BROKEN PROMISES OR FADING MEMORIES?: THE QUESTION OF UNILATERAL ACTS AND PROMISES UNDER INTERNATIONAL LAW IN THE CONTEXT OF NATO ENLARGEMENT

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ABSTRACT

After more than two decades of relatively relaxed relations between the West and Russia, mutual mistrust seems to have now reached a level similar to that during the Cold War. The immediate cause of this souring relationship is rooted in the Ukraine crisis starting in 2014 and the annexation of Crimea by Russia. Yet, the underlying reasons for this new antagonism go much deeper, namely, back to the end of the Cold War and the fall of the Berlin Wall. Russia claims that Western leaders, especially those of the United States and West Germany, made binding commitments that NATO would not expand eastward, and in return, the Soviet Union allowed for German reunification. By enlarging NATO and accepting former Warsaw Pact countries into its fold, the West broke this promise under international law, prompting Russia to take action in Ukraine.

Historians mostly agree that the involved political decision makers made certain implicit and informal statements, alluding to such a non-enlargement pledge, but also that none of these statements can be taken as binding commitments. Nonetheless, the narrative of a broken promise has become too strong to be rebutted solely by historical claims, and has turned into a persisting memory, which is used to justify Russian actions in Ukraine. From the perspective of international law, this particular chapter of twentieth-century history remains under-researched: the conclusion of historians ignores the legal point of view and the question of whether or not a promise under international law, supposedly given by the West to the Soviet Union not to extend the jurisdiction of NATO eastward after the fall of the Berlin Wall, amounted to a legally binding unilateral act. Consequently, a clear and structured legal analysis is required to rebut the arguments put forth by Russia. By examining the formal and substantive requirements of promises under international law, this Article scrutinizes these relevant statements from a legal outlook and tries to corroborate that no statements made in 1990 can be regarded as legally binding, despite persisting claims made by Russia to the contrary.

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Introduction: Of Cold Wars and Uncertain Promises

The ongoing crisis in Ukraine has formatively reshaped the relationship between the West and Russia since 2014. After the Cold War between the United States and the Soviet Union ended in 1989, the world saw over two decades of relatively relaxed relations between the East and West.[1] Yet, the events in Ukraine following the ousting of then-President Viktor Yanukovych—namely, the Russian annexation of Crimea and the war in Donbass, as well as the ensuing economic sanctions imposed by the United States and the European Union—resulted in a rapidly deteriorating relationship between Russia and the West.[2] Some already call this conflict "Cold War II" or the "New Cold War," but given the changed landscape of international relations since the end of the Soviet Union, this label might be a misnomer.[3] This Article, however, is only indirectly concerned with history and certainly does not pursue a political agenda in this conflict. Rather, it intends to examine, *sine ira et studio* and on the basis of international law alone, whether a promise, supposedly given by the United States to the Soviet Union *not* to extend the jurisdiction of the North Atlantic Treaty Organization (NATO) eastward after the fall of the Berlin Wall, amounted to a legally binding unilateral act.[4]

Therefore, the issue in the following discussion is also only indirectly concerned with the actual NATO enlargements of 1999 and 2004, which saw the integration of former Warsaw Pact countries or Soviet Union republics into the alliance, respectively.[5] In fact, the problem goes much deeper and dates back to 1990, concern-

1. For a general historical overview, see, for example, Robert Service, The End of the Cold War: 1985–1991 500 (2015); Serhii Plokhy, The Last Empire: The Final Days of the Soviet Union 356 (2015); International Relations Since the End of the Cold War 2 (Geir Lundestad ed., 2013).

2. *See, e.g.*, William C. Wohlforth & Vladislav M. Zubok, *An Abiding Antagonism: Realism, Idealism, and the Mirage of Western-Russian Partnership after the Cold War*, 54 Int. Pol. 405 (2017).

3. Biljana Vankovska, *The Cold War II: Just Another Misnomer?*, 14 Contemp. Macedonian Def. 49–60 (2014).

4. This narrative has become so powerful that it has also already permeated popular culture. *See, e.g.*, Veit Etzold, Dark Web ch. 1 (2017).

5. *See, e.g.*, Stanislav J. Kirschbaum, *Phase II Candidates: A Political or Strategic Solution?*, *in* The Future of NATO: Enlargement, Russia, and European Security 197, 200–01 (Charles-Philippe David & Jacques Lévesque eds., 1999); Jeffrey Simon & Joshua Spero, *Security Issues: NATO and Beyond*, *in* Central and East European Politics: From Communism to Democracy 143, 147–50 (Sharon L. Wolchik & Jane L. Curry eds., 2d ed., 2011); Edward W. Walker, *Between East and West: NATO Enlargement and the Geopolitics of the Ukraine Crisis*, *in* Ukraine and Russia: People, Politics, Propaganda and Perspectives 141, 144 (Agnieszka Pikulicka-Wilczewska & Richard Sakwa eds., 2015).

ing the enlargement of NATO with regard to East Germany (the German Democratic Republic, or the GDR) and German reunification. Although the negotiations between the United States, the Soviet Union, and West Germany (the Federal Republic of Germany, or the FRG) eventually resulted in German reunification, they also gave rise to the current bitter dispute between the West and Russia: what exactly had been agreed to about the future of NATO? Had the United States formally promised the Soviet Union that the alliance would not expand eastward as part of the deal?[6] "[W]hat kind of security arrangements would emerge in post-Cold War Europe"[7] and "[w]hat, if anything, was said or happened during [this re]unification diplomacy that was meant to affect NATO's future shape and purpose?"[8]

Every phase of NATO enlargement was a politically delicate matter for Russia, as NATO intruded into its former sphere of influence in Central and East Europe. This and the failure to address the obvious question of "why not invite Russia, too?"[9] further antagonized the successor state to the Soviet Union.[10] Consequently, Russia decried additional states becoming part of the alliance[11] and openly opposed Ukraine's integration in the economic, as well as political "West," and particularly the possibility of its NATO membership.[12] The Russian position has been well known, but the West insisted on every European state's sovereignty and legal right to decide on its association with other states freely, which also included membership in the European Union and NATO.[13] Therefore, the often-heard argument on the part of Russia is that in the 1990s, the United States had made a commitment "not to

6. Mary Elise Sarotte, *A Broken Promise? What the West Really Told Moscow about NATO Expansion*, 93 Foreign Aff. 90, 90 (2014).

