December 2023

Non-Legally Binding Political Commitments On Space Arms Control Norms

By Olga Volynskaya

SECURE WORLD FOUNDATION

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Doc. #PP23.09

Last Update: December 2023

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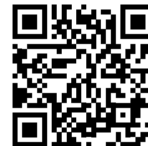

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Non-Legally Binding Political Commitments On Space Arms Control Norms

Executive Summary

Recent years have been marked with an increasing number of non-legally binding commitments relating to space arms control. The respective positions of states are taking form of unilateral or bilateral statements of states, as well as resolutions of the United Nations General Assembly (UNGA). These types of instruments are usually perceived as recommendatory, or "politically binding".

However, based on previous examples of state practice, authoritative findings of the International Law Commission (ILC) supported by the relevant decisions of the International Court of Justice, this report addresses the prospects for recommendatory norms to give rise to legally binding rules enshrined in international treaties or customary international law.

OBJECTIVE OF THE RESEARCH

This research presents a comparative analysis of:

- The UNGA resolution on destructive direct-ascent anti-satellite (ASAT) missile testing and UNGA resolutions on no first placement of weapons in outer space, and
- Unilateral declarations by states not to conduct destructive direct-ascent ASAT missile tests and bilateral statements by states not to be the first to place weapons in outer space.

The objective of this comparative study is to determine whether the above non-legally binding international instruments could have a possible indirect legal effect, i.e. lead to the emergence of new legally binding norms. This paper examines in detail the requirements which shall be met for such recommendatory norms to potentially create new norms of international treaties, international customary law or even transform into obligations of the *erga omnes* nature.

Recommendatory, or "politically binding", international norms are by definition more flexible than the binding rules of international treaties or custom. However, there are no legal consequences for both declaring such norms and breaking them.

When states make non-legally binding declarations which they do not intend to abide by, this leads to uncertainty in international relations.[1] Therefore, this exercise aims at revealing the true intentions of the respective states: whether they intended to act responsibly, commit themselves not to words but actions, and ultimately ensure legal certainty in the area of space arms control.

SCOPE OF THE RESEARCH AND ANALYSIS

This research addresses the following interconnected questions:

I. What is the nature and legal effect of non-legally binding political commitments?

- What non-legally binding political commitments exist in regards to current arms control measures?
- Are there examples of such non-legally binding political commitments that have resulted in the emergence of new international customary norms or new legally binding treaties?
- Are there examples where such declarations have been considered to be legally binding on the parties that have made such commitments?
- Are there examples of unilateral declarations that have failed to attract support of other nations?
- What seem to be the factors that distinguish success from failure?
- Are any of these non-legally binding political commitments applicable to space?
- Which of them are UNGA resolutions, and which are unilateral state declarations?

II. In the context of the UNGA's recent work on space arms control, what effect does the recent non-legally binding UNGA resolution on ASAT missile testing (UNGA Resolution 77/41)[2] have?

- Could UNGA Resolution 77/41 rise to the level of customary international law?
- What role might the report of the OEWG on reducing space threats have in the development of customary international law?

III. In the context of recent national unilateral declarations to not conduct direct-ascent ASAT missile testing, what effect would these have? Could they rise to the level of customary international law?

IV. What are the likely consequences of either/both the efforts at UNGA Resolution 77/41, the report of the OEWG on reducing space threats, and the various national commitments?

Some of the questions listed above were grouped and comparatively examined. Other issues (e.g., possible role of the report of the OEWG on reducing space threats) did not receive much attention due to the recent developments.[3]

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1 Zimmermann 2021, at 3.

2 UNGA Resolution 77/41 "Destructive direct-ascent anti-satellite missile testing", adopted on 7 December 2022.

3 Theresa Hitchens, Russia spikes UN effort on norms to reduce space threats, 1 September 2023. https://breakingdefense.com/2023/09/russia-spikes-un-effort-on-norms-to-reduce-space-threats/.

Additional matters (notably, the role and possible legal effect of UNGA resolutions and joint declarations by states on no first placement of weapons in outer space) were highlighted and integrated into the research.

MAIN FINDINGS AND CONCLUSIONS

UNGA resolutions

As a general rule, UNGA resolutions due to their non-legally binding nature do not institute new norms of international law. However, UNGA resolutions can recall the already existing binding rules established by international agreements, international custom or other sources of international law. Furthermore, recommendatory documents by the UNGA can indicate the ongoing process of creation of a new rule of international law, including in the form of an international custom.

Examples of other branches of international law (international environmental, economic, and humanitarian law) show that UNGA resolutions only confirm the existence or formation of international customary rules, but only state practice and its perception of it as legally binding (*opinio juris*) can create a new international custom. Therefore, UNGA resolutions relevant to the prevention of an arms race in outer space do not as such give rise to new legally binding rules.

The conduct of states in connection – and not necessarily in strict conformity – with UNGA resolutions on arms control could be proof that both practice and its perception by a state (or group of states) as law are in place. National legislation could also serve this purpose. Practice of national courts, diplomatic correspondence, and official statements on behalf of states are a few examples of actions leading to the development of an international custom. However, whether there are sufficient grounds for an international custom to emerge should be examined on a case-by-case basis.

UNGA resolutions can also reflect the approaches of states regarding the drafting of an international agreement or agreements to prevent an arms race in outer space. However, the ultimate decision lies with the states whether they choose to transform a non-legally binding provision of a UNGA resolution into a treaty norm and, most importantly, agree to be bound by it.

Moreover, treaty provisions against ASAT testing, and conduct of states in connection – once again, not necessarily in full accordance with – the respective treaty, whether bilateral or with a limited number of parties, could also respectively constitute state practice and express *opinio juris*. On the one hand, norms of an international treaty are binding only upon the parties to this treaty. But on the other hand, if the treaty in question obtains in time support of a larger group of states so that the relevant treaty rule could be categorized as “sufficiently widespread, representative, and consistent”, this rule would become an international custom binding upon all states. With this development, the (hopefully few) states that do not agree to be bound by the emerging customary rule would have to resort to the ‘persistent objector’ technique.[4] Otherwise, they would become bound by the new international custom regardless of their opposition.

4 According to the International Law Commission, any state or states have an opportunity to object to being bound by an emerging international custom, but such objection “must be clearly expressed, made known to other States, and maintained persistently”.

Unilateral declarations of states on space arms control norms

Unilateral declarations of states are usually regarded as not legally binding upon the respective state.

However, in certain situations a unilateral declaration could become legally binding. According to the International Law Commission (ILC), "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".[5]

These conditions include the following:

1. Intention by the declaring state to commit itself;
2. Declaration made by a duly authorized state representative (head of state, head of government, minister of foreign affairs or another official representative (e.g., a head of space agency) duly authorized to formulate such declarations in specific areas);
3. Declaration made in good faith;
4. Clear and specific terminology;
5. No reservations which would allow the state to opt out from its declared obligation;
6. Further modifications;
7. Context and factual circumstances in which the statements were made;
8. Reaction by other states.[6]

Out of 35 states that made unilateral commitments not to conduct destructive direct-ascent ASAT missile tests, only one (Germany) expressly stated that it regarded the said declaration as non-legally binding.

As to the remaining 34 states, following the ILC guidelines and ICJ practice, a good argument could be made that the respective statements are capable of creating legal obligations. The formal features of a potentially legally binding commitment, according to the ILC list mentioned above, are assumedly present:

1. Every declaration was made by an assumedly authorized state representative: vice president, prime minister, minister, or head of space agency (jointly with a minister);
2. The intention by the declaring states to commit themselves was clearly stated, although not elaborated upon in terms of its legal consequences;
3. One would assume (unless a counter-evidence is found) that every declaration was by default made in good faith;
4. The wording used in all the statements is clear;
5. No declaration contained any reservations which would allow the respective states to opt out from their obligation;
6. There is no evidence that any of the statements have been subsequently modified;
7. The statements share the same context and were made in similar factual circumstances;
8. None of the declarations have met direct opposition from other states.

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5 UN Doc. A/61/10, Sec. IX.
6 Or, more specifically, no negative reaction from other states to the respective unilateral declaration by one state.

However, each statement has to be examined individually. Special emphasis must be placed on the following key factors: willful consent of the declaring state to legally bind itself and the perception by other states that this declaration is binding upon the declaring state.

Having in mind selected historic examples of unilateral state declarations which, according to the ICJ and ILC, had a legally binding effect upon the declaring states, one could posit that some or even most of the unilateral declarations examined for this research have the potential to create a legal obligation.

Joint statements by states on no first placement of weapons in outer space (NFP)

Compared to the declarations of states on ASAT weapons testing, statements on NFP are usually shaped as joint declarations by Russia and its foreign state partners.

It is noteworthy that the NFP concept already provides for a reservation: the respective joint statements, even if they were politically binding, would cease to apply the moment the first weapon is placed in outer space by any other state.

Unilateral or joint declarations of states could potentially lead to the emergence of a new international customary rule or a conventional norm if the respective procedural and substantive requirements are met. For an international custom to form, a multitude and consistency of such unilateral declarations could qualify as general practice and as *opinio juris* – if the respective states believe that the declared action or abstention from action is based on their legal right or legal obligation.

Convergence of the anti-ASAT weapons testing and NFP initiatives

Geopolitical tensions aside, this legal assessment of the anti-ASAT weapons testing and NFP initiatives – both at the UNGA and state level – reveals that these instruments could perfectly complement each other.

First, all of them share one goal – prevention of an arms race in outer space.

Second, joint statements of states on NFP and unilateral declarations on anti-ASAT testing could serve as conduct in connection with resolutions adopted by an international organization – UNGA resolutions on NFP and ASAT respectively. This means that such joint and unilateral statements, once they multiply, could potentially qualify as both general practice and *opinio juris* necessary for the emergence of a new international customary rule.

Third, UNGA resolutions on NFP and ASAT highlight the necessity to develop an international agreement or agreements to prevent an arms race in outer space.

Therefore, joint statements on NFP and unilateral declarations on anti-ASAT testing could work in harmony towards the legally binding space arms control regime:

Step 1 – NFP statements: non-legally binding but covering any types of weapons;

Step 2 – anti-ASAT testing declarations: potentially legally binding but focused on one category of weapons;

Step 3 – a series of UNGA resolutions on NFP and ASAT (maybe in time merged into one): testifying to the progress of the above initiatives and reflecting the emergence of new legally binding norms of an international treaty or international customary law – or both in parallel to cover respectively the signatories to the future treaty, and the international community of states at large.

