important in the face of ongoing debates about the legality of acts such as the invasion of Iraq. Further, one of the justifications for invasion, preemptive self-defence is, for now, still the official policy of the US.[94] Moreover, the power of the US indicates that unilateral acts will continue to be of significance for the foreseeable future. Consequently, this thesis is significant for its application of a narrow critical legal studies method to the requirements of unilateral acts. This thesis also has practical application because it resolves an ongoing difficulty for the doctrine of international law – the difficulty in applying the requirements of unilateral acts to specific acts of states. Lastly, this thesis adds to ongoing debates in the doctrine about the role of unilateral acts. Therefore, this thesis makes a significant contribution to the literature.

7. Organization of the Thesis

This chapter provides context and purpose for studying the research question "are unilateral acts legal?" The scope of this research question is limited by the need to

[92] See for example, Kennedy, International Legal Structures (n 83) and Koskeniemmi, Apology (n 81).
[93] See for example ILC Report 2006 (n 41).
[94] See National Security Strategy (n 4).

define a unilateral act and the need to define legality for purposes of this thesis. Once this is done a comparison is undertaken between the criteria of unilateral acts and the requirements of legality. Consequently, Part 1 of this thesis is concerned with definitions. Chapter 2, Background to Unilateral Acts, provides a history of unilateral acts, introduces the requirements of unilateral acts and justifies the adoption of these requirements to define unilateral acts in this work. Chapter 3, Method, explains and justifies the meaning of legality for purposes of this thesis and expands on the overview provided in this Chapter.

Part 2 of this work addresses the research question directly by answering the question, "are unilateral acts legal?" It does this by comparing the criteria of unilateral acts defined in Chapter 2 to the doctrine of international law defined in Chapter 3. Each chapter in this Part corresponds to one doctrine in international law that is identified in Chapter 3. Each chapter begins by introducing the doctrine, then introducing the criterion of unilateral acts that most closely performs the function of this doctrine. Finally, in several chapters a practical example is presented to illustrate the analysis in the chapter. This format for each chapter allows for an assessment of whether the requirement of unilateral act studied meets the definition of legality. Consequently, Chapter 4 focuses on the doctrine of sources. Sources doctrine is "concerned with the origin and authority of international law".[95] The requirement of a unilateral act that performs this function is intention. An example of an act that displays the uneasiness between the doctrine of sources and intention is the Iranian pursuit of nuclear weapons. As a result this chapter defines the sources of international law and compares the requirements of these sources to the criterion of intention in unilateral acts. If intention cannot be explained by the doctrine of sources this aspect of a unilateral act is not legal.

A similar comparison is performed for the doctrine of substance in Chapter 5. Substance doctrine is the doctrine that can "address issues of sovereign co-operation and conflict more directly."[96] In unilateral acts the function of substance is performed by the requirement of autonomy. Chapter 5 begins by outlining the doctrine of substance. Then the requirement of autonomy in unilateral acts is examined and compared to the doctrine of substance. Lastly, the example of the San Juan River case is used to illustrate the practical implications of this comparison.

In Chapter 6 process is examined. This chapter begins by establishing that process "considers the participants and jurisdictional framework for international law

[95] Kennedy, International Legal Structures (n 83) at p 8.
[96] Kennedy, International Legal Structures (n 83) at p 8

independent of both the process by which international law is generated and the substance of its normative order."[97] From this basis the meaning of process in the doctrine of international law is expanded upon. Then the requirement of unilateral acts that most closely performs the function of process, revocability is explored and assessed to see if it can be explained by the doctrine of process. Finally, in Chapter 7, conclusion, the conclusion in each chapter is summarized and final conclusions are drawn. Then analysis in this thesis is put into the context first outlined in the introduction and the significance of this thesis is examined. Lastly, some directions for future research are suggested and implications of the thesis are assessed. Following this organization this thesis will answer the research question, "are unilateral acts legal?"

[97] Kennedy, International Legal Structures (n 83) at p 8.

PART 1: DEFINITIONS

Chapter 2: Background to Unilateral Acts

1. Introduction

This chapter answers the research question, "what are unilateral acts?" by providing an overview of the research question, by outlining the history of unilateral acts, by providing an overview of the leading case in this area – the *Nuclear Tests cases* - and by establishing the importance of the criteria for legality established in this case for the definition of unilateral acts. Consequently, this chapter presents the criteria for unilateral acts that will be used in this thesis and establishes that these criteria form the definition of unilateral acts used in this work.

2. The Research Question

The question "what are unilateral acts" is difficult to answer. The examples of the Iraq war, the bombing of Osirak, and the withdrawals from Lebanon and Gaza, presented in the previous chapter, demonstrate that the term unilateral act is used to refer to a wide and varied range of acts of states. This variety seems to point to a broad definition of unilateral acts: as an act that a state undertakes without reference to another state.[98] However, not all acts that meet this definition have identifiable legal implications. Moreover, the situations in which unilateral acts are considered legal are not settled as is evident from the difficulty the ILC has had defining unilateral acts.

Over the six years it dealt with the topic, the ILC could not define unilateral acts and as a result it confirmed that the concept was vast and not uniform. One consequence of the lack of uniformity of unilateral acts was that the ILC could not arrive at a codification of the principles of unilateral acts, nor in fact a definition of these acts. Instead it substituted criteria of legality in place of a definition. The ILC published these criteria in "Guiding Principles," non-binding recommendations to states about the obligations that could arise from unilateral acts. For example, Guiding Principle 1 established that

[98] See, Dupuy (n 36) at p 20.

> Declarations publicly made and manifesting the will to be bound may have the effect of creating legal obligations. When conditions for this are met, the binding character of such declarations is based on good faith; States concerned may then take them into consideration and rely on them; such States are entitled to require that such obligations be respected.[99]

Principle 1 established three criteria for unilateral acts to have legal effect. These were: will; the public nature of the statement; and the requirement that they are binding in good faith.

Other guiding principles elaborated details of these criteria. For example, Principle 10 affirmed that unilateral acts were not arbitrarily revocable.[100] This last principle confirmed the requirement of revocability. Each principle expanded on Principle 1 in some way but did not clarify the contradictory criteria established in Principle 1.

Consequently, the work of the ILC establishes that there is no agreed definition for unilateral acts. Therefore, in order to understand what unilateral acts are, one can only look at the criteria for determining if a unilateral act is legal. In this instance the work of the ILC is instructive but not original, as the work of the ILC draws heavily on established doctrine to try to establish consensus about the legality of unilateral acts. Particularly, as the Working Group of the ILC noted when it recommended codifying this area of law, there is established jurisprudence in this area that establishes criteria for unilateral acts, specifically a decision of the ICJ, the *Nuclear Tests cases*.[101] As a result to understand the "Guiding Principles" of the ILC and the requirements they adopt, one must return to the core criteria on which they based their analysis, the *Nuclear Tests cases*. As will be developed below, this case is central to the doctrine of unilateral acts. It established three main criteria for legality of unilateral acts, intention, autonomy and revocation. However, as the ILC also acknowledged, these criteria are ambiguous and therefore not a substitute for a clear definition.[102] This helps explain why it is so difficult to prove the legality of specific unilateral acts, such as Iraq, Osirak, Lebanon or Gaza.

[99] ILC Report 2006 (n 41) at par 176.
[100] ILC Report 2006 (n 41).
[101] ILC Yearbook 1996 (n 39) at appendix 3, par 3.
[102] ILC Yearbook 1996 (n 39) at appendix 3, par 8.

This chapter develops this idea by examining the history of unilateral acts, by outlining the decision in the *Nuclear Tests cases* and by establishing the importance of the criteria established in the *Nuclear Tests cases* for the definition of unilateral acts.

3. The History of Unilateral Acts

The introductory chapter illustrates the wide variety of contexts in which unilateral acts operate. This diversity leads to debate as to when unilateral acts are considered legal. There appears to be a gap between the assertion that a unilateral act is legal (or illegal) and the ability to identify the legality of this act in practice. Therefore, to analyse the research question for this thesis, "are unilateral acts legal", requires an understanding of the definition of unilateral acts. This chapter begins to unpack this definition by examining the history of unilateral acts. In particular this section illustrates that unilateral acts have not, historically, been considered legal.

This section begins with the observation that it is only recently that unilateral acts have been considered legal. As Yasuaki observes "[f]or most of the time since the human species appeared in history, the human sphere of activities did not cover the entire globe. People lived as members of various societies, communities or worlds, ranging from families to clans, villages, cities, states, empires and civilizations."[103] However, societies and peoples always interacted, primarily for trade and war. Therefore, there was a need for norms to structure these interactions.[104] In spite of this need the law governing relations between these groups was not universal. This lack of uniformity leads Bederman to caution that current international law cannot be justified by the past;[105] the rules that historically governed group interactions all operate within their own context.[106] Consequently, current ideas about unilateral acts emerged as part of the formation of modern international law. Therefore, this section begins with the development of the doctrine in the mid 19th century and focuses primarily on the post-World War II history of unilateral acts.

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[103] O Yasuaki, "When was the Law of International Society Born? – An Inquiry of the History of International Law from an Intercivilizational Perspective" (2000) 2 Journal of the History of International Law 1 at p 8.
[104] This is a reading of Yasuaki (n 103) at p 8.
[105] DJ Bederman, *International Law in Antiquity* (CUP, Cambridge 2001) at p 1.
[106] Bederman notes this particularly in his study of the international law of the ancient world; Bederman, International Law (n 105) at p 1 ff.

In the 19th century states[107] accepted that unilateral acts could give rise to rights and obligations indicated by a binding treaty.[108] However, the majority of acts that were classified as unilateral acts were not considered "legal acts"; they were considered "political" or "diplomatic" acts and they did not have legal effect until they were codified in treaty form. This view of unilateral acts was illustrated by the Monroe Doctrine. In 1823 President Monroe included in his annual address a unilateral statement of US policy in the Americas. This doctrine contained three primary assertions.[109] First, President Monroe reiterated the independence of all states in the Americas: "the American continents, by free and independent condition which they have assumed and maintained, are henceforth not to be considered as subjects for future colonization…"[110] Second, he warned European powers that, "…we should consider any attempt on their part to extend their system to any portion of this hemisphere as dangerous to our peace and safety."[111] Third, he asserted that the US would take a position of neutrality in European affairs.[112] This declaration has shaped US policy towards the Americas since its formulation.[113] However, it was not initially perceived as a legal declaration. As Root noted in 1914, "[n]o one ever pretended that Mr. Monroe was declaring a rule of international law or that the doctrine which he declared has become international law."[114] Similarly, in 1920 Tower argued that the doctrine "was a declaration of policy, a rule of conduct in regard to our own independent position in the world."[115] Consequently, at the start of the 20th century the Monroe Doctrine was not considered legal; however, this changed over the course of the century. By the 1960s the doctrine was interpreted as creating a legal obligation. This was exemplified by an opinion given to President Kennedy during the Cuban missile crisis. [116] This legal opinion argued that the Monroe Doctrine was a special law of the Western Hemisphere and as a result this doctrine authorized unilateral military action by the US. This advice

[107] At this time international law only applied to those states considered "civilized." Statehood was defined by this criterion. See for example DP Fidler, "Return of the Standard of Civilization" (2001) 2 Chi J Int'l L 137 at p 138 ff.
[108] The Law Review of British and Foreign Jurisprudence (Hein, London 1849) at p 266
[109] MT Gilderhus, "The Monroe Doctrine: Meaning and Implications" (2006) 36 Presidential Studies Quarterly 5 at p 8.
[110] President J Monroe, "Monroe Doctrine" [Seventh Annual Address to Congress] (2 December 1823) available online at <wwwl.yale.edu/Avalon/Monroe.htm> accessed on 2 November 2007; See also Gilderhus (n 109) at p 8.
[111] Monroe Doctrine (n 110); Gilderhus (n 109) 8.
[112] Monroe Doctrine (n 110); Gilderhus (n 109) at p 8.
[113] Gilderhus (n 109) at p 6.
[114] E Root, "The Real Monroe Doctrine" (1914) 8 AJIL 427 at p 431.
[115] C Tower, "The Origin and Meaning of the Monroe Doctrine" (1920) 14 AJIL 1 at p 17.
[116] A Chayes, "Sumposium [sic]: Nuclear Weapons, The World Court and Global Security: Living History Interview" (1997) 7 Trans'l L & Contemp Probs 468-469.

was rejected by President Kennedy. [117] In spite of Kennedy's reticence this opinion was important. Legal doctrine now considered that a formerly political act had become a binding legal obligation.

The opinion given to President Kennedy - that the Monroe Doctrine was a special law - expanded on an approach that emerged in the doctrinal writing of the 1950s. Prior to this opinion the idea that unilateral acts could have independent legal effect had already been "floated" by scholars who tried to separate these acts from treaties.[118] These scholars argued that it was necessary to have an enforceable category of unilateral obligations to maintain good faith in international relations. Two scholars in particular contributed to this argument, Schwarzenberger and Fitzmaurice.

Schwarzenberger and Fitzmaurice were proponents of the view that an obligation arose from the intention of a state and autonomy of the act. Prior to their writings, many authors preferred to see unilateral acts as a tacit treaty. One example from the earlier literature was an article from the 1930s by Garner. Garner conceptualized unilateral declarations as a form of oral agreement. In analyzing a case that was current at the time, the *Eastern Greenland case,* he explained that "[t]he conclusion to the whole matter would seem to be that an oral agreement between states is, or may be, as binding upon the parties as if it were recorded in writing, and will be applied by international tribunals whenever the facts as to the agreement may be proved."[119] Garner argued that binding unilateral acts were oral agreements and he never mentioned intention as a criterion for unilateral acts.

Over 20 years later, Schwarzenberger took a different approach; he asserted the legal character of unilateral acts in a course at The Hague Academy in 1955. He argued that

> If a subject of international law chooses to take a position in relation to a matter which is legally relevant and communicates this intent to others it is bound within such limits to accept the legal implications of such a unilateral act. If it acts contrary to its notified intent, it breaks the rule on the binding character of communicated unilateral acts.[120]

[117] Chayes (n 116) at p 468-469.
[118] See, G Schwarzenberger, "The Fundamental Principles of International Law" (1955) 87 Rec Des Cours 195; G Fitzmaurice, Sir, "The Law and Procedure of the International Court of Justice 1951-1954: Treaty Interpretation and Other Treaty Points" (1958) 33 BYIL 302.
[119] JW Garner, "The International Binding Force of Unilateral Oral Declarations" (1933) 27 AJIL 493 at p 497.
[120] Schwarzenberger (n 118) at p 312.

He traced the legitimacy of this rule to the "obnoxiousness of contradictory behaviour" enshrined in the principle of *venire contra factum proprium*. He argued that this principle had assisted in developing the rule of *opinio juris* in custom. From this basis it had developed into a self-justifying rule of international law.[121] He provided two examples of state practice to justify this contention, state recognition and wartime blockades. For his example of recognition, Schwarzenberger referenced a note by the British Government to the Government of Persia (now Iran) that confirmed the independence of Afghanistan. This note confirmed earlier acts of recognition by the British Government. As an example of a wartime blockade Schwarzenberger discussed British practice during the US Civil War. During the civil war Britain asserted its right as a neutral state to sail into Confederate ports closed by Union ships. The British government argued that preventing their ships from entering these ports was a violation of their rights as a neutral state.[122]

Schwarzenberger's analysis had two problems. The first problem was his derivation of a separate category of unilateral acts from the principle of *contra factum*. The second problem was the appropriateness of his examples of state practice. In the first instance Schwarzenberger offered no proof as to where or how the doctrine of *contra factum* became substantively separate from its role in creating *opinio juris.* He did not clarify how this principle was distinct from estoppels, stating his point as a matter of fact. Further, the examples of state practice presented by Schwarzenberger were inappropriate. They were both obscure and narrow. Britain's recognition of Afghanistan was more accurately a refusal to bow to Persian pressure to withdraw recognition of Afghanistan. It was not a new unilateral act; it was the continuation of an original act of recognition. Consequently, this example did not prove Schwarzenberger's point, as it did not establish that states believed it was illegal, as opposed to politically expedient or diplomatic, to continue the previous recognition of a state. Additionally, it was a stretch to argue that British practice during the US Civil War was a unilateral act. Schwarzenberger implied that recognition of a state was a unilateral act with legal effect. This act ostensibly allowed third states to exercise their rights of neutrality, an action which was unilateral in nature. However, Schwarzenberger did not demonstrate the act's independent legal effect. This example

[121] Schwarzenberger (n 118) at p 312.
[122] Schwarzenberger (n 118) at p 312-313.

affirmed that states could always exercise rights of neutrality they possessed under customary international law. Therefore, the suitability of these two examples was questionable. If these were the most appropriate examples, then Schwarzenberger changed legal doctrine on thin precedent. In spite of these weaknesses Schwarzenberger confidently stated that unilateral acts had "legal effect." He based this obligation on the intention on the part of the state to be bound by their actions.

Similarly, a few years later - in the late 1950s - Fitzmaurice published a review and comment on the jurisprudence of the ICJ. In this review he discussed the concept of unilateral declarations. He asserted that unilateral declarations were of three kinds, "(i) [b]ilateral or multilateral Declarations which are unilateral neither in substance nor in form; (ii) unilateral Declarations that are unilateral in form and substance; and (iii) unilateral Declarations that are unilateral in form but not in substance."[123] He argued that unilateral acts in category (i) were tacit treaties and that as treaties these acts had legal effect according to the principles of treaty interpretation.[124] He also contended that acts in category (iii) were contractual and that declarations in this category were made in exchange for a "*quid pro quo*." Therefore, these acts were not really unilateral; the exchange element made it similar to a contract, a form of treaty. As a result these acts were also interpreted according to principles of treaty interpretation. He cited the *Iranian Oil case* in this regard.[125] Acts in categories (i) and (iii) were binding because of their reciprocity or exchange that led to a "*quid pro quo*".

Fitzmaurice's second category was particularly important to the history of unilateral acts. This category dealt with the situation in which a declaration was unilateral in form and substance. These acts were unilateral "in the sense that it is not made in return for, or simultaneously with, any specific quid pro quo or as part of any general understanding."[126] These acts were legal if "clearly intended to have that effect, and held out so to speak, as an instrument on which others may rely and under which the Declarant purports to assume obligations."[127] Consequently, if the state undertaking the act intended it to be legal, it was, and it was open to interpretation according to principles of treaty interpretation. Fitzmaurice provided no references to doctrine or state practice to back up his definition of a unilateral act. It was suggested that he may have had the *Iranian Oil case* in mind. However, as noted he had already used this case

[123] Fitzmaurice (n 118) at p 329-330.
[124] Fitzmaurice (n 118) at p 230.
[125] Fitzmaurice (n 118) at p 230-231.
[126] Fitzmaurice (n 118) at p 230.
[127] Fitzmaurice (n 118) at p 230.

as an example of an act unilateral in form but not substance.[128] In short, Fitzmaurice's second category of unilateral act, an act unilateral in form and substance, was novel and unsubstantiated.[129] As a result Schwarzenberger and Fitzmaurice each proposed original criteria for binding unilateral acts. These criteria were later adopted by the ICJ. Schwarzenberger proposed that a unilateral act had legal effect when a state intended to be bound by its act. Fitzmaurice severed this type of act from a tacit treaty by asserting the unilateral nature or autonomy of the act.

Often these scholars examined *Eastern Greenland case,* a PCIJ decision, as an example of a unilateral declaration.[130] Therefore, this case was important to the development of the jurisprudence of unilateral declarations.[131] To explain, the Court in the *Eastern Greenland case* identified the issue before it as follows:

> Nevertheless, the point which must now be considered is whether the Ihlen declaration -- even if not constituting a definitive recognition of Danish sovereignty -- did constitute an engagement obliging Norway to refrain from occupying any part of Greenland.[132]

The Court was concerned with the capacity of a statement made by a foreign minister to bind their government; its reasoning centred on the capacity of a diplomat make a binding declaration for his state in the course of ongoing negotiations.[133] The decision stated that

> The Court considers it beyond all dispute that a reply of this nature given by the Minister of Foreign Affairs on behalf of his Government in

[128] AP Rubin, "The International Effects of Unilateral Declarations" (1977) 71 AJIL 1 at p 11.
[129] Fitzmaurice (n 118) at p 230; Rubin has written,

> [i]t may be concluded that therefore, State practice prior to the Nuclear Tests cases reveals no consensus supporting a rule asserted an international obligation to be created by a unilateral declaration uttered publicly and with the intent to be bound, in the absence of additional factors such as a negotiating context, an affirmative reaction to other states, a tribunal to receive the declaration officially, or a supporting pre existing obligation.

Rubin (n 128) at p 7.
[130] See generally, Garner (n 119).
[131] As Franck notes, prior to the Nuclear Test Cases decision, "[o]ne case stands out in the jurisprudence."; See, , T Franck, "Word Made Law: The Decision of the ICJ in the Nuclear Test Cases" (1975) 69 AJIL 612 at p 615.
[132] *Legal Status of Eastern Greenland (Denmark v. Norway)* PCIJ Series A/B No 53 in M O Hudson, ed, *World Court Reports: A Collection of the Judgments Orders and Opinions of the Permanent Court of International Justice* (vol 3 Carnegie Endowment, Oceana 1969).
at p 190.
[133] Eastern Greenland case (n 132) at p 151 ff.

> response to a request by the diplomatic representative of a foreign Power, in regard to a question falling within his province, is binding upon the country to which the Minister belongs.[134]

The declaration was treated as a question of fact. The Court asked whether a statement made by a foreign minister in international negotiations could be binding on the state that made the statement. The Court was not concerned with whether the state had the intention to be bound. Applying Fitzmaurice's schema, the Ihlen Declaration was unilateral in form but not in substance.[135] This statement was made in the context of ongoing negotiations and was part of an exchange, a *quid pro quo.* This focus on negotiations meant that the *Eastern Greenland case* was really concerned with a tacit treaty. Indeed, the differences between these two cases leads Rubin to argue that before the *Nuclear Tests cases* a "rule" regarding the legal effect of "truly" unilateral acts did not exist.[136] Rubin asserts that

> [a]side from writings derived directly from this article by Sir Gerald Fitzmaurice, there is no support in learned opinion prior to the ICJ judgement in the *Nuclear Tests* cases for the proposition that the intention to be bound of a state publicly issuing a unilateral declaration is by itself sufficient to create a legal obligation.[137]

Rubin's conclusions are not entirely accurate. Schwarzenberger had previously asserted that unilateral acts could be binding in good faith. However, in this quotation Rubin raises the key point that the *Nuclear Tests cases* had no precedent in the case law.

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[134] Eastern Greenland case (n 132) at p 192.
[135] See Fitzmaurice (n 118) at n 38.
[136] As Rubin has written,

> [i]t may be concluded that therefore, State practice prior to the Nuclear Tests cases reveals no consensus supporting a rule asserted an international obligation to be created by a unilateral declaration uttered publicly and with the intent to be bound, in the absence of additional factors such as a negotiating context, an affirmative reaction to other states, a tribunal to receive the declaration officially, or a supporting pre existing obligation.

Rubin (n 128) at p 7.
[137] Rubin (n 128) at p 13.

4. *The Nuclear Tests Cases*

The previous section demonstrated a trend towards legalization of unilateral acts that culminated with the *Nuclear Tests cases* decision. Before this decision there was no agreement that unilateral acts were a type of legal obligation and when they were considered legal, unilateral acts were often considered an oral treaty. Therefore, this decision has been called "revolutionary"[138] for its clear determination that "oral statements by government officials – until then unperfected legal acts – could henceforth be deemed binding."[139] Unperfected legal acts were acts in which the legal requirements had not been completed.[140] Thus, the *Nuclear Tests cases* established the criterion for perfecting unilateral acts, acts that had previously been viewed as "unperfected" and perhaps even "un-perfectible." In the *Nuclear Tests cases* the Court formalized the requirements of a new form of obligation. As a result this decision will form the basis of the answer to the question: "what are unilateral acts?" To answer this question, this case must be examined in detail.

The *Nuclear Tests cases* were separate actions brought to the ICJ by Australia and New Zealand. The judgments in these actions were so similar that they were often treated together.[141] In these cases Australia and New Zealand each sued France for testing nuclear weapons on the Muraroa Atoll in the South Pacific. The testing was above ground and took place between 1966 and 1972.[142] Australia and New Zealand challenged the legality of these tests. They argued that fallout from the nuclear testing had been deposited on their territory. Australia and New Zealand claimed that these tests gave rise to environmental and health concerns.[143] In June 1973 the Court issued an order for interim measures. These measures enjoined France from further nuclear testing. France ignored the interim order and conducted above ground tests on the atoll in the summer of 1973 and fall of 1974.[144] France did not participate in the proceedings

[138] WM Reisman, "Unratified Treaties and Other Unperfected Acts in International Law: Constitutional Functions" (2002) 35 Vand J Transnat'l L 729 at p 737.
[139] Resiman, Unratified Treaties (n 138) at p 737.
[140] *Black's Law Dictionary* (8th ed, West 2004), "Perfect".
[141] Nuclear Tests cases (n 55).
[142] Nuclear Tests cases (n 55) at par 17.
[143] Nuclear Tests cases (n 55) at par 18.
[144] Nuclear Tests cases (n 55) at par 19.

before the ICJ. They withdrew from the proceedings on the grounds that the Court had no power to hear the matter.[145]

In France's absence the ICJ held that "a number of authoritative statements have been made on behalf of the French Government concerning its intentions as to future nuclear testing in the South Pacific Ocean."[146] These statements led the Court to establish the "existence of a dispute."[147] Further, based on previous diplomatic correspondence the Court held that Australia and New Zealand's "object" in the dispute was to have France end its above ground nuclear testing.[148] Constructing the "object" of the dispute in this manner allowed the Court to conclude that French statements "…could have been constructed by Australia as 'a firm explicit, and binding undertaking to refrain from further atmospheric tests', [and] the applicant Government would have regarded its objective as having been achieved."[149]

This was very convenient for the Court. If French statements were binding then France was legally obligated to stop above ground nuclear testing regardless of the lawsuit against them and Australia and New Zealand's lawsuit was without purpose. Consequently, the primary evidence the Court analysed was French public statements. These statements were analysed in order to determine whether these declarations were binding. The Court was concerned whether the statements by French officials[150] accurately reflected France's intention to stop nuclear testing. The Court concluded that "…France made public its intention to cease its conduct of atmospheric nuclear tests following the conclusion of the 1974 series of tests."[151] The Court found that French statements reflected the intention of the state. As a result it then considered whether France's statements of intention could have legal effect. The Court examined the legal "status"[152] of these statements, beginning its analysis of France's statements with a general "review" of the "law" in this area:

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[145] Nuclear Tests cases (n 55) at par 4 ff.
[146] Nuclear Tests cases (n 55) at par 20; These statements included: a communiqué by the Office of the President of the French Republic, 8 June 1974; a note from the French Embassy in Wellington, New Zealand to the New Zealand Ministry of Foreign Affairs, 10 June 1974; a statement by the President of the French Republic, 25 July 1974; a statement by the Minister of Defence, 16 August 1974; a statement by the Minister of Foreign Affairs in the United Nations General Assembly, 25 September 1974 and a statement by the Minister of Defence, 11 October 1974; Nuclear Tests cases (n 55) at paras 34-41.
[147] Nuclear Tests cases (n 55) at par 24.
[148] They also noted that Australia and New Zealand had both intimated in diplomatic correspondence that a promise by France to stop testing would have satisfactorily resolved their dispute; Nuclear Tests cases (n 55) at par 25 ff; Nuclear Tests cases (New Zealand v France) (n 55) par 28.
[149] Nuclear Tests cases (n 55) at par 27.
[150] Nuclear Tests cases (n 55) at paras 34-41.
[151] Nuclear Tests cases (n 55) at par 41.
[152] Nuclear Tests cases (n 55) at par 42.

> It is well recognised that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations. Declarations of this kind may be, and often are, very specific. When it is the intention of the State making the declaration that it should become bound according to its terms, that *intention confers on the declaration the character of a legal undertaking*, *the State being thenceforth legally required to follow a course of conduct consistent with the declaration.* An undertaking of this kind if made publicly and with the intent to be bound, even though not made within the context of international negotiations is binding. In these circumstances, *nothing in the nature of a quid pro quo nor any subsequent acceptance of the declaration, nor even any reply or reaction from other states is required* for the declaration to take effect, since such a requirement would be inconsistent with the strictly unilateral nature of the juridical act by which the pronouncement by the state was made.[153]

The Court found that a unilateral act created a legal obligation when the state intended the act to be binding. When the state had this intention it could not arbitrarily revoke its unilateral act. Further, the act had to be autonomous in nature. No *quid pro quo* or other exchange had to occur. In a single paragraph the Court established the core criteria of a "legal" unilateral act: any act of a state undertaken with intention to create a legal obligation that was not undertaken for an exchange or a *quid pro quo* was legally binding on that state. The act could no longer be revoked. When these criteria were met the state was obligated by its act. Further, to ascertain when these criteria were met the Court offered the following guidance:

> [o]f course, not all unilateral acts imply obligation; but a state may choose to take up a certain position in relation to a particular matter with the intention of being bound - the intention is to be ascertained by interpretation of the act. When states make statements by which their freedom of action to be limited, a restrictive interpretation is called for.[154]

[153] Nuclear Tests cases (n 55) at par 43 [italics added for emphasis].
[154] Nuclear Tests cases (n 55) at par 44.

The Court concluded that the statements by French officials demonstrated intention to stop nuclear testing.[155] The ICJ decided, by 9 votes to 6, that the object of the dispute was met. There was no longer a purpose to Australia's and New Zealand's claim, thus there was no reason to proceed to a decision on the merits of this case. [156]

Therefore, in the *Nuclear Tests cases* the Court found a way around ruling on the contentious issue of nuclear testing, a stance pragmatic for the Court. France was unlikely to recognise the decision and ruling on this issue would have put the Court in an awkward position. They would have had an unenforceable decision on a contentious issue, thereby damaging the stature of the Court.[157] Instead the ICJ clarified the criteria for unilateral declarations to take legal effect. Any public statement made with the intent to be bound was potentially of legal effect. In reaching this conclusion the Court may have had in mind Schwarzenberger and Fitzmaurice, or at least their spirits.[158] The Court adopted Schwarzenberger and Fitzmaurice's two core requirements for a unilateral act to have legal effect. The act had to be autonomous and the state had to intend to be legally bound by their act.

Importantly, these criteria were not uncontested. Once the suit was started New Zealand and Australia did not believe that French statements could substitute for the decision of the Court, as, in spite of their earlier statements to the contrary, they sought a judgment on the issues.[159] Further, some judges were concerned that the Court had radically reinterpreted the submissions of the parties in its decision. The Joint Dissenting Opinion of Judges Onyeama, Dillard, Jiminez de Arechaga, and Waldock noted, "[w]hile the Court is entitled to interpret the submissions of the parties, it is not authorized to introduce into them radical alterations…" [160] and the dissent continued,

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[155] Nuclear Tests cases (n 55) at par 51.
[156] Nuclear Tests cases (n 55) at par 61.
[157] See, for example, Franck, (n 131) at p 612; this also led Franck to highlight the strength and value of the dissenting opinions in this case; Franck (n 131) at p 613.
[158] See generally Schwarzenberger (n 118) at p 312; Fitzmaurice (n 118) at p 230.
[159] See generally, *Nuclear Tests (Australia v. France)* Memorial on Jurisdiction and Admissibility Submitted by the Government of Australia available online at < http://www.icj-cij.org/docket/files/58/9443.pdf> accessed on 31 May 2007; *Nuclear Tests (Australia v. France)* Oral Arguments on Jurisdiction and Admissibility: Minutes of Public Sittings available online at <http://www.icj-cij.org/docket/files/58/11829.pdf> accessed on 31 May 2007; *Nuclear Tests (New Zealand v. France)* Memorial on Jurisdiction and Admissibility Submitted by the Government of New Zealand, available online at <http://www.icj-cij.org/docket/files/59/9451.pdf> accessed on 31 May 2007; *Nuclear Tests (New Zealand v. France)* Oral Arguments on Jurisdiction and Admissibility: Minutes of Public Sittings available online at <http://www.icj-cij.org/docket/files/59/9453.pdf> accessed on 31 May 2007; These pleadings contradict the earlier diplomatic negotiations cited by the Court; *Contra* Nuclear Tests cases (n 55) par 27-28.
[160] A similar dissent is appended to the Australian decision with only slight variations to address the differences in the pleadings*; Nuclear Tests (New Zealand v. France)* Joint Dissenting Opinion, (Judgment) General List 59 [1974] ICJ 498 at par 10; A similar argument was advanced in the Separate Opinion of Judge Gros, *Nuclear Tests (Australia v. France)* Separate Opinion of Judge Gros (Judgment)

> [t]he judgment revises, we think, the applicant's submission by bringing in other materials such as diplomatic communications and statements made in the course of the hearings and governmental press statements which are not part of the judicial proceedings. These materials do not justify, however, the interpretation arrived at in the Judgment. They refer to requests made repeatedly by the Applicant for an assurance from France as to the cessation of tests. But these requests for assurance cannot have the effect attributed to them by the Judgment…."[161]

In the dissent it was suggested that New Zealand did not want to restrict its right to sue. New Zealand sought a declaration of illegality and was claiming compensation for past tests. This meant that New Zealand did not just want to stop tests going forward[162] but also wanted to receive damages for past harms. Limiting New Zealand's right to sue on the basis of French statements made outside the Court changed New Zealand's claim. As a result the object of New Zealand's claim was not entirely met.

Additionally, some members of the ICJ felt that French officials had not intended their statements to be binding. In a dissenting opinion Judge (Ad Hoc) Garfield Barwick argued that the Court's interpretation of French statements was "indicative of a failure on the part of the Court to perform its judicial function." He accepted that France's promises were valid. Further, he acknowledged that New Zealand could always accept a promise by France. New Zealand could choose to discontinue the litigation, but this did not occur here. Consequently, it was not up to the Court to enforce a compromise on the litigant's behalf.[163] In a similar dissent to the Australian decision Judge Barwick asserted that French statements should have been recognized as findings of fact, not of law. There was "…judicial impropriety of deciding the matter without notice to the Parties of the questions to be considered…"[164] This was particularly unfair to France, now legally bound to all nations for all time. Moreover Judge Barwick was sceptical

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General List 58 [1974] ICJ 276 at par 2. Judge Gros felt Australia had disqualified itself by its conduct; Nuclear Tests (Australia v. France) Separate Opinion of Judge Gros (n 73) at paras 6, 13.

[161] Nuclear Tests cases (New Zealand v. France) Joint Dissenting Opinion (n 160) at par 13.

[162] Nuclear Tests cases (New Zealand v. France) Joint Dissenting Opinion (n 160) at paras 14-15.

[163] *Nuclear Tests (New Zealand v. France)* Dissenting Opinion, Judge Sir Garfield Barwick (Judgment) General List 59 [1974] ICJ 525 at p 526-527.

[164] *Nuclear Tests (Australia v. France)* Dissenting Opinion, Judge Sir Garfield Barwick (Judgment) General List 58 [1974] ICJ 391 at p 448 ff.

whether the statements led to the conclusion that France had intended to be bound to such a wide promise.[165]

Similarly, Judge de Castro felt it was correct to take account of the statements. However, these statements had little "legal worth." He stated that "the fact remains that not every statement of intent is a promise, there is a difference between a promise which gives rise to a moral obligation and a promise which legally binds the promisor"[166] but identifying French intention required evidence. France had to intend to renounce above ground nuclear testing indefinitely and this standard was not met by the French statements. Consequently, Judge de Castro noted, "I see no indication warranting a presumption that France wished to bring into being an international obligation, possessing the same binding force as a treaty – and vis-à-vis whom the whole world?"[167] French statements were primarily evidentiary and were not an indication of a unilateral declaration. Judge de Castro's opinion supported the argument that prior to the *Nuclear Tests cases* unilateral declarations were considered as oral treaties. In his opinion unilateral acts were an obligation to a specific party, not to the world at large. Judge de Castro supported the view that *Nuclear Tests cases* fundamentally reshaped the law as the decision created new criteria for a unilateral act to have legal effect. The criteria of intention and autonomy were novel.

The *Nuclear Tests cases* also established a doctrinal basis for unilateral acts. The Court tied the legal effect of unilateral acts to the principle of good faith.[168] The decision stated:

> One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international co-operation, in particular in an age where co-operation in many fields is becoming increasingly essential. Just as the very rule of *pacta sunt servanda* in the law of treaties is based on good faith, so also is the binding character of an international obligation assumed by unilateral declaration. Thus interested states may take cognizance of unilateral declarations and place confidence in them, and are entitled to require that the obligation thus created be respected.[169]

[165] Nuclear Tests (Australia v. France) Dissenting Opinion, Judge Garfield Barwick (n 164) at p 448 ff.
[166] *Nuclear Tests (Australia v. France) Dissenting Opinion, Judge de Castro (Judgment)* General List 58 [1974] ICJ 372 at par 3.
[167] Nuclear Tests (Australia v. France) Dissenting Opinion, Judge de Castro (n 166) at par 4.
[168] Nuclear Tests cases (n 55) at par 46.
[169] Nuclear Tests cases (n 55) at par 46.

The ICJ echoed Schwarzenberger's assertion of *contra factum*, resulting in the Court's assertion that a unilateral declaration was binding in good faith. Consequently, states were able rely on unilateral declarations made in good faith. This requirement was expanded to unilateral acts categorically yet this requirement was problematic because it confused the binding nature of a unilateral act with reliance on that act. This case raised questions about the autonomous nature of the unilateral act. It also led to other questions considered by the Court: When was a state entitled to change their intention? Was a unilateral act revocable? In the *Nuclear Tests cases* the ICJ held that the "unilateral undertaking resulting from [the French] Statements cannot be interpreted as having been made in an implicit reliance on arbitrary power of reconsideration."[170] Therefore, the decision limited the ability to change a unilateral act and so this case established that a unilateral act cannot be revoked arbitrarily.

As a result this case formalized two things. First, it established that unilateral acts could be the basis of a legal obligation. Second, it established the criteria for unilateral acts; it clarified that to create a legal obligation a unilateral act required intention, autonomy and revocation. The next section demonstrates the importance of these criteria to the definition of unilateral acts.

5. The Importance of the Nuclear Tests cases to the Definition of Unilateral Acts

This section demonstrates the importance of the *Nuclear Tests cases* to the definition of unilateral acts. However, it also illustrates the difficulty in applying the criteria established in the unilateral acts to analysis in the jurisprudence and the literature.

To begin this analysis a review is helpful. The *Nuclear Tests cases* developed three criteria for unilateral declarations: First, the act had to be autonomous. Second, the state undertaking the act had to intend the act to have legal effect. Third, once legal effect was ascertained the state could not arbitrarily reconsider or revoke its act. Other criteria have sometimes been derived from this decision. For example, publicity is

[170] Nuclear Tests cases (n 55) at par 51.

another criteria often mentioned. However, these three criteria are the main requirements for unilateral acts to take legal effect. Consequently, they have been applied to unilateral acts in various formulations since this decision.

Three prominent cases have applied the *Nuclear Tests cases*.[171] The first case was the *Military and Paramilitary Activities in and Against Nicaragua case*. This case arose out of covert US intervention in Nicaragua. The US began providing "training advice and support" to the Contra guerrilla fighters. The Contras were fighters who opposed the communist leaning government of Nicaragua. This government had taken power in a revolt by the Sandinista rebels. This revolt had lead to the fall of the Somoza dictatorship, in 1979 -80.[172] In response to American interference Nicaragua filed a claim at the ICJ. Nicaragua asked the ICJ "to condemn the United States support of the 'contras' as a violation of the basic norms of conventional and customary and international law." Nicaragua also requested an order to require the US to cease "all overt or covert uses of force or intervention in Nicaraguan affairs and to receive damages for those activities already undertaken."[173] The US attempted to block the litigation, issuing a statement that became known as the "Schultz declaration." Through this declaration the US retroactively rescinded their consent to the jurisdiction of the Court. On this basis it tried to have Nicaragua's claim removed from the Court's list. The US argued that the Court did not have jurisdiction to hear the merits of the case. The Court did not accept these arguments and consequently the US withdrew from the litigation.[174]

This decision forced the US to justify its interference in Nicaragua. The US argued that they took action because the Nicaraguan Government was ignoring its "'solemn commitments to the Nicaraguan people, the US and the Organisation of American States'" to institute a democratic government, including elections.[175] As a result the ICJ had to determine if Nicaragua had made a unilateral promise to transition

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[171] Other cases have tangentially dealt with similar issues, such as the *Case Concerning Border and Transborder Armed Actions* (*Nicaragua v. Honduras*) (Judgment) [1988] ICJ Rep 69; and *Aegean Sea Continental Shelf Case* (*Greece v. Turkey*) (Judgment) [1978] ICJ Rep 3; These cases do not directly pertain to the present discussion; See for example, B Kwiatkowska, "New Zealand v. France Nuclear Tests Case: the "Little Big" Order of the International Court of Justice of 22 September 1995" (1995) 6 Ius Gentium: The Finnish Yearbook of International Law 1.

[172] See TD Gill, "Litigation Strategy in the Nicaragua Case at the International Court" in Y Dinstein and M Tabory (eds), *International Law at a Time of Perplexity: Essays in Honour of Shabtai Rosenne* (Martinus Nijhoff, Dordrecht/London 1989) at p 199 ff.

[173] Gill in Dinstein & Tabory (n 172) at p 210.

[174] See for example Gill in Dinstein & Tabory (n 172) at pp 217-219.

[175] *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. USA)* (Merits) [1986] ICJ Rep 14, par 257; See the same quote in HWA Thirlway "The Law and Procedure of the International Court of Justice, 1960-1989." (1990) 60 BYIL 1 at pp 17-18.

to a democratic form of government and hold elections. [176] This argument was not addressed by Nicaragua in its pleadings or oral arguments.[177] Therefore, the Court held on the evidence that the promise to have elections was a domestic act, not an international act. The Court did not find any evidence of a unilateral act by Nicaragua and the ICJ was not prepared to entertain this promise as an obligation as *erga omnes*. In fact the Court did not refer directly to the *Nuclear Tests case*s in this regard. The Court asserted that even if the Nicaraguan government had made such a promise, it would have been made to the Organisation of American States, not to the US.[178] This case was not an example of the principles in the *Nuclear Tests cases* as the Court did not assess the intention of a state undertaking an autonomous legal act. It examined a unilateral obligation undertaken between specific parties.[179] In this specific situation the Court did not find the intention required for an act to take legal effect.

The second case in which unilateral acts were considered was the *Case Concerning the Frontier Dispute* between Burkina Faso and Mali.[180] This case arose out of a border dispute between Burkina Faso and Mali. To resolve this dispute a Mediation Commission was set up and in the course of the work of this Commission the Head of State of Mali stated that the recommendations of the Mediation Commission were binding, even though the body had not been given binding powers. The Court considered whether this statement could have legal effect. Mali denied that the statements were intended to have legal effect and called them a "witticism."[181] The Court held that the statements were not made in the context of negotiations. Therefore, the Court considered the statements similar to the statements in the *Nuclear Tests cases*.[182] However, unlike in that case the ICJ adopted a narrow interpretation of intention; they considered intention to be applicable in the same circumstances as the *Nicaragua case*. The Court took a cautious approach finding that non-directed statements, such as the general statements of Mali's Head of State, were not legally

[176] Thirlway (n 175) at p 18.
[177] *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. USA)* Memorial of Nicaragua (Merits) available online at <http://www.icj-cij.org/docket/files/70/9619.pdf> accessed on 31 May 2007; *Case Concerning Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. USA)* (ICJ Oral Pleadings) available online at <http://www.icj-cij.org/docket/files/70/9641.pdf> accessed on May 31, 2007.
[178] It did refer to this case at other points in the decision; See Nicaragua case (n 175) at paras 27, 31, 58, 71, 260-262.
[179] This point was made by Thirlway (n 175) at p 18.
[180] *Case Concerning the Frontier Dispute (Burkina Faso v. Mali)* (Judgment) General List No 69 [1986] ICJ Rep 554; See also Thirlway (n 175) at p 18 ff.
[181] See, Frontier Disputes case (n 180) at paras 38-9; see also Thirlway (n 175) at p 18.
[182] Frontier Disputes case (n 180) at par 39; See also Thirlway (n 175) at p 18.

binding.[183] The Court held that in the *Nuclear Tests cases* the broad subject matter and the situation of the parties to the litigation necessitated an *erga omnes* statement. In this case the Court felt the parties had the option of reaching an agreement. Mali did not intend to be bound by their statements.[184]

The third case in which unilateral acts were considered was the *Case Concerning Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge*.[185] In this case the ICJ considered sovereignty over Pedra Branca/Pulau Batu Puteh, which was a source of friction between Singapore and Malaysia. The Parties agreed that the dispute "crystallized" in 1980 when Singapore protested publication of Malaysian maps showing Malaysian sovereignty over Pedra Branca/Pulau Batu Puteh Island, although the date is less clear as to the dispute over the middle rocks and south ledge, with the Court settling on 1993 as the date of crystallization of the latter claim.[186] Of primary concern to the present discussion is correspondence in 1953 between Singapore and the British Advisor to the Sultan of Johor (in Malaysia) asking to confirm sovereignty of Pedra Branca/Pulau Batu Puteh.[187] A reply written by the Acting Secretary of State for Johor disclaimed ownership of the Island.[188] This letter, known as the Johor reply, was interpreted variously by the parties; Malaysia argued the letter disclaimed "ownership," not sovereignty, and was written without authority. Singapore claims the letter disclaimed title, and therefore sovereignty over the Island.[189] The ICJ held that the letter was not a clear disclaimer of title to the Island, and that moreover Singapore could not prove the detrimental reliance necessary to estop Malaysia in its claim.[190] Most importantly, the Court considered the unilateral nature of the "Johor reply." The Court acknowledged that the statement was made without reference to a claim or dispute with Singapore and so cannot be taken to indicate a unilateral obligation.[191] According to the ICJ the "Johor reply" was merely an answer to a question posed by Singapore and was

[183] Frontier Disputes case (n 180) at par 39.
[184] Frontier Disputes case (n 180) at par 40; See also Thirlway (n 175) at p 18-20; Thirlway also discusses the *Border and Transborder Armed Action Case* between Nicaragua and Honduras, but this is in the context of his discussion of good faith. The "declaration" discussed in this case is analogous to a treaty obligation; Thirlway (n 175) at p 20-21.
[185] *Case Concerning Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore)* (Judgment) General List No 130 [2008] available online at < http://www.icj-cij.org/docket/files/130/14492.pdf> accessed on 2 June 2009 [hereinafter Pedra Branca/ Pulau Batu case.
[186] Pedra Branca/Pulau Batu case (n 185) at paras 33-36.
[187] Pedra Branca/Pulau Batu case (n 185) at par 192.
[188] Pedra Branca/Pulau Batu case (n 185) at par 193.
[189] Pedra Branca/Pulau Batu case (n 185) at paras 197-201.
[190] Pedra Branca/Pulau Batu case (n 185) at paras 225-226.
[191] Pedra Branca/Pulau Batu case (n 185) at par 229.

not an indication of a legal obligation that affected sovereignty over Pedra Branca/Pulau Batu Puteh.[192] Therefore, the ICJ declined to find a unilateral act in this case.

Additionally, the ICJ will consider unilateral action again in an ongoing case, the *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo,* in which the UN General Assembly has asked for an advisory opinion on the unilateral declaration of independence of Kosovo.[193] Consequently, the *Nuclear Tests cases* identified the criteria for unilateral acts to have legal effect; three of these criteria are intention, autonomy, and revocability. However, the ICJ has found it difficult to apply these criteria in subsequent cases and has always distinguished these later cases from the *Nuclear Tests cases*.

Similarly, there are many examples where the literature has considered the *Nuclear Tests cases* as establishing the legality of unilateral acts. For example, Dupuy considers the nature of unilateral acts. He believes such acts are Janus-like. By this he means that they have two aspects, "one properly legal, the other more deliberately political..."[194] He defines the legal aspect as the "taking of unilateral legal action."[195] He cites the *Nuclear Tests cases* and asserts there is a "proper legal nature" to unilateral acts.[196] He then goes on to question the effects of unilateral acts but not their legal nature. In the same vein, Kennedy even defines this decision as the "classic" case of unilateral declarations.[197] Finally, many if not all the texts noted in the introduction consider this case as part of their analysis.

Lastly, the Working Group of the ILC considered the topic of unilateral acts suited for codification because it had been considered in the jurisprudence and particularly in the *Nuclear Tests cases*, although they noted that the criteria in this case were not unambiguous.[198] This case also appeared as core criteria in the typology proposed for unilateral acts at the ILC.[199] Therefore, subsequent case law, literature and ILC demonstrate that the criteria established in the *Nuclear Tests cases* are central to the understanding of unilateral acts. The meaning of each of these requirements in the doctrine is examined in great detail in Part 2 of this work, intention in Chapter 4,

[192] Pedra Branca/Pulau Batu case (n 185) at para 229-230.
[193] *Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo (Request for Advisory Opinion)* available online at <www.icj-cij.org> accessed on 2 June 2009.
[194] Dupuy (n 36) at p 20.
[195] Dupuy (n 36) at p 20.
[196] Dupuy (n 36) at p 20.
[197] Kennedy, International Legal Structures (n 83) at p 56.
[198] ILC Yearbook 1996 (n 39) at addendum 3, par. 3,
[199] ILC Yearbook 1996 (n 39) at addendum 3, par 8

autonomy in Chapter 5 and revocation in Chapter 6. To conclude: in this thesis unilateral acts are defined as any act that meets the criteria of intention, autonomy and revocation. These criteria are established in the *Nuclear Tests cases* and are fleshed out in subsequent case law, literature and the work of the ILC. These criteria will be examined in detail in Part 2 of this work.

6. Conclusion: What are Unilateral Acts?

This chapter asks the question 'what are unilateral acts?' This chapter notes that the variety of acts classified as unilateral makes defining these acts difficult. In fact the ILC worked on this topic for six years and could not secure widespread agreement on a definition, beyond non-binding "Guiding Principles" which establish criteria for unilateral acts to become legal. Therefore, there is no single definition of unilateral acts. What are unilateral acts, then? They are the result of the history and development of the doctrine in this area.

To arrive at this conclusion this chapter examines the history of unilateral acts, and establishes that prior to the ICJ decision in the *Nuclear Tests cases*, there is no doctrinal certainty that unilateral acts create a legal obligation. Consequently, the *Nuclear Tests cases* "revolutionize" the category of unilateral obligations by establishing criteria for assessing when unilateral acts are legal. This case establishes three main criteria for unilateral acts to be considered legal, intention, autonomy and revocation. These criteria are applied in subsequent case law, and they are treated as important in the literature. Additionally, they are cited as a justification for the work of the ILC. As a result a unilateral act, for purposes of this work, is any act that applies the criteria from the *Nuclear Tests cases*. Therefore, these criteria are the working definition of unilateral acts in this thesis. When the term unilateral act is used in this thesis it refers to acts that meet the criteria of intention, autonomy and revocation established in the *Nuclear Tests cases*.

Chapter 3: Method

1. Introduction

This chapter answers the research question "what is legality?" By answering this question this chapter explains the method of analysis adopted in this thesis. This chapter answers this question by providing an overview of the research question, by outlining possible methods, by justifying the choice of a narrow critical legal studies method, by providing an overview of the narrow critical legal studies and by establishing the importance of this method as a framework for answering the question of legality. Consequently, this chapter presents the method that is used in this thesis, a narrow critical legal studies method, and establishes that this method provides the definition of legality used in this work.

2. The Research Question

This chapter answers the research question "what is legality?" Answering this question is necessary to establish a basis upon which to assess the legal nature of unilateral acts. However, legality is imprecisely defined as the "state of being legal"[200] and the term legal is defined as "related to, based on or required by law."[201] Ostensibly "required by law" could be further defined to identify the subjects and nature of law, but it is at this point definitions break down as the requirements of law are a matter of debate; there is no single answer to the question, "what is required by law?" Consequently, any definition of legality is the product of a theory – a "conceptual apparatus or framework" – that helps answer the research question posed.[202] Therefore, when a theory is applied to the practical question of the legality of unilateral acts it becomes a method, as a method is defined as an applied theory.[203] Therefore, the theory used to answer the question "what is legality?" is also the method used in this thesis. As a result the next part of this chapter evaluates the methods of international law that could be applied to

[200] Concise OED (n 57) "legality".
[201] Concise OED (n 57) "legal."
[202] Ratner & Slaughter (n 61) at p. 292.
[203] Ratner & Slaughter (n 61) at p 299.

answer the question "what is legality?" This chapter then goes on to offer a rationale for the method adopted in this thesis, a narrow critical legal studies method. Subsequent parts of this chapter then analyse this method in depth and outline its application to the question of legality of unilateral acts.

3. The Methods of International Law

This section surveys the methods of international law. From this survey the following section analyses the relative merits of each method for answering the question "what is legality?" and then a method is chosen and justified. Consequently, this section begins by identifying the current methods of international law.

In a symposium on this issue, Ratner and Slaughter survey the field and identify seven current methods in international law: positivism, the New Haven school, international legal process, critical legal studies, international law and international relations, feminist jurisprudence and law and economics.[204] Ratner and Slaughter acknowledge that these are not the only "methods of international law." However, they assert that this list represents the methods that are most often used in modern international law.[205] This is an accurate survey of current methods of international law; however, it ignores one other current method, natural law. Ratner and Slaughter dismiss this method merely on the basis of their symposium's space constraints.[206] However, natural law methods are alive and influential in several areas of international law, particularly the discussion of the hierarchy of norms[207] and in the question of the universality of international law.[208] As a result natural law methods remain central to international law in a way in which other methods excluded from the symposium do not. For example, Ratner and Slaughter mention that they exclude comparative law methods and functionalism.[209] The first of these methods, comparative law, is used mostly in private international law and so is not relevant here. The second of these methods, functionalism, has not had the historical relevance of natural law theory and therefore does not merit the same consideration. Consequently, this section surveys

[204] Ratner & Slaughter (n 61) at p 293.
[205] Ratner & Slaughter (n 61) at p 293.
[206] Ratner & Slaughter (n 61) at p 293.
[207] See, for example D Shelton, "Normative Hierarchy in International Law" (2006) 100 AJIL 291.
[208] See, for example, J Charney, "Universal International Law" (1993) 87 AJIL 529.
[209] Ratner & Slaughter (n 61) at p 293.

eight methods of international law: positivism, natural law, the New Haven School, international legal process, feminist jurisprudence, international law/international relations, law and economics and critical legal studies.

3.1 Positivism

Hart, the pre-eminent Anglo-American positivist of the 20th century, traces the intellectual history of positivism to Bentham and Austin.[210] The key insight of this method is the separation of law and morality – what law is from what it ought to be.[211] Therefore law is a social fact and it must be studied "…as it is, backed up with effective sanctions, with reference to formal criteria, independently of moral or ethical considerations."[212] Applied to international law, Ago notes that a rich tradition develops from Grotius on of using "positive law" to refer to law created by an act of will of a sovereign state.[213] By this definition positivism privileges states as the primary actors in international law and gives states unfettered freedom of action when no positive law exists to limit their sovereignty.[214] Ratner and Slaughter note that this method is still widely used in European international law.[215]

3.2 Natural Law

"The traditional view of natural law is that it is a body of immutable laws superior to positive law."[216] In the twentieth century this is understood as either the "objective moral content of a legal norm" or the "universal ideal" of law.[217] The recent debate over the content of peremptory norms is an example of the application of natural law principles in modern international law.[218]

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[210] HLA Hart, "Positivism and the Separation of Law and Morals" (1958) 71 Harv L Rev 593 at p 594.
[211] Hart, "Positivism" (n 210) at p 594.
[212] Ratner & Slaughter (n 61) at p 293.
[213] R Ago, "Positive Law and International Law" (1951) 51 AJIL 691 at pp 693, 698
[214] Ratner & Slaughter (n 61) at p 293.
[215] Ratner & Slaughter (n 61) at p 293.
[216] AG Chloros, "What is Natural Law?" (1958) 21 Modern L Rev 609, at p 609.
[217] Chloros (n 216) at p 622.
[218] See generally Shelton (n 207).

3.3 The New Haven School

The New Haven school is identified most closely with the work of Lasswell and McDougal at Yale.[219] The New Haven school grows out of a realist perspective that law is the product of power, but offers the more hopeful view "that world order is not simply a function of state power, as political realists would have it, but of human agency as well."[220] Therefore, the New Haven school denies the positivist assumption that law is the sum of the rules created by the sovereign, and the realist contention that law is merely power. Instead they argue that international law is the product of authoritative decisions and the process by which these decisions is reached.[221] To New Haven scholars, "[a]uthority is the structure of expectation concerning who, with what qualifications and what mode of selection is competent to make decisions by what criteria and what procedures"[222] Consequently, international law is considered "legal" when an empirical study reveals that a decision is reached by a competent decision maker which is later followed.

3.4 International Legal Process

This method is exemplified by the work of Chayes, Henkin, Ehrlich and Lowenfeld,[223] who are concerned with the way in which process – defined as lawyers and institutions – is effective in guiding international relations.[224] Their goal is to explain how law acts to "constrain" actors in international relations.[225]

3.5 International Law and International Relations

IR/IL, as international law and international relations is often abbreviated, is an interdisciplinary method that identifies areas of "convergence" between international law and international relations theory. It recognizes the commonality between the two

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[219] Ratner & Slaughter (n 61) at p 293.
[220] OA Hathaway, "Commentary: The Continuing Influence of the New Haven School" (2007) 32 Yale Int'l L J 3, at p 6 available online at <http://papers.ssrn.com> accessed on 4 April 2009
[221] J Brunnée et al, *International Law Chiefly as Applied in Canada* (7th ed, Emond Montgomery, Toronto 2008) at p 5.
[222] Lasswell H & McDougal MS. "The Identification and Appraisal of Diverse Systems of Public Order" in Ms McDougal Ed (eds) *Studies in World Public Order* (Martinus Nijhof, Dordrecht 1987) 3 at p 13.
[223] A-M Slaughter, "International Law in a World of Liberal States" (1995) 6 EJIL 503, at p 503.
[224] A-M Slaughter, "International Law and International Relations Theory: A Dual Agenda" (1993) 87 AJIL 205, at p 213-214.
[225] Ratner & Slaughter (n 61) at p 294.

disciplines and it strives to create a joint research agenda in areas of common interest to both disciplines.[226]

3.6 Feminist Jurisprudence

Feminist international law method seeks to uncover how law reflects male dominance.[227] As Charlesworth, Chinkin and Wright explain, "[i]nternational legal structures and principles masquerade as "human" – universally applicable set of standards. They are more accurately described as international men's law."[228]

3.7 Law and Economics

International law and economics is an interdisciplinary method that seeks to apply principles of economics to international law. It is concerned with applying economic principles such as rational choice and game theory to international decision making. Particularly it has been considered relevant to questions such as regulatory competition, international organizations, environmental law, law and development and institutional analysis.[229]

3.8 Critical Legal Studies

Critical legal studies have focused on the role of language in creating and structuring international law.[230] Critical legal studies represent a wide variety of methods that try "… to move beyond what constitutes law or the relevance of law to policy to focus on the hypocrisies and failings of international legal discourse."[231] Some of these scholars focus on the role of culture,[232] but other critical legal scholars take an approach to law that, to quote Hunt, "takes legal doctrine seriously."[233] Hunt describes this version of

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[226] See generally, A-M Slaughter, AS Tulemello & S Wood, "International Law and International Relations Theory: A New Generation of International Law Scholarship" (1998) 92 AJIL 367; See also Ratner & Slaughter (n 61) at p 294.
[227] Ratner & Slaughter (n 61) at p 294.
[228] H Charlesworth, C Chinkin, & S Wright, "Feminist Approaches to International Law" (1991) 85 AJIL 613, at p 644.
[229] See generally, JF Dunoff & JP Trachtman, "Economic Analysis of International Law: An Invitation and a Caveat" *SSRN Working Paper Series* (1998) available online at <http://papers.ssrn.com> accessed on 26 March 2009.
[230] Ratner & Slaughter (n 61) at p 294.
[231] Ratner & Slaughter (n 61) at p 294.
[232] Ratner & Slaughter (n 61) at p 294.
[233] Hunt (n 77) at p 14.

critical legal studies as a "narrow" position "in which law is described by the internal understanding lawyers hold of their subject matter."[234] This branch of critical legal studies accepts that lawyers hold a coherent internal understanding of law, that law is the product of legal doctrine, but they do not define law or legality. This branch of critical legal studies has been particularly important in applications of the critical legal studies method to international law.[235]

It is beyond the scope of this thesis to address in detail each method just surveyed. However, the overview just provided is sufficient to allow a discussion of the most appropriate method to answer the question "what is legality?" This will be the subject of the next section of this chapter.

4. Analysis of the Methods of International Law

To determine which method is most appropriate to answer the question 'what is legality?' requires analysis of the strengths and weaknesses of each method. This section undertakes this analysis. As a starting point the eight methods just summarized can be further grouped together into five main categories for analysis: Positivism and natural law, the New Haven school, international legal policy, interdisciplinary methods and critical legal studies. These five categories are examined for strengths and weaknesses of the methods analysed.

4.1 Positivism and Natural Law

In the Anglo-American tradition, positivist methods are closely aligned with analytic philosophy.[236] Positivism that is based on analytic philosophy assumes that international law is a concept that relates to people's actual experience of the world in some way.[237] Analytic philosophers understand this relationship as a process of application. People comprehend the world by applying *a priori* criteria to unconnected instances in the real

[234] Hunt (n 77) at p 14.
[235] See for example, Kennedy, International Legal Structure (n 83); See also Koskenniemi, Apology (n 81).
[236] Chloros (n 216) at p 612 ff.
[237] DS Lee, "The Construction of Empirical Concepts" (1966) 27 Philosophy and Phenomenological Research 183 at p 185-186.

world.[238] These *a priori* criteria form the concept by providing people with standards by which they can measure real world events. These *a priori* criterions form the "pure" concept.[239]

The "pure" concept is always elusive as real events rarely match the *a priori* criterion for the concept. Consequently, all concepts are only partial explanations of this "pure" concept.[240] These partial explanations are called conceptions and are a reflection of the "pure" concept. This analytical method explains how it is that individuals share an idea of "international law." However, this method has not been unproblematic in the doctrine as conceptions are characterized in various ways. For example, Swanton identifies types of conceptions that describe political concepts. The first type of conception provides a schema of a concept.[241] The second type of conception is drawn from Rawls (a follower of Hart[242]) and Lukes and is based on the commonalities between understandings of the concept.[243] Dworkin also adopts this method.[244] The third type of conception is found in Gallie who asserts that there is an "original exemplar" of a concept from which all conceptions derive.[245] All of these characterizations of conceptions share one weakness. They all rely on the fact that there is a core or "pure" concept which can be identified even when the conceptions themselves are contested.[246] This analytic method is sound so long as the concept has a schema, core or original exemplar.[247] However, analytic philosophers admit that not all concepts yield to such an analysis. For example, Gallie finds it difficult to apply his method of identifying these common elements to the idea of art; he even admits there has been no "original exemplar," or common conception of the meaning of art.[248] A similar difficulty exists with the concept of law. There is no "pure" concept of law.