7. Mary Elise Sarotte, 1989: The Struggle to Create Post-Cold War Europe 218–19 (2d ed., 2014).

8. Kristina Spohr, *Precluded or Precedent-Setting? The "NATO Enlargement Question" in the Triangular Bonn-Washington-Moscow Diplomacy of 1990–1991*, 14 J. Cold War Stud. 4, 6, 47–48 (2012).

9. *See* Michael Mandelbaum, Susan Eisenhower, Jack Mendelsohn & Jonathan Dean, *The Case Against NATO Expansion*, 97 Current Hist. 132, 134 (1998).

10. Zoltan D. Barany, The Future of NATO Expansion: Four Case Studies 15–16, 20–21 (2003).

11. Christian Marxsen, *The Crimea Crisis: An International Law Perspective*, 74 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 367, 368 (2014).

12. *See, e.g.*, Robert H. Donaldson, *The Role of NATO Enlargement in the Ukraine Crisis*, 44 Soviet & Post-Soviet Rev. 32, 40–41 (2017); Taras Kuzio, *Ukraine Between a Constrained EU and Assertive Russia*, 54 J. Common Mkt. Stud. 103, 104–05 (2016).

13. Anton Bebler, *Crimea and the Russian-Ukrainian Conflict*, 15 Romanian J. Eur. Aff. 35, 49 (2015).

expand NATO" and has repeatedly broken this commitment in the years since.[14] Similar claims were made by Western analysts who stressed that the United States "had promised the Russians that NATO would not expand into the former Soviet empire."[15] According to the Russian line of argumentation, it is consequently the United States and Europe who share most of the responsibility for the crisis in Ukraine.[16] After NATO's military intervention in Kosovo in 1999 as the "original sin" of post-Cold War international law,[17] the root of the problem remains NATO enlargement and the backing of prodemocracy movements in Ukraine,[18] beginning with the Orange Revolution in 2004.[19] For Russia, the ousting of Yanukovych was the final straw, and its taking of Crimea constituted an appropriate response to the West's undemocratic and destabilizing actions.[20]

Thus, as briefly mentioned above, this Article explores and critically discusses the legal issues surrounding this ominous and alleged promise. Even though this particular chapter of twentieth-century history is well and clearly explained by historians, it remains under-researched from the viewpoint of international law—especially given some ambiguous statements made by some of the key political decision makers at that time. Hence, legal scholars are still divided over whether the diplomatic talks on German reunification lend some support to the Russian claims of a broken

14. *Charlie Rose: A Conversation with Sergei Lavrov, Russian Foreign Minister* (PBS television broadcast Sept. 25, 2008), https://charlierose.com/videos/18449 [https://perma.cc/CY5P-26NB].

15. George Friedman, *Georgia and the Balance of Power*, 55 N.Y. Rev. Books 24, 24 (2008); *see also* Mark Kramer, *The Myth of a No-NATO-Enlargement Pledge to Russia*, 32 Wash. Q. 39, 40 (Apr. 2009) (discussing U.S. policymakers such as George H.W. Bush and James A. Baker's public statements on extending membership to Warsaw Pact countries).

16. *See, e.g.*, Richard Sakwa, Frontline Ukraine: Crisis in the Borderlands 54–56 (2016); Tom Sauer, *The Origins of the Crisis in Ukraine and the Need for Collective Security between Russia and the West*, 8 Global Pol'y 82, 82–83 (2017).

17. Lauri Mälksoo, Russian Approaches to International Law 173 (2015) (noting the Russian government construed the intervention as the "original sin").

18. *See, e.g.*, Natalia Chaban, Ole Elgström & Olga Gulyaeva, *Russian Images of the European Union: Before and after Maidan*, 13 Foreign Pol'y Analysis 480, 483, 494 (2017); Elias Götz, *Russia, the West, and the Ukrainian Crisis: Three Contending Perspectives*, 22 Comtemp. Pol. 253–54 (2016); David Lane, *The International Context: Russia, Ukraine, and the Drift to East-West Confrontation*, 6 Int'l Critical Thought 623, 624–27 (2016).

19. *See* Sergei M. Plekhanov, *Assisted Suicide: Internal and External Causes of the Ukrainian Crisis*, *in* The Return of the Cold War: Ukraine, The West, and Russia 3, 16 (J.L. Black & Michael Johns eds., 2016).

20. John J. Mearsheimer, *Why the Ukraine Crisis Is the West's Fault: The Liberal Delusions that Provoked Putin*, 93 Foreign Aff., 77, 77 (2014).

non-enlargement pledge.[21] To this end, Part I delves into history and examines what really happened in 1989–1990 in the course of German reunification. Again, this is not a historical Article nor can its author claim to be a historian. Therefore, the findings in this Part must necessarily rely on other works and treat them as facts for the purposes of the subsequent legal study. Part II then analyzes from both a procedural and substantive viewpoint whether this promise—assuming that one was indeed given—was a legally binding unilateral act in international law. Without preempting the conclusion of this study, the overall objective of this Article nevertheless is to rebut the arguments put forth by Russia and to demonstrate that the oft-used narrative of an alleged promise not to extend NATO eastward after the end of the Cold War has no legal basis. Therefore, this Article undertakes this task solely on the basis of positive international law; political considerations remain unaffected.