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Acronyms and Abbreviations

ASAT

Anti-satellite

EIA

Environmental impact assessment

***Erga omnes* obligations**

Obligations in whose fulfilment all states have a legal interest because their subject matter is of importance to the international community as a whole

General Assembly

See UNGA

ICJ

International Court of Justice

ICJ Statute

Statute of the International Court of Justice

ICRC

International Committee of the Red Cross

ILC

International Law Commission

ILC Draft Conclusions

Draft conclusions on identification of customary international law

ILR

International Law Reports

International custom

Evidence of a general practice accepted as law

International law

A set of binding rules regulating international relations

Legal norm

A social norm enforced by a relatively strong degree of coercion, see Norm; Legally binding norm

Legally binding norm

A norm which is intended to give rise to legal obligations under CIL (Customary international law; see *International custom*)

NFP

No first placement of weapons in outer space

NGOs

Non-governmental organizations

Non-legally binding norm

A political or moral commitment which is not intended to create legal rights and obligations

Norm

A situation or a pattern of behavior that is usual or expected, synonym: Rule; see Legal norm, Rule of international law

OEWG on reducing space threats

Open-ended working group on reducing space threats through norms, rules and principles of responsible behaviours

PLO

Palestine Liberation Organization

Rule of international law

Norm of conduct which is precise, certain, and binding upon subjects of international law

SDG

Sustainable Development Goals

TCBM

Transparency and confidence-building measures

TPNW

United Nations Treaty on the Prohibition of Nuclear Weapons

UN

United Nations

UNGA

General Assembly of the United Nations, the main deliberative organ of the United Nations which consists of all the Members of the United Nations, each of them having one vote.

UN Charter

Charter of the United Nations

UNTS

United Nations Treaty Series

USSR

Union of Soviet Socialist Republics

USTS

United States Treaty Series

1. Introduction

Recent years have been marked with an increasing number of non-legally binding commitments relating to space arms control. The respective positions of states are taking form of unilateral or bilateral statements of states, as well as resolutions of the General Assembly of the United Nations (hereinafter – “UNGA”). These types of instruments are usually perceived as recommendatory, or “politically binding”.

However, based on previous examples of state practice and authoritative findings of the International Law Commission supported by the relevant decisions of the International Court of Justice, this report addresses the prospects for recommendatory norms to give rise to legally binding rules enshrined in international treaties or customary international law.

OBJECTIVE OF THE RESEARCH

This research presents a comparative analysis of:

- The UNGA resolution on destructive direct-ascent anti-satellite (hereinafter – “ASAT”) missile testing and UNGA resolutions on no first placement of weapons in outer space; and
- Unilateral declarations by states not to conduct destructive direct-ascent ASAT missile tests and bilateral statements by states not to be the first to place weapons in outer space.

The objective of this comparative study is to determine whether the above non-legally binding international instruments could have a possible indirect legal effect, i.e. lead to the emergence of new legally binding norms. This paper examines in detail the requirements which shall be met for such recommendatory norms to potentially create new norms of international treaties, international customary law or even transform into obligations of the erga omnes nature[7].

Recommendatory, or “politically binding”, international norms are by definition more flexible than the binding rules of international treaties or custom.

However, there are no legal consequences for both declaring such norms and breaking them. When states make non-legally binding declarations which they do not intend to abide by, this leads to uncertainty in international relations.[8] Therefore, this exercise assesses whether unilateral and bilateral declarations, including voting for UNGA resolutions, of states and UNGA resolutions on such a critical and highly sensitive issue as space arms control, could potentially have legal consequences aims at revealing the true intentions of the respective states: whether they intended to act responsibly, commit themselves not to words but actions, and ultimately ensure legal certainty in the area of space arms control.

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7 *Erga omnes* obligations are “obligations in whose fulfillment all states have a legal interest because their subject matter is of importance to the international community as a whole. It follows from this that the breach of such an obligation is of concern not only to the victimized state but also to all the other members of the international community. Thus, in the event of a breach of these obligations, every state must be considered justified in invoking (probably through judicial channels) the responsibility of the guilty state committing the internationally wrongful act”. Oxford Dictionary of Law 2022. In the words of the International Court of Justice, erga omnes obligations are obligations towards the international community as a whole due to their importance to all nations; therefore, “all States can be held to have a legal interest in their protection”. See Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain) [1970] ICJ Rep. 6, p. 32.

8 Zimmermann 2021, at 3.

SCOPE OF THE RESEARCH

This research addresses the following interconnected questions:

I. What is the nature and legal effect of non-legally binding political commitments?

- What non-legally binding political commitments exist in regards to current arms control measures?
- Are there examples of such non-legally binding political commitments that have resulted in the emergence of new international customary norms or new legally binding treaties?
- Are there examples where such declarations have been considered to be legally binding on the parties that have made such commitments?
- Are there examples of unilateral declarations that have failed to attract support of other nations?
- What seem to be the factors that distinguish success from failure?
- Are any of these non-legally binding political commitments applicable to space?
- Which of them are UNGA resolutions, and which are unilateral state declarations?

II. In the context of the UNGA's recent work on space arms control, what effect does the recent non-legally binding UNGA resolution on ASAT missile testing (UNGA Resolution 77/41)[9] have?

- Could UNGA Resolution 77/41 rise to the level of customary international law?
- What role might the report of the OEWG on reducing space threats have in the development of customary international law?

III. In the context of recent national unilateral declarations to not conduct direct-ascent ASAT missile testing, what effect would these have? Could they rise to the level of customary international law?

IV. What are the likely consequences of either/both the efforts at UNGA Resolution 77/41, the report of the OEWG on reducing space threats, and the various national commitments?

Some of the questions listed above were grouped and comparatively examined. Other issues (e.g., possible role of the report of the OEWG on reducing space threats) did not receive much attention due to the recent developments.[10]

Additional matters (notably, the role and possible legal effect of UNGA resolutions and joint declarations by states on no first placement of weapons in outer space) were highlighted and integrated into the research.

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9 UNGA Resolution 77/41 "Destructive direct-ascent anti-satellite missile testing", adopted on 7 December 2022.

10 Theresa Hitchens, Russia spikes UN effort on norms to reduce space threats, 1 September 2023. https://breakingdefense.com/2023/09/russia-spikes-un-effort-on-norms-to-reduce-space-threats/.

LEGALLY BINDING NORMS/NON-LEGALLY BINDING NORMS

For the purposes of this research, the term “legally binding norm” is defined as a norm which is intended to give rise to obligations under international law.[11]

In its turn, the term “non-legally binding norm” is understood as a political or moral commitment which is not intended to create legal rights and obligations.[12]

The words “rule” and “norm” are used interchangeably.

This research is based on the common understanding that international treaties and international customs as the main sources of international law13 contain legal rules, i.e. legally binding norms. UNGA resolutions, unilateral and bilateral declarations of states due to their recommendatory nature are considered as not providing for legal, i.e. binding, rules.

ACKNOWLEDGMENTS

The author would like to express her sincere gratitude to Ambassador Andrzej Misztal, chairman of the Working Group on Legal Aspects of Space Resource Activities of the UNCOPUOS Legal Subcommittee; Professor Dr. Bernhard Schmidt-Tedd, honorary Professor of the Law School of Leuphana University of Lüneburg; Professor Dr. Vladlen Vereshchetin, former Judge of the International Court of Justice, and Robin J. Frank, Associate General Counsel for International Law, National Aeronautics and Space Administration (retired) & former Attorney Adviser, U.S. Department of State, for their invaluable remarks and constructive criticism which helped reflex the balance of opinions and keep this research on the legal track.

DISCLAIMER

The research, writing, and publication of this report was conducted as part of the Secure World Foundation’s Space Sustainability Research Fellowship program, which invites scholars to explore fundamental questions underpinning space sustainability. The views and opinions expressed in this publication are those of the authors. They do not necessarily reflect the opinions or views of the Secure World Foundation, or any other organization referred to in this publication.

11 See, e.g., Schachter 1977, Bothe 1980, Shelton 2003, Zimmermann 2021.

12 Gautier P. Non-Binding Agreements in Max Planck Encyclopedia of Public International Law; Thürer D. Soft Law in Max Planck Encyclopedia of Public International Law.

13 Article 38(1) of the Statute of the International Court of Justice.

2. Multilateral international non-legally binding instruments

2.1 CAN UNGA RESOLUTIONS GIVE RISE TO CUSTOMARY INTERNATIONAL LAW?

According to the Charter of the United Nations (hereinafter – "UN Charter"),14 resolutions of the UNGA are generally15 not legally binding due to their recommendatory nature. Article 10 of the UN Charter stipulates that

> *"[t]he General Assembly may... make recommendations to the Members of the United Nations or to the Security Council or to both on any... questions or any matters within the scope of the present Charter".*

Article 13 of the UN Charter further clarifies that the purposes for adopting UNGA resolutions shall be as follows:

> *"promoting international co-operation in the political field and encouraging the progressive development of international law and its codification; promoting international co-operation in the economic, social, cultural, educational, and health fields, and assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion".*

In addition, UNGA is authorized, *inter alia*, to make recommendations aimed at peaceful adjustment of situations that are

> *"likely to impair the general welfare or friendly relations among nations, including situations resulting from a violation of the provisions of the present Charter setting forth the Purposes and Principles of the United Nations".*[16]

Space-related issues, including international cooperation in the peaceful uses of outer space,[17] prevention of an arms race in outer space,[18] destructive direct-ascent anti-satellite missile testing,[19] etc. are evidently also included in the scope of the UN Charter, which gives the mandate to the UNGA to adopt the relevant recommendations.

As a general rule, UNGA resolutions due to their non-legally binding nature do not institute new norms of international law. However, UNGA resolutions can recall the already existing binding rules established by international agreements,20 international custom or other sources of international law. Furthermore, recommendatory documents by the UNGA can witness the ongoing process of creation of a new rule of international law, including in the form of an international custom.[21]

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14 1 UNTS XVI.

15 Some UNGA resolutions relating to administrative matters (e.g. financial and budgetary arrangements) are binding for the United Nations bodies. See, e.g. UN Charter, Art. 17; Shaw 2021.

16 UN Charter, Art. 14.

17 See, e.g., UNGA Res. 77/121 of 12 December 2022.

18 See, e.g., UNGA Res. 77/42 of 7 December 2022.

19 UNGA Res. 77/41 of 7 December 2022.

20 See, e.g., preambular paras. 5-7 of the UNGA Res. 77/121 of 12 December 2022.

21 For the respective position of the ICJ, see, e.g., International Court of Justice, The Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion of 8 July 1996, para. 70: "The Court notes that General Assembly resolutions, even if they are not binding, may sometimes have normative value. They can, in certain circumstances, provide evidence important for establishing the existence of a rule or the emergence of an opinio juris. To establish whether this is true of a General Assembly resolution, it is necessary to look at its content and the conditions of its adoption; it is also necessary to see whether an opinio juris exists as to its normative character. Or a series of resolutions may show the gradual evolution of the opinio juris required for the establishment of a new rule".