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[238] Lee (n 237) at p 185.

[239] For example, Lee uses the idea of a "horse" to demonstrate the notion of a "pure" concept. He writes:

> …this pure concept of "horse" applied to the given is a rule for organising certain elements like large, four legged and small eared, in a certain way to yield the concept of a horse. The pure concept of horse is a rule tying together different sections of experience in which I saw a large, four legged, and small eared creature.

Lee (n 237) at p 191.

[240] See Bix (n 63) at p 5, who makes this assertion as well; Further, Bix notes that this is not an original assertion and can be found in the work of Hart as well as Finnis, Bix (n 63) at p 5, n 2.

[241] C Swanton, "On the Essential Contestedness of Political Concepts" (1985) 95 Ethics 811 at p 813.

[242] J Rawls, *A Theory of Justice* (OUP, Oxford 1972) at p 5, n 1.

[243] Swanton (n 241) 813; See also, Rawls (n 242) at p 5.

[244] See R Dworkin, *Law's Empire* (Hart, Oxford 1998) at p 87ff.

[245] Swanton (n 241) at p 5*;* See also, Gallie (n 69).

[246] Swanton (n 241).

[247] Swanton (n 241) at p 816.

[248] Gallie (n 69) at p 182.

There are no agreed upon *a priori* criteria,[249] whether a schema, common core, or an exemplar, for law. In this way, concepts like art, or law, differ from scientific concepts. Scientific concepts can be determined "at least temporarily and provisionally."[250] Art or law cannot be determined because such concepts[251] are social concepts.[252] Social concepts lack agreed upon *a priori* criteria that can resolve debates about the core of the concept. Such deficiencies are compensated for by acting as if there are clear criteria for the concept.[253] As a result the analytic method cannot answer the question "what is legality" as it cannot offer definitive criteria by which to analyse legality. Any criteria proposed are at best unresolved and are at most, as Gallie notes, essentially contestable.

Natural law theories suffer from similar difficulties. Like positivism, natural law relies on a notion of *a priori* criteria of legality. The main difference between positivism and natural law is the location of the criteria, either in morality or in social fact. Moreover, as Choloros points out, modern natural law methods are also a branch of analytics as these methods ascertain legality from the premise that there is a "core concept" of law.[254] However, as Gallie notes, there are concepts that cannot be reduced to a core. These concepts resist definition in analytic terms, as any determination of a core concept is challenged and debated. Law is arguably one such concept because there are competing conceptions of law. Consequently, the positive law and natural law methods cannot resolve debates about legality and are therefore difficult to apply to the research question "what is legality?"

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[249] For a notion of *a priori* concepts, see generally A MacIntyre, "The Essential Contestability of Some Social Concepts" (1973) 84 Ethics 1; For a critique of this approach see NS Care, "On Fixing Social Concepts" (1973) 84 Ethics 10.

[250] See MacIntyre (n 249) at p 1.

[251] *Contra* MacIntyre (n 249), MacIntyre specifically excludes law from his notion of essentially contested concepts. He feels law involves "presupposing a certain application and understanding of essential contestedness." MacIntyre (n 249) at p 9.

[252] MacIntyre does not offer a concrete definition of a social concept. He identifies characteristics of social concepts through examples of social institutions or events. The closest he comes to a definition of a social concept appears to be in contrast to concepts in natural sciences. As Care interprets, the difference between a social and a natural concept is whether or not the actors in the concept "have a say in their own definition." Care (n 249) at p 11.

[253] As MacIntyre notes regarding social concepts ,

> I can put the matter like this: both Waismann and Putnam have shown that there is not a finite and determinate set of necessary and sufficient conditions which determine the application of the concept (Waismann) or a word (Putnam) but the examples which they cite also reveal that in normal circumstances in standard conditions we can behave as if there were such a finite and determinate set and we do indeed so behave. Otherwise every question of fact would be indefinitely debatable and while every assertion of fact is potentially open to question, every such assertion is not actually open to question. Natural science settles certain debates at least temporarily and provisionally.
>
> But in large areas of social inquiry there are not even temporary or provisional settlements.

MacIntyre (n 249) at p 2.

[254] Chloros (n 216) at p 622.

4.2 The New Haven School

Falk notes that McDougal and Lasswell, the leaders of the New Haven school, view the requirements of law "…as the end result of an authoritative decision making process."[255] The New Haven school describes this process as "empirical knowledge" directed towards a "purposive outcome," an outcome which is defined by values necessary in a free society.[256] Kennedy observes that by taking this approach the New Haven school is critical of both natural law and positive law methods for their formalism,[257] but replaces this formalism with a "realism" that matches with the values of Western democracies in the cold war.[258]

Problematically, this method of study turns away from a focus on legal norms to focus on requirements of law derived from authoritative decision making and values. Reliance on these values means that legality becomes coextensive with the values this method defines as relevant for international coexistence.[259] In this sense, the New Haven school faces the same difficulty as the analytic theorists – that legality, and the requirements of law, are defined in reference to "core" criteria, in this case preferred values exemplified by authoritative decision making. As with positivist and natural law methods; these core values are ultimately contestable and cannot resolve debates about legality.

4.3 International Legal Process

International legal process method focuses solely on "understanding how international law works."[260] Consequently, international legal process methods explain law by focusing on the practical role international law plays in international society. [261] However, this practical bent means that international legal process method does not have a theory of legality. In fact, a main criticism of this method, in its original form, is

[255] Falk (n 71) at p 1992.
[256] Falk (n 71) at p 1992.
[257] D Kennedy, "When Renewal Repeats: Thinking Against the Box" (1999) 32 NYU JILP 335, at p 381.
[258] Kennedy, "Renewal Repeats" (n 257) at pp 381-382.
[259] Kennedy, "Renewal Repeats" (n 257) at p 381.
[260] O'Connell (n 72) at p 334.
[261] O'Connell (n 72) at p 337.

that it suffers from a "normative deficit."[262] This deficit means that legal process, in its most recent uses, returns to defining process in reference to values.[263]

Neither the original international legal process method nor its recent uses can adequately assess legality. The original purpose of the legal process method is to define law solely by reference to "what it does." As a result it offers no method of determining legality outside description of the process followed. Further, in its recent iterations, international legal process suffers from the same weakness as the New Haven school method in which there are no agreed upon values by which one can define legality; ultimately each definition of values proposed by the international legal process method is open to questions about its validity.

4.4 Interdisciplinary Methods

Feminist jurisprudence, IR/IL, and law and economics have one similarity – they each rely on insights from other disciplines to arrive at their method of international law: they are interdisciplinary methods. Further, as Slaughter, Tulumello and Wood note, there has been a trend towards interdisciplinarity in law, particularly between law and other social sciences.[264] These methods claim to add rigour to legal method.[265] However, as a result these methods often dissolve the question of legality into assessments of insights from other disciplines. For example, Ratner and Slaughter note that there is a concern that non-positivist methods may not have a distinctive "legality quality";[266] so there is concern that these methods cannot define legality in a way that is distinct from other social processes. While this is not, generally, a problem for these methods, in fact it means that they avoid the problem of definition endemic to the methods already examined. Further, it also means that these methods cannot answer a research question that defines the requirements of law. To summarize, these methods add to our understanding of law as part of society but they are not useful for answering the question "what is legality?"

[262] O'Connell (n 72) at p 334.
[263] O'Connell (n 72) at p 334.
[264] Slaughter, Tulumello & Wood (n 226) at p 371.
[265] Ratner & Slaughter (n 61) at p 299.
[266] Ratner & Slaughter (n 61) at p 299.

4.5 Critical Legal Studies

Similar to the interdisciplinary methods, critical legal studies methods resist attempts to define law and draw insight from other disciplines. However, unlike the interdisciplinary methods discussed above, the strand of critical legal studies method most often applied in international law, the narrow version of critical legal studies, turns its focus inward on the "failings" of "international legal discourse".[267] It is the focus on the role language[268] plays within law that separates critical legal studies from the other interdisciplinary methods. The focus on language allows critical legal studies to look inward at laws' rhetorical structures and biases, law's doctrine. This strand of critical legal studies, according to Hunt, "takes legal doctrine seriously."[269] Hunt describes this version of critical legal studies as a "narrow" position "in which law is described by the internal understanding lawyers hold of their subject matter."[270] The internal understanding lawyers hold of their subject matter is law's doctrine. Doctrine is defined as "2. That which is taught…b. esp. that which is taught or laid down as true concerning a particular subject or department of knowledge, as religion, politics, science, etc; a belief, theoretical opinion; a dogma tenet…"[271] and the narrow version of critical legal studies takes an internal understanding of law seriously without having to define law. It provides a way for law to explain what is "laid down as true" about its discipline based on the understanding of law that lawyers hold about their subject matter. Narrow critical legal studies methods seem to answer both concerns that have emerged in the attempt to define legality; that legality cannot be defined by definitions of law; and that legality requires a way of determining what is legal from what is not legal. Further, this branch of critical legal studies has been particularly important in applications of the critical legal studies method to international law.[272]

As a result the narrow version of critical legal studies is the method adopted in this thesis. This version of critical legal studies avoids the problems raised about positive law and natural law methods, New Haven school, international legal process methods and interdisciplinary methods. These methods either propose definitions of legality that are based on preferences cloaked in certainty or they do not provide

[267] Ratner & Slaughter (n 61) at p 293.
[268] Ratner & Slaughter (n 61) at p 293.
[269] Hunt (n 77) at p 14.
[270] Hunt (n 77) at p 14.
[271] Oxford English Dictionary Online, "Doctrine" (n 71).
[272] See for example, Kennedy, International Legal Structures (n 83); See also Koskenniemi, Apology (n 81).

sufficient guidance to identify the requirements of law. The narrow version of critical legal studies responds to both these concerns. As in the New Haven school, international legal process school and interdisciplinary methods, which criticize positive law and natural law, this strand of critical legal studies sees law as part of society. However, unlike these methods, and like positive law and natural law, it takes legal doctrine seriously on its own terms.

In sum, this section examines the applicability of various methods of international law to the question "what is legality" and determines that the most viable method for answering this question is a narrow version of critical legal studies. This is the method that is adopted in this thesis. Consequently, the next part of this chapter will proceed to explain this method in greater detail and explain how this method will be applied in this thesis.

5. The Critical Legal Studies Method

This section of the thesis outlines the critical legal studies method that is used in this thesis. For purposes of this thesis law is constructed from its doctrine and the analysis of the impact or effect of that doctrine in a specific social context. This doctrine makes up "international law." Further, as justified above, a narrow critical legal studies method is adopted in this thesis. In this method the doctrine of international law is not an absolute; it is a structure which provides a way of understanding the doctrine of international law.[273] Critical legal studies method identifies three types of doctrinal debates or "discourses" that form part[274] of structure the doctrine international law. These are referred to in this work as sources, substance and process.[275] As Trimble notes, these discourses "are not in any way idiosyncratic."[276] As Kennedy points out, standard casebooks follow this pattern.

Consequently, more relevant to understanding the narrow critical legal studies method is the origin of these structures. The basic assumption of critical legal studies is

[273] Koskenniemi calls this a grammar for law; Koskenniemi, Apology (n 81) at p 566 ff.
[274] P Trimble, "International Law, World Order, and Critical Legal Studies" Review Essay (1990) 42 Stan L Rev 811, at p 824.
[275] Kennedy refers to sources doctrine, substance doctrine, and process doctrine. Kennedy's definitions of these arguments are found in Kennedy, International Legal Structures (n 83) at p 8; this work sometimes modifies Kennedy's approach; see *contra* Kennedy, International Legal Structures (n 83) at p 8.
[276] Trimble (n 274) at p 824.

derived from Foucault, that "[i]n Western societies since the Middle Ages, the exercise of power has always been formulated in terms of law." [277] The idea that law serves power requires critical legal studies methods to examine how law manifests power relationships. Critical legal scholars argue that there are discursive structures underlying the doctrine of international law. These structures force law to serve power in "Western" states[278] as a result of the liberal democratic model on which "Western" law is built. The liberal democratic model creates tensions within liberal societies that the doctrine of law then tries to mediate by providing a structure within which these tensions can be debated – made legal.

The first doctrine of international law is the doctrine of sources. The doctrine of sources establishes the way in which the authority of international law is determined. Koskenniemi asserts that sources doctrine is "often understood from two perspectives: as a description of the social processes whereby states create law (concreteness) and as a methodology for verifying the law's content independently of political opinions (normativity)."[279] Therefore, in sources doctrine there is a tension between how law must appear – either as a concrete rule or as a process for verifying the law's content. In practice these manifest themselves as two different perspectives on how the authority of law is determined. Koskenniemi refers to these perspectives as consent – the capacity of a source to reflect the will of the state - and what is "just" – the existence of law by virtue of the consensus it embodies.[280] These two views of the authority of law and the debate they engender shape the doctrine of sources. Therefore, sources doctrine in this work will refer to the debate between consent and consensus as establishing the authority of international law.

The second tension that legal doctrine mediates is law's substance. The substance of law is its subject matter, [281] and there is rhetorical tension in liberal societies about the proper subject matter that law should regulate. This tension stems from the fact that the form of law, the way law must appear, is not conclusive, but is derived from the tension between facts and values. This can be best explained as follows: the origin and authority of law are indeterminate, thus creating a problem. Without a concrete form it is hard to identify the substance of law. Kennedy argues that the inconclusive nature of

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[277] R Hurley (tr) M Foucault *The Will to Knowledge: The History of Sexuality Volume 1* (Penguin, London 1998) at p 87; See also I Ward, *Introduction to Critical Legal Theory* (Cavendish, London, 1998); Ward writes "[l]aw according to Foucault is simply the expression and exercise of power." Ward (n 277) at p 149.
[278] See Koskenniemi, Apology (n 81) at p 71 ff.
[279] Koskenniemi, "The Politics of International Law" (1990) 1 EJIL 4 at p 13.
[280] Koskenniemi, Politics of International Law (n 279) at pp 20, 27.
[281] Compact OED (n 60) "Substance."

the substance of law leads the doctrine to manifest larger goals of liberal societies. These goals reveal two conflicting impulses within liberal societies. People want things for themselves. They also want to be community minded.[282] The substance of law reflects a tension between's society's goals of individualism and altruism. Individualism is

> the making of a sharp distinction between one's interests and those of others, combined with a belief that a preference for conduct in one's own interest is legitimate, but that one should be willing to respect the rules that make it possible to coexist with others similarly self interested.[283]

Conversely, altruism "is the belief that one ought not to indulge a sharp preference for one's own interest over those of others."[284] Kennedy argues that liberal societies are inordinately skewed to favour individualist thinking[285] as they favour laws that protect property and individual rights and reject collectivism. At the international level this debate also exists. States wish to protect their sovereignty, which is a form of individualism. However, states also need mechanisms of ensuring international co-ordination[286] as they are not always able to act alone. This is a form of altruism. The substance of international law reflects the conflict within states about whether international society is interest based or communal; this conflict forms the doctrine of substance.

The third area of tension doctrine mediates are the debates over process. Process refers to "the rules by which the game of international law is to be played"; it is necessary for substance to take on a legal form. Consequently, the doctrine in this area establishes the ways in which acts can become law. The doctrine of process identifies the processes for substance to take legal effect. These processes are "independent" of both the sources of law and its substance[287] yet they are related to them. This relationship exists because process ensures that the substance the law wants to regulate is given a legal form through a recognized source of law. Process achieves this function by balancing the tension that exists in liberal societies between the need for predictable

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[282] This is also Kelman's reading of Kennedy; M Kelman, *A Guide to Critical Legal Studies* (Harvard, Cambridge/London, 1987) at p 54ff.
[283] Kennedy, Form and Substance (n 84) at p 1713.
[284] Kennedy, Form and Substance (n 84) at p 1717.
[285] Kennedy, Form and Structure (n 84) at p 1717.
[286] Kennedy, International Legal Structures (n 83) at p 8.
[287] This is *contra* Kennedy. Kennedy's definition of process focuses on jurisdiction and standing. Process also provides a way to organise change. *Contra* Kennedy, International Legal Structures (n 83) at p 289.

processes by which law is created and allowing the law to change in response to changes in either the desired substance or form of law.[288] The tension between maintaining stability and promoting change is mediated by the doctrine of process.

To summarize and make clear the application of this structure to international law: sources/form, substance and process are the doctrines that together structure international law. These doctrines emerge to mediate tensions that exist in liberal societies by providing structure within which these tensions can be resolved. As Kennedy notes:

> …sources doctrine is concerned with the origin and authority of international law – a concern it resolves by referring the reader to authorities constituted elsewhere. Process doctrine – the bulk of modern international public law – considers the participants and jurisdictional framework for international law independent of both the process by which international law is generated and the substance of its normative order. Substance doctrine seems to address issues of sovereign co-operation and conflict more directly.[289]

Therefore, sources are the way law must manifest itself to gain authority – the form international law must take. Substance refers to areas on which states agree to cooperate – that is the substance of law that has been given normative treatment.[290] Process refers to "the rules by which the game of international law is to be played." It refers to the processes by which substance is given form.[291] Each of these doctrines is distinct and explains a different aspect of the structure of international law.

Sources, substance and process each operate independently.[292] However, these doctrines are also dependant on each other. As Kennedy notes, "For all their structural similarity, the discourses of source, process and substance seemed to both distinguish themselves and relate to their brother [sic.] discourses in a series of quite distinctive rhetorical manoeuvres. Quite paradoxically, each discourse seemed to distinguish itself by referring to its brothers for the completion and continuation of its project."[293] Each doctrine interacts to complete and continue the doctrine of international law. Sources,

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[288] This is what Kennedy calls, in a different context, stasis and motion; Kennedy, International Legal Structures (n 83) at p 294; Bederman also discusses the problem stability and change pose for international law. Bederman is considered in Chapter 6, below.
[289] Kennedy, International Legal Structures (n 83) at p 8.
[290] Kennedy, International Legal Structures (n 83) at p 193.
[291] Kennedy, International Legal Structures (n 83) at p 110.
[292] See above.
[293] D Kennedy "A Formalism of International Law While Simultaneously New Stream of International Law Scholarship" (1988) 7 Wisconsin J of Int'l L 1 at p 27.

substance, and process are simultaneously independent and interdependent doctrines. Each doctrine performs a specific role within the overall structure of international law. However, it is the way that form, substance and process interact that provides structure to international law.

Every act that is "legal" must fit within this structure. Otherwise it is not considered doctrinally sound. However, the place of an act within this structure can be contested. Laws are often ambiguous enough that they can be justified by both goals of the doctrine. This is law's indeterminacy. Consequently, the interaction among the doctrines of form, substance and process provide a structure for the doctrine of international law. This interaction allows international law to appear doctrinally complete. Koskenniemi explains,

> [m]y descriptive concern was to try to articulate the rigorous accounting for its political open-endedness - the sense that competent argument in the field needed to follow strictly defined formal patterns that, nevertheless, allowed (indeed enabled) the taking of any conceivable position in regard to a problem.[294]

Law is not clearly formulated and it is always open to interpretation. Consequently, the doctrines of sources, substance and process act as limits of the interpretations which are accepted as legal.

Further, these doctrines are also interdependent. Each of the doctrines relies on the other for its authority. As Kennedy notes, indeterminacy of form leads to indeterminacy of substance and process tries to mediate between form and substance. It is this interaction and interdependence which allows international law to appear to be an internally coherent doctrine. [295] Consequently, for purposes of this thesis a doctrinal

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[294] Koskenniemi, Apology (n 81) at p 563-4.

[295] As Kennedy has written,

> These referential patterns seem to reinforce this general purport of public international law in three quite distinct ways. First, it seems that the rhetorical system as a whole is able to assert itself quite firmly as an international regime while sustaining a very humble and deferential tone. Public international law seems a quite well articulated and complete legal order even though it is difficult to locate the authoritative origin or substantive voice in the system in any particular area. Each doctrine seems to free ride somewhat on this overall systemic image -- an image which is sustained by a continual reference elsewhere for authority or decisiveness. Sources refers us to the states constituted by process and grounded in the violence defined and limited by substance. Process refers us to its origin in sources and its determination in substance. Substance refers us to the boundaries of process, its origins in sources and its resolution in an institutional system of application and interpretation. Thus, the variety of references among these discursive areas always shrewdly locates the moment of authority and the

analysis of unilateral acts assesses how unilateral acts fit within the structure of international law; moreover, the structure of international law is found in the doctrine of sources, the doctrine of substance and the doctrine of process. This method of analysis will be used to analyse the legality of unilateral acts. The next part of this thesis undertakes this analysis. This part is divided into three chapters. Each chapter is devoted to a detailed examination of one doctrine – sources, substance or process. Each chapter then proceeds to examine the requirement of a unilateral act that relates to that doctrine. Finally, each of these requirements is analysed for their relation to the doctrine of international law.

6. Conclusion

This chapter established the method this thesis will use to answer the question "what is legality," by examining the current methods of international law and by justifying the choice of a narrow critical legal studies method for the analysis of legality. This method defines legality through the structure of the doctrine of international law and in this method three doctrines provide the structure of international law: sources, substance and process. Consequently, legality is the result of a concept being justifiable within the structure of international legal doctrine. Therefore, this structure can be applied as a method to answer the broader research question of this thesis: "are unilateral acts legal?" As a method each of the components of the structure of international law can be compared to the corresponding requirement of a unilateral act in order to assess whether these requirements can be justified within the structure of international law (and therefore legal doctrine). This analysis is undertaken in the next part of this work, which is divided into three chapters that each correspond to a doctrine which structures international law – sources, substance and process. Within each chapter the doctrine is analysed, the requirement of a unilateral act which corresponds to that doctrine is introduced, and the ability of that requirement to fit within that doctrine is analysed. In this way the "legality" of unilateral acts is assessed. In a concluding chapter the results of each chapter's doctrinal analysis is analysed, conclusions reached about the legality

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application in practice elsewhere -- perhaps behind us in process or before us in the institutions of dispute resolution.

Kennedy, International Legal Structures (n 83) at p 293.

of unilateral acts are discussed and then these conclusions are applied to the context of this thesis to provide further analysis and relevance to the substance of this thesis.

PART 2: ARE UNILATERAL ACTS “LEGAL”?

Chapter 4: The Sources of International Law

1. Introduction

This chapter begins the analysis of the research question "are unilateral acts legal?" Specifically, this chapter focuses on one aspect of "legality" defined in Chapter 3, the doctrine of sources. It asks the question: can unilateral acts be explained by the doctrine of sources? To answer this question this chapter provides an overview of the research question and outlines the sources of international law and the requirements of unilateral acts that provide the "source" of a unilateral act, intention. This chapter then compares the doctrine of sources to the source of unilateral act, intention, in order to reach conclusions about the "legality" of the source of unilateral acts. Consequently, this chapter examines the sources of international law; discusses the requirement of a unilateral act as the "source" of a unilateral act's legality, intention; and compares the two doctrines in order to establish whether unilateral acts can be explained by the doctrine of sources. Some context for this analysis will be provided through the example of Iran's pursuit of nuclear weapons, and conclusions will be drawn from the chapter.

2. The Research Question

This chapter examines one aspect of the question "are unilateral acts legal?" Particularly, it focuses on the question "can unilateral acts be explained by the doctrine of sources?" To explain why this question is necessary, a brief summary is helpful. As noted in the introductory chapter, answering the question "are unilateral acts legal?" requires answering two subsidiary questions: "what are unilateral acts?" And "what is legality?" Chapter 2 establishes that unilateral acts are defined by three core requirements that separate these type of obligations from other legal obligations: intention, autonomy and revocability. Chapter 3 establishes a method of assessing legality derived from a narrow critical legal studies method – a doctrinal analysis of unilateral acts based on the structure of international law. This method clarifies that the doctrinal structure of unilateral acts is derived from three primary, interlinked doctrines – sources, substance and process. Consequently, any analysis of the "legality" of

unilateral acts requires a comparison of the requirement of a unilateral act in relation to the doctrine of international law. If unilateral acts can be explained within the doctrinal structure they must be considered legal, otherwise unilateral acts pose a problem for the doctrine of international law.

This chapter begins the analysis of the legality of unilateral acts by examining one doctrine of international law, sources doctrine, and the requirement of a unilateral act that establishes the legal authority of a unilateral act, intention. This analysis is necessary because comparing the requirement of intention to sources doctrine determines whether unilateral acts can be considered to be a "source" of authority in international law. This leads to the question that guides this chapter: Can unilateral acts be explained by the doctrine of sources? If unilateral acts cannot be explained by sources doctrine this makes their place in the structure of international law doctrinally weak, and leads to questions about the legality of obligations created by unilateral acts.

3. Sources Doctrine

Sources doctrine establishes the ways in which the authority of international law is determined. [296] Koskenniemi asserts that sources doctrine is "often understood from two perspectives: as a description of the social processes whereby states create law (concreteness) and as a methodology for verifying the law's content independently of political opinions (normativity)."[297] Therefore, in sources doctrine there is a tension between how law must appear – either as a concrete rule or as a process for verifying the law's content. In practice these manifest themselves as two different perspectives on how the authority of law is determined. Koskenniemi refers to these perspectives as consent, the capacity of a source to reflect the will of the state, and what is "just," the capacity of a source to reflect a consensus amongst states.[298] These two views of the authority of law and the debate they engender shape the doctrine of sources. Consequently, in this thesis sources doctrine refers to the debate between consent and consensus as establishing the authority of international law. To explain this further the following section will develop the link between the sources of international law and the concepts of consent and consensus.

[296] On sources doctrine, see generally, Kennedy, International Legal Structures (n 83).
[297] Koskenniemi, "Politics of International Law" (n 279) at p 13.
[298] Koskenniemi, "Politics of International Law" (n 279) at pp 20, 27.

3.1 The Sources of International Law and the Concepts of Consent and Consensus

Sources doctrine establishes the sources of authority in international law; put differently, sources determine the ways in which international law is considered "legal." Sources doctrine explains that international law has a "legal" source when it is created by consent or consensus. To explain, sources doctrine considers a concept to have legal authority in two circumstances: when states express their consent to the obligation, or there emerges a consensus among states that a legal obligation exists.[299] The doctrinal distinction between consent and consensus is clear simply from the dictionary definitions of these terms. Consent is a verb defined as to "give permission" or to "agree to do." Consent is also a noun defined as "permission or agreement."[300] Consensus is a noun indicating a "general agreement."[301] These definitions illustrate the opposed nature of consent and consensus. Consent forms international law through the permission of an individual state. It explains how states cooperate with one another. Conversely, consensus explains how states achieve collective agreement. It describes how international law emerges from the collective interests of states. Sources doctrine mediates the debates over whether consent or consensus is the source of authority of legal obligations. This debate must be mediated by doctrine because each source of international law is imprecisely defined. Each source supports defensible arguments that it is established by either consent or consensus.[302]

A brief example provides context for this assertion. International law has three primary sources: treaty, custom and general principles of law. Each source is explained by both consent and consensus. For example, treaty law is codified in the VCLT[303] and as a result the definition of a treaty in this convention is the most widely accepted definition of a treaty. Therefore, "treaty" is defined in Article 2(1)(a) of the VCLT as

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[299] This statement is conventional. Hollis notes, "The debate over the sources of international law still engages age-old arguments between positivists dedicated to law created through the consent of states and naturalists supporting international law as divined from moral dictates existing independent of state consent." DB Hollis, "Why State Consent Still Matters - Non-State Actors, Treaties, and the Changing Sources of International Law" (2005) 23 Berkeley J Int'l L 137 at p 141.

[300] Compact OED (n 60) "consent."

[301] Compact OED (n 60) "consensus."

[302] Hollis has even described this as a "stalemate." See generally, Hollis (n 299) at p 140ff.

[303] *Vienna Convention on the Law of Treaties* (1969) 1155 UNTS 331 available online at < http://157.150.195.4.proxy.library.carleton.ca/LibertyIMS::/sidFhy5U8yfNR37IvMh/Cmd%3D%24%24C699ApMPXCmhX_%3B-XEOvM%3D%231-%3Bcnh%3DiOus%3BafzV%3Db%3B3FZuv%3DYf%25%3B%3B%3Bstyle%3DXmlPageViewer.xsl> accessed on 6 September 2008.

> …an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.[304]

According to Article 2, a treaty is an international agreement concluded in writing. The term agreement connotes that a treaty is primarily the result of the consent of the state to the obligation contained in the treaty. However, a treaty is also "concluded between States." This implies that a treaty represents more than just the state's consent to create a legal obligation. This suggests negotiation and compromise between states prior to the consent that produces an agreement. This means that the written agreement to which states may consent does not represent the will of one state alone. It is created by compromise. This indicates that consensus must be reached on the text of treaty. This demonstrates that treaties are primarily formed by consent; the legal obligation is created when states consent to the treaty. However, treaties are premised on consensus – negotiation of a text to which states may then consent. This demonstrates that treaties are given legal force by both consent and consensus. This example also demonstrates that sources doctrine invokes both consent and consensus to determine the authority of law. For example, consent is used to explain treaty law. As Kennedy puts it,

> [t]hroughout sources discourse doctrines repeatedly invoke a distinction between consensually and non-consensually based norms. Most of the rhetorical strategies developed by sources discourse can be understood to recapitulate this basic distinction in one form or another."[305]

In this quotation Kennedy refers to the role of both consent and consensus as sources of authority in international law. However, Kennedy coins the term non-consensual to describe consensus-based norms. Kennedy's broad terminology is deliberate but it is not used in this thesis because it is also potentially inaccurate. The word consensual is defined as "relating to or involving consent or consensus."[306] By definition, non-consensual sources include consent-based sources. This is not Kennedy's intention. Kennedy wishes to separate consent based and "non-consensual" sources. He searches

[304] VCLT (n 303) at Art 2(1) (a).
[305] Kennedy, International Legal Structures (n 83) at p 99.
[306] Compact OED (n 60) "consensual."

for a term that refers to all sources "not consent based." The conventional term used to refer to "non-consent based" sources in international law is consensus. Kennedy wants to create a broader term than consensus. However, by definition, the term non-consensual cannot explain the difference between consent and non-consent based sources. The sources of authority in international law are more clearly explained by the conventional terminology of consent and consensus and it is this terminology that is used in this thesis.

Sources doctrine defines the origin of authority in international law. The two basic explanations of the authority of international law are that law gains authority from the consent of states or from a consensus among the community of states. Each source of international law is ambiguous enough to display elements of both types of authority. Consequently, this ambiguity leads to debate over whether a source of international law is primarily consent based or consensus based. This debate must be mediated by sources doctrine. The next sections of this chapter will offer a detailed examination of the sources of international law in order to illustrate the ways in which sources doctrine mediates the debate between consent and consensus in international law.

3.2 The Sources of International Law

It is customary to begin a discussion of the sources of international law with a review of Article 38 of the Statute of the ICJ.[307] This Article lists the sources of international law the ICJ can apply in its decisions. Article 38(1) a-c lists the three primary sources of law treaty, custom and general principles of law. Article 38(1) d lists the secondary sources the Court can apply. The secondary sources are judicial decisions and decisions of publicists.[308] Technically this Article is only a treaty provision.[309] However, the provision holds power beyond its scope, as it

[307] As Kennedy notes, "[t]he discussion usually revolves around the four classic sources contained in Article 38 of the Statute of the International Court of Justice." D Kennedy, "Sources of International Law" (1987) 2 American U J Int L & Pol 1 at p 2.

[308] Article 38 states that

> 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.
>
> 2. This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto.

> …can be looked at two ways. It has to be applied by the International Court itself because it is part of the Statute by which it is governed; but it may also be referred to by other tribunals generally, because it can now be regarded as an authoritative statement of the sources of international law as a consequence of the backing of general practice accepting it as such. It governed the international court because it is in its statutes; it guides generally because it has come to be seen as a convenient statement of accepted practice. [310]

This Article's authority stems from the fact that it is the only widely agreed upon statement of the sources of international law. Further, this Article is so widely agreed upon as a statement of the sources of law because it "reflects state practice."[311]

The sources listed in Article 38 are not of equal weight. Treaty and custom are considered the main sources of international law. [312] As a result general principles of law are often marginalised because of the conceptual confusion regarding the scope, meaning and application of general principles of law as compared to treaty and custom. [313] Similarly, the subsidiary sources of law identified in Article 38(1) d are also given lesser weight as they are derived from treaty, custom and general principles of law. They are considered as "indirect"[314] sources because they merely provide evidence of a treaty, custom or general principle of law. As such, they are not considered "independent" sources of international law, so the focus of this section is on the independent sources of law, treaty, custom and general principles. This section examines each source in the order in which they appear in Section 38(1) of the Statute of the ICJ.

Statute of the International Court of Justice, (1945) at Art 38 <http://www.icj-cij.org/icjwww/ibasicdocuments/ibasictext/ibasicstatute.htm> accessed on 28 February 2005.

[309] See, for example, Jennings & Watts (n 47) at p 24.

[310] See, RY Jennings, 'General Course on Principles of International Law' (1967) 121 Rec des Cours 323 at p 330-331; See for example E Lauterpacht (ed) H Lauterpacht, *International Law: Being the Collected Papers of Hersch Lauterpacht* (vol 1 CUP, London 1970) at p 56.

[311] Jennings & Watts (n 47) at p 24.

[312] See for example RW Tucker (ed) H Kelsen, *Principles of International Law* (2nd ed Holt, Reinhardt & Winston, New York 1967) at p 438.

[313] Kelsen (n 312) at p 440.

[314] This is the phrase used by Jennings & Watts regarding judicial decisions; See, Jennings & Watts (n 47) at p 41.

3.2.1 Treaty

As noted above a treaty is an

> international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation…[315]

The "essential characteristic" of treaties "is twofold: that the consent is common to the parties, i.e. that there is an agreement; and that this agreement is in writing." [316] As a result of the requirement of common consent treaties are bilateral or multilateral in form.[317]

Bilateral treaties are negotiated and agreed by two parties whereas multilateral treaties are negotiated and agreed to by multiple (more than two) parties. The distinction between bilateral and multilateral treaties is usually explained by two analogies. Treaties are analogized to contracts in municipal law or to legislation. For example, Lauterpacht describes the analogy between treaties and contracts. He observes that, "[l]ike contracts, they [treaties] fulfil a large variety of purposes. They lay down the rules of law to be followed by the parties as a matter of legal obligation."[318] However, some treaties also perform a legislative function. As Lauterpacht also notes, "[h]aving regard to the absence, in the present state of international organization, of legislative machinery in the proper sense of that term, treaties fulfil in many respects a functions similar to that performed by the national legislature within the state."[319] The analogy between treaty and contract is often applied to bilateral treaties. The analogy between treaties and legislation is often applied to multilateral treaties.[320]

These analogies correspond to another categorization often used to describe treaties. Treaties are often divided into law-making and non law-making treaties. Many treaties only obligate the parties to the treaty. They do not create general "international law" and as a result they are not considered "law making." Alternately, Brownlie

[315] VCLT (n 303) at Art 2(1) (a); See also, RY Jennings, "Treaties" in Bedjaoui (n 53) 135; and see Lauterpacht, International Law (n 310) at p 58.
[316] Jennings, "General Course" (n 310) at p 333.
[317] Jennings also notes the existence of "universal treaties" such as the UN Charter; see for example Jennings, "Treaties" in Bedjaoui (n 315) at p 135.
[318] Lauterpacht, International Law (n 310) at p 58 [words in brackets added].
[319] Lauterpacht, International Law (n 310) at p 58-9.
[320] See, for example Jennings, "Treaties" in Bedjaoui (n 315) at p 136.

describes law-making agreements as treaties that "create general norms for the future conduct of the parties in terms of legal propositions and the obligations are basically the same for all parties."[321] Therefore, law-making treaties contain general legal propositions, which have an influence on customary international law, and these are opposed to non law-making treaties which reflect only the consent of the parties to the treaty. However, this division is not uncontested as it is debated whether there is a difference between the norm created by a law-making treaty and its obligation.[322] Moreover, whichever analogy is relied on to describe treaties it is clear that treaties manifest both consent and consensus, as both contracts and laws require both consent (a vote or signature) and negotiation (consensus or aggregation of interests). Further, within treaties the relationship between consent and consensus is most clearly illustrated by the requirements of treaty formation which is "codified and in part developed" [323] in the VCLT.

The VCLT requires two phases of treaty formation. The first phase is the negotiation of a final agreed text. The second phase is the assent of the state to the obligations in that text.[324] These two phases must be examined in order to illustrate that consent and consensus are present in treaty doctrine. First, the VCLT establishes the way that states can agree upon the text of a treaty. This is formally called "adoption of the text," and its requirements are established by Article 9 of the Convention. Article 9 states:

> 1. The adoption of the text of a treaty takes place by the consent of all the States participating in its drawing up except as provided in paragraph 2.
> 2. The adoption of the text of a treaty at an international conference takes place by the vote of two thirds of the States present and voting, unless by the same majority they shall decide to apply a different rule.[325]

Article 9(1) applies to all bilateral treaties and to some multilateral treaties. The text is adopted when states who are party to the negotiations consent to the final text. Article

[321] Brownlie (n 48) at p 12.
[322] See, HWA Thirlway, *International Customary Law and Codification: An Examination of the Continuing Role of Custom in the Present Period of Codification of International Law* (AW Sijthoff Leiden 1972) at p 25-26.
[323] Jennings, "Treaties" in Bedjaoui (n 315) at p 136.
[324] Jennings, "Treaties" in Bedjaoui (n 315) at p 137.
[325] VCLT (n 303) at Art 9.

9(1) affirms the function of consent in treaty formation. However, in certain multilateral settings negotiation of a treaty text is more complex. Unanimous consent is not required so that a text is considered authoritative when states negotiating the treaty approve the text. This is the requirement unless states adopt another formality. Consequently, a state must consider the text authoritative even if it does not consent to the final text. This often occurs when a treaty text is adopted by a consensus that is indicated by a majority vote. It is then up to individual states to decide whether to consent to the final text or not.

Further, the VCLT establishes the ways in which states can consent to the text of a treaty. Article 11 states:

> The consent of a State to be bound by a treaty may be expressed by signature, exchange of instruments constituting a treaty, ratification, acceptance, approval or accession, or by any other means if so agreed.[326]

A state must consent to the text of a treaty. Consent is given by signature and ratification, signature alone or exchange of instruments. A state may also accede to a treaty once it is in force. This illustrates the function of consent in treaty doctrine.

Article 9 and Article 11 of the VCLT demonstrate that both consent and consensus are present in rules on treaty formation. Article 11 promotes the view that treaty law is a consent-based obligation. States must consent to a treaty in order to be obligated by it. However, the text of the treaty is not always established by consent.[327] As Article 9(2) illustrates, a treaty text may be finalized by consensus. [328] A state may consent to a treaty that reflects a consensus achieved by negotiators on a range of issues. A state may not consent to any specific provision of a treaty during the finalization of the text; it may choose to consent to the treaty as a whole. Therefore, the doctrine of treaty law reflects consent to the consensus of states. Treaties are explained by both consent and consensus. This demonstrates that sources doctrine serves to mediate between consent and consensus as sources of authority for treaty obligations.

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[326] VCLT (n 303) at Art 11.
[327] VCLT (n 303) at Art 11.
[328] VCLT (n 303) at Art 9; For a general discussion of this problem see, for example, OA Elias and CL Lim, *The Paradox of Consensualism in International Law* (Kluwer, The Hague 1998) at p 184.

3.2.2 Custom

Custom is an "ancient" source of international law. [329] Customary obligations require two elements, "constancy and uniformity of practice" and "that [the] practice must be followed under the impulse of the sense of obligation, *opinione necessitatis*."[330] The requirement of "constancy and uniformity" is commonly referred to as "state practice." The second requirement of a "sense of obligation" is generally referred to as *opinio juris*, from the saying *opinione juris et necessitatis*.[331] Custom is formed by the action of states when that action is carried out with a sense of obligation, so custom results from what Condorelli calls a "broad social consensus."[332]

Consequently custom is primarily produced by consensus. However, consistently determining when consensus exists about a custom is difficult as questions arise as to timing and amount of practice required for a customs to become obligatory. Generally speaking custom formation is considered more an art than a science as it is premised on an accumulation of state practice coupled with a psychological belief in the legality of that practice. These are not precise measures but subjective standards.

On state practice Lauterpacht writes that

> [c]onstancy and uniformity of practice are a matter of degree. There is no rule of thumb to predict with any degree of assurance what amount of precedent will cause an international tribunal to assume in any given case that the degree of accumulation of precedent qualifies as custom. [333]

There is no standard for a practice to become a custom. It is a matter of judgment and consensus over time. However, *opinio juris* is more esoteric then state practice as it is the psychological element, a mental state. [334] It is a subjective belief that the custom is legal. The subjectivity of *opinio juris* leads to doctrinal debate in this area. On one side of the debate are theorists who believe that the mental element of custom is conflated with the will of the state and is identified by tacit consent. This position is contested[335] although *opinio juris* is often considered a form of consent.[336] On the other side of the

[329] See, for example, Lauterpacht, International Law (n 310) 61; See also Jennings & Watts (n 47) at p 25.
[330] Lauterpacht, International Law (n 310) at p 61.
[331] See, for example, Brownlie (n 48) at p 7.
[332] L Condorelli, "Custom" in Bedjaoui (n 53) at p 181.
[333] Lauterpacht, International Law (n 310) at p 61.
[334] Elias & Lim (n 328) at p 3.
[335] Elias & Lim (n 328) at p 3.
[336] Elias & Lim (n 328) at p 3.

debate are theorists who believe that "opinio juris is indeed the product of consensus and not consent." [337]

The requirement of *opinio juris* creates a paradox. This paradox emerges from the fact that "…every act or claim geared towards the creation of new law, and which would perforce be different from existing law, would be in contravention of that existing law and would thus be unlawful."[338] This problem produces diverse responses. One explanation is that the state acts on an erroneous belief that its action is legal. Another explanation is that the concept is unworkable and *opinio juris* should be abandoned entirely.[339] For example, Elias and Lim propose the "stages" approach. This approach equates *opinio juris* with consent. [340] In contrast, Wolfke asserts that *opinio juris* is meaningless and that custom formation only requires an accumulation of state practice. Once there is sufficient practice it can be presumed that the act is recognised as law.[341]

The difficulty in determining *opinio juris* has implications for state practice as the mental element is often *de facto* determined by what states actually do. Koskenniemi identifies this relationship as follows:

> …we cannot automatically infer anything about State wills or beliefs - the presence or absence of custom - by looking at the State's external behaviour. The normative sense of behaviour can be determined only once we first know the "internal aspect" - that is, how the State itself understands its conduct. But if, in custom-ascertainment, we have to rely on the internal aspect, then we lose custom's normativity. [342]

Consequently, *opinio juris* is subjective but is determined by objective indicators such as state action. This objectivity permits the interpretation of the state's beliefs through external evidence of that belief. This is problematic because this interpretation may be contrary to the state's belief. However, the alternative, a subjective interpretation of *opinio juris*, is equally problematic because as Koskenniemi notes, if *opinio juris* is interpreted as subjective it is an "internal" belief of the state and as an internal belief it

[337] On this, see for example, Lauterpacht, International Law (n 310) at p 62.
[338] Elias & Lim (n 328) at pp 4-5.
[339] Elias & Lim (n 328) at pp 5-7.
[340] Elias & Lim (n 328) at p 13.
[341] K Wolfke, *Custom in Present International Law* (2nd ed Martinus Nijhoff, Dordrecht London 1993) 48 at p 51.
[342] Koskenniemi, Apology (n 81) at p 437.

can never provide any normative force.[343] Koskenniemi identifies this problem as the "circularity" of custom. He writes "[t]o sum up: doctrine about customary law is indeterminate because circular."[344]

Arguably, the circularity Koskenniemi notes results from the relationship between consent and consensus in custom. Custom relies on state practice and a subjective belief in the legality of that practice. However, the doctrinal debate within this source of law centres on the assessment of this subjective standard. One response is to assert that *opinio juris* is a form of tacit consent, consent being identified through state practice. A second response is to interpret *opinio juris* as subjective. This subjectivity renders *opinio juris* ineffective and reliance is placed on state action to identify custom Consequently, *opinio juris* is explained by either consent or consensus which means that there are elements of both consent and consensus in custom formation. Custom confirms that consent and consensus are the heart of the debate that shapes sources doctrine.

3.2.3 General Principles of Law

General principles of law are applied when there is no custom or treaty to guide the Court on an issue.[345] The ICJ rarely applies general principles of law.[346] There is no agreed upon definition of a general principle of law.[347] Consequently, general principles of law are considered a lesser source of international law.[348] Some scholars even suggest that general principles of law are not an independent source of law.[349] In this view, custom and general principles of law form a single "common law" of the international system.[350] Similarly, Tunkin and Guggenheim

> …maintain that paragraph (c) adds nothing to what is already covered by treaty and custom; for these authorities hold that general principles of

[343] Koskenniemi, Apology (n 81) as cited above.
[344] Koskenniemi, Apology (n 81) at p 437.
[345] See Lauterpacht, International Law (n 310) at p 68; See also Kelsen (n 312) at p 440.
[346] Jennings & Watts (n 47) at p 37.
[347] See for example W Friedmann, *The Changing Structure of International Law* (Stevens& Sons, London 1964) at p 142; See also W Friedmann, "The Uses of "General Principles" in the Development of International Law" (1963) 57 AJIL 279; For a more recent restatement of this point, see Jennings & Watts (n 47) at p 36.
[348] See Jennings & Watts (n 47) at p 36.
[349] H Waldock, Sir 'General Course on Public International Law' (1962) 106 Rec des Cours 5 at pp 39-40.
[350] Waldock (n 349) at pp 63-64.

> national law are only part of international law only to the extent they have been adopted by states in treaties or recognised in state practice.[351]

These authors argue that general principles of international law become a source of law only when they are incorporated by consent of states in a treaty or through recognised custom. General principles of law are not often considered because they are not consent based.

Another interpretation of general principles does not require consent. In this view general principles of law "authorise the Court to apply the general principles of municipal jurisprudence, insofar as they are applicable to relations of states."[352] Brierly, for example, expands on this view when he argues that general principles of law are derived from private law principles.[353] A second common interpretation is that general principles of law are derived from general principles of international practice.[354] In this interpretation, general principles of law are derived from the practice of states over time. They perform the function of consensus.

Doctrine accepts that both positions are true,[355] from which it follows that general principles of law are explained by both consent and consensus. As Waldock notes, the "majority" of "jurists"

> … do not accept the view that Article 38 incorporates "natural" law in the sense of "ideal" law in international law; nor do they at the same time consider that general principles, which have already found concrete expression and recognition in national systems of law, must necessarily have had prior recognition in treaties or state practice before they are available for application by an international tribunal.[356]

Waldock's jurists do not accept that general principles of law are formed exclusively by consent or exclusively by consensus. For example, Lauterpacht asserts that general

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[351] Waldock (n 349) at p 55.
[352] Jennings & Watts (n 47) at p 37; See also GA Finch, *The Sources of Modern International Law* (Carnegie Endowment for International Peace, Washington 1937) at p 97.
[353] H Waldock, Sir (ed) J L Brierly, *The Law of Nations: An Introduction to the International Law of Peace* (6th ed Clarendon, Oxford 1963) at p 62.
[354] Malanczuk mentions this as one of the common views of general principles of law; P Malanczuk (ed) *Akehurst's Modern Introduction to International Law* (7th rev'd ed Routledge, Oxford 1997) at p 48.
[355] See generally Malanczuk (n 354) at p 48.
[356] Waldock (n 349) at pp 55-56.

principles are a source of law because they are listed in Article 38. They are a source of law as a result of their pre-existing status as customary law. They are also a source of law because of "the reason of the thing." Lauterpacht argues general principles are explained at various times by consent, consensus and natural law.[357]

Alternatively, Cheng's leading work on general principles of law takes a practical approach. He identifies principles as they are applied in international law. He uses this analysis to suggest categories of general principles that have created legal obligations.[358] Similarly, Parry differentiates general principles from custom through their use as "principles" of law as opposed to rules of law. He writes "[t]he upshot may thus be that the term general principles may be used variously. Sometimes it connotes actual rules of international law which are, however, of so broad a description that it is not improper to refer to them as principles."[359]

General principles of law are seen as either the product of the consensus of states or the result of the tacit consent of states. Doctrine mediates between these two views by using the pragmatic approach that general principles are the built up practice of states identified through comparative law methodologies. General principles of law are the subject of debate in the doctrine. As a result, general principles of law can be explained by sources doctrine as a product of consent, as a product of consensus, or as a pragmatic combination of the two.

3.3 The Relationship between the Sources

The sources of law mediate debates over the authority of international law. These debates concentrate on two main sources of authority, consent and consensus. Each source is more easily explained by favouring one of these sources of authority over the other but is ambiguous enough to display elements of both consent and consensus. Consequently, to fit within the doctrine a source of law must be capable of being explained by both consent and consensus. Therefore, doctrinal debate over the relationship between the sources of law is a debate over the basis of authority in international law in either consent or consensus. This part discusses the relationship

[357] Lauterpacht, International Law (n 310) at pp 75-76.
[358] B Cheng, *General Principles of Law: As Applied by International Courts and Tribunals* (New ed Grotius, Cambridge 1987) at p 6.
[359] C Parry, *Sources and Evidences of International Law* (MUP, Manchester 1965) at p 85; See also B Cheng, "General Principles of Law as a Subject for Codification" (1951) 4 Current Legal Problems 35 at p 39.

between the sources. This relationship is discussed through the examples of the "hierarchy of sources," and the problem of *non liquet.*

3.3.1 The Hierarchy of Sources[360]

There is debate over the hierarchy of the sources of law. Henkin argues, "State consent is the foundation of international law."[361] Consistent with this position, Henkin asserts that treaties are the primary source of law. In opposition, Kelsen argues that "[t]he norms of customary international law represent the highest stratum in the structure of the international legal order."[362] Friedmann[363] and Thirlway[364] make a more moderate argument. They argue that custom is being superseded by treaty as the primary source of international law. Positions regarding the hierarchy of law are so absolute and uncompromising that some scholars dismiss the question of hierarchy altogether as an unresolved area of doctrinal debate. For example, Jennings asserts that "[i]t seems doubtful that this is a fruitful line of enquiry."[365] These positions shape the parameters of the debate over the hierarchy of sources.

Arguing for the primacy of a source makes that source superior and able to supersede other sources. Consequently, debates about the hierarchy of sources are arguments about the "ultimate" source of authority for international law.[366] This means that each source is a battleground for a viewpoint on the hierarchy of sources. This debate occurs because each source can be explained by both consent and consensus. As a result, the hierarchy of sources confirms that the sources of international law are structured by the concepts of consent and consensus.

One way to enter the doctrinal debate over hierarchy of sources is to examine the relationship between treaty and customary international law. This relationship is, to paraphrase Oscar Schacter, "entangled."[367] Schacter notes

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[360] Kennedy, "Sources of International Law" (n 307) at p 16.
[361] L Henkin, 'International Law: Politics, Values, and Functions: General Course on Public International Law' (1989) 216 Rec des Cours 19 at p 46; This view has been adopted by scholars as diverse as Tunkin, Corbett, and Kelly, see for example, G Tunkin, 'International Law in the International System' (1975) 147 Rec des Cours 9 at p 112; PE Corbett, "The Consent of States and the Sources of the Law of Nations" (1925) 6 BYIL 20 at p 25; See generally, JP Kelley, "The Twilight of Customary International Law" (2000) 40 Va J Int'l L 449.
[362] Kelsen (n 312) at p 508; this view is also reflected in, for example, Parry; Parry (n 359) at p 53.
[363] Friedmann, The Changing Structure (n 347) at pp 123-124.
[364] Thirlway, Customary Law and Codification (n 322) at pp 6-7; See generally, JA Perkins, "The Changing Foundations of International Law: From State Consent to State Responsibility" (1997) 15 BU Int'l LJ 433.
[365] Jennings, 'General Course' (n 310) at p 344.
[366] Lauterpacht, International Law (n 310) at p 89.
[367] O Schacter, "Entangled Treaty and Custom" in Dinstein &Tabory (n172) 717 at p 717 ff.

> [t]he different positions taken in respect to the relation of treaty and customary law cannot be adequately understood solely on the basis of the principles referred to in the cases or the empirical data on State practice and belief. Other factors linked to political and pragmatic considerations as well as philosophical conceptions of social change are also likely to influence the positions taken. These instances emerge more clearly when we bear in mind that treaty and custom are not only alternative sources of international law but also competitive with each other. International lawyers have tended to lean toward to one or the other 'source.'[368]

The hierarchy of sources uncovers a predisposition towards either consent or consensus as the ultimate "authority" of international law. [369]

The preference for consent or consensus is highlighted when treaty and custom conflict. Villiger examines this problem in detail.[370] He starts with the assumption that there is no hierarchy of sources. Villiger also suggests that the argument over the supremacy of consent and consensus cannot be determined because treaty and custom are equally authoritative sources.[371] Consequently, the general rules of interpretation apply. These rules are that the specific overrides the general and the later in time governs. [372] The general rules of interpretation also apply to conflicts among multilateral treaties and within custom itself[373] so that in absence of an established hierarchy consent may sometimes trump consensus and vice versa.

The situation becomes even more complicated when sources co-exist. For example, a treaty may codify existing law. In this case, either the treaty "crystallizes" the existence of custom[374] or a non-ratifying state "harmonises" its acts with the treaty. Both crystallization and harmonisation create custom.[375] However, crystallization and harmonisation strain the relationship between the sources. If a treaty codifies a custom the treaty is redundant as the custom is already law. Additionally, ratification of a treaty is evidence of state practice. However, ratification is not evidence of *opinio juris*. When a state ratifies a treaty it does not act out of a belief in the legality of the contents of the

[368] Schacter in Dinstein & Tabory (n 367) at p 720.
[369] Schacter describes these predilections as to a liberal or conservative approach; Schacter in Dinstein & Tabory (n 367) at p 720.
[370] ME Villiger, *Customary International Law and Treaties: A Study of Their Interactions with Special Consideration of the 1969 VCLT on the Law of Treaties* (Martinus Nijhoff, Dordrecht 1985) at p 34 ff.
[371] Villiger (n 370) at p 35.
[372] Villiger (n 370) at p 36.
[373] W Czaplinski, "Sources of International Law in the Nicaragua Case" (1989) 38 ICLQ 151 at p 164.
[374] Thirlway, Customary Law and Codification (n 322) at p 80.
[375] Thirlway, Customary Law and Codification (n 322) at p 85.

treaty, but out of a belief that the treaty has created a legal obligation.[376] States obey treaties because they consent to the obligation. They do not have a subjective belief in the legality of the contents. However, collective ratifications of a treaty provide evidence of custom. Once a treaty is ratified custom becomes "subordinate" to the treaty. The treaty is a specific obligation that supersedes the general obligation of the custom.[377] In sum: the hierarchy of sources is relative. The doctrine is explained by both consent and consensus; these are the parameters of the doctrine of sources of international law.

Thirlway raises another serious problem for the hierarchy of sources. He explores the problem of a treaty that codifies existing custom. There are three elements to this examination. First, states may be persistent objectors to the custom. Second, a persistent objection is ineffective if the state does not object when the rule is "crystallizing." Third, if there are a sufficient number of states that dissent from the codification this may create a competing custom. [378] Custom can develop after a treaty is in force and custom can change a treaty if it is the more recent of the two obligations.[379]

Villiger considers the "dynamic impact" of custom on treaty. He focuses on the fact that codification always modifies custom. This is because a codification is only interpreted in light of the reservations to the treaty. This brings a customary element into the treaty. A treaty reflects the state of the law at the time of codification.[380] Villiger explains,

> Custom and treaty rules may exert a strong influence on each other. Nonidentical rules of one source can modify rules of the other or cause them to pass from use. Identical rules can parallel each other and assist in their mutual interpretation and ascertainment. Do such processes in any way affect the identity or individuality of the sources of customary law and treaties? Clearly, if the rules of one source may bear in such a manner on the other, this results in considerable relativization of the sources with regard to one another.[381]

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[376] Thirlway, Customary Law and Codification (n 322) at pp 86-88.
[377] Thirlway, Customary Law and Codification (n 322) at p 95.
[378] Thirlway, Customary Law and Codification (n 322) at pp 110, 116.
[379] Thirlway, Customary Law and Codification (n 322) at pp 130-132.
[380] Villiger (n 370) at pp 293-294; There is disagreement in the doctrine over this point. Some suggest Villiger's approach is not accurate. Arguments are advanced that treaties are flexible over time. This is arguably the case with the European Convention on Human Rights; See A Drezemczewski "The Sui Generis Nature of the European Convention on Human Rights" (1980) 29 ICLQ54 at p 57; This may also be the case in the United Nation's Law of the Sea Convention; See generally A Boyle "Further Development of the Law of the Sea Convention: Mechanisms for Change" (2005) 54 ICLQ 563. Boyle also discusses the possibility of a dynamic approach to treaty interpretation and its limits; Boyle (n 380) at p 567 ff.
[381] Villiger (n 370) at pp 295-296.

The "entanglement" of treaty and custom is illustrative of the interdependence of consent and consensus in sources doctrine. Custom may change treaty law and treaty may crystallize custom. Consensus sometimes supersedes consent and vice versa. As a result, consent and consensus both function as explanations of doctrine of the sources of international law. Another example of the relationship of consent and consensus is the debate over *non liquet* in the doctrine. This will be the subject of the next section.

3.3.2 *Non Liquet*

There is debate over whether the ICJ can pronounce a *non liquet*. *Non liquet* is the ability of the Court to "decline to give judgment on the ground of insufficiency or obscurity of law."[382] The debate considers the Court's ability to use general principles of law to avoid a declaration of *non liquet*. The debate over *non liquet* further illustrates that consent and consensus provide structure to the sources of international law.

Lauterpacht emphatically argues that the Court cannot declare a *non liquet*. He writes that

> …the international legal system must be regarded as complete in the sense that an international judicial or arbitral tribunal, when endowed with requisite jurisdiction, is bound and able to decide every dispute submitted to it, by allowing or dismissing the claim advanced by the plaintiff State.[383]

Lauterpacht's position is highly contested. In fact, he enters into one of the great debates of the twentieth century on this issue with Stone. The Lauterpacht/Stone debate reaches its zenith in the middle of the twentieth century. However, this debate over *non liquet* is still current. In 1996, the ICJ issued its decision in the Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons.*[384] The Court declared that there was no law prohibiting or permitting the use of nuclear weapons.[385] In dissent Judge Higgins asserted that this holding was tantamount to declaring a *non liquet*.[386] This advisory

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[382] Lauterpacht, International Law (n 310) at p 94.
[383] Lauterpacht, International Law (n 310) at p 94.
[384] *The Legality or Threat of Nuclear Weapons, Advisory Opinion* [1996] ICJ Rep 226.
[385] Advisory Opinion on Nuclear Weapons (n 384) at par 105.
[386] The Court notes in paragraph 97 of the Dispositif,
> Accordingly, in view of the present state of international law
> viewed as a whole, as examined above by the Court, and of the elements

opinion has renewed interest in the problem of *non liquet* and has ensured that this is again a live legal issue.[387] The "high point" of this doctrinal dispute is the Stone/Lauterpacht debate.

Lauterpacht examines the intention of the drafters of Article 38 of the Statute of PCIJ.[388] This Article is later copied directly into the Statute of the ICJ and therefore it is still relevant. Lauterpacht concludes that some drafters inserted this provision to prevent declarations of *non liquet*. Building on this interpretation of Article 38 Lauterpacht asserts that international law is a complete system. There are no "gaps" in the law.[389] Further, he argues that the completeness of law is an "a priori assumption of every system of law."[390] There can never be a declaration of *non liquet* by the Court. Consequently, the Court is required to fill perceived gaps "by reference to or by way of analogy with a wider legal principle derived in first instance from international law."[391] This includes the principle that in the absence of a clear rule of law a state is free to act "according to discretion." The state is obligated only by its duty to act in good faith.[392] General principles of law act as a method of "completing" international law, thereby "confirming" that there are no gaps in the law.[393] However, "the completeness of the international order is a general principle of law."[394]

Lauterpacht asserts that "[i]f consent is the essential condition for the existence of a rule of international law then a revealed and deliberate absence of agreement would point to a gap on the subject."[395] Nonetheless, this is not the case as the gap in law

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> of fact at its disposal, the Court is led to observe that it cannot reach a definitive conclusion as to the legality or illegality of the use of nuclear weapons by a State in an extreme circumstance of self-defence, in which its very survival would be at stake.

Advisory Opinion on Nuclear Weapons (n 384) at par 97;
This position led judge Higgins to opine,

> But at paragraph 97 of its Opinion, and in paragraph 2 E of its *dispositif*, the Court effectively pronounces a *non liquet* on the key issue on the grounds of uncertainty in the present state of the law, and of facts. I find this approach inconsistent.

Advisory Opinion on Nuclear Weapons (n 384) at par 2. See also, TLH MacCormack, "A Non-Liquet on Nuclear Weapons – The ICJ Avoids the Application of General Principles of Humanitarian Law" 316 International Review of the Red Cross 76.

[387] MJ Aznar-Gomez, "The 1996 Nuclear Weapons Advisory Opinion and *Non Liquet* in International Law" (1999) 48 ICLQ3 at p 3; See also, IF Dekker & WG Werner, "The Completeness of International Law and Hamlet's Dilemma: Non Liquet, The Nuclear Weapons Case and Legal Theory" (1999) 68 Nordic Journal of International Law 225.

[388] H Lauterpacht, *The Function of Law in the International Community* (Clarendon, Oxford 1933) at p 53.

[389] Lauterpacht, International Law (n 310) at p 94

[390] Lauterpacht, The Function of Law (n 388) at p 64.

[391] Lauterpacht, International Law (n 310) at p 95.

[392] Lauterpacht, International Law (n 310) at p 95.

[393] Lauterpacht, International Law (n 310) at p 95.

[394] Lauterpacht, International Law (n 310) at p 96.

[395] Lauterpacht, The Function of Law (n 388) at p 77.

disappears when the state agrees to obligatory adjudication. Accepting the jurisdiction of the Court confers on the Court competence to reach a judgment.[396] The Court has to reach a decision. The Court generally uses positive law to reach a decision. However, if no custom or treaty exists then the Court has to apply general principles of law to prevent a declaration of *non liquet*.

Lauterpacht's argument relies on both consent and consensus. It begins with the statement that international law is a complete system. Gaps in international law have to be filled by general principles of law. General principles of law are created by consensus of state practice. Consequently, Lauterpacht's argument strives for consensus. However, his approach also has an element of consent. The completeness of international law is translated into a meaningful premise for adjudication when states consent to the jurisdiction of the ICJ. Through their consent, states agree that the Court can reach a judgment. Therefore, Lauterpacht's arguments about *non liquet* are explained by both consent and consensus.