I. The Historical View: The Question of Eastward-Moving NATO Jurisdiction

A. *The World of 1989 and Germany*'s NATO Membership

"Everything changed in 1989"[22] when the Berlin Wall fell. Not only did German reunification transform from a mere theoretical possibility to the most crucial topic on the international agenda, but the future external status of Germany also came under close scrutiny. The basic question was whether a unified Germany should be neutral, join NATO, or set an example of oxymoronic politics by becoming a member of both NATO and the Warsaw Pact.[23] When Soviet President Mikhail Gorbachev realized that unification had "effectively [become an] unstoppable process,"[24] Moscow's "tactical priority . . . shifted from preventing the unification process to slowing it down"[25] and dispelling any hopes of a

21. Joshua R. Itzkowitz Shifrinson, *Deal or No Deal? The End of the Cold War and the U.S. Offer to Limit NATO Expansion*, 40 Int'l Security 7, 15 (2016).

22. Jeffrey A. Engel, *1989: An Introduction to an International History*, *in* The Fall of the Berlin Wall: The Revolutionary Legacy of 1989 1, 30 (Jeffrey A. Engel ed., 2009).

23. Hannes Adomeit, *Gorbachev's Consent to United Germany's Membership of NATO*, *in* Europe and the End of the Cold War: A Reappraisal 107, 107 (Frédéric Bozo, Marie-Pierre Rey, N. Piers Ludlow & Leopoldo Nuti eds., 2009).

24. Andreas Rödder, Deutschland einig Vaterland: Die Geschichte der Wiedervereinigung 195–99 (2009); Spohr, *supra* note 8, at 12.

25. Spohr, *supra* note 8, at 11.

unified Germany joining NATO.[26] Nonetheless, the basic narrative of this early "romantic period" between the West and the crumbling Soviet Union was a "shared optimism based on both sides' common willingness to [overcome past] Cold War divisions."[27] "NATO membership and the alliance's future were [only] discussed . . . in relation to Germany,"[28] and "neither Gorbachev nor any of his advisors even thought to bring up the question of the expansion of NATO to other Warsaw Pact countries beyond East Germany. This was simply not an issue at the time."[29]

Hans-Dietrich Genscher, the West German foreign minister, first raised German reunification and security as public issues in a speech on January 31, 1990, when he explained that there was no interest in extending NATO to the east, as this "would block intra-German rapprochement."[30] Even though this statement may have only been made to secure Soviet consent to German unity, it made an advisor in the German chancellery raise the question of "[h]ow should . . . one united Germany, of which two-thirds[, the FRG, are] within NATO, and one-third outside"[31] work in practice. There are claims that Genscher's position was misrepresented, and that he advocated NATO membership for Germany as a whole.[32] But this was not how the interview was perceived at that time,[33] and Soviet leaders presumably welcomed Genscher's language, as his "inconclusive formulations [left] much room for speculation."[34] The German chancellery also struggled with this intricate situation of somehow reconciling German reunification and NATO membership and suggested a "'special status . . . for the (reduced) GDR forces' under NATO's umbrella"—again "leaving room to decide in the future what this 'special status' might [actually mean and]

26. *See* MICHAIL GORBATSCHOW UND DIE DEUTSCHE FRAGE: SOWJETISCHE DOKUMENTE 1986–1991, Doc. 66, 287–90 (Aleksandr Galkin & Anatolij Tschernjajew eds., 2011) [hereinafter Galkin & Tschernjajew].

27. Tuomas Forsberg & Graeme Herd, *Russia and NATO: From Windows of Opportunities to Closed Doors*, 23 J. CONTEMP. EUR. STUD. 41, 43 (2015).

28. Spohr, *supra* note 8, at 12.

29. Kramer, *supra* note 15.

30. *See* Foreign Minister Hans-Dietrich Genscher, Speech at a Conference of the Tutzing Protestant Academy (Jan. 31, 1990), *in* EUROPE TRANSFORMED: DOCUMENTS ON THE END OF THE COLD WAR 440–41 (Lawrence Freedman ed., 1990) [hereinafter EUROPE TRANSFORMED].

31. Spohr, *supra* note 8, at 14.

32. *Id.*

33. PHILIP ZELIKOW & CONDOLEEZA RICE, GERMANY UNIFIED AND EUROPE TRANSFORMED: A STUDY IN STATECRAFT 175 (1997).

34. Spohr, *supra* note 8, at 15–16.

entail."[35] Therefore, much depended on the Soviet Union's "next moves" and the upcoming bilateral talks between the United States and the Soviet Union, as well as between the Soviet Union and West Germany, planned for early February.[36] Genscher then flew to Washington on February 2, 1990 to further coordinate their positions and to discuss these issues with Secretary of State James Baker.[37]

In an interview after the meeting, Genscher told journalists that he and Baker had been "in full agreement" and that they had "no intention of extending the NATO area of defense and security toward the East."[38] Furthermore, he insisted that there would be no "halfway membership, this way or that" and that "there [was] no intention of extending the NATO area to the East."[39] In other words, NATO's political councils should be enjoyed by the reunified Germany as a whole, but "NATO's integrated military command would not encompass" the territory of the (former) GDR.[40] By refraining from expressly objecting to Genscher's statements, Baker apparently consented to this formula.[41] Four days later, Genscher met with British Foreign Secretary Douglas Hurd in Bonn and confirmed that the German government "wanted neither to extend nor to leave NATO."[42] Genscher was more concerned with the vision of a reunified Germany participating in pan-European collective security structures, such as the Conference on Security and Cooperation in Europe (CSCE), which could help the Soviet Union "save face" and "to come to terms with the erosion of the Warsaw Pact."[43] The relevant British documents mention that, interestingly, Genscher went even further and explained that the issue of not extending NATO also applied to other states besides the GDR, and that the Russians must have assurance that NATO

35. *Id.* at 17 (discussing Peter Hartmann, *Nr. 151: Aufzeichnung des Ministerialdirigenten Hartmann*, *in* DOKUMENTE ZUR DEUTSCHLANDPOLITIK: DEUTSCHE EINHEIT – SONDEREDITION AUS DEN AKTEN DES BUNDESKANZLERAMTES 1989/1990, 727–35 (Hanns Jürgen Küsters & Daniel Hofmann eds., 1998) [hereinafter Küsters & Hofmann]).