Identification of international custom

In conformity with Article 38(1) of the Statute of the International Court of Justice (hereinafter – “***ICJ Statute***”), international custom is generally recognized as one of the main sources of international law. The above Article stipulates that an international custom is “evidence of a general practice accepted as law”.

In 2008, the International Law Commission (hereinafter – “***ILC***”) adopted the Draft conclusions on identification of customary international law[22] (hereinafter – “***ILC Draft Conclusions***”). The aim of the document was to formulate the basic guidelines how to determine the existence and content of rules of customary international law.[23] In line with Article 38(1) of the ICJ Statute mentioned above, the ILC pointed at two elements a rule in question must have in order to qualify as international custom:

1. General practice, and
2. Acceptance of this practice as law, also known as *opinio juris*.24

General practice

According to the ILC, the first mandatory constitutive element of an international custom – general practice – implies primarily practice of states and in certain cases of international organizations.[25] Conduct of other actors (e.g. non-governmental organizations) is not considered to be “practice that contributes to the formation, or expression, of rules of customary international law” but “may be relevant when assessing the practice” of states and international organizations.[26]

A practice is attributed to a state when it represents the exercise of its executive, legislative, judicial or other functions.[27]

The requirement for such practice to be general implies that the respective behaviour (action or inaction) must be sufficiently widespread, representative, and consistent.[28] However, there is no minimum or maximum duration for a practice to transform into an international custom. For instance, Shaw and Cheng argue that the principle of sovereignty-free outer space is an example of “instant” customary law which took shape shortly after the launch of the first artificial Earth satellite Sputnik due to the fact that the second mandatory element of an international customary rule – *opinio juris* – was clearly established.[29]

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22 UN Doc. A/73/10, Sec. IV(E); Yearbook of the International Law Commission 2018. Vol. II Part Two.

23 ILC Draft Conclusions, Conclusion 1.

24 Id., Conclusion 2.

25 Id., Conclusion 4 paras. 1-2.

26 Id., para. 3.

27 Id., Conclusion 5.

28 Id., Conclusion 8 para. 1. See also the findings of the ICJ in the Asylum case that international customary rule must be “in accordance with a constant and uniform usage practised by the States in question”. See Colombia v Peru [1950] ICJ Rep. 6, p. 276.

29 Shaw 2021, Cheng 1997.

The ICJ considered it not necessary for states to strictly adhere to a particular practice constituting international custom. In the Nicaragua v. United States case,[30] the ICJ noted that

> *"[i]n order to deduce the existence of customary rules, the Court deems it sufficient that the conduct of states should, in general, be consistent with such rules, and that instances of state conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule".*[31]

Opinio juris

Acceptance of the general practice as law "means that the practice in question must be undertaken with a sense of legal right or obligation".[32] As the ILC specified in its commentary to the respective provision of the ILC Draft Conclusions,[33] *opinio juris* represents a psychological, or subjective, constituent element of an international customary rule. It means that the general practice in question "must be accompanied by a conviction that it is permitted, required or prohibited by customary international law".[34]

In other words, a state must feel or believe that its respective behaviour (action or, under certain circumstances, inaction[35]) was based on a legal right or legal obligation of this state.[36]

Forms of general practice and evidence of opinio juris

Both general practice and *opinio juris* can take various forms, including verbal and physical. The ILC listed some of these forms as follows (no hierarchy is implied by order of listing,[37] and some of the forms may overlap[38]):

30 ICJ Reports. 1986. P. 14; 76 ILR. P. 349.
31 ICJ Reports. 1986. P. 98; 76 ILR. P. 432.
32 ILC Draft Conclusions, Conclusion 9 para. 1.
33 UN Doc. A/73/10, Sec. IV(E).
34 Id. P. 138.
35 ILC Draft Conclusions, Conclusion 6 para. 1. In its commentary to Conclusion 6, the ILC explains that only a deliberate abstention from acting can qualify as practice for the purposes of identifying customary international law. See UN Doc. A/73/10, Sec. IV(E). P. 133.
36 Id. P. 138. See also Shaw 2021.
37 ILC Draft Conclusions, Conclusion 6 para. 3.
38 UN Doc. A/73/10, Sec. IV(E). P. 134.

FORMS OF PRACTICE[39]	FORMS OF EVIDENCE OF OPINIO JURIS[40]
Diplomatic correspondence41	
Conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference	
Decisions of national courts	
Diplomatic acts	Public statements made on behalf of states
Conduct in connection with treaties	Official publications
Executive conduct,[42] including operational conduct "on the ground"[43]	Government legal opinions
Legislative and administrative acts	Treaty provisions

According to this non-exhaustive list, the conduct of states in connection with resolutions adopted by an international organization (e.g., UNGA resolutions) – but not the resolutions as such – can also be the grounds for the establishment of an international custom.

Possible effects of UNGA resolutions on the formation of customary international law

The ILC clearly stated that resolutions of international organizations "cannot, of itself, create a rule of customary international law".[44] At the same time, the ILC acknowledged that a non-legally binding document adopted, e.g., by UNGA "may provide evidence for determining the existence and content of a rule of customary international law, or contribute to its development"[45] if the respective provisions of such resolution correspond to a general practice accepted as law.[46]

39 Id., Conclusion 6 para. 2.

40 Id., Conclusion 10 para. 2.

41 According to the ILC, diplomatic correspondence, conduct in connection with resolutions adopted by an international organization or at an intergovernmental conference, as well as decisions of national courts can be at the same time the forms of general practice of states and the forms of evidence of opinio juris.

42 The term "executive conduct" refers to "any form of executive act, including executive orders, decrees and other measures; official statements on the international plane or before a legislature; and claims before national or international courts and tribunals". See commentary to Conclusion 6 in UN Doc. A/73/10, Sec. IV(E). P. 134.

43 The expression "operational conduct "on the ground" includes "law enforcement and seizure of property as well as battlefield or other military activity, such as the movement of troops or vessels, or deployment of certain weapons". See id.

44 ILC Draft Conclusions, Conclusion 12 para. 1.

45 Id., para 2.

46 Id., para. 3.

The value of UNGA resolutions as evidence of the existence of international law, including customary international rules, was also supported by the International Court of Justice. In the Nicaragua v. United States case, the ICJ noted that

> *"opinio juris may, though with all due caution, be deduced from, inter alia, the attitude of the Parties [i.e. the US and Nicaragua] and the attitude of States towards certain General Assembly resolutions, and particularly resolution 2625 (XXV) entitled "Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations".*[47]

This opinion by the ICJ, according to Shaw, signifies that the existence of *opinio juris* could be determined based on the circumstances of the adoption and application of a respective UNGA resolution.[48] Shaw also argues that the UNGA Declaration on the Legal Principles Governing Activities of States in the Exploration and Use of Outer Space[49] could also qualify as evidence of state practice leading (or having led to) the establishment of an international custom.[50]

In its Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons the ICJ also noted that "a series of resolutions may show the gradual evolution of the *opinio juris* required for the establishment of a new rule" (para. 70). Considering the above issue, the Court examined the relevant UNGA resolutions and established that there was no consistency in the voting or even the substance of the documents, therefore *opinio juris* did not exist.

Can states avoid becoming bound by an international customary rule?

A state that is able to react (or more precisely, object) over time to the establishment of a general practice but fails to do so may find itself bound by a customary rule which has formed regardless of the unvoiced or inconsistently voiced objection by this state. According to the findings of the ILC, the repeated failure to react to the formation of practice "may serve as evidence of acceptance as law (*opinio juris*)".[51]

However, when the customary rule is being established, a state can still avoid being legally bound by it by applying the "persistent objector" technique. As the ILC summarized it, any state or states have an opportunity to object to being bound by an emerging international custom, but such objection "must be clearly expressed, made known to other States, and maintained persistently".[52]

For instance, with respect to one aspect of the law of the sea, the United States persistently objected to the establishment of an international customary rule according to which the Area[53] and its resources are the common heritage of humankind.[54] Due to the fact that all the requirements to "persistent objector" were met, the US never became legally bound by this international custom.[55]

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47 ICJ Reports, 1986. P. 14, 99–100; 76 ILR. P. 349, 433–434.

48 Shaw 2021.

49 UNGA Res. 1962(XVIII). Adopted on 13 December 1963.

50 Shaw 2021.

51 ILC Draft Conclusions, Conclusion 10 para. 3.

52 Id., Conclusion 15.

53 United Nations Convention on the Law of the Sea, Art, 1 para. 1(1): ""Area" means the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction".

54 This international customary rule became a treaty norm: see the United Nations Convention on the Law of the Sea (UNCLOS), Part XI Art. 137.

55 For more details, see, e.g., Green 2016.

Therefore, as Bratspies concisely formulated, "[u]nless a state persistently and clearly objects, it will be bound by a customary rule".[56]

2.2 FORMATION OF INTERNATIONAL CUSTOM IN OTHER AREAS OF LAW[57] (SELECTED EXAMPLES)

International Environmental Law

The obligation to carry out environmental impact assessment (hereinafter – "EIA") regarding activities that can potentially cause a transboundary harm has been recognized by the ICJ as a rule of customary or general international law.[58] According to Bratspies, both mandatory elements of this international custom – general practice and *opinio juris* – proceed from the "near-universal environmental obligations states impose on themselves through their own municipal law".[59]

The Declaration of the United Nations Conference on the Human Environment[60] and Rio Declaration on Environment and Development[61] also show that conducting EIA is an established international custom, but neither of these documents due to their recommendatory nature establishes a binding obligation to carry out the EIA. The respective custom originated from the municipal (or national) environmental legislation enacted by a vast majority of states which amounts to general state practice and the evidence of *opinio juris*.[62] According to the findings of Morgan, as of 2011, 181 state incorporated the EIA into their national legislation and 10 more states were bound by this obligation through participation in international or regional international treaties.[63]

International Economic Law

Expropriation by states of the property of foreign entities is widely viewed as one of the few customary rules of international economic law. Zamora and Ziemblicki argue that the existence of this rule, which arguably emanates from the principle of permanent sovereignty of states over their natural resources, was confirmed, *inter alia*, by a number of UNGA resolutions.[64] These include primarily the Charter of Economic Rights and Duties of States[65] and the resolution on permanent sovereignty over natural resources.[66]

56 Bratspies 2018, at 5.
57 With the exclusion of space law and the activities regulated thereby.
58 Pulp Mills on the River Uruguay (Argentina v. Uruguay) [2006] ICJ Rep. 113, para. 204 et seq.
59 Bratspies 2014, at 3.
60 The Stockholm Declaration. UN Doc. A/Conf.48/14/Rev.1 of 16 June 1972, Principle 21: "States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction".
61 UN Doc. A/CONF.151/26/Rev.1 of 14 June 1992, Annex I Principle 17: "Environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority".
62 Bratspies 2018, at 12.
63 Morgan 2012, at 6.
64 See Ziemblicki 2018, at 210; Zamora 1996, at 63.
65 UNGA Res. 3281 (XXIX) of 12 December 1974.
66 UNGA Res. 1803 (XVII) of 14 December 1962.