In contrast, Stone argues that "[t]he *non liquet* question, in the present view, inevitably draws one into controversies concerning the source of validity of international law, and the authority of international tribunals…"[397] Stone goes to the root of Lauterpacht's position. He does not think that international law is a complete system. He disagrees that the ICJ is entitled to create law. Lauterpacht argues that in significant cases the Court has never declared a *non liquet*. This illustrates that it is a custom of international law that a *non liquet* cannot be declared. [398] Stone argues that this conclusion is weak. The fact that a *non liquet* has never been declared does not mean that the Court cannot declare a *non liquet*.[399] This is because "…obviously even the mere permissibility of a *non liquet* would refute the view that there is a prohibition of *non liquet* in international law."[400] The contrary only demonstrates that the Court has not chosen to declare a *non liquet*.[401] There is no proof that the Court believes that it cannot declare a *non liquet*.

Stone then turns on Lauterpacht's arguments for the completeness of international law. He uses the adversary principle as the basis of his argument. This principle holds that "unless the court finds that there is a rule of law supporting the Applicant's claim

[396] Lauterpacht, The Function of Law (n 388) at p 77.
[397] J Stone, "Non Liquet and the Function of Law in the International Community" (1959) 35 BYIL 124 at p 125.
[398] Stone (n 397) at p 129.
[399] Stone (n 397) at p 130.
[400] Stone (n 397) at p 139.
[401] Stone (n 397) at p 139.

judgment must be for the Respondent."[402] Stone argues that the adversary rule encourages the Court to engage in law creation by operating when the Court does not choose to apply a principle of law.[403] Discretion to apply the law has the same effect as a declaration of *non liquet*. If

> …the court gives judgment for the Respondent on the ground that no rule of law has been found to support the Applicant's case, this judgment certainly determines that the Applicant does not win, and that the rule on which his case depends does not exist. But then, a declaration of non liquet by the court would also have the same effect."[404]

Prohibiting *non liquet* ensures that the ICJ always exercises its jurisdiction. This grants the Court the power to create law to cover situations in which they would have declared a *non liquet*. This power of law creation is "limited only by the novelty and range of matters coming before it for decision."[405] By refusing to declare a *non liquet*, the ICJ is choosing to create law.[406] As such, a declaration of *non liquet* is a policy decision. When parties consent to adjudication at the Court they are agreeing that the Court can create law to adjudicate their dispute. Stone finds this problematic in an international system that has no legislature to correct judicial errors.[407] Consequently, he suggests that

> [b]ecause no *general* answer to this can be given the present writer believes that it should be left open to a tribunal, in the absence of contrary request by both parties, to decide that the legal materials and other resources available for judgment do not in the particular case enable it to make a binding judgment.[408]

Stone appears to favour state consent; but, his position actually privileges consensus over consent. At first glance Stone argues that a Court can only apply law that has been consented to by states. However, Stone ignores the fact that states begin litigation in

[402] Stone (n 397) at p 134.
[403] Stone (n 397) at p 135.
[404] Stone (n 397) at p 136.
[405] Stone (n 397) at pp 132-3.
[406] Stone (n 397) at pp 132-3.
[407] Stone (n 397) at pp 148-149.
[408] Stone (n 397) at pp 160.

order to obtain a statement of law. Consequently, a declaration of *non liquet* is an admission by the Court that there is no consensus among states about the law. Therefore, Stone's argument ultimately privileges the clear consensus among states as to the existence of the law.

Lauterpacht and Stone debate the function of state practice at the ICJ. Their argument concerns the permissibility of a declaration of *non liquet.* Lauterpacht argues that declarations of *non liquet* are not permitted. He underlines the consensus-based nature of a *non liquet* because he believes that international law is a complete system where all gaps are filled by general principles of law. However, consent is also present. States consent to have gaps in the law filled when they consent to adjudication by the Court. State consent allows the Court to create law based on state practice. State practice is derived from a consensus of state action. In consequence, Lauterpacht's argument supports both consent and consensus.

Stone highlights a problem for Lauterpacht. Lauterpacht cannot prove that declarations of *non liquet* are prohibited. He can only assert that the ICJ has never declared a *non liquet*. Moreover, the fact that they have not declared a *non liquet* does not mean they cannot do so. Stone argues that the Court can declare a *non liquet*. Parties to litigation can and do consent to the possibility of a declaration of *non liquet*. Stone adopts the opposite approach to Lauterpacht. In absence of consensus on the existence of the law the Court must declare a *non liquet*. A declaration of *non liquet* is a declaration that law is formed by consensus. The consent of states to adjudication does not obviate the need for consensus to exist. Consequently, Stone favours consent based law and consensus based adjudication. Lauterpacht favours consensus in the law and consent in adjudication. The Stone/ Lauterpacht debate illustrates the relationship between consent and consensus in sources doctrine.

3.3.3 Analysis

The debate over the hierarchy of sources and the debate over *non liquet* illustrate that sources doctrine mediates the tension over the ultimate source of authority in international law - consent or consensus. The interaction of these sources illustrates the entwined nature of consent and consensus as the sources of authority that structure the international law.

Further, the authority of international law is structured by consent and consensus, as consent is justified in terms of consensus and *vice versa*. In this way, consent and consensus structure the debate in sources doctrine. Writers such as Kennedy [409] and Koskenniemi [410] explore this relationship in detail; they begin from the starting point that sources doctrine is independent of considerations of substance and process.[411] Sources perform different functions than substance or process within the structure of international law. Additionally, sources doctrine is also able to provide authority for substantive and procedural questions. Also, the sources of authority within the doctrine, consent and consensus, are themselves entwined. The interdependence of consent and consensus leads Kennedy to characterize sources doctrine as follows:

> In sources argument one characteristically seeks to convince someone that a state which does not currently believe it to be in its interests to follow a given norm should do so anyway. Sources rhetoric provides two rhetorical persuasive styles which we might call "hard" and "soft." A "hard" argument will seek to ground compliance in the "consent" of the state to be bound. A "soft" argument relies upon some extra consensual notion of the good or the just.[412]

To Kennedy, consent is a source of law that is "binding" whereas consensus is merely "authoritative."[413] This is why "hard" sources are sometimes preferred; other times "softer" custom and general principles are required.[414] These preferences are illustrated

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[409] See, for example, Kennedy, International Legal Structures (n 83); See also Kennedy, "The Sources of International Law" (n 307).

[410] Koskenniemi, Apology (n 81) at Ch 5; Kennedy and Koskenniemi use different terms to categorise this relationship. However, their approaches are very similar; Koskenniemi acknowledges that his approach has been "inspired" by Kennedy. Koskenniemi, Apology (n 81) at p 207, n 9.

[411] Kennedy notes,

> The important thing about these inquiries into the scope and meaning of the sources considered is the pervasive attempt to delimit boundary conditions for the category in an abstract way, independent of the particular content of the norms whose source is being considered. The sense that it is important to elaborate a theoretical boundary which has an on-off quality reflects the shared understanding among those doing this work that the abstract categories will control the content of the norms rather than merely register them.

Kennedy, "The Sources of International Law" (n 307) at p 11; Koskenniemi observes, "[i]n this way sources doctrine includes a concrete and a normative perspective within itself; the law it projects is a result of concrete State action and yet something independent from it." Koskenniemi, Apology (n 81) at p 306.

[412] Kennedy, "The Sources of International Law" (n 307) at p 20; This is a narrow interpretation of "hard" law in an obligation. It is tailored to the discussion of the doctrine of sources. However, in a broader formulation this distinction can be used to explain how substance comes to have form. This function of hard law/soft law is discussed in chapter 5.

[413] Kennedy, "The Sources of International Law" (n 307) at p 21.

[414] Kennedy, "The Sources of International Law" (n 307) at p 24.

by the doctrines of treaty and custom.[415] However, "[d]espite the allocation" of custom as soft and treaty as hard, "commentators have sought to characterize Article 38 as dominantly hard or soft, and continue to differentiate sources from one another by their relative hardness or softness."[416] According to Kennedy doctrine tries to straightjacket sources to one of the types of authority accepted within international law. However, the sources of international law are explained by both consent and consensus.[417]

As a result, sources doctrine is preoccupied with mediating between the seemingly contradictory sources of authority in international law. In fact the conflict between the sources creates a doctrinal problem. As Koskenniemi notes, doctrine can never "explain their assumed objective needs so as to avoid the criticism of arguing for an essentially political position."[418] Koskenniemi characterizes this problem as defining "… consent in terms of justice and justice in terms of consent."[419]

To explain, Article 38(1) (a)-(c) of the Statute of the ICJ lists the three primary sources of law, treaty, custom and general principles of law. The sources in Article 38 represent the agreed upon sources authority in international law and are known as sources doctrine. Sources doctrine mediates between two opposed sources of authority that are present in Article 38 (1) (a)-(c). International law has authority because it is based on either the consent of states or on the consensus among states. Each source of law traditionally favours one of these bases of authority accepted by the doctrine. However, each source is also ambiguous enough to be explained by either consent or consensus. For example, debates over the hierarchy of sources illustrate that sources are formed by both consent and consensus. Similarly, *non liquet* is a debate over the ability of general principles of law to fill "gaps" in the law. These debates are premised on consent or consensus. These examples illustrate the "entangled" relationship between the sources and they demonstrate that each source can be given authority by either consent or consensus or even a combination of the two. The nature of this relationship leads Kennedy to characterize sources doctrine as "frustratingly fluid."[420] This fluidity does not stop the doctrine from proceeding *as if* it is settled. Consequently, sources doctrine tries to reconcile "incompatible rhetorics," debates over the functions of the doctrine of sources that act as the parameters of the doctrine.[421]

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[415] Kennedy, "The Sources of International Law" (n 307) at p 28.
[416] Kennedy, "The Sources of International Law" (n 307) at p 28.
[417] Kennedy, "The Sources of International Law" (n 307) at p 20.
[418] Koskenniemi, Apology (n 81) at p 314.
[419] Koskenniemi, Apology (n 81) at p 387.
[420] Kennedy, "The Sources of International Law" (n 307) at p 88.
[421] Kennedy, "The Sources of International Law" (n 307) at p 89.

Debate in the doctrine results from the fact that the sources are of law are ambiguous. Koskenniemi explains that "[s]ources argument will, on its own premises, remain in continuous flight from having to admit its own political character."[422] These are the conditions that "explain its indeterminacy."[423] This implies that the indeterminacy of sources is both a cause and consequence of the conflict over the authority of consent and consensus. The ambiguity of each source is necessary to allow sovereigns "to remain autonomous within a binding normative order."[424] However, sources doctrine tries to "bind states against their own perception of their interests."[425]

Sources doctrine also explains the normativity of law.[426] As Kennedy notes,

> People who discuss the sources of international law are trying to do two things. They seek the norm which can bind states against their own perception of their interests. They seek to elaborate the normative order in a way which does not presume away the diversity of State interests. Sources discourse argues about the normative forms which can bind states without overthrowing their authority. The discourse is about the form of the catalogue of norms. It is about the sources of normative authority in the system of autonomous sovereigns.[427]

Therefore, debate over sources doctrine structures international law by providing an explanation for law's authority. Kennedy notes emphatically, "the turn to sources doctrine thus seems to provide an escape from fruitless theoretical argument, moving us toward legal order, precisely by opening up an endlessly proliferating field of legal argumentation."[428]

In sum: the sources of international law explain law's authority as deriving from either consent or consensus. The doctrine of sources provides a way for mediating this debate through the sources of law listed in Article 38 (1) of the Statute of the ICJ. Consequently, the doctrine of unilateral acts must also be explained consent or consensus in order to be considered to have "legal" authority – be a source of law. As such, assessing whether unilateral acts fit within this doctrine will be the subject of the next section.

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[422] Koskenniemi, Apology (n 81) at p 387.
[423] Koskenniemi, Apology (n 81) at p 387.
[424] Kennedy, "The Sources of International Law" (n 307) at p 23.
[425] Kennedy, "The Sources of International Law" (n 307) at p 92.
[426] Kennedy, "The Sources of International Law" (n 307) at p 95.
[427] Kennedy, International Legal Structures (n 83) at p 104.
[428] Kennedy, International Legal Structures (n 83) at p 107.

4. Unilateral Acts, Intention and the Sources of International Law

Intention is the requirement that gives a unilateral act its legal authority; a unilateral act does not create a legal obligation unless and until there is an intention to create a legal obligation. Therefore intention is the requirement that acts as the "source" of the obligation contained in the act. This section expands on this statement and justifies the use of the requirement of intention as an indicator of a unilateral act's "legality" within the doctrine of sources.

4.1 The Issue of Intention at the International Law Commission

Intention was examined by the ILC where it was a contested part of the definition of a unilateral act. Examining this definition is relevant as it was the most recent attempt to establish the "legal" source of a unilateral act. Further, the difficulties the ILC faced defining intention raises questions about the ability of intention to provide authority for unilateral acts; this is particularly evident in the difficulty the ILC had in relating unilateral acts to the accepted sources of authority in international law, consent and consensus. This section of the chapter reviews the consideration of intention by the ILC and its relationship to the sources of authority in international law.

In 1996 unilateral acts of states were proposed as a topic for consideration by the ILC.[429] The General Assembly approved the topic. The ILC set up a Working Group that reported in time for the Commission's 1997 meeting.[430] In its first report the Working Group established intention as a central feature of its analysis. Moreover, intention was one justification for undertaking the codification of unilateral acts but the Working Group offered three reasons why pursuing codification would be "advisable and feasible." The first reason was:

> In their conduct in the international sphere States frequently carry out unilateral acts with the intent to produce legal effects. The significance of such unilateral acts is constantly growing as a result of the rapid political,

[429] ILC, 'Report of the International Law Commission on the Work of its Forty-Ninth Session' (1997) UN Doc A/52/10, Supplement 10 at par. 191 available online at <http://www.un.org/law/ilc/reports/1997/97repfra.htm > accessed on 29 June 2005.
[430] ILC Report 1997 (n 429) at par 192.

> economic and technological changes taking place in the international community at the present time and in particular the great advances in the means of expressing and transmitting the attitudes and conduct of States.[431]

Their second reason was state practice. There was sufficient state practice, academic writing and international judgments to analyse. Their third reason was necessity, as it was felt that codification would promote "certainty, predictability and stability" in the law.[432] This last requirement suggested that unilateral acts did not promote these three conditions. The Working Group assumed that it was a practical fact that states acted internationally with intent to create legal obligations. Codification was designed to determine the circumstances in which intention created a legal obligation. Intention was one of the key requirements for a unilateral act.

As a result of this decision the ILC began work on this topic at its 1997 session. The Commission appointed a Special Rapporteur, V Rodriquez Cedeño.[433] Rodriguez Cedeño issued his first report at the 1998 meeting of the Commission.[434] From the outset Rodriguez Cedeño considered the requirement of intention. He defined intention as an expression of will on the part of the acting state.[435] As Rodriquez Cedeño explained it,

> …in the case of strictly unilateral acts the obligation arose neither when that obligation was accepted nor at the time that the State which was a beneficiary of that obligation subsequently engaged in any particular form of conduct. Rather it arose when the State which performed the unilateral act intended that it should arise. A State was able to assume an obligation in this way by exercising the power of auto-limitation which was conferred upon it by international law.[436]

In this quotation Rodriquez Cedeño was articulating his understanding of the relationship between the unilateral act and its source of legal authority. He clarified that a unilateral act was binding upon the acting state as a result of the intention with which

[431] ILC Report 1997 (n 429) at par 196.
[432] ILC Report 1997 (n 429) at par 196.
[433] ILC Report 1997 (n 429) at par 212.
[434] See, ILC, 'Report of the International Law Commission on the Work of its Fiftieth Session' (1998) UN Doc A/53/10, Supplement 10 at par 113ff available online at <http://www.un.org/law/ilc/reports/1998/98repfra.htm> accessed on 29 June 2005.
[435] ILC Report 1998 (n 434) at par 135.
[436] ILC Report 1998 (n 434) at par 137.

the act was performed; intention that arose out of an act of will of the state. Nevertheless, he was never able to clearly articulate the relationship between will and intention. As a result, Rodriguez Cedeño defined a unilateral act

> …as an autonomous expression of clear and unambiguous will, explicitly and publicly issued by a State for the purpose of creating a judicial relationship -in particular, of creating legal obligations - between itself and one or more States which did not participate in its elaboration, without it being necessary for those States to accept it or subsequently to behave in such a way as to signify such acceptance.[437]

Here Rodriguez Cedeño conflated the concept of intention with the concept of will. This lack of distinction between will and intention was extremely important for reasons that will be developed throughout the rest of this section.

However, to briefly summarize, Rodriguez Cedeño's approach was important because of the relationship between consent and will that directly conflicts with the purpose of intention. The Oxford English Dictionary primarily defines intent as "[t]he act or fact of intending or purposing; intention, purpose (formed in the mind)".[438] This indicates that intending is an internal mental state. Conversely, the Oxford English Dictionary offers over twenty definitions of "will." The most pertinent definition in this context is "[t]he action of willing or choosing to do something; the movement or attitude of the mind which is directed with conscious intention to (and, normally, issues immediately in) some action, physical or mental; volition."[439] This definition is clarified further in a sub-definition as "[i]ntention, intent, purpose, determination."[440] Moreover, will is also the "[i]ntention or determination that something shall be done by another or others, or shall happen to take place; (contextually) an expression or embodiment of such intention or determination, an order, command, injunction."[441] Consequently, the idea of "will" connotes taking action on an intention. This indicates that intention is a purely mental exercise that requires "manifestation" as an act of will. This indicates that intention in and of itself may provide sufficient evidence of legal authority. This also may explain why Rodriguez Cedeño asserts that intention is unknowable until it

[437] ILC Report 1998 (n 434) at par 142.
[438] Concise OED (n 57) "Intent"
[439] Concise OED (n 57) "Will."
[440] Concise OED (n 57) "Will."
[441] Concise OED (n 57) "Will."

displays itself as the "will" of the state. Rodriguez Cedeño appears not to delve into this distinction in any detail, preferring to treat will as equivalent to intention.

Perhaps it was Rodriguez Cedeño's decision to conflate will with intent that made this definition controversial; what is known is that not all of the Members of the ILC accepted this definition. The 1998 Report noted that some Members supported this definition of intention while

> [o]thers disagreed, arguing that while it might be necessary in the case of certain types of unilateral acts for there to be an intention on the part of their authors that they produce legal effects, this was not so in the case of others. Indeed the jurisprudence suggests that States could perform a unilateral act without realizing it. An international tribunal might, for example, find that a unilateral declaration which contained a promise was binding upon its author in international law, even though that State might maintain that it had no intention to assume any such intention when it performed the act.[442]

Some Members argued that intention was not an expression of will of the state. These Members felt that intention was constructed *ex post facto* by an international tribunal. Intention did not require an expression of will by the state as intention was always assessed objectively by third party observers as in, for example, the judgment of an international tribunal. Members who adopted this view followed the precedent of the *Nuclear Tests cases.* In that case, the ICJ determined that it was be the arbiter of a state's intention.[443]

Members who opposed Rodriguez Cedeño's definition premised their opposition on an objective definition of intention. Objective interpretations of intention view unilateral acts as resulting not from the intention of the acting state, or even their will, but from the interpretation of that act by a tribunal or other state. In this view the source of authority of a unilateral act was the fact that the act could be interpreted as displaying evidence of intention to create a legal obligation. Members who opposed this approach took a subjective view of intention; in this view the obligation resulted from the will of the state regardless of interpretations of the act.

The debate among Members of the ILC over Rodriguez Cedeño's proposed definition of intention demonstrated an ongoing tension in the doctrine. This tension

[442] ILC Report 1998 (n 434) at par 168.
[443] See discussion of this case in Chapter 1 and below.

arises because intention is a mental state that can never be known with any certainty. As a result, intention always requires interpretation in order to produce a legal obligation. The tension arises over which interpretation of intention should be given primacy: the objective interpretation or the subjective interpretation - the interpretation of the act or the actual will of the state. The doctrine in this area tries to mediate this tension but it meets with two related yet separate problems. How does a state manifest its intention? And how does a state manifest its intention to create a legal obligation? Each of these questions presents problems for the definition of intention and so these questions will be examined in further detail.

The first problem the ILC faced in defining intention was the need to determine how a state can manifest its intention. In this regard unilateral acts are different from treaties and other "consent" based sources of authority in law. For example, in treaty law a state uses the symbols of treaty formation, such as a signature, to demonstrate its consent to the substantive obligation contained in the treaty. In treaty law, a state's obligation is separate from the manifestation of its intention to accept that obligation. The former is indicated by the latter. However, in unilateral acts there is no way to determine when a state has indicated an intention to accept an obligation apart from the act itself – the act and the obligation is one and the same. To demonstrate this difference a practical example is helpful. You may want a sandwich but you do not have bread in your house. You intend to go to the store to buy bread. As you leave, your telephone rings and you speak to your friend until the store closes. You do not go to buy bread. You rummage in your cupboard and have pasta instead. There is no indication of your intention to buy bread - will and intention are conflated. However, if you agree to buy a pair of trousers and leave them for tailoring in the store there may be objective indications of your will. You may leave a deposit, you may pay a bill or a receipt may be written. These are expressions of your will that indicate an intention to create a legal obligation. You wish to return for your trousers. There is a subtle difference between legal obligations such as treaties, in which the manifestations of the intention of the state and obligation indicated by that intention are separated by indications of consent, and legal obligations such as unilateral acts, in which the intention and the act are one and the same. It is true that a state that wants to create a unilateral obligation can choose to provide separate indicators that their intention is coextensive with their actions. However, this is not necessary for a legal obligation to result from an act. In the paradigmatic example of the *Nuclear Tests cases* French statements were similar to the example of the bread; there was no evidence in French statements or actions that clearly

indicated their intentions. There was no "receipt" or any indication of how France intended its statements. Further, they did not participate in the Court proceedings so no evidence of their intention was given. Consequently, in unilateral acts the only way intention is known is through objective interpretation of the act itself.

The requirement of objective interpretation of intention creates an additional difficulty for the ILC: the problem of establishing intention to create a legal obligation. Rodriguez Cedeño's definition of intention requires a manifestation of will. However, there is no clear way to differentiate between a state's intention to act in a certain way and a state's intention to manifest the will to create a legal obligation from that act. This problem becomes clear in the following example: State A announces that it will not test nuclear weapons. It contradicts this act by continuing with its nuclear tests. States affected by this act then have two options. First, they might do nothing. In this option, it is irrelevant whether State A intends to create a legal obligation by its statements. If states do not respond to State A's actions, their promise does not have meaning. It remains legally ambiguous as it is irrelevant whether or not there was an intention on the part of State A to create a legal obligation. Second, other states may become aware of State A's act and demand that State A live up to its stated obligation. For simplicity, consider these "states" State B. This second scenario gives State B two further options. One, State B can approach State A directly and demand that it live up to its obligation. In this case, the unilateral act becomes a matter of negotiation between the parties. It is not necessary to determine State A's intention because their original intention becomes subsumed in a new context, bilateral negotiations. In this situation State A's act is now part of a series of acts that involve State A and State B, so that any obligation that results is no longer unilateral. This situation is similar to that of the *Eastern Greenland case*, in which acts are undertaken in the context of negotiations. These acts are not considered unilateral. Consequently, intention is only relevant in the final option. In this option, State B asserts that State A is bound by the act and State B claims against State A as a result. This option may arise if negotiation fails or may be pursued directly. State B brings its claim to a Court or other adjudicative body. This body is then placed in a position in which it must assess State A's intention. This is the only option where State A's intention is assessed. Moreover, this assessment is an "objective" assessment of intention as the Court assesses intention through the evidence it hears. This evidence includes the facts that led State B to believe State A meant the act to create a legal

obligation.[444] This is necessary because a Court cannot effectively assess State A's intention without interpreting the evidence presented by both State A and State B as to the meaning of the act. State B can present evidence of its belief that State A meant its act to create a legal obligation. Therefore, the "objective" search for intent must always include an assessment of responses to the act.[445] However, once the Court considers evidence presented by State B, it is no longer clear that State A's obligation results solely from their intention; their obligation may result instead from interpretation of that intention by other states. This results in a situation in which others interpret the meaning of a state's intention regardless of what that intention actually was. A state's actual intention is meaningless as it is the interpretation of that intention that creates the legal obligation.

The inability to differentiate between an intention to act and an intention to create a legal obligation arises because conceptually intention is subjective; it is always unknown to other actors. This creates a need to objectify a state's intention based on indications of intent, will.[446] However in unilateral acts the indications of the will of the state are determined through interpretations of intention. Consequently, international law is faced with a situation similar to the determination of *mens rea* in Anglo-American criminal law although the analogy is not perfect. A state cannot have a "state of mind," but its representatives can indicate a state's intent. In both situations, it is through objective evidence about subjective understanding that intention is determined.[447] It is assumed that people will foresee the natural consequences of their actions. *Mens rea* is a useful analogy for those who introduce objective indicators of will into intention.

As a result of the differing views on intention as either objective or subjective, the ILC did not adopt Rodriguez Cedeño's definition. In his 1999 Report Rodriguez Cedeño again presented his will-based approach to determining intention and, perhaps in response to the criticisms noted above, he further proposed analogising intention to the requirements of treaty law established in the VCLT. He used the Convention as a basis for a proposed draft Article, Article 6, about which the

[444] *Contra* Franck, "Word Made Law" (n 131) at pp 617-618.
[445] This is one of three interpretations of intention presented by Koskenniemi. See Koskenniemi, Apology (n 81) at p 345 ff.
[446] On the three possibilities of interpretation of intention, see Koskenniemi, Apology (n 81) at p 349.
[447] See generally and for example K Roach, P Healy & G Trotter, *Criminal Law and Procedure: Cases and Materials* (9th ed Emond Montgomery, Toronto, 2004) at p 418.

> …Special Rapporteur stressed that in order for a legal act to be valid under international law, it must be attributable to a State, the representative of that State must have the capacity to engage it at the international level, the act must be the expression of its will and free of irregularities and it must be formulated in the proper manner. It had to have a lawful object and must not derogate from prior obligations. Article 6 referred specifically to obligations: the State must not be able to acquire rights through its acts and, conversely, it must not be able to place obligations on other States without their consent. Intention was fundamental to the interpretation of the act.[448]

Members were still not in unanimous agreement with this characterization of intention. Some Members argued that intention "… could not always be discerned clearly in every instance."[449] Again, these Members were reiterating the difficulty noted above in differentiating between an intention to act and an intention to create a legal obligation with clear legal authority. This debate became acute in discussions of Rodriguez Cedeño's draft definition of unilateral acts. Some Members favoured going further than Rodriguez Cedeño. These Members wished to remove the reference to intention altogether. They preferred to define unilateral acts by the "unequivocal" will of the state.[450] The use of unequivocal will signalled a stronger move towards an objective interpretation of intention by reinforcing the requirement of will as an unequivocal indication of intent. However, unequivocal will was itself a contestable standard. It was open to interpretation in several areas and so Members' reactions to Article 6 were mixed. For example, some Members argued that the standard for "consent" was overly reliant on standards of the VCLT.[451] There was some concern that the analogy to the VCLT was an attempt to place an objective test on a subjective standard. The criticisms of reliance on the treaty model led to the reconstitution of a Working Group for the topic.

The reconstituted Working Group soon proposed its own definition of a unilateral act. A unilateral act was "[a] unilateral statement by a State by which such State intends to produce legal effects in its relations with one or more States or International Organizations and which is notified or other [wise] made known to the State or organization concerned."[452] This definition adopted a subjective view of intention,

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[448] ILC, 'Report of the International Law Commission on the Work of its Fifty-First Session' (1999) UN Doc A/54/10, Supplement 10 at par 524 available online at <http://www.un.org/law/ilc/reports/1999/english/99repfra.htm > accessed on 29 June 2005.
[449] ILC Report 1999 (n 448) at par 541.
[450] ILC Report 1999 (n 448) at par 544.
[451] ILC Report 1999 (n 448) at par 553.
[452] ILC Report 1999 (n 448) at par 589.

however, it too required notification. Therefore, this definition represented a retreat from the objectivity of Rodriguez Cedeño's definition, although it was not adopted either.

As a result, in his 2000 Report Rodriguez Cedeño once again reiterated that intention was defined by the will of the state. However, he also asserted that intention was a "fundamental element" of unilateral acts, and was central to the determination of whether the act was legal or political.[453] Will and intention were not differentiated. On this basis a new draft definition was proposed. This definition was largely a reiteration of the Working Group's proposed definition. The only change was that the word "statement" was replaced with the word "act." "Statement" was considered too "restrictive."[454] Additionally, at the start of the definition, the phrase "a unilateral act means an unequivocal expression of will" was added and "notified or otherwise made known" was changed to "is known to that state or International Organisation…" The new definition read,

> For the purposes of the present articles, unilateral acts of a state means an unequivocal expression of will which is formulated by a State with the intention of producing legal effects in relation to one or more other States or international organizations, and which is known to that State or international organisation.[455]

Some members approved of the draft definition's focus on intention. Other Members focused on the double wording of will and intention. Some Members argued that will and intention were two separate concepts, a point noted above.[456] These Members opposed the approach of Rodriguez Cedeño. In response Rodriguez Cedeño reiterated that the "unequivocal nature of the will" was central to the determination of the state's intent.[457] Additionally, draft Provision 6 was removed from the new draft. Members' criticism of the draft Article and scepticism about the applicability of treaty law to unilateral acts led to its removal.[458] Members expressed a range of views on the

[453] ILC, 'Report of the International Law Commission on the Work of its Fifty-Second Session' (2000) UN Doc A/55/10, Supplement No 10 at paras 515-516 available online at <http://daccessdds.un.org/doc/UNDOC/GEN/N00/664/24/IMG/N0066424.pdf?OpenElement > accessed on 29 June 2005.
[454] ILC Report 2000 (n 453) at par 517, n. 117.
[455] ILC Report 2000 (n 453) at par 517, n. 117.
[456] ILC Report 2000 (n 453) at par 549.
[457] ILC Report 2000 (n 453) at par 520.
[458] ILC Report 2000 (n 453) at par 526.

applicability of treaty law to unilateral acts. Some Members supported the analogy, some Members rejected the analogy and some Members expressed moderate views in between.[459]

The debate continued, so in his 2001 Report, Rodriguez Cedeño again defended the analogy between unilateral acts and treaty law and he argued that treaty law provided the soundest basis for the codification of unilateral acts.[460] Therefore, the continued repetition of the appropriateness of the treaty model was necessary. As a result, some Members remained sceptical of the applicability of treaties to unilateral acts,[461] so the ILC was not convinced that will was the same as intent.

Rodriguez Cedeño also drafted a provision on interpretation of unilateral acts. This draft Article was modelled on Article 31 Paragraph 1 of the VCLT. This provision of the VCLT asserted that acts should be interpreted in good faith in light of their object and purpose. This new draft provision was considered useful[462] and this led some Members to observe that

> …the draft articles contained some contradictory elements in that they posed intention as a primary criterion yet placed among the supplementary means of interpretation the main ways in which intention could be asserted in connection with a unilateral act, namely preparatory work and circumstances at the time of the act's formulation. Some doubts were expressed on giving paramount importance to intention in the interpretation of unilateral acts and consequently preference was voiced for the approach of the international court of justice to give due regard to intention without interpreting unilateral acts in light of intention. States other than the author state were entitled to rely on the act per se, not on the intention which might be subjective and which, in many cases, quite elusive. However, according to one view, the real will of the author State should constitute the decisive factor in the interpretation of unilateral acts since, in many cases, the contents of the unilateral act did not correspond to the State's real will, since it was adopted under strong pressure by other States or international public opinion and committed the State in a manner that went beyond what it might consider necessary. There was thus a dichotomy between the real will and the declared will of the State, a matter which favoured adopting a restrictive interpretation of the unilateral act.[463]

[459] ILC Report 2000 (n 453) at paras 536-537.
[460] ILC, 'Report of the International Law Commission on the Work of its Fifty-Third Session' (2001) UN Doc A/56/10, Supplement 10 at par 227 ff available online at <http://www.un.org/law/ilc/reports/2001/2001report.htm > accessed on 29 June 2005)
[461] ILC Report 2001 (n 460) at par 241.
[462] ILC Report 2001 (n 460) at par 243.
[463] ILC Report 2001 (n 460) at par 244.

In this quotation the ILC acknowledged the core difficulty in defining intention – that intention was a subjective concept that required objective interpretation in order to create a legal obligation. This problem first emerged in the *Nuclear Tests cases* where the ICJ held that intention was required for a unilateral act to create a legal obligation. However, the Court did not provide practical guidance as to how to determine intention. This led to confusion over the definition of intention, a problem that has evidently also confounded the ILC.

This confusion over intent carried into the next year's ILC meetings. In 2002 the problem was that unilateral acts as a "…mechanism was impossible to describe in terms of a voluntary scheme in which States had the intention of creating legal effects and in which they formulated actions that then did so."[464] Some suggested that intention should be replaced by reliance as the core requirement of legal obligation.[465] However, some Members felt the two approaches were complementary.[466] The debate over intention had come full circle and the ILC had not determined the issue of intention.

By this time Commission had become bogged down over issues such as intention. To ensure the work continued the Working Group proposed a series of recommendations. These recommendations were arrived at by consensus of the Working Group. One recommendation was to define a unilateral act as a statement "expressing the will or consent" of the state.[467] There was no resolution of the issue of intent in the 2004 Report of the ILC.[468] Similarly, the 2005 Report did not discuss this issue directly. However, in 2006 the ILC decided to end its work on the topic. In spite of the ongoing debates about intention, the Commission adopted "Guiding Principles" for unilateral acts.[469] These acts were not legal obligations but were designed to be persuasive upon states.

In 2006 the Commission considered the report of a reconstituted Working Group. From this report they developed 10 Guiding Principles for Unilateral Acts discussed in the earlier chapters. These Guiding Principles were considered at the Sixth Committee of the United Nations. These principles were "taken note of" by the Committee. They

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[464] ILC, 'Report of the International Law Commission on the Work of its Fifty-Fourth Session' (2002) UN Doc A/57/10, Supplement 10 at par 335 available online at <http://www.un.org/law/ilc/reports/2002/2002report.htm > accessed on 29 June 2005.
[465] ILC Report 2002 (n 464) at par 339.
[466] ILC Report 2002 (n 464) at par 349.
[467] ILC, 'Report of the International Law Commission on the Work of its Fifty-Fifth Session' (2003) UN Doc A/58/10, Supplement 10 at par 306, available online at <http://untreaty.un.org/ilc/reports/2003/2003report.htm> accessed on 17 June 2008.
[468] See generally ILC, 'Report of the International Law Commission on the Work of its Fifty-Sixth Session' (2004) UN Doc A/59/10, Supplement 10 at par 306, available online at < http://untreaty.un.org/ilc/reports/2004/2004report.htm > accessed on 17 June 2008.
[469] ILC Report 2006 (n 41) at par 170.

were then commended for "dissemination" in a General Assembly Resolution that accompanied the Report of the Sixth Committee.[470] The ILC sought a resolution to this topic. However, it could not agree on core principles let alone a legal document to govern unilateral acts. These principles were simply a statement of the current understanding of unilateral acts. As the Commission noted,

> The Commission is aware, however, that the concept of a unilateral act is not uniform. On the one hand, certain unilateral acts are formulated in the framework and on the basis of an express authorization under international law, whereas others are formulated by States in an exercise of their freedom to act on the international plane; in accordance with the Commissions previous decisions only the latter have been examined by the Commission… On the other hand, in this second case there exists a very wide spectrum of conduct covered by the designation "unilateral acts," and the difference among legal cultures partly account for the misunderstanding to which this topic has given rise, as for some the concept of a juridical act necessarily implies an express manifestation of a will to be bound on the part of the author State, whereas for others any unilateral conduct by the State producing legal effects on the international plane may be categorized as a unilateral act.[471]

There was never agreement over the meaning of intention. Some proposed definitions preferred to give primary importance to objective interpretations of intention. Other definitions tried to discern a subjective intent and still other approaches dismissed intention entirely. Consequently, the ILC adopted a hybrid definition of intention. Intention was defined as:

> [D]eclarations 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. States concerned may then take them into consideration and rely on them; such States are entitled to require that such obligations be respected.[472]

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[470] United Nations General Assembly, 'Resolution Adopted By the General Assembly [on the Report of the Sixth Committee A/61/454] – Report of the International Law Commission on the Work of its Fifty-Eighth Session' UN GA A/Res/61/34 at par 3 available online at < http://daccessdds.un.org/doc/UNDOC/GEN/N06/496/47/PDF/N0649647.pdf?OpenElement> accessed on 07 May 2007.

[471] ILC Report 2006 (n 41) at par 174.

[472] ILC Report 2006 (n 41) at par 177.

In this definition the ILC paid homage to various approaches to intention. First, they included the will to create a legal obligation. Will connoted a manifestation of a state's intention which could then be objectively interpreted. This was a response to the problem of manifestation of intention. Second, unilateral declarations were determined by good faith in the act. The term good faith was the ILC's response to the problem of determination of a state's intention to create a legal obligation. To illustrate why this is so, it is worth examining what happens when a state does not act in good faith. Please return to the example of State A and State B. State A declares that they will stop their above ground nuclear testing. Through this act State A manifests the intention to stop nuclear testing. They do not stop testing and State B is offended because State A has not lived up to its word. State B starts a claim against State A in court. The Court hears the case and objectively determines from State A's statement that State A has manifested an intention to stop nuclear testing. The Court must then determine what, if any, legal obligations result from the fact that State A did not live up to their stated intention. According to the ILC the determination of State A's legal obligation rests on an examination of whether or not State A's statement was made in good faith. However, in order to determine good faith the Court does not only rely on State A's interpretation of the statement, they also hear evidence from State B as to why they believed State A's statement created a legal obligation. From the evidence presented by State A and State B the Court reaches an assessment as to whether or not it is reasonable to decide that State A intended to create a legal obligation. There must be objective evidence before the Court that it is reasonable to believe State A is bound in good faith by their act. Therefore, the "objective" evidence before the Court is determined by weighing the evidence of State A and State B. As such, determining whether a good faith obligation was created is always the result of the objective assessment of the views of both the acting state and those states that interpret the meaning of the act. The ILC noted that this requirement derived from the *Nuclear Tests cases*.[473]

In the *Nuclear Tests cases* intention was named the primary requirement for a unilateral act, although the Court did not establish how to determine intention except in the most general terms.[474] As a result, of this decision the ILC was forced to grapple with how to define intention. In this process two problems emerged with the concept of intention as the source of authority for a legal obligation. First, intention could not be determined without a manifestation of that intention to other states. Second, there had to

[473] ILC Report 2006 (n 41) at par 177.
[474] See Nuclear Tests cases (n 55) at par 43.

be a way to determine when a state wished to create a legal obligation as opposed to simply a desire to act in a certain way. As a result, the ILC eventually determined that intention was only present when there was both an act of will – a manifestation of intention – and good faith –a formal indication to other states of an intention to create a legal obligation.

The two problems faced by the ILC in defining intent and their resolution of these issues allow intention to be interpreted in a way that fits in the doctrine of sources. First, the requirement of will means that a unilateral act must have a clear manifestation that allows third parties to believe the state understood, consented, to the act that was undertaken. Second, the requirement of good faith means that there must be evidence from which the community of states could reasonably believe an obligation was intended – an indication that there was consensus about the creation of a legal obligation. However, as demonstrated in the debates and examples above, intention does not necessarily require either will or good faith. One can have intentions without acting upon them, and acting upon one's intentions does not mean one intended to create a legal obligation. The concept of intention is "interpreted" to require both will and good faith to make intention meet the requirements of the doctrine of sources. The ILC tried to base a definition of unilateral act on intention and ended up reinterpreting intention as the will of the state undertaken in good faith. Neither of these two concepts are equivalent to intention, which in its most direct meaning is a "state of mind".[475] This indicates that the concept of intention had to be massaged to provide legal authority for unilateral acts. Further, this interpretation was heavily debated at the ILC and only resolved provisionally and without any formal agreement. This suggests difficulties in defining intention which mean that intention alone cannot create a source of international law.

4.2 Predictability in the Law and Intention

In the previous section it was demonstrated that intention cannot create a legal obligation unless it is objectively interpreted. This creates a further problem for a unilateral act as a source of international law; an objective interpretation of intention creates the possibility that a state will not know if its true intention will be respected by the ICJ (or any third party in a position to determine objectively intention). The Court's objective assessment of intention stems from its interpretation of the evidence before it

[475] See Concise OED (n 57) "Intend."

– interpretation of the act in question. However, this interpretation of the act may or may not match the acting state's actual intention. Consequently, the Court's interpretation of a unilateral act may differ from the acting state's subjective understanding of its own intention.[476] For example, in the *Nuclear Tests cases* France may not have intended their statements to create a legal obligation. France may have merely wanted to indicate that they would act to stop nuclear tests.[477] This demonstrates that the Court's interpretation of a unilateral may differ from the acting state's intention. This fact is troubling because it means that a State cannot know, with any predictability, how their act will be interpreted prior to adjudication.

To support this assertion requires examining the role of predictability in law. To be predictable is defined under the term to predict as "to declare or to indicate in advance."[478] Therefore, predictability requires knowing in advance the law to which one will be held. Predictability is an *a priori* concept underlying legal systems, and it is a requirement of the rule of law.[479] Further, principles of predictability have been given application by the ICJ. Cassese notes that the *South West Africa case* established that "a rule must be construed 'within the framework of the entire legal system prevailing at the time of the interpretation.'"[480] This created a general principal of law that a state is judged by the law in place at the time of the act. Moreover, predictability was a justification for the codification of unilateral acts at the ILC.[481]

Applied to intention, predictability would require the certainty to know in advance when intention will create a legal obligation. However, a state always undertakes a unilateral act without knowing whether its intention is going to be respected when interpreted objectively. A state cannot know in advance whether its intention will create a legal obligation. To demonstrate this assertion one can examine Israel's withdrawal from Gaza in 2005. This act was promised and the withdrawal

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[476] See for example Koskenniemi, Apology (n 81) at p 353; Franck, "Word Made Law" (n 131) at p 618.
[477] See for example Koskenniemi, Apology (n 81) at pp 350-351.
[478] Merriam -Webster's Online Dictionary "predictable" available online at <http://www.merriam-webster.com/>
[479] As Tamanaha notes:

> The rule of law, at its core, requires that government officials and citizens are bound by and act consistent with the law. This basic requirement entails a set of minimal characteristics: law must be set forth in advance (be prospective), be made public, be general, be clear, be stable and certain, and be applied to everyone according to its terms. In the absence of these characteristics, the rule of law cannot be satisfied.

B Tamanaha, "A Concise Guide to the Rule of Law" Legal Studies Research Paper Series Paper # 07-0082 September 2007 at p 3 available online at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1012051> accessed on 7 September 2008.
[480] *International Status of South West Africa*, (Advisory Opinion) [1950] ICJ Rep 128 as quoted in Cassese (n 49) at p 192.
[481] ILC Report 1997 (n 429) at par 196.

occurred. The act was never contested. Consequently, intention to withdraw was never determined. Israel would not have known whether its act had created a legal obligation.[482] This was similar to the *Nuclear Tests cases.* The Court interpreted French statements as creating a legal obligation. Intention was the central factor in determining a legal unilateral act.[483] However, France did not participate in most of the litigation. The ICJ did not effectively consider evidence of their intention. It was not obvious that France intended its statements to create a legal obligation. Additionally, Franck notes that Australia and New Zealand never relied on French statements. They did not withdraw their lawsuit. Instead, they did not treat French statements as definitive.[484] It was the decision of the Court that established that France intended to create a legal obligation by its statements. Until the decision was rendered, France, Australia and New Zealand did not know which standard of intention would be applied. This was assuming that they knew that such statements could create a legal obligation. Prior to this decision, it was not predictable that this was the case.

The lack of predictability of unilateral acts highlights a core problem with the legal authority of intention. Intention is a "state of mind" and can only be determined by interpretation of the act. The legal nature of the act cannot be determined until intention is known. Intention cannot be known until there is interpretation of the act but an interpretation of intention can always differ from the actual intention. As a result, unilateral acts always violate the principle of predictability. They can never satisfy the principle that one should know in advance the law to which one will be held. This problem is evident in the *Nuclear Tests cases*. Prior to the Court decision, the parties did not know whether French statements would be considered "legal."

This creates a doctrinal dilemma for unilateral acts (as well as for other intention based obligations). To paraphrase Koskenniemi, in identifying intention one is trying to objectively determine the subjective.[485] As such, Koskenniemi believes "[t]he doctrine of unilateral acts cannot provide the law with the kind of objectivity which is taken to

[482] See Chapter 1 above.
[483] See for example Franck who notes "[t]echnically then, reliance was placed on the French statements not by the applicants but by the majority of the International Court." Franck, "Word Made Law" (n 131) at p 618; For a detailed analysis reaching the conclusion that Court tried to give effect to both "subjective French intent, subjective reliance by Australian and New Zealand and objective justice," see Koskenniemi, Apology (n 81) at pp 346ff, 354.
[484] Franck, "Word Made Law" (n 131) at p 618.
[485] Koskenniemi's entire analysis of this topic leads to this point; see Koskenniemi, Apology (n 81) at p 345 ff.

distinguish it from political argument."[486] This point is taken up in the next section of this chapter.

4.3 Intention and Consent or Consensus

This section outlines the strained relationship between intention and consent and consensus. Intention is necessary for a unilateral obligation to create a legal obligation. This makes intention key to establishing unilateral acts as a "source" of law within sources doctrine. However, intention is a state of mind, and it is not capable of observation. This means that on its own intention cannot provide evidence of a legal obligation. Consequently, in order for the Court to reach the conclusion it reached in the *Nuclear Tests cases* it had to make intention capable of objective observation. The Court had to determine "the way in which another state could be expected to view French statements."[487] Koskenniemi reiterates this point when he analyses the *Nuclear Tests cases* decision and observes that

> [t]he strategy in the Nuclear Tests case is to give effect to all three considerations: Subjective French intent, subjective reliance by Australia and objective justice. Each renders the same solution: France is bound. No preference is made. But the argument leaves unexplained how the court can maintain that it gives effect to French intent in face of the fact that France denied it. It leaves unexplained how it can protect the Applicant's reliance as they deny having relied. And it leaves unexplained its theory of justice, which says that certain statements bind by good faith. Moreover, having recourse to the three arguments is contradictory. Each of them makes the other two superfluous. If giving effect to French intent is what counts, then it must suffice as the sole criterion. Its point is to override other State's intent or objective justice. And if justice is effectual it must override any subjective intent or reliance. [488]

In the *Nuclear Tests cases* the Court paid lip service to intention as the key requirement of a unilateral act. However, it ignored the actual intention of the acting state. This occurred because intention is a subjective concept and intention cannot be determined without interpretation. Consequently, since this decision, intention is always interpreted; most recently at the ILC it is interpreted primarily as an expression of will that indicates good faith. The ILC uses the concept of will to indicate that a unilateral act must be

[486] Koskenniemi, Apology (n 81) at p 354.
[487] Kennedy, "Sources of International Law" (n 307) at p 53.
[488] Koskenniemi, Apology (n 81) at p 354.

interpreted objectively and have an external manifestation. The act creates a legal obligation when a third party can objectively identify intention through an expression of will. Further, the act must be manifested in such a way that a Court could reasonably believe the state is now obligated by its intention in good faith. This latter requirement rests not only on objective indications of the will to be obligated, but also on evidence that other states would view the act as creating good faith obligations. To rephrase, a unilateral act has legal authority when there is evidence to indicate that the state consented to give the act legal authority. However, this alone is deemed insufficient as a basis for authority of unilateral acts because objective intention is found to have little meaning unless it was also accompanied by good faith in the act. Intention was interpreted by the ILC to fit within the parameters of sources doctrine. On the one hand, it was interpreted as manifestation of the will of the state. This connoted consent. On the other hand, unilateral acts were interpreted as a good faith obligation. This connoted a consensus of states. Intention must be interpreted in this way order to provide legal authority to unilateral acts. Intention itself is "a state of mind," which means that that cannot be ascertained without objectification, including a requirement of good faith. Without a requirement of good faith intention will lack the authority to create a legal obligation. This semantic trap led the ILC to interpret intention in a very peculiar way: Intention created a legal obligation when objective evidence indicates a consensus that the act was sufficiently predictable that the state should be obligated in good faith.

Consequently, the work of the ILC highlights the difficulty with identifying intention and fitting intention into sources doctrine. Rodriguez Cedeño favoured analogizing unilateral acts with treaty law. He promoted consent as the basis of intention. However, Members of the ILC did not unanimously accept this analogy. Many Members of the ILC preferred a good faith based interpretation of intention. The ILC's Guiding Principles mediated this debate by accounting for both. As defined by the ILC, intention was reinterpreted so that it was given authority by both consent and consensus.[489]

Arguably, the problem with intention lay in the very nature of the concept. Koskenniemi notes that intention theoretically requires an examination of the subjective intention behind the act.[490] This is problematic because subjective intention is internal to the state. As such,, it requires neither an expression of will nor a reaction to the act. It requires neither consent nor consensus. Intention alone cannot provide the authority

[489] See Koskenniemi, Apology (n 81) at p 355.
[490] Koskenniemi, Apology (n 81) at pp 346-348, 354.

required of a source of international law. Koskenniemi suggests that the law cannot account for both the subjective intention of the acting state and objective justice.[491] This raises the problem of predictability in the law. Predictability requires that the state know in advance the law to which it will be held. To satisfy this requirement intention must be determined. Yet, intention is not known until it is determined. Intention cannot provide predictability.

Ultimately, the problem that unilateral acts pose for the doctrine of sources is that they rest on neither consent nor consensus. The requirement of intention is purely internal; it is "a state of mind". As a result, it must be objectified and interpreted in order to provide any sort of legal authority. Consequently, intention is always redefined to reflect the requirements of consent and consensus. However, when intention is defined in this way it may not reflect the intention – the "state of mind" - of the acting state. As a result, intention can provide predictability and authority as a source of law but it no longer reflects the "state of mind" of the acting state, its defining feature.[492] Intention on its own cannot create a "source" of law.

5. Context: Iran and Nuclear Weapons

The previous parts of this chapter are abstract and theoretical, and in order to provide context to this discussion and help clarify the meaning doctrine of intention, an example is instructive. The example chosen is Iran's effort to "go nuclear." This example is relevant for three reasons. First, the example of Iran's pursuit of nuclear weapons illustrates the relationship between intention and authority in international law but places this discussion in the context of ongoing events in international relations. Second, the example of Iran's pursuit of nuclear weapons demonstrates the problems in identification of intention noted above, particularly the need for objective evidence of both intention to act and intention to create a legal obligation. It also demonstrates the problem of predictability. Lastly, the example of Iran is chosen because it represents one of the unresolved tensions in current international relations, and the problem of unilateral acts may shed some additional light on this problem. To undertake this analysis this section of the chapter proceeds in four parts. First, a brief review of the facts is presented. Second, the facts are analysed for intention. Third, the facts are

[491] See, for example, Koskenniemi, Apology (n 81) at p 355.
[492] See generally Koskenniemi, Apology (n 81) at p 354.

analysed for predictability. Fourth, some concluding thoughts and analysis are presented.

5.1 Facts

In the summer of 2002, Iranian exiles report that the Government of Iran is building a secret infrastructure to enrich uranium.[493] This threatens stability in the region. It is also violates international law; Iran is a party to the NPT.

In December 2002, the US media releases intelligence that confirms the existence of nuclear enrichment plants at Natanz and Arak.[494] In response, Iranian President Khatami confirms publicly that Iran intends to pursue the "Nuclear Fuel cycle." This leads the IAEA, the UN body that enforces the NPT, to try to inspect these sites.[495] These inspections lead the IAEA to report that Iran is not complying with the NPT.[496] Iran then declares that it will end enrichment. However, there is no evidence to this effect.

In December of 2003, Iran signs the additional protocol to the NPT in response to diplomatic pressure. This is significant because the protocol allows the IAEA to undertake snap inspections of suspected nuclear sites.[497] Three months later the IAEA urges Iran to allow inspection of its entire nuclear program.[498] Iran blocks these inspections and the IAEA accuses Iran of non-cooperation.[499]

At this point the organizational track stalls. Hopefully, Iran then enters into negotiations with the "EU 3", France, Britain and Germany, over its nuclear program. In the course of these negotiations Iran again promises to stop enrichment.[500] In June, however, Iran says it will resume enrichment at the Isfahan plant.[501] The EU 3 determines that this is fatal to negotiations. As a result, Iran promises to stop its enrichment program until the EU presents it with an offer as part of negotiations.[502] In

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[493] See for example "Timeline: Iran Nuclear Crisis" BBC (2006) available online at http://news.bbc.co.uk/1/hi/world/middle_east/4134614.stm accessed on 4 September, 2006.
[494] BBC, "Timeline" (n 493).
[495] BBC, "Timeline" (n 493).
[496] "Timeline: Iran's Nuclear Development" The Washington Post (2006) available online at <http://www.washingtonpost.com/wp-dyn/content/custom/2006/01/17/CU2006011701017.html> accessed on 4 September 2006.
[497] Washington Post, "Timeline" (n 496); BBC, "Timeline" (n 493).
[498] BBC, "Timeline" (n 493);
[499] BBC, "Timeline" (n 493); Washington Post, "Timeline" (n 496).
[500] Washington Post, "Timeline" (n 496).
[501] BBC, "Timeline" (n 493).
[502] BBC, "Timeline" (n 493).

August, Iran rejects the EU 3 proposals and it starts up enrichment.[503] The resumption of enrichment is confirmed by the IAEA in September.[504] At this point a new Iranian President, Ahmedinijad, takes power. He continues Iran's bellicose rhetoric.[505] Additionally, over the next few months the Russian government tries to negotiate with Iran. To resolve the impasse it proposes to peacefully enrich uranium on Iran's behalf.[506]

Iran rejects these negotiations and publicly re-opens the Natanz facility by removing the UN seals.[507] This leads the EU 3 to call off negotiations. The three Governments believe that Iran must be brought before the UN Security Council. Iran reciprocates by stating that a referral is leading it to end any contact with IAEA.[508] In March 2006 the UN Security Council considers the situation. The Security Council gives Iran 30 days to suspend enrichment.[509] The rhetoric then ratchets up a notch. President Ahmedinijad claims that Iran is successfully enriching uranium. This is confirmed by the IAEA.[510] As a result, the US, Russia, China and the EU 3 make a new offer to Iran to induce them to stop enrichment.[511] They also renew their threats to return to the UNSC. This time sanctions are proposed in hopes of provoking an Iranian response to the EU 3's earlier offer.[512] These threats are unsuccessful. However, the EU 3 has to follow through on their threats and so a new resolution is proposed at the UNSC. This resolution imposes a deadline of August 31 to suspend enrichment or face sanctions.[513]

About ten days before the deadline, Iran's Supreme Leader, the head of the religious theocracy that governs over Iran in tandem with Parliament, [514] announces that "The Islamic Republic of Iran has made up its mind based on the experience of the past 27 years to forcefully pursue its nuclear program and other issues it is faced with, and will rely on God…"[515] The Iranian President confirms this stance and shows no signs

[503] BBC, "Timeline" (n 493).
[504] Washington Post, "Timeline" (n 496).
[505] Washington Post, "Timeline" (n 496).
[506] Washington Post, "Timeline" (n 496).
[507] Washington Post, "Timeline" (n 496).
[508] Washington Post, "Timeline" (n 496).
[509] Washington Post, "Timeline" (n 496).
[510] Washington Post, "Timeline" (n 496).
[511] Washington Post, "Timeline" (n 496).
[512] Washington Post, "Timeline" (n 496).
[513] Washington Post, "Timeline" (n 496).
[514] "Iran's Politics" Backgrounders Economist (8 August 2006) available online at <www.economist.com/research> accessed on 24 August 2006.
[515] As quoted in M Slackman, "Iran Defiant on Nuclear Program As Deadline Approaches" The New York Times (22 August 2006).

of complying with the Security Council's resolution.[516] The US responds to these statements in equally robust terms.[517]

On August 31, the IAEA confirms that Iran is not in compliance with the deadline to stop enrichment. However, instead of sanctions the UN sets a new deadline for Iran to stop enrichment, October.[518] It takes until December for the UNSC to agree, unanimously, to new sanctions against Iran. However, these sanctions are relatively mild.[519] They include a ban on sale to Iran of any material that would help them enrich uranium, any technical assistance or financial assistance to obtain any material that would help Iran enrich uranium and restrictions on 22 Iranian officials and organizations involved in the nuclear program, including the freezing of their foreign assets.[520] This resolution has little effect. Iran states their aim to continue to enrich uranium. In February 2007, the IAEA confirms that Iran is still pursuing enrichment.[521] This leads to further sanctions and more threatening statements by Iran. For example, President Ahmedinejad announces that Iran is pursuing an "industrial scale" enrichment program.[522]

Since 2007 not much has changed in substantive terms. In March of 2008 the UNSC extends "asset restrictions" and "travel bans" on Iranian individuals involved in the nuclear program and certain companies. It also prevents sale to Iran of "dual use" products that could possibly be used either for civilian purposes or the nuclear program.[523] Further, the IAEA Report of February 2009 asserts that Iran has enough "basic material from which to make a nuclear device."[524] However, this material has not yet been enriched to a high enough grade. The report also asserts that enrichment rates have been slowing. [525] This seems to be borne out by the US National Intelligence Estimate which asserted that Iran has not had a nuclear weapons program since 2003. [526] Countries including Israel and the UK believe this assessment is inaccurate.[527]

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[516] N Karimi, "Iran's President Defies UN on Deadline to Stop Enrichment" Associated Press (August 31, 2006).
[517] H Cooper & DE Sanger, "US Drafting Sanctions as Iran Ignores Deadline" The New York Times (August 31, 2006).
[518] Washington Post, "Timeline" (n 496).
[519] Washington Post, "Timeline" (n 496).
[520] United Nations Security Council, Resolution 1737 (2006) UN SC S/Res/1737; See also Washington Post, "Timeline" (n 496).
[521] Washington Post, "Timeline" (n 496).
[522] Washington Post, "Timeline" (n 496).
[523] BBC, "Q&A: Iran and the Nuclear Issue" available online at <http://newsvote.bbc.co.uk.mpaaps/pagetools/print/news.bbc.co.uk/2/hi/middle_east/403160...> accessed on 1 May 2009.
[524] "Q &A" (n 523).
[525] "Q &A" (n 523).
[526] "Q &A" (n 523).
[527] "Q &A" (n 523).

Simultaneously there have been renewed diplomatic efforts to end Iran's nuclear program, including a concrete offer to Iran by the EU 3, the US, China and Russia to start multiparty talks in exchange for ending the enrichment of uranium.[528]

Iran's pursuit of nuclear weapons is replete with unilateral acts. Iran repeatedly states that it will stop its nuclear program. Iran just as often states that it is resuming nuclear enrichment. Consequently, these statements are an excellent forum to analyse the requirement of intention discussed above. However, Iranian pursuit of nuclear weapons is more complex than the situation in the *Nuclear Tests cases*. The unilateral nature of the statements is challenged by the dialogue between the EU 3 and Iran, by the promise of multiparty talks, by the tension between the US and Iran and by the involvement of the UNSC. In spite of these other multilateral processes, Iran's statements about their nuclear programs may represent unilateral acts. This assertion is warranted because Iran's intention is the focus of the analysis of Iranian statements by the US, the EU 3 and the UNSC.

Further, it is important to note that the presence of multilateral factors does not *a priori* render this scenario multilateral. Acts can be unilateral even if they are recognized by several states or even the world at large. This is established in the *Nuclear Tests cases.* The confusion between multilateral and unilateral in this case merely reiterates a point that was raised in the context of the invasion of Iraq that unilateral acts refer to all acts undertaken outside the multilateral framework whether they involve one or many states. Moreover, in accordance with the analysis of intention outlined in this chapter, the focus of the analysis is on Iran's intention, and only tangentially on the recognition of these acts to the extent that they indicate an intention to create a legal obligation. To undertake this interpretation, the requirements of intention and predictability are the particular focus of this analysis.

5.2 Intention

According to the *Nuclear Tests cases*,[529] it is Iran's intention to create a legal obligation that transforms statements on their nuclear program into unilateral acts. The requirement of intention is debated but not clarified in the Guiding Principles of the ILC. In the Guiding Principles intention is identified as will.[530] This interpretation accords with the practice in the *Nuclear Tests cases*. In this case the ICJ is the arbiter of intention when

[528] "Q &A" (n 523).
[529] See Nuclear Tests cases (n 55).
[530] See generally, ILC Report 2006 (n 41).

the Court adopts an objective standard of intention. This standard requires that intention be determined from the act itself. This decision is interpreted, most recently by the ILC, to assert that intention is a "mental state" but is only assessed by its manifestations, objectively determined. This is derived from the ILC's use of the term "manifestations of will". This term requires objective analysis of the act in order to determine if the act itself displays intent. Further, if the act provides evidence of objective intent, then the state is bound in good faith by its obligations. Consequently, intention is "legalized" by objective interpretation that produces a good faith obligation. However, the Iranian example demonstrates that it is difficult to derive objective evidence of intent from acts themselves. Further, in light of this difficulty it is extremely ambiguous as to whether a good faith obligation can result.

Iran has made several statements intimating that it will stop pursuing a nuclear program. The objective interpretation of Iran's statements would indicate that Iran has made statements that could create a legal obligation. Further, there is evidence that states hearing these statements could believe that an obligation has been undertaken to the international community. On first glance it appears that Iran has a good faith obligation to end its pursuit of enriched uranium. In a prima facie analysis this example seems analogous to the facts of *Nuclear Tests cases*. However, there is one primary difference. In the *Nuclear Tests cases* France stopped nuclear testing and kept its promise. In the Iranian scenario this is not the case. Iran's stated intention and its actions diverge both through its continued violation of the NPT and its bellicose rhetoric regarding its right to pursue uranium enrichment. This makes interpretation of Iran's intentions more difficult. Which acts are more relevant, statements which create obligations, or statements and acts which contradict those obligations? This is not at issue in the *Nuclear Tests cases* nor is it considered in detail by the ILC. However, the *Nuclear Tests cases* do offer some guidance in this situation, as when the Court asserts that the objective evidence of intention should be interpreted restrictively.[531] Consequently, unlike in the *Nuclear Tests cases* there is not objective evidence of a manifestation of intention, so the need for consent is not met.

Further, even if Iranian statements manifest intention, it must be unambiguous that this intention was to create a legal obligation in good faith. As noted above good faith obligations are determined partially by Iran's intentions and partially by how those intentions are perceived in the international community. Internal assessments are balanced by the interpretation of an objective observer. On this standard, intention to

[531] Nuclear Tests Cases (n 55) par 44.

create a legal obligation is not present in Iranian statements. From the facts outlined above it is clear that many states do not trust the Iranian statements and they continue to ask for verification of Iranian compliance with their statement. This is evident from the fact that states pursue negotiations and sanctions at the UN in spite of the statements of Iranian officials. These steps make it difficult to assert that Iran intends to create legal obligations by its statements. Consequently, states do not believe Iran's statements create obligations in good faith. In fact the opposite is occurring. The mistrust generated by these statements leads to pressure for political action and sanction from the UNSC. Iranian statements are either evidence of a violation of international law or political so they do not display an intention to create a legal obligation.