36. *Id.* at 18.

37. *Id.*

38. ZELIKOW & RICE, *supra* note 33, at 176.

39. *Id.*

40. *See* Spohr, *supra* note 8, at 18.

41. *See id.*

42. *See* Telegraph from Private Secretary Mr. Hurd to Sir C. Mallaby (Bonn) (Feb. 6, 1990), *in* DOCUMENTS ON BRITISH POLICY OVERSEAS, SERIES III, VOL. 7, GERMAN UNIFICATION 1989/ 1990, 261, 262 (Keith Hamilton et al. eds., 2009) [hereinafter DOCUMENTS ON BRITISH POLICY OVERSEAS].

43. *Id.*

would not expand overnight.[44] Thus, Genscher's formulation logically would have required giving the Soviet Union assurances that, for example, if "the Polish government left the Warsaw Pact one day, [it] would not join NATO the next."[45] "The West German notes from this meeting curiously include at this point a mention of Hungary instead of Poland,[46] with Genscher explaining":

> The West could do a lot to alleviate the current developments for the USSR. The declaration that NATO has no intention to expand its territory eastward would be particularly important. Such a declaration should not be focused solely on [the] GDR, but would have to be of a general nature. For example, the USSR would need assurance that Hungary, after a change of government, would not become part of the Western alliance.[47]

However, the central problem with all these statements is that Genscher expressly "went over the heads of [the] East European [states] and against their potential future desires to join NATO."[48] It could be argued that Genscher was only referring to a possible immediate NATO enlargement (using the phrase "the next day"), which could be interpreted as not necessarily excluding membership in the further future.[49] Yet more importantly in the context of this Article, he "had no political authority to speak for NATO as a whole . . . nor had he voiced any of these . . . ideas in public or in front of Soviet leaders."[50] His statements can be considered attempts to influence the thinking and future behavior of Germany's Western allies by putting out "feelers," "testing the ground," and "trying out different things with different people."[51] Yet, at the end of the day, Genscher's focus was not on NATO per se, which he did not regard as that important for the future relationship between the West and the Soviet Union, but instead on building a "transformed future European security framework under the CSCE."[52] Therefore, he simply granted less practical significance to the various issues surrounding NATO's "changing shape, future, and territorial reach."[53]

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44. *Id.*
45. *Id.*
46. Spohr, *supra* note 8, at 20.
47. *Id.* (citation omitted).
48. *Id.*
49. *See* ROBERT L. HUTCHINGS, AMERICAN DIPLOMACY AND THE END OF THE COLD WAR: AN INSIDER'S ACCOUNT OF U.S. POLICY IN EUROPE, 1989–1992, 112 (1997); Spohr, *supra* note 8, at 20.
50. Spohr, *supra* note 8, at 21.
51. *Id.*
52. *Id.*
53. Spohr, *supra* note 8, at 21 (citing HUTCHINGS, *supra* note 49, at 120–21).

B. *Baker and Kohl in Moscow: What Did They Tell Gorbachev?*

History did not end here, as another round of talks took place that more plausibly could have produced such a promise: Baker's talks in Moscow on February 7–9, 1990. Although the U.S. State Department's Principal Deputy Assistant Secretary of State for European Affairs, James Dobbins, insisted to British Ambassador Sir Antony Acland in Washington that Baker had not explicitly endorsed Genscher's ideas, the reality is that Baker communicated these very ideas under the guise of presenting U.S. considerations on Germany's future in his meetings with Gorbachev and Eduard Shevardnadze, the Soviet Minister of Foreign Affairs.[54] Baker's handwritten notes from these meetings indicate that they discussed the so-called "2+4 framework," a framework to include the "two Germanys" in all talks with the four occupying powers as a better alternative to meetings merely between the four powers.[55] Furthermore, when they discussed the U.S. desire for Germany to remain in NATO, a critical statement was made that seems to represent the factual basis for a potential promise not to extend NATO in the current discussion.[56] In his handwritten notes, Baker included the words: "End result: Unified Ger. anchored in a *changed (polit.) NATO – *whose juris. would not move *eastward!"[57] "With these words, Baker [apparently] implied that Article 5 of the North Atlantic Treaty (the common defense guarantee) would not extend to GDR territory."[58] Gorbachev reacted "by emphasizing that any expansion of the 'zone of NATO' was not acceptable,"[59] to which Baker responded, according to Gorbachev: "we agree with that."[60] Understandably, this statement was extremely important to Gorbachev, and he later remembered it as *the* point during the conversation that "cleared the way for a compromise" on Germany.[61]

This very moment "form[ed] the nucleus of the [ongoing] controversy,"[62] since Baker did not offer any substantial guarantees in exchange for Gorbachev's consent to German unification, and

54. *Id.* at 21–22 (citing Hamilton & Salmon, *supra* note 42, at 255).
55. Sarotte, *supra* note 7, at 110.
56. *Id.*
57. *Id.*
58. Spohr, *supra* note 8, at 22.
59. Sarotte, *supra* note 7, at 110 (citing Mikhail Gorbachev, Memoirs 528–29 (2007)).
60. *Id.*
61. *Id.*
62. *Id.*