International Humanitarian Law

In its 2005 study, the International Committee of the Red Cross (ICRC) identified 161 rules of customary international humanitarian law. The examples of general state practice selected for the purposes of this study included:

- Physical acts of states, e.g., "battlefield behaviour, the use of certain weapons, the treatment afforded to different categories of persons";[67]
- Verbal acts of states, e.g., "military manuals, national legislation, national case-law, instructions to armed and security forces, military communiqués during war, diplomatic protests, opinions of official legal advisers, comments by governments on draft treaties, executive decisions and regulations, pleadings before international tribunals, statements in international fora, and government positions on resolutions adopted by international organizations".[68]

In the course of this study, the ICRC found it difficult (and not always necessary) to clearly distinguish between state practice and *opinio juris*.[69] However, the establishment of the existence of *opinio juris* was required in some cases to determine whether this or that practice – mainly abstention from a certain behaviour – amounted to the general state practice as a mandatory constituent element of an international custom.[70]

2.3 UNGA RESOLUTION 77/41

The UNGA Resolution 77/41 "Destructive direct-ascent anti-satellite missile testing" adopted on 7 December 2022 is not a legally binding document by nature but still influential as it reflects opinions of UN member states – both in substance and procedure through voting – on a highly topical issue.

In a nutshell, the UNGA Resolution 77/41 serves two main purposes: first, to state the problem, and second, suggest possible approaches how to solve it.

Following preambular paras. 7 and 8, prevention of an arms race in outer space is the main focus of the Resolution.

The document further states that the UNGA is " determined that practical measures should be taken to prevent an arms race in outer space", as well as "determined to advance norms of responsible behaviour for outer space activities" (preambular paras. 16 and 20 respectively). This determination to act was supported by 155 and opposed by 9 UN member states (9 more states abstained from voting).[71]

UNGA Resolution 77/41 calls upon all states to take the following sequence of measures:

- Urgently make a commitment not to conduct destructive direct-ascent anti-satellite missile tests (paras. 1-2);
- Pursue the establishment and development of further practical steps aiming at risk reduction, prevention of conflict and an arms race in outer space (paras. 2-3).

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67 International Review of the Red Cross. Vol. 87 No. 857. March 2005.
68 Id., at 179.
69 Id., at 182.
70 Id.
71 UN Doc. A/77/PV.46*, at 9.

Among such steps the Resolution names “transparency and confidence-building measures and additional moratoriums, which could contribute to legally binding instruments on the prevention of an arms race in outer space in all its aspects” (para. 3).

It should be noted in this context that the Resolution builds upon the relevant international efforts (either completed or ongoing) on the prevention of an arms race in outer space, reducing space threats through norms, rules and principles of responsible behaviours, transparency and confidence-building measures, long-term sustainability of outer space activities,[72] space debris mitigation (preambular paras. 9, 11-12, 14).

To sum up, the UNGA Resolution 77/41 acknowledges the importance and urgency for states to make unilateral commitments not to conduct ASAT missile testing, but abstention only from such action is not enough: further practical action is required to mitigate the potential for a conflict in outer space.

Can UNGA Resolution 77/41 lead to the emergence of a customary rule?

As discussed above, the UNGA resolutions as such do not establish rules of customary international law but still can serve as a proof of the existence or formation of a custom. However, it is the widespread practice of states (and in certain cases international organizations) and their attitude towards this practice that can lead to the emergence of a customary rule.

It is unlikely that the UNGA Resolution 77/41 reflects an “instant” international custom due to the absence of uniform support of this document by UN member states. Therefore, the emergence of a customary rule not to carry out destructive direct-ascent ASAT missile tests in line with the UNGA Resolution 77/41 must be shown by the respective conduct of states in connection with this Resolution, which, according to the ILC, can qualify as general state practice and *opinio juris* at the same time.

Following the opinion of the ICJ, a series of UNGA resolutions against ASAT missile testing could testify to the gradual development of the respective customary rule. However, this would be the case if such resolutions were consistent both in terms of substance (i.e. uniform wording of the key provisions) and procedure (I.e., no significant shift in the distribution of votes) in order to establish the existence of *opinio juris*.

In the relevant practical case,[73] the ICJ examined the potential of a series of UNGA resolutions for reflecting the formation of a customary rule. Nothing was said about other types of non-legally binding but still highly relevant international documents that could be aligned with UNGA resolutions. For instance, the UNGA Resolution 77/41 gives reference to the 2021 Report of the UN Secretary-General on reducing space threats through norms, rules and principles of responsible behaviours,[74] the work of the Conference on Disarmament, the Open-ended working group (OEWG) on reducing space threats through norms, rules and principles of responsible behaviours, Guidelines for the Long-term Sustainability of Outer Space Activities, as well as the Space Debris Mitigation Guidelines adopted by the UNCOPUOS. The already adopted or future documents having relevance to the prevention of an arms race in outer space could collectively testify to the gradual development of a customary rule in question. In this case, it

72 It is noteworthy that the Resolution uses at the same time the term “long-term sustainability of outer space activities” developed and widely used in the framework of the UNCOPUOS, and “long-term sustainability of the outer space environment”. The document does not specify the reasons for using both these terms and the interrelation between them.

73 Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America). ICJ Reports, 1986.

74 UN Doc. A/76/77 of 13 July 2021.

may prove hard to ensure consistency of both substance and procedure of these sources, but a more difficult task would be the establishment of evidence of *opinio juris*.

States are free to choose from a variety of techniques to shape their relevant practice and formulate *opinio juris* regarding the performance of ASAT tests or abstention thereof. Conduct in connection – and not necessarily in strict conformity – with UNGA Resolution 77/41 could serve as a proof that both practice and its perception by a state (or group of states) as law are in place. National legislation could also serve this purpose following the precedent of International Environmental Law. Practice of national courts, diplomatic correspondence, official statements on behalf of states are a few examples of actions leading to the development of an international custom. However, the guidelines offered by the ILC on how to establish practice and articulate *opinio juris* do not bind states or prevent them from using other methods. It should be examined on a case-by-case basis whether such other methods suffice for a customary rule to emerge.

Can UNGA Resolution 77/41 lead to the development of new treaty norms?

The UNGA Resolution 77/41 calling upon states to commit not to conduct ASAT testing also encourages them to advance norms of responsible behaviour for outer space activities (preambular para. 20). It is expressly mentioned that the "conclusion of an international agreement or agreements to prevent an arms race in outer space remain[s] a priority task of the Conference on Disarmament" (preambular para. 13). When addressing possible practical steps towards the prevention of conflicts in outer space, the Resolution names transparency and confidence-building measures (TCBM) and "additional moratoriums which could contribute to legally binding instruments on the prevention of an arms race in outer space in all its aspects" (para. 3).

In any case, the ultimate decision lies with the states whether they choose to transform a non-legally binding provision of a UNGA resolution into a treaty norm and, most importantly, agree to be bound by it.[75]

Moreover, treaty provisions against ASAT testing and conduct of states in connection – once again, not necessarily in full accordance with – the respective treaty, whether bilateral or with a limited number of parties, could also respectively constitute state practice and express *opinio juris*. On the one hand, norms of an international treaty are binding only upon the parties to this treaty. But on the other hand, if the treaty in question obtains in time support of a larger group of states so that the relevant treaty rule could be categorized as "sufficiently widespread, representative, and consistent", this rule would have the potential of transforming into an international custom binding upon all states.[76] With this development, the (hopefully few) states that do not agree to be bound by the emerging customary rule would have to resort to the "persistent objector" technique and be able to exercise it strictly in line with the rules attached to it by previous practice. Otherwise, they would become bound by the new international custom regardless of their opposition.

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75 In conformity with Art. 11 et seq. of the 1969 Vienna Convention on the Law of Treaties, 1155 UNTS 331.

76 According to the findings of the ILC, see infra., Section 2.1.

2.4 UNGA RESOLUTIONS ON NO FIRST PLACEMENT OF WEAPONS IN OUTER SPACE

In 2014, the UN General Assembly adopted Resolution 69/32 "No first placement of weapons in outer space" (hereinafter – "***NFP***") which started a series of eponymous resolutions adopted in 2015-2022.[77] These resolutions were built upon the preceding work of the United Nations on TCBM in outer space activities.[78]

The NFP resolutions "encourage all States, especially space-faring nations, to consider the possibility of upholding as appropriate a political commitment not to be the first to place weapons in outer space".[79] This wording indicates that the respective declarations by states on NFP (see infra., para. 3.3) are not considered as legally binding or having a potentially legally binding effect.

Similar to the UNGA Resolution 77/41 discussed above, the series of NFP resolutions address the creation of new treaty norms.

The NFP resolutions aim at the "negotiation of a multilateral agreement, or agreements, as appropriate, on the prevention of an arms race in outer space in all its aspects".[80] Moreover, these recommendatory instruments urge "an early start of substantive work based on the updated draft treaty on the prevention of the placement of weapons in outer space and of the threat or use of force against outer space objects submitted by China and the Russian Federation at the Conference on Disarmament, under the agenda item entitled "Prevention of an arms race in outer space".[81]

Can UNGA resolutions on NFP lead to the development of new treaty norms or international customary rules?

As discussed above with regard to UNGA Resolution 77/41, non-legally binding resolutions by the UN do not create legally binding norms: only sovereign states can transform their practice (and recognition of it as law to establish an international custom) into legally binding norms.

77 UNGA Resolutions 70/27 of 7 December 2015, 71/32 of 5 December 2016, 72/27 of 4 December 2017, 73/31 of 5 December 2018, 74/33 of 12 December 2019, 75/37 of 7 December 2020, 76/23 of 6 December 2021, 77/42 of 7 December 2022.

78 UN Doc. A/72/65 "Transparency and confidence-building measures in outer space activities: report of the Secretary-General", 16 February 2017; see also, e.g., preambular paras. 9-10 of UNGA Res. 69/32, preambular paras. 2, 11 of UNGA Res. 77/42.