This example also demonstrates the practical difficulties in identifying intention. Iran's "true" intentions can never be known. Intention can only be identified by Iranian statements, Iranian acts and the assessment of those acts by the community of states. Its statements and acts are contradictory and as a result the international community does not treat these statements as creating unilateral obligations. Thus, this example illustrates the difficulty of finding intention. When placed in a context of ongoing international relations it becomes difficult to identify both stages of analysis of intention, the objective ascertainment of intention and the requirement of good faith. This example illustrates how unlikely it is, in the context of ongoing international relations, to determine which acts provide objective evidence of intention. Consequently, the ongoing nature of Iran's unilateral acts appears to point to a restrictive assessment of these acts, and further attention to the interpretation of these acts by the international community. These factors make it difficult to assert an intention to create a legal obligation.

In concrete terms, this example contextualizes the difficulty in using intention as the basis of the obligation in unilateral acts. Iran's intentions are obscure. It is impossible for any outside observer to know what Iran hopes to achieve through its statements and the acts which contradict those statements. Further complicating matters, Iranian actions are often opposed to their stated intention which makes intention difficult to determine. Therefore, this example demonstrates that Iran is aware of the legal implications of undertaking nuclear testing. However, Iran is more interested in testing the "political will" of the world community to stop them. Iran's intentions might be framed in legal terms, but it is probable that they do not have the intention required to create a unilateral obligation. This analysis highlights the difficulty of establishing legal authority based on intention. Iran's intentions can only be identified through its

acts. The requirement is not what Iran believes its intention to be, but whether that intention is expressed in the act or whether there is evidence of good faith in the act. In this case the acts are unclear and so good faith is questioned. This may explain why states have not relied on Iranian statements as an expression of intent.

5.3 Predictability

Iranian leaders make statements that might be explained by the requirement of intention. These statements are apparently similar to French statements in the *Nuclear Tests cases*. However, these statements are not truly unilateral. Several of these statements are made in response to the IAEA's investigation of Iran's nuclear program. Thus, these statements are made in the context of negotiation of the terms under which it will continue enrichment with the wider international community. This demonstrates the difficulty in de-contextualizing any individual statement made by Iran. Lastly, the statements of the Iranian leadership, such as the statement of the Supreme Leader that Iran will continue its enrichment, cannot be separated from the political threat of sanctions. Nor can statements following the imposition of UN sanctions be separated from the need of the Iranian government to reassure its domestic constituency. Thus, Iranian statements may appear unilateral but they are not without context.

The complex context of the Iranian statements creates a unique problem for the predictability of the law. States are not placing good faith in Iran's statements. States are not attempting to enforce these obligations against Iran. As a result, the legal nature of these acts is never determined. Therefore, this scenario demonstrates that without an objective determination of good faith the legality of a unilateral act is never known. This is problematic because in theory the act creates a legal obligation for the state when it is made, and Iran's statements illustrate that the reality is different. Until a state believes it has relied on the statements, a state's intention to create a legal obligation is not assessed. As a result, the Court undertakes an assessment of good faith. The Court interprets the will of the actor by examining the facts of the case. This demonstrates two things. First, there is an interplay between the reaction of other states and will in assessment of intention. This corresponds to the opposed parameters of consent and consensus in the sources of international law. Second, without interaction with another state the obligation of a unilateral act is always indeterminate. Therefore, there is no predictability to the act prior to adjudication. This leads to the conclusion that Iran will

not be able to predict in advance whether their unilateral statements will create legal obligations.

5.4 Analysis

The example of Iran's pursuit of nuclear weapons demonstrates two key difficulties in applying the requirement of intention in context. First, intention requires an objective determination as to whether the act in question manifests the will of the state. However, as the Iranian example illustrates, it is rare that such acts are unambiguous – in the sense of not being contradicted by other acts or statements – to the extent that intention will be present. Therefore this example contextualizes a problem that was alluded to above in regard of the *Nuclear Tests cases*: if France's statements manifested its intention, why did Australia and New Zealand institute their claim? Further, this demonstrates how rare it is that an action will reveal clear evidence of intention, which in turn means that a restrictive interpretation of the act is called for. This implies that objective indications of intention will rarely be found. This leads directly to the second difficulty with applying intention in context, which is that in order for an individual act to display objective indications of intention other states must believe that the intention to create an obligation is present. This is the case in the example above. Even if individual Iranian statements display intent (and this is by no means clear), it is difficult to assert a good faith obligation in the face of the fact that the international community does not take Iranian statements as evidence of intention.

Consequently, this example presents two conclusions about intention as the source of a legal authority: First, objective intention, which is analogous to consent in sources doctrine, is rarely unambiguous in context. Second, the fact that objective evidence of intention is often ambiguous in context makes it less likely that a consensus will emerge in the international community that a good faith obligation has been created by a unilateral act. This analysis is important because it adds context to the analysis presented above and complexity to the conclusions to this chapter presented below.

6. Conclusion

This chapter examines one aspect of the question "are unilateral acts legal?" Specifically it focuses on the question "can unilateral acts be explained by the doctrine of sources?" After outlining this research question, this chapter then provides an overview of the doctrine of sources and establishes that the doctrine of sources mediates debates over whether the authority of international law is derived primarily from consent or consensus.

Following on this analysis this chapter proceeds to examine the requirement of a unilateral act that establishes the legal authority of a unilateral act, the requirement of intention. Intention provides the authority of a unilateral act and so it is the "source" of the unilateral act's legal obligation. It performs the function of sources doctrine for a unilateral act. Further, this analysis reveals that intention is a "state of mind." As a result, in order to assess intention it must be interpreted objectively. This is reflected in the most recent formulations of intention in the work of the ILC. The ILC terms this objective interpretation the "will of the state." Moreover, the work of the ILC, as supported by the case law, demonstrates that ascertaining this objective interpretation requires that a third party is able to find in the act evidence that the state intended to act in the manner it did. This conflation of the "mental state" of the actor with the act itself is deemed to furnish the evidence that the state acted with intent. This is equivalent to consent in sources doctrine as the unilateral act provides evidence of consent to the obligation contained in that act.

However, the will of the state is supplemented in the Guiding Principles of the ILC by a further requirement, good faith. This requirement is introduced to resolve a doctrinal problem that results from the objectification of intention: if an act is deemed to provide objective evidence of intention, then how can the objective observer separate the evidence of the intention to perform the act from the evidence that the act intends to create a legal obligation? An act may indicate an intention to perform an action without unambiguously providing evidence of intention to create a legal obligation. Consequently, the ILC adds the requirement of good faith. Good faith requires that there

is not only objective evidence of an intention to act, but also that there is objective evidence that other states believe that that act creates an obligation. This incorporates an element of consensus within the international community. To summarize: the ILC interprets intention so that it incorporates both consent and consensus so that intention "fits" within sources doctrine. However, as was demonstrated in this section of the chapter, neither manifestations of intention, "will", nor "good faith" truly represent state's intentions. Intention is a state of mind. However, objective interpretations of the will of the state can mean that a state is bound by the interpretation of the act regardless of their state of mind. Moreover, "good faith" means that a state can be obligated by an act because the third party hears evidence that a consensus of states believed the act manifested intent. Therefore, it is only through reinterpretation as "will" and "good faith" that intention can provide legal authority for a unilateral act. Intention does not fit naturally in the doctrine of sources; a state of mind cannot provide authority for a legal act.

In addition to the doctrinal analysis above, the problem of intention is placed in the context of Iranian pursuit of nuclear weapons. This contextualization reveals that intention is extremely ambiguous as a source of authority for a legal obligation. As noted above, the analysis of the example of Iranian pursuit of nuclear weapons leads to two conclusions: First, objective intention, which is analogous to consent in sources doctrine, is rarely unambiguous in context. Second, the fact that objective evidence of intention is often ambiguous in context makes it less likely that a consensus will emerge in the international community that a good faith obligation has been created by a unilateral act. These conclusions are important, because even if intention can be interpreted to provide theoretical authority for a legal obligation, it is extremely difficult to apply these criteria in practice.

This chapter asks "can unilateral acts be explained by the doctrine of sources?" Ultimately, the problem that unilateral acts pose for the doctrine of sources is that they rest on neither consent nor consensus. The requirement of intention is purely internal; it is "a state of mind". As a result, it must be objectified and interpreted in order to provide any sort of legal authority. Consequently, intention is always redefined to reflect the requirements of consent and consensus. However, when intention is defined in this way it may not reflect the intention – the "state of mind" - of the acting state. Intention can provide predictability and authority as a source of law at the expense of

the "state of mind" of the acting state, its defining feature.[532] Intention on its own cannot create a "source" of law. Further, even when it is interpreted to meet the requirements of the doctrine of sources, the example of Iranian pursuit of nuclear weapons demonstrates that intention is extremely difficult to apply in practice. The doctrinal difficulty posed by intention, together with the difficulty in applying intention in practice, helps explain the gap between the assertion that a unilateral act is legal and the ability to identify its legal obligation in practice.

[532] See generally Koskenniemi, Apology (n 81) at p 354.

Chapter 5: Substance

1. Introduction

This chapter continues the substantive analysis of the research question "are unilateral acts legal?" Specifically, this chapter focuses on one aspect of "legality" defined in chapter 3, the doctrine of substance. It asks the question: "can unilateral acts be explained by the doctrine of substance?" To answer this question this chapter provides an overview of the research question, it outlines the substance of international law and the requirement of a unilateral act that provides the "substance" of a unilateral act, autonomy. This chapter then compares the requirements of autonomy to the doctrine of substance in order to reach conclusions about the "legality" of the substance of unilateral acts. Consequently, this chapter examines the substance of international law; discusses the requirement of a unilateral act that is the basis of a unilateral act's substance, autonomy; and compares the two doctrines in order to establish whether unilateral acts can be explained by the doctrine of substance. Following on this analysis some context for this discussion will be provided through the example of the San Juan River dispute and conclusions will be drawn.

2. The Research Question

This chapter examines one aspect of the question "are unilateral acts legal?" Specifically it focuses on the question "can unilateral acts be explained by the doctrine of substance?" To explain why this question is necessary to a doctrinal analysis of unilateral acts, a brief summary is necessary. As noted in the introductory chapter, answering the question "are unilateral acts legal?" requires answering two subsidiary questions: "what are unilateral acts?" And "what is legality?" Chapter 2 establishes that unilateral acts are defined by three core requirements that separate these type of obligations from other legal obligations: intention, autonomy and revocability. Chapter 3 establishes a method of assessing legality derived from a narrow critical legal studies method – a doctrinal analysis of unilateral acts based on the structure of international

law. This method clarifies that the doctrinal structure of unilateral acts is derived from three primary, interlinked doctrines: sources, substance and process. Consequently, in order to be considered "legal" a concept must be explained by the doctrinal structure of international law. Applied to unilateral acts, this method explains that in order to be considered substantively "legal," unilateral acts must be defined by the doctrine of substance.

This chapter continues the doctrinal analysis of the legality of unilateral acts started in the previous chapter. It focuses on one doctrine of international law, substance doctrine, and the requirement of a unilateral act that provides the doctrinal "substance" of a unilateral act, autonomy. This analysis is necessary because comparing the requirement of autonomy to substance doctrine determines whether unilateral acts can be considered, substantively, international law. This leads to the question that guides this chapter: Can unilateral acts be explained by the doctrine of substance? If unilateral acts cannot be explained by sources doctrine, their place in the structure of international law is doctrinally weak, which leads to questions about the legality of obligations created by unilateral acts.

3. The Substance of International Law

Substance is defined as "the subject matter of a text or work of art."[533] Applied to the doctrine of law, substance refers to the method of determining the proper subject matter of a legal "text." A text can be defined as the "a source of information or authority."[534] The "texts" of international law are the written documents, oral declarations and actions from which the sources of international law are determined. Further, the doctrine substance mediates debates over which texts ought to have legal authority. Mediation of this debate is necessary because the substance of international law is not predetermined; it is reflective of concerns of states. Further, these concerns often conflict as states wish to pursue their own self-interest. States who pursue their own self interest are asserting their right to individualism in the substance of international law. However, whenever

[533] This is one definition found in the Compact OED (n 60) "Substance."
[534] Merriam-Webster's online dictionary (n 478) "Text".

these conflicting interests of states occur, there is a competing drive within international law to try to bind states (often against their own self-interest) to collective interests of all states. Laws that bind all states in the collective interest are designed to mediate conflicts between individual interests and a competing vision of international law, one that is altruistic in substance. The substance of international law is considered "legal" when it is able to mediate the drive for individualism with a need for altruism; if the doctrine is not able to achieve this balance, the substance of law is of dubious legality. As a result, individualism and altruism shape the doctrine of substance.

The doctrine of substance in unilateral acts is established by the requirement of autonomy. Autonomy requires that a unilateral act is not performed in exchange for a response by another state or a *quid pro quo*. The requirement of autonomy does not predetermine the substance of a unilateral act; any "subject matter" can result in a unilateral obligation; however, in order to be considered legal, the act must meet the requirement of autonomy, as this requirement explains when a unilateral "text" is legal. This chapter examines whether autonomy can meet the requirements of the doctrine of substance, individualism and altruism. It first examines the doctrine of substance, it then explores the substance of unilateral acts, and finally, it assesses whether "autonomy," the substance of a unilateral act, can be explained by the doctrine of substance. However, it is necessary first to clarify further what is meant by the doctrine of substance.

The doctrine of substance establishes which texts become laws. The parameters of this doctrine are established by the relationship between individual states and the collective interest. International law organizes relationships in international relations through the substance it regulates. However, the substance of international law is not predetermined and its potential applications are unspecified. Therefore, the doctrine of substance identifies the conditions in which a specific law is obligatory. States accept substance as legal when it is in their interest to bind themselves to that specific law. An example of this is a treaty. States willingly enter into treaties on a wide range of substances, and treaties are primarily individualistic in substance. Alternatively, states also accept substance as legal when states identify a collective interest in the obligation. An example of this substantive obligation is custom. Custom is derived from collective of state practice and belief in the legality of the act; it binds all states that do not protest the formation of the custom. Consequently, custom creates a legal obligation regardless of an individual state's interest. Custom is primarily an altruistic obligation. The

substance of law must manifest both individualistic and altruistic considerations. These considerations determine whether substance is "legal."

Further, the doctrine of substance is concerned with establishing the conditions in which states should, do or *ought* to accept a text as legal. Consequently, the doctrine of substance is related to the question of when states treat a text as legal which, in turn, determines when they comply with international law. This is often termed the "compliance problem," as it explains the paradox of why states obey or comply with international law when there is little enforcement of the law. As is evident the "compliance problem" is intimately concerned with the conditions in which states consider a law obligatory. As Koh notes "[l]ike most laws, international rules are rarely enforced, but usually obeyed."[535] Therefore, the "compliance problem" can provide a starting point for an examination of the doctrine of substance.

The "compliance problem" is a recent interpretation of the older question of obedience to law. Writing on compliance incorporates interdisciplinary insights drawn from international relations. The incorporation of international relations approaches into the doctrine has not altered the doctrine's core debates which emerged in older explanations of obedience. It is merely a semantic shift. The core debate the doctrine of substance mediates is still whether the substance of a law is primarily individualistic or altruistic. This chapter refers to both obedience and compliance depending on the time period under discussion. As a result, examination of the "compliance problem" provides the link between the question of obedience/compliance and the doctrine of substance. States "obey" international law for individualistic or altruistic reasons. Consequently, explanations of obedience describe the conditions in which a text is considered "legal."

Individualism and altruism are at the centre of the debate that shapes the doctrine of substance; these concepts identify the conditions in which a text is considered legal. For example, Kennedy identifies in private law a "substantive dichotomy of individualism and altruism. These are two opposed debates about the content of private law rules."[536] As has been seen, these oppositions also apply to the conditions in which a state considers international law obligatory. Consequently, Kennedy's definitions of individualism and altruism also apply to the doctrine of substance in international law. Kennedy notes "[t]he essence of individualism is the making of sharp distinctions between one's interests and those of others, combined with a belief that a preference for

[535] HH Koh "Review: Why Do Nations Obey International Law?"(1997) 106 Yale LJ 2599 at p 2603.
[536] Kennedy, "Form and Substance" (n 84) at p 1713.

conduct for one's own interests is legitimate…."[537] Individualism indicates a preference for private interests. Kennedy argues that individualism is dominant in the doctrine of private law. However, there is an opposed view of substance that is "altruistic" representing sharing and sacrifice. These are communitarian notions[538] As altruism requires placing the collective interest first. Further, these definitions of substance also apply to international law. States obey international law when it is in their interest to do so or when it reflects the collective interests of states, but these interests may conflict. Therefore, individualism and altruism explain the conditions in which a state accepts a text as legal. The doctrinal debate considers which of these two conditions should be primary in the substance of law. Consequently, the remainder of this section explores how the doctrine of substance mediates between substantive individualism and substantive altruism.

3.1 Obedience/Compliance with International Law

In international law debates over the primary condition for a text to be binding, arguments over the substance of law, are defined by debates over obedience to law. Initially obedience to international law is justified by classical natural law and then by positive law arguments. These approaches will be examined in order to further explore the structure of the doctrine of substance.

3.1.1 "Classical" Approaches to Obligation

Natural law can be traced to ancient Greece and Rome,[539] and is reintroduced to Western philosophy through medieval Christian theology.[540] Natural law approaches all argue that there is a higher objective to law. Law cannot violate natural laws. Shen explains,

> Naturalism and its variations, in numerous ramifications, began with the assumption that according to its nature, the law is a super-sensibly valid order and must therefore also, in the last instance derive its validity from a

[537] Kennedy, "Form and Substance" (n 84) at p 1713.
[538] Kennedy "Form and Substance" (n 84) at p 1717.
[539] For example the different views of Aristotle and Cicero; Referred to in AP Rubin, *Ethics and Authority in International Law* (CUP, Cambridge 1997) at pp 7, 9.
[540] Most prominently by St Thomas Aquinas; see a brief discussion by Rubin, Ethics (n 539) at p 16.

> super-sensual source. This super-sensual source has been sought in, for example, the will of God, pure reason inherent in man, the idea of justice and social solidarity. According to naturalists, the individual has some rights which can be deduced directly from nature in general, and, in particular, from nature as created by God. The nature from which these rights are deduced is mostly considered to be man himself in particular his reason.[541]

Natural law asserts that the source of a legal obligation is determined by the laws of nature. The laws of nature are derived from forces outside human knowledge, although these laws are identified through human reason. The extra-human nature of natural law is confirmed by Thomas Aquinas in the *Summa Theologica*. "The natural law is promulgated by the very fact that God instilled it into man's mind so as to be known by him naturally."[542] Natural law is moral law. Further, this moral law is eternal and immutable.

The relationship between law's origin outside of human knowledge and law's obligation means that natural law is primarily, although not exclusively, altruistic in substance. To explain, in *De Jure Belli ac Pacis*, Grotius writes: "Natural right is the dictate of right reason, shewing the moral turpitude, or moral necessity, of any act from its agreement or disagreement with a rational nature, and consequently that such an act is either forbidden or commanded by God, the author of nature."[543] To Grotius right reason is equivalent to the command of God. These commands are obligatory because of their moral imperative. Grotius does not question the substance of these laws. He assumes that natural law applies eternally and immutably. Consequently, natural law is equivalent to collective "morality." This implies altruism, a preference for the collective interest. However, natural law also contains elements of individualism as natural law is revealed by God to "man." Collective morality is applied through individual natural rights. This is an individualistic explanation of obedience. Natural law is primarily altruistic but can be seen as a product of both individualistic and altruistic interests.

Classical natural law approaches pose two problems for the doctrine of substance. First, natural law approaches establish a predetermined substance to international law. Second, natural law approaches assert a moral basis to this substance. Eventually natural

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[541] J Shen, "The Basis of International Law: Why Nations Observe" (1999) 17 Dickinson J Int'l L 287 at pp 295-6.
[542] Fathers of the English Dominican Province (tr), T Aquinas, *Summa Theologica* (Part 1, II, Benziger Brothers, New York) at p 94 available online at Project Guttenberg <http://www.gutenberg.org/files/17897/17897.txt> accessed on 6 June 2007.
[543] AC Campbell (tr) H Grotius, *De Jure Belli Ac Pacis* (London, 1815) Ch I, X available online at < http://www.constitution.org/gro/djbp_101.htm> accessed on 9 March 2008.

law's insistence on law's predetermined and moral nature becomes the subject of criticism. The gist of these criticisms is summarized by Kelsen,[544] Who notes that natural law presupposes a value to certain moral goods. Kelsen argues that this is not possible unless one accepts a religious basis to law. This confuses what law is with what it ought to be.[545] Kelsen's criticisms are typical of positivism, a response to natural law approaches. Classical positivists argue that the law is the command of a sovereign. As Austin writes, "[e]very positive law, or every law simply and strictly so called is set by a sovereign person or a sovereign body of persons to a member or members of the independent political society wherein that person or body is sovereign or supreme." [546] The sovereign is the supreme authority in political society. Its law is obeyed out of a fear of sanction not because of a perceived moral obligation to obey.[547] This doctrine is difficult to apply in international law. There is no international sovereign. There is rarely formal sanction for violations of international law. Thus, many classical positivists deny that international law is law "properly so called." [548]

Austinian positivism cannot explain the substance of international law because it cannot explain why states feel bound by international obligations. Consequently, scholars have to adapt "classical positivism" to international law. As a starting point for their analysis positivists assume that states form a community of sovereign equals. Sovereign equals are not bound by the will of another sovereign. States are sovereign within their own domain as states form the legitimate authority in a territory. As legitimate authorities, states have the right to consent to obligations on behalf of their populations. Through this consent international law becomes binding, as it manifests the will of the state. As a result, the substance of international law is not predetermined but it is individualistic.

Bentham is one of the first scholars to carve out a niche for positivism in international law. Koh notes, "By breaking the normative link between the international and domestic legal systems, Bentham helps initiate the era of dualistic theory, in which the bases for compliance in domestic and international law expressly diverged."[549] Bentham writes:

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[544] H Kelsen, "The Natural-Law Doctrine before the Tribunal of Science" (1949) 2 Western Political Quarterly 481; for application to international law specifically see also Shen (n 541) at p 309.
[545] Kelsen, "The Natural-Law Doctrine" (n 544) at pp 483-486.
[546] J Austin, *Province of Jurisprudence Determined* (2nd ed John Murray, London 1861) at Lecture V, 118.
[547] See also Koh, "Obey" (n 535) at pp 2608-9.
[548] Austin (n 546).
[549] Koh, "Obey" (n 535) at p 2608.

> The end of the conduct which a sovereign ought to observe relative to his own subjects, - the end of the internal laws of a society, - ought to be the greatest happiness of the society concerned. This is the end which individuals will unite in approving, if they approve of any. It is the straight line - the shortest line - the most natural of all those by which it is possible for a sovereign to direct his course. The end of the conduct he ought to observe towards other men, what ought it to be, judging by the same principle? Shall it again be said, the greatest happiness of his own subjects? Upon this footing, the welfare, the demands of other men, will be as nothing in his eyes: with regard to them, he will have no other object than that of subjecting them to his wishes by all manner of means.[550]

Bentham argues that the obligation of the sovereign, the ultimate authority, is to act for the greatest good for the greatest number of its subjects. This implies that the sovereign can treat individuals outside its state poorly, provided this aids the welfare of individuals within its state. This leads to conflict between sovereigns. Consequently, Bentham argues that sovereign equals are bound by the common utility of all nations.[551] The common utility means that states obey international law for the greater good of the greatest number of nations.[552] States obey international law because it is in their collective interest to do so. This is an altruistic explanation of obedience.

Importantly, Bentham's approach grants states legal personality. Critics of Bentham argue that granting the state legal personality is problematic. The state's artificial legal status ensures that it can impose obligations on individuals within its state without their consent. To respond to this criticism Hegel and Treipel assert the doctrine of the will of the state. This doctrine views the state as the embodiment of the will of all individuals within the command of the sovereign. As the embodiment of this collective will the state is "sovereign" and "supreme" and needs no sovereign over it.[553] Similarly, Jellinek defines sovereignty as "…the quality of the state by virtue of which it can only be legally bound by its own will."[554] The state's sovereignty comes from its authority to limit itself. However, this limitation is necessary because of the presence of a collective of states. Hegel argues that "the individual belonged to the State because the State

[550] J Bentham, *Principles of International Law* (essay 1, vol 2, Bowring, 1843) available online at <http://www.la.utexas.edu/research/poltheory/bentham/pil/pil.e01.html> accessed on 7 June 2007.
[551] Bentham (n 550).
[552] Koh, "Obey" (n 535) at p 2608.
[553] Shen (n 541) at p 312.
[554] G Jellinek, *Die Lehre Von den Staaatenverbindungen* 34 as quoted in P Stirk "The Westphalian Model, Sovereignty and Law in Fin-de-siècle German International Theory" (2005) 19 International Relations 153 at p 159.

contained the wills of all citizens and these wills were transformed into the higher level of the State."[555] Hegel writes,

> Internal sovereignty is this ideality in so far as the elements of spirit, and of the state as the embodiment of spirit, are unfolded in their necessity, and subsist as organs of the state. But spirit, involving a reference to itself, which is negative and infinitely free, becomes an independent existence, which has incorporated the subsistent differences, and hence is exclusive. So constituted, the state has an individuality, which exists essentially as an individual, and in the sovereign is a real, direct individual.[556]

Other scholars emphasize that will is the primary form for the state to "express" its will.[557] These approaches stress the individual interest of the state to obey the law. As such, classical positivists have radically individualistic visions of the substance of international law.

Additionally, the doctrine of will is self-limiting. For example, Jellinek argues that "[t]he state can release itself of any self-imposed restraint, but only in legal forms and in creating new limitations. The restraint, but not the particular limitation, is permanent." [558] In this view the principle *pacta sunt servanda* is an offshoot of the consent of states to be bound by international law and international law is obeyed because it reflects the individual wills of states. Further, these scholars hold that the natural law principle of *pacta sunt servanda* forms the "basic norm of the whole legal system we call international law."[559] As a result, states are only bound by their consent [560] and states have the ability to consent to treaties or tacitly consent to customary international law. This again indicates a preference for an individualistic doctrine of substance.

Individualistic approaches that rely solely on consent-based explanations of obedience are often criticized. Guzman notes,

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[555] Shen, (n 541) 312.
[556] SW Dyed (tr) GWF Hegel, *The Philosophy of Right* (Batoche, Kitchener 2001) at par 321, available online at <http://socserv.mcmaster.ca/econ/ugcm/3ll3/hegel/right.pdf> accessed on 10 March 2008.
[557] Shen (n 541) at p 314 ff.
[558] Georg Jellinek, Allgemeine Staatslehre 482 (3rd ed.) as quoted in H Wehberg, "Pacta Sunt Servanda" at p 781 online at <http://tldb.uni- koeln.de/php/pub_show_document.php?pubdocid=129500> accessed on 12 March 2008; Wehberg uses this quote in the context of a binding contract; Jellinek in Wehberg (n 510).
[559] Shen (n 541) at p 324.
[560] Shen (n 541) at p 324.

> The consent-based theories are flawed because they confuse a (possibly) necessary condition for states to be bound with a sufficient condition, in other words, the consent based theory only observes that states are not bound to international agreements unless they consent to them. This initial presumption, even if assumed to be correct does not lead to the conclusion that is consent enough to bind a state, consent, by itself does not provide states with an incentive to obey the law.[561]

It seems that positivists cannot escape Bentham's dilemma, as obedience cannot be explained by individualism alone.

Consequently, Bentham's approach provokes several additional responses. One response is the liberal cosmopolitan explanation of obedience. Cosmopolitans believe law is obligating because *ubi societas, ibi jus:* where there is a society, there is law. The relations between states create law. This view is espoused by natural law scholars such as Von Wolff [562] and is famously related to Kant. To Von Wolff international law is voluntary law,[563] whereas Kant espouses a voluntary community of states created by sovereign equals. Kant writes

> Each of them [States], may and should for the sake of its own security demand that the others enter with it into a constitution similar to the civil constitution, for under such a constitution each can be secure in his right. This would be a league of nations, but it would not have to be a state consisting of nations. That would be contradictory, since a state implies the relation of a superior (legislating) to an inferior (obeying), i.e., the people, and many nations in one state would then constitute only one nation. This contradicts the presupposition, for here we have to weigh the rights of nations against each other so far as they are distinct states and not amalgamated into one.[564]

Similarly, Brierly explains the obligatory force of international law in the following cosmopolitan terms: "In international law the cause of obedience is present on the surface. In both the cause is simply the force of opinion, the conviction of the majority of individuals in the state and in the international field, the conviction of all states, that

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[561] AT Guzman "A Compliance-Based Theory of International Law" (2002) 90 Calif L Rev 1823 at p 1834.
[562] Shen (n 541) at p 307-308.
[563] A Verdross & HF Koeck, "Natural Law: The tradition of Universal Reason and Authority" in R St J MacDonald & DM Johnston (eds), *The Structure and Process of International Law: Essays in Legal Philosophy Doctrine and Theory* (Martinus Nijhoff, The Hague 1986) 17 at p 36.
[564] I Kant, *Perpetual Peace: A Philosophical Sketch, 1795* available online at <http://www.mtholyoke.edu/acad/intrel/kant/kant1.htm> accessed on 6 June 2007.

obedience to the law is not a matter for individual choice but is obligatory."[565] In this approach, states must interact. This interaction then impels states to create rules for this interaction, law. This, in turn, requires that states create to a community of law in which the substance of law is determined by states' collective interest in stability. Therefore, interaction of collective interests creates an altruistic community of law, and obedience to law is explained by both individualism and altruism.

In conclusion, "classical" approaches explain obedience in domestic legal systems and so they are applied imperfectly to the international sphere. Further, each approach is best explained by either individualism or altruism, which also explains the unresolved debate over the binding authority of each approach. The classical approaches assert that there is an obligation to obey one's covenants. Positivists draw an analogy between the state and the individual. They favour individualistic explanations of obedience. However, individualism is balanced by a need for cooperation with other states. Hence, individualism is balanced by altruism. On the other hand, in natural law obedience results from moral imperatives. Natural law favours altruism. Lastly, cosmopolitan approaches are explained by both individualistic and altruistic parameters of the substance of international law. Therefore, the classical explanations of obedience reduce the doctrine of substance to explanations of law's obligatory nature; and obedience is justified by either the individual will of the state or the collective morality of states. The ongoing debate between these explanations of obedience establishes the parameters of the doctrine of substance until today. However, the weaknesses in each approach create debate over the explanation of obedience in international law.

3.1.2 "Modern" Approaches to Obligation

Koh observes that in the 20th century the classical approaches are refined into four main explanations of obedience in international law.[566] These approaches are termed here "modern" approaches to obligation. They are defined by their derivation from "classical obligations" and their response to developments in 20th century international relations. To explain further: the first approach is the "realist" approach. Realism argues that international law is not really law because it lacks the ability to command obedience. States obey international law only when the law reflects the state's rational self

[565] JL Brierly, "Sanctions" (1931) 17 Transactions of the Grotius Society 67 at p 68; See generally Shen (n 541).
[566] Koh, "Obey" (n 535) at p 2611.

interest.[567] There is no collective interest in international law. As Morgenthau, a leading realist writes:

> If an event in the physical world contradicts all scientific forecasts, and thus challenges the assumptions on which the forecasts have been based, it is the natural reaction of scientific inquiry to reexamine the foundations of the specific science and attempt to reconcile scientific findings and empirical facts. The social sciences do not react in the same way. They have an inveterate tendency to stick to their assumptions and to suffer constant defeat from experience rather than to change their assumptions in light of contradicting facts. This resistance to change in uppermost in the history of international law. All the schemes and devices by which great humanitarians and shrewd politicians endeavored to reorganize the relations between States on the basis of law have not withstood the trials of history.[568]

The second "modern" approach is an adaptation of Bentham's utilitarian/contractarian approach.[569] Utilitarianism asserts that the rational self interest of states requires rules to guide their relations. According to this approach states obey international law because it is in their interest to create stability and promote cooperation. For an example of this view, Henkin describes international law as "the law of the international political system of States interacting, having relations."[570] The third approach is liberal cosmopolitan in nature, an adaptation of the classical approach seen above. In this approach, states obey international law because it is just to do so. After World War II Kantian cosmopolitanism flourishes because "…democratically organized states do not wage war against one another, and that democracy is spreading throughout the world as the basis of legitimate government."[571] The final "modern" explanation of compliance is the "process school," also seen in chapter 3. The process school asserts that states obey the law because it is a self-justifying process.[572] Lasswell and McDougal explain,

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[567] Koh, "Obey" (n 535) at p 2611.
[568] HJ Morgenthau, "Positivism, Functionalism and International Law" (1940) 34 AJIL 260 at p 260.
[569] Koh, "Obey" (n 535) at p 2611.
[570] L Henkin, *International Law: Politics and Values* (Martinus Nijhoff, Dordrecht 1995) at p 8.
[571] RA Falk, *Human Rights Horizons: Pursuit of Justice in a Globalizing World* (Routledge, New York 2000) at p 18.
[572] Koh, "Obey" (n 535) at p 2611.

> The primary concern of the scholar must be, as we have indicated, for *enlightenment* about the aggregate interrelationships of authoritative decision and other aspects of community process, while the authoritative decision maker and others may be more interested in *power*, in the making of effective choices in conformity with the public order.[573]

As a result, the doctrine of substance is diffuse in the 20th century. However, the main outline of the doctrine of substance remains static, as scholars continue many of the debates that structured "classical" explanations of obedience. Therefore, the core of the doctrine remains the same. The doctrine of substance still explains obedience in terms of either individualism or altruism.

"Modern" approaches reframe the classic question of obedience as a question of compliance. It is beyond the scope of the current discussion to delve into the reasons for this shift. What is known is that in the 20th century scholars explain compliance in two ways. They relate compliance to idealism and realism. The four approaches noted above – Realism, Utilitarianism, Cosmopolitanism and Process Approaches – are fit into this binary conceptual framework. Realism explains compliance as "rule based" and idealism explains compliance as process based. For example, positivism is an example of realism and process based approaches are representative of idealism.[574] The shift in focus from natural law and positivism to idealism and realism mirrors the shift in terminology from obedience to compliance. This shift allows substance doctrine to reach outside itself and begin to incorporate interdisciplinary approaches to compliance. Recent examinations of substance draw heavily on these interdisciplinary approaches to the "compliance problem."

3.1.3 Recent Approaches to Compliance with International Law

Kingsbury asserts that

> the concept of "compliance with law does not have, and cannot have any shared meaning, except as a function of prior theories of nature and

[573] HD Lasswell & MS McDougal *Jurisprudence for a Free Society: Studies in Law, Science and Policy* (vol 1New Haven/Martinus Nijhoff, New Haven and Dordrecht, 1992) at p 18.
[574] B Kingsbury "The Concept of Compliance as a Function of Competing Conceptions of International Law" (1998) 19 Mich J Int'l L 345 at pp 348-9.

> operation of the law to which it pertains." Compliance is, thus, not a freestanding concept, "compliance" must depend on a stipulated or shared theory of law.[575]

Recently, in an attempt to overcome the lack of shared meaning about substance, doctrine has focused heavily on interdisciplinary explanations of compliance.[576] However, this focus on interdisciplinarity does not fundamentally change the debates that shaped the "modern" doctrine. During the cold war, doctrine split into rule-based and process-based approaches to compliance. Recent doctrine further expands these approaches by joining them to interdisciplinary explanations of compliance. These approaches still maintain the rule based/process based distinction. However, as Kingsbury notes, recent explanations of compliance further subdivide the doctrine of substance. Substance further divides into rational actor versus other approaches, and directive versus non-directive approaches.[577] Rational actor approaches explain that states comply with the substance of law because it is economically rational. Contrasting non-rational actor approaches argue that states comply with the substance of law for a variety of reasons. They may comply because the law is law, out of habit, because it enriches their self image or out of a wish to "do good."[578] Substance doctrine then further divides into directive and non-directive approaches. Directive approaches explain that states adhere to law when it is oriented towards a specific goal. Non-directive doctrines argue that states adhere to a law when it is considered just.[579] Combining these approaches creates eight possible explanations of compliance. These approaches structure the range of the recent doctrinal debates over compliance. To be clear, these approaches are based on the combination of the rule-based/process-based explanation of compliance, the rational actor/non-rational actor explanation of compliance and the directive/non-directive explanation of compliance. For example, an approach may provide a rule based, rational actor, directive explanation of compliance. This section identifies the doctrinal school or the individual scholar that most closely approximates each category, and examines how each approach to compliance is explained by the parameters of substance identified in the classic and modern doctrine.

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[575] Kingsbury (n 574) at p 345-6.
[576] See for example Slaughter, "International Law and International Relations" (n 224).
[577] Kingsbury (n 574) at p 349 ff.
[578] Kingsbury (n 574) at p 349.
[579] Kingsbury (n 574) at p 350.

3.1.3.1 Rule Based-Rational Actor-Directive Approaches[580]

This category corresponds with neo-realist explanations of compliance.[581] The most prominent neo-realist is Waltz, who builds on the work of realists such as Morgenthau.[582] As Waltz explains, "[n]eorealism contends that international politics can only be understood if the effects of structure are added to the unit-level explanations of realism."[583] In this view, states are the primary units of international politics. However, the structure of the international system also influences compliance. States form the international system and the system responds to the powers in place at any given time so that the system itself may "constrain" state behaviour.[584] Guzman explains that,

> Neorealist theory, an outgrowth of classical realism, treats states as unitary actors and as the relevant unit in international relations. According to neorealist theory, international cooperation will exist with respect to a particular issue only when it is in the interest of affected states. Neorealists posit that states primarily seek power and security and international relations are driven primarily by power.
> Some scholars conclude that international law has little or no independent impact on the behavior of states. By this view, compliance with international law is explained by coincidence between international law - whose content anyway is said to be controlled by powerful states - and the self-interest of nations. International law is simply an epiphenomenon.[585]

Neo-realists maintain that international law has no obligatory force independent of the interests of powerful states. The substance of international law is derived directly from individual state interests. Consequently, states are rational actors. Further, neorealists believe law is directive as the system reflects the interests of powerful states and these states set the goals for the international system. Therefore, the neorealist approach is an example of a rule-based, rational actor, directive approach. Additionally, the neorealist belief that compliance depends on state interests and power indicates an individualistic explanation of compliance.

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[580] This is a variation on the structure that Kingsbury uses in his article. See generally, Kingsbury (n 574) at p 345.
[581] See Kingsbury (n 574) at p 345.
[582] See generally, KN Waltz, "The Origins of War in Neorealist Theory" (1988) 18 Journal of Interdisciplinary History 615.
[583] Waltz (n 582) at p 617.
[584] Waltz (n 582) at p 618.
[585] Guzman (n 561) at pp 1836-7.

3.1.3.2 Process-Based -Rational Actor-Directive Approaches

Rationalist or institutionalist explanations of compliance "…emphasize the structure of interests, actors, power and incentives at play in particular issue."[586] Keohane, a prominent proponent of this approach, explains that

> [i]t emphasizes international regimes and formal international organization. Since this research program is rooted in exchange theory it assumes scarcity and competition as well as rationality on the part of the actors. It therefore begins from the premise that if there were no potential gains from agreements to be captured in world politics – that is, if no agreements could be mutually beneficial – there would be no need for specific institutions.[587]

For rationalists/institutionalists, institutions factor into the cost benefit analysis that states undertake to determine compliance, [588] so that compliance is likely when states calculate that the costs of participating in an institution are low compared to the benefits of cooperation.[589] Rationalists also believe that states are the primary actors in international law.[590] Guzman explains that,

> …institutionalists believe that international cooperation is possible and that international institutions can play a role in facilitating that cooperation. Specifically, institutionalists argue that institutions can reduce the verification costs in international affairs, reduce the costs of punishing cheaters, and increase the repeated nature of interaction all of which make cooperation more likely.[591]

Guzman notes that game theory helps predict the effect of institutions and rules on state behaviour. As Kingsbury observes,

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[586] K Rustiala "Compliance and Effectiveness in International Regulatory Cooperation" (2000) 32 Case Western Res J Int'l L 387 at p 400.
[587] RO Keohane, "International Institutions: Two Approaches" (1988) 32 International Studies Quarterly 379 at p 386.
[588] Keohane (n 587) at p 386.
[589] Keohane (n 587) at p 387.
[590] Guzman (n 561) at p 1839.
[591] Guzman (n 561) at p 1840.

> [t]he effect of legal rules on behaviour, like the effect of institutions is analyzed in functional terms. Rules and institutions help stabilize expectations, reduce the transaction costs of bargaining, raise the price of defection by lengthening the shadow of the future, increase the available information. Facilitation provides monitoring, settled disputes increased audience costs of commitment, connect perfomance across different issues, increase reputational costs and benefits relating to conformity of behavior with rules.[592]

To rationalists/institutionalists, interests of states structure institutions and institutions in turn affect state interests through repeated interaction among states. This interaction is modelled by game theory, so that over time the institutions become an independent reason for compliance with the substance of law. Consequently, rationalist/institutionalist approaches explain compliance as a structured process of authoritative decision making. Through this process rational actors make decisions towards collective goals. Institutionalist explanations of compliance are an example of process based, rational actor, directive explanations of compliance. Institutionalist approaches use individualistic rationales to explain cooperation by states. Institutionalists also believe that state interests necessitate cooperation. This cooperation leads states to create institutions in order to structure their interactions. These institutions in turn motivate state compliance. Institutionalists favour an individualistic doctrine of substance. However, the continued interaction between states leads to the creation of collective interests. According this approach compliance results from both individualism and altruism; individualistic interests explain why altruism occurs.

3.1.3.3 Rule-Based-Rational Actor-Non-Directive Approaches

Charney provides a universalistic explanation of compliance and universalistic approaches exemplify the rule based, rational actor, and non directive arguments. To explain, Charney asserts that "…there exists an international legal system with standards and procedures for making, applying and enforcing international law."[593] However, "[a]s a jurisprudential matter the source of the obligation to abide by international law is a source of debate."[594] The substance of international law is rule based and presumably non-directive. There is no predetermined goal for states in

[592] Kingsbury (n 574) at pp 351-2.
[593] Charney, "Universal International Law" (n 208) at p 532.
[594] Charney, "Universal International Law" (n 208) at p 532.

complying with international law, so the substance of law is a variable factor in compliance. This variability is rational. Charney explains,

> The international legal system is supported not only by state's interests in promoting individual rules, but also by their interests in preserving and promoting the system as a whole. Thus, states collectively and severally maintain an interest in encouraging law-abiding behavior. There is also an effective decentralized system for imposing sanctions of violators of the law through individual state and collective acts of disapproval, denial and penalties. Fear of sanctions, the desired to be viewed by others as law-abiding and domestic institutional inclinations to conform to rules denominated by law further impel states to comply with international law.[595]

For Charney the international system is universal and rule based, and states comply with the substance of law for rational reasons. However, there is no pre-set substance to international law because international law is not directive.

To Charney, international law is becoming a universal law that promotes collective over individual interests. However, Charney's universalism is grounded in a rule based and rational actor explanation of compliance. Initially compliance is compelled through sanction, and sanctions are individualistic in nature. Although, states then begin to comply with the substance of law out of a sense of collective interest. Accordingly, Charney argues that the doctrine of substance is transcending the interests of individual states. As a result, he uses individualistic explanations to argue that law is moving towards an altruistic universal approach to compliance.

3.1.3.4 Process Based-Rational Actor-Non-Directive Approaches

Liberal approaches are rationalist,[596] and there is substantial accord between liberal scholars such as Slaughter and institutionalists such as Keohane. In fact the two often collaborate.[597] However, liberal approaches take institutionalist insights in new directions. Guzman explains that "[l]iberal theory begins with the assumption that the

[595] Charney, "Universal International Law" (n 208) at p 532.
[596] Kingsbury (n 574) at p 356.
[597] See for example, RO Keohane, A Moravcsik, A-M Slaughter, "Legalized Dispute Resolution: Interstate and Transnational" (2000) 54 IO 457.

key actors in international relations are individuals and groups. The theory is interested in the particulars of domestic politics in addition to the interaction of states. "[598] For liberals, states are both individual and complex non-unitary actors. This contrasts with the unitary vision of states in rationalist and realist approaches presented above. It also means that the domestic politics and the institutions of states help determine why states comply with the substance of law. Slaughter explains that "[f]rom a liberal perspective state behaviour is best analyzed as a function of domestic and international behaviour patterns for which liberal and non liberal states serve as an excellent proxy."[599] A state's international behaviour is a result of its domestic political structure. Therefore, liberalism is the theoretical equivalent of the saying "all politics is local." As Rustiala notes, "…indeed strategic interaction is a key component. However, the locus of attention is on domestic actors, the institutions that aggregate and shape the interests of such actors, and the variation among states in these internal attributes."[600] States comply with international law because of their unique internal attributes. These unique attributes include distinct institutions and histories.

Liberal approaches view states as rational actors, and assume that state behaviour is goal directed.[601] This makes state behaviour predictable through game theory interaction. However, each state is also an individual with interests that cannot be generalized to the legal system as a whole. Further, states' unique interests are determined by their own internal dynamics and institutions. Liberal approaches promote process based arguments as state interests are derived from the process of internal politics. Liberal approaches also view states as rational actors working towards individual interests, but these approaches do not assume collective goals for the legal system. Consequently, liberal approaches are not goal directed, since states have individual interests and compliance is based on the individual needs of states. However, liberal approaches do argue that international cooperation and compliance are possible. Thus, there is an altruistic element to the overwhelmingly individualistic liberal explanation of compliance.

[598] Guzman (n 561) at p 1839.
[599] Slaughter, "International Law and International Relations" (n 224) at p 236.
[600] Rustiala (n 586) at p 429.
[601] Guzman (n 561) at p 1840.

3.1.3.5 Rule-Based - Other than Rational Actor-Directive Approaches

Franck argues that just law is premised on fairness and he defines fairness as the law's legitimacy, its "right process," and its distributive justice. Therefore, fairness is the substantive element of the law[602] and legitimacy is the key to understanding when and how nations comply with law.[603] Specifically, he argues that rules exert a "pull" to compliance when they are formulated according to legitimate processes. Franck expands on this point:[604]

> [t]his essay posits that, in a community organized around rules, compliance is secured - to whatever degree it is - at least in part by perception of the rule of legitimate by those to whom it is addressed. Their perception of legitimacy will vary in degree from rule to rule and time to time.[605]

Franck's explanation of compliance relies on two interlinked premises. Compliance rests on the quality of the rules of international law, whether substantive or procedural, and the on the existence of an international community. As Franck explains "[a] teleology that makes legitimacy its hypothetical center envisages - for purposes of speculative inquiry - the possibility of an orderly community functioning by consent and validated obligation, rather than coercion."[606]

Franck hypothesizes that within this community rules are given legitimacy when they exhibit four "elements". He calls these elements "the indicators of rule legitimacy."[607] These elements are determinacy, symbolic validation, coherence and adherence. Franck defines determinacy as "the ability of the text to convey a clear message, to appear transparent in the sense that one can see through the language to the meaning."[608] Franck defines symbolic validation "as a cue to elicit compliance with a command. This cue serves as a surrogate reason for such obedience."[609] Coherence is equated with the consistent application of rules, and if consistency is not possible, then differences in application should be based on "general principles that connect with an

[602] See TM Franck *Fairness in International Law and Institutions* (Clarendon Oxford, 1995) at p 7.
[603] TM Franck "Legitimacy in the International System" (1988) 82 AJIL 705 at pp 705-6.
[604] Franck, "Legitimacy" (n 603) at pp 705-706.
[605] Franck, "Legitimacy" (n 603) at p 705.
[606] Franck, "Legitimacy" (n 603) at p 710.
[607] Franck, "Legitimacy" (n 603) at p 712.
[608] Franck, "Legitimacy" (n 603) at p 713.
[609] Franck, "Legitimacy" (n 603) at p 725.

ascertainable purpose of the rules and with similar distinctions made throughout the rule system."[610] Adherence refers to the pull to a normative hierarchy; it requires a rule community that is "…a community of principle", whose purpose is to

> …validate behavior in accordance with rules that confirm principles' coherence and adherence rather than acknowledging only the rule of power. A rule community operates in conformity not only with primary rules but also with secondary ones - which are generated by valid legislative and adjudicative institutions. Finally a community accepts its ultimately secondary rules of recognition not consensually, but as an inherent concomitant of membership status.[611]

Rustiala and Slaughter clarify, "[w]hat distinguishes the legitimacy theory of compliance is its focus on rule-making processes and the quality of rules themselves rather than on rational strategic action."[612]

Particularly, Franck's explanation of law as fairness is directed towards achieving just law. He writes,

> [t]hus the perception that a rule or a system of rules is distributively fair, like the perception of its legitimacy, however, distributive justice is rooted in the moral values in which the system operates. The law promotes distributive justice not merely to secure greater compliance, but primarily because most people think it is *right* to act justly.[613]

Franck contends that compliance can be promoted by legitimate process but it is primarily promoted by the substantive "justness," distributive justice of the law in question.

Therefore, Franck's explanation of compliance is premised on the quality of substantive rules of law. This quality separates rule of law from non-legal rules. Compliance is promoted by rules that are procedurally legitimate and rules that foster distributive justice. States are not merely rational actors but moral actors capable of

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[610] Franck, "Legitimacy" (n 603) at pp 750-1.
[611] Franck, "Legitimacy" (n 603) at p 759.
[612] K Rustiala & AM Slaughter, "International Law, International Relations and Compliance" in W Carlsnaes, T Risse & B Simmons (eds) Handbook *of International Relations* (Sage, Thousand Oaks 2002) at pp 438, 541.
[613] Franck, Fairness (n 602) at p 8.

fairness. Lastly, compliance and law are directed towards the achievement of fairness, not only because this aids compliance, but because an international community ought to pursue this goal. Consequently, Franck's approach is rule based, other than rational actor, and non-directive. Further, his approach blurs arguments for substance and process as Franck asserts both the existence of collective interests within the international sphere and that process produces a just substance to international law. As such, his approach is rooted primarily in altruistic beliefs about compliance. Additionally, Franck promotes the belief that states comply with international law when the rules that form that system are legitimate and just. From this basis Franck builds on Kantian cosmopolitan explanations of compliance with international law and he asserts that international law is primarily altruistic.

3.1.3.6 Process Based - Other than Rational Actor-Directive Approaches

Chayes and Chayes create a "managerial" model of compliance. They reject the realist contention that states comply only with international law that is in their interest. Rustiala and Slaughter note,

> Managerialism begins with the premise that states have a propensity to comply with international commitments. This propensity stems from three factors, first because international legal rules are largely endogenous, an assumption of rational behavior predicts that states share an interest in compliance with rules. Second, compliance is efficient from an internal decisional perspective. Once a complex bureaucracy is directed to complex explicit calculations of costs and benefits for every decision is itself costly. The agreement may also create a domestic bureaucracy with a vested interest in compliance. Third, extant norms induce a sense of obligation in states to comply with legal undertakings.[614]

For Chayes and Chayes compliance is premised on rational and non-rational interests. Compliance is fostered by the existence of the regime, rational behaviour and the power of the norm itself. Koh explains that Chayes and Chayes

[614] Rustiala & Slaughter (n 612) at pp 542-3.

> …offer a "management" model, whereby national actors seek to promote compliance not through coercion, but rather through a cooperative model of compliance, which seeks to induce compliance through interactive processes of justification, discourse and persuasion. Sovereignty, they, contend, no longer means freedom from external interference, but freedom to engage in international relations as members of international regimes.[615]

Chayes and Chayes further explain that "[t]he central proposition is that the interpretation, elaboration, application, and ultimately enforcement of international rules is accomplished through a process of (mostly verbal) interchange among the interested parties."[616] Therefore, Chayes and Chayes believe it is the process of international relations that structures the international interaction of states. Process structures these interactions through the creation of international regimes. Regimes in turn affect compliance.

Chayes and Chayes also assert that compliance is related to a second goal of adherence, fairness. Chayes and Chayes explain,

> In the context of norms, this element is even more central because the claim of the norm to obedience is based in significant part on its legitimacy. The notion of legitimacy or a norm (or norm system or regime) invokes characteristics broadly related to "fairness" that enhance prospects for compliance.[617]

Consequently, for Chayes and Chayes, substantive norms have to be directed towards fairness in order to assure compliance.

Thus, Chayes and Chayes' explanation of compliance represents a "process based" approach. Interaction between states creates regimes. Regimes are sustained by the interests of states and considerations of fairness. Interests and fairness promote compliance with the regime. As a result, this approach is process based but does not assert that states are rational actors. Finally, the managerial approach is directive since compliance rests, in part, on the directive goal of fairness.

Overall Chayes and Chayes represent an amalgam of approaches to compliance. For example, in their work states are individual actors with interests. These interests

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[615] Koh, "Obey" (n 535) at p 2636.
[616] A Chayes & A Handler Chayes *The New Sovereignty: Compliance with International Agreements* (Harvard Cambridge, 1995) at p 118.
[617] Chayes & Chayes (n 616) at p 127.

help shape the legal system through the ongoing process of norm and regime creation. Further, when a regime is created, the pull of that regime and individual interests promote compliance. Thus, managerialism believes the substance of law is both individualistic and altruistic. Interests provide the impetus to enter into a regime. This is individualistic. However, the substance of law is also altruistic, because once a regime is created collective interests in compliance prevail over individual interests.

3.1.3.7 Rule Based - Other than Rational Actor - Non-Directive Approaches

Koh argues that compliance is a process of norm internalization which is secured through the transnational process. As he explains the transnational process

> …can be viewed as having three phases. One or more transnational actors provokes an interaction (or a series of interactions) with another which forces an interpretation or enunciation of a global norm applicable to the situation. By so doing, the moving party seeks not to coerce the other party, but internalize the new interpretation of the international norm into the other party's internal normative system. The new aim is to "bind" that other party to obey the interpretation as part of its internal value set. Such a transnational legal process is normative, dynamic and constitutive. The transaction generates a legal rule which will guide future transnational interaction between the parties; future transactions will further internalize these norms; and, eventually, will help reconstitute the interests and even identities of the participants in the process.[618]

It first appears that Koh takes a process based approach to compliance as he argues that compliance is secured through the interaction of states. However, Koh also argues that legal norms have a uniquely legal nature. Koh explains of his approach,

> …as we move down the scale from coincidence to conformity to compliance to obedience, three shifts occur. First, there is the shift from the external to the internal, we witness an increase in the degree of norm internalization, or the actor's internal acceptance of the rule as a guide for behavior…A second shift is from the instrumental to the normative. As we move down the scale from coincidence to obedience, we see an increase in

[618] Koh, "Obey" (n 535) at p 2646.

> normatively driven conduct… a third shift is from the coercive to the constitutive.[619]

Compliance, obedience with law, results from the transnational process. It is premised on the quality of the law and it occurs when a law is internalized. This implies that a law is more likely to be internalized when it is of high quality. The quality of the law is what ultimately ensures a state's compliance.

Additionally, legal internalization is only one type of internalization. Koh asserts that there are three types of internalization, social, political and legal. To Koh, "[s]ocial internalization occurs when a norm acquires so much public legitimacy that there is widespread adherence to it."[620] Conversely, "[p]olitical internalization occurs when political elites accept an international norm and advocate its adoption as a matter of government policy."[621] Finally, "[l]egal internalization occurs when an international norm is incorporated into the domestic legal system and becomes domestic law through executive action, legislative action, judicial interpretation or some combination of the three."[622] The three types of internalization interact among themselves. In addition, Koh asserts that the domestic structure within a state is not unitary; it can change over time in response to internalization.[623] Consequently, states are not rational actors as they do not have fixed responses to problems. Their behavior is swayed by the quality of the norm itself.

Koh also believes that international law does not have predetermined goals as he argues that only the perception of fairness makes a state more likely to obey a given norm.[624] However, he does feel that the goals of the system are influenced by the specific norm and the process of norm creation.[625] As such, fairness is one possible explanation of obedience to law. Compliance may also result from "coercion, self-interest, rule-legitimacy, communitarianism, and internalization of rules through

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[619] HH Koh "The 1998 Frankel Lecture: Bringing International Law Home" (1998) 35 Hous L Rev 623 at pp 627-8.
[620] Koh, "Frankel Lecture" (n 619) at p 641.
[621] Koh, "Frankel Lecture" (n 619) at p 641.
[622] Koh, "Frankel Lecture" (n 619) at p 641.
[623] Koh, "Frankel Lecture" (n 619) at p 675.
[624] Koh, "Obey" (n 535) at p 2645.
[625] Koh identifies six "key agents" who influence the transnational process; "transnational norm entrepreneurs", "governmental norm sponsors", "transnational issue networks", "interpretive communities and law declaring fora", "bureaucratic compliance procedures" and "issue linkages." Koh, "Frankel Lecture" (n 619) at p 645; The norm is not predetermined by the goals of the system. It is determined by the goals of unitary actors who themselves have different goals.

socialization, political action, and legal process."[626] States comply with a norm for any of these reasons and Koh continues to assert that states internalize norms for moral, normative and legal reasons.[627]

Koh's approach to compliance is ultimately rule based, as compliance is predicated on the quality of the rule. As a result, Koh is ambivalent about whether legal norms are substantively different from non-legal norms, since compliance occurs through the interaction of social, legal and political processes. For Koh, laws are obeyed because of their perceived fairness. Consequently, one way to assess the fairness of a law is through compliance and compliance is judged by the level of internalization of the norm in domestic legal systems. In sum: Koh's approach to compliance is ultimately rule-based, not process-based. However, he incorporates process-based ideas into his explanations. Further, Koh does not believe states are unitary rational actors, as he believes compliance is a result of the transnational process, which privileges rules and shapes a state's perception of a rule's fairness. Moreover, there is no goal for the transnational process, as it is the process of norm creation that sets the ever changing goals of the system. Therefore, Koh's explanation of compliance is non-directive.

Additionally, Koh's approach promotes both altruistic and individualistic ideals. A state complies with a norm out of fear or self-interest, particularly at the early stages of the transnational process. However, over time adherence to the transnational process is enhanced by the "fairness" of the rule. This approach promotes individualism through its commitment to state interaction into the transnational process. It is the altruistic "fairness" of a rule that ultimately secures compliance with the norm. Koh incorporates individualism but his approach is ultimately premised on altruism. Compliance is best secured when a rule is fair.

3.1.3.8 Process Based - Other than Rational Actor - Non-Directive Approaches

Constructivism is a normative, process based, approach to compliance.[628] For constructivists the process of interaction among states secures compliance. This process of interaction creates the norm. Toope and Brunnée are prominent proponents of constructivism. They explain,

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[626] Koh, "Frankel Lecture" (n 619) at p 633.
[627] See generally Koh, "Obey" (n 535) at p 2659.
[628] SR Ratner "Does International Law Matter in Preventing Ethnic Conflict?" (2000) 32 NYU JILP 591 at p 650.

> The essential constructivist commitments are to the priority of identity over interest, to the relevance of nonmaterial explanations of actor behavior, to the possibility of "collective intentions" or shared understandings, and to the mutual construction of agent and structure. None of these commitments reveal any intrinsically idealist bias.[629]

Consequently, international relations are premised on the "social construction of identities and meanings and actors in the international system."[630] This means that norms structure and constitute the meanings and identities of states[631] through the interaction among states. This interactive process creates meaning, so constructivism is a process-based approach.

According to constructivist approaches, states comply with international law because it is part of their identity and their way of conveying inter-subjective meaning, but states are not always rational actors. Accordingly, compliance rests on identity as much as interest, since law is both regulative and constitutive.[632] As a result, of the stress on identity, constructivists have a difficult time establishing an independent basis for compliance. States respond to interests as part of the constitution of their identity. Further, interests are defined broadly so that constructivist approaches are non-directive. The substance of law is not predetermined or directive. Therefore, constructivist approaches are process based, non rational actor and non-directive.

Further, constructivism views the substance of international law as primarily, although not exclusively, altruistic as in this approach altruism is premised on the way states comply with law. Constructivists assert that states internalize and comply with law As a result, of their individual characteristics and interests. This approach's conceptualization of compliance as a result of individual interests illustrates that constructivism incorporates both individualism and altruism.

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[629] J Brunnée & SJ Toope, "International Law and Constructivism: Elements of an Interactional Theory of International Law" (2000) 39 Colum J of Tran'l L 19 at p 32.
[630] Kingsbury (n 574) at p 358.
[631] Kingsbury (n 574) at p 358.
[632] Kingsbury (n 574) at p 358.

3.1.3.9 Analysis

The eight approaches to compliance lead to several conclusions. First, approaches that believe that states can cooperate are more likely to pursue altruism. In this sense altruistic approaches can be contrasted with rational actor approaches which favour individualism. Second, competing approaches to compliance all debate the appropriate substance for international law. The above survey indicates that recent approaches do not agree on whether individualism or altruism determines the substance of law. It also indicates that it does not matter whether an approach is incorporated from other disciplines or is indigenous to international law as all the approaches examined debate whether the substance of a text should reflect individualism and altruism. Consequently, recent approaches to compliance fit within the doctrine of substance. This doctrinal continuity links these approaches to the modern and classical approaches in terms of responding to the "compliance paradox". Importantly, recent approaches continue to explain compliance as a function of either state interest or collective interests. The continued doctrinal reliance on individualism and altruism ensures that individualism and altruism remain central to the debate over the substance of international law. The importance of this conclusion to the doctrine is most easily examined in state practice. Consequently, in the next section of this chapter UNCLOS will provide an example of the debates over the doctrine of substances in state practice.

3.2 United Nations Convention on the Law of the Sea (UNCLOS) and the Substance of International Law

UNCLOS[633] is an example of the substantive debate outlined above,[634] as individualism and altruism provide a common theme to the literature on the Convention.[635] These opposed explanations of substance are apparent in the areas the Convention actively regulates. Specific examples of individualism and altruism in the substance of UNCLOS are the territorial sea, the contiguous zone, the exclusive economic zone, the continental

[633] *United Nations Convention of the Law of the Sea* (1982) 1833 UNTS 396, at Art 2(1) available online at < http://157.150.195.4.proxy.library.carleton.ca/LibertyIMS::/sidagKE3p3g3NV50N6f/Cmd%3D%24%24FF7E2DgVX-2nT7%3BSxgQ3O%3D%23Nk%3B-zL%3D6rjSI%3BGP5h%3D1%3BpZ7Q1%3DSV%25%3B%3B%3Bstyle%3DXmlPageViewer.xsl>.
[634] Koskenniemi, Apology (n 81) at p 488.
[635] Koskenniemi, Apology (n 81) at p 489 n 48.

shelf and the seabed.[636] Each of these concepts is examined in further detail in order to demonstrate the role of individualism and altruism in each. This demonstrates the concrete nature of the debate that shapes the doctrine of substance.