Gorbachev, imprudently, let the meeting end without securing this agreement formally, unambiguously, and in written form, which could have served as a clear piece of evidence for a promise not to extend NATO eastward. Thereby, the Soviet leader left his successors entirely "empty-handed when they protested against NATO expansion."[63] Subsequent "Russian presidents would assert that this meeting had given them assurances that NATO would not expand," but the United States would remember this meeting differently; the United States remembered the meeting as one in a number of conversations and negotiations limited solely to Germany that would be non-binding until final documents were signed.[64]

When the West German Chancellor Helmut Kohl subsequently arrived in Moscow on February 10, 1990, he was given a secret letter from Baker[65] summarizing the meeting with Gorbachev. This included the promise that Germany's membership in NATO would be accompanied by "assurances that NATO's jurisdiction would not shift one inch eastward from its present position" to the territory of the GDR and the result that, by implication, any extension of NATO would be unacceptable to the Soviet Union.[66] The ensuing problem was, however, that Kohl had also already received another letter from the U.S. administration, namely, from President George H.W. Bush himself.[67] This presidential message differed significantly from Baker's statements. In it, Bush did not promise not to extend NATO's jurisdiction, but merely limited himself to promising a "special military status for what is now the territory of the GDR," in other words, "a special status for it within NATO as the alliance expanded its territory."[68] Thus, in contrast to Baker's (and Genscher's) phrasing, which principally excluded NATO expansion to East Germany, Bush's wording was open to interpretation as it left this option unaffected, thereby ensuring the protection and defensibility of a reunified Germany as a whole. Seeing

63. *Id.* at 110–11; Mary Elise Sarotte, *Not One Inch Eastward? Bush, Baker, Kohl, Genscher, Gorbachev, and the Origin of the Russian Resentment toward NATO Enlargement*, 34 DIPLOMATIC HIST. 119, 128 (2010).

64. SAROTTE, *supra* note 7, at 111; RONALD D. ASMUS, OPENING NATO'S DOOR: HOW THE ALLIANCE REMADE ITSELF FOR A NEW ERA 4 (2004).

65. *See* JAMES A. BAKER & THOMAS M. DEFRANK, THE POLITICS OF DIPLOMACY: REVOLUTION, WAR, AND PEACE, 1989-1992 206 (1995); Sarotte, *supra* note 6, at 92.

66. *Nr. 173: Schreiben des Außenministers Baker an Bundeskanzler Kohl* (Feb. 10, 1990), *in* Küsters & Hofmann, *supra* note 35, at 793–94; Kramer, *supra* note 15, at 49.

67. Spohr, *supra* note 8, at 25.

68. Sarotte, *supra* note 63, at 130; George H.W. Bush, *Nr. 170: Schreiben des Präsidenten Bush an Bundeskanzler Kohl* (Feb. 9, 1990), *in* Küsters & Hofmann, *supra* note 35, at 784–85.

that such a "special status" had already been proposed by an internal chancellery memorandum one week earlier,[69] Kohl likely was not surprised by Bush's message.[70]

When the time for the meeting with Gorbachev arrived, Kohl echoed the line of Genscher and Baker,[71] and stressed his own understanding of Gorbachev's domestic sensitivities and security interests. Concurrently, he also emphasized that the federal government would not accept the neutralization of Germany, meaning its removal from the ambit of NATO.[72] Hence, he intended Germany to join NATO as a unified country, but without expanding NATO territory to the GDR.[73] Despite some differences in wording, both the German and the Russian transcripts show that "in delineating NATO's future boundary, [Kohl] was referring solely to [East] Germany, making no mention whatsoever of any other Warsaw Pact countries."[74] Again, it was certainly not within Kohl's authority to make promises on behalf of NATO, but "Gorbachev did not react in any meaningful way to these points."[75] "Leaving matters open for future negotiations, Gorbachev simply thanked Kohl for his thoughts" and agreed with Kohl that the question of unity was one for the Germans alone to decide.[76] As a quid pro quo, Kohl then emphasized that Gorbachev expect financial help from him, and that given the excellent state of the German economy, West Germany and the Soviet Union "could do much together."[77]

By letting the meeting end in this manner, Gorbachev had again—as in his meeting with Baker—done something politically ill-considered: he had agreed to his end of the deal—consenting to German reunification—without getting the potential trade-off—no expansion of NATO—in written form.[78] The main issue was that Baker's and Kohl's words to Gorbachev on NATO's future were, at this point in time, no more than speculations that could be taken

69. Spohr, *supra* note 8, at 25.
70. *Id.*
71. *Id.* at 27.
72. *See id.*
73. *Nr. 174: Gespräch des Bundeskanzlers Kohl mit Generalsekretär Gorbatschow Moskau*, *in* Küsters & Hofmann, *supra* note 35, at 798–99; Doc. 72, *in* Galkin & Tschernjajew, *supra* note 26, at 322.
74. Spohr, *supra* note 8, at 27.
75. *Id.* at 28.
76. *Id.*; Doc. 72, *in* Galkin & Tschernjajew, *supra* note 26, at 322.
77. *Nr. 174*: *Gespräch des Bundeskanzlers Kohl mit Generalsekretär Gorbatschow Moskau*, *in* Küsters & Hofmann, *supra* note 35, at 798–99.
78. Sarotte, *supra* note 63, at 131.

up in detail in future negotiations, including the 2+4 framework.[79] Gorbachev remained opposed to a unified Germany within NATO and continued to hope for German neutrality.[80] Yet, the reason why Gorbachev did not pin down either Baker or Kohl on this matter was not due to any false beliefs, poor negotiation skills, or a lack of wisdom on his part, but rather because he simply felt no need to pin anything down at this point in relation to the future of NATO.[81] During these bilateral meetings, a potential security deal was not on the agenda, and "Gorbachev acted [with] the belief that he [was still in control] to shape the future [European] security framework"; therefore, "he saw no reason at this stage . . . to adopt a bargaining position."[82] In other words, Gorbachev had, at this point, not even considered the possibility that other East European states may seek to join NATO in the future.[83]