79 See, e.g., para. 5 of UNGA Res. 69/32, para. 5 of UNGA Res. 77/42.

80 See, e.g., paras. 2-3 of UNGA Res. 69/32, paras. 2-3 of UNGA Res. 77/42.

81 Id., paras. 3.

3. Unilateral and bilateral declarations of states

3.1 LEGAL EFFECT OF UNILATERAL DECLARATIONS OF STATES

Unilateral declarations of states are usually regarded as not legally but "politically binding" upon the respective state.

However, in certain situations a unilateral declaration could become legally binding. As the ICJ noted in the Nuclear Tests (Australia v. France) case,[82]

> *"[i]t is well recognized 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 given publicly, and with an intent to be bound, even though not made within the context of international negotiations, is binding".*[83]

According to the ICJ, once a state makes a public unilateral declaration and has the intent to be bound by it,

> *"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".*[84]

Therefore, the intention of a state to be bound is the decisive factor for a particular unilateral declaration to become legally binding. Whether intention was present in this concrete case "is to be ascertained by interpretation of the act".[85] Assumedly and quite logically, the opinion of the state in question will be the primary source of such interpretation.

ILC recommendations regarding the potentially binding effect of unilateral declarations

In 2006, the ILC adopted Guiding Principles applicable to unilateral declarations of states capable of creating legal obligations[86] (hereinafter – "***ILC Guiding Principles***").

As stated in the ILC Guiding Principles,

> *"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".*[87]

Public manifestation of the will to be bound is the key starting point for interpretation whether the concrete declaration made by a respective state could be legally binding upon that state. In its commentary to the said recommendation, the ILC specifies that the known precedents of such declarations provided an "important indication of their authors' intention to commit themselves".[88] As will be shown further, these historic declarations used different wording to articulate the intention to commit the respective states. None of them, however, contained the terms "binding" or "binding norm / rule".

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82 Nuclear Tests (Australia v. France) [1974] ICJ Rep. 1974, p. 253.
83 Id., para. 43.
84 Id.
85 Id., para. 44.
86 UN Doc. A/61/10, Sec. IX; Yearbook of the International Law Commission 2006. Vol. II Part Two.
87 ILC Guiding Principles, para. 1.
88 Id. at 370.

The ILC further suggests that the general international law principle of good faith should be applied to interpret the unilateral declaration and determine whether its nature is recommendatory of legally binding. The other necessary factors to consider are the content of the declaration (whether its terms are clear and specific),[89] context and factual circumstances in which it was formulated, as well as the ensuing reaction of other states.[90]

It is interesting to note that a unilateral declaration by one state can be addressed to the international community of states, thus amounting to an erga omnes obligation[91] for this state, or only to a selected state, a group of states or other entities.[92] Therefore, not only the declaring state's opinion should be taken into account while interpreting its unilateral declaration, but also the stance of the states addressees of the declaration. In any case, a unilateral declaration as its name indicates can be potentially binding only upon the state that formulated it; no other state is bound by it unless they willfully "incur obligations in relation to such a unilateral declaration to the extent that they clearly accepted such a declaration".[93]

A unilateral declaration could be binding upon a state if it was made either orally or in writing[94] by a head of state, head of government, minister of foreign affairs or another official representative duly authorized to formulate such declarations in specific areas.[95] For example, a head of space agency could potentially make a unilateral declaration regarding space activities on behalf of its state provided that he or she was granted the power to do so. It is therefore important to examine whether a state official having made a unilateral and potentially binding declaration had valid grounds to do so.

Can unilateral declarations of states lead to the emergence of a customary or treaty rule?

Unilateral declarations of states could assumedly launch the process of establishing a new international customary rule or a conventional norm. Both these tracks, however, require a certain sequence of steps (see supra., Sections 2.1 and 2.3).

For an international custom to form, both general state practice and *opinio juris* must be present.

As to the first element, one or a limited number of unilateral declarations would hardly qualify as general, i.e. widespread and representative, practice of states. The consistency of unilateral declarations is also important to recognize such practice as general.

Unilateral declarations as public statements or official publications made on behalf of states could also qualify as *opinio juris* on condition that the respective states are convinced that the declared behaviour (either action or abstention from action) is based on a legal right or legal obligation of the state in question. Finding the proof that this or that state truly

89 Id., para. 7. The ILC suggests that if there are doubts as to the "scope of the obligations resulting from such a declaration, such obligations must be interpreted in a restrictive manner".

90 Id., paras. 1, 3 and 8.

91 "Obligations in whose fulfillment all states have a legal interest because their subject matter is of importance to the international community as a whole. It follows from this that the breach of such an obligation is of concern not only to the victimized state but also to all the other members of the international community. Thus, in the event of a breach of these obligations, every state must be considered justified in invoking (probably through judicial channels) the responsibility of the guilty state committing the internationally wrongful act". Oxford Dictionary of Law 2022.

92 Id., para. 6.

93 Id., para. 9.

94 Id., para. 5.

95 Id., para. 4.

had this conviction when formulating a declaration appears to be the most complicated practical exercise.

The *opinio juris* requirement implies that only unilateral declarations of states that have a potentially binding effect could serve as the evidence of existence or development of an international customary rule.

For universal declaration to transform into a treaty rule the decisive factor would be willful consent of states to become bound by this rule in accordance with the procedures of the Law of International Treaties.[96]

Can states depart from their unilateral declarations?

As the ILC noted, a unilateral declaration with a legally binding effect upon the declaring state cannot be revoked arbitrarily.[97] In each case, the wording of the declaration (whether it contained an opt-out clause), scope of the relevant obligations and a possible fundamental change in the circumstances should be examined when assessing the “arbitrariness” of revocation of a unilateral declaration.[98]

This approach, however, is applicable only to unilateral declarations with a potentially binding effect.

3.2 UNILATERAL DECLARATIONS OF STATES IN OTHER AREAS OF INTERNATIONAL LAW (SELECTED EXAMPLES)

The ILC research on unilateral declarations of states capable of creating legal obligations, which led to the adoption of the ILC Guiding Principles, focused on a variety of practical examples of unilateral declarations.

Testing of nuclear weapons in the atmosphere

In 1974, the French president,[99] minister of defense[100] and minister of foreign affairs[101] consecutively made public declarations that France would discontinue nuclear testing in the atmosphere.

The ICJ in its Nuclear Tests (Australia v. France) and Nuclear Tests (New Zealand v. France)[102] cases found that

> *“the unilateral undertaking resulting from these statements [by France] cannot be interpreted as having been made in implicit reliance on an arbitrary power of reconsideration…”,[103] therefore “France has undertaken the obligation to hold no further nuclear tests in the atmosphere in the South Pacific”.[104]*

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96 See Art. 11 et seq. of the Vienna Convention on the Law of Treaties.

97 Id., para. 10.

98 Id.

99 “[O]n this question of nuclear tests… I had myself made it clear that this round of atmospheric tests would be the last, and so the members of the Government were completely informed of our intentions in this respect…”. See Nuclear Tests (Australia v. France), ICJ Reports 1974, para. 37.

100 “On 16 August 1974, in the course of an interview on French television, the Minister of Defence said that the French Government had done its best to ensure that the 1974 nuclear tests would be the last atmospheric tests…”. Id., para. 38.

101 “On 25 September 1974, the French Minister for Foreign Affairs, addressing the United Nations General Assembly, said: “We have now reached a stage in our nuclear technology that makes it possible for us to continue our programme by underground testing, and we have taken steps to do so as early as next year”. Id.

102 Nuclear Tests (New Zealand v. France) ICJ Rep. 1974, p. 457.

103 Id., para. 53; Nuclear Tests (Australia v. France), para. 51.

104 Nuclear Tests (Australia v. France), para. 52; Nuclear Tests (New Zealand v. France), para. 55.

In the above situation, according to the findings of both the ICJ and ILC, all the criteria to recognize these declarations as legally binding were met, namely:

1. Intention by the declaring state to commit itself;
2. Declaration made by a duly authorized state representative;
3. Declaration made in good faith;
4. Clear and specific terminology;
5. No reservations which would allow the state to opt out from its declared obligation;
6. Further modifications;
7. Context and factual circumstances in which the statements were made;
8. Reaction of other states.[105]

Use of nuclear weapons against non-nuclear weapon states

In 1995, a series of statements was made by the Russian Ministry of Foreign Affairs to the UN Security Council, by the United States Secretary of State, as well as by permanent representatives of the UK, France and China to the Conference on Disarmament.

All these statements gave the "negative security guarantees"[106] that the respective nuclear powers would not use such weapons against non-nuclear-weapon states.[107] At the same time, some of the declarations contained reservations according to which nuclear weapons could be used by a state

> *"...in the case of an invasion or any other attack on it, its territory, its armed forces or other troops, or against its allies or a State to which it has a security commitment, carried out or sustained by such a State, in association or alliance with a nuclear-weapon State".*[108]

Later, in 1996, the nuclear powers reiterated that "there are circumstances in which resort to nuclear weapons would be lawful".[109] As ILC Special Rapporteur on Unilateral Acts of States noted, "[i]t would appear that the opinions expressed by the nuclear Powers are mainly political statements which are not legally binding upon their authors".[110]

Freedom of navigation through the Suez Canal

In 1957, the Government reaffirmed its commitment to be bound by the 1888 Constantinople Convention, namely to ensure free and uninterrupted navigation for all nations through the Suez Canal.[111]

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105 Or, more specifically, no negative reaction from other states to the respective unilateral declaration by one state.
106 Or negative security assurances (NSAs).
107 UN Doc. A/CN.4/557 of 26 May 2005, para. 106.
108 Id., para. 108.
109 Id., para. 112.
110 Id., paras. 112, 115.
111 "The Government of Egypt makes this Declaration, which re-affirms... the Constantinople Convention of 1988, as an expression of their desire and determination to enable the Suez Canal to be an efficient and adequate waterway linking the nations of the world and serving the cause of peace and prosperity. This Declaration, with the obligations therein, constitutes an international instrument and will be deposited and registered with the Secretariat of the United Nations". Id., para. 58.

Specific wording used in this declaration ("with the obligations therein", "constitutes an international instrument", "will be deposited and registered with the Secretariat of the United Nations") indicate the intention of the Government of Egypt to commit itself to the declared behaviour, i.e. accept to be bound by the declared provisions.