UNCLOS promotes the concept of the territorial sea. The territorial sea is the product of debates about the nature of the sea. These debates began in the seventeenth century [637] in the attempt to understand the "anomalous" character of the sea; the sea was neither the territory of a state nor entirely free to all states.[638] As Article 2 (1) of UNCLOS states, "[t]he sovereignty of the coastal state extends beyond its land territory and internal waters and, in the case of an archipelagic state, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea."[639] This provision extends state sovereignty to that part of the sea, set at 12 nautical miles,[640] designated as the territorial sea. This is a property based concept which establishes that the sea can be divided into or become part of the territory of the state. It also confirms that states can exercise sovereignty over parts of the sea and promotes the idea that individual rights of states must be respected. As such, the principle implies that states can exercise their individual interests in this territory and it represents an individualistic approach to the law of the sea. However, this "territorial right" is limited. For example, Article 2 cannot conflict with UNCLOS or the "rules" of international law,[641] and as a result the individualism inherent in the territorial sea is not absolute, it is limited by the needs of the international community and by UNCLOS itself. Thus, the individualism of the territorial sea is moderated by the altruistic goal of regulating the sea.

The goal of altruism is also found in several other Articles that limit the territorial sea. Article 15 deals with the determination of the territorial seas between states with

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[636] These are some of the concepts identified by Allott. As he notes

> [s]ince the conclusion of the 1982 Convention – whatever view one may take of its effect on customary law in the period before its entry into force as a treaty – there is generally thought to be a much more complex legal interface of land and sea, with many areas of mediation between all-power and all-freedom: territorial sea, contiguous zone, international strait, archipelagic sea, exclusive economic zone, fisheries zone, continental shelf, safety zone, deep seabed and ocean floor, superajacent high seas.

P Allott, Allott, P. "Mare Nostrum: A New International Law of the Sea" (1992) 86 AJIL 764 at p 767; Allott notes the broad goal of the convention is to integrate economics, environment, pollution and research. In addition Allot notes the "links" between the territorial sea the EEZ and straits, between the EEZ and the High Seas and delimitation Articles and the dispute resolution Articles, and between the continental shelf and deep seabed, among others; P Allott, "Power Sharing in the Law of the Sea" (1983) 77 AJIL1 at 12; It is outside the scope of this section to address all these areas in detail. However, several of the main concepts are discussed. Moreover, Allott's division of the seas into traditional all-power and all-freedom broadly correspond to the doctrinal framework of individualism and altruism.

[637] Allott, "Mare Nostrum" (n 636) at p 767.

[638] Allott, "Mare Nostrum" (n 636) at p 767.

[639] UNCLOS (n 633).

[640] UNCLOS (n 633) at Art 3.

[641] UNCLOS (n 633) at Art 2.

adjacent or opposite coasts. In these cases the states' respective territorial seas overlap.[642] Additionally, Articles 17-26 concern the right to innocent passage. Innocent passage is passage through territorial sea of the state which "is not prejudicial to the peace, order or security of the coastal State…"[643] Therefore, the territorial sea is limited by communal rights of passage as these communal rights result from a collective interest in balancing the rights of different states. Consequently, altruism limits individualism in regard of the territorial sea.

Similarly, the Articles establishing the contiguous zone promote a proprietary approach to the sea. The contiguous zone is a zone adjacent to the territorial sea of 12 miles. In this area a state can enforce its laws.[644] However, the contiguous zone is justified by the need to restrict activity in the sea for the common good. For example, the state may regulate the zone for environmental or conservation reasons. Further, the right to regulate the contiguous zone is circumscribed by other provisions of UNCLOS.[645] Consequently, individualism and altruism both function as explanations of the contiguous zone.

On the other hand, the EEZ is an innovation of UNCLOS. It gives states the exclusive right to "exploring and exploiting, conserving and managing the natural resources whether living or non-living, of the waters superadjacent to the seabed and its subsoil, and with regard to other activities of economic exploitation and exploration of the zone…" of an additional territory of up to 200 nautical miles.[646] Therefore, the EEZ is also an example of the property-based model. It is individualistic in substance. Moreover, the EEZ and the high seas are entwined. This linking illustrates the relationship between individualism and altruism in the law of the sea. As Allott notes,

> …it is not at first sight clear whether the EEZ is essentially the high seas with a special EEZ regime superimposed upon it (the "high seas minus" view) or whether the EEZ is a new sui generis zone of the coastal state in which the high seas freedoms are the equivalent of the right of innocent passage (the "EEZ minus" view). [647]

[642] UNCLOS (n 633) at Art 15.
[643] UNCLOS (n 633) at Art 17; See also Allott, "Power Sharing" (n 636) at p 13.
[644] UNCLOS (n 633) at Art 33.
[645] This is true regardless of whether the State is acting for individualistic or altruistic reasons. See for example the *M/V Saiga Case* (*St. Vincent and Grenadines v. Guinea*) (Judgment) (1997) ITLOS Case No 1.
[646] UNCLOS (n 633) at Art 56-57.
[647] Allott, "Power Sharing" (n 636) at p 15.

Allott asserts that the EEZ is neither territory nor the high seas. He argues that it is an example of shared sovereignty manifesting both individualism and altruism.[648] This demonstrates that characterization of the EEZ as individualistic or altruistic is debated in the doctrine.[649]

Alternatively, Article 76(1) of UNCLOS states

> The continental shelf of a coastal State comprises the seabed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.[650]

Therefore, the concept of the continental shelf protects state sovereignty,[651] and it promotes the goal of individualism. However, these parameters are further troubled by the relationship between the continental shelf and the EEZ, and the relationship between the EEZ and the high seas.[652] To explain, the EEZ is not clearly territory of the state. Presumably this is not an issue so long as the continental shelf and the EEZ overlap as this overlap provides territorial status to the EEZ. Further complicating matters though is the fact that these regimes are all limited by a non-exhaustive protection of freedom of the seas in Article 87.[653] On top of this, determining the boundary of the continental shelf is problematic[654] because the outer limit of the continental shelf marks the beginning of the deep seabed. The overlap between the two zones creates an area of shared sovereignty.[655] It also creates an opposition between the individualism of the shelf and collective interests inherent in the concept of the deep seabed. The deep seabed is primarily governed by the principle of common heritage of "mankind"

[648] Allott, "Power Sharing" (n 636) at p 15.
[649] N Klein, *Dispute Settlement in the UN Convention on the Law of the Sea* (CUP, Cambridge 2005) at p 132.
[650] UNCLOS (n 633) at Art 76(1).
[651] Allott, "Power Sharing" (n 636) at p 14.
[652] Allott, "Power Sharing" (n 636) at pp 14-15.
[653] UNCLOS (n 633) Art 87; Allott, "Power Sharing" (n 636) at p 15
[654] Allott notes four possible calculations; Allott, "Power Sharing" (n 636) at p 18.
[655] Allott, "Power Sharing" (n 636).

embedded in UNCLOS.[656] As Cassese notes that these layers of sovereignty create a paradox.

> It is indeed striking that at the very time developing countries appropriated the exclusive economic zone, they also declared that the ocean beyond that zone was part of the common heritage of mankind. It has been objected that the former area might also have been declared part of the same heritage. But national self-interest prevailed, no doubt because in the exclusive economic zone coastal States, even the poor ones, were able to exploit their own resources directly. In the area beyond the zone the 'have nots,' being totally unable to engage in highly technical forms of exploration and exploitation, urged that the States able to do so should act in the interests of everyone.[657]

Consequently, these examples all illustrate that UNCLOS' "*Gestalt* seems to be much more that of a public law system than that of a contractual arrangement."[658] This implies that UNCLOS uses traditional notions of sovereignty to create a constitutional regime of the seas. As a result, UNCLOS promotes altruism through individualism and it protects individualism through altruism. It reflects both collective and individual interests. Therefore, UNCLOS is an example of the ways individualism and altruism function as parameters of the doctrine of substance.

3.3 The Substance of International Law and Individualism and Altruism

Classical, modern and recent doctrines of substance all debate whether a legal text should promote individualism or altruism. Kennedy pays particular attention to the structure of this debate and so his interpretation is highly relevant here. He begins his analysis by explaining the uniqueness of the doctrine of substance in international law:

> Substantive discourse about public international law seems different from the international regime of process because it self-consciously and directly addresses issues of sovereign conflict and co-operation, elaborating a social order which responds to both sovereign autonomy and sovereign equality - balancing or managing national particularism and community sharing. However these two dimensions of the substantive problem is

[656] UNCLOS (n 633) at Art 136; A Cassese, *International Law in a Divided World* (Clarendon, Oxford 1986) at p 378.
[657] Cassese, Divided (n 656) at p 392.
[658] Allott, "Mare Nostrum" (n 636) at p 785.

> labelled, the aspiration of substance is to resolve their differences. On the one hand, a fully integrated international order seems impossible, naïve, utopian, or quaint. Likewise, an order which is responsive only to state interests seems dangerously anarchistic. On the other hand an international order which is centralized seems likely to be inefficient and dangerous while a fully decentralized regime of sovereign autonomy seems a threat to national interests in order and mutual respect. Like the demands for a process which both open and closed, these narrative constraints of the good form a contradictory set of interests which can be projected onto sovereigns and into communities and from which substance doctrine must struggle to elaborate a normative order.[659]

Therefore, the doctrine of substance explains that a text is considered legal when it reflects either individual state interests or establishes a strong international order. For Kennedy, the doctrine's role is to mediate debates over the relationship between law and its "other" which he interprets as extreme individualism, anarchy.[660] Moreover, Kennedy links these functions of substance with the structure of law,[661] when he writes,

> Robert Keohane's recent book *After Hegemony* illustrates this hyperbolic practice. Keohane considers "co-operation" within international "regimes" - which he thinks of as simultaneously political, sociological, administrative and psychological structures. "Co-operation," he insists, "should not be viewed as the absence of conflict, but rather as a reaction to conflict or potential conflict. Without the *specter of conflict* there is no need to co-operate." This analysis suggests that we trace this "specter" in the institutional practice and doctrinal life of international law *as* a specter.[662]

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[659] Kennedy, International Legal Structures (n 83) at p 196-7.

[660] Kennedy examines this relationship through several examples. One of these examples is the relationship between law and war. Kennedy writes,

> [s]een this way, the terms which international legal theorists use to assess the struggle between law and its other sustain their difference from one another by operating against a more hyperbolic extension or projection of themselves. Law seems to struggle against war because operates *both* within the legal order *and* as an image of an absent, perhaps successfully excluded violence, in the same way that peace operated *both* as the terrain for law's struggle with war *and* as the image of durable 'peace' which might exclude violence.

Kennedy, International Legal Structures (n 83) at p 286; Here, however, this same point is illustrated through an examination of the arguments surrounding the binding nature of international law, which illustrates the same patterns of argumentation.

[661] Kennedy, International Legal Structures (n 83) at p 286.

[662] Kennedy, International Legal Structures (n 83) at p 286.

Consequently, Kennedy examines the relationship between cooperation and conflict and concludes that the doctrine of substance mediates debates over the need to cooperate for individualistic or altruistic reasons.[663]

In conclusion, the doctrine of substance establishes the conditions in which a text is considered legal; that is, the situations in which a substantive obligation contained in a legal text is considered obligatory. As established above, a legal text is considered obligatory when it reflects either individual state interests or collective interests of states. This is reiterated when Koskenniemi notes that international law "describes social life amongst states alternatively in terms of community and autonomy."[664] Koskenniemi's "community" reflects altruism and "autonomy" reflects individualism. Importantly, autonomy is the main requirement of substance of unilateral acts; it reflects individualism. Therefore, autonomy and its relationship to individualism will be the subject of the next part of this chapter.

4. Unilateral Acts and the Substance of International Law

Substance is defined as the subject matter of a text. As such, the doctrine of substance establishes the circumstances in which a text is considered legal. Applied to unilateral acts, a text is considered legal when it meets the requirement of autonomy and autonomy calls for an act to produce an obligation without any *quid pro quo* or response on the part of another state. However, autonomy as a requirement of a unilateral act is introduced only in the *Nuclear Tests cases;* [665] prior to this ICJ decision there is no consensus that a unilateral act creates an autonomous legal obligation.[666] This evident in the earlier case law which does not consider this issue directly; for example, in the *Eastern Greenland case* the issue is Denmark's response to the statement of the

[663] See generally, Kennedy, International Legal Structures (n 83) at p 196-7.
[664] Koskenniemi, Apology (n 81) at p 477.
[665] Nuclear Tests (n 55) at par 43.
[666] See Rubin, "International Effects" (n 128) 1 at p 3-7; Further, Garner, in his 1933 article on the unilateral declarations, discusses the leading precursor to the *Nuclear Tests cases*, the *Eastern Greenland case*. In his analysis he appears to treat unilateral declarations as a form of oral agreement; See generally, Garner, (n 119); See also Verzijil; Verzijil offers case law examples of unilateral declarations held to binding, however in his analysis these acts are all contextualized, and are not autonomous acts; also JHW Verzijl, *International Law in Historical Perspective* (Part VI AW Sijthoff Leiden, 1973) at pp 107-9.

Norwegian Foreign Minister. This response takes place in the context of ongoing negotiations[667] and the PCIJ does not consider the autonomous nature of the act. Thus, it is important that in the *Nuclear Tests cases* the ICJ states that,

> An undertaking of this kind [a unilateral declaration], if given publicly, and with an intent to be bound, even though not made in the context of international negotiations, is binding. In these circumstances, nothing in the nature of a *quid pro quo* nor any subsequent acceptance of the declaration, nor even any reply or reaction from other States, is required for the declaration to take effect, since such a requirement would be inconsistent with the strictly unilateral nature of the juridical act by which the pronouncement by the State was made.[668]

As such, the *Nuclear Tests cases* establish autonomy as the way unilateral acts create a legal obligation.

Autonomy defines the substance of unilateral acts by determining the conditions in which a text of a unilateral act is considered legal. In this regard, autonomy is important because the substance of unilateral acts is not predetermined; as a result, autonomy acts to establish legality by excluding any rituals or response by other states for a unilateral obligation to take effect. Thirlway notes that this makes unilateral acts different from contracts as there is neither a requirement of consideration, as in common law obligations, nor is there a requirement of cause, as found in civil law obligations. As such, intention alone is the source of the obligation, whether or not it is "synallagmatic,"[669] reciprocal. Consequently, in this context autonomy refers to an act that creates a legal obligation whether or not there is any response by another state.[670] Therefore, a unilateral act creates a legal obligation when it is given legal authority by intention and is substantively autonomous. Consequently, the notion of autonomy requires further clarification.

Autonomy is defined as the "liberty to follow one's will"[671] and, as noted above, in international law autonomy is linked to the sovereignty of the state. Sovereignty

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[667] See Eastern Greenland (n 132) at p 151 ff.; See also and for example Franck, "Word Made Law" (n 131).
[668] Nuclear Tests Cases (n 55) at par 43.
[669] HWA Thirlway, "The Law and Procedure of the International Court of Justice, 1960-1989" (1990) 60 BYIL 1 at pp 12-13.
[670] Nuclear Tests Cases (n 55) at par 43.
[671] OED Online (n 79) "Autonomy."

implies that states are self-governing[672] and are not subject to interference from any other state. The requirement of autonomy promotes sovereignty by allowing the state to pursue its interests internationally. The relationship between sovereignty and individualism makes plain the link between individualism and autonomy in these acts. However, individualism alone cannot sustain a legal obligation since, as noted above, the doctrine of substance must mediate between the individual interest of the state and the state's need to cooperate in international relations. Consequently, without an element of altruism, unilateral acts do not achieve this balance and they do not fit within the doctrine of substance. As a result, the requirement of autonomy cannot exist without cooperation. This will be discussed further in the next part of this chapter. This section will examine the relationship between autonomy and cooperation with other states.

4.1 Cooperation and Unilateral Acts

Unilateral acts are autonomous acts that create an obligation that is given legal authority by that state's intention. Theoretically, unilateral acts are not concerned with the reaction of other states to their act[673] and there is no need for any sort of cooperation with other states in order for a unilateral act to be considered binding. However, in the *Nuclear Tests cases* decision the Court stated that

> [t]rust and confidence are inherent in international co-operation, in particular in an age when this co-operation in many fields is becoming increasingly essential. Just as the very rule of pacta sunt servanda in the law of treaties is based on good faith, so also is the binding character of an international obligation assumed by unilateral declaration. Thus interested states may take cognizance of unilateral declarations and place confidence in them, and are entitled to require that the obligation thus created be respected.[674]

This is contradictory. On the one hand the Court required the autonomy of a unilateral declaration. An obligation was created regardless of the response, recognition or even

[672] OED Online (n 79) "Sovereignty".
[673] Nuclear Tests cases (n 55) at par 43.
[674] Nuclear Tests cases (n 55) at par 46.

acknowledgement of the act by other states. On the other hand the Court explained the need for autonomy by the requirement of good faith in the international arena. Good faith promoted cooperation between states by requiring that a state's word be kept, thereby ensuring that the obligations those words contained were respected.

These opposed requirements created a doctrinal paradox. Unilateral acts were autonomous in order to ensure that states could place their faith in the obligation the act created; this implied that cooperation was an element of the substance of unilateral acts. This was an oxymoron: a "cooperatively autonomous" act. Consequently, this paradox raised several doctrinal questions: Could an autonomous act ever be undertaken cooperatively? If a state acted unilaterally, how could that ever be a "cooperative" act?

These contradictions resulted from a conundrum the Court faced, which is best termed the "the tree falls in the forest" problem. Consider the following: If a unilateral act is truly autonomous then cooperation with the act is not required for the act to be considered legal. In this sense a unilateral act is similar to the proverbial tree that falls in a forest. If states do not respond to a unilateral act, the act becomes similar to a tree that falls in the forest that no one hears. Does it, the act, then make a sound? Does it create a legal obligation? As with the proverbial tree, the answer is theoretically yes. However, like the proverbial tree, the obligatory force of a unilateral act cannot be determined without, at a minimum, cognizance of the act by another state. Therefore, without cooperation by another state, it is impossible to know whether a substantive unilateral obligation has been created. Unfortunately, autonomy specifically precludes a requirement of cooperation on the part of another state. This conundrum is further clarified in the following hypothetical example: China makes a statement that it is going to allow a referendum on the sovereignty of Tibet. At this point this act has no international legal impact as China does not recognize Tibet's independence. This is an act of internal law with international implications, and as such it is not known if China intends to create an obligation under international law or if China intends to create a new political policy. Therefore, the legality of China's statement is not yet determined. Moreover, if China runs the referendum as promised the legal nature of the act continues to have this nebulous legal status. It is only if China decides to cancel the referendum that the legality of this act is determined. If the referendum is cancelled other states may respond to this act unfavourably and seek to hold China to its word. Good faith will then become a priority as states pressure China to comply with its obligation. To do this, states may, for example, send a reference question on the issue to the ICJ. It is only at this juncture that the legality of the statement is considered.

Moreover, it is not until other states "hear," take cognizance, of China's act and seek to have it upheld that its legality is determined. However, this requirement of "hearing" negates the requirement that the act is autonomous as the unilateral act is considered legal only as a result of the cognizance taken of the act by another state. Further, without this cooperative element it is impossible to determine whether the act creates a legal obligation. Consequently, like the tree that falls in the forest, a unilateral act may make a sound but if no one hears that sound the act does not create a legal obligation.[675]

The above example demonstrates that cognizance of the act gives rise to claims of good faith, which must now be defined. Good faith is understood as the "trust" required for international cooperation.[676] As noted above, unilateral acts are considered binding in order to protect this trust. However, there can be no "trust" without cognizance of an act as good faith must be demonstrable by the state raising the claim about the legality of the unilateral act. Specifically, a state must be able to show that it "heard" and placed trust in the act in order to argue that the promise must be upheld. This means that, in practice, a state must show that it has changed its position or that it has recognized and placed trust in the act in some way in order for the act to be substantively binding. This requirement makes it difficult to find an autonomous act, and it also makes unilateral acts hard to separate from other obligations based on good faith.

In the *Nuclear Tests cases* the ICJ avoided this logical conundrum. The Court had before it a concrete case in which Australia and New Zealand were responding to France's actions. The Court was able to construct an obligation from France's statements without having to explicitly consider a response on the part of Australia and New Zealand.[677] As a result, the judgment created an obligation in which a response by another state was not a requirement for legality, although the facts indicate that responses by states to the act were in fact a precondition for the dispute to exist.[678] If Australia and New Zealand had not taken notice of France's nuclear tests and had not been able to claim damages as a result, there would have been no claim for the Court to hear. This demonstrates that both cognizance and trust are elements of the substance of unilateral acts in practice, if not in theory.

[675] This analogy is to the author's knowledge original; however, it draws on the spirit of criticisms raised in Koskenniemi, Apology (n 81).
[676] See above and definition in Chapter 1.
[677] Nuclear Tests Cases (n 55) at par 46.
[678] Nuclear Tests Cases (n 55) at par 46.

Koskenniemi [679] discusses this problem with the *Nuclear Tests cases.* He asserts that

> [t]he judgment followed the strategy of tacit consent, French intent was construed on the basis of the status of the authorities involved, the "general nature and characteristic of these statements", and the fact that they were addressed to the public at large. These same facts also made it possible to appeal to the subjective reliance of other States and to non-subjective considerations about good faith, trust and confidence etc.[680]

Therefore, the ICJ implicitly considered the cognizance Australia and New Zealand took of the French statements. The Court tried to make the unilateral act meet the needs of Australia and New Zealand as well as France. As Franck notes, "[i]ntentionality, as the Court said, must be the test, but intentionality cannot be determined solely by reference to the Speaker's state of mind, but must also take into account that of the listeners."[681] This is borne out by the fact that the Court gave credence to the other states in creating a substantive obligation from a unilateral act. This element of cooperation allowed the Court to construct an obligation binding in "good faith." Without this cooperative element the Court had no substance on which to base its decision. Practically, France's obligations were determined by the good faith placed in the act by Australia and New Zealand. France's own reasons for adhering to the act, whether individualistic or altruistic were never determined.[682] The Court, in effect, made cooperation a primary consideration in the determination of a unilateral obligation.

Koskenniemi argues that the contradictory requirements of autonomy, good faith and objectivity can never be resolved [683] so the Court has created a doctrinal trap. Franck disagrees. Franck argues that paying attention to the listener's understanding of intention does not translate into a requirement of mutuality or a need for states to respond to the act. He maintains that the Court does not adopt the speaker's, France's,

[679] Koskenniemi sees unilateral acts as part of the non-consensual forms of law, a position dismissed in Chapter 2; He also has argues that unilateral acts will always lack the certainty, the objectivity to be binding; Koskenniemi, Apology (n 81) at p 345 ff; Koskenniemi is the basis for the argument that unilateral acts are inherently political. Unilateral acts are ostensibly autonomous acts, when in fact they require an element of reliance. However, on this point this work takes an opposite approach to Koskenniemi.
[680] Koskenniemi, Apology (n 81) at p 352.
[681] Franck, "Word Made Law" (n 131) at p 616.
[682] See generally, Nuclear Tests case (n 55).
[683] See Koskenniemi, Apology (n 81) at p 352 ff.

intent. Nor does it adopt the listener's, Australia and New Zealand's, intention. It constructs its own intention. However, Franck still expresses unease that there can be international obligations without the cooperation of both parties even as he asserts that such an obligation is acceptable under international law.[684] Franck's approach is problematic as he does not directly address the relationship between the need for cooperation and the requirement of autonomy. Instead, he merely separates the ICJ's ability to construct a response to the act from its discussion of intention. Arguably, Koskenniemi and Franck are both right. Theoretically it is possible to separate the requirement for cooperation from the acting state's intention. Practically, however, an autonomous obligation cannot exist as a unilateral act's legality cannot be ascertained without cooperation, at a minimum cognizance, of other states to the act. Koskenniemi asserts that the construction of intention always begins with cooperation by another state or is constructed by the Court. Thus, the *Nuclear Tests cases* demonstrate contradictory requirements of substance for unilateral acts. Primarily, the decision requires that unilateral acts are undertaken autonomously but simultaneously the Court asserts that unilateral acts create legal obligations only when undertaken in good faith. Doctrinally good faith is linked to the requirement that states take cognizance and place trust in an act. Paradoxically, the requirement of cognizance means a unilateral act is always interpreted as less than autonomous in order to account for good faith.

Consequently, the substance of an obligation cannot be defined solely by autonomy. As a result Rubin argues, contra Franck, that the ICJ creates an untenable, dangerous and unrealistic precedent in the *Nuclear Tests cases*. He asserts that an obligation must be based on responses by other states. He believes that states are unlikely to accept such a fictional basis for an obligation.[685] Similarly, Thirlway notes that in the *Nuclear Tests cases* the Court tries to distinguish unilateral actions from obligations premised on the cognizance of other states, such as estoppels.[686] This leads Thirlway to conclude that the decision creates a "dangerously wide formulation" for an obligation. Therefore, he argues that the decision is likely to be "tempered." [687]

It was problematic that the ICJ stressed the autonomy of the act. Autonomy is one requirement that ostensibly gave unilateral acts their unique substantive force. This was evident from the efforts by the ICJ to separate unilateral acts from a *quid pro quo* or other reaction or response to the act. However, this separation was strained because

[684] Franck, "Word Made Law" (n 131) at p 616-619.
[685] Rubin, "International Effects" (n 128) at p 30.
[686] Thirlway, "Law and Procedure" (n 669) at p 11.
[687] Thirlway, "Law and Procedure" (n 669) at p 17.

unilateral acts always existed within a context that involves other states. As such, unilateral acts also required that states became bound in good faith to their promises. This implies a role for other states and effectively precluded autonomy from forming the basis of an obligation. Thirlway notes that the decision in the *Nuclear Tests cases* looked to avoid an obligation based on cooperation with other states, such as estoppels. However, as noted above, the facts tell a different story. In this case Australia and New Zealand did not respond to France's statements, but they did recognize and place reliance on French actions as is clear in their claim. In consequence, the Court ignored this fact and avoided mentioning other states directly. Therefore, the facts illustrate that an obligation could not be created without some form of cooperation on the part of other states.

As a result of the above analysis, it is asserted that unilateral acts pose a problem for the doctrine of substance. Either unilateral acts are purely autonomous acts or they are good faith obligations. If the first statement is accurate, unilateral acts are autonomous acts and they can be explained by individualism. However, an autonomous act cannot be ascertained until the act is at least recognized and trusted by other states. This contradiction in the doctrine makes it difficult to identify a purely autonomous act.[688] It also creates a conceptual problem for the doctrine as the requirement of autonomy tries to separate unilateral acts from the responses of other states to that act. This is troubling because the doctrine of substance cannot support an obligation that is not balanced by an altruistic parameter such as good faith. As a result the *Nuclear Tests cases* ends up incorporating the concept of good faith into its requirements for a unilateral act.[689] Problematically, introducing good faith makes the cooperation of other states part of the determination of a unilateral act. Further, introducing this requirement into unilateral obligations makes it difficult to separate unilateral acts from other substantive acts. To support this assertion the relationship between unilateral acts and one specific type of response-based act, estoppels is examined. Estoppels are chosen because of their basis in the concept of detrimental reliance, which is a good faith based requirement. The requirement of good faith reliance links estoppels to unilateral acts. Therefore, the following section will explore the relationship of unilateral acts to estoppels.

[688] This is similar to Koskenniemi's assertion that unilateral acts will always lack the certainty to be distinguished from political obligations. Koskenniemi, Apology (n 81) at p 354.
[689] See text at n 674.

4.2 Estoppels and Unilateral Acts

This section examines the concept of estoppels and their relationship to unilateral acts. It begins with an examination of the concept of estoppels in international law, and then compares estoppels with unilateral acts.

4.2.1 Estoppels

International estoppels are derived from municipal law principles which are then adapted to the unique circumstances of international law. Therefore, estoppels are a general principle of international law [690] as they reflect broad principles.[691] Their purpose is to promote "the requirement that a state ought to be consistent in its attitude to a given factual or legal situation."[692] Estoppels are less fully developed here than in the municipal legal systems from which they are derived. Consequently, estoppels are not only evidentiary but create a substantive obligation.[693] In this regard MacGibbon cites Judge Spender, who asserts that estoppels are a "substantive rule of law."[694]

Additionally, estoppels in international law have a unique justification. In municipal systems estoppels are justified by the need for evidentiary consistency. The same is true of international estoppels. However, in international law this is further supported by a requirement of good faith which is incorporated to ensure that states maintain stable international relations. In other words, in international law the justification of estoppels is that a state cannot "blow hot and cold." A state cannot go back on its word.[695] As MacGibbon summarizes

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[690] H Lauterpacht *Private Law Sources and Analogies of International Law (with special reference to international arbitration)* (Longmans London, 1927) at p 203; this assertion is questioned by MacGibbon, who sees estoppel as less technical than in domestic law. See IC MacGibbon "Estoppel in International Law" (1958) 7 ICLQ 468 at p 512.

[691] See, for example, ML Wagner "Jurisdiction by Estoppel in the International Court of Justice" (1986) 74 Calif L Rev 1777 at p 1778.

[692] MacGibbon (n 690) at p 468.

[693] See for example MacGibbon (n 690) 468. This point is *contra*, in part, Lauterpacht, Private Law Sources (n 690) 203 ff.

[694] MacGibbon (n 690) at p 479.

[695] Lord McNair (1924) BYIL 5, as quoted in MacGibbon (n 690) at p 468*;* JF O'Connor *Good Faith in International Law* (Dartmouth, Aldershot 1991) at p 391; See also, Wagner (n 691) at p 1779.

> What appears to be the common denominator of the various aspects of estoppel which have been discussed is that a State ought to maintain towards a given factual or legal situation an attitude consistent with that which it was known to have adopted with regard to the same circumstances on previous occasions. At its simplest estoppel in international law reflects the possible variations in circumstances and effects of the underlying principle of consistency which may be summed up in the maxim *allegans contraria non audiensus est*. Linked as it is with the device of recognition, it is potentially applicable throughout the whole field of international law in a variety of contexts, not primarily as a procedural rule but as a substantive principle of law.[696]

Further, in all these uses estoppel obligations share characteristics. To be considered an estoppel in international law, an act must meet three requirements mentioned below.

> First the statement creating the estoppel must be clear and unambiguous, second the statement must be voluntary, unconditional and authorized; and finally there must be good faith reliance upon the representation of one party by the other party to the detriment of the other party or to the advantage of the party making the representation.[697]

The above mentioned requirement of clarity makes the line between a unilateral act and an estoppel thin, as it is analogous to the requirement of intention that was discussed in Chapter 3. However, more important for present purposes is the fact that a unilateral act is also identified by the requirement of good faith. Good faith in a unilateral act requires "cooperation" by another state that is similar in practice to "good faith reliance" required of an estoppel. Consequently unilateral acts are not substantively different from estoppels and are difficult to separate doctrinally. This relationship is evident from the confused interpretation of the case law in this area. For example Wagner cites the *Eastern Greenland Case* as an instance of an estoppel. [698] Certainly before the *Nuclear Tests Cases* the distinction between estoppels and unilateral declarations was not firm.

Additionally, recent case law on estoppels falls into two categories. The first is a line of cases in which estoppels are used as a substantive principle. In these cases estoppels prevent a party from pursuing a claim before the Court. This refers to estoppel

[696] MacGibbon (n 690) at p 512
[697] Wagner (n 691) at p 1780.
[698] Wagner (n 691) at p 1784

or acquiescence. The second is a line of cases in which estoppel acts as a bar to continuing litigation before the Court. The first line of cases involves substantive arguments of good faith. These arguments are raised in boundary delimitation cases. The second line of cases occurs in preliminary arguments before the ICJ. Further, the relationship between unilateral acts and estoppels has been considered by the ILC in their work on unilateral acts. Therefore, this section will examine the two lines of cases at the ICJ. It will then consider the discussion of estoppels at the ILC. From this analysis conclusions will be made about the relationship between estoppels and unilateral acts.

4.2.1.1 Substantive Estoppel

One of the earliest examples of estoppel in international litigation was in the *Fisheries Jurisdiction Case.*[699] This case was a contest between Norway and the United Kingdom over maritime boundaries. In this case the Court alluded to the concept of estoppel although it did not refer to it by name. The Court held that the United Kingdom had not contested Norway's delimitation of the boundary for a long period of time, and the long time between the event and the protest precluded the United Kingdom from claiming a protest before the Court.[700] As a result, the United Kingdom could not in good faith raise a claim as they had remained silent and Norway had placed reliance on their silence.

A related case was the *Case Concerning the Temple of Preah Vihear*.[701] In this case Cambodia and Thailand contested sovereignty over the ancient temple of Preah Vihear as different boundary lines for the escarpment on which the temple was built produced different sovereigns.[702] Conflict over the temple began in 1904-1908 with boundary settlements between the colonial power in Cambodia, France, and Thailand, which was then called Siam. A boundary treaty signed between France and Siam in 1904 established the borders between the two countries.[703] Further, this treaty established a Commission, the Franco-Siamese Mixed Commission, to resolve

[699] For a summary of this case see Wagner (n 691) 1785; See also *Fisheries Case* (*United Kingdom v. Norway*) General List 5 [1951] ICJ Rep 116 (18 December 1951).
[700] Fisheries Jurisdiction case (n 699); See also, Wagner (n 691) 1786.
[701] (Merits) [1962] ICJ Rep 6.
[702] Temple of Preah Vihear case (n 701) at p 15.
[703] Temple of Preah Vihear case (n 701) at p 16.

boundary issues that arose out of the treaty.[704] This body did not concern itself directly with the Temple of Preah Vihear. Additionally, another boundary treaty was signed in 1907 and another Mixed Commission was established.[705] This second Commission did not intend to deal with the region of the Temple. However, it did join up the boundary with an existing eastern boundary. It was not clear how this eastern boundary was established and the Court presumed it had been already agreed upon.[706] At the end of the delimitation exercise, mentioned above, maps were to be published, and so the Government of Thailand acceded to having France prepare these maps. The French Government had the maps, eleven in total, drawn up and delivered to the Thai Government. Importantly, one of these maps placed Preah Vihear on the Cambodian side of the boundary.[707] Cambodia claimed sovereignty over the temple based on this map, but the Thai government protested this claim, by arguing, alternatively that the map in question did not result from the work of the Mixed Commission, that the work of the Mixed Commission violated the earlier treaty and the Mixed Commission had finished work before the maps were published. Thailand claimed the maps were delineated in error.[708] The Court accepted Thailand's argument that this map was not legally binding.[709] Although, the Court held that it was within the power of each Government to approve the maps as binding, so that if the maps were approved this amounted to acquiescence to the boundary, and acquiescence created a legal obligation. Moreover, if acquiescence had occurred it would not have mattered whether the maps resulted from inaccurate work by the Mixed Commission or that the Commission had changed a treaty obligation. As such, acquiescence was tantamount to acceptance of the legal obligation.[710] As a result, the Court considered whether Thailand's passive acceptance of the maps amounted to acquiescence. The Court considered that the exchange of the maps was formal and many copies of the maps were distributed.[711] The Court also accepted "[t]hat the Siamese authorities by their conduct acknowledged the receipt and accepted the character of these maps…"[712] Therefore, the Court concluded that

[704] Temple of Preah Vihear case (n 701) at p 17.
[705] Temple of Preah Vihear case (n 701) at p 17-19.
[706] Temple of Preah Vihear case (n 701) at p 19.
[707] Temple of Preah Vihear case (n 701) at p 20-21.
[708] Temple of Preah Vihear case (n 701) at p 21.
[709] Temple of Preah Vihear case (n 701) at p 21.
[710] Temple of Preah Vihear case (n 701) at p 22.
[711] Temple of Preah Vihear case (n 701) at p 23.
[712] Temple of Preah Vihear case (n 701) at p 24.

> [e]ven if there were any doubt as to Siam's acceptance of the map in 1908 and hence of the frontier indicated thereon, the Court would consider that in light of the subsequent course of events that Thailand is precluded by her conduct from asserting that she did not accept it. She has, for fifty years enjoyed such benefits as the Treaty of 1904 conferred on her, if only the benefit of a stable frontier.[713]

In a separate opinion Judge Alfaro agreed with the majority judgment. He referred explicitly to estoppels, also called preclusion, forclusion, and acquiescence, and noted that

> [w]hatever term or terms be employed to designate this principle such as it has been applied in the international sphere, it substance is always the same: inconsistency between claims or allegations put forward by a State and its previous conduct in connection therewith, is not admissible (allegans contraria non audiendus est). Its purpose is always the same: a State must not be permitted to benefit by its own inconsistency to the prejudice of another state (nemo potest consilum sum in alterius injuriam). A fortiori, the state must not be allowed to benefit from its own wrong or illegal act that the other party has been deprived of its right or prevented from exercising it. (Nullus commodum capere de sua injuria propria.) Finally, the party, which by its recognition, its representation, its declaration, its conduct or its silence had maintain an attitude manifestly contrary to the right it is claiming before an international tribunal is precluded from claiming that right (venire contra factum propria non valet).[714]

Judge Alfaro also argued that the principle of estoppel was a substantive principle of good faith.[715]

Unlike Judge Alfaro, Judge Fitzmaurice agreed with the "operative portion" of the judgment.[716] However, he also discussed the issue of preclusion/estoppel and its relation to acquiescence. He felt that,

> The principle of preclusion is the nearest equivalent in the field of international law to the common-law rule of estoppel, though perhaps not applied under such strict limiting condition (and it is certainly applied as a rule of substance and not merely as one of evidence or procedure). It is

[713] Temple of Preah Vihear case (n 701) at p 32.
[714] Temple of Preah Vihear case (n 701) at p 40.
[715] Temple of Preah Vihear case (n 701) at p 41-42.
[716] Temple of Preah Vihear case (n 701) at p 52.

> quite distinct theoretically from the notion of acquiescence, but acquiescence can operate as a preclusion or estoppel in certain cases, for example, where silence, on an occasion where there was a duty or need to speak or act, implies agreement, or a waiver of rights, and can be regarded as a representation to that effect…On that basis it must be held in the present case that Thailand's silence meant acquiescence , or acted as a representation of acceptance of the map line, operates to preclude or estop her from denying such acceptance or operates as a waiver of her original right to reject the map line or its direction at Preah Vihear.[717]

Consequently, Judge Fitzmaurice argued that estoppel did not apply when an obligation had already been formed. As a result estoppel did more than prevent a state from "blowing hot and cold." He asserted that the defining characteristic of an estoppel was reliance on the act or a benefit secured by the acting party. This required from the parties "a change or alteration in their relative positions." [718] Therefore, for Fitzmaurice, estoppels were a substantive principle premised on the maintenance of good faith, and good faith had to be preserved in cases of reliance.

Not all judges agreed that this was a case of acquiescence and preclusion. In contrast to his colleagues, Judge Koo argued that preclusion did not apply in this situation. Judge Koo asserted that Thailand never accepted the map in question and that Thailand's silence was offset by its active attempt to exercise sovereignty in the area. As such, there was no evidence of French reliance on Thailand's silence.[719]

In this vein, Judge Spender also rejected the approach of the ICJ. He argued that Thailand's silence had to be weighed against all other "relevant evidence." He found that the evidence did not support a conclusion that Thailand's silence was binding.[720] Further, Judge Spender denied that acquiescence was a substantive principle. He argued that it was merely an evidentiary principle.

> [t]here is, however, in my view, no foundation in international law for the proposition that an act of recognition by a state of or acquiescence by a state in a situation of fact or law is a unilateral juridical act which, operating of its own force, has the legal consequence of precluding a party giving or making it from thereafter challenging the situation which is the subject of acquiescence.[721]

[717] Temple of Preah Vihear case (n 701) at p 62.
[718] Temple of Preah Vihear case (n 701) at p 62-64.
[719] Temple of Preah Vihear case (n 701) at p 97.
[720] Temple of Preah Vihear case (n 701) at p 132-133.
[721] Temple of Preah Vihear case (n 701) at p 143.

Moreover, Judge Spender adopted a narrow view of preclusion. He argued that preclusion was a substantive principle of the Court. This principle

> …operates to prevent a State contesting before the Court a situation contrary to a clear and unequivocal representation previously made by it to another State, either expressly or impliedly, on which representation the other State was, in the circumstances entitled to rely and in fact did rely, and as a result that State has been prejudiced or the State making it has secured some benefit or advantage for itself.[722]

Consequently, preclusion was a question of fact and on the facts preclusion was not established. Judge Spender felt that Thailand did not receive a benefit from its silence. Further, like Judge Koo, he felt that France did not rely on Thailand's silence.[723] Therefore, as a result of the range of judgments the most that can be concluded is that the majority of judges in the *Temple of Preah Vihear case* accepted estoppels as a substantive principle of international law. Consequently, this decision stood for the fact that reliance created a legal obligation.

Estoppel was revisited by the Court in the *North Sea Continental Shelf case*, 1969 [724] in which Denmark and the Netherlands claimed that the Federal Republic of Germany had, through its past conduct, become bound by a convention regarding the continental shelf. In their arguments Denmark and the Netherlands cited German actions and public statements which led them to believe that Germany was required to adhere to the convention.[725] The Court held that

> only the existence of a situation of estoppel could suffice to lend substance to this contention, - that is to say if the Federal Republic were now precluded from denying the applicability of the Conventional regime, by reason of past conduct, declarations etc., which not only clearly and consistently evinced acceptance of that regime, but also had caused Denmark or the Netherlands, in reliance on such conduct, detrimentally to change position or suffer some prejudice.[726]

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[722] Temple of Preah Vihear case (n 701) at p 144-145
[723] Temple of Preah Vihear case (n 701) at p 145.
[724] (*Denmark v. Federal Republic of Germany/Netherlands v. Federal Republic of Germany*) [1969] 1CJ Rep 3.
[725] North Sea Continental Shelf case (n 724) at par 27.
[726] North Sea Continental Shelf case (n 724) at par 30

However, the Court felt that evidence of German acceptance of their obligation was inconclusive. Consequently, the ICJ held that there was no estoppel on the facts. [727] Further, the Court stressed that finding estoppel on these facts created doctrinal "dangers."[728] In this case the Court did not deny the possibility of substantive estoppels; it merely held that a substantive estoppel did not exist on the facts of this case.

Estoppels were subsequently considered in the *Gulf of Maine Case.*[729] In this case Canada argued that the US had "acquiesced" to the use of a median to establish the maritime boundaries in the Gulf of Maine. Canada argued that the US was estopped from going back on this acquiescence.[730] Canada acknowledged that the doctrine of estoppel was not clearly developed. As a result, they maintained that it was not established law that estoppels required detrimental reliance. Canada suggested that estoppels could be derived from the non-action of the other party,[731] which was traditionally defined as acquiescence. The Court agreed and determined that it was "able to take the two concepts [estoppels and acquiescence] into consideration as different aspects of one and the same institution."[732]

The facts of this case are as follows: In 1964 Canada began to issue "long-term options (permits) for the exclusive exploitation of hydrocarbons…" in its waters [733] Canada claimed that the US was aware of these permits but the US denied that these permits were "common knowledge." What is known is that in April 1965 the Bureau of Land Management of the United States Department of the Interior wrote to the Canadian Department of Northern Affairs and National Resources asking about the location of two of the permits. The Canadian Government replied with the requested information leading to further correspondence. In this correspondence, American representatives inquired about the Canadian position on the median line between Canada and the US. Canadian representatives replied that they were using the median lines established by Article 6 of the *Geneva Convention on the Continental Shelf.* This position led to further diplomatic correspondence. For example, in a 1966 letter the Canadian Under-Secretary of State for External Affairs mentioned the accepted median

[727] North Sea Continental Shelf case (n 724) at par 31-32.
[728] North Sea Continental Shelf case (n 724) at par 33.
[729] *Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada v. United States of America)* [1984] ICJ Rep 246.
[730] Gulf of Maine case (n 729) at paras 128-129.
[731] Gulf of Maine case (n 729) at par 129.
[732] Gulf of Maine case (n 729) at par 130.
[733] Gulf of Maine case (n 729) at par 131.

line. The US made no mention of the use of this line until 1969.[734] Additionally, the US asserted in response that the 1965 correspondence was written by officials "who had no authority to define international boundaries or take a position on behalf of their Governments on foreign claims in this field."[735] As a result these claims could not create an estoppel/acquiescence.[736] Moreover, the US claimed that the 1969 correspondence referred only to the fact that the median line was in question and that Canada never officially publicized its claims. In consequence, the US argued that it should not have had to infer a claim.[737] Canada argued in return that the US had never challenged the status quo until 1970.[738] The US responded that the Canadian challenge to the median line was insignificant as the permits were minor.[739]

The Court eventually sided with the US, and held that there was no acquiescence by the US to the median line. The Court wrote,

> In the view of the Chamber, it may be correct that the attitude of the United States on maritime boundaries with its Canadian neighbour, until the end of the 1960s revealed uncertainties and a fair degree of inconsistency. Notwithstanding this the facts advanced by Canada do not warrant the conclusion that the United States government recognized the median line once and for all as the boundary between the respective jurisdictions over the continental shelf; nor do they warrant the conclusion that mere failure to react to the issue of Canadian exploration permits, from 1964 until the aide-memoire of 5 November 1969, legally debarred the United States from continuing to claim a boundary following the Northeast Channel, or even including all the areas southwest of the adjudged perpendicular.[740]

The Court also determined that the technical correspondence was not authorized as the author had not realised the implications of his letter. As a result, it was not binding on the US Government.[741] Further, the US' silence was not tantamount to acquiescence. [742]

[734] Gulf of Maine case (n 729) at par 132.
[735] Gulf of Maine case (n 729) at par 133.
[736] Gulf of Maine case (n 729) at par 133.
[737] Gulf of Maine case (n 729) at par 134-135.
[738] Gulf of Maine case (n 729) at par 135.
[739] Gulf of Maine case (n 729) at par 136.
[740] Gulf of Maine case (n 729) at par 138.
[741] Gulf of Maine case (n 729) at par 139.
[742] Gulf of Maine case (n 729) at par 140.

Lastly, the Court denied the significance of the US' issuing its own permits as it held that this was not evidence of acquiescence.[743]

However, the Court did give credence to the diplomatic correspondence between Canada and the US. It was especially concerned by the 1966 letter in which Canada stated its preference for the median line. The Court wrote about this letter that

> …it might admittedly have expected a reaction on the part of the United States Department of State. The United States concedes that it was officially informed of Canada's views on the problem of delimitation…. In waiting until 10 May 1968 before suggesting, through diplomatic channels the opening of discussions, while the question remained pending, and then waiting a further year and half, until November 1969, before stating clearly that no Canadian permit for the exploration or exploitation of the natural resources of the Georges Bank could be recognized, the United States cannot be regarded as having endeavoured to keep Canada sufficiently informed of its policy. It is even possible that Canada was reasonably justified in hoping that the United States would ultimately come around to its view. To conclude from this, however, in legal terms, that by its delay the United States had tacitly consented to the Canadian contention, or had the forfeited its rights is, in the Chamber's opinion, overstepping the conditions required for invoking acquiescence or estoppel.[744]

From this analysis the Court then reviewed the case law on estoppel and acquiescence presented by Canada but held that on the facts the US had not acquiesced to the median. There were no estoppels here but the Court did affirm the possibility of estoppels based on reliance.

This line of cases suggests that the ICJ has consistently accepted estoppels as a substantive principle of international law. Consequently, estoppels form a category of substantive obligation in the doctrine. However, the Court has been reluctant to find substantive estoppels on the facts of the cases. To understand why this is the case the second category of estoppels, estoppels as a bar to proceeding before the ICJ, will now be examined.

[743] Gulf of Maine case (n 729) at par 141.
[744] Gulf of Maine case (n 729) at par 142.

4.2.1.2 Estoppels as a Bar to Proceeding before the ICJ

Through the 1960s the ICJ was reluctant to embrace estoppels as a bar to jurisdiction. For example, in 1964 it rejected this possibility out of hand in the preliminary proceedings of the *Barcelona Traction case.*[745] In this case the Court refused to consider an argument of estoppel made by Spain,[746] in which the Spanish Government argued that Belgium had withdrawn a similar case from the Court in 1961. Their position was that discontinuance of the earlier proceedings precluded any further action on this matter before the Court. [747] Spain argued that Belgium should be precluded from starting a claim, as its actions had "misled" Spain about the seriousness of the discontinuance.[748] The Court held that Belgian statements could not have induced reliance and that Spain was not negatively affected by agreeing to the discontinuance. The discontinuance had in fact promoted out of Court negotiations and the new submissions may have resulted from these negotiations. Therefore, the Court found that Spanish reliance was not sufficient to reach the level of an estoppel.[749] However, this finding demonstrated that estoppels were a reliance based obligation.

The reluctance of the Court to find an estoppel as a bar to jurisdiction continues until today. For example, in 1990 the Court denied the possibility of equitable estoppel to Nicaragua, in *Case Concerning the Land, Island and Maritime Frontier Dispute.*[750] In this case Nicaragua applied to the ICJ to be recognized as an intervener in a dispute between El Salvador and Honduras. Nicaragua argued that it should be allowed to intervene because the dispute between the parties affected Nicaraguan interests.[751] The Court interpreted this claim as a request for equitable estoppel or recognition. They held that this request was unwarranted because Nicaragua had provided no evidence that they had met the requirements of estoppels. The Court viewed estoppels as "a statement or representation made by one party to another and reliance upon it by that other party to

[745] *Case Concerning the Barcelona Traction, Light and Power Company Limited (Belgium v. Spain)* (Preliminary Objections) [1964] ICJ Rep 6 (24 July 1964).
[746] Barcelona Traction case (n 745) at p 4.
[747] Barcelona Traction case (n 745) at p 2.
[748] Barcelona Traction case (n 745) at p 4.
[749] Barcelona Traction case (n 745) at p 4.
[750] *(El Salvador/Honduras)* Application by Nicaragua to Intervene [1990] ICJ Rep 92.
[751] Land Island and Maritime Frontier case (n 750) at par 63.

his detriment or to the advantage of the party making it."[752] The Court saw no evidence that representations had been made or that reliance was present in this case. [753]

Similarly, in the *Case Concerning the Land and Maritime Boundary Between Cameroon and Nigeria* [754] estoppels arose in the context of a boundary dispute over Lake Chad. Nigeria occupied an area of the Lake and shore. Nigeria asserted that the parties had implicitly accepted a bilateral mechanism for resolving boundary disputes. These mechanisms created an estoppel against a suit at the ICJ.[755] Cameroon argued that the bilateral mechanisms were temporary solutions so that estoppels barred litigation.[756] The Court held that

> An estoppel would only arise if by its acts or declaration Cameroon had consistently made it fully clear that it had agreed to settle the boundary dispute submitted to the Court by bilateral avenues alone. It would further be necessary that, by relying on such an attitude Nigeria had changed position to its own detriment or suffered some prejudice… [757]

In this case the Court accepted a traditional interpretation of estoppel. The ICJ held that Nigeria did not change its position or face prejudice by Cameroon's choice to bring a claim to the Court.[758]

Estoppels were again an issue in the *Aerial Incident of 10 August 1999* [759] in which India disputed the ICJ's jurisdiction to hear a claim initiated by Pakistan for damages against India. India argued that the Court was estopped from jurisdiction as a result of reservations India had made to the Statute of the ICJ.[760] Particularly, India had reserved jurisdiction from disputes with other current or former Commonwealth states such as Pakistan. Pakistan in turn argued that this reservation was invalid on the basis that it violated various provisions of international law.[761] Alternatively, Pakistan argued that even if the reservation was valid it would not be operable in this case by virtue of Article 1 of the *Simla Accord*. In the *Simla Accord* India and Pakistan agreed to resolve

[752] Land Island and Maritime Frontier Case (n 750) at par 63.
[753] Land Island and Maritime Frontier Case (n 750) at par 63.
[754] *(Cameroon v. Nigeria)* (Preliminary Objections) [1998] ICJ Rep 275.
[755] Cameroon and Nigeria Boundary Dispute case (n 754) at par 49.
[756] Cameroon and Nigeria Boundary Dispute case (n 754) at par 49.
[757] Cameroon and Nigeria Boundary Dispute case (n 754) at par 57.
[758] Cameroon and Nigeria Boundary Dispute case (n 754) at par 58.
[759] *(Pakistan v. India)* [2000] ICJ Rep 119.
[760] Aerial Incident case (n 759) at par 29.
[761] Aerial Incident case (n 759) at paras 29-30.

their disputes by peaceful means. India rejected this argument on the basis that the *Simla Accord* did not contain a compromisory clause. The Court held that obligation in Article 1 of the *Simla Accord* was general, and as such it was not affected by India's reservation to the Statute of the Court. As a result, the Court was not estopped from hearing this case.[762] Therefore, this case did not attack the general principle of estoppel on substantive grounds, instead the Court simply refused to find an estoppel on the facts.

Another recent example of estoppel occurred in 2004. The ICJ heard claims about the legality of use of force by eight NATO countries against the former Yugoslavia. Serbia and Montenegro initiated separate cases against each country that had participated in the NATO action. One claim was started against Canada.[763] As such, Canada challenged the jurisdiction of the Court to hear the dispute on both procedural and substantive grounds. Procedurally, Canada contested Serbia and Montenegro's standing before the Court. Substantively Canada argued that the cause of the dispute had "disappeared".[764] Canada argued that the unascertained status of Serbia and Montenegro before the Court meant that Serbia and Montenegro was estopped from continuing proceedings. Eventually, the Court rejected this position and did not remove the case from the list.[765] Consequently, from this line of cases it can be concluded that the ICJ has never denied the possibility of estoppel as an evidentiary principle although, it has been reluctant to apply estoppels as a bar to proceeding before the Court.

Therefore, this section demonstrates that estoppels are both a substantive and evidentiary principle of international law, depending on the interpretation. In both its forms estoppel requires detrimental reliance, and it is a determination of fact as to whether there has been detrimental reliance. Importantly, the jurisprudence illustrates that the Court is often reluctant to find reliance on the facts. Further, it is worth noting here that detrimental reliance requires the cooperation of other states; this links unilateral acts with estoppels because both detrimental reliance and cooperation connote good faith. This relationship will be examined in greater detail in the following section.

[762] Aerial Incident case (n 759) at par 44.
[763] *Case Concerning Legality of Use of Force (Serbia and Montenegro v. Canada)* (Preliminary Objections) [2004] ICJ Rep 429.
[764] Legality of Use of Force case (n 763) at paras 41- 42.
[765] Legality of Use of Force case (n 763) at paras 42-43.

4.2.1.3 Unilateral Acts and Estoppel at the ILC

In his introduction to his first report the Special Rapporteur for unilateral acts, Rodriguez Cedeño, observed that

> …estoppel was a rule of evidence which had its origins in common law legal systems, but which had now found a place in the doctrine and jurisprudence of international law. However, while international courts had on a number of occasions considered the doctrine of estoppel they had rarely relied upon it as a basis for their decisions…[766]

He noted that

> …estoppel did not constitute a phenomenon which was of direct concern to the study of unilateral acts. An estoppel involved acts or conduct by one State which gave rise to certain expectations on the part of another State, on the basis of which that other State had proceeded to adopt a course of action which was to its own detriment. Although the conduct of the State which was responsible for the representation might appear at first blush to have some similarity to a unilateral legal act, it was in fact of a quite different character. The conduct which gave rise to an estoppel could involve either a positive act or a passive attitude, such as silence. There was furthermore no necessity that the conduct should be performed with any intention to create legal effects. A true unilateral legal act, on the other hand was a positive and formal legal act, such as a promise, the State which made it under a legal obligation immediately that act was performed, in contrast, the most important element of estoppel was the conduct of the State to which the representation was made, that is the conduct in which that other State engaged in reliance upon the representation by the first State. In the case of estoppel then, the legal effect flowed not from the will of the State which made the representation, but from the reliance which was placed on that representation by the State to which it was made. The conduct of that other State was of fundamental importance. In the case of a unilateral legal act, on the other hand, such as a promise, the conduct of the beneficiary was, analytically speaking not of any importance in determining its binding character…[767]

[766] ILC, Yearbook of the International Law Commission, vol 2 [1998] UNGA Doc A//53/10 at par 130 available online at <http://untreaty.un.org/ilc/guide/gfra.htm> accessed on 29 June 2007.
[767] ILC Yearbook 1998 (n 766) at par 131.

As a result, Rodriguez Cedeño proposed excluding acts of estoppel from the study of unilateral acts. In a short analysis he described the "analytical" differences between unilateral acts and estoppels. However, he did not provide guidance for telling the difference between the two types of acts.

Members of the ILC questioned Rodriguez Cedeño's choice to exclude estoppels from the study. This may have been because these Members could not clearly differentiate between the two concepts. However, other Members distinguished between the two concepts; these Members considered estoppels separate from the study of unilateral acts on the basis that estoppels did not require intention to create a legal obligation whereas unilateral acts did. Conversely, it was also noted that reliance was not a requirement of unilateral acts but was a requirement of estoppels. Members who took this position reiterated the theoretical distinction between the two concepts. However, other members argued that for practical reasons estoppels should be included in the study.[768] A Mr. Lukashuk noted in debates at the ILC that"[o]ne minor criticism was that the report emphasized the unilateral nature of acts of States, but the legal consequences of such acts usually arose when other States reacted to them. The effect of reactions of States must therefore be duly taken into account."[769]

In the following year, Rodriguez Cedeño reiterated that

> …although acts relating to estoppel could be categorized as unilateral acts in formal terms, they did not of themselves produce effects. They depended on the reaction of other States and the damage caused by the primary act. There was certainly a close connection between the two…[y]et it was a different kind of act because, unlike a non-treaty-based promise, a waiver, a protest, a recognition, it did not of itself produce effects…[770]

A working group was constituted at the 1997 meeting of the ILC. The working group recommended that "the question of estoppel and the question of silence should be examined by the Special Rapporteur, at the appropriate time, with a view to determining what rules, if any, could be formulated in this respect in the context of unilateral acts of States."[771] However, Members became preoccupied with discussing the draft Articles

[768] ILC Yearbook 1998 (n 766) at paras 159-160.
[769] ILC, Yearbook of the International Law Commission vol 1 [1997] UNGA Doc A/CN.L.543 at par 11.
[770] ILC Report 1999 (n 448) at par 509.
[771] ILC Report 1998 (n 434) at par 10.

proposed by Rodriguez Cedeño and did not discuss this recommendation.[772] The relationship between estoppels and unilateral acts was not pursued further at the ILC.[773]

This section demonstrates that the ILC did not always differentiate between estoppels and unilateral acts. It wavered between reiterating the theoretical differences between the two concepts and acknowledging their practical similarity. This section highlights the fact that, in spite of their asserted differences, unilateral acts and estoppels are often indistinguishable in practice.

4.2.2 Unilateral Acts and Estoppel

The jurisprudence and the work of the ILC indicate that the line between unilateral acts and estoppels is thin. The case law does not often state whether a case is an instance of a unilateral act or an estoppel, and writers are often divided on the interpretation of a given case. As an example, Wagner classifies unilateral declarations as a form of an estoppel.[774] Further, she cites the *Eastern Greenland case* as an example of estoppel.[775] Similarly, MacGibbon, writing before the *Nuclear Tests cases*, also classifies the *Eastern Greenland case* as an example of estoppel.[776] On the other hand, Thirlway separates the *Nuclear Tests cases* from other cases of good faith obligations in international law[777] and Franck and Rubin take the opposite approach and incorporate the *Eastern Greenland case* in their comments on the *Nuclear Tests cases*.[778] As noted above, Rodriguez Cedeño asserts that the two obligations are not related. [779]

Therefore, the ICJ, the ILC and authors do not always differentiate between unilateral acts and estoppels. As Koskenniemi explains, "[t]here is considerable difficulty to carve out an independent area for each of the three doctrines of unilateral declaration, acquiescence and estoppel."[780] In theory estoppel and unilateral acts are substantively different obligations. Unilateral acts are premised on the good faith requirement that a state abide by its intention to be bound whereas estoppels require not

[772] See for example, ILC Report 1999 (n 448).
[773] A search by the author of all of the subsequent reports of the International Law Commission for the terms "estoppel" and "reliance" yielded no results.
[774] Wagner (n 691) at p 1781 ff.
[775] Wagner (n 691) at p 1784.
[776] MacGibbon (n 690) at p 481.
[777] See Thirlway, "Law and Procedure" (n 669) at p 8ff.
[778] See generally, Franck, "Word Made Law" (n 131); Rubin, "International Effects" (n 128).
[779] See for example, ILC Report 1999 (n 448) at par 40.
[780] Koskenniemi, Apology (n 81) at p 355.

only a statement but detrimental reliance or a change of position by the party to whom the statement was directed. Further, a unilateral act's substance is derived from the autonomy of the acting state but estoppels arise out the reliance of another state on the unilateral act. However, these differences are merely cosmetic as it has already been seen that unilateral acts cannot create a legal obligation without good faith in the act by another state. In order to claim that a unilateral act has not been observed, a state must both take cognizance of the act and be able to show how a Court how the act affected them. Ascertaining the effect of a unilateral act is, in practice, identical to finding the detrimental reliance required of estoppels. Therefore, Koskenniemi notes of this relationship that:

> Initially each of the three concepts [unilateral declarations, acquiescence, estoppel] contains a description of how a state may become bound by an obligation through adopting a form of behaviour. Broadly speaking, the doctrine of unilateral declarations seems initially to bear a closer contact to intent-based justification of obligations than do acquiescence or estoppel. Basing obligation on non-verbal behaviour seems to have a closer relationship with considerations of reliance, reciprocity and justice. Whatever merit there is to *prima facie* impressions, it seems clear that just as the binding character of unilateral declarations could not be justified in a purely subjective way, neither can acquiescence or estoppel be held purely objective doctrines. In some way they need to be understood from both perspectives.[781]

In this passage Koskenniemi distinguishes acquiescence from estoppel. He argues that they are the substantive and procedural aspects of the same concept.[782] However, he considers this to be a very "fluid" difference[783] so that "[w]ithin argument acquiescence and estoppel become indistinguishable."[784] This confusion allows Koskenniemi to conclude that estoppels have a subjective element similar to unilateral acts. The doctrines of both estoppels and unilateral acts contain requirements of intention. However, intention can only be inferred from behaviour. The Court establishes these behaviours as "good faith, reasonableness or legitimate expectations." Consequently, this does not provide the Court with justification for reliance.[785] This is problematic as

[781] Koskenniemi, Apology (n 81) at p 356.
[782] Koskenniemi, Apology (n 81) at p 357.
[783] Koskenniemi, Apology (n 81) at p 359.
[784] Koskenniemi, Apology (n 81) at p 359.
[785] Koskenniemi, Apology (n 81) at p 362-3.

"such behaviour is relevant which manifests itself in "a clear and unambiguous way."[786] Thus, Koskenniemi asserts that the ICJ has to explain how behaviour was clear and unambiguous when a state argues that it has no intention to create an obligation, and as a result, the Court takes a factual determination of intention. This leads the Court back to step one as the intention of the state undertaking the act has to be determined. This intention is subjective.[787]

The circular nature of intention observed in cases of estoppel helps explain the confusion between estoppels and unilateral acts. Estoppels and unilateral acts both rely on a substantive determination of autonomy. However, unilateral acts are not binding unless there is *de facto* (and *de jure)* good faith placed in them by other states that amounts to reliance. Conversely, estoppels are not invoked unless there is a formal determination of intention. Consequently, Koskenniemi asserts that estoppel and unilateral acts are two sides of the same coin. Unilateral acts require trust and good faith that in practice are similar to reliance, the basis of estoppels. Similarly, estoppels require a formal determination of intention, the basis of a unilateral act. Therefore, estoppels, in theory, require reliance but practically they also require intention. On the other hand, unilateral acts theoretically are autonomous but practically they also require reliance. So, while theoretically the concepts of unilateral acts and estoppels are distinct, further analysis reveals that practically they are indistinguishable.