Finally, when Kohl and Bush met at Camp David on February 24–25, 1990, they reached a final agreement on their joint position on NATO, namely, that a unified Germany had to be a full member of the alliance.[84] Moreover, they were confident on how to secure agreement with Gorbachev: they surmised that the Soviet Union would eventually accept a united Germany in NATO, "but they will want to be paid for it"[85] from the "deep pockets" of the German chancellor.[86] Gorbachev eventually relented on the Western position on NATO in July at another meeting with Kohl and agreed to let a reunified Germany become a full member of NATO, with a special military status for the former GDR territory in the shape of some restrictions on both NATO troops and nuclear weapons there.[87] In exchange, Gorbachev received twelve

79. *Nr. 174*: *Gespräch des Bundeskanzlers Kohl mit Generalsekretär Gorbatschow Moskau*, *in* Küsters & Hofmann, *supra* note 35, at 806; James A. Baker, Drei Jahre, die die Welt veränderten: Erinnerungen 183–84 (1995); Spohr, *supra* note 8, at 29.

80. Spohr, *supra* note 8, at 29.

81. *Id.*; *see also id.* at 29 n.87 (noting that a commentator implicitly "faults Gorbachev for 'naïveté' among other things").

82. *Id.* at 29.

83. Kramer, *supra* note 15, at 51.

84. Sarotte, *supra* note 63, at 135.

85. *Nr. 192: Gespräch des Bundeskanzlers Kohl mit Präsident Bush, Camp David* (Feb. 24, 1990), *in* Küsters & Hofmann, *supra* note 35, at 868–69.

86. George H.W. Bush & Brent Scowcroft, A World Transformed 253 (1998); Zelikow & Rice, *supra* note 33, at 215; *Nr. 192: Gespräch des Bundeskanzlers Kohl mit Präsident Bush, Camp David* (Feb. 24, 1990), *in* Küsters & Hofmann, *supra* note 35, at 868–69.

87. *Nr. 350: Gespräch des Bundeskanzlers Kohl mit Präsident Gorbatschow Moskau* (July 15, 1990), *in* Küsters & Hofmann, *supra* note 35, at 1345; Documents on British Policy Overseas, *supra* note 42, at 434–35.

billion Deutsche Mark and another three billion in interest-free credit,[88] and signed the final 2+4 Treaty.[89]

C. *The Verdict of History: The Promise as Fact or Fiction?*

Russia's new assertiveness in Ukraine (as well as Syria) is often explained by referring to the alleged humiliation it suffered because of the "West's many broken promises, including the promise not to enlarge [NATO] beyond the borders of a reunified Germany."[90] In light of the historical analysis above, Mary Elise Sarotte raised two principal questions which are also crucial for the further analysis of this Article: first, when did the idea of NATO moving eastward come to mean more than to just East German territory? And second, is there historical evidence to support Russia's claim that such a step was prohibited under international law by the events of February 1990?[91]

With regard to the first question, the historical documents show that Baker, as well as Kohl, only discussed the future of Germany in the context of a potential extension of NATO into East Germany, and nothing more.[92] It needs to be mentioned that at no point did anybody bring up the question of extending NATO membership to other Warsaw Pact countries beyond Germany.[93] This would have never occurred to them because this issue was "simply not on the agenda" in Washington, Moscow, or any other Warsaw Pact capital.[94] If anybody raised the issue, it was the East European countries themselves. Already, on February 20, 1990, the Foreign Minister of Hungary, Gyula Horn, publicly suggested that his country should begin forging closer ties to NATO with a view to "eventually being integrated in its political bodies"—a view also echoed by Poland.[95] These suggestions were only speculative and any tentative feelers in the same direction received cool replies and were

88. Sarotte, *supra* note 6, at 96.

89. Sarotte, *supra* note 63, at 136.

90. Michael Rühle, *NATO Enlargement and Russia: Discerning Fact from Fiction*, 36 Am. Foreign Pol'y Ints. 234, 234 (2014); Gerald B. Solomon, The NATO Enlargement Debate, 1990–97: Blessings of Liberty 56 (1998).

91. Sarotte, *supra* note 63, at 136.

92. *See Nr. 173: Schreiben des Außenministers Baker an Bundeskanzler Kohl* (Feb. 10, 1990), *in* Küsters & Hofmann, *supra* note 35, at 793–94; Baker & Defrank, *supra* note 65, at 206.

93. Kramer, *supra* note 15, at 48.

94. *See id.* at 24, 48; Spohr, *supra* note 8, at 24.

95. Vojtech Mastny, *The Warsaw Pact as History*, *in* A Cardboard Castle? An Inside History of the Warsaw Pact, 1955–91 71 (Vojtech Mastny & Malcolm Byrne eds., 2005); Kramer, *supra* note 15, at 42.

strongly discouraged.[96] In fact, in the following years, it was not the West, but the East European states themselves that would push for future NATO membership.[97] Thus, except for Genscher's lone statement that the Soviet Union should have assurance that the Warsaw Pact countries "would not join NATO the next" day,[98] "[t]he record shows that no explicit promises on NATO expansion were made, but what was implied during the negotiations ultimately lies in the eyes of the beholder."[99] And it is exactly these implied statements that raise some doubts as to their legal quality.