West Bank

In 1988, the king of Jordan publicly addressed the nationals of his state stating that

> *"Jordan was dismantling its 'legal and administrative' links with the West Bank, a territory that formed part of Palestine under the mandate given to the United Kingdom of Great Britain and Northern Ireland and that was occupied by Jordan in 1950 following the first war between the Arab countries and Israel".*[112]

This declaration, addressing the international community and constituting a unilateral waiver of a claim to part of Jordan's territory,[113] was met with a mixed reaction from other states. For instance, the Palestine Liberation Organization (PLO) "expressed surprise at Jordan's decision, although it ultimately accepted the share of responsibility that Jordan had assumed with respect to the administration of the West Bank".[114]

Israel also acknowledged that the territorial dispute over the West Bank must be solved jointly with the PLO.[115]

In their turn, the US, France and other states that did not recognize Palestine as an independent state, officially acknowledged in 1988 that the West Bank was the area of responsibility of the PLO.[116]

It is also noteworthy that by making the above declaration the king of Jordan assumedly exceeded the authority granted to him by the Constitution of Jordan.[117] Nevertheless, the king's statement was confirmed afterwards by domestic acts and therefore had a legally binding effect.[118]

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112 Id., para. 44.
113 *Id.*, para. 52.
114 Id., para. 48.
115 Id.
116 Id., paras. 50-51.
117 Id., para. 53.
118 Id.

3.3 UNILATERAL AND BILATERAL DECLARATIONS OF STATES REGARDING SPACE ARMS CONTROL

Destructive direct-ascent ASAT missile tests

From April 2022 until the end of August 2023, thirty-five states, including all 27 members of the European Union, have declared their intent not to conduct destructive direct-ascent ASAT missile tests.

For the purposes of this research, the declarations of the above mentioned states will be analysed from the point of view of their potentially binding legal effect in accordance with the following criteria:

1. Declaration made by a duly authorized state representative;
2. Intention by the declaring state to commit itself;
3. Declaration made in good faith;[119]
4. Clear and specific terminology;
5. No reservations which would allow the state to opt out from its declared obligation;
6. Further modifications;
7. Context and factual circumstances in which the statements were made;
8. Reaction of other states.

The declarations are listed in chronological order of their public announcement.

119 This criterion will be marked as met unless there are objective grounds to assume otherwise.

Table 1 – Unilateral declarations of states regarding the conduct destructive direct-ascent ASAT missile tests (as at 8 September 2023)

#	STATE	DATE	DECLARING AUTHORITY	Intention to commit itself	Good faith	Clear terminology	Reservations	Further modifications	CONTEXT AND FACTUAL CIRCUMSTANCES	REACTION OF OTHER STATES
1	The United States[120]	18 Apr 2022	Vice President	Yes	Yes	Yes	No	No	National Security Council, Department of Defense, Department of State, and other national security agencies were tasked to "develop proposals for national security space norms that advance U.S. interests and preserve the security and sustainability of space"; the US "seeks to ensure outer space remains free from conflict"; the US "will engage the international community to uphold and strengthen a rules-based international order for space"[121]	No direct opposition
2	Canada[122]	9 May 2022	Permanent Mission of Canada in Geneva	Yes	Yes	Yes	No	No	For 40 years, Canada advocated for a halt to ASAT tests	No direct opposition
3	New Zealand[123]	1 Jul 2022	Minister of Foreign Affairs	Yes	Yes	Yes	No	No	ASAT tests "create debris clouds and risk to space infrastructure, they also raise tensions on Earth and increase potential for the misperceptions"; New Zealand seeks to "establish, maintain, and protect rules-based systems" including "for space"[124]	No direct opposition
4	Japan[125]	12 Sep 2022	Ministry of Foreign Affairs	Yes	Yes	Yes	No	No	The decision followed the non-ASAT testing declaration by the US; Japan is interested in the development of norms of responsible behavior in outer space	No direct opposition
5	Germany[126]	13 Sep 2022	German representative at the United Nations Conference on Disarmament	Yes	Yes	Yes	No	No	Germany is "committed to strengthening the rules-based order in space"[127]	No direct opposition
6	United Kingdom[128]	3 Oct 2022	(Jointly) Foreign, Commonwealth & Development Office and UK Space Agency	Yes	Yes	Yes	No	No	Direct ascent ASAT "missiles can be conclusively regarded as irresponsible"; ASAT "missile testing is one of a number of threats to space systems"[129]	No direct opposition
7	Republic of Korea[130]	4 Oct 2022	Permanent Representative of the Republic of Korea to the UN First Committee	Yes	Yes	Yes	No	No	Republic of Korea "strongly believes in the value of the rules-based international order"[131]	No direct opposition
8	Switzerland[132]	26 Oct 2022	Permanent Mission of Switzerland to the UN in New York	Yes	Yes	Yes	No	No	Switzerland expects that such declarations contribute to the adoption of new measures aiming at the prevention of an arms race in outer space, as well as the adoption of appropriate binding international norms	No direct opposition
9	Australia[133]	27 Oct 2022	(Jointly) Minister for Foreign Affairs, Deputy Prime Minister/Minister for Defence, Minister for Industry and Science	Yes	Yes	Yes	No	No	The unilateral declaration is consistent with Australia's role as a responsible actor in space and "is demonstrating Australia's commitment to act responsibly to protect our national security interests"[134]	No direct opposition

120 "Vice President Kamala Harris announced that the United States commits not to conduct destructive, direct-ascent anti-satellite (ASAT) missile testing, and that the United States seeks to establish this as a new international norm for responsible behavior in space. The Vice President also called on other nations to make similar commitments and to work together in establishing this as a norm, making the case that such efforts benefit all nations". See FACT SHEET: Vice President Harris Advances National Security Norms in Space, The White House, 18 April 2022.
121 Id.
122 "For 40 years [Canada] has advocated for a halt to anti-satellite (ASAT) tests. Today we joined the US pledge not to conduct destructive ASAT missile testing. We encourage all states to join so that together we can make this a global norm". Canada in Geneva, X, 9 May 2022.
123 "Today I'm pleased to announce that Aotearoa New Zealand will join this declaration and make the same commitment. We will not conduct destructive direct-ascent anti-satellite missile testing. We do not have that capability, and neither are we looking to develop it. But our commitment is a further expression of our multilateral commitment towards establishment of rules and norms for te tātai arorangi". See Otago Foreign Policy School, opening address by Hon Nanaia Mahuta, Minister of Foreign Affairs of New Zealand, 1 July 2022.
124 Id.
125 "The Government of Japan decided not to conduct destructive, direct-ascent anti-satellite (ASAT) missile testing in order to actively promote discussions in the international fora concerning the development of norms of responsible behavior in outer space". See Decision not to conduct Destructive, Direct-Ascent Anti-Satellite Missile Testing, Ministry of Foreign Affairs of Japan, 13 September 2022.
126 "Germany commits not to conduct any destructive anti-satellite direct-ascent missile tests". See Germany commits in Geneva not to conduct anti-satellite direct-ascent missile tests, Federal Foreign Office, 13 September 2022.
127 Id.
128 The UK "commits not to destructively test direct ascent anti-satellite (DA-ASAT) missiles, as part of the UK's enduring efforts to promote responsible space behaviours". See Responsible space behaviours: the UK commits not to destructively test direct ascent anti-satellite missiles, Press release, Foreign, Commonwealth & Development Office and UK Space Agency, 3 October 2022.
129 Id.
130 "Today, the Republic of Korea commits not to conduct destructive direct-ascent anti-satellite missile testing following the U.S.'s announcement in April. We call on other States to join the relay of this commitment". See Statement by H.E Joonkook Hwang, Permanent Representative of the Republic of Korea to the United Nations First Committee of the 77th Session of the General Assembly, 4 October 2022.
131 Id.
132 "[N]ous nous félicitons des annonces faites par un certain nombre d'États de ne pas effectuer d'essais destructifs de missiles antisatellites à ascension directe dans l'espace. À cet égard, je suis heureux d'annoncer que la Suisse se joint à cet engagement. Nous espérons que de tels engagements contribueront à l'adoption de nouvelles mesures visant à prévenir une course aux armements dans l'espace et de normes internationales contraignantes appropriées". See Déclaration prononcée par la Suisse, 77ème session de l'Assemblée Générale, Première Commission, 26 octobre 2022.
133 "The Australian Government commits to never conduct destructive, direct-ascent anti-satellite missile testing, consistent with our role as a responsible actor in space". See Australia advances responsible action in space. Minister for Foreign Affairs, Joint media release, 27 October 2022. Id
134 Id.

LEGEND: ● Yes ▲ No

#	STATE	DATE	DECLARING AUTHORITY	Intention to commit itself	Good faith	Clear terminology	Reservations	Further modifications	CONTEXT AND FACTUAL CIRCUMSTANCES	REACTION OF OTHER STATES
10	France[135]	29 Nov 2022	(Jointly) Ministry for Europe and Foreign Affairs, Ministry for the Armed Forces	Yes	Yes	Yes	No	No	"France has never carried out [ASAT] tests, which it deems destabilizing and irresponsible"[136]	No direct opposition
11	The Netherlands[137]	27 Feb 2023	Deputy Prime Minister and Minister of Foreign Affairs	Yes	Yes	Yes	No	No	"Outer space as humanity's common heritage";[138] focus on the global security architecture, risk reduction measures and outer space security	No direct opposition
12	Austria[139]	30 Mar 2023	Permanent Mission of Austria in Geneva	Yes	Yes	Yes	No	No	Austria is committed to further strengthening the rules-based order; supported UNGA Resolution 77/41	No direct opposition
13	Italy[140]	6 Apr 2023	Deputy Prime Minister and Minister of Foreign Affairs and International Cooperation	Yes	Yes	Yes	No	No	Outer space is "a common good"; Italy is determined to "support and strengthen a rules-based and conflict-free international order for space activities"[141]	No direct opposition
14	Lithuania[142]	4 Jul 2023	Ministry of Foreign Affairs	Yes	Yes	Yes	No	No	Lithuania deems ASAT tests "destabilizing and irresponsible"	No direct opposition
15	Belgium[143]	15 June 2023	EU joint contribution on the works of the OEWG on space threats	Yes	Yes	Yes	No	No	"The EU will continue to do its utmost to protect the integrity of the rules-based international system"; "The EU and its Member States regard outer space as a global commons"[144]	No direct opposition
16	Bulgaria	15 June 2023	*Id.*	Yes	Yes	Yes	No	No	*Id.*	No direct opposition
17	Croatia	15 June 2023	*Id.*	Yes	Yes	Yes	No	No	*Id.*	No direct opposition
18	Cyprus	15 June 2023	*Id.*	Yes	Yes	Yes	No	No	*Id.*	No direct opposition
19	Czechia	15 June 2023	*Id.*	Yes	Yes	Yes	No	No	*Id.*	No direct opposition
20	Denmark	15 June 2023	*Id.*	Yes	Yes	Yes	No	No	*Id.*	No direct opposition
21	Estonia	15 June 2023	*Id.*	Yes	Yes	Yes	No	No	*Id.*	No direct opposition
22	Finland	15 June 2023	*Id.*	Yes	Yes	Yes	No	No	*Id.*	No direct opposition
23	Greece	15 June 2023	*Id.*	Yes	Yes	Yes	No	No	*Id.*	No direct opposition
24	Hungary	15 June 2023	*Id.*	Yes	Yes	Yes	No	No	*Id.*	No direct opposition
25	Ireland	15 June 2023	*Id.*	Yes	Yes	Yes	No	No	*Id.*	No direct opposition
26	Latvia	15 June 2023	*Id.*	Yes	Yes	Yes	No	No	*Id.*	No direct opposition
27	Luxembourg	15 June 2023	*Id.*	Yes	Yes	Yes	No	No	*Id.*	No direct opposition
28	Malta	15 June 2023	*Id.*	Yes	Yes	Yes	No	No	*Id.*	No direct opposition

135 "France formally pledges not to conduct destructive direct-ascent anti-satellite missile tests. It wholeheartedly supports this new standard of responsible behaviour and its universalization, in the multilateral framework of the United Nations". See France's commitment not to conduct destructive direct-ascent anti-satellite missile tests, Joint Communique issued by the Ministry for Europe and Foreign Affairs and the Ministry for the Armed Forces, 29 November 2022.