4.3 Unilateral Acts and the Substance of International Law

The previous section illustrates that there is no practical difference between estoppels and unilateral acts. This is important because it raises questions about the legality of unilateral acts as a category of obligation. As noted above, substantively unilateral acts are individualistic, but practically they cannot exist without the cooperation, reliance or good faith of other states. Moreover, incorporating this requirement of good faith makes unilateral acts practically impossible to separate from estoppels, as estoppels are also based on good faith and the response of other states to the act.

Therefore, doctrinally unilateral acts require individual autonomy. However, autonomy cannot be ascertained without an element of good faith, and ascertaining

[786] Koskenniemi, Apology (n 81) at p 363.
[787] Koskenniemi, Apology (n 81) at p 363-4.

good faith directly contradicts the autonomy of the act. Additionally, incorporating good faith as a requirement of a unilateral act makes these acts indistinguishable from estoppels. Estoppels are a substantive principle of international law. They require detrimental reliance or a change of position by the state relying on the act in question. Estoppels also require intention. This leads to the conclusion that doctrinally estoppels and unilateral acts are inseparable as unilateral acts require both autonomy and a response by other states (a response that amounts to a change of position) in order to create legal obligations and so do estoppels. This points to two conclusions. The first conclusion is that an autonomous act cannot be ascertained without good faith by other states. However, the incorporation of this requirement means the act is no longer autonomous. The second conclusion is that the doctrine of estoppels and the doctrine of unilateral acts are joined in practice. The doctrine does not support a separate category of unilateral acts.

The above analysis illustrates that autonomous legal acts cannot produce a substantive obligation. This is evident because truly individual acts, such as unilateral acts, do not fit within the doctrine of substance. They cannot create the cooperation necessary to produce an independent obligation. Consequently, to achieve cooperation good faith is introduced but once good faith is introduced unilateral acts become impossible to separate from estoppels. This creates a paradox: without altruism individual obligations have no meaning. However, once altruism is pursued the individual acts lose their justification. This paradox ensures that unilateral acts are problematic for the doctrine of substance as they are difficult to justify as a separate category of legal obligation. These difficulties will be examined in the example of the San Juan River dispute.

5. Context: The San Juan River Dispute

The previous parts of this chapter provide a methodological examination of the doctrine of substance as it applies to unilateral acts. The discussion is abstract and theoretical. To provide context to this discussion and help clarify its meaning, an example is

instructive. A relevant example is the San Juan River dispute. This example is applicable for three reasons. First, it illustrates the relationship between autonomy and the doctrine of substance but, unlike the analysis above, it places this discussion in the context of ongoing events in international relations. Second, the example of the San Juan River dispute demonstrates the problems of autonomy noted above, particularly the difficulty in maintaining autonomy. It also highlights the difficulty in separating unilateral acts from other good faith obligations. Lastly, the example of the San Juan River dispute is chosen because it represents an ongoing dispute in international relations, and connecting this example to the problem of unilateral acts may shed some additional light on this problem. To undertake this analysis this section of the chapter will proceed in four parts. First, a brief review of the facts will be presented. Second, the facts will be analysed for autonomy. Third, the facts will be analysed for cooperation and fourth some concluding thoughts and analysis will be presented.

5.1 Facts

On 29 September 2005 the government of Costa Rica instituted proceedings against Nicaragua at the ICJ.[788] At issue in the dispute were navigation rights on the San Juan River.[789] The dispute concerned Nicaraguan restriction of Costa Rican navigation rights that had been guaranteed by treaties and arbitration. Costa Rica contended that restrictions on the river began in the 1990s. Restrictions included charging fees for Costa Rican boats, stopping boats at military outposts, restricting supply ships, restricting free movement of ships and the right to stop on the banks and other limitations.[790] Costa Rica argued that these limitations violated their guaranteed rights. These rights included rights of navigation for commercial purposes, rights to "touch" the banks without paying dues unless agreed upon in advance, rights established by the second Article of the Cleveland Award to navigate the river, rights to navigate the river for specific official purposes such as staffing border posts, supplying posts or protection

[788] *Dispute Concerning Navigational and Related Rights of Costa Rica on the San Juan River (Costa Rica v. Nicaragua)* (Application) available online at <www.icj-cij.org> accessed on 1 April 2008.
[789] San Juan River case (n 788) at par 10; See also ICJ, "Costa Rica brings a case against Nicaragua to the Court in a dispute concerning navigational and related rights of Costa Rica on the San Juan River" Press Release 2005/20 available online at <www.icj-cij.org> accessed on 1 April 2008.
[790] San Juan River case (n 788) at par 8.

and the right not to have the river obstructed in violation of these rights.[791] There was also a treaty obligation on Nicaragua to abide by all agreements on the San Juan and to work together to supervise the common border.[792] Further, Costa Rica claimed that the dispute was governed by the Treaty of Limits between Costa Rica and Nicaragua, San Jose 1858; an arbitral award of President Grover Cleveland (the Cleveland Award), United States, 22 March 1858; judgment of the Central American Court of Justice in Costa Rica v. Nicaragua, 13 September 1916; and an Agreement Supplementary to Article IV of the Pact of Amity, Washington, 9 January 1956.[793] Costa Rica also asserted that the dispute was governed by general international law.[794] As a result this dispute was substantively legal.

Jurisdiction of the ICJ was contested but Costa Rica argued that the Court had jurisdiction to hear this dispute. Costa Rica insisted that both parties had declared acceptance of jurisdiction and that jurisdiction was granted in treaties between the parties. For example it claimed that jurisdiction of the ICJ was reiterated in the Tovar-Caldera Agreement, Alajuela, September 2002.[795] The Tovar-Caldera Agreement was a treaty between Nicaragua and Costa Rica. In this agreement Nicaragua agreed not to withdraw from the jurisdiction of the ICJ and in exchange Costa Rica agreed not to start a Court action or any other dispute resolution process for three years.[796] However, Nicaragua initially rejected the jurisdiction of the Court on the basis of treaties concluded prior to 1901. In spite of this assertion, President Bolaños of Nicaragua acknowledged the jurisdiction of the Court in a newspaper article where he stated that he was certain that "Nicaragua and Costa Rica will not need to have recourse to any court."[797]

Since starting the dispute memorials and counter memorials were filed, oral hearings were completed, and the judgement was released.[798] President Bolaños' statement was indeed mentioned in Costa Rica's memorial as part of its arguments

[791] San Juan River case (n 788) at par 6.
[792] San Juan River case (n 788) at par 7.
[793] San Juan River case (n 788) at par 1.
[794] San Juan River case (n 788) at par 1.
[795] San Juan River case (n 788) at par 2-3.
[796] San Juan River case (n 788) at par 4-5.
[797] C Sandoval, "The San Juan Frozen" La Prensa (27 September 2002) trans. Caroline Pardo as quoted in San Juan River case (788) at Attachment 6.
[798] See *Dispute Regarding Navigational Rights (Costa Rica v. Nicaragua)* available online at <www.icj-cij.org> accessed on (5 May 2009); See particularly *Case Concerning the Dispute Regarding Navigational and Related Rights (Costa Rica v. Nicaragua) Judgment* ICJ General List No. 133 [2009].

regarding the Court's jurisdiction.[799] Nicaragua for its part tried to sidestep this statement by stipulating that it accepted jurisdiction of the Court, but this did not preclude the fact that the issues in dispute had already been decided by previous agreements.[800] This claim ensured that jurisdiction was not at issue in either additional pleadings or the oral argument before the Court and it did not affect the Court's judgment on the merits. Arguably, this was because Nicaragua tacitly acknowledged it was bound by the statement of its President. If this was in fact the case, the legality of this statement was highly relevant to the current analysis, as Nicaragua tacitly acknowledged the substantive obligation contained in its Presidential statement.

5.2 Autonomy

The statement of President Bolaños was undertaken without any exchange or *quid pro quo*. It went beyond the requirements of the Tovar-Caldera Agreement. Nicaragua agreed that for three years they would not withdraw from the jurisdiction of the Court and that all rights under international law were maintained.[801] Further, President Bolaños acknowledged the jurisdiction of the Court. He agreed to good faith efforts to resolve the dispute with Costa Rica. Consequently, this statement was autonomous; it represented the individual interests of Nicaragua.

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[799] *Memorial of Costa Rica, Dispute concerning navigational and related Rights (Costa Rica v. Nicaragua)* at paras1.1, 3.45 available online at < http://www.icj-cij.org/docket/files/133/15084.pdf> accessed on 5 May 2009.

[800] *Counter-Memorial of Nicaragua, Dispute Concerning Navigational and Related Rights (Costa Rica v. Nicaragua)* at paras 3, 4 available online at < http://www.icj-cij.org/docket/files/133/15086.pdf> accessed on 5 May 2009.

[801] The Tovar-Caldera Agreement states that:

> 3. The Government of Nicaragua undertakes to maintain, for a period of three years from today's date, the legal status existing on today's date with respect to its declaration of acceptance of the jurisdiction of the International Court of Justice. For its part, during the same period, the Government of Costa Rica will not engage in initiating any action or any international protest against Nicaragua neither before the Court nor before any other authority on any matter or protest mentioned in treaties or agreements currently in force between both countries.
>
> 4. Nothing in the preceding paragraphs shall be interpreted or presumed to be a renunciation or as a diminishing of rights that each party retains in accordance with treaties currently in force in the area of international law.
>
> Tovar-Caldera Agreement, Articles 3 and 4 in San Juan River case (n 788) at Attachment 4.

5.3 Cooperation

The statement of President Bolaños was autonomous. However, its legality was not determined. For the duration of the Tovar-Caldera Agreement its legality was moot but the statement gained legal significance because Costa Rica included it as part of its application to the ICJ. Including this statement illustrated the "reliance" Costa Rica placed in the legal obligation of President Bolaños' statement. However, this reliance illustrated the difficulty in meeting the requirements for the determination of substance.

President Bolaños' statement was problematic for the doctrine of substance although it was autonomous. To explain, even though President Bolaños' statement was autonomous and it was not undertaken in exchange for a response on the part of Costa Rica. It was Costa Rica's attempt to uphold this statement at the ICJ that made the statement legally binding. In other words, it was Costa Rica's reliance on President Bolaños' statement, not its autonomous nature, that made it legally relevant. This tension demonstrated that the requirements of autonomy and good faith were in opposition to each other. As a result, the uneasiness between autonomy and good faith became apparent in the fact that Nicaragua stipulated that they would not contest the jurisdiction of the Court.[802] Further, it was unclear from the pleadings whether President Bolaños' made his statement because Nicaragua acknowledged Costa Rica's good faith in the act, or vice versa, whether Costa Rica placed reliance President Bolaños' words because he made his statement. The former would have made this statement a unilateral act, the latter an estoppel. Therefore, the lack of clarity in the pleadings also demonstrated that the good faith Costa Rica tacitly claimed in President Bolaños' statement was impossible to distinguish from the reliance required of an estoppel. Although the act was autonomous, the fact that Costa Rica included the statement in its pleadings represented a claim of good faith in President Bolaños' statement. Costa Rica was in effect claiming good faith and, potentially, reliance on this statement. It was this response that forced Nicaragua to consider the statement's legality and ultimately accept the jurisdiction of the Court. To summarize: By introducing President Bolaños' statement, Costa Rica made the claim that Nicaragua was bound by good faith and as such could not deny the jurisdiction of the ICJ. Once good faith was introduced, Nicaragua could not go back on its word. Therefore, it was irrelevant whether this good faith created a unilateral act or an estoppel. In fact, the good faith

[802] See Counter-Memorial of Nicaragua (n 800) at par 3.

Costa Rica placed in the act made the obligation indistinguishable from an estoppel. As a result the *San Juan River case* was an example of the difficulty in determining the substance of unilateral acts. The doctrine of unilateral acts required autonomy of substance. However, this requirement was meaningless without Costa Rica placing good faith placed in the act itself, but if good faith was placed in the act it was no longer autonomous. This made it difficult to determine the substantive legality of President Bolaños' statement and it made the act indistinguishable from an estoppel.

5.4 Analysis

The San Juan River dispute demonstrates two key difficulties in applying the requirement of autonomy in context. First, autonomy ensures that an act is not undertaken in exchange for any *quid pro quo* or response to the act. However, as the San Juan River dispute illustrates, it is difficult to imagine a situation in which this could practically occur, as it is only when Costa Rica chooses to include President Bolaños' statement that its legal substance is assessed. Therefore, this example contextualizes a problem alluded to in regard of the *Nuclear Tests cases*, that a statement must produce good faith in order to acquire substantive legality. This leads directly to the second difficulty in establishing the substance of a unilateral act, the problem of autonomy. This problem arises because even if an individual act displays autonomy, it will not be considered legal without good faith in the act. However, once good faith is established the act is no longer autonomous. Moreover, once the act is no longer autonomous the trust placed in the act becomes indistinguishable from the reliance required of estoppel.

Consequently, this example leads to two conclusions about autonomy as the substantive requirement of a unilateral act. First, an act can either be autonomous or it can create a substantive legal obligation. Second, the fact that a unilateral act requires good faith in order to produce a substantive obligation makes these acts indistinguishable in practice from estoppels. This analysis is important because it adds context to the analysis presented above and complexity to the conclusions to this chapter presented below.

6. Conclusion

This chapter examines one aspect of the question "are unilateral acts legal?" Specifically it focuses on the question "can unilateral acts be explained by the doctrine of substance?" After outlining this research question, this chapter provides an overview of the doctrine of substance and establishes that the doctrine of substance mediates debates over whether the subject matter of international law is derived primarily from individualism or altruism.

Following on this analysis this chapter proceeds to examine the requirement of a unilateral act that establishes the substantive legality of an act, the requirement of autonomy. Autonomy establishes that a unilateral act has legal substance when it reflects the interests of the state undertaking the act. However, analysis of this requirement demonstrates that autonomy alone cannot create a legal obligation. As the example of the tree that falls in the forest illustrates, it is only when cognizance is taken of an act that autonomy can be exercised. Confusingly, requiring cognizance of the act makes the act less than autonomous because another state must recognize the act. It is for this reason that the ICJ introduces a requirement of good faith which, in effect, contradicts the requirement of autonomy. Moreover, introducing the requirement of good faith makes unilateral acts difficult to separate from acts of estoppel. Unilateral acts and estoppels both rely on good faith as a determinant of their substantive legal obligation and in practice they both rely on an element of autonomy. Therefore, unilateral acts are substantively indistinguishable from estoppels.

In addition to the doctrinal analysis above, the problem of autonomy is placed in the context of the San Juan River dispute. This contextualization reveals that autonomy is functionally indeterminate unless good faith is introduced, and once good faith is introduced, the act is no longer autonomous. It is Costa Rica's good-faith in Nicaragua's statements that makes them legally relevant. However, once Costa Rica's good faith in the statement becomes legally significant, Nicaragua is no longer able to act autonomously. Further, the San Juan River dispute demonstrates that it is practically impossible to distinguish between the good faith required of a unilateral act and the good faith that produces the detrimental reliance required of an estoppel. These observations are important because even if the requirement of autonomy can be interpreted to provide the substantive requirements for a legal obligation, in practice these obligations will always be indistinguishable from estoppels.

This chapter asks "can unilateral acts be explained by the doctrine of substance?" The problem that unilateral acts pose for the doctrine of substance is that they rest

entirely on autonomy, the interest of a single acting state. The requirement of autonomy is unable to produce a legal obligation without some form of cooperation by other states. As a result, it must be balanced by a requirement of good faith in order to provide legal authority. However, introducing good faith makes the act less than autonomous. Consequently, a unilateral act can be autonomous or it can produce a substantive legal obligation. This produces a second difficulty for the doctrine: when autonomy is defined to include good faith, it becomes practically indistinguishable from an estoppel, and autonomy is no longer its defining feature. This is evidence of the fact that autonomy on its own cannot create a substantive legal obligation. Further, even when an act interpreted to meet the requirements of the doctrine of substance, as the example of the San Juan River dispute demonstrates, the autonomous obligations are functionally indistinguishable from estoppels. The doctrinal difficulty posed by autonomy, together with the difficulty in applying autonomy in practice, helps explain the gap between the assertion that a unilateral act is legal and the ability to identify its legal obligation in practice.

Chapter 6: The Process of International Law

1. Introduction

This chapter completes the analysis of the research question "are unilateral acts legal?" Specifically, this chapter focuses on one aspect of "legality" defined in Chapter 3, the doctrine of process. It asks the question: can unilateral acts be explained by the doctrine of process? To answer this question this chapter provides an overview of the research question, it outlines the processes of international law, and it examines the requirements of unilateral acts that establish the processes of a unilateral act, revocation. This chapter then compares the doctrine of process to the process of a unilateral act in order to reach conclusions about the "legality" of the process of unilateral acts. Consequently, this chapter examines the processes of international law, discusses the requirement of a unilateral act that establishes the "process" of a unilateral act, revocation, and compares the two doctrines in order to evaluate whether unilateral acts can be explained by the doctrine of process. Finally, conclusions will be reached from the analysis.

2. The Research Question

This chapter examines one aspect of the question "are unilateral acts legal?" Specifically it focuses on the question "can unilateral acts be explained by the doctrine of process?" To explain why this question is necessary to the analysis of the legality of doctrinal analysis of unilateral acts, a summary of the basic outline of this work is helpful. As noted in the introductory chapter, answering the question "are unilateral acts legal?" requires answering two subsidiary questions: "what are unilateral acts? And "what is legality?" Chapter 2 establishes that unilateral acts are defined by three core requirements that separate these type of obligations from other legal obligations: intention, autonomy and revocability. Chapter 3 establishes a method of assessing

legality derived from a narrow critical legal studies method – a doctrinal analysis of unilateral acts based on the structure of international law. This method clarifies that the doctrinal structure of unilateral acts is derived from three primary, interlinked doctrines: sources, substance and process. Consequently, any analysis of the "legality" of unilateral acts requires a comparison of the requirement of a unilateral act in relation to the doctrine of international law. If unilateral acts can be explained within the doctrinal structure they will be considered legal; otherwise unilateral acts pose a problem for the doctrine of international law.

This chapter concludes the analysis of the legality of unilateral acts by examining one doctrine of international law, process doctrine, and the requirement of a unilateral act that establishes the legal process of a unilateral act, revocation. This analysis is instructive because comparing the requirement of revocation to process doctrine determines whether unilateral acts can provide procedural authority in international law. This leads to the question that guides this chapter: "can unilateral acts be explained by the doctrine of process?" If unilateral acts cannot be explained by process doctrine this makes their place in the structure of international law doctrinally weak, and leads to questions about the legality of obligations created by unilateral acts.

3. The Process of International Law

Process refers to the rules by which "the game" of international law is to be played. Therefore, the process of international law is the method by which laws among states are created. As such process doctrine establishes the methods by which a state enters into, maintains, alters or ends its legal obligations. This implies that purpose of the doctrine of process is to provide a link between the doctrine of sources and the doctrine of substance; that is to explain the methods by which a specific text is given legal authority. To act as this link the doctrine of process must explain how obligations are entered into and maintained while simultaneously explaining how obligations can be altered or ended. To rephrase this in terms of the structure of international law, the doctrine of process must provide stability in the creation of legal obligations while at the

same time permitting these obligations to change. Consequently, process doctrine mediates the debates within the doctrine over the need to balance stability and change.

The relationship between stability and change is illustrated by comparing the concepts of "soft" law and "hard "law. The term soft law describes obligations that do not take a legal form. Soft law is identified with change and flexibility. Hard law describes obligations that take a legal form. The process of "hardening" of an obligation is termed legalization. Although hard law provides stability, some obligations never legalize; they never gain the authority of a source of law. Unilateral acts are one of these obligations. Unilateral acts promote change, but lack stable processes. Examining the indicators of legalization illustrates the difficulty unilateral acts have performing the functions required of the doctrine of process.

This section examines three processes of international law: the processes of treaty law, the processes of custom and the processes of the general principle of equity. These examples represent the processes of the primary sources of international law and are relevant for two reasons. First, process in international law is not uniform. It depends on the legal authority, the source, of the act being examined. Second, the diverse processes of law have similar parameters. All the processes examined establish stable methods by which substance is given legal authority. These processes also allow for change when required. They explain how sovereign states become bound by law and they formalize substance. Consequently, the doctrinal functions of these processes are examined followed by an analysis of one example of these procedures, the processes of UNCLOS.

3.1 Treaties

Treaties are agreements between states, a source of law. Treaties can represent agreement to any substantive obligation other than a violation of a *jus cogens*. The doctrine of process ensures that a substantive agreement between states is recognized as a treaty. It establishes the methods for determining when a treaty is concluded. These methods also create processes for changing these relationships. Two principles structure this process, *pacta sunt servanda* and *rebus sic stantibus.* This section examines these principles in detail and it explains how treaty law mediates doctrinal debates between stability and change.[803]

[803] This entire section owes much of its shape to Bederman; See generally, DJ Bederman, "The 1871 London Declaration, Rebus Sic Stantibus and a Primitivist View of the Law of Nations" (1988) 82 AJIL

3.1.1 *Pacta Sunt Servanda*

The principle of *pacta sunt servanda* is mentioned in previous chapters. This principle forms the basis for the doctrine of treaty law. In the VCLT the substantive principle of *pacta sunt servanda* is codified. Through codification this substantive principle shapes the process of international law. Therefore, it is the procedural aspect of the principle that is the focus of this section.

Pacta sunt servanda is codified in Article 26 of the VCLT.[804] This Article appears in the part of the Convention dealing with observance, application and interpretation of treaties. It is part of the section on observance of treaties. This Article states: "[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith."[805] This provision declares the basic principle of treaty law. Once a treaty is signed its obligations must be obeyed.[806] This is the minimal *procedural* requirement of treaty law. This principle ensures that the substance of a treaty takes on the treaty form. Consequently *pacta sunt servanda* establishes the basic process of a treaty. Further, any departure from the principle of *pacta sunt servanda* must be justified by a process of law as well.[807] One example of an authorized departure from *pacta sunt servanda* is the situation of fundamental change of circumstances. This principle is examined below.

3.1.2 *Rebus Sic Stantibus*

An accepted derogation from the rule of *pacta sunt servanda* is the principle that a fundamental change in circumstances may permit the termination of a treaty.[808] Jennings and Watts note that this principle is derived from the "*conventio omnis itelligitur rebus sic stantibus*, with the consequence that all treaties are concluded

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1; However, Bederman denies that the opposition between stability and change is really a "problem" Bederman, "Rebus" (n 803) at p 37.

[804] VCLT (n 303) at Art 26.

[805] VCLT (n 303) at Art 26.

[806] See generally, Jennings &Watts (n 47) at 1296 n4.

[807] See generally, Jennings &Watts (n 47) at p 1296.

[808] See generally, Jennings &Watts (n 47) at p 1304 ff; See also, Cassese, International Law (n 49) at p 180 ff.

subject to an implied condition *rebus sic stantibus*…" [809] This principle asserts that "a change in the basic circumstances underlying the making of a treaty could terminate it."[810] In order to terminate a treaty, the change in circumstances must be fundamental to the treaty and must limit a state's ability to perform the obligations outstanding under the treaty.[811] Further, in cases of fundamental change of circumstances a state may choose to suspend its obligations under a treaty short of terminating the treaty.[812]

Rebus sic stantibus has a long history in international law.[813] Prior to the 19th century the principle was not considered legal doctrine.[814] Vagts cites several examples of *rebus sic stantibus* from this period. These were the 1585 Anglo-Dutch Convention of Military Assistance and Subsidy, the 1871 London Declaration, and the Treaty of Berlin, 1878. Vagts also raises the example of the Panama Canal.[815] Each of these examples will now be examined in more detail.

Vagts' first example is the Anglo-Dutch Convention of Military Assistance and Subsidy in 1585. He notes that England and the Netherlands signed the treaty, but Queen Elizabeth I reneged on this agreement.[816] She justified this action on the basis that "'conventions must be understood to hold only while things remain in the same state.'"[817] This statement asserted the right to terminate a treaty on the grounds of a fundamental change of circumstances. The second episode that Vagts identifies is the London Declaration of 1871. This event is examined in detail by Bederman.[818] The episode began with Russia's defeat in the Crimean War. After this loss Russia was "isolated" by the other European powers. Russia was forced to sign the Treaty of Paris which was designed to limit Russian "aggression."[819] The clauses pertaining to the Black Sea restricted Russian powers. Russia was unable to deter either British or Ottoman activities in an area that had traditionally been within Russia's sphere of influence.[820] Consequently, Russia terminated the provisions of the Treaty that affected the Black Sea. Russia informed the other parties of this termination in two notes to the British Foreign Minister. In these notes Russia asserted changed circumstances and

[809] Jennings & Watts (n 47) at p 1305-06.
[810] Cassese, International Law (n 49) at p 181.
[811] VCLT (n 303) at Art 62(1).
[812] VCLT (n 303) at Art 62 (3).
[813] D Vagts, "Rebus Revisited: Changed Circumstances in Treaty Law" (2005) 43 Colum J Trans L, 459 at p 459.
[814] See generally, the history of this concept provided by Bederman, "Rebus" (n 803) at p 8.
[815] Vagts (n 813) at pp 466-8.
[816] Vagts (n 813) at p 466.
[817] Queen Elizabeth I, as quoted in G Schwarzenberger, "Clausula Rebus Sic Stantibus" 1 Encyclopaedia of Public International Law 611, at 612-613 as quoted in Vagts (n 763) at p 466.
[818] See generally, Bederman, "Rebus" (n 803).
[819] Bederman, "Rebus" (n 803) at pp 8-9; See also Vagts (n 813) at pp 466-7.
[820] Bederman, "Rebus" (n 803) at p 9; Vagts (n 813) at pp 466-7.

fundamental breaches by other parties to the treaty.[821] Bederman notes that by "December 1870… the rhetoric in the Communications between Russia, Britain and Turkey took on an edge of ill disguised hostility and the mood of impending conflict."[822] Only Britain and Turkey were interested in Russia's actions. The other European powers did not get involved for various reasons.[823] Bederman observes that Britain particularly chose to avoid aggression. Consequently, a conference was arranged in London.[824] Vagts notes that at this conference

> … a declaration was signed by Britain, Austria, France, Italy, Russia, Turkey, and North Germany. Its text read as follows: "[i]t is an essential principle of the Law of Nations that no Power can liberate itself from the engagements of a Treaty, nor modify the stipulations thereof, unless with the consent of the Contracting Parties by means of an amicable arrangement."[825]

This conference was known as the London Conference and the Declaration it produced was known as the London Declaration. English officials held that this statement was the "statement" of the law in this area.[826] The London Declaration was a "legal" response to Russia's claim.

The third example Vagts cites is *The Treaty of Berlin*, 1878.[827] Article XXV of the treaty stated:

> The provinces of Bosnia and Herzegovina shall be occupied and administered by Austria-Hungary. The government of Austria-Hungary, not desiring to undertake the administration of the Sanjak of Novi-Pazar [modern Kosovo Province], which extends between Serbia and Montenegro in a South-Easterly direction to the other side of Mitrovitza, the Ottoman administration will continue to exercise its functions there. Nevertheless, in order to assure the maintenance of the new political state

[821] Bederman, "Rebus" (n 803) at p 9; Vagts (n 813) at p 467.
[822] Bederman, "Rebus" (n 803) at pp 11-12.
[823] Bederman, "Rebus" (n 803) at p 11.
[824] See Bederman, "Rebus" (n 803) at pp 14-15.
[825] The London Declaration, 1871, as quoted in Vagts (n 813) at p 467.
[826] See, for example, the statement of Gathorne Hardy, British Secretary of State for India in 1878. As the New York Times reported: "Mr. Gathorne Hardy, Secretary for India, presiding at a banquet in Bradford to-night said the Government took its stand upon public faith and honesty, and upon the Declaration of 1871, that one party to an arrangement could not withdraw from it without the consent of the rest." "England's Eastern Policy" New York Times (April 30, 1878) available online at <www.newyorktimes.com> accessed on 7 April 2008.
[827] Vagts (n 813) at p 467.

> of affairs, as well as freedom and security of communications, Austria-Hungary reserves the right of keeping garrisons and having military and commercial roads in the whole of this part of the ancient vilayet of Bosnia. To this end the governments of Austria-Hungary and Turkey reserve to themselves to come to an understanding on the details.[828]

Austria annexed these territories and in time Turkey acquiesced to this annexation.[829] This was an example of acquiescence to a claim of *rebus sic stantibus*. This is important because Turkish acquiescence was seen by some commentators as a prelude to World War I.[830] Vagts also mentions a fourth example, the Clayton Bulwer Treaty of 1850. In this treaty the US and Great Britain both waived their claims to exclusive control over the Panama Canal.[831] Article 1 of the Treaty stated "[t]he governments of the United States and Great Britain hereby declare, that neither the one nor the other will ever obtain or maintain for itself any exclusive control over the said ship canal…"[832] However, between 1858 and 1882 the US claimed that "given changes in the economics of a canal, *rebus sic stantibu*s allowed it to escape from its obligations."[833] Great Britain disputed this claim.[834]

These examples illustrate that through the 19th century the legality of the principle of *rebus sic stantibus* was denied in order to promote stability in international obligations. However, the preference for procedural stability was altered by World War I. Bederman observes that, "World War I was the decisive moment in reshaping thinking about the role of law in international politics."[835] This shift resulted in the fact that "[f]rom 1919 to 1939 there were more claims of the right to resort to *rebus sic stantibus* than over all the prior history of the claim."[836] The increased uses of the principle of *rebus sic stantibus* produced feeble attempts to limit the right of states to claim a fundamental change of circumstances. One attempt to limit this principle was in Article 19 of the *Covenant of the League of Nations*. This Article gave the League the power to decide when a treaty would no longer be in force.[837] It stated that "[t]he

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[828] "Excerpts on the Balkans" *The Treaty of Berlin*, 1878 at Art XXV in the Modern History Sourcebook online at <www.fordham.edu> accessed on 8 April 2008 [text in brackets in original]; See also Vagts (n 813) at p 467.
[829] Vagts (n 813) at p 467.
[830] Bederman, "Rebus" (n 803) at p 23.
[831] Vagts (n 813) at p 467.
[832] *Convention Between the United States of America and Her Britannic Majesty* (1850) available online at <www.academic.brookly.cuny.edu/history/johnson/cb.htm> accessed on 8 April 2008.
[833] Vagts (n 813) at pp 467-8.
[834] Vagts (n 813) at p 468.
[835] Bederman, "Rebus" (n 803) at p 24.
[836] Vagts (n 803) at p 468.
[837] See generally, Vagts (n 803) at p 468.

Assembly may from time to time advise the reconsideration by Members of the League of treaties which have become inapplicable and the consideration of international conditions whose continuance might endanger the peace of the world."[838] Therefore, *rebus sic stantibus* was permitted but only with the consent of the League itself. This was an attempt to limit the use of this claim. Further, Vagts notes that in this period the PCIJ heard two cases involving *rebus sic stantibus*. The first of these cases was the *Nationality Decrees of Tunis and Morocco.* In this case the PCIJ considered whether or not France was entitled to enact nationality decrees affecting British citizens in Tunisia and Morocco. France argued that previous treaties governing this question were invalidated by the principle *of rebus sic stantibus*.[839] However, the relevance of this example is limited as the parties agreed on the merits, preventing a final decision on the issue by the Court.[840] The second case was the *Case of Free Zones of Upper Savoy and Gex*.[841] In this case the PCIJ considered a dispute between Switzerland and France. At issue in this case was the provisions of the Treaty of Versailles in which Switzerland's neutrality was recognized in exchange for giving up sovereignty of upper Savoy. This led to negotiations over the effect of earlier treaties that created "free zones" to protect Geneva.[842] Switzerland was not a party to the Treaty of Versailles. France argued that this Treaty superseded the earlier treaties on the basis of *rebus sic stantibus*. In the end the PCIJ held that the Treaty of Versailles could not be applied against Switzerland since it was not a party to the treaty.[843]

Confusion about this principle continued after World War II, as states were concerned that Germany had invoked *rebus sic stantibus* in the run up to the war. [844] However, worries about the misuse of *rebus sic stantibus* never translated into a challenge to the principle itself.[845] Bederman notes that in both the interwar and post war periods, attempts to reconcile claims of *rebus sic stantibus* with a staunch interpretation of the London Declaration resulted in reduced reliance on this principle.[846]

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[838] *The Covenant of the League of Nations* at Art 19 available online at <http://www.yale.edu/lawweb/avalon/leagcov.htm#art19> accessed on 8 April 2008.
[839] *Nationality Decrees Issued in Tunis and Morocco (French Zone) on November 8th, 1921* (Advisory Opinion) General List 3 [1922] PCIJ at paras 57-58 available online at <www.worldcourts.com> accessed on 7 April 2008.
[840] G Haraszati, "Treaties and The Fundamental Change of Circumstances" (1975) 146: III Rec des Cours 1 at p 38.
[841] *Case of the Free Zones of Upper Savoy and the District of Gex* [1922] PCIJ Ser A 22.
[842] "Chronology 1919" available online at <www.indiana.edu/~league/1919.htm> accessed on 8 April 08.
[843] Haraszati (n 840) at p 39.
[844] Vagts (n 813) 468.
[845] See generally, Vagts (n 813) 469.
[846] Bederman, "Rebus" (n 803) 27, 29.

Following the creation of the United Nations, the application of *rebus sic stantibus* changed. This change occurred because the UN Charter contained the "modest and realistic notion that states should behave properly in their international relations."[847] Elaboration of what constituted "proper behaviour" included establishing circumstances in which a treaty could be modified. The situations when a treaty could be modified were negotiated leading up to the VCLT. For example, in 1935 the Harvard Research project wrote a *Draft Convention on the Law of Treaties.* This draft convention included a clause allowing for a treaty to be terminated in cases of changed circumstances.[848] However, to terminate a treaty on these grounds, a party had to obtain a declaration from an international tribunal that confirmed the changed circumstances.[849] This was a method of limiting recourse to this process.

This limitation was not adopted by states' parties in the final text of the VCLT.[850] Article 62 of the VCLT reads,

> 1. A fundamental change of circumstances which has occurred with regard to those existing at the time of conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:
> (a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and
> (b) the effect of the change is to radically transform the extent of obligations still to be performed under the treaty.
> 2. A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty:
> (a) if the treaty established a boundary; or
> (b) if the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty.
> 3. If, under the foregoing paragraphs, a party may invoke a fundamental change of circumstances as a ground for terminating or withdrawing from a treaty it may also invoke the change as a ground for suspending the operation of a treaty.[851]

[847] Bederman, "Rebus" (n 803) 29.
[848] Vagts (n 813) 469.
[849] Article 28, Research in International Law: III. Law of Treaties, 29 Am J. of Int'l L. Supp. 657, 1119-1120, as quoted in Vagts (n 813).
[850] VCLT (n 303); See also A Aust, *Modern Treaty Law and Practice* (CUP, Cambridge 2000) 361; See also Vagts (n 813) 470.
[851] VCLT (n 303) at Art 62.

Article 62 has been considered several times by the ICJ. It was considered in the *Fisheries Jurisdiction case (Federal Republic of Germany v. Iceland)* and the *Gabickovo-Nagymoros case.*[852] In the first of these cases, *Fisheries Jurisdiction (Federal Republic of Germany v. Iceland),* Iceland sought to unilaterally extend its fishing jurisdiction to 12 miles. It did so in accordance with its domestic policy. This policy change led to an "exchange of notes" with Germany in 1961. Germany agreed in these notes to respect the new boundaries and to phase out its ships from Icelandic waters.[853] These notes required Iceland to provide six months' notice to Germany of any further extension of its fishing zone. Iceland provided this notice in 1971.[854] Germany wished to challenge this extension. Germany argued that these notes were intended to confer jurisdiction on the ICJ and the Court agreed[855] but Iceland did not participate in the hearing. However, the Icelandic Althing (parliament) passed a resolution stating that these compromisory clauses were no longer of effect.[856] One reason for this was provided in communications to the Court by the Icelandic Minister of Foreign Affairs. The Minister asserted that there were "…changed circumstances resulting from the ever-increasing exploitation of the fishery resources in the seas surrounding Iceland." [857] In response the ICJ observed that

> International law admits a fundamental change in the circumstances which determined the parties to accept a treaty, if it has resulted in a radical transformation of the extent of the obligations imposed by it, it may, under certain conditions, afford the party affected a ground for invoking the termination or suspension of the treaty. This principle, and the conditions and exceptions to which it is subject, have been embodied in Article 62 of the Vienna Convention on the Law of Treaties, which may, in many respects be considered as a codification of existing customary law on the subject of the termination of a treaty relationship on account of change of circumstances.[858]

[852] Aust (n 850) at p 241; See also Vagts (n 813) at p 471 ff; Vagts and Aust also mention a European Court of Justice Decision, *Racke* v. *Hauptzollanpt Mainz*. This decision will not be examined in any detail here, although it likely is considered persuasive by the ICJ; Vagts (n 813) at p 471 ff; Aust (n 850) at p 241.
[853] *Fisheries Jurisdiction Case* (*Federal Republic of Germany v. Iceland*) (Judgment - Jurisdiction) General List No 56 [1973] ICJ Rep 49 at par 17.
[854] Fisheries Jurisdiction case (n 853) at paras 14-16.
[855] Fisheries Jurisdiction case (n 853) at par 23.
[856] Fisheries Jurisdiction case (n 853) at par 25.
[857] Fisheries Jurisdiction case (n 853) at par 35.
[858] Fisheries Jurisdiction case (n 853) at par 36.

The ICJ held that Article 62 was a custom that had been codified by treaty law. The Court also held that a claim of changed circumstance under the VCLT must be "fundamental" in nature.[859] Further, the Court concluded that even if a change was fundamental and caused a treaty to lapse, this lapse would never affect the compromisory clause that established the Court's jurisdiction.[860] The Court considered that "…in order that a change of circumstances may give rise to a ground for invoking the termination of a treaty it is also necessary that it should have resulted from a radical transformation of the extent of obligations still to be performed."[861] The obligations must have become such a "burden" that they fundamentally altered the original obligation. The Court did not find a radical change on the facts of this case.[862] Finally, the Court agreed with Germany's contention that a claim of changed circumstances did not automatically release a state from its obligations. Changed circumstances existed by mutual agreement of the signatories or by judicial "settlement" that the circumstances had changed.[863]

Rebus sic stantibus was also considered in the *Case Concerning Gabcikovo-Nagymoros Project.*[864] In this case Hungary wished to terminate a 1977 treaty with Czechoslovakia. Hungary asserted "that it was entitled to invoke a number of events which, cumulatively, would have constituted a fundamental change of circumstances."[865] Hungary referred to political changes that had occurred as well as economic viability and environmental concerns and norms.[866] On the facts of this case the Court held that the changed political situation did not affect the original circumstances of the treaty. Similarly, the ICJ did not consider economic shifts to be fundamental.[867] The Court also held that the environmental changes claimed by Hungary were in fact anticipated in the treaty.[868] Consequently, Hungary's claim of fundamental change of circumstances was unsuccessful on all these grounds.[869]

In these two cases the Court held that a fundamental change of circumstances justified termination of a treaty and that a fundamental change of circumstances was a

[859] Fisheries Jurisdiction case (n 853) at par 37.
[860] Fisheries Jurisdiction case (n 853) at par 40.
[861] Fisheries Jurisdiction case (n 853) at par 43.
[862] Fisheries Jurisdiction case (n 853) at par 43.
[863] Fisheries Jurisdiction case (n 853) at par 44.
[864] *Case Concerning Gabcikovo-Nagymoros Project (Hungary v. Slovakia)* (Judgment) General List No 92 [1997] ICJ Rep 7 < www.icj-cij.org> accessed on 20 February 2006; See also reference in Aust (n 850) at p 241.
[865] Gabcikovo-Nagymoros case (n 864) at par 104.
[866] Gabcikovo-Nagymoros case (n 864) at paras15, 104.
[867] Gabcikovo-Nagymoros case (n 864) at par 104.
[868] Gabcikovo-Nagymoros case (n 864) at par 104.
[869] Gabcikovo-Nagymoros case (n 864) at par 104.

custom of international law. However, in both these cases the Court refused to find on the facts a change in circumstances. As Vagts notes, "[w]hat can be said is that rebus sic stantibus will not avail unless the change in circumstances is clearly a drastic change from the circumstances anticipated by the parties." [870] Vagts indicates that Court interpreted *rebus sic stantibus* narrowly; the claim of changed circumstances was limited to instances of radical change. Through this approach the ICJ preserved the stability of law, but only by narrowing interpretations of changed circumstances, which was a concept that had been designed to promote change in the law.

3.1.3 The Opposition Between *Pacta Sunt Servanda* and *Rebus Sic Stantibus*

Bederman traces the genealogy of the 1871 London Declaration. Through this history he explores the relationship between the principle of *pacta sunt servanda* and the principle of *rebus sic stantibus*.[871] He notes that "[p]acta sunt servanda and rebus sic stantibus express different visions of international law. One is harmonious and stable; the other is dynamic dangerous and uncertain."[872] Bederman is not the only commentator to note the opposition of stability and change in these principles. Lauterpacht notes of *rebus sic stantibus* that

> [t]here are only few problems of international law that have caused more embarrassment to international publicists, or which are more unsettled then the doctrine in question [*clausula rebus sic stantibus*]. The *clausula* is, on the one hand, commonly styled as 'mischievous' and 'notorious' and as revealing in a striking manner the absence of law within the international community. It is, on the other hand, almost universally conceded that some aspects of the doctrine are just and necessary, and that it would be unreasonable to reject it lock, stock, and barrel. These two opposing opinions are, as a rule, held by the same writers who try to bridge the gulf between the two points of view by advising the utmost caution and conscientious self-restraint in the resort to be had to the *clausula*. [873]

[870] Vagts (n 813) at p 474.
[871] Bederman, "Rebus" (n 803).
[872] Bederman, "Rebus" (n 803) at p 2.
[873] Lauterpacht, Private Law Sources (n 690) at p 167.

In this quotation Lauterpacht identifies the core debate mediated by the doctrine of process. He acknowledges that processes of law try to create stability and that as a result recourse to the *clausula rebus sic stantibus* is limited. However, he also notes that the limitation of *rebus sic stantibus* hampers the ability of states to respond to changes in their circumstances. Vagts agrees with Lauterpacht. Vagts writes that, "[p]erhaps the major effect of the doctrine is the way in which it lightens the load of the state seeking to escape its treaty obligation. Some observers would say that it provides a needed elasticity in the law of treaties so that countries that would otherwise simply violate their obligations can escape respectably."[874]

The process of treaty law mediates between stability and change. States are reluctant to enter into obligations that can never be changed. However, states require the stability that absent extraordinary circumstances promises will be kept. For this reason the ICJ has interpreted Article 62 of the VCLT restrictively. Therefore, processes of treaty law provide stability by limiting the circumstances in which a treaty can be terminated. It appears that stability is preferred but change is permitted. This balancing of procedural parameters is also present in the doctrine of custom formation and in the principle of equity.

3.2 Custom

Guzman and Meyer claim that custom does not have an established process.[875] They note that custom has "…struggled with the vexing question of how to promote stability and reliance on customary law, while preserving the voluntary support of customary law in the fluid environment of international relations."[876] This claim results from the fact that the processes that guide custom are customary in nature.[877] However, the mere fact that these processes are customary does not mean that they do not exist. Arguably, in custom the process of custom formation mediates the debates between stability and change in a manner that the doctrine recognizes. Consequently, the relationship between

[874] Vagts (n 813) at p 476.
[875] AT Guzman & TL Meyer, "Customary International Law in the 21st Century" UC Berkeley Public Law Research Paper No. 984581, available online at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=984581> accessed on 3 May 2008.
[876] V Fon & F Parisi, "Stability and Change in International Customary Law" (April 2004) American Law & Economics Association Annual Meetings. American Law & Economics Association 14th Annual Meeting Working Paper 21 available online at <http://law.bepress.com/alea/14th/art21> accessed on 3 May 2008.
[877] Fon & Parisi (n 876)

stability and change in custom can be examined through the principles of custom formation and the doctrine of the persistent objector.

3.2.1 The Elements of Custom Formation

The requirements of custom formation are derived from the definition of custom. Custom is commonly defined as state practice adhered to out of the subjective belief that the custom is legal.[878] When the conditions of state practice and subjective belief are met, custom creates a legal obligation. Therefore, these requirements provide a mechanism by which actions of states, over time, create legal obligations. Also, once a custom is established it is effective against states as general international law. The general nature of customary obligations indicates that stability is fostered when the two elements of custom formation are present.[879] However, there is widespread debate over the amount of state practice necessary for a custom to develop. There is also a debate over how long that practice must be sustained to create consensus. Additionally, the meaning of the subjective requirement of belief is not settled.[880] As a result, there are two circumstances in which this belief is determined. First, an international tribunal may declare that a custom exists and it creates a legal obligation.[881] Second, states may collectively declare a custom legal. Although, as a collective unilateral act this declaration must satisfy the requirements of intention and autonomy, requirements already proven to raise questions of legality.[882]

As such, the rules of custom formation establish methods of turning state action into a legal custom, but the methods adopted are broad and imprecise. The methods provide a stable form but are ambiguous enough to account for change. In sum, the process of custom formation can be explained as promoting stability and permitting change. This indicates that custom formation mediates the debates as required of the doctrine of process. Further, the relationship between stability and change in custom formation is particularly evident in one rule of custom formation, the persistent objector principle. This rule will now be examined more thoroughly.

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[878] See for example, Brownlie (n 48) at p 4 and Shaw (n 50) at p 58.
[879] Fon & Parisi (n 876).
[880] See for example Guzman & Meyer (n 875); See also Brownlie (n 48) at p 4ff; Shaw (n 50) at pp 59, 61, 69.
[881] Fon & Parisi (n 876).
[882] See discussion in Chapters 1 and 2.

3.2.2 The Persistent Objector: The Exception to the Principle of Custom Formation

The persistent objector principle is an exception to the process of custom formation.[883] This principle was affirmed by the ICJ in the *Fisheries Jurisdiction Case (UK v. Iceland).*[884] In its present shape the persistent objector principle permits a state to object to a custom and to refuse to be obligated by it. Consequently, in order to qualify as a persistent objector a state must object to the custom during its formative period and consistently thereafter;[885] and once this custom has been objected to the custom cannot be applied to the state. One problem with the doctrine is that this doctrine may be invoked out of political interest so that it does not always represent a principled objection to a custom.[886] This is particularly problematic since persistent objector status is determined by state consent.[887] Therefore, the persistent objector doctrine is a departure from general methods of custom formation, as it is a rule which recognizes that states can legitimately opt out of a custom. This results in a situation in which custom is applied against some states but not all states. As a result this principle limits application of custom by providing a stable process for states to object to a customary obligation, since a state can always object to a custom as it is formed. To conclude, the persistent objector doctrine provides stability by limiting processes of change in custom formation.

An additional difficulty is that the doctrine of the persistent objector is not universally accepted as a process of international law. For example, Danilenko notes that this rule has been opposed in opinions of the ICJ.[888] Further, Stein notes that the persistent objector doctrine is rarely used in practice.[889] Consequently, the existence of the rule of the persistent objector is debatable,[890] although its existence is regularly

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[883] Fon and Parisi (n 876).
[884] *Fisheries Jurisdiction (United Kingdom of Great Britain and Northern Ireland v. Iceland)* (Judgment - Merits) [1974] ICJ Rep 3 available online at <http://www.icj-cij.org/docket/files/55/5749.pdf> accessed on 3 May 2008; GM Danilenko, *Law-making in the International Community* (Kluwer Norwell, 1993) at p 112.
[885] See for example, H Lau "Rethinking the Persistent Objector Doctrine in International Human Rights Law" (2005) 6 Chi J Int'l L 495 at p 495.
[886] Danilenko (n 884) at p 112.
[887] Danilenko (n 884) at p 111.
[888] See for example Danilenko (n 884) at p 113 n 128.
[889] TL Stein, "The Approach of a Different Drummer: The Principle of the Persistent Objector in International Law" (1985) 26 Harv Int'l LJ 457, at p 457.
[890] See For example, S Toope and S Rehaag, "Globalization and Instrument Choice: The Role of International Law" in P Eliadis, MM Hill & M Howlett (eds) *Designing Government: From Instruments to Governance* (McGill Queens University, 2005) at pp 322, 325; See generally Stein (n 889).

asserted.[891] Consequently, what can be concluded about this doctrine is that it likely exists in theory but it lacks the state practice to establish doctrine in this area. This in turn demonstrates the doctrinal preference for processes of stability over those that promote change.

3.2.3 Stability and Change in Custom Formation

Custom formation establishes processes for state practice to create custom. These processes promote both stability and change, and are broad enough to allow states to change general obligations which affect their vital interests. Custom achieves this balance between the need for stability and the need for change by recognizing the persistent objector. This principle permits states to maintain an objection to a custom provided they have objected to the custom persistently and publicly since it was formed. However, this principle also promotes stability by limiting opportunities to change custom once it is formed. As such custom formation is explained by both stability and change. Custom "fits" within the doctrine of process as it mediates debates between stability and change that is necessary to provide structure to international law.

3.3 Equity

Equity in international law is not well defined or well understood.[892] In fact, doctrine uses the term equity in three distinct ways. Equity can refer to: a substantive principle of justice; a general principle of law; or a specific process to achieve equity. To illustrate, Lowe defines equity as "general principles of justice as distinguished from any particular system of jurisprudence or the municipal law of any state." He wants to "…use the term to signify equity as distinct from law."[893] He defines equity as a

[891] Stein notes that the majority of textbooks and writings on sources assert the existence of the doctrine but cannot support this by state practice other than the Fisheries and Asylum cases; Stein (n 889) at p 459; Villiger even goes so far as to assert that the concept is accepted by the majority of writers; See Villiger (n 370) at p 16.
[892] CR Rossi, *Equity and International Law: A Legal Realist Approach to International Decision Making* (Transnational, Irvington 1993) 41; See generally, Jennings & Watts (n 41) at p 43, n 1.
[893] V Lowe, "The Role of Equity in International Law" (1988) 12 Australian Year Book of International Law 54 at p 54.

substantive principle. This is the first use of equity. The second use of equity is as a source of law. While equity is not listed in Article 38(1) of the Statute of the ICJ,[894] it is formally incorporated into decisions of the ICJ in two ways. First, equity is considered a general principle of law. As a principle of law it is a source of legal obligation. Second, equity is introduced in Article 38 (2) of the Statute of the ICJ. This provision states that "This provision shall not prejudice the power of the Court to decide a case *ex aequo et bono*, if the parties agree thereto."[895] This Article established that equity is a source of international law. Third, equity also refers to the ability of the ICJ to choose the law applicable to the dispute before it.[896] As a result, equity operates in many ways at the Court,[897] including the use of equitable processes, reaching equitable decisions and determining equitable results.[898] Consequently, equity is also described as a "lawmaking process"[899] insofar as it establishes methods of achieving equitable processes, equitable decisions or equitable results. It is the third sense of equity,, equity as a process, that is the focus here. Therefore, in this section equity refers to the processes by which principles of justice are incorporated into decisions of the ICJ.

3.3.1 The Substance and Form of Equity

It is necessary to explain the substance and form of equity in order to understand the processes of equity that are applied by the ICJ. Equity refers to a substantive principle of justice. Another way of describing this is "equity-as-fairness."[900] The substance of equity is applied by the Court in three circumstances. Equity is used when formal doctrine would lead to unfairness; it is used to prevent misapplication of the substance of law; and it is also used to fill gaps in the law.[901] The substantive use of equity is demonstrated by the doctrinal debate as to whether Courts can refuse to apply a law

[894] See generally Rossi (n 892) at Ch 3.
[895] Statute of the ICJ (n 308) at Art 38 (2).
[896] AE Boyle & C Chinkin, *The Making of International Law* (OUP, Oxford, 2007) at p 288.
[897] *Maritime Boundary Between Greenland and Jan Mayen (Denmark v. Norway)* (Separate Opinion of Judge Weeramantry) (1993) ICJ Rep 38 at par 5
[898] Maritime Boundary Between Greenland and Jan Mayen (n 897) par 7; Boyle and Chinkin (n 897) 288.
[899] Cassese, International Law (n 97) at p 183.
[900] See generally, TM Franck & DM Sughrue "The International Role of Equity-as-Fairness" (1992) 8 Geo LJ 563 at p 570.
[901] This corresponds to the traditional categories of equity *praetor legem*, equity *infra legem* and equity *contra legem*. M Akehurst, "Equity and General Principles of Law" (1976) 25 ICLQ 801 at p 801.

because they consider it unjust.[902] As a substantive principle equity is given legal form by incorporation into the framework of existing law. Shaw explains that "what is really in question here is the use of equitable principles in the context of a rule requiring such an approach. The relevant courts are not applying abstract principles of justice, but rather deriving equitable principles and solutions from applicable law."[903] There are two "rules" that require an equitable approach. First, equity is considered a general principle of law.[904] Second, equity can be applied by the Court when the parties agree a case may be decided *ex aequo et bono*.[905]

Equity was first interpreted as a general principle of law by the PCIJ in the *Diversion of Water from the River Meuse case.* In this case Judge Hudson held that equity was an independent principle of international law.[906] He asserted that "[w]hat are widely known as principles of equity have long been considered to constitute part of international law, and as such they have often been applied by international tribunals."[907] He argued that, "[i]t must be concluded, therefore that Article 38 of the Statute, if not independently of that Article, the Court has some freedom to consider principles of equity as part of the international law which it must apply."[908] This contention was affirmed in the *Rann of Kutch Arbitration.* This was an arbitration heard at the Indo-Pakistan Western Boundary Case Tribunal.[909] In this decision the panel denied a motion by Pakistan to decide the case *ex aequo.*[910] However, the panel did assert that equity was a general principle of law.[911] Equity was also considered in the *North Sea Continental Shelf case.* This case held that maritime delimitation was determined by principles of equity; the equidistance principle of maritime delimitation could not be applied if it would lead to an inequitable result. Further, the ICJ held that equity formed a rule of law. [912] Similarly, in the *Fisheries Jurisdiction case* the ICJ directed the United Kingdom and Iceland to resolve their dispute using equitable

[902] Akehurst (n 901) at p 807.
[903] Shaw (n 50) at p 84.
[904] See for example, Kindred et al (n 51) at p 136.
[905] Statute of the ICJ (n 308) at Art 38(2).
[906] See for example, Shaw (n 50) at p 26; Brownlie (n 48) at p 82.
[907] Individual Opinion by Mr. Hudson, *Diversion of Water From the River Meuse* (*Netherlands v. Belgium*) PCIJ Rep Series A/B No 70 at p 7.
[908] River Meuse case (n 908) at p 77; See also, Brownlie (n 48) at p 26; See Shaw (n 50) at p 83.
[909] See J Gillis Wetter, "The Rann of Kutch Arbitration" (1971) 65 AJIL 346 at p 347; See generally Shaw (n 50) at p 83.
[910] Gillis Wetter (n 909) at p 348.
[911] Gillis Wetter (n 909) at p 348.
[912] See, for example, *North Sea Continental Shelf Cases* (*Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands*) (Judgment - Merits) [1969] ICJ Rep 4; Summary available at <www.icj-cij.org> accessed on February 24, 2006; See also Brownlie (n 48) at p 83ff; Shaw (n 50) at p 24.

principles.[913] In this case the Court held by 10 votes to 4 that "…the government of Iceland and the Government of the United Kingdom are under mutual obligations to undertake negotiations in good faith for the equitable solution of their differences concerning their fishery rights…"[914] Additionally, the scope of the principles of equity was clarified by the *Libya/Malta case*. In this case it was determined that equity required consistency in its application.[915] Finally, the *Mali v. Burkina Faso case* considered the meaning of equity, but felt equity did not apply in cases of established boundaries.[916]

The second type of equity is equity *ex aequo et bono*. Equity *ex aequo* is a source of international law as it gives formal effect to principles of fairness. This type of equity is confined to tribunals and it is only available when permitted by a tribunal's statute.[917] The main example of this type of equity is Article 38 (2) of the Statute of the ICJ. This Article states that: "[t]his provision shall not prejudice the power of the Court to decide a case *ex aequo et bono* if the parties agree thereto."[918] This form of equity is often dismissed as a product of the statute of the Court because state consent is necessary for the ICJ to decide a matter *ex aequo*.[919] This consent has never been given.[920] However, as Cassese notes, "[w]henever an international court or tribunal applies equity, it creates law between the parties to a dispute."[921] It is this application of equity that turns the substantive principle of fairness into a general principle of law. This is the procedural function of equity and it is this function that will now be examined in further detail.

3.3.2 The Processes of Equity

Equity describes the processes by which principles of justice/fairness are applied at the ICJ. It refers to the methods the Court uses to achieve equitable proceedings, equitable decisions or equitable results. Equitable processes are required because the substance of

[913] Fisheries Jurisdiction (n 884) at par 79; See also, Brownlie (n 48) at p 26.
[914] Fisheries Jurisdiction (n 884) at par 79.
[915] Shaw (n 50) at p 84.
[916] Shaw (n 50) at p 85; See generally, Brownlie (n 48) at p 26; Frontier Disputes case (n 180) at par 149.
[917] See for example, Cassese, International Law (n 49) at p 187.
[918] The Statute of the ICJ, Art 38(2) as quoted in Kindred et al (n 51) at p 77.
[919] See, for example, Jennings & Watts (n 47) at p 44.
[920] To the author's knowledge Article 38(2) of the Statute of the ICJ has never been applied directly by the Court; Search of the ICJ website <www.icj-cij.org> conducted on 16 September 2008.
[921] Cassese, International Law (n 49) at p 187.

fairness is not predetermined; this produces a situation where the substance of equity is formed only by the methods used to achieve fairness as a general principle of law. Therefore, equity functions as a process. Three examples of equitable principles that have been applied by international tribunals are compensation, estoppels and the equidistance/special circumstances rule.[922] These examples demonstrate the range of processes of equity.

The first example of an equitable process is compensation. Compensation is awarded according to equitable principles. For example, at the end of the Mexican revolution Mexico and the United Kingdom established the British-Mexican Claims Commission.[923] The Commission heard 110 claims.[924] One claim heard by this the Commission was *Dennis J. and Daniel Spillane (Great Britain) v. United Mexican States.*[925] In this claim the Commission found that the Spillane's claims for compensation were "exaggerated." Consequently, it was in the interest of the "principles of justice and equity" to award only part of the claim.[926] This arbitration was one example of the ability of a tribunal to award compensation on an equitable basis.[927] In this case equity acted as a legal process for determination of fair compensation. It allowed the ICJ to depart from the compensation claimed. As a result of this decision, the substantive principle of fairness was turned into a general principle of law through the outcome it produced, equitable compensation. As such, equity was a method of calculating damages. As a result, equity provided justification for variations in compensation. Therefore, equitable principles provided limited stability for variations in tribunal awards.

The second example of an equitable process is estoppels. In the previous chapter it was noted that estoppels can act as a bar to proceeding before an international tribunal. When used this way equity constitutes a substantive principle that acts as a procedural restraint in international law.[928] One illustration of this type of estoppels was the *Eastern Greenland case*. This case considered the force of the Ihlen Declaration, specifically whether this declaration barred Norway from pursuing a claim to territories

[922] Rossi (n 892) at p 127.
[923] *British-Mexican Claims Commission (Great Britain, United Mexican States)* [1929-1930] 5 RIAA 3.
[924] British Mexican Claims Commission (n 923) at p 3.
[925] *Dennis J. and Daniel Spillane (Great Britain) v. United Mexican States* Decision No 111 [1931] 5 RIAA 289.
[926] Spillane Arbitration (n 925) at p 290.
[927] See for example Akehurst (n 901) at p 802 n7.
[928] See above; Estoppels in international law have expanded beyond their procedural role, however, estoppels still play a procedural role in international adjudication.

in Greenland.[929] In this case the Ihlen Declaration acted as a procedural restraint, when the Court barred Norway from denying the statements of their government official. One outcome of this decision is that this case is often classified as an estoppel. Further, this case demonstrated that estoppels act as more than a substantive principle, in this case they also provided a method for the court to enforce a promise in the case of good faith. Therefore, in this case estoppels protected good faith through process, and in doing so ensured that the ICJ introduced procedural stability.

The third example of an equitable process is the equidistance/special circumstances rule of maritime delimitation. This type of equitable process was prominently considered in the *North Sea Continental Shelf case.* This case held that that the equidistance principle of maritime delimitation could not be applied if it would lead to an inequitable result. [930] However, as Evans notes,

> Many in the international legal community – judges, advocates, and academics – have now spent much of the last 35 years attempting to make this [case] mean more or less the opposite of what it says and today there is an imperative rule, and that is the equidistance/special circumstances rule.[931]

To illustrate this point he cites the *Maritime Boundary between Cameroon and Nigeria (Cameroon v Nigeria: Equatorial Guinea intervening)* where the court stated[932]

> The Court has on various occasions made it clear what the applicable criteria, principles and rules of delimitation are when a line covering several zones of coincident jurisdiction is to be determined. They are expressed in the so-called equitable principles/relevant circumstances method. This method, which is very similar to the equidistance/special circumstances method applicable in delimitation of the territorial sea, involves first drawing an equidistance line, then considering whether there are factors calling for the adjustment or shifting of that line in order to achieve an 'equitable result'.[933]

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[929] See generally Eastern Greenland case (n 132).
[930] North Sea Continental Shelf Case (n 912); See also Brownlie (n 48) at p 83ff; Shaw (n 50) at p 24.
[931] MD Evans, "Maritime Boundary Delimitation: Where do we go from here?" in D Freestone, R Barnes, D Ong (eds) *The Law of the Sea: Progress and* Prospects (OUP, Oxford 2006) 137 at p 144 [words in brackets added].
[932] *Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v Nigeria; Equatorial Guinea Intervening)* (Judgement) [2002] ICJ Rep 303; also quoted in Evans (n 931) at p 144.
[933] Land and Maritime Boundary Case (n 932) par 288; also quoted in Evans (n 931) at p 144.

Evans argues that the Court has *de facto* always applied the equidistance/special circumstances rule to achieve an equitable delimitation in maritime boundary disputes.[934] This supports the view that equitable principles act as a process, and that that process is the equidistance/special principles rule. This is demonstrated by the fact that this rule produces equitable results.[935] Further, through this method of maritime delimitation, equity is given legal form. Consequently, the equidistance/special principles rule performs the functions of process in the area of maritime delimitation.