Concerning the second question—whether NATO enlargement was indeed legally impermissible—the question of whether a promise was made or not must first be ascertained. By using recently declassified materials, *historians* agree that no legally binding promise was given to Soviet leaders by Western policy makers during the negotiations in February 1990 or later to foreclose NATO membership for Warsaw Pact countries or even Soviet republics.[100] In relation to Germany, it was not until the 2+4 Treaty signed in September 1990 that any binding assurances on Germany's security arrangements on the basis of NATO were given in writing and legally binding form. The resulting costs for the "'GDR's special military status' . . . were [subsequently] laid out in four bilateral German-Soviet treaties."[101] But most importantly, none of these treaties made any mention of NATO outside the context of discussing the status of German territory.[102] Concretely, if no legal promises on NATO's future membership were made, then there was no binding obligation that could subsequently have been broken. From a political and historical perspective, one can certainly debate whether NATO enlargement was a wise move or not, as it provoked Russia and ultimately soured its relations with the West.[103]

At this point, it should be clarified that the issue is not whether a formal agreement precluding NATO enlargement beyond Germany into East Europe was ever concluded; even Russian leaders

96. *See generally* Mark Kramer, *NATO, Russia, and East European Security, in* RUSSIA: A RETURN TO IMPERIALISM? 105–61 (Uri Ra'anan & Kate Martin eds., 1995) (discussing, inter alia, the relationship between NATO and East European countries).

97. Sarotte, *supra* note 63, at 137.

98. Spohr, *supra* note 8, at 18.

99. ANGELA E. STENT, RUSSIA AND GERMANY REBORN: UNIFICATION, THE SOVIET COLLAPSE, AND THE NEW EUROPE 140–41 (1999).

100. *See* Kramer, *supra* note 15, at 40; Sarotte, *supra* note 6, at 96–97.

101. Spohr, *supra* note 8, at 48.

102. *Id.*

103. *Id.*; Kramer, *supra* note 15, at 55.

claiming that the West broke a promise refrain from arguing that the Soviet Union had received a formal deal in 1990. Instead, what is much more pressing in the context of international law is the question of whether the various informal and implicit statements exchanged between Western and Soviet politicians can be regarded as legally binding promises,[104] and therefore, the historians' conclusions are without prejudice to any legal effect. These political and historical analyses need to be strictly distinguished from a thorough legal examination, which has never been conducted before. What really matters here is that some statements were made that might have been construed as "more far-reaching and . . . [legally] consequential in the [Russian] perceptions than has so far been acknowledged."[105] As a result, one could surmise that contrary to the predominant Western opinion, the issue of NATO enlargement regarding East Germany was indeed discussed between West Germany and the United States on the one hand, and the Soviet Union on the other hand.

Hence, together with the "persistence of preferred memories," the argument perseveres that the Soviet Union, and consequently Russia, were "bribed out" or even deceived by the West.[106] But the verdict of history seems insufficient to set the record straight, and therefore, a precise legal analysis is required to rebut this argument once and for all and to clarify that (at least) from an international law perspective, there never was a legally binding promise and hence, no promise could have been broken.

II. Unilateral Acts and Promises in International Law in Context

This Part proceeds to the legal analysis of the historical facts considered above. At the outset, it should be stipulated that the Russian claim can only be true if any of the above statements made by Genscher, Baker, or Kohl can be considered a legally binding unilateral act in the shape of a promise under international law. By examining the formal and substantive requirements of legally valid promises, this Article assesses whether the statements made by Genscher, Baker, and Kohl can be regarded as such or whether they were mere political announcements. First, this Part addresses the consensus around unilateral acts as sources of binding obligations in international law and sets out the specific elements consti-

104. Shifrinson, *supra* note 21, at 17.
105. Spohr, *supra* note 8, at 48–49.
106. Sarotte, *supra* note 7, at 227–29.

tuting unilateral acts. It then analyzes whether these elements were satisfied in the context of the negotiations for German reunification, addressing first the formal requirements, and then substantive requirements. Lastly, it considers factors that would have precluded the formation of a promise.

A. *Some Doctrinal Prolegomena on Unilateral Acts and Promises*

In certain situations, assurances given by states can create legally binding obligations for them to act accordingly henceforth. In contrast to the conclusion of a bilateral or multilateral treaty, which requires the active involvement of two or more state parties, such an obligation resulting from an assurance is not created through an offer met with acceptance, but solely through a state's unilateral undertaking.[107] Thus, unilateral acts constitute sources of obligation, although they are not among the traditional sources of international law enumerated in Article 38(1) of the Statute of the International Court of Justice (ICJ).[108] Because there is no codified definition of unilateral acts in international law, jurists have debated whether such acts have or display any binding force under international law, and if in the affirmative, whether to avoid a definition at all or whether to employ either a narrow, moderate, or broad definition.[109] For purposes of this Article, however, it suffices to define unilateral acts of states as (1) "an expression of will emanating from one state or states" made by an authorized representative of that state or states. Moreover, in order for the unilateral act to produce legal effects in conformity with international law, this expression of will additionally needs to be formulated as (2) a formal declaration, either written or oral, (3) directed towards an addressee, and (4) "with the intent to produce obligations under international law" through the manifestation of an intent to be bound.[110] This definition, mainly inspired by the

107. Christian Eckart, Promises of States under International Law 1, 40–41 (2012); Alfred P. Rubin, *The International Legal Effects of Unilateral Declarations*, 71 Am. J. Int'l L. 1, 8 (1977).

108. *See* Int'l Law Comm'n, Rep. on the Work of Its Fifty-Fourth Session, U.N. Doc. A/57/10, at 52 (2012).

109. *See, e.g.*, Eva Kassoti, The Juridical Nature of Unilateral Acts of States in International Law 23–28 (2015); Przemyslaw Saganek, Unilateral Acts of States in Public International Law 34–85 (2016).

110. *See* Int'l Law Comm'n, Rep. on the Work of Its Fifty-Eighth Session, U.N. Doc. A/61/10, at 367–68 (2006); Victor Rodriguez Cedeño & Maria Isabel Torres Cazorla, *Unilateral Acts of States in International Law*, *in* Max Planck Encyclopedia of International Law paras. 1–21 (Rüdiger Wolfrum ed., 2017).

Nuclear Tests judgments of the ICJ,[111] is used throughout this Article.