136 Id.

137 "[T]he Netherlands commits not to conduct destructive direct-ascent anti-satellite missile tests from this moment on". See High-level Segment of the Conference on Disarmament in Geneva, Statement of H.E. Wopke Hoekstra, Deputy Prime Minister and Minister of Foreign Affairs of the Kingdom of the Netherlands, 27 February 2023.

138 Id.

139 "Austria commits not to conduct destructive, direct-ascent anti-satellite missile testing. Austria has also never developed any capacities to do so". Austrian Statement, Conference on Disarmament, 30 March 2023.

140 "Italy is committed to not conducting destructive direct-ascent anti-satellite missile tests". See Statement by Deputy Prime Minister Tajani on Italy's commitment not to conduct destructive direct-ascent anti-satellite missile tests, 6 April 2023.

141 Id.

142 "Lithuania formally pledges not to conduct destructive direct-ascent anti-satellite missile tests. It wholeheartedly supports this new standard of responsible behaviour and its universalization". See Lithuania commits not to conduct destructive direct-ascent anti-satellite missile tests, Ministry of Foreign Affairs of the Republic of Lithuania, 4 July 2023.

143 "The Member States of the European Union commit not to conduct destructive direct-ascent antisatellite missile tests". EU joint contribution on the works of the Open-Ended Working Group on reducing space threats through norms, rules and principles of responsible behaviours. Fourth part: recommendations on possible norms, rules and principles of responsible behaviour relating to threats by States to space systems. 15 August 2023.

144 Id. at 1.

LEGEND: Yes No

#	STATE	DATE	DECLARING AUTHORITY	Intention to commit itself	Good faith	Clear terminology	Reservations	Further modifications	CONTEXT AND FACTUAL CIRCUMSTANCES	REACTION OF OTHER STATES
29	Poland	15 June 2023	*Id.*	Yes	Yes	Yes	No	No	*Id.*	No direct opposition
30	Portugal	15 June 2023	*Id.*	Yes	Yes	Yes	No	No	*Id.*	No direct opposition
31	Romania	15 June 2023	*Id.*	Yes	Yes	Yes	No	No	*Id.*	No direct opposition
32	Slovakia	15 June 2023	*Id.*	Yes	Yes	Yes	No	No	*Id.*	No direct opposition
33	Slovenia	15 June 2023	*Id.*	Yes	Yes	Yes	No	No	*Id.*	No direct opposition
34	Spain	15 June 2023	*Id.*	Yes	Yes	Yes	No	No	*Id.*	No direct opposition
35	Sweden	15 June 2023	*Id.*	Yes	Yes	Yes	No	No	*Id.*	No direct opposition

LEGEND: ● Yes ▲ No

The above comparative exercise has revealed several questions.

First, ***did the declaring states consider themselves bound by the respective declarations?***

A definite answer to this question was given only by one out of 35 states: Germany expressly stated that it made a "politically binding voluntary commitment".[145] This wording is clear and unambiguous, which allows to conclude that Germany did not intend to legally bind itself to the declared behaviour.

As regards the remaining 34 states, following the ILC guidelines and ICJ practice, there is a potential for a debate whether the respective statements are capable of creating legal obligations. However, each statement has to be examined individually. Despite the assumedly existing formal features of a potentially legally binding commitment, the following decisive factors must be confirmed: willful consent of the declaring state to legally bind itself and the perception by other states that this declaration is binding upon the former state.

Second, ***how do states define and/or interpret the term "to commit"?***

Most states (the US, New Zealand, Germany, the UK, the Republic of Korea, Australia, the Netherlands, Austria, Italy, jointly Member States of the European Union) used the terms "to commit" or "commitment" in their declarations. Three other states (Canada, France and Lithuania) made a "pledge" or "pledged" not to conduct ASAT tests. Japan and Switzerland used their own terminology ("decision not to conduct…" and "engagement" respectively).

None of the declarations offered any clarity regarding the meaning of any of the above terms. This circumstance further complicates the task of revealing the true intentions of the declaring states – whether any of them intended to be legally bound by such commitments or viewed those only as politically binding promises which could be revoked.

Third, how do states define and/or interpret the term "norm"?

Most declarations contained references to different "norms":

"new international norm for responsible behavior in space" (US);

"global norm" (Canada);

"rules and norms for [outer space]" (New Zealand);

"norms of responsible behavior in outer space" (Japan);

"norms, rules and principles of responsible behaviours" (the UK);

"binding international norms" (Switzerland);

"rules and norms that can guide how states behave in outer space" (Australia);

"normative framework and… legally binding measures vis-à-vis our actions in outer space" (the Netherlands);

"global norm to ban direct ascending destructive anti-missile tests" and "comprehensive set of norms and rules, including legally binding instruments" (Austria);

"norms, rules and principles of responsible behaviours" (jointly EU Member States).

145 Germany commits in Geneva not to conduct anti-satellite direct-ascent missile tests, Federal Foreign Office, 13 September 2022.

In addition, France and Lithuania use the term “standard of responsible behaviour”, but its exact sense in the given context is equally unclear.

This multitude of terms and expressions and the absence of any interpretation does not help establish whether each or some of the states attached a legal meaning to their statements.

In some statements, however (e.g. by the US, Canada, New Zealand, Switzerland, etc.), it is evident that the above terms refer not to the declared behaviour but to the anticipated future result. One could therefore assume that some states perceive the current declarations as an intermediate step towards (or maybe a building block of) a new customary or treaty rule.

It is noteworthy that the US Office of the Director of National Intelligence presented on its public website different definitions of the terms “international norms” and “international legal norms”:

> *“International norms: Widely shared expectations about what constitutes appropriate behavior among governments and certain non-state actors at the international level. Non-binding frameworks, such as voluntary codes of conduct or conventions, sometimes set the scene for more formal, binding agreements.*

International legal norms: Generally referred to as international law, these norms are binding on actors and typically formalized in written agreements, particularly treaties”.[146]

These definitions were formulated in a report authored by the US National Intelligence Council’s Strategic Futures Group in consultation with outside experts and Intelligence Community analysts,[147] therefore it can hardly be referred to as an official state position.

Fourth, ***can these declarations (at least some of them) potentially have a legally binding effect?***

The above comparative table highlights the following:

1. Every declaration was made by an assumedly authorized state representative: vice president, prime minister, minister, or head of space agency (jointly with a minister);
2. The intention by the declaring states to commit themselves was clearly stated, although not elaborated upon in terms of its legal consequences;
3. One would assume (unless a counter-evidence is found) that every declaration was by default made in good faith;
4. The wording used in all the statements is clear;
5. No declaration contained any reservations which would allow the respective states to opt out from their obligation;
6. There is no evidence that any of the statements have been subsequently modified;
7. The statements share the same context and were made in similar factual circumstances;
8. None of the declarations have met direct opposition from other states.

Having in mind selected examples of unilateral state declarations which, according to the ICJ and ILC, had a legally binding effect upon the declaring states (see supra., Section 3.2), one could assume that some or even most of the unilateral declarations examined have the potential to create a legal obligation. This development, however, would concern each state

146 See The Future of International Norms: US-Backed International Norms Increasingly Contested. Office of the Director of National Intelligence, October 2021.

147 Id.

individually. In other words, a unilateral declaration by a state, if all the necessary factors are in place, could give rise to a legal obligation binding only upon that particular state.

And fifth, ***can the above unilateral declarations, having regard to UNGA Resolution 77/41, potentially lead to the formation of an international law rule?***

Most declaring states, including 27 EU Member States, reaffirmed their support of the UNGA Resolution 77/41. Some states specified that the unilateral commitments by states to refrain from ASAT missile testing, as the said Resolution urges, would "contribute to building confidence between States in the development of possible legally binding instruments on the prevention of an arms race in outer space in the future".[148]

As was mentioned above, unilateral declarations of states could lead to the establishment of a new international customary rule or a conventional norm if the respective procedural and substantive requirements are met (see supra., Section 3.1). If the unilateral anti-ASAT declarations are regarded as amounting to "conduct in connection with resolutions adopted by an international organization" (see supra., Section 2.1), they could simultaneously testify to the general practice and *opinio juris* paving the way to a new international customary rule.

No first placement of weapons in outer space

Since 2004, Russia has been promoting the concept of NFP. As of 8 September 2023, according to publicly available official information, 31 state joined this initiative.[149]

Compared to the declarations on ASAT weapons testing examined above, the NFP initiative does not imply unilateral statements: it is usually shaped as a joint declaration by Russia and its foreign state partner.[150]

Due to this fact, the guidelines by the ILC regarding unilateral state declarations potentially having a legal effect are not applicable to the said initiative.

Nevertheless, it is interesting to note that the NFP concept already provides for a reservation: the respective joint statements, even if they were politically binding, would cease to apply the moment the first weapon is placed in outer space by any other state.

Revocation of unilateral declarations of states on space arms control

In August 1983, the Union of Soviet Socialist Republics (USSR) unilaterally introduced a moratorium on the placement in outer space of any types of anti-satellite weapons.[151]

As discussed above, states cannot arbitrarily depart from their unilateral declarations which entailed legal obligations for the respective state.

In this case, at least one of the key criteria of a potentially legally binding unilateral declaration was not met. The Soviet statement provided for a clear reservation that the moratorium

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148 EU joint contribution on the works of the Open-Ended Working Group on reducing space threats through norms, rules and principles of responsible behaviours. Fourth part: recommendations on possible norms, rules and principles of responsible behaviour relating to threats by States to space systems. 15 August 2023.