Therefore, the processes of compensation, estoppels and the equidistance/special circumstances rule are all methods of applying equity. These examples demonstrate that equity is applied as a process of international law and, moreover, that equity performs the functions of doctrine of process of international law

3.3.3 Analysis

Equity arises when the ICJ applies substantive principles of justice as general principles of law.[936] To explain why this occurs, recall that equity mediates between sources and substance. Consequently, the methods of applying equity can be explained in terms of the doctrine of process, and its requirements of stability and change. One example of this use of equity arises when courts apply these principles to determine compensation. As discussed above, compensation is decided on facts, not the law, which makes levels of compensation vary widely. Consequently, methods of compensation promote change and provide an explanation for variations in tribunal awards, providing stability to processes that might otherwise be seen as arbitrary. Similarly, equitable principles such as estoppels ensure that good faith is protected. Moreover, estoppels also establish processes that create ordered defection from a promise, as was seen in the example of the principle of equity in maritime delimitation. This principle is interpreted as the outcome of application of a proper method, the equidistance/special circumstances rule. This rule provides form to the substantive principle of equity in maritime delimitation, therefore it acts as a process.

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[934] Evans (n 931) at p 144
[935] Evans (n 931) at p 145.
[936] General principles of law are the only form of equity applied by the ICJ in practice; See n 920 above.

Alternatively, equity promotes change in international law, as "…on the broadest level it is possible to see equity (in an analogy with domestic law) as constituting a creative charge in legal development, producing the dynamic changes in the system rendered inflexible by the strict application of rules."[937] However, this change is often limited in practice through process. This is borne out by the examples of estoppels and the equidistance/special circumstances rule. These rules require a consistent practice in interpreting equitable principles. Even in the case of compensation, which promotes change, processes provide more stability than if equity had not been applied.[938] These examples confirm that overall doctrine prefers stability over potential for change but must account for both. This explains why estoppels and decisions in maritime delimitation cases are considered to have more doctrinal legitimacy than abstract principles of compensation. The doctrinal preference for stability is also evident in the example of UNCLOS.

3.4 Example: UNCLOS

UNCLOS is a comprehensive agreement that governs the law of the sea.[939] It is an example of how the processes of international law promote stability and limit change. Boyle notes that UNCLOS is an

> …interlocking package deal, its provisions form an integrated whole, protected from derogation by compulsory third-party settlement of disputes, a prohibition on reservations, and a ban on incompatible *inter se* agreements. Within these limits, it was intended to be capable of further evolution through amendment, the incorporation by reference of other generally accepted international agreements and standards, and the adoption of additional global and regional agreements and soft law.[940]

[937] Shaw (n 50) at p 83.
[938] If compensation claims could not be justified in terms of equitable compensation then calculations of compensation would either be arbitrary or unfair in a given situation.
[939] A Boyle, "Further Development of the Law of the Sea Convention: Mechanisms for Change" (2005) 54 ICLQ 563 at p 563.
[940] Boyle, "Further Developments" (n 939) at pp 563-4.

Thus, UNCLOS has a unique framework. It promotes stability by limiting states' ability to defect from the treaty's obligations and it further limits change by providing mechanisms for review of the treaty obligations. Consequently, UNCLOS establishes the processes used in the area of the law of sea.

3.4.1 UNCLOS Processes that Promote Stability

Boyle observes that UNCLOS is intended to be a "comprehensive" agreement.[941] It has unique processes that prohibit reservations to the agreement and incompatible side agreements.[942] These requirements promote adherence to the treaty's substantive obligations. These requirements are procedural. They also link the substance of the treaty to the way the obligation is implemented. As such, UNCLOS strives for procedural stability in the law of the sea.

To illustrate this point Article 300 of UNCLOS states that "States Parties shall fulfil in good faith the obligations assumed under this Convention and shall exercise the rights, jurisdiction and freedoms recognized in this Convention in a manner which would not constitute an abuse of right."[943] This statement affirms the principle of *pacta sunt servanda*. It also underpins the assertion that UNCLOS is a comprehensive regime for the law of the sea. It establishes stable processes to ensure the ability to regulate the law of the sea. This preference for stability is expanded on in the Articles that prohibit derogation from the treaty.

Additionally, Article 309 of UNCLOS prohibits reservations to the treaty. This provision states that "[n]o reservations or exceptions may be made to this Convention unless expressly permitted by other articles of this Convention."[944] This provision limits the ability to change substantive obligations in the treaty. As a result it promotes stability. However, the rigid requirement of stability is softened by the exceptions to this rule. An example of an exception is found in the declarations permitted by Article 310. Article 310 establishes that

> Article 309 does not preclude a State, when signing, ratifying or acceding to this Convention, from making declarations or statements, however phrased or named, with a view, *inter alia*, to the harmonization of its laws

[941] Boyle, "Further Developments" (n 939) at p 563.
[942] Boyle, "Further Developments" (n 939) at p 563.
[943] UNCLOS (n 633) at Art 300.
[944] UNCLOS (n 633) at Art 309.

> and regulations with the provisions of this Convention, provided that such declarations or statements do not purport to exclude or to modify the legal effect of the provisions of this Convention in their application to that State.[945]

Thus, Article 310 actually limits a state party's ability to change the meaning of UNCLOS through its statements. According to this Article, a state can only use unilateral statements to harmonise, but not modify, its obligations.

Continuing in this vein, Articles 311 (3)-(6) restrict states' ability to enter into agreements that subvert the object and purpose of UNCLOS or impede a state party's ability to perform its obligations or exercise its rights under the treaty. States cannot derogate from the provisions affecting the "common heritage of mankind". These provisions establish that

> 3. Two or more States Parties may conclude agreements modifying or suspending the operation of provisions of this Convention, applicable solely to the relations between them, provided that such agreements do not relate to a provision derogation from which is incompatible with the effective execution of the object and purpose of this Convention, and provided further that such agreements shall not affect the application of the basic principles embodied herein, and that the provisions of such agreements do not affect the enjoyment by other States Parties of their rights or the performance of their obligations under this Convention.
> 4. States Parties intending to conclude an agreement referred to in paragraph 3 shall notify the other States Parties through the depositary of this Convention of their intention to conclude the agreement and of the modification or suspension for which it provides.
> 5. This article does not affect international agreements expressly permitted or preserved by other articles of this Convention.
> 6. States Parties agree that there shall be no amendments to the basic principle relating to the common heritage of mankind set forth in article 136 and that they shall not be party to any agreement in derogation thereof. [946]

Therefore, Article 311 provides stability in the law of the sea by limiting the ability of states to conclude side agreements that affect the performance of obligations under

[945] UNCLOS (n 633) at Art 310.
[946] UNCLOS (n 633) at Art 311.

UNCLOS. These agreements would weaken the normativity of the treaty. As a result they must be limited so that stability is achieved.

Stability is further ensured by the mandatory dispute resolution provisions. Article 279 requires that states peacefully resolve disputes that arise under the convention.[947] Parties are entitled to choose the means by which their dispute is resolved.[948] This includes non-binding methods such as conciliation[949] as well as binding dispute resolution processes.[950] If states are unable to resolve their dispute through non-binding means they must choose to resolve their dispute at one of three binding forums: the International Tribunal for the Law of the Sea, the ICJ, or a specially constituted arbitral tribunal. States may elect which body they choose to resolve their disputes through a written declaration. If they do not choose a forum for their dispute a state is deemed to pick arbitration. If both parties to a dispute declare the same process this process automatically becomes the forum for the dispute. If they do not agree to the same forum then the dispute is resolved by arbitration.[951] The bodies are entitled to resolve any dispute which comes before them. To resolve disputes UNCLOS and general international law are applied. A body may also decide a dispute *ex aequo et bono* at the request of the parties.[952] The exceptions to these rules are enumerated in Articles 297 and 298.[953]

In conclusion, states must abide by their obligations in UNCLOS in good faith. Consequently, the processes to derogate from these obligations are limited and any disputes that arise must be peacefully resolved. As such, these processes promote adherence to the UNCLOS regime and they promote a level of stability. Further, stability requires limiting the circumstances of change. Processes that permit change will now be examined.

3.4.2 UNCLOS Processes Which Promote Change

UNCLOS also permits change in limited circumstances: it allows for amendment by consensus, and it also permits expansion through incorporation of other international

[947] UNCLOS (n 633) at Art 279.
[948] UNCLOS (n 633) at Art 280.
[949] UNCLOS (n 633) at Art 282-284.
[950] UNCLOS (n 633) at Art 286 ff.
[951] UNCLOS (n 633) at Art 286.
[952] UNCLOS (n 633) at Art 293.
[953] UNCLOS (n 633) at Art 297-298.

laws and standards such as soft law.[954] These two methods of change are examined because, generally speaking, UNCLOS does not permit derogation from its obligations; reservations to UNCLOS are prohibited. However, after 10 years in force amendments are permitted. This is established in Article 312, which reads

> 1. After the expiry of a period of 10 years from the date of entry into force of this Convention, a State Party may, by written communication addressed to the Secretary-General of the United Nations, propose specific amendments to this Convention, other than those relating to activities in the Area, and request the convening of a conference to consider such proposed amendments. The Secretary-General shall circulate such communication to all States Parties. If, within 12 months from the date of the circulation of the communication, not less than one half of the States Parties reply favourably to the request, the Secretary-General shall convene the conference.
> 2. The decision-making procedure applicable at the amendment conference shall be the same as that applicable at the Third United Nations Conference on the Law of the Sea unless otherwise decided by the conference. The conference should make every effort to reach agreement on any amendments by way of consensus and there should be no voting on them until all efforts at consensus have been exhausted.[955]

There is also a simplified process for amendment of obligations. In this process a state provides an amendment to the Secretary General of the United Nations. This amendment is then passed on to the other state parties. If no parties object within 12 months the amendment enters into force. If any state party objects to the proposed amendment then the amendment does not come into force.[956] The only exception to this rule is an amendment to the amendment process which is limited even further.[957] Moreover, it must be noted that there is a distinction between this amendment process, which is limited, and modifications to UNCLOS. Freestone and Elferink argue that a modification is not an amendment, so modifications are permitted under UNCLOS. This difference is highlighted by the two implementation agreements that have been

[954] See Boyle, "Further Development" (n 939) at pp 563-4.
[955] UNCLOS (n 633) at Art 312.
[956] UNCLOS (n 633) at Art 313.
[957] UNCLOS (n 633) at Art 314.

entered into since UNCLOS came into force.[958] These are modifications that are permitted without requiring the formal amendment process.

All the processes just noted permit change to UNCLOS. However, it is argued that these provisions are so difficult to implement as to be practically impossible to operate.[959] Consequently, the processes of amendment are a method of permitting and yet limiting change.

Other aspects of UNCLOS also permit limited change. For example, Article 211 concerns pollution of the marine environment by vessels. This article states:

> 1. States, acting through the competent international organization or general diplomatic conference, shall establish international rules and standards to prevent, reduce and control pollution of the marine environment from vessels and promote the adoption, in the same manner, wherever appropriate, of routeing systems designed to minimize the threat of accidents which might cause pollution of the marine environment, including the coastline, and pollution damage to the related interests of coastal States. Such rules and standards shall, in the same manner, be re-examined from time to time as necessary.[960]

Article 211 does not specify the process required to prevent pollution of the marine environment. These rules can take either the form of a rule or the form of a "standard." The process required for states to prevent marine pollution is not fixed nor is it clearly legal in form. This instability means that this provision will not necessarily turn the substance of the provision into a legal obligation. Therefore, Article 211 fosters processes of change. Further, the language of "rules and standards" is not used in other Articles of UNCLOS which require states to pass "laws" and "regulations".[961] The terms "laws" and "regulations" require states to establish legal processes. Therefore, there are times were UNCLOS purposely does not require a stable legal process as a way of permitting change.

Additionally, provisions of UNCLOS incorporate other international agreements or standards. Boyle notes the specific provisions of UNCLOS which introduce these

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[958] D Freestone & A Oude Elferink, "Flexibility and Innovation in the Law of the Sea – Will the LOS Convention Amendment Procedures Ever Be Used?" in A Oude Elferink (ed), *Stability and Change in the Law of the Sea: The Role of the LOS Convention* (Brill, Leiden 2005) at pp 169, 171, 184.
[959] A G Oude Elferink, "Introduction" in Elferink (n 958) 4.
[960] UNCLOS (n 633) Art 211(1).
[961] See, for example, UNCLOS (n 633) Arts 207, 208, 210, 212 (1).

principles.[962] Additionally, Article 293 permits disputes under UNCLOS to be resolved by general international law or, if the parties elect, *ex aequo et bono*. These provisions introduce instability into international law by allowing states to interpret their obligations by reference to wider obligations of law. Through interpretation the obligations of UNCLOS are modified or expanded. Therefore, UNCLOS implicitly introduces processes by which obligations can change. However, these processes are limited in terms of substance and scope. For example, general law is introduced specifically to resolve disputes and its application is limited to these provisions of the treaty. The provisions on dispute resolution incorporate general international law and equity. In other areas of UNCLOS incorporation is more limited. Consequently, processes of UNCLOS permit change. However, change is limited and strictly controlled.

3.4.3 Analysis

UNCLOS is a strong example of the doctrine of process. UNCLOS establishes a complete regime for the law of the seas. This includes processes to implement its substantive obligations and it includes mechanisms such as prohibitions on reservations that prevent derogation from the treaty. These processes provide a link between the treaty form and the substance of the law and secure stability in the regime. UNCLOS further ensures stability by limiting the circumstances in which treaty obligations can be changed. However, it also establishes the way in which obligations are modified and when its obligations can be expanded. As a result UNCLOS circumscribes change and ensures the stability of the system. Therefore, UNCLOS provides a concrete example of the way the doctrine of process mediates debates over the goals of processes of international law; it promotes stability and allows change. However, UNCLOS also demonstrates that stability processes are preferred by the doctrine so that opportunities for change to legal obligations are limited.

[962] Boyle, "Further Development" (n 939) at p 564 n 5.

4. Stability and Change in International Law

The doctrine of process allows international law to promote stability while permitting change. This is illustrated by the examples presented above. In treaty law *rebus sic stantibus* is derogation from the principle of *pacta sunt servanda.* As such, change is permitted as an exception to procedural stability. In customary law processes are less stable; however, custom formation and the doctrine of the persistent objector both function to provide stability and permit limited change. Similarly, equity acts as a method by which doctrine regulates change in general principles of law. Lastly, UNCLOS is an example of a specific treaty regime that creates procedural stability, but encourages change through amendments, its incorporation of rules and standards, and its incorporation of general international law. UNCLOS demonstrates that the doctrine of process promotes stability and limits change. To understand further how doctrine mediates between the requirements of stability and change, two legal concepts are instructive: stability and change are related to the concepts of hard law and soft law. These concepts help clarify the debates within the doctrine of process and explain its preference for stability, and so they will be discussed in more detail in the next section.

4.1 Hard Law and Soft Law in the Doctrine

Weil identifies the "blurring of the normativity threshold" as a key weakness of the international system.[963] To Weil, "the international norm is becoming a singularly evasive quarry…"[964] He asserts that doctrinal confusion is leading international law towards a system of graduated normativity.[965] One way of conceptualizing this shift is through the concept of hard law as opposed to soft law.

Doctrine contrasts the notion of hard law with that of soft law. Abbott and Snidal define "hard law" as "legal obligations that are precise (or can be made precise through

[963] P Weil "Towards Relative Normativity in International Law?" (1977) 3 AJIL 413 at p 415.
[964] Weil (n 963) at p 418.
[965] Weil (n 963) at p 421.

adjudication or the issuance of detailed regulations)."[966] Hard law refers to a norm that creates a legal obligation.[967] To rephrase this point: hard law refers to processes which ensure that substance is given legal authority. In contrast, soft law does not create a legal obligation. It is comprised of broad principles that have not been solidified into "rules," and also soft law does not establish dispute resolution mechanisms.[968] Boyle notes that these characteristics are not always dependent on the source of the obligation, as a treaty may contain both "hard" and "soft" obligations.[969] This is seen in the example of Article 211 of UNCLOS.[970] Moreover the "softness" of an obligation is not predetermined. A given subject matter is not automatically hard or soft.[971] Consequently, the "hardness" of the obligation is determined by the process used to implement the obligation.

Shelton notes that "[a]n examination of practice demonstrates that the mode of adoption does matter and that states consciously choose the form of texts to distinguish those that are legally binding from those that are not."[972] As such, Shelton demonstrates that process matters as the process chosen indicates whether states have a substantive interest in a substantive obligation taking formal effect as a source of law. Adopting a process that results in a formal obligation indicates that states' interests, whether individual or collective, are capable of establishing stable expectations of behaviour so that they have legal authority. Alternatively, the choice to adopt a "soft" process results in a less formal obligation but allows for greater elasticity. This elasticity means that the obligation does not fit within the requirements of the doctrine of process because it does not provide substance with a stable legal source. Consequently, the relationship between "hard" law and "soft" law demonstrates the role that the doctrine of process plays within the structure of international law. The reason why some processes harden is further developed in section 6.3.1 in the discussion of legalization. For present purposes it is sufficient to observe that the doctrine of process establishes methods to mediate the doctrinal debate by requiring processes that establish stability while limiting change.

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[966] KW Abbott & D Snidal, "Hard and Soft Law in International Governance" (2000) 54 IO 421 at p 421.
[967] Boyle & Chinkin (n 896) 213; J Blavin Rapporteur, C de Jonge Oudraat, P.J. Simmons & D Shelton "Commitment and Compliance: What Role for International Soft Law?" [Carnegie Endowment for International Peace Lecture 22 November 1999] available online at <http://www.carnegieendowement.org/events/index.cfm?fa=pring&id=47> accessed on 5 May 2008.
[968] See for example, A Boyle "Some Reflections on the Relationship of Treaties and Soft Law" (1999) 48 ICLQ 901 at pp 901-02.
[969] See Boyle, "Relationship of Treaties and Soft Law" (n 968) at p 902; See also CM Chinkin, "The Challenge of Soft Law: Development and Change in International Law" (1989) 38 ICLQ 850 at p 851.
[970] See n 961, above.
[971] Boyle and Chinkin (n 896), 213; Chinkin, "The Challenge of Soft Law" (n 969) at p 852; However, states prefer "hard" law in some areas and "soft" obligation in others. Many areas contain both such as human rights or international finance. See for example Blavin (n 967).
[972] Shelton (n 207) at p 292.

Soft law promotes the opposite. A strong example of this point will be discussed below in the Israel-Jordan Peace Treaty.

4.2 Example: Treaty of Peace (Israel-Jordan)

Bell notes that international peace agreements tend to go through several phases before leading up to a final text.[973] The first phase is the "prenegotiation" agreement. Bell describes these agreements as "talks about talks." They are less formal and political then treaty negotiations and they tend to result in "soft" obligations[974] that are not legal obligations on the parties. The next phase is the substantive or framework agreement that is often aimed at ending the conflict and creating peace. These agreements establish a "framework" within which the conflict can end peacefully and as a result these agreements often include provisions regarding demilitarization and governance reforms.[975] These agreements create legal obligations, though they often do not take the "treaty" form.[976] Moreover, these agreements often involve non-state parties.[977] Lastly, the final phase is the implementation or renegotiation agreement. These agreements expand and reconsider the earlier commitments. These agreements take varying "forms" and use a variety of processes.[978] As Bell notes, it is only the second category of substantive agreements that contain "hard" treaties.

One example of a "hard" peace treaty is the *Treaty of Peace Between the State of Israel and the Hashemite Kingdom of Jordan*.[979] This treaty was entered into in 1994 [980] as the culmination of back channel contacts that dated from the 1920s. Irrespective of wars and boundary changes these contacts produced highly functional informal regulation of issues of mutual interest.[981] In the late 1980s efforts were made to formalize this arrangement; however, internal Israeli politics, the first *intifada* and a lack of US support led this initiative to fail. The first Gulf War changed the political and

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[973] C Bell, "Peace Agreements: Their Nature and Legal Status" (2006) 100 AJIL 373 at p 375.
[974] Bell (n 973) at p 377.
[975] Bell (n 973) at pp 377-8.
[976] Bell (n 973) at p 378.
[977] Bell (n 973) at p 378.
[978] Bell (n 973) at p 378-9.
[979] *Treaty of Peace Between the State of Israel and the Hashemite Kingdom of Jordan* (October 26, 1994) available online at <www.mfa.gov.il> accessed on 6 May 2008.
[980] Israel-Jordan Peace Treaty (n 979).
[981] L Zittrain Eisenberg & N Caplan, "The Israel-Jordan Peace Treaty: Patterns of Negotiation, Problems of Implementation" (2003) 9 Israel Affairs 87 at pp 88-90.

economic conditions in Jordan and ensured that negotiations were restarted; Jordan had sided with Iraq in the war and had suffered economically, and so it needed US debt forgiveness and aid. These pressures led Jordan to seek US approval through negotiation with Israel.[982] Additionally, the progress of Israeli-PLO negotiations led King Hussein of Jordan to try to protect his interests in the West Bank and Jerusalem.[983] As a result negotiations took place under US auspices in Madrid and then in Washington.[984]

The final treaty was preceded by the "Washington Declaration." This declaration was signed by Israel and Jordan on 25 July 1994.[985] It outlined five "underlying principles of their understanding" including: the negotiation of a final fair and durable peace, negotiating peace on the basis of existing UNSC resolutions, respect for the role of Jordan in maintaining holy sites in Jerusalem, the recognition of the need for secure boundaries and respect for sovereignty and the development of cooperation and an end of threats between the two states.[986] Lastly, it formally ended the state of war between Israel and Jordan.[987] Concrete cooperation measures adopted between the two states included creating phone links, joining electric grids, opening border crossings and ending economic boycotts.[988] These steps created an atmosphere for negotiations and a framework for further negotiations to occur, but it is of nebulous legal status. The declaration contains aspirational commitments to peace, as well as limited unilateral action to foster peace, but it falls under Bell's "prenegotiation" phase. It produces a soft-law obligation and not a binding treaty.

In contrast the Israel-Jordan Peace Treaty meets the formal requirements of the VCLT.[989] It is a "hard" legal obligation that follows processes for treaty formation. Following the Washington Declaration, bilateral negotiations on a treaty occur. During this period the parties hold talks and a text is agreed upon which results in a treaty that is signed and ratified.[990] The treaty is given legal authority by this process and it

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[982] Zittrain Eisenberg & Caplan (n 981) at p 93.
[983] Zittrain Eisenberg & Caplan (n 981) at p 94.
[984] Zittrain Eisenberg & Caplan (n 981) at pp 91, 97.
[985] United Nations, "Letter Dated 5 August 1994 from the Permanent Representatives of Israel, Jordan, the Russian Federation and the United States of America to the United Nations addressed to the Secretary General" (1994) UNGA Doc A/49/300, UNSC Doc S/1994/939 available online at <http://domino.un.org/unipsal.nsf> accessed on 6 May 2008.
[986] UN Letter (n 985) at Annex par B.
[987] UN Letter (n 985) at Annex par C.
[988] UN Letter (n 985) at Annex par F.
[989] P Malanczuk, "Some Basic Aspects of the agreements Between Israel and the PLO from the Perspective of International Law" (1996) 7 EJIL 485 at p 488.
[990] See generally, "The Israel-Jordan Negotiations" available online at < http://www.mfa.gov.il/MFA/Peace%20Process/Guide%20to%20the%20Peace%20Process/Israel-Jordan%20Negotiations> accessed 12 June 2008.

establishes substantive obligations for peace between Israel and Jordan.[991] The treaty achieves this by delimiting the boundary between the two states,[992] and it contains provisions on security and diplomatic relations.[993] It also discusses issues such as water allocation,[994] Jordan Rift Valley Development, cooperation on crime,[995] freedom of navigation [996]and places of religious significance.[997] It establishes economic ties between Israel and Jordan[998] and enshrines a requirement of good neighbourly relations.[999] Lastly, the treaty establishes a claims commission to resolve financial disputes between the parties.[1000] On the other hand, some of the obligations it establishes are aspirational. For example, the provision on refugees established negotiations that are to run parallel to permanent status talks with the PLO.[1001] In spite of these aspirational obligations the treaty is not a "soft" obligation[1002] as it meets the procedural requirements of a treaty. Further, unlike soft law obligation the Israel-Jordan Peace Treaty contains rules for the parties to follow[1003] and contains processes for dispute resolution. This also indicates the "hard" nature of the obligation.

It is the process that makes the Israel-Jordan Peace Treaty obligatory; carrying out the processes required to adopt a treaty and establishing a dispute resolution process ensures that the treaty becomes a "source" of law. This process creates stability in the relationship between Jordan and Israel. It also limits opportunities for the parties to defect from the legal obligation by limiting the ability to change obligations outside the treaty. It achieves this by establishing dispute resolution mechanisms. Lastly, following Bell's three phase schema it also produces further agreements to implement this initial arrangement.[1004] These agreements limit further opportunities for the parties to change

[991] Israel-Jordan Peace Treaty (n 979) at Art 1.
[992] Israel-Jordan Peace Treaty (n 979) at Art 3.
[993] Israel-Jordan Peace Treaty (n 979) at Art 4, 5.
[994] Israel-Jordan Peace Treaty (n 979) at Art 6.
[995] Israel-Jordan Peace Treaty (n 979) at Art 12.
[996] Israel-Jordan Peace Treaty (n 979) at Art 13.
[997] Israel-Jordan Peace Treaty (n 979) at Art 9.
[998] Israel-Jordan Peace Treaty (n 979) at Art 7.
[999] Israel-Jordan Peace Treaty (n 979) at Art 11.
[1000] Israel-Jordan Peace Treaty (n 979) at Art 24.
[1001] Israel-Jordan Peace Treaty (n 979) at Art 8.
[1002] Boyle, "The Relationship of Treaties and Soft Law" (n 968) at p 901.
[1003] Boyle, "The Relationship of Treaties and Soft Law" (n 968) at pp 901-02.
[1004] See, for example *Agreement for the Implementation of Article 19 (Energy) of the Treaty of Peace Between Israel and Jordan* (1995) available online at <http://www.mfa.gov.il/MFA/Templates/Amanot.aspx?NRMODE=Published&NRORIGINALURL=%2fmfa%2ftreaties%2fisrael%2520bilateral%2520agreements%2f&NRNODEGUID=%7b5F215993-CC42-421E-B74D-949AACCA4C9C%7d&NRCACHEHINT=Guest> accessed on 6 May 2008. There are nine further agreements between Israel and Jordan listed by the Government of Israel since this time. See Israel Bilateral Agreements available online at <http://www.mfa.gov.il/ > accessed on 6 May 2008.

their obligations. Therefore the Israel-Jordan Peace Treaty is an example of a hard law obligation that promotes stability in inter-state relations.

4.3 Hard Law, Soft Law and the Processes of International Law

The doctrine of process provides a way for substance to be given legal authority. It establishes the way that obligations can come into effect, remain in effect or "die." One useful way of understanding what process achieves in the doctrine is to juxtapose processes of law with non-legal processes; to achieve this, the doctrine of hard law is contrasted with the less formal soft law. These concepts are not differentiated by the substantive obligations they contain, or necessarily the form they take.[1005] They are differentiated by the processes they follow that result in an obligation that has legal authority. In this sense, processes act signal the legal nature of their obligation. This is illustrated by the procedural differences between the Washington Declaration, the Israel-Jordan Peace Treaty and subsequent implementing agreements. These processes indicate various levels of obligation that promote stability. This example shows how process turns a political obligation into a legally authoritative agreement. It turns a soft declaration in a hard treaty. Consequently, the concepts of hard and soft law help explain the role of process in international law. Doctrinally, process produces stability by providing a way for soft obligations to harden. Additionally, this explains the doctrinal preference for stability as the role of this process is to provide stability and limit opportunities for change. These observations about the doctrine of process will now be applied to the requirements for unilateral acts.

5. Unilateral Acts and the Process of International Law

The processes of international law mediate between the need to promote stability and permit change. However, process doctrine favours stability over change as generally

[1005] For example treaties may take on "hard" or "soft" obligations. See Boyle, "The Relationship of Treaty and Soft Law" (n 968).

change is limited in order to establish stability in the law. This can be described as the way process hardens legal obligations; process doctrine explains that process provides stability by establishing the method by which one can discern the legal authority of substantive legal obligations. Therefore, to be considered legal unilateral acts must be explained in reference to this doctrine. If unilateral acts cannot be explained by stability and change then they cannot be explained by the doctrine of process. In this case unilateral acts do not fit within the doctrine and cannot be considered legal.

There are few procedural requirements placed on unilateral acts by the doctrine. As a result, each type of unilateral act has specific processes. For example, notification requires an act of notification. Declarations require a declaration.[1006] Therefore, one of the few general processes that has received attention at ILC was the method of revoking a unilateral act. However, revocability proves to be doctrinally problematic. This is because the revocability of unilateral acts means that these acts can always be withdrawn or modified according to the intention of the acting state. Further, the ability to unilaterally modify an obligation promotes change and not stability. Consequently, the ability to modify unilateral acts must be limited so that there are processes in place which promote doctrinal stability. As such, revocability provides a useful reference point for the process of unilateral acts.

The doctrinal consequences of revocation for the stability of unilateral acts will be the subject of this section of the chapter. This discussion will proceed in three parts: first, the concept of revocation will be discussed; second, the revocability of unilateral acts will be explored; and third, the consequences of revocation for the procedural stability of unilateral acts will be examined.

5.1 Revocation in International Law

Revocation is considered in the context of individual sources of law,[1007] and is particularly important in the context of treaty law[1008] where revocation is most closely associated with the withdrawal, denunciation and termination of treaties. Withdrawal,

[1006] See generally, and for example, Jennings &Watts (n 47) at p 1192.
[1007] Jennings & Watts have no entry in their index for revocation; See generally Jennings & Watts (n 47).
[1008] This is logical, as both custom and general principles of law (the other main sources of law) have often been considered consensus based sources of law, therefore, the act of termination of a custom or general principle is never be dependant on the act of one state. See generally and for example, Jennings & Watts (n 47) at p 24 ff.

denunciation and termination are different in context but not in substance. In multilateral treaties obligations do not end when one party decides the treaty is no longer legally obligatory but if one party wishes to end its obligations this party withdraws from the treaty. This means that the treaty no longer applies to the withdrawing party; however, it remains in effect for all other parties to the treaty. Alternatively, in a bilateral treaty when one party decides to end its obligation, this leads to the denunciation of the treaty, and denunciation can effect termination of the treaty.[1009] In spite of this difference of terminology, acts of withdrawal and denunciation are collectively referred to as termination, which is the term for the process of revoking a treaty. Therefore, this section of the chapter examines the doctrine of termination. First, customary international law regarding termination is examined. Then the right to terminate a treaty in the VCLT is discussed.

5.1.1 Termination of Treaties in Customary International Law

Prior to the VCLT, processes for treaty termination were customary. A leading treatise of the pre-VCLT era observed that there was a "…general presumption against the existence of any right of unilateral termination of a treaty."[1010] This was related to the duration of a treaty; if a treaty did not implicitly or explicitly establish the duration of its obligations then the parties intended it to be "of perpetual duration" and perpetual duration prevented unilateral termination.[1011] Without a fixed time limit a treaty always contained obligations that had not been performed and so a party could never terminate the treaty without breaching its obligations under the treaty.[1012] However, the converse was also true; parties to a treaty could always agree to terminate the treaty. The only exception was if the treaty affected third parties or contained general obligations, such as obligations *erga omnes.*[1013] States could also tacitly agree to terminate a treaty as agreement to terminate was derived from the actions of the parties.[1014] Additionally, parties could unilaterally denounce a bilateral treaty when there was an express or implied term of the agreement that authorized this unilateral act.[1015]

[1009] Jennings & Watts (n 47) at parts 2-4, p 1296, n1
[1010] AD McNair, *The Law of Treaties* (Clarendon, London 1961) at p 493.
[1011] McNair (n 1010) at pp 493-4.
[1012] McNair (n 1010) at p 494.
[1013] McNair (n 1010) at p 507.
[1014] McNair (n 1010) at p 508.
[1015] McNair (n 1010) at p 510 ff.

According to customary international law treaties could also be terminated when general rules of international law permitted dissolution of the agreement. A general rule that permitted termination was desuetude. Desuetude refers to termination of a treaty when there is "discontinuance of use" of the treaty. To assert termination on the grounds of desuetude, other parties had to acquiesce to the fact that the treaty had fallen into disuse.[1016] Other general grounds for termination of treaties were *rebus sic stantibus* [1017]and changes nullifying the purpose of the treaty.[1018]

Once a treaty was properly terminated by agreement the parties had to determine the status of the treaty. They had two options: first, the parties could be returned to the position they were in prior to the treaty agreement or second, the treaty could be terminated from a date after the treaty was in force. The latter option meant the parties were in a different position than they had been upon entering into the treaty.[1019] In practice, however, the date of termination often depended on the nature of the agreement. Rights gained through the obligations of a treaty that had already been executed could not be undone so in these situations only the continuing obligations of the treaty ceased.[1020] Further, the revision of treaties was not considered a legal question and was not discussed as part of the process of termination of treaties.[1021] From the above examination of customary international law it is clear that prior to the VCLT termination was limited to two situations, mutual agreement between the parties and termination under general rules of international law.

5.1.2 The Vienna Convention on the Law of Treaties

The ILC produced a draft Convention on the Law of Treaties that formed the basis of the VCLT. However, this draft did not settle the doctrine of revocation, [1022] as it only provided general guidance in this area when it stated that treaties could be altered by notification or by the duty of good faith negotiation to resolve disputes. To counteract

[1016] McNair (n 1010) at p 516ff.
[1017] See, for example, McNair (n 1010) at p 682 ff.
[1018] McNair (n 1010) at p 685 ff.
[1019] McNair (n 1010) at p 520 ff.
[1020] McNair (n 1010) at p 531 ff.
[1021] McNair (n 1010) at pp 534-5.
[1022] WM Reisman, "Procedures for Controlling Unilateral Treaty Termination" (1969) 63 AJIL 544 at p 544; See also HW Briggs "Procedures for Establishing the Invalidity or Termination of Treaties Under the International Law Commission's 1966 Draft Articles on the Law of Treaties" (1967) 61 AJIL 976 at p 976.

this generality the ILC Rapporteurs proposed a rigid process of dispute resolution in Article 62 bis.[1023] As Rosenne explains,

> Here it may be observed that the International Law Commission itself, in 1966, did not accept the view which had been urged upon it by two of its special rapporteurs, Lauterpacht and Fitzmaurice, but not by Waldock, that the good faith of a party claiming a ground for invoking the invalidity of a treaty or its termination should be tested by the willingness of that party to submit its claim to impartial third-party examination and decision. The most that the Commission was prepared to do in 1966 was to link this part of the codified law of treaties to the Charter of the United Nations, and to overcome possible limitations that could flow from the Charter which, in its dispute-settlement provisions, always places emphasis on disputes of the kind likely to endanger international peace and security.[1024]

In response, Reisman predicted that the Draft's rigid processes governing unilateral termination or change of a treaty would be rejected by states in the final version of the text.[1025] Reisman was proved partially correct.[1026]

The VCLT was completed in 1969 and has been in force since 1980.[1027] It has an entire part, Part V, devoted to the "Invalidity, Termination and Suspension of the Operation of Treaties."[1028] In this part Article 54 lists the circumstances when termination of a treaty can occur.

> The termination of a treaty or the withdrawal of a party may take place:
> (a) in conformity with the provisions of the treaty; or
> (b) at any time by consent of all the parties after consultation with the other contracting parties.[1029]

[1023] Reisman, "Procedures" (n 1022) at p 545.
[1024] S Rosenne, *Developments in the Law of Treaties 1945-1986* (CUP, Cambridge 1989) at p 352.
[1025] Reisman, "Procedures" (n 1022) at p 545.
[1026] See VCLT (n 303) at Art 65.
[1027] See generally, VCLT (n 303) at Art 65
[1028] VCLT (n 303) at Arts 42-72.
[1029] VCLT (n 303) at Art 54.

Consequently, the VCLT codifies the customary law on termination. Moreover, if a treaty does not contain provisions for withdrawal or termination, Article 56 establishes that

> 1. A Treaty which contains no provision regarding its termination and which does not provide for denunciation or withdrawal is not subject to denunciation or withdrawal unless:
> (a) it is established that the parties intend to admit the possibility of denunciation or withdrawal; or
> (b) a right of denunciation or withdrawal can be implied by the nature of the treaty.
> 2. A party shall give not less than twelve months' notice of its intention to denounce or withdraw from a treaty under paragraph 1.[1030]

This provision requires that the right to terminate is expressly or impliedly derived from the treaty. However, Article 56 departs from customary law when it requires a notice period for denunciation or withdrawal from a treaty. Additionally, a treaty can be terminated by a later treaty. Article 59 states:

> 1. A treaty shall be considered as terminated if all the parties to it conclude a later treaty relating to the same subject matter and:
> (a) it appears from the later treaty or is otherwise established that the parties intended that the matter should be governed by that treaty; or
> (b) the provisions of the later treaty are so far incompatible with those of the earlier one that the two treaties are not capable of being applied at the same time.
> 2. The earlier treaty shall be considered as only suspended in operation if it appears from the later treaty or is otherwise established that such was the intention of the parties.[1031]

Further, material breaches of bilateral treaties allow the harmed party to either terminate or suspend the treaty. In these situations a material breach is defined as any "repudiation of the treaty not sanctioned by the present Convention; or"[1032] a breach of a term that is necessary to satisfy the "object and purpose of the treaty".[1033] On the

[1030] VCLT (n 303) at Art 56.
[1031] VCLT (n 303) at Art 59.
[1032] VCLT (n 303) at Art 60 (3) (a).
[1033] VCLT (n 303) at Art 60(3) (b).

other hand in multilateral treaties non-breaching parties are allowed to suspend or terminate the treaty either in its entirety or between themselves and the breaching party.[1034] In addition, the VCLT establishes specific grounds for termination or withdrawal from a treaty. These include supervening impossibility of performance,[1035] fundamental change of circumstances[1036] and a violation of an emerging *jus cogens* norm.[1037]

Article 65 of the VCLT establishes the process for parties to invalidate, terminate, withdraw from or suspend a treaty. Article 65 says,

> 1. A party which, under the provisions of the present convention invokes either a defect in its consent to be bound by a treaty or a ground for impeaching the validity of a treaty terminating it, withdrawing from it or suspending its operation, must notify the other parties of its claim. The notification shall indicate the measure proposed to be taken with respect to the treaty and the reasons therefore.
> 2. If, after the expiry of a period which, except in cases of special urgency, shall not be less than three months after the receipt of the notification, no party has raised any objection, the party making the notification may carry out in the manner provided in article 67 the measure which it has proposed.
> 3. If, however, objection has been raised by any other party, the parties shall seek a solution through the means indicated in article 33 of the Charter of the United Nations.
> 4. Nothing in the foregoing paragraphs shall affect the rights or obligations of the parties under any provisions in force binding the parties with regard to the settlement of disputes.
> 5. Without prejudice to article 45, the fact that a State has not previously made the notification prescribed in paragraph 1 shall not prevent it from making such notification in answer to another party claiming performance of the treaty or alleging its violation.[1038]

The quotation above refers to Article 33 of the United Nations Charter, which requires states to peacefully settle their disputes, by negotiation, mediation, arbitration, judicial settlement or any other "peaceful means", when the dispute would "endanger the maintenance of international peace and security."[1039] As well, Article 45 of the VCLT prevents a state from going back on its agreement or acquiescence not to terminate a

[1034] VCLT (n 303) at Art 60.
[1035] VCLT (n 303) at Art 61.
[1036] VCLT (n 303) at Art 62.
[1037] VCLT (n 303) at Art 64.
[1038] VCLT (n 303) at Art 65
[1039] Charter of the United Nations (n 37) at Art 33.

treaty once grounds for invalidation are brought to their attention.[1040] Consequently, Article 65 requires a state to notify other parties of a termination, at which point other parties to the treaty can then accept or protest the termination. If states protest and the dispute may lead to conflict there is a requirement to negotiate. Moreover, without contradicting Article 45, a state may always respond to a notification of termination by terminating the treaty. Finally, the notification required by Article 65 must be in writing and communicated to the other parties.[1041] However, notification of termination under this Article can be revoked as long as it has not come into effect.[1042]

To implement the requirements of Article 65, Article 66 establishes a 12 month period of negotiation for disputes about termination. After 12 months, if the dispute has not been resolved, it can be submitted to the International Court of Justice or to conciliation under the auspices of the Secretary General.[1043] Lastly, Article 70 lists "consequences" for termination of a treaty. Termination "(a) releases the parties from any further obligation to perform the treaty; (b) does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination."[1044] In multilateral treaties the relationship between the terminating state and all other parties ends.[1045] However, Rosenne notes that the ICJ has not generally implemented mandatory negotiation in termination disputes. This results from a gap in the law. The text of the Charter requires a dispute to reach the level of a threat before the UN will force a negotiation,[1046] And so the ICJ has been reluctant to enforce these provisions. Consequently, Rosenne argues that "[w]ith the exception of the *Namibia* case, none of those so far examined by the Court are seen as likely to come within that category and the viability of Article 65, with its reference to the 'means' of dispute settlement indicated in Article 33 of the Charter, has not yet been tested."[1047]

In conclusion, the VCLT limits the right of a party to revoke a treaty obligation unilaterally. For example, Article 54 circumscribes the right to terminate a treaty by limiting termination to two situations. The first situation arises where the parties have included a clause on termination. The second situation occurs when the parties to the treaty consent to termination. Consequently, Article 56 creates an implied right to terminate. This right is invoked when it can be determined from the agreement itself or

[1040] VCLT (n 303) at Art 45.
[1041] VCLT (n 303) at Art 67.
[1042] VCLT (n 303) at Art 68
[1043] VCLT (n 303) at Art 66, Annex.
[1044] VCLT (n 303) at Art 70(1).
[1045] VCLT (n 303) at Art 70(2).
[1046] Rosenne (n 1024) at 352.
[1047] Rosenne (n 1024) at 352.

from an understanding of the parties that termination is permitted. Thus, Article 54 and Article 56 are designed to prevent a unilateral withdrawal, denunciation or termination of a treaty and these rights are restricted further by Article 65 of the VCLT, which requires notice of revocation. The VCLT also implements dispute resolution processes to resolve disputes over the termination of a treaty. Therefore, revocation is limited in two ways; it is limited by the requirement that parties consent to revocation, and it is limited by the processes established by the VCLT. Doctrinally these processes limit change and promote stability by establishing limits to a state's right to terminate its treaty obligations. In the next section the requirements for revocation will be applied to unilateral acts.

6. Revocation of Unilateral Acts

Unilateral acts are theoretically revocable by the acting state. Jennings and Watts observe that

> [a] question which arises in relation to all unilateral acts is whether, once made, they can be later amended or revoked. While no general answer can be given applicable to all cases, it would seem that such acts are in principle revocable except where some rule of international law stipulates to the contrary.[1048]

In this quotation, Jennings and Watts assert that unilateral acts are revocable but this right is limited by rules of general international law. The consequences of the theoretical right to revoke a unilateral act are considered in both the case law of the ICJ and in the recent work of the ILC. These discussions reveal that the relationship between general rules of international law that limit revocation, such as estoppels, and revocation of

[1048] Jennings & Watts (n 47) at p 1188; See also Koskenniemi, Apology (n 81) at p 349.

unilateral acts means that the processes of unilateral acts never harden. The difficulty this softness poses for the doctrine of process can be explained in terms of the "legalization" of the process of unilateral acts. Therefore, the case law, the work of the ILC and the concept of legalization will all be explored in this section of the chapter.

6.1 Case Law on the Revocability of Unilateral Acts

The *Nuclear Tests cases* stated that the "unilateral undertaking resulting from [the French] statements cannot be interpreted as having been made in an implicit reliance on arbitrary power of reconsideration." [1049] This case established that unilateral acts were not automatically revocable. The ILC explained that "[t]his does not, however, exclude any power to terminate a unilateral act, only its arbitrary withdrawal or amendment."[1050] Here the principle of revocability was limited, but what constitutes arbitrary withdrawal as opposed to legitimate termination was never clarified.

The limit on arbitrary revocation of unilateral acts derived from the *Nuclear Tests cases* has subsequently been applied by the ICJ. Revocation was an issue in the *Case Concerning Military and Paramilitary Activities in and Against Nicaragua.* [1051] In this case the Court considered whether the "modification" by the US of its declaration of acceptance of the jurisdiction of the Court under Article 36(2) of the Statute of ICJ was valid.[1052] The Court held that it was not.

> Although the United States retained the right to modify the contents of the 1946 Declaration or to terminate it, a power which is inherent in any unilateral act of State, it has, nevertheless assumed an inescapable obligation towards other States accepting the Optional Clause, by stating formally and solemnly that any such change should take effect only six months have elapsed from the date of notice.[1053]

In this quotation the Court acknowledged that the US had the right to modify its obligation and the Court further asserted that this right was inherent in any unilateral

[1049] Nuclear Tests cases (n 55) at par 51.
[1050] ILC Report 2006 (n 41) at par 177.
[1051] Nicaragua case (n 175); See also, Jennings & Watts (n 47) at n 13.
[1052] See, for example, Nicaragua case (n 175) at par 52 ff.
[1053] Nicaragua case (n 175) at par 62; See also Jennings & Watts (n 47) at n 13, where this passage is also mentioned.

act.[1054] However, good faith required that the US uphold its commitments regarding the jurisdiction of the Court.[1055] In this case the Court interpreted arbitrariness to mean that was a general right to revoke a unilateral undertaking, but this right was subject to the requirement that it was not opposed to any other principle of law such as good faith.

Revocation was also considered in the *Fisheries Jurisdiction Case*.[1056] In this case the Court was asked to interpret Canada's reservation to its declaration accepting the jurisdiction of the ICJ under Article 36(2).[1057] In this case the Court held that

> A declaration of acceptance of the compulsory jurisdiction of the Court, whether there are specified limits set to that acceptance or not, is a unilateral act of State sovereignty. At the same time, it establishes a consensual bond and the potential for a jurisdictional link with the other States which have made declarations pursuant to Article 36, paragraph 2, of the Statute, and "makes a standing offer to the other States party to the Statute which have not yet deposited a declaration of acceptance (Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nigeria), Preliminary Objections, I.C.J. Reports 1998, para.25).[1058]

In this case the Court confirmed that acceptance of the ICJ's jurisdiction was a unilateral act. However this act created a relationship with other depository states and as a result of the trust this created it could not be unilaterally revoked or changed.

The case law of the ICJ established a general rule that unilateral acts were revocable unless they were limited by good faith. Consequently, states had a duty to live up to their obligation which precluded the arbitrary revocation of unilateral acts. However, this limitation applied only when there was trust placed in a unilateral act that produces good faith. These principles helped shaped the work of the ILC on this topic, which will be the subject of the next section of this chapter.

[1054] Nicaragua case (n 175) at par 62.
[1055] Nicaragua case (n 175) at par 62.
[1056] *Fisheries Jurisdiction Case (Spain v. Canada)* (Judgment - Jurisdiction) General List No 96 [1998] ICJ Rep 432.
[1057] See for example, Fisheries Jurisdiction case Spain/Canada (n 1056) at par 42 ff.
[1058] Fisheries Jurisdiction case Spain/Canada (n 1056) at par 46.

6.2 The International Law Commission

The ILC's outline for its work considered the duration, amendment and termination of unilateral acts.[1059] Consequently, revocation was raised early in the ILC's consideration of unilateral acts and Members even argued over the revocability of unilateral acts.[1060] First,

> Some remarked 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. Thus, if it had intended that its promise be revocable, then it should be susceptible of revocation, subject to whatever conditions or restrictions the State might have imposed upon itself in this regard. Reference was made in support of this conclusion to the decision of the International Court of Justice in the jurisdictional phase of the case concerning Military and Paramilitary Activities in and Against Nicaragua. Conversely if the State which had made the promise had intended that it be irrevocable, then it should not, in principle, be subject to revocation.[1061]

Certain Members of the ILC felt that unilateral acts were revocable when this had always been the intention of the state. Moreover, to limit revocation, a contrary intention on the part of the acting state had to be established. Other Members argued that a wide ranging right to revoke unilateral acts ensured that such acts would not have more than an "illusory" power to bind states.[1062] However, if revocation was not permitted then Members were concerned that "States would be reluctant to ever make such promises."[1063] Consequently, revocation must not be "unlimited"[1064] and an analogy to treaty law provided a valid way to establish these limits.[1065]

As a result of these varied approaches to revocation, the ILC Working Group on unilateral acts circulated a questionnaire to states to determine their practice of unilateral acts.[1066] Question 9 asked directly about the revocability of unilateral acts.[1067]

[1059] ILC Report 1997 (n 429) at paras 192, 210.
[1060] ILC Report 1998 (n 434) at par 183.
[1061] ILC Report 1998 (n 434) at par 184.
[1062] ILC Report 1998 (n 434) at par 185.
[1063] ILC Report 1998 (n 434) at par 185.
[1064] ILC Report 1998 (n 434) at par 185.
[1065] ILC Report 1998 (n 434) at par 186.
[1066] ILC Report 1999 (n 448) at paras 591-7.

The reactions of states varied. For example, Argentina presented a complex response when it asserted that once a unilateral act had an external manifestation it could not be arbitrarily revoked but the state could always limit the act. This limitation meant that acts could be revoked in various circumstances such as situations of "force majeure." Further, Argentina suggested that protests were always revocable.[1068] However, Argentina's approach contrasted with the view that unilateral acts could not be revoked if good faith was at issue. Further, unlike Argentina, El Salvador felt that unilateral acts were revocable only with appropriate notice[1069] and both Finland and Italy felt revocation was possible according to the terms set out in the *Nuclear Tests cases.*[1070] Georgia felt that unilateral acts could be revoked only in specific situations including cases of error, fraud, conflict with a rule of international law or other obligation of the state.[1071] Israel felt that revocation was available but it was not unlimited. Further, it suggested that good faith would require notice of any revocation.[1072] Similarly, the Netherlands asserted that revocation was available in the same situations as in treaty law.[1073] Sweden felt no general rules existed in regards to revocation of unilateral acts; however, it suggested that the ILC might look to some provisions of the VCLT for guidance.[1074] In the following year the Working Group on this topic was reconvened and raised two points about the answers to Question 9. First, it was noted that only 12 states had responded to the questionnaire. Second, it was observed that the states that had responded to the Questionnaire had provided few concrete examples of state practice.[1075] As a result the Questionnaire was inconclusive, and highlighted a lack of agreement over the revocability of unilateral acts.

The wide range of views recorded led Rodriguez Cedeño to propose a draft provision on the invalidity of unilateral acts. Draft Article 5 read

> Article 5
> Invalidity of unilateral acts
> A State may invoke the invalidity of a unilateral act:

[1067] United Nations General Assembly. "Unilateral Acts of States: Replies from Governments to the Questionnaire: Report of the Secretary General" (2000) UN GA Doc A/CN.4/511 available online at <http:/daccessdds.un.org/doc/UNDOC/GEN/N00/520/46/PDF/N0052046.pdf?OpenElement>. .
[1068] Replies from Governments 2000 (n 1067) at p 20.
[1069] Replies from Governments 2000 (n 1067) at p 20.
[1070] Replies from Governments 2000 (n 1067) at pp 20-1.
[1071] Replies from Governments 2000 (n 1067) at p 20.
[1072] Replies from Governments 2000 (n 1067) at p 20-1.
[1073] Replies from Governments 2000 (n 1067) at p 20-1.
[1074] Replies from Governments 2000 (n 1067) at p 20-1.
[1075] ILC Report 2000 (n 453) at par 621.

> 1. If the act was formulated on the basis of an error of fact or a situation which was assumed by that State to exist at the time when the act was formulated and formed an essential basis of its consent to be bound by the act. The foregoing shall not apply if the State contributed to its own conduct to the error or if the circumstances were such as to put that State on notice of a possible error;
> 2. If a state has been induced to formulate an act by the fraudulent conduct of another State;
> 3. If the act has been formulated as a result of the corruption of the person formulating it, through direct or indirect action by another State;
> 4. If the act has been formulated as a result of coercion of the person formulating it, through acts or threats against him;
> 5. If the formulation of the act has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations;
> 6. If, at the time of its formulation, the unilateral act conflicts with a peremptory norm of international law;
> 7. If, at the time of its formulation, the unilateral act conflicts with a decision of the Security Council;
> 8. If the unilateral act as formulated conflicts with a norm of fundamental importance to the domestic law of the State formulating it.[1076]

Members criticised this draft Article. A group of Members argued that unilateral acts were revocable, that revocation was preferable to declaring a unilateral act invalid as invalidity had to be procedurally constructed. Therefore, invalidity was limited to situations where revocation was not available.[1077] As a result of these criticisms the ILC eventually approved separate guiding principles on revocation and invalidity.

Revocation was also considered in Rodriguez Cedeño's Sixth Report on Unilateral Acts of States. The focus of this report was on the specific unilateral act of recognition. In this context Rodriguez Cedeño wrote:

> We note first of all that in relation to unilateral acts in general, the view of most legal writers is that the author State does not, generally, speaking, have the power to modify a legal relationship unilaterally. For some, the State which is the author of the act does not have the power to create arbitrarily, by means of another unilateral, a rule constituting an exception to the one which had created by means of the first act. For others such capacity can be limited or even nonexistent. In the specific case of revocation, and in relation to unilateral acts in general, it is admissible...[1078]

[1076] V Rodriguez Cedeño, "Second Report on Unilateral Acts of States" (1999) UN Doc A/CN.4/500 at p 22.
[1077] ILC Report 2000 (n 453) at par 587.
[1078] V Rodriguez Cedeño, "Sixth Report on Unilateral Acts of States by Victor Rodriguez Cedeño Special Rapporteur" (2003) UN Doc A/CN.4/534 at par 117.

Additionally, Rodriguez Cedeño considered that revocation was available when it was accounted for in the act itself.[1079] As such, Rodriguez Cedeño was in favour of a very limited right of revocation, but the narrowness of his approach was questioned by several Members of the ILC in their discussion of his Report. As the Report noted, "[d]oubts were expressed over the assertion in the report that the modification, suspension or revocation of an act of recognition was feasible only if specific conditions were met."[1080] This point was reiterated by the Membership of the ILC the following year. Members proposed that "[t]he revocability of a unilateral act should also be examined in detail. By its very nature, a unilateral act was said to be freely revocable unless it explicitly excluded revocation or, before the act was revoked, it became a treaty commitment following its acceptance by the beneficiary of the initial act."[1081] This demonstrates that Rodriguez Cedeño's approach to revocation was not universally accepted. However, the wider notion of revocation favoured by the Membership was also unsubstantiated. Unrestricted revocation was not promoted by the ICJ. The ICJ established restrictions on revocability, primarily good faith. Consequently, the ILC membership was developing the law in this area.

The ILC's debates revealed three different approaches to revocation. First, Rodriguez Cedeño proposed a narrow approach to revocation. Second, several Members proposed restricting revocation to the circumstances approved by the ICJ. Third, other Members put forward a wide formulation of revocation. Consequently, the ILC's approach to revocation was not uniform; as a result they attempted to remedy this instability in their Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations. These principles were adopted by the International Law Commission in 2006. Principle 10 dealt directly with the revocability of unilateral acts. This principle stated

> 10. A unilateral declaration that has created legal obligations for the State making the declaration cannot be revoked arbitrarily. In assessing whether such a revocation would be arbitrary, consideration should be given to:
> (i) Any specific terms of the declaration relating to revocation;

[1079] Rodriguez Cedeño, Sixth Report (n 1030) at par 118.
[1080] ILC Report 2003 (n 467) at par 295.
[1081] ILC Report 2004 (n 468) at par 228.

> (ii)The extent to which those to whom the obligations are owed have relied on such obligations;
> (iii) The extent to which there has been a fundamental change in circumstances.[1082]

Principle 10 reflected the case law of the ICJ. As the commentary to this principle observed there was a difference between termination of a unilateral act and arbitrary withdrawal of the act. Termination would be permitted; arbitrary withdrawal would not be permitted. Presumably arbitrary withdrawal was prohibited because it violated good faith.[1083] As a result, the ILC noted that "[t]here can be no doubt that unilateral acts may be withdrawn or amended in certain specific circumstances. The Commission drew up an open-ended list of criterion to take into consideration when determining whether or not a withdrawal is arbitrary."[1084] These criteria considered whether the declaration included the possibility of termination. They also took into account whether a state had placed good faith in the unilateral act. However, revocation was also permitted in enumerated situations, including a fundamental change of circumstances. The ILC defined a fundamental change of circumstances as having the same scope as Article 62 of the VCLT. Consequently, the ILC did not undermine the basic principle that unilateral acts were *prima facie* capable of revocation. They merely narrowed this principle in a manner consistent with the decisions of the ICJ. Revocation was circumscribed by arbitrariness, and arbitrariness was defined as commensurate with good faith. This ensured that revocation was permitted and would not be considered arbitrary if a state acted in good faith.

The ILC reached this conclusion by analogizing the requirements of arbitrariness to treaty law. However, one can question this assumption. To explain: Treaty law begins from the assumption of *pacta sunt servanda.* Similarly, unilateral acts that create legal obligations cannot be arbitrarily revoked but unlike in treaty law there is no underlying procedural principle to limit revocability; there is no principle of *acta sunt servanda.* This is problematic because it means the limits on revocation set by the ILC lack doctrinal foundations. The consequences of these assumptions will be explored further in the next section.

[1082] ILC Report 2006 (n 41) at par 176.
[1083] ILC Report 2006 (n 41) at par 176.
[1084] ILC Report 2006 (n 41) at par 176.

6.3 The Consequences of Revocability of Unilateral Acts

Unilateral acts are revocable but revocability is limited by arbitrariness. This means that a unilateral act cannot be revoked without reason. This limitation on revocability is justified by the need to protect good faith, the trust that other states place in the act. Placing trust in an act implies that states are both cognizant of the unilateral act and are responding to the act with indications that they are placing trust in the acting state that the act will be carried out. As noted in the previous chapter the requirement of good faith equates to placing reliance in the act and reliance is a defining characteristic of estoppels. Therefore, in practice a state is estopped from revoking a unilateral act when it would be arbitrary to do so. To explain further: a unilateral act is intention based and thus inherently revocable. It is not based on a principle of *acta sunt servanda*, a general rule that promises must be kept. This rule has been suggested; however, it is problematic as the rule *acta sunt servanda* implies that it is the act itself, and not the state's intention, that is the basis of authority of a unilateral obligation. This is a purely objective interpretation of intention the problems with which have been discussed in detail in Chapter 4. As has been demonstrated, there is a doctrinal problem with interpreting intention solely from the act itself, as this interpretation of intention may violate a state's actual intention. Consequently, there is no agreement on a general principle of obligation that corresponds with *pacta sunt servanda* in treaty law. However, the fact that there is no such principle for unilateral acts produces instability in the requirements of revocation. The right to revocation is limited by good faith and good faith means that requirement of revocation collapses into estoppels. This relationship must now be expanded upon.

Estoppels are considered a procedural limitation on revocation because estoppels provide a process to prevent revocation when a state relies on a unilateral act. However, estoppels are problematic for the process of unilateral acts because they break the link between the source of the unilateral act and its substance. The source of authority of a unilateral act is its intention but, as noted in Chapter 4, intention is a mental state and as a "mental state" it is always capable of change. This means that as intention changes so should the obligation required by the unilateral act. Revocation provides a process for the state to change its intention. However, good faith limits the right to revocation; good faith limits intention. For example, a unilateral act cannot be revoked where there

has been good faith placed in the act. The actor is prevented, effectively estopped, from going back on its word regardless of its intention. This confuses a state's intention with the reliance, the cognizance and trust, that an act creates. In these cases the act is no longer "unilateral" as its legal authority is contingent on good faith. To illustrate this point, consider French statements in the *Nuclear Tests cases*. Assume France intended their statements to be legally binding. If these statements were truly unilateral then France should have been allowed to change its intention and resume nuclear testing. However, the ICJ precluded such a possibility. It argued that France was prevented from changing its intention because of good faith - Australia and New Zealand's cognizance and trust in France's *erga omnes* promises. This good faith ensured that all states could hold France to its word. This in turn implied that states were concerned that French intentions would change. They responded to and had trust in the promise, and they had an interest in its performance. Through this trust there became two parties to the act: there was the state that made the promise to stop nuclear testing, France, and the state or states that sought to uphold the promise, Australia and New Zealand. The act was not unilateral. This example demonstrates that a unilateral act is either unilateral and revocable or not unilateral and limited by good faith. This is not the case in treaty law where there the obligation rests on reciprocal obligations. The doctrinal limits on revocation confuse these issues. As a result revocation does not provide a method for a substantive act to gain legal authority. An obligation can either have a unilateral source, intention, or it can provide procedural stability. Doctrine requires that it do both, but unilateral acts cannot do both and remain unilateral. Revocation highlights the difficulty that unilateral acts have fitting within the doctrine of process.

Revocation underscores the instability of the requirements of unilateral acts and highlights the inability of process doctrine to separate unilateral acts from estoppels. This confusion leads the ILC to conclude that unilateral acts can be withdrawn provided the revocation is not arbitrary. This is based on two principles, good faith and analogy to treaty law. The analogy to treaty law rests on an assumption of a principle of *acta sunt servanda.* This assumption is false as it conflates the unilateral nature of the act with the responses to the act. This conflation is reinforced by the requirement of good faith. If revocation is limited by good faith then revocation is estopped by good faith. As a result the process of revocation and the process of estoppels become identical. This point is underscored by Major Bulman in his discussion of the *Nuclear Tests cases*, "[f]irst, and most importantly, the court underscored the potential legal dangers

for states that issue unilateral declarations and then subsequently repudiate them."[1085] These problems are often glossed over in an attempt to project legality. As a result, unilateral acts do not fit in the doctrine of process.

The role of process is to ensure that states know when a legal obligation is created or ended. To turn substance into form requires stable process. Consequently, doctrine promotes stability and limits change, but revocability of unilateral acts does not perform these functions. Unilateral acts can either be revocable or procedurally stable; therefore, unilateral acts do not provide the legality necessary for an obligation to "harden." This point will be clarified further in the following section.

6.3.1 The Process of Unilateral Acts and Legalization

The process of unilateral acts does not mediate between stability and change in the manner required by the doctrine of international law. Unilateral acts are inherently revocable. This produces instability in the obligation of a unilateral act, which means that the requirements of the doctrine are not met. The instability of revocation as a requirement of unilateral acts in turn creates a problem of legalization that is linked to the concepts of hard law and soft law. Legalization is the attempt to explain why some law hardens into legal forms. Exploring this process of legalization helps explain the doctrine of process.

Legalization does not try to explain why states inter-relate. Consequently, it does not explain the substance of international law. Also, legalization does not explain how states interact, so it does not explain the sources of international law. It seeks to understand how states operate within structures. Legalization helps to analyse "the decision in different issue-areas to impose international legal restraints on governments."[1086] As such, legalization explains why substance achieves the procedural stability necessary to take formal effect. It also explains why in less "legalized" areas substance is not given legal authority. Thus, it explains the process of international law.