Furthermore, unilateral acts are usually categorized in terms of content and thus placed into four subcategories:[112] protest (as an act confirming rights), waiver (implying abandonment of rights), recognition, and promise (the latter two producing new obligations).[113] This four-fold categorization has received its fair share of criticism, for instance, for "confus[ing] conditioning facts and legal consequences,"[114] or for being incomplete.[115] Yet, for the purposes of this Article, these problems are negligible, as its main focus is on the particular subcategory of *promise* whose existence as a legal principle is undoubtable. It has been remarked that the formulation of "promise" is unfortunate or even a misnomer because it seems to imply mere moral, and not legal, obligations.[116] In this vein, ICJ Judge De Castro clearly stressed in his dissenting opinion in the *Nuclear Tests* case that there is "a difference between a promise which gives rise to a moral obligation (even when reinforced by oath or a word of honor) and a promise which legally binds the promisor. This distinction is universally prominent in municipal law and must be accorded even greater attention in international law."[117] A promise under international law is hence commonly understood to constitute a unilateral and unequivocal manifestation of a state's will, formulated either orally or in writing,[118] by which the state undertakes a legally binding commitment to do or to refrain from doing something in the future. This commitment on the part of the promisor is then reflected in a subjective right on the part of the addressee or promisee, which entitles the latter to demand the correct performance or better fulfillment of what has been promised.[119] Accordingly, a promise is not

111. *See* Nuclear Tests Case (Austl. v. Fr.), Judgment, 1974 I.C.J. Rep. 253, ¶ 43 (Dec. 20); Nuclear Tests (N.Z. v. Fr.), Judgment, 1974 I.C.J. Rep. 457, ¶ 46 (Dec. 20).

112. Dionisio Anzilotti, Cours de droit international 346 (1929).

113. Cedeño & Cazorla, *supra* note 110, para. 8.

114. *See, e.g.*, James Crawford, Brownlie's Principles of Public International Law 416 (8th ed., 2012).

115. *See, e.g.*, Eckart, *supra* note 107, at 27–28.

116. *Summary Record of the 2629th Meeting*, [2000] 1 Y.B. Int'l L. Comm'n 129, U.N. Doc. A/CN.4/SR.2629; Eckart, *supra* note 107, at 1 n.1.

117. Nuclear Tests Case (Austl. v. Fr.), Judgment, 1974 I.C.J. Rep. 374, ¶ 3 (Dec. 20) (J. De Castro, dissenting).

118. *See* Camille Goodman, *Acta Sunt Servanda?: A Regime for Regulating the Unilateral Acts of States at International Law*, 25 Austl. Y.B. Int'l L. 43, 47–48 (2006).

119. Eckart, *supra* note 107, at 28–29; Eric Suy & Nicolas Angelet, *Promise*, *in* Max Planck Encyclopedia of International Law paras. 1–2 (Rüdiger Wolfrum ed., 2013); Antonio Cassese, International Law 185 (2d ed., 2005).

required to be embedded in a treaty and thus has a truly autonomous and unilateral nature.[120]

At this point, attention should be redrawn to the definition of unilateral acts of states given above, according to which the following Sections and sub-Sections are structured. Unilateral acts of states are defined as (1) an expression of will emanating from one state or states made by an authorized representative of that state or states; (2) which needs to be formulated by way of a formal declaration, either written or oral, (3) directed towards an addressee, and (4) with the intent to produce obligations under international law by manifesting an intent to be bound. These elements will also be separated into "formal" (elements 1–3) and "substantive" (element 4) categories.

B. *Formal Requirements*

This Section proceeds by subsuming the historical facts discussed in Part I under the legal framework of unilateral acts, in general, and promises, in particular, under international law. It focuses on the formal requirements of a legally valid promise to determine whether the statements made by Genscher, Baker, and Kohl can be regarded as such. The analysis proceeds from the least controversial conditions (which can be more easily assessed and even affirmed) to the more problematic criteria.

1. Capacity of the State and Persons Authorized to Formulate Promises

This sub-Section discusses the formal requirement that a unilateral act has to be an expression of will emanating from one state or states made by an authorized representative of that state or states. Thus, the least problematic and controversial criterion is the question of whether the involved states (in this case, Germany and the United States) have the capacity to formulate a promise. This question can be clearly answered in the affirmative. First, states are sovereign and therefore are "free to restrict their freedom as they like";[121] second, if a state has the intent to bind itself unilaterally, its will to do so gives rise to a legal obligation once it has been expressed; and third, if states act in good faith, then there is no reason why they should be unable to bind themselves.[122] Moreover, one could resort to the analogy of Article 6 of the Vienna Con-

120. Suy & Angelet, *supra* note 119, paras. 2–3.
121. Eckart, *supra* note 107, at 195.
122. *Id.*

vention on the Law of Treaties (VCLT) declaring that "[e]very State possesses capacity to conclude treaties."[123] Consequently, if this capacity is the "essential legal prerequisite for a legally relevant expression of the intent to be bound by a treaty,"[124] where legal relations are at least of a bilateral nature and thus more complex, then it may also be safely applied in the context of less complex unilateral acts of states.[125] This capacity has also been confirmed by the works of the International Law Commission (ILC),[126] concretely in Guiding Principle 2, which closely follows the language of Article 6 of the VCLT.[127] Equally, a state can commit itself through unilateral acts such as a promise to undertake certain international obligations.[128]

A closely related, but nonetheless different question, is *who* has the authority to speak on behalf of a state and to commit it to a legally binding promise. In analogy with the law of treaties, Article 7(2)(a) of the VCLT sets forth that heads of state, heads of government, and ministers for foreign affairs are not required to produce full powers for the purpose of performing all acts relating to the conclusion of a treaty.[129] To ensure the effective functioning of international relations, states may, under international law, safely assume and trust that any act of any of another state's "Big Three" in the treaty-making process is definitively attributable to that respective state.[130] The same applies to unilateral acts and, as the ICJ emphasized