149 In chronological order: Russia (2004), Armenia (2005), Belarus (2005), Kazakhstan (2005), Kyrgyzstan (2005), Uzbekistan (2005), Tajikistan (2005), Brazil (2012), Indonesia (2013), Sri Lanka (2013), Argentina (2014), Cuba (2014), Venezuela (2015), Bolivia (2016), Nicaragua (2016), Ecuador (2016), Uruguay (2017), Viet Nam (2017), Surinam (2017), Guatemala (2018), Pakistan (2019), Cambodia (2019), Burundi (2020), Myanmar (2020), Syria (2020), Turkmenistan (2020), Sierra Leone (2021), Republic of Congo (2021), Togo (2021), Seychelles (2021), and the Union of the Comoros (2022). See Предотвращение гонки вооружений в космическом пространстве (ПГВК) (Справка). Russian Ministry of Foreign Affairs, 2 March 2023.

150 See, e.g.: Pakistan and Russia sign Joint Statement on No First Placement of Weapons in Outer Space. Ministry of Foreign Affairs, Government of Pakistan. 22 May 2019.

151 The Pravda Gazette, 19 August 1983.

would be effective until other states refrain from launching into outer space any types of ASAT weapons, including missile testing. After the United States performed an ASAT test in 1985, intentionally destroying the Solwind spacecraft, the USSR announced that from that moment it considered itself free from its unilateral commitment but would still de facto refrain from launching into outer space ASAT weapons.[152] After the collapse of the Soviet Union in 1991, Russia declared itself as the legal successor of the USSR with regard, *inter alia*, to international treaties of the disintegrated state. Since unilateral commitments are not international treaties, one can assume that the said legal succession by Russia does not extend to any instruments (legally binding or not) other than international treaties.

Regardless of its true legal effect, the unilateral moratorium on ASAT ceased to apply after the state no longer considered itself bound by the respective obligation.

This historic precedent highlighted the problem of revocation of unilateral declarations with a potential legally binding effect. As discussed above (section 3.1), the revocation would be arbitrary if there were no opt-out clause or no fundamental change in the circumstances. Both factors seemed to be present, though the latter one was subjectively determined by the declaring state.

This approach, however, is not applicable to unilateral declarations without a potentially binding effect. As a result, there is a risk that even an expected and orderly change of circumstances (e.g., the change of state administration) could be used to justify the annulment of a unilateral politically binding commitment.

152 The Pravda Gazette, 5 September 1985. For more information, see: Malov A. Взгляды в США на правовые аспекты использования космического пространства в военных целях [RUS US Approaches to the Legal Aspects of Military Uses of Outer Space]. Center of Political and Military Studies, 27 February 2014; Vereshchetin V.S. Юридические аспекты запрещения применения силы в космическом пространстве и предотвращения гонки космических вооружений [RUS Legal Aspects of the Prohibition of the Use of Force in Outer Space and Prevention of a Space Arms Race] / Космическое оружие: дилемма безопасности [RUS Space Weapons: A Security Dilemma] / ed. by E.P. Velikhov et al. MIR, 1986, at 163.

4. Conclusions

UNGA RESOLUTIONS

UNGA resolutions relevant to the prevention of an arms race in outer space do not as such give rise to new legally binding rules.

However, such resolutions can recall the already existing binding rules established by international agreements, international custom or other sources of international law, and also witness the creation of new conventional or customary rules of international law.

Examples of other branches of international law (international environmental, economic, humanitarian law) show that UNGA resolutions only confirm the existence or formation of international customary rules, but only state practice and perception of it as legally binding (*opinio juris*) can create a new international custom.

The conduct of states in connection – and not necessarily in strict conformity – with UNGA resolutions on arms control could be proof that both practice and its perception by a state (or group of states) as law are in place. National legislation could also serve this purpose. The practice of national courts, diplomatic correspondence, official statements on behalf of states are a few examples of actions leading to the development of an international custom. However, it should be examined on a case-by-case basis whether there are sufficient grounds for an international custom to emerge.

UNGA resolutions on NFP and anti-ASAT testing already reflect the resolve of states to draft an international treaty to prevent an arms race in outer space. However, the ultimate decision lies with the states whether they choose to transform non-legally binding provisions of UNGA resolutions into treaty norms and, most importantly, agree to be bound by them.

Moreover, treaty provisions against ASAT testing, and conduct of states in connection – once again, not necessarily in full accordance with – the respective treaty, whether bilateral or with a limited number of parties, could also respectively constitute state practice and express *opinio juris*. On the one hand, norms of an international treaty are binding only upon the parties to this treaty. But on the other hand, if the treaty in question obtains in time support of a larger group of states so that the relevant treaty rule could be categorized as “sufficiently widespread, representative, and consistent”, this rule would have the potential of transforming into an international custom binding upon all states. With this development, the (hopefully few) states that do not agree to be bound by the emerging customary rule would have to resort to the “persistent objector” technique.[153] Otherwise, they would become bound by the new international custom regardless of their opposition.

UNILATERAL DECLARATIONS OF STATES ON SPACE ARMS CONTROL NORMS

Unilateral declarations of states are usually regarded as not legally binding upon the respective state.

However, in certain situations a unilateral declaration could become legally binding. According to the findings of the ILC, “declarations publicly made and manifesting the will to be bound may

153 According to the International Law Commission, any state or states have an opportunity to object to being bound by an emerging international custom, but such objection “must be clearly expressed, made known to other States, and maintained persistently”.

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”.[154]

These conditions include the following:

1. Intention by the declaring state to commit itself;
2. Declaration made by a duly authorized state representative (head of state, head of government, minister of foreign affairs or another official representative (e.g., a head of space agency) duly authorized to formulate such declarations in specific areas);
3. Declaration made in good faith;
4. Clear and specific terminology;
5. No reservations which would allow the state to opt out from its declared obligation;
6. Further modifications;
7. Context and factual circumstances in which the statements were made;
8. Reaction by other states.[155]

Out of 35 states that made unilateral commitments not to conduct destructive direct-ascent ASAT missile tests, only one (Germany) expressly stated that it regarded the said declaration as non-legally binding.

As to the remaining 34 states, following the ILC guidelines and ICJ practice, there is a potential for a debate whether the respective statements are capable of creating legal obligations.

The formal features of a potentially legally binding commitment are assumedly present:

1. Every declaration was made by an assumedly authorized state representative: vice president, prime minister, minister, or head of space agency (jointly with a minister);
2. The intention by the declaring states to commit themselves was clearly stated, although not elaborated upon in terms of its legal consequences;
3. One would assume (unless a counter-evidence is found) that every declaration was by default made in good faith;
4. The wording used in all the statements is clear;
5. No declaration contained any reservations which would allow the respective states to opt out from their obligation;
6. There is no evidence that any of the statements have been subsequently modified;
7. The statements share the same context and were made in similar factual circumstances;
8. None of the declarations have met direct opposition from other states.

However, each statement has to be examined individually. Special emphasis must be placed on the following key factors: willful consent of the declaring state to legally bind itself and the perception by other states that this declaration is binding upon the former state.

Having in mind selected examples of unilateral state declarations which, according to the ICJ and ILC, had a legally binding effect upon the declaring states, one could assume that some or even most of the unilateral declarations examined have the potential to create a legal

154 UN Doc. A/61/10, Sec. IX.
155 Or, more specifically, no negative reaction from other states to the respective unilateral declaration by one state.

obligation. This development, however, would concern each state individually. In other words, a unilateral declaration by a state, if all the necessary factors are in place, could give rise to a legal obligation binding only upon that particular state.

Joint statements by states on no first placement of weapons in outer space (NFP)

Compared to the declarations of states on ASAT weapons testing, the NFP initiative does not imply unilateral statements: it is usually shaped as a joint declaration by Russia and its foreign state partner.

It is noteworthy that the NFP concept already provides for a reservation: the respective joint statements, even if they were politically binding, would cease to apply the moment the first weapon is placed in outer space by any other state.

Joint statements of states on NFP could potentially lead to the emergence of a new international customary rule or a conventional norm if the respective procedural and substantive requirements discussed above are met.

The intention of a state to be bound is the decisive factor for a particular declaration to become legally binding. However, proving this intention appears to be the most complicated practical exercise. The opinion of each particular state in question will be the primary source of such interpretation.

Convergence of the anti-ASAT weapons testing and NFP initiatives

Geopolitical tensions aside, the legal assessment of the anti-ASAT weapons testing and NFP initiatives – both at the UNGA and state level – reveals that these instruments could perfectly complement each other.

First, all of them share one goal – prevention of an arms race in outer space.

Second, joint statements of states on NFP and unilateral declarations on anti-ASAT testing could serve as conduct in connection with resolutions adopted by an international organization – UNGA resolutions on NFP and ASAT respectively. This means that such joint and unilateral statements, once they multiply, could potentially qualify as both general practice and *opinio juris* necessary for the emergence of a new international customary rule.

Third, UNGA resolutions on NFP and ASAT highlight the necessity to develop an international agreement or agreements to prevent an arms race in outer space.

Therefore, joint statements on NFP and unilateral declarations on anti-ASAT testing could work in harmony towards the legally binding space arms control regime:

Step 1 – NFP statements: non-legally binding but covering any types of weapons;

Step 2 – anti-ASAT testing declarations: potentially legally binding but focused on one category of weapons;

Step 3 – a series of UNGA resolutions on NFP and ASAT (maybe in time merged into one): testifying to the progress of the above initiatives and reflecting the emergence of new legally binding norms of an international treaty or international customary law – or both in parallel to cover respectively the signatories to the future treaty, and the international community of states at large.

5. Way forward

This research highlighted a number of issues that deserve further in-depth examination. These include, *inter alia*:

- Interconnection between the development of the international space arms control regime and protection of the environment of the Earth and outer space;
- Shift from the traditional space law approach to defining space-related damage to a comprehensive understanding and international regulation of damage encompassing environmental damage;
- Possible role of NGOs and civil society in the furtherance of multilateral, bilateral and unilateral international efforts to develop space arms control norms.[156]

156 This track could cover such questions as: (1) what strategic steps could NGOs take to promote multilateral, bilateral and unilateral anti-ASAT testing initiatives; (2) which other areas could serve as an example of how NGOs and civil society influenced the development of new legally binding international norms (e.g., a ban on heavy fuel oil in the Arctic waters; prohibition of nuclear weapons; UN climate negotiations which culminated in the adoption of the Paris Agreement, and others); (3) what lessons could be learned from the work of the Conference on Disarmament and the OEWG on reducing space threats, etc.

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SWF Publication: PP23.09

Published: 23.12