Legalization studies law as an institution of international relations.[1087] Consequently, Goldstein *et al* define international institutions as "…enduring sets of

[1085] Major TP Bulman, "A Dangerous Guessing Game Designed as Enlightened Policy: United States Law of War Obligations During Military Operations Other Than War" (1999) 159 Military L Rev 152 at p 161.
[1086] J Goldstein et al , "Legalization and World Politics" (2000) 54 IO 385 at p 386.
[1087] Goldstein et al (n 1086) at p 386.

rules, norms, and decision making processes…."[1088] It explains why law becomes institutionalized or "hardened" through process. It also accounts for the different processes of revocation in treaty law and in unilateral acts. For Abbott, Keohane, Moravcsik, Slaughter and Snidal,

> "Legalization" refers to a particular set of characteristics that institutions may (or may not) possess. These characteristics are defined along three dimensions, obligation, precision and delegation. *Obligation* means that states or other actors are bound by a rule or commitment or by a set of rules of commitments. Specifically, it means that they are *legally* bound by a rule or commitment in the sense that their behaviour thereunder is subject to scrutiny under the general rules, procedures and discourse of international law and often domestic law as well. *Precision* means that rules unambiguously define the conduct they require, authorize or prescribe. *Delegation* means that third parties have been granted the authority to implement, interpret and apply the rules; to resolve disputes and (possibly) to make further rules.[1089]

They also note that the elements of legalization are ideals, ideals that are met to a greater or lesser degree.[1090] Further, the requirement of obligation corresponds with the substance of law, as it corresponds to the "compliance problem" discussed in chapter 5. Consequently, it is not considered further here, other than to say that it is an example of overreach by this theory to try to encompass substance as part of the debate over legalization. However, precision and delegation relate directly to the doctrine of process.[1091] The interplay between precision and delegation are the focus of this analysis.

Abbott *et al* note that "[a] precise rule specifies clearly and unambiguously what is expected of a state or other act (in terms of both the intended objective and the means of achieving it) in a particular set of circumstances."[1092] This requires

[1088] Goldstein et al (n 1086) at p 387.
[1089] KW Abbott et al, "The Concept of Legalization" (2000) 54 IO 401, 401. See also, Goldstein et al (n 1086) at p 387.
[1090] Abbot et al (n 1089) at pp 401-02.
[1091] Abbott et al (n 1089) at p 404, fig. 1; Abbott et al categorise *pacta sunt servanda* and *rebus sic stantibus* as part of the obligation of international law. This work contests this argument. *Contra*, Abbott et al (n 1089) at p 409.
[1092] Abbott et al (n 1089) at p 412.

> …not just that each rule in the set is unambiguous, but the rules are related to one another in a noncontradictory way, creating a framework within which case-by-case interpretation can be coherently carried out. Precise sets of rules are often, though by no means always, highly elaborated or dense, detailing conditions of application, spelling out the required or proscribed behaviour in numerous situations, and so on.[1093]

The precision of a rule establishes the degree to which the rule promotes stability. A stable rule requires that future conduct is predicted on the basis of past process. If a rule is not precise it will create unpredictable processes. To explain, Abbot *et al* note that "[p]recision is an important characteristic of many theories of law."[1094] They cite Fuller, who considers certainty and predictability core requirements of law.[1095]

Moreover, the relationship between precision and delegation in domestic systems is converse. The more precise a rule is the less delegation there is to decision making bodies. Most of the decisions about what is restricted are taken before the rule is made into law. The opposite is true of imprecise rules.[1096] However,

> [i]n most areas of international relations, judicial quasi-judicial, and administrative authorities are less highly developed and infrequently used. In this thin institutional context, imprecise norms are, in practice, most often interpreted and applied by the very actors whose conduct they are intended to govern. In addition, since most international norms are created through the direct consent or practice of states, there is no centralized legislature to overturn inappropriate self-serving interpretations. Thus precision and elaboration are especially significant hallmarks of legalization at the international level.[1097]

Abbot *et al* believe that "much of international law is in fact quite precise" and that precision is becoming increasingly common in international law.[1098] The indicators of precision are "determinate" rules, "standards" and situations where it is "impossible to determine whether conduct complies." [1099] To provide an example, the processes of the VCLT are highly precise. Using the example of revocation, the Convention establishes

[1093] Abbott et al (n 1089) at p 413.
[1094] Abbott et al (n 1089) at p 413.
[1095] Abbott et al (n 1089) at p 413.
[1096] Abbott et al (n 1089) at p 413.
[1097] Abbott et al (n 1089) at p 414.
[1098] Abbott et al (n 1089) at p 414.
[1099] Abbott et al (n 1089) at p 415, Table 3.

rules of conduct regarding termination of treaties. These rules limit the freedom of states to act and guide state conduct in this area. Additionally, processes for resolving disputes are established.[1100] Therefore, precision considers the "hard" nature of the obligation and unilateral acts have very low indicators of precision. One area of particular imprecision is the revocation of unilateral acts. The circumstances in which revocation is permitted or prohibited are indeterminate. As such, unilateral acts are considered revocable unless the revocation is arbitrary, not in good faith, or is a result of changed circumstances but these are broad limitations; they cannot be used to determine in advance the specific circumstances in which a unilateral act can be withdrawn. Further, good faith rests on the trust other states place in the act. Revocation is permitted unless trust in the act must be preserved. Assessing trust requires an evaluation of how other states respond to the unilateral act. However, these responses are problematic for the doctrine. An example illustrates this point: State A promises to provide aid to State B. State A suffers an economic downturn and revokes its promise of aid. Has this revocation been in bad faith? Two opposed principles emerge. State A argues the revocation is legitimate because its circumstances have changed. This is acceptable grounds for revocation according to the ILC. On the other hand, State B argues that it has placed trust in the promise in good faith and is now without aid and further, that state A is now acting in bad faith in its revocation of its promise. It is impossible to know which one of these principles will prevail before adjudication takes place. Therefore, the process of revocation lacks the precision necessary to determine this dispute.

Abbot *et al* argue also argue that precision is not always necessary for legalization to occur. Lack of precision is compensated for by delegation to an appropriate international body.[1101] Consequently, Abbot *et al* assert that

> [d]ispute settlement mechanisms are most highly legalized when the parties agree to binding third-party decisions on the basis of clear and generally applicable rules; they are least legalized when the process involves political bargaining between parties who can accept or reject proposals without legal justification.[1102]

[1100] And, in fact Abbott et al have offered this as an example of the increased "determinacy" that some treaties of international law have been promoting, Abbott et al (n 1089) at p 414.
[1101] Abbott et al (n 1089) at p 415.
[1102] Abbott et al (n 1089) at p 415.

The indicators of delegation range from "Courts, binding third-party decisions; general jurisdiction; direct private access; can interpret and supplement rules; domestic courts have jurisdiction; Courts jurisdiction, access or normative authority, limited or consensual; Binding arbitration; Nonbinding arbitration; Conciliation, mediation; Institutionalized bargaining; pure political bargaining."[1103] To provide an example, the processes set out in Article 65 of the VCLT include high and low indicators of dispute resolution. [1104] To revoke a treaty requires negotiation, and it is only if negotiation fails that mandatory dispute resolution processes and adjudication may be used. In contrast, unilateral acts only have low indicators of delegation. There are no mechanisms for resolving disputes over revocation. There is always the option of dispute resolution by the ICJ. However, recourse to the Court is not formalized as a process for unilateral acts.

Legalization also considers the delegation of rule making and implementation. The indicators of this type of delegation, from high to low, are: binding regulations with centralized enforcement; binding regulations with consent or opt-out; binding internal policies; legitimation of decentralized enforcement, coordination standards, draft conventions; monitoring and publicity; recommendations and confidential monitoring; normative statements; forum for negotiations."[1105] As a baseline the law of treaties contains binding regulations with consent or opt-out. In contrast unilateral acts display only low indicators of delegation. The processes of unilateral acts are contained in nonbinding recommendations of the ILC and judgments of the ICJ. Further, the leading case in this area, the *Nuclear Tests cases*, never proceeded to a judgment on the merits. The VCLT indicates high levels of delegation in process; in contrast, unilateral acts have low indicators of delegation in the area of revocation.

Finnemore and Toope argue that low instances of delegation are often attributable to a narrow definition of law. This definition of law does not accept as law rules that do not rely on delegation.[1106] This is a cogent critique but it ignores the relationship between legalization and the concept of hard law. Finnemore and Toope argue for a wider definition of law. This is not merited by the doctrine as the division between hard law and soft law is central to the doctrine. It accords with the concept of legalization and the doctrine of process.

[1103] Abbott et al (n 1089) at p 416, Table 4.
[1104] See VCLT (n 303) at Art 65.
[1105] Abbott et al (n 1089) at p 416.
[1106] M Finnemore & SJ Toope "Alternatives to 'legalization' Richer views of Law and Politics" (2001) 55 IO 743 at p 747.

A greater problem for Abbot *et al* is that they maintain that legalization is an all encompassing explanation of law, but in fact legalization serves a narrow function in doctrine; it provides a schematic explanation of the processes of law. The wide application of legalization explains many of its weaknesses. The schema of obligation, precision and delegation confuses the process of law and its substance.[1107] Obligation explains the compliance with obligations. This is more properly considered the doctrine of substance. Precision and delegation explain how legal obligations are created; this is properly part of the doctrine of process. Focusing on the elements of legalization that concern legal process narrows its scope but it also increases its utility. A narrower version of legalization explains the doctrine of process. Consequently, the indicators of obligation can be high or low, independent of the processes of law.

Precision and delegation indicate opposite trends in legalization. For example, the processes of custom are imprecise but are delegated to the ICJ.[1108] However, the higher the indicators of precision and delegation the more procedurally stable the area of law. Low indicators of precision and delegation highlight areas of law that have not developed legalized processes. The processes for terminating a treaty are representative of a process that is highly legalized. In contrast, unilateral acts are revocable unless a rule of law indicates otherwise. Unilateral acts have low indicators of precision and delegation; consequently, it can be concluded that unilateral acts are not procedurally legalized.

The revocability of unilateral acts indicates a low level of development of process. The processes that do exist provide little stability for state actors. This contrasts with the highly legalized processes for termination of treaties. As a result the softness of unilateral acts impacts on their stability; they do not have the procedural stability necessary to be considered a hard legal obligation.

6.4 Stability, Change and Unilateral Acts

The processes of international law link sources to substance by providing a way for a substantive area to gain the authority of law. As a result process doctrine tries to

[1107] See for example, Finnemore & Toope (n 1106) at p 747

[1108] Finnemore and Toope identify the lack of concern for custom as a weakness in approaches to legalization in the special issue of IO edited by Goldstein et al. The article by Goldstein et al noted above is the introduction to this volume; Finnemore & Toope (n 1106) at p 746.

provide for stable methods of limiting change in order to ensure doctrine acts as the link between source and substance. Consequently, the doctrine of processes must mediate between the desire for stability in obligations that are created and the need to permit change to these obligations when it is required. The law of treaties, custom and the principles of equity illustrate the doctrinal balance between stability and change. UNCLOS also provides an example of this doctrine in practice. The discussion of treaty, custom, equity and state practice illustrate that the preference of the doctrine is for stability. This preference is justified by reference to the concepts of hard and soft law. Process establishes when an obligation has hardened and it also promotes stability to allow legalization to occur.

This chapter illustrates that unilateral acts do not fit within the doctrine of process. They do not promote the stability required for "hardening" of a legal obligation. This problem is illustrated by the requirement of revocation in unilateral acts. In treaty law termination is highly regulated, as the rules for termination are codified in the VCLT. In contrast, processes for revoking unilateral acts are not well developed. Revocation is generally permitted, and the only exception to this is that revocation must be in good faith. This creates doctrinal confusion between unilateral acts and estoppels. The problem is as follows: if an act is unilateral it must always be revocable but good faith limits this ability. Good faith limits revocation by prohibiting revocation when there has been "trust" or confidence in that act. This implies that another state has taken cognizance of the act; some entity must place trust or confidence in the act for good faith to arise. However, once this occurs the act is now no longer unilateral; revocation is prohibited because of the trust of other states in the unilateral act. This effectively collapses the process for unilateral acts into the process for estoppels.

The relationship between revocation and good faith prevents unilateral acts from developing independent processes. Recall that process must link form to substance. Additionally, a unilateral act must be unilateral and if it is not unilateral it is no longer formally a unilateral act; instead it creates an estoppel. Consequently, the examination of revocation uncovers a key problem in the process of unilateral acts. For a unilateral act to create a legal obligation, its substance must be given proper legal authority. This is the job of process doctrine in the structure of international law, and in the case of unilateral acts this job is confused. In order to fit the requirements of unilateral acts revocation must be permitted. This fits the doctrinal need for change. However, this ability to change must be limited to promote stability. Therefore, revocation is limited

when it would be arbitrary, or in bad faith, to revoke the act. This is a limitation of good faith. This fits the doctrinal requirement of stability, but it introduces the cognizance of other states as a requirement of process. This makes the process of unilateral acts akin to an estoppel. Unilateral acts can retain their status as an independent category of legal obligation but then they do not fit the requirements of the doctrine of process. Conversely, they can fit within the doctrine of process but the act is no longer unilateral, it is an estoppel.

Unilateral acts have not legalized to the point at which their principles of process have sufficient hardness to predict stability over change. Consequently, unilateral acts cannot be explained by the doctrine of process.

7. Conclusion

This chapter examines one aspect of the question "are unilateral acts legal?" Specifically it focuses on the question "can unilateral acts be explained by the doctrine of process?" After outlining this research question, this chapter then provides an overview of the doctrine of process and establishes that process doctrine mediates between a need for processes that create stable legal obligations and the need to allow for change to those processes when appropriate. This doctrinal tension is exemplified by the difference between hard and soft obligations. Hard obligations are those obligations that have stable processes to allow substantive obligations to gain legal authority, whereas soft obligations lack these stable processes.

Following on this analysis, this chapter proceeds to examine the requirement of revocation which is one of the few processes of a unilateral act. Revocation establishes that a unilateral act may be changed or terminated. However, unilateral acts cannot be revocable solely at the will of the state. As a result the ability to revoke a unilateral act is limited by the requirement of good faith, called arbitrariness at the ILC. Confusingly, requiring good faith introduces a requirement of cognizance and trust in the act that makes the act less than unilateral because another state must recognize the act. Thus, the requirement of good faith in effect contradicts the requirement of revocability. Moreover, introducing the requirement of good faith makes unilateral acts difficult to

separate from acts of estoppel, as unilateral acts and estoppels both rely on good faith as a limit on the revocability of the act. This means that unilateral acts can either be revocable and unilateral, or they can promote stability through good faith, but then they are no longer unilateral acts. In the latter case unilateral acts become indistinguishable from estoppels.

This conclusion leads to an examination of the problem of "legalization" of unilateral acts. In this section of the chapter it is asserted that the revocability of unilateral acts indicates a low level of development of process. The processes that do exist provide little stability for state actors. This contrasts with the highly legalized processes for termination of treaties. The softness of unilateral acts impacts on their stability. It is concluded that unilateral acts do not have the procedural stability necessary to be considered a "hard" legal obligation.

This chapter asks "can unilateral acts be explained by the doctrine of process?" The problem that unilateral acts pose for the doctrine of process is that they lack the procedural stability to produce a "hard" legal obligation; they do not provide the stability required to give legal authority to substance by turning it into a source of law. This is demonstrated by the requirement of revocability which is unable to produce procedural stability without limiting revocation in good faith. However, introducing good faith makes the act less than unilateral. Consequently, unilateral acts can be revocable or they can provide a stable process for substance to gain legal authority. This produces a second difficulty for the doctrine; when revocation is defined to include good faith, it becomes practically indistinguishable from an estoppel, and unilateralism is no longer its defining feature. Revocation on its own cannot create a stable process of international law. Further, even when revocation is interpreted to meet the requirements of the doctrine of process, its processes are practically indistinguishable from estoppels. This demonstrates the weak legalization of the process of unilateral acts. Consequently, the doctrinal difficulty posed by revocation, together with the difficulty in applying revocation in practice, helps explain the gap between the assertion that a unilateral act is legal and the ability to identify its legal obligation in practice.

Chapter 7: Conclusion and Future Directions

1. Introduction

The final chapter of this thesis summarizes the conclusions reached about each research question. This summary will allow for conclusions to be drawn about the research problems identified in the introduction. This conclusion then returns to the context for this thesis in order to assess the implications of this research. Then the limitations of this research area are revisited and directions for further study are identified.

2. Conclusions Drawn from the Research Questions

This thesis asks the question "are unilateral acts legal?" This research question was further subdivided into three subsidiary research questions: What is the definition of a unilateral act? What is the definition of legality? And do unilateral acts meet the definition of legality? It is necessary to summarize the discussion of each of these questions in order to reach some general conclusions about the legality of unilateral acts.

The definition of a unilateral act was developed in Chapter 2 of this thesis. This chapter opens with the premise that defining unilateral acts is difficult. As this chapter notes in the introduction, the ILC worked on this topic for six years and could not define unilateral acts. Consequently, the only way to understand unilateral acts is through an examination of the history of the development of unilateral acts. To undertake this examination Chapter 2 explored the history of unilateral acts and established that prior to the ICJ decision in the *Nuclear Tests cases* there was no doctrinal certainty that a unilateral act created a legal obligation. As a result this case is considered "revolutionary" and is critical to assessing when unilateral acts are "legal."

Further, the *Nuclear Tests cases* establish three main criteria for unilateral acts to be considered legal: intention, autonomy and revocation. Chapter 2 also demonstrates that these criteria have been applied in the subsequent case law and in the literature. Additionally, this case was cited as justification for the work of the ILC. Therefore, the criteria established in the *Nuclear Tests cases* are identified as a working definition of unilateral acts. In this thesis, a unilateral act is defined as any act that meets the criteria of intention, autonomy and revocation.

Next the definition of legality is developed. Chapter 3 of this thesis asks the question "what is legality?" By answering this question this chapter also establishes the method of this thesis by providing an overview of the research question, by outlining the possible methods of this thesis, and by justifying the method ultimately adopted in this work - a narrow critical legal studies approach.

This chapter examines seven methods currently used to answer the question "what is legality?" The methods examined are: positivism, natural law, the New Haven school, international legal process, feminist jurisprudence, international law and international relations, law and economics and critical legal studies. This chapter explains that the most viable method for answering the question "what is legality" is a narrow critical legal studies approach.

The narrow critical legal studies approach begins from the premise that law is constructed from its doctrine and doctrine is defined as a rhetorical structure. In this method the internal structure of law, its doctrine, shapes international law and defines its legality.[1109] Consequently, critical legal studies identify three doctrines that structure of international law: sources doctrine, substance doctrine, and process doctrine.[1110] These doctrines reflect the structures of the standard case books on international law. Each of these doctrines therefore plays a unique role in the structure of international law. For example, sources doctrine establishes the authority of international law, substance doctrine establishes a legitimate subject matter of law, and process doctrine establishes how a text is given legal authority. Each of these doctrines operates independently in order to structure discourse within the doctrine about the sources, the substance or the process of law. However, these doctrines also operate together to provide structure to international law. Consequently, for any subject matter of international relations to be considered legal it must be capable of explanation by each of these doctrines.

[1109] Koskenniemi, Apology (n 81) at p 566 ff.
[1110] Trimble (n 274) at p 824.

This analysis leads to the conclusion that a narrow version of critical legal studies is the most appropriate method for this thesis. Narrow critical legal studies methods assert that law is formed by its doctrine, an internal rhetorical structure, which in turn defines what is "legal." Therefore, this method is used in this thesis to answer the research question "what is legality?" and it is applied to the broader research question "are unilateral acts legal?" This method is applied in Part 2 of this thesis where each doctrine of international law is compared to a component of the definition of a unilateral act.

This thesis builds on the definition of unilateral acts and legality established in Part 1 and undertakes the substantive analysis of unilateral acts in Part 2. The three chapters of Part 2 of the thesis answer the question "are unilateral acts legal?" Each chapter in this part of the thesis is devoted to one doctrine of unilateral acts - sources substance and process. Within each chapter, the doctrine of international law is examined and compared to the requirements of unilateral acts that correspond to that particular doctrine. Thus, Chapter 4 examines the doctrine of sources and compares the doctrine to the requirement of intention in unilateral acts. Chapter 5 examines the doctrine of substance and compares the requirements of autonomy to this doctrine. Chapter 6 examines the doctrine of process and compares the requirement of revocation to this doctrine. These chapters answer the question of legality because, as noted above, international law is structured by the doctrines of sources, substance and procedure. Therefore, if the requirements of unilateral acts cannot be explained by these doctrines, then they cannot be considered legal, as they do not fit within the structure of international law; they do not satisfy the need for legality.

Chapter 4 focuses on one aspect of legality defined in Chapter 3, the doctrine of sources. It asks the question: can unilateral acts be explained by the doctrine of sources? This chapter provides an overview of the research question, outlines of sources of international law, and the requirement of unilateral acts that provides the "source" of a unilateral act's authority, intention, in order to assess the legality of unilateral acts. Context to this discussion is provided through the example of Iran's pursuit of nuclear weapons.

After outlining the research question, this chapter provides an overview of the doctrine of sources. This section demonstrates that every source of international law is premised on a debate between consent and consensus which the doctrine of sources mediates. Following on this analysis, this chapter proceeds to examine the requirement of a unilateral act that establishes the source, of that act - intention. Intention provides

the legal authority of a unilateral act and in so doing acts as the source of a unilateral acts obligation. Further, this analysis reveals that intention is a "state of mind" and as a state of mind intention must be interpreted objectively. This requirement of objectivity is reflected in the most recent formulations of intention in the work of the ILC. The ILC terms this objective interpretation the "will of the state." Moreover, the work of the ILC, as supported by the case law, demonstrates that ascertaining objective intention requires that a third party can find in the unilateral act evidence that the state acted with intention. This objectivity conflates the "mental state" of the actor with the act itself in order to establish intention. Deriving the “mental state” of the actor from the act allows the third party to establish “consent” to the obligation contained in the unilateral act.

However, will of the state alone is not sufficient to establish an obligation. In its Guiding Principles, the ILC supplemented the requirement of “will of the state” with a further requirement, good faith. This requirement is introduced to resolve a doctrinal debate that arises from the objectification of intention: if an act is deemed to provide objective evidence of intention, then how can the objective observers separate the evidence of intention to perform the act from the evidence that the act intends to create a legal obligation? Acts may indicate intention to perform an action without providing unambiguous evidence of intention to create a legal obligation. Consequently, the ILC adds the requirement of good faith. Good faith requires not only that there is objective evidence of an intention to act, but also that there is objective evidence that other states believe that that act has created an obligation. This incorporates an element of consensus of the international community into the act. To summarize: the ILC interprets intention so that it incorporates both consent and consensus making intention “fit” within sources doctrine. Additionally, as was demonstrated in this section of the chapter, neither manifestations of intention, “will”, nor “good faith” truly represent state’s intentions. Intention is a state of mind. However, objective interpretations of the will of the state can mean that a state is bound by the interpretation of the act, regardless of its state of mind. Moreover, “good faith” means that a state can be obligated by an act because the third party hears evidence that a consensus of states believed the act manifested intent. Therefore, it is only through reinterpretation as “will” and “good faith” that intention can provide legal authority for a unilateral act. Intention does not fit naturally in the doctrine of sources; a state of mind cannot provide authority for a legal act.

In addition to the doctrinal analysis above, the problem of intention is placed in the context of Iranian pursuit of nuclear weapons. This contextualization reveals that

intention is extremely ambiguous as a source of authority for a legal obligation. As noted above, the analysis of the example of Iranian pursuit of nuclear weapons leads to two conclusions. First, objective intention, which is analogous to consent in sources doctrine, is rarely unambiguous in context. Second, the fact that objective evidence of intention is often ambiguous in context makes it less likely that a consensus will emerge in the international community that a good faith obligation has been created by a unilateral act. These conclusions are important because even if intention can be interpreted to provide theoretical authority for a legal obligation it is extremely difficult to apply these criteria in practice.

This chapter asks "can unilateral acts be explained by the doctrine of sources?" Ultimately, the problem that unilateral acts pose for the doctrine of sources is that they rest on neither consent nor consensus. The requirement of intention is purely internal: it is "a state of mind". As a result it must be objectified and interpreted in order to provide any sort of legal authority. Consequently, intention is always redefined to reflect the requirements of consent and consensus. However, when intention is defined in this way it may not reflect the intention – the state of mind - of the acting state. Intention can provide predictability and authority as a source of law at the expense of the state of mind of the acting state, its defining feature.[1111] Intention on its own cannot create a source of law. Further, even when it is interpreted to meet the requirements of the doctrine of sources as the example of Iranian pursuit of nuclear weapons demonstrates, intention is extremely difficult to apply in practice. The doctrinal difficulty posed by intention, together with the difficulty in applying intention in practice, helps explain the gap between the assertion that a unilateral act is legal and the ability to identify its legal obligation in practice.

Similarly, Chapter 5 focuses on a second aspect of legality defined in chapter 3, the doctrine of substance. It asks the question: "can unilateral acts be explained by the doctrine of substance?" To answer this question this chapter provides an overview of the research question, outlines the substance of international law and examines the requirement of a unilateral act that provides the substance of the unilateral act, autonomy. This chapter then compares the requirement of autonomy to the doctrine of substance in order to reach conclusions about the substantive legality of unilateral acts. Finally, context for this analysis is provided through the example of the San Juan River dispute.

[1111] See generally Koskenniemi, Apology (n 81) at p 354.

This chapter begins by providing an overview of the doctrine of substance. This analysis establishes that the doctrine of substance mediates debates between scholars over whether the subject matter of international law is derived primarily from individualism or altruism. Following on this analysis, this chapter proceeds to examine the requirement of a unilateral act that establishes the substantive legality of that act, the requirement of autonomy. Autonomy establishes that a unilateral act has substance when it reflects the interests of the state undertaking the act. However, analysis of this requirement demonstrates that autonomy alone cannot create a legal obligation. As the example of the tree that falls in the forest highlights, it is only when cognizance is taken of an act that autonomy can be exercised. Confusingly, requiring cognizance of the act makes the act less than autonomous because another state must recognize the act. It is for this reason that the ICJ introduces another substantive requirement for unilateral acts, the requirement of good faith. However, the requirement of good faith in effect contradicts the requirement of autonomy. Moreover, introducing the requirement of good faith makes unilateral acts difficult to separate from acts of estoppel, as unilateral acts and estoppels rely on good faith as a determinant of their substantive legal obligation, and in practice they both are premised on an element of autonomy. Therefore, unilateral acts are substantively indistinguishable from estoppels.

In addition to the doctrinal analysis above, the problem of autonomy is placed in the context of the San Juan River dispute. This contextualization reveals that autonomy is functionally indeterminate unless good faith is introduced, and once good faith is introduced the act is no longer autonomous. For example, it is Costa Rica's good faith in Nicaragua's statements that makes these statements legally relevant. However, once Costa Rica's good faith and the statements become legally significant, Nicaragua is no longer able to act autonomously. Further, the San Juan River dispute demonstrates that it is practically impossible to distinguish between the good faith required of unilateral acts and good faith that produces the detrimental reliance required of an estoppel. These observations are important because even if the requirement of autonomy can be interpreted to provide a substantive basis for a legal obligation, in practice these obligations are always indistinguishable from estoppels.

Chapter 5 asks "can unilateral acts be explained by the doctrine of substance?" The problem that unilateral acts pose for the doctrine of substance is that they rest entirely on autonomy, the interest of a single acting state. However, the requirement of autonomy is unable to produce a legal obligation without some form of cooperation by other states. As a result, it must be balanced by a requirement of good faith in order to

provide legal authority but introducing good faith makes the act less than autonomous. Consequently, a unilateral act can be autonomous, or it can produce a substantive legal obligation. This produces a second difficulty for the doctrine. When autonomy is defined to include good faith, it becomes practically indistinguishable from an estoppel, and autonomy is no longer its defining feature. Autonomy on its own cannot create a substantive legal obligation. Further, even when it is interpreted to meet the requirements of the doctrine of substance, the example of the San Juan River dispute demonstrates that autonomous obligations are functionally indistinguishable from estoppels. The doctrinal difficulty posed by autonomy, together with the difficulty in applying autonomy in practice, helps explain the gap between the assertion that a unilateral act is legal and the ability to identify its legal obligation in practice.

Chapter 6 completes the analysis of the research question "are unilateral acts legal?" Specifically, this chapter focuses on one aspect of legality defined in Chapter 3, the doctrine of process. To determine the legality of the processes of unilateral acts this chapter provides an overview of the research question, outlines the processes of international law and outlines the requirement of a unilateral act that determines the processes of a unilateral act, revocation. This chapter compares the doctrine of process to the processes of unilateral acts in order to reach conclusions about the legality of the processes of unilateral acts.

After outlining the research question, this chapter then provides an overview of the doctrine of process and establishes that process doctrine mediates between the need to create stable legal obligations and the need to allow for change to these obligations when appropriate. This is exemplified by the difference between hard and soft obligations. Hard obligations are those obligations that have stable processes to allow substantive obligations to gain legal authority, whereas soft obligations lack these stable processes.

Following on this analysis, this chapter proceeds to examine the requirement of revocation, which is one of the few processes of a unilateral act. Revocation establishes that a unilateral act may be changed or terminated. However, it was demonstrated that unilateral acts cannot be revocable solely at the will of the state. As a result, the ability to revoke a unilateral act is limited by the requirement of good faith, called arbitrariness at the ILC. Confusingly, requiring good faith introduces a requirement of cognizance and trust in the act that makes the act less than unilateral because another state must recognize the act. Thus, the requirement of good faith in effect contradicts the requirement of revocability. Moreover, introducing the requirement of good faith makes

unilateral acts difficult to separate from acts of estoppel, as unilateral acts and estoppels both rely on good faith as a limit on the revocability of the act. This means that unilateral acts can either be revocable and unilateral, or they can promote stability through good faith and lose status as unilateral acts. In the latter case unilateral acts become indistinguishable from estoppels.

This conclusion leads to an examination of the problem of "legalization" of unilateral acts. In this section of the chapter it is asserted that the revocability of unilateral acts indicates a low level of development of process. The processes that do exist provide little stability for state actors. This contrasts with the highly legalized processes for termination of treaties. The softness of unilateral acts impacts on their stability. It is concluded that unilateral acts do not have the procedural stability necessary to be considered a hard legal obligation.

Chapter 6 asks "can unilateral acts be explained by the doctrine of process?" The problem that unilateral acts pose for the doctrine of process is that they lack the procedural stability to produce a hard legal obligation; they do not provide the stability required to link form to substance. This is demonstrated by the requirement of revocability, which is unable to produce procedural stability without limiting revocation in good faith. However, introducing good faith makes the act less than unilateral. Consequently, unilateral acts can be revocable or they can provide a stable process for substance to gain legal authority. This produces a second difficulty for the doctrine. When revocation is defined to include good faith it becomes practically indistinguishable from an estoppel and unilateralism is no longer its defining feature. Revocation on its own cannot create a stable process of international law. Further, even when revocation is interpreted to meet the requirements of the doctrine of process, its processes are practically indistinguishable from estoppels. This demonstrates the weak legalization of the process of unilateral acts. Therefore, the doctrinal difficulty posed by revocation, together with the difficulty in applying revocation in practice, helps explain the gap between the assertion that a unilateral act is legal and the ability to identify its legal obligation in practice.

In short, this thesis asks the question "are unilateral acts legal?" Answering this question requires asking to two sub questions: "what are unilateral acts?" And "what is legality?" Answering the first question leads this thesis to define unilateral acts according to the criteria established by the ICJ in the *Nuclear Tests cases*. Answering the second question leads this thesis to define legality according to a "narrow" critical legal studies method of international law. In this method international law is defined by

its doctrine which, critical legal studies scholars argue, is a structure created by the rhetoric used by international lawyers to understand their own subject matter. In this thesis this structure is defined by the discourses of sources doctrine, substance doctrine and process doctrine. Legality is defined as a doctrinal structure created by these three doctrines. Therefore, answering the research question necessitates a comparison between the requirements of unilateral acts and the structure of international law. In Part 2 of this thesis this comparison is undertaken in chapters devoted to each doctrine: sources, substance and process. In each chapter a particular doctrine is introduced and compared to the requirement of a unilateral act that performs the function of this doctrine within a unilateral act. That is, Chapter 4 examines sources doctrine and determines that intention performs this requirement for a unilateral act. Chapter 5 examines substance doctrine, and determines that autonomy performs this requirement for a unilateral act and Chapter 6 examines process doctrine and determines that revocation performs this requirement for unilateral act.

However, this analysis reveals the difficulty with which unilateral acts are explained by each of these doctrines. For example, intention is a "state of mind" but a state of mind is never known other than by its objective manifestations. Objectifying intention satisfies a doctrinal requirement of sources doctrine, that an act indicate consent. Problematically, objectification of intention means that intention is found by interpreting evidence derived from the act itself. This means that intention can be determined even when a “state of mind” does not in fact exist. This is troubling because it means that a unilateral act can either be based on intention, or it can meet the requirements of the doctrine. Similarly, the requirement of autonomy reflects substantive individualism – an obligation based on state interest. However, autonomy cannot be determined in practice without a requirement of altruism. Therefore, the doctrine also requires good faith. Unfortunately, once good faith is introduced the act is no longer autonomous and is substantially indistinguishable from an estoppel. Lastly, difficulties also arise when unilateral acts are compared to the requirements of process doctrine. Unilateral acts have few processes, revocation being one of the clearest. Theoretically, an action can always be revocable if it is based on intention, but if an act is revocable at the will of the state, it does not promote the stability required to create legal processes. This obligation permits change but does not provide stability required by the processes of hardening of a legal obligation. Therefore, limits are considered on revocation in order to promote stability - limits of good faith or arbitrariness. These limits mean that unilateral acts cannot be arbitrarily revoked. This introduces stability

but precludes autonomy of the act because good faith implies, at a minimum, cognizance and trust in the act by another state, and trust leads to a requirement that the promise of the act be kept. This means an act can either be autonomous and revocable or stable but not autonomous.

Consequently, the requirements of unilateral acts pose difficulties for each of the doctrines of international law; intention does not create a source of law, autonomy alone cannot support a substantive obligation and revocability cannot provide the stable processes required of a legal act. Therefore, unilateral acts cannot be explained by the doctrine of international law. To conclude, this thesis asks the question: "are unilateral acts legal?" The answer to this question is no. The significance of these conclusions is presented in the next section.

3. The Significance of the Conclusions of this Thesis

This thesis identifies a problem with the legality of unilateral acts. The research question emerges from to the 2003 invasion of Iraq and the conclusions drawn from this thesis are applied to this context in detail in the next section of this chapter. For present purposes, it is sufficient to note that this act, the invasion of Iraq, is commonly referred to as unilateral, and yet three different justifications are put forward for why this act is legal (or, conversely, these justifications are rejected as illegal). The invasion of Iraq is constantly referred to as unilateral, and yet it is not clear that this claim has legal implications. A similar problem is seen in the examples of Osirak and the withdrawal from Lebanon and Gaza. These examples all highlight a gap between the assertion that an act is unilateral and the ability to assess legal implications of these acts. This gap is explained by the analysis undertaken in this thesis. Further, the ability to explain this gap is significant because events such as the invasion of Iraq in 2003 indicate a need to address the legality of unilateral action comprehensively – as a product of the sources, substance and processes of law. This thesis fills this gap by examining the requirements of unilateral acts, defined in the *Nuclear Tests cases*, and comparing them comprehensively to the doctrine of international law defined by the structure formed by sources doctrine, substance doctrine and process doctrine. This thesis specifically

contributes to the literature by providing this detailed and exclusive study of unilateral acts.

Moreover, by undertaking the analysis outlined in the previous section this thesis concludes that unilateral acts are not legal, because requirements of unilateral acts cannot be explained by the doctrine of international law. Specifically, unilateral acts cannot establish a source of international law because intention cannot provide a basis for legal authority; unilateral acts cannot establish a substantive legal obligation without collapsing into estoppels; and unilateral acts cannot establish processes that can clearly separate unilateral acts from other good faith obligations such as estoppels. This analysis explains why the legality of unilateral acts is so difficult to determine: they lack the required doctrinal development to mediate the requirements of sources substance and process. Consequently, this thesis is significant for its application of a narrow critical legal studies approach to the requirements of unilateral acts in order to resolve a practical problem -- the difficulty in applying the requirements of unilateral acts to specific acts of states such as the invasion of Iraq noted above.

To summarize, this thesis reaches one significant conclusion, that the gap between the claims that a unilateral act is legal and the ability to assess the legality of the specific act exists because unilateral acts are not legal, in the sense that the requirements of unilateral acts cannot be explained easily by the doctrine. Moreover, this analysis also leads to a further point that emerges from this first conclusion - unilateral acts may give rise to legal obligations in situations of estoppel. Estoppels, unlike unilateral acts, meet the requirements of the doctrine, so when a unilateral act creates an estoppel it creates a legal obligation. This fact may perpetuate some of the confusion in the doctrine because many unilateral acts seem to create an obligation but these cases, including arguably the *Nuclear Test cases*, are instances of estoppel.

These theoretical findings also have practical application – they can explain the difficulty in assessing the legality of specific acts such as the 2003 invasion of Iraq. The next section of this chapter applies these conclusions to this context.

4. Implications of this Research in Context

The purpose of this section of the conclusion is twofold. First, it returns the discussion of this thesis to the context in which this research emerged. Second, it develops the conclusions reached in previous parts of this chapter and applies them to the context of this thesis. This twofold purpose leads to a discussion of the limitations of this thesis and directions for future research in subsequent parts of this chapter.

To recall the facts: On March 20, 2003 the US and their coalition partners, including the United Kingdom, invaded Iraq.[1112] Popular reports continually spoke of this invasion as "unilateral"[1113] so the term unilateral became, in a sense, shorthand for all the justifications advanced for the US-led invasion. These justifications were complex and evolved over the course of the events that led up to the invasion of Iraq. First, the invasion of Iraq was justified as an act of preemptive self-defence. Second, the invasion of Iraq was defensible because Iraq was in defiance of United Nations Security Council Resolutions by possessing and making weapons of mass destruction. Consequently, military action was appropriate to enforce these resolutions. Third, the invasion of Iraq was warranted as a humanitarian act to bring democracy to the Iraqi people.

The first justification of the invasion, preemptive self-defence, was first advanced by President Bush in 2002 and it became the official policy of the US in the its National Security Strategy of 2002.[1114] This non-binding policy document stated that the US:

> ….will disrupt and destroy terrorist organizations by
> …defending the United States, the American people, and our interests at home and abroad by identifying and destroying the threat before it reaches our borders. While the United States will constantly strive to enlist the support of the international community, we will not hesitate to act alone, if necessary, to exercise our right of self-defence by acting pre-emptively against such terrorists, to prevent them from doing harm against our people and our country…[1115]

In this policy the US expanded its definition of self-defence under international law to include preemptive action to prevent terrorism. This policy responded to the belief, held by the US and other states, that Iraq possessed weapons of mass destruction and had not

[1112] Iraq Timeline (n 1).
[1113] Norton-Taylor (n 2); See also Cook (n 2).
These two examples illustrate that the term "unilateral" was widely used, even by senior politicians, in reference to the 2003 invasion of Iraq.
[1114] Charlesworth, "Is International Law Relevant" (n 3).
[1115] NSS (n 4).

hesitated to use them against their own people, particularly against the Kurdish people of Northern Iraq. Yoo, the Deputy Assistant Attorney General in the Office of Legal Council US Department of Justice from 2001-2003,[1116] explains the standard for preemptive self-defence established for the invasion of Iraq as follows:

> The use of force in anticipatory self-defence must be necessary and proportional to the threat. At least in the realm of WMD [weapons of mass destruction], rogue nations and international terrorism, however, the test for determining whether a threat is "imminent" to render the use of force necessary at a particular point has become more nuanced…Factors to be considered should now include the probability of an attack; the likelihood that this probability will increase, and therefore the need to take advantage of a limited window of opportunity; whether diplomatic alternatives are practical; and the magnitude of harm that could result from the threat.. Applying the reformulated test to for using anticipatory self-defense to Iraq reveals that the threat of a WMD attack by Iraq, either directly or by Iraq's support of terrorism, was sufficiently imminent to render the use of force necessary to protect the United States, its citizens and allies. [1117]

The argument for preemptive self-defence was soon supplemented by a second argument that invasion of Iraq was warranted by Iraqi failure to implement UNSC Resolutions that required it to destroy its weapons of mass destruction.[1118] This argument rested on the fact that earlier resolutions had demanded this disarmament, justifying invasion, and on the ambiguity of the resolutions involved in this debate. Yoo explains this argument as follows:

> Resolution 678 authorized members states "to use all necessary means to uphold and implement resolution 690 (1990) and all subsequent resolutions and to restore international peace and security in the area." One of the most important "subsequent relevant resolutions" was Resolution 687. Pursuant to resolution 678, the United States could use force not only to enforce Resolution 687's cease-fire, but also to restore "international peace and security" to the region. In Resolution 1441, the Security Council unanimously found that Iraq was in material breach of these earlier resolutions and its continued development of WMD programs, its support for terrorism, and its repression of the civilian population presented a strong

[1116] See "Yoo Home" (n 5).
[1117] Yoo (n 6).
[1118] Charlesworth (n 3) at pp 3-4.

> ongoing threat to international peace and security. These findings triggered Resolution 678's authorization to use force in Iraq. Suspending the cease-fire and resuming hostilities in Iraq was an appropriate response to Iraq's material breaches of Resolution 687.[1119]

The final rationale advanced for invading Iraq was humanitarian. Some argued that the invasion of Iraq was necessary to bring democracy to the Iraqi people.[1120] Each of these justifications was put forward and debated by politicians, academics and the popular press. However, the second justification – that invasion was authorized by Security Council Resolutions – appears to have been the ultimate justification for the coalition's invasion of Iraq.

Therefore, in 2003 the term unilateral act was commonly used to refer to a range of justifications for the US', and its coalition partners', actions in Iraq, actions that were undertaken without support, or arguably approval, of any multilateral institution. In light of this range of justifications, the precise meaning of a unilateral act was unclear and the assessment of the legal source and substantive legality of such acts was widely debated. Further, the debate over the invasion of Iraq was part of a wider trend in international law. The US had repeatedly acted in its preemptive self-defence before invading Iraq. Yoo notes incidents in Libya, Panama, Iraq, Afghanistan and Sudan. [1121]

Thus, in 2003 the term unilateral was shorthand for the justifications of the invasion of Iraq. The only commonality that can be drawn from these justifications is that term "unilateral" refers to actions undertaken without reference to multilateral institutions, justified by a variety of legal means. However, the legality of these acts is contested and indeterminate. Consequently, this suggests a problem with identifying the circumstances in which a unilateral act will be considered legal. In fact, the three justifications for the invasion of Iraq indicate profound disagreements about the source and substantive basis of the invasion. Well informed people disagree on this issue, raising questions about the nature of unilateral acts. This disagreement leads to the research question of this thesis: "are unilateral acts legal?" The analysis of this research question led to conclusions about the legality of unilateral acts that have been outlined in previous sections of this chapter. These conclusions can now be applied to the context of the invasion of Iraq outlined above.

[1119] Yoo (n 6).
[1120] Charlesworth (n 3) at p 4.
[1121] See Yoo (n 6).

The invasion of Iraq is justified by three different legal concepts: as preemptive self-defence on the part of the US and its allies, by Iraqi defiance of UNSC resolutions and as a humanitarian act. Among these justifications it appears that Iraqi defiance of Security Council resolutions serves as the most widely advanced reason for the invasion. Interestingly, this is the only justification to remove the invasion from a unilateral context -- when unilateralism is defined by the *Nuclear Tests cases*. If the invasion of Iraq is justified by the fact that Iraq is not complying with UNSC resolutions, the act of invading is unilateral as it occurs without explicit multilateral approval. However, it does not meet the requirement for a legal unilateral act as defined by the *Nuclear Test cases*; the intention to invade is clear from the act of invasion, but the act is not autonomous because it enforces existing legal obligations, UNSC resolutions. Therefore, according to the *Nuclear Tests cases* this act is not a unilateral act capable of producing legal obligations. Additionally, the revocability of enforcement of UNSC resolutions is not clear. Therefore, this justification of the invasion of Iraq is similar to the situation in the *Eastern Greenland case* where unilateral acts take place in a bilateral context which ensures the act is not autonomous. The act is, to paraphrase Fitzmaurice, unilateral in form but not in substance. Therefore this justification does not need to be discussed further, as the legality of the invasion in this case is not derived from the unilateral nature of the invasion, but is contextualized by other obligations of international law. More difficult to explain within the doctrine are the first and third justifications for the invasion of Iraq: preemptive self-defence and humanitarian intervention. It is these justifications that are the focus of this section of the chapter.

Preemptive self-defence is official policy of the US since the National Security Strategy of 2002. According to this policy the US may take preemptive action to prevent harm when it "is necessary and proportional to the threat", which is a more "nuanced" test of imminence of a threat then traditional tests of proportionality.[1122] Applied to Iraq, this test means that the invasion is permitted by the basis of the security threat posed by Iraq's believed possession of WMD. This justification is related to the ban on use of force an Article 2(4) of the of the United Nations, and the exception for self-defence contained in Article 51 of the Charter. However, the relationship of this justification for invasion to established legal standards of self-defence, does not preclude examining this act as a unilateral act (unlike the justification of Iraqi non-compliance with UNSC resolutions discussed above). The determination to invade Iraq is in fact a unilateral act for the following three reasons. First, the assessment of the

[1122] Yoo (n 6).

need for self-defence is applied solely by the US, and its allies, without reference to other states. Second, the expansion of the definition of self-defence, while common practice in the US, is not widely accepted; it exists as a justification that is legally indeterminate. Third, the use of preemptive self-defence in the invasion of Iraq is undertaken without the approval of the international community and so this act is unilateral. Consequently, from this perspective the invasion of Iraq is a unilateral act capable of explanation by the definition of legality established in this thesis.

Therefore, the justification of preemptive self-defence meets the definition of a unilateral act established in the *Nuclear Tests cases*. First, the invasion of Iraq represents objective intention of the US and its allies. Second, the act is autonomous as it explicitly disavows a reaction or *quid pro quo* on the part of other states. Third, the act is revocable as the US and its allies can revisit their intention to invade Iraq at any time prior to the invasion. Consequently, because this justification meets the definition of legality established in Chapter 2, questions about the legality of the invasion of Iraq can compared to the structure of legality established in Chapter 3 of this thesis.

Similarly, the justification of the invasion of Iraq as a humanitarian intervention also meets the definition of a unilateral act established in the *Nuclear Test cases*. This definition is applicable to this justification of invasion for the following three reasons. First, the need for humanitarian intervention is determined solely by the US and its allies. Second, the applicability of humanitarian intervention in Iraq is debated, and the legality of this justification for invasion is not clear.[1123] Third, this "humanitarian act" is undertaken without the approval the international community. Therefore, according to this justification, the act is undertaken with humanitarian intent, it is autonomous, and the intervention is revocable prior to invasion. It meets the criteria for a unilateral act established in the *Nuclear Tests cases*.

To conclude, the invasion of Iraq is justified according to the criteria of a unilateral act established in this thesis, whether one considers it preemptive self-defence or a humanitarian intervention. Therefore, analysis of this act according to the criteria for legality used in this thesis can shed some light on why the legality of this act is difficult to determine.

The first element of legality is the doctrine of sources. This doctrine requires that an act is capable of mediating the debate between consent and consensus as the basis of international legal obligations. This chapter argues that the requirement of a unilateral act that performs this mediatory function is intention. Intention is doctrinally

[1123] See for example, Roth (n 35).

problematic as it cannot provide the legal authority required of a legal obligation. To explain: Intention is a "state of mind" and as such intention is interpreted objectively from the act itself. However, the very act of objectification means that intention cannot be determined other than by the cognizance taken of the act and the interpretation of the act that is made from that cognizance. Applied to the invasion of Iraq, this means that the legal authority of the invasion of Iraq is determined by objective interpretation of the act itself from which the US' intention is determined. However, this requirement of objective interpretation means that it is not the US' intention that is relevant but how other states perceive its intention and react to that. It also means that the US and its allies cannot know the legality of their actions prior to the objective interpretation of their actions. This uncertainty means that the US' intention is ultimately unascertainable and may even be irrelevant to the determination of legality of the invasion of Iraq. This leads to a situation in which the assessment of the act by other states can directly conflict with the US' intentions. Further, this analysis helps shed light onto two areas of confusion over the invasion of Iraq: the fact that the US' intentions and the assessment of these intentions are in conflict, and the fact that differing interpretations of formal legality are drawn from the very same action.

Similarly, the doctrine of substance mediates debates over whether the text of the law is individualistic or altruistic, whether the subject matter of a law should reflect the interests of a state or the needs of the international community. Unilateral acts cannot fit within the doctrine of substance because the requirement of a unilateral act that provides the substance of the act, its autonomy, is purely individualistic in nature. As a result, the doctrine of substance in effect introduces a requirement of good faith, cognizance and trust, as a limitation on autonomy. As the discussion in Chapter 5 demonstrates, an act can either be autonomous, or it can meet the requirement of good faith, which effectively creates a community interest in the act. However, once the requirement of good faith is introduced the act is no longer autonomous. In fact, it becomes indistinguishable from the reliance required of an estoppel. Applied to the invasion of Iraq, the difficulty unilateral acts pose for the doctrine of substance is acute. Whether one justifies the invasion as an act of preemptive self-defence or as a humanitarian act, the autonomy of the invasion of Iraq is questionable. Autonomy is defined as an act that is undertaken without an expectation of an exchange, *quid pro quo* or reaction by another state. However, the invasion of Iraq is not autonomous for two reasons. First, the act of invasion is a response to Iraqi acts, whether defined as violations of international humanitarian law or the possession of WMD. This means that the invasion

of Iraq is in fact a response to the unilateral acts of Iraq. This creates an appearance of reciprocity which makes the invasion less than unilateral and more akin to other reliance-based obligations such as estoppels. Second, one can see the act of invading Iraq creating good faith in states who object to the invasion. This is evident from the protests by countries such as France and Germany that the invasion is illegal.[1124] Therefore the autonomy of the invasion of Iraq is difficult to ascertain and the autonomy of the invasion is impossible to separate from the context of the invasion, whether this context is found in prior Iraqi acts or protests of other states that the invasion is illegal. This lack of autonomy explains the difficulty in determining the legality of the substance of the invasion of Iraq.

Lastly, the doctrine of process mediates between the law's need for stable processes and the law's need to respond to change. The requirement of a unilateral act that performs this function is revocation. A unilateral act is theoretically revocable if a state's intention changes but in order to introduce stability into the processes of unilateral acts, the *Nuclear Tests cases* introduce a requirement of good faith. Revocation is limited when a unilateral act induces cognizance and trust. This requirement ensures that the balance is maintained between stability and change, but as with the substance of a unilateral act, the requirement of good faith also ensures that the act is now responsive to the reaction of other states in a way that precludes unilateral action and makes the act impossible to distinguish from an estoppel. Applied to the case of Iraq, it is clear that the US can revoke its intention up to the time of invasion, but states are also free to take notice and respond to the planned invasion. In the case of Iraq cognizance took the form of protest of the legality of the invasion. These protests demonstrate that even if revocation occurs (which is not a factor in this case), it is never clear whether revocation is in response to protests of the act or a change of intention. This demonstrates the role of good faith in the processes of unilateral acts, as well as the difficulty in distinguishing between good faith in unilateral acts and estoppels.

Consequently, the claim that unilateral acts are not legal helps explain the gap between the claim that the invasion of Iraq is legal and the ability to ascertain the legality of this act in practice. This thesis demonstrates that the gap between the claim of legality and its ascertainment is not a result of competing justifications of legality. In fact, competing justifications of legality result directly from the structural deficiencies in the concept of unilateral act itself. The concept of unilateral acts cannot be explained

[1124] "Final Countdown: An Hour by Hour Chronology of Diplomatic Efforts to Resolve the Iraq Crisis" The Guardian (19 March 2003) online: <www.guardian.co.uk> accessed on 14 May 2009.

within the doctrine of international law and as a result these acts are not legal. This leads to a conceptual vacuum in which the term unilateral is used as shorthand for competing justifications of the same act.

Similar difficulties exist within the other examples of context provided in the introductory chapter. For example, the Israeli actions at Osirak and their withdrawals from Lebanon and Gaza are of indeterminate legality, precisely because of the fact that unilateral acts are not capable of explanation within the doctrine of international law.

The bombing of Osirak is a unilateral act, as it is an act undertaken outside the multilateral context, but it does not fit within the definition of a unilateral act in the *Nuclear Tests cases* because the legality of this act is determined only on the basis of the reaction of other states to the act. Israeli intention is never considered relevant to the assessment of the legality of the bombing as it is clear that Israel believes it is within the law and acts on this intention. It is the reaction -- the cognizance of other states to this act - that raises questions about the legality of the act. This means the legality of the bombing of Osirak is neither intention based nor autonomous. The legality of Osirak can never be ascertained with any certainty if this act is viewed as a unilateral act.

Additionally, Israel's withdrawals from Lebanon and Gaza also remain legally uncertain because these acts do not involve cognizance and trust. As a result intention and autonomy are never determined. This demonstrates that intention alone cannot produce a legal obligation without cognizance being taken of the act. However, as is repeatedly observed, once cognizance is taken of an act, the act is no longer autonomous or intention based. It becomes indistinguishable from an estoppel. In the cases of Lebanon and Gaza Israel withdraws from the territories as it promised. However, Israel kept its promises, so other states did not have to explicitly claim good faith in their acts. This means that the legality of these acts, as unilateral acts, is never determined. This demonstrates that the uncertainty regarding the legality of these actions is not a result of competing justifications of their legality, but that competing justifications of legality result from the fact that these acts cannot be explained by the doctrine of international law. This thesis asks the question “are unilateral acts legal?” Applying the conclusions reached in this thesis to the context in which this thesis has emerged indicates that unilateral acts are not legal.

This analysis is significant because it explains the gap between the claim that the invasion of Iraq is legal (or illegal) and the difficulty of substantiating these claims in practice. The only conclusion that can be reached from this analysis is that this gap exists because of doctrinal problems inherent in unilateral acts. These doctrinal

problems indicate that unilateral acts are not legal. This raises a final question: If unilateral acts are not legal acts, what are they? How can unilateral acts be explained in terms of law and in terms of international relations? These questions are expanded on in the penultimate section of this chapter. However, before these questions can be discussed further the limitations of the conclusions of this thesis must be discussed.

5. Limitations of the Conclusions Reached in this Thesis

As noted at the outset of this thesis, the research question "are unilateral acts legal" is a broad and difficult question. As a result the conclusions in this thesis are limited in a number of significant ways.

The first limitation on the conclusions of this thesis is the definition of unilateral act adopted. For purposes of this thesis, unilateral acts are defined by the criterion established in the *Nuclear Tests cases*. This limitation is necessary in order to establish workable parameters for the subject matter of this thesis. Further, this limit is defensible because the *Nuclear Tests cases* are the leading case in this area. However, this definition limits the scope of this thesis significantly; it excludes acts which do not meet this definition. Specifically, this thesis does not discuss certain categories of acts that otherwise appear to be unilateral: Unilateral acts of retaliation under trade agreements, notifications required by treaties and humanitarian interventions by regional and multinational organizations. These acts are excluded because the autonomy required of unilateral act is, by definition, not present in these acts. Consequently, the definition of unilateral act adopted in this thesis limits its scope. It also leads to a final caveat: the conclusions reached in this thesis only apply to acts meeting the definition of unilateral act used in this thesis.

The second limitation in this thesis is the definition of legality. In order to assess the legality of unilateral act it is necessary to determine which acts display the required qualities of law. In Chapter 3 of this thesis current definitions of legality are examined and a “narrow” critical legal studies method is adopted. This method is adopted because it “takes law seriously” on its own terms thereby narrowing the scope of legality. In this thesis legality is determined by a comparison of the requirements of unilateral acts of to

the doctrines of international law identified by the critical legal studies method. However, adopting this approach limits the scope of the conclusions of this thesis. This limitation is necessary because the meaning of legality is contested in the doctrine therefore limits have to be drawn in order to define legality in a way that allows for a meaningful method of assessing legality. Adopting a "narrow" critical legal studies method allows for this to occur. The choice of this method is justified and more fully discussed in Chapter 3. However, for present purposes it is sufficient to note that the use of this method limits the conclusions reached in this thesis to a specific definition of legality. Further, by defining law as a product of doctrinal debate, this thesis determines that legality is a matter internal to law. Therefore, the conclusions in the thesis are limited to conclusions about legality defined in legal doctrine; this is opposed to political, socio-legal or philosophical analyses, which are specifically excluded.

Additionally, the conclusions reached in this chapter reveal a further limitation on the analysis in this thesis. This thesis restricts its analysis to unilateral acts; this focus specifically precludes detailed discussion of other concepts discussed in this thesis such as soft law, good faith and estoppels. Unilateral acts are intimately related to these concepts and yet it is outside the scope of this thesis to discuss them in great detail. This is a limit on the conclusions in this thesis, and it is also the subject of the next section of this chapter - further research.

6. Further Research

This thesis asks the question "are unilateral acts legal?" The answer to this question is twofold: unilateral acts are not legal, and, further, in order for unilateral acts to be considered legal they must become effectively indistinguishable from estoppels. These conclusions raise several interesting questions for future study. First, if intention cannot create the legal authority required of a legal obligation, what is the relationship between unilateral acts and other sources of authority in international law? Specifically, what is the role of unilateral acts in treaty formation and in custom formation? Second, if unilateral acts cannot be substantially distinguished from estoppels, then what is the relationship between these two concepts? Does the mutual reliance of good faith indicate that there is one common good faith obligation based on reliance? Third, if

unilateral acts lack the processes necessary to legalize, then what is their role as a non-legal or soft obligation in international relations? Future studies can examine each of these questions with the aim of elaborating the role of unilateral acts in international relations and with the goal of forming a common understanding of obligations such as unilateral acts and estoppel. This thesis begins this dialogue with the hope that others will build on this research.

7. Implications of this Thesis

This thesis concludes that unilateral acts are not legal. Building on this conclusion this thesis will now discuss the implications of this thesis in three areas doctrine, practice and method.

An ongoing problem in the doctrine of international law is the explanation of unilateral acts. This problem is defined by the gap between the asserted legality of unilateral acts in the doctrine and the difficulty with determining this legality in practice. This thesis addresses this gap by determining that unilateral acts are not easily explained by the doctrine. This leads to the conclusion that unilateral acts are not legal. This conclusion implies that a more nuanced view of the role of unilateral acts in the doctrine is necessary and this thesis suggests that a primary direction for doctrinal development is to examine the relationship of unilateral acts to estoppels and to seek clarification of the relationship of unilateral acts to soft law. This conclusion also implies that a more nuanced view of unilateral acts focuses on the way that unilateral acts contribute to the creation of legally authoritative of obligations such as custom, treaty and estoppels. Therefore, this thesis has many implications for the doctrine of international law.

This thesis also has many practical implications. These implications are best summed up in the phrase "fitting a round peg into a square hole." Doctrine tries to make unilateral acts “legal,” but practically these acts do not fit in the structure of legality. This difficulty is demonstrated in such examples as the invasion of Iraq, Osirak, Lebanon and Gaza, Iran’s pursuit of nuclear weapons and the San Juan River dispute. The practical implication of these examples is that unilateral acts are best treated as

indeterminate or perhaps even political acts unless the unilateral act results in an estoppel.

Lastly, this thesis has implications for method. It applies the "narrow" critical legal studies method as a way of establishing the meaning of legality and demonstrates the potential of the "narrow" critical legal studies approach as a method of determining legality. An obvious implication of applying the critical legal studies approach as a method of defining legality is its usefulness in separating "legal" from "non-legal" obligations.

8. Conclusions

This chapter opens with a summary of the conclusions of each substantive chapter of this thesis and concludes that unilateral acts are not legal. The significance of this conclusion is that it resolves the gap between the asserted legality of unilateral acts and the difficulty in determining this legality in practice. Further, when this conclusion is applied to the context of this thesis, the invasion of Iraq, the fact that unilateral acts are not legal explains why debates over the legality of this invasion remain unresolved. Finally, the limitations of this thesis are discussed, areas of further research are suggested and the implications of the research question are drawn. This thesis concludes the way it opens - with the question "are unilateral acts legal?" However, it ends with an answer: no.

APPENDIX A: GUIDING PRINCIPLES APPLICABLE TO UNILATERAL DECLARATIONS OF STATES CAPABLE OF CREATING LEGAL OBLIGATIONS

Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations 2006

 Text adopted by the International Law Commission at its Fifty-eighth session, in 2006, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/61/10). The report, which also contains commentaries on the draft articles, will appear in *Yearbook of the International Law Commission, 2006*, vol. II, Part Two.

Guiding Principles applicable to unilateral declarations of States capable of creating legal obligations

The International Law Commission,

Noting that States may find themselves bound by their unilateral behaviour on the international plane,

Noting that behaviours capable of legally binding States may take the form of formal declarations or mere informal conduct including, in certain situations, silence, on which other States may reasonably rely,

Noting also that the question whether a unilateral behaviour by the State binds it in a given situation depends on the circumstances of the case,

Noting also that in practice, it is often difficult to establish whether the legal effects stemming from the unilateral behaviour of a State are the consequence of the intent that it has expressed or depend on the expectations that its conduct has raised among other subjects of international law,

Adopts the following Guiding Principles which relate only to unilateral acts *stricto sensu*, i.e. those taking the form of formal declarations formulated by a State with the intent to produce obligations under international law,

1. 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; States concerned may then take them into consideration and rely on them; such States are entitled to require that such obligations be respected;

2. Any State possesses capacity to undertake legal obligations through unilateral declarations;

3. To determine the legal effects of such declarations, it is necessary to take account of their content, of all the factual circumstances in which they were made, and of the reactions to which they gave rise;

4. A unilateral declaration binds the State internationally only if it is made by an authority vested with the power to do so. By virtue of their functions, heads of State, heads of Government and ministers for foreign affairs are competent to formulate such declarations. Other persons representing the State in specified areas may be authorized to bind it, through their declarations, in areas falling within their competence;

5. Unilateral declarations may be formulated orally or in writing;

6. Unilateral declarations may be addressed to the international community as a whole, to one or several States or to other entities;

7. A unilateral declaration entails obligations for the formulating State only if it is stated in clear and specific terms. In the case of doubt as to the scope of the obligations resulting from such a declaration, such obligations must be interpreted in a restrictive manner. In interpreting the content of such obligations, weight shall be given first and foremost to the text of the declaration, together with the context and the circumstances in which it was formulated;

8. A unilateral declaration which is in conflict with a peremptory norm of general international law is void;

9. No obligation may result for other States from the unilateral declaration of a State. However, the other State or States concerned may incur obligations in relation to such a unilateral declaration to the extent that they clearly accepted such a declaration;

10. A unilateral declaration that has created legal obligations for the State making the declaration cannot be revoked arbitrarily. In assessing whether a revocation would be arbitrary, consideration should be given to:

(i) Any specific terms of the declaration relating to revocation;

(ii) The extent to which those to whom the obligations are owed have relied on such obligations;

(iii) The extent to which there has been a fundamental change in the circumstances.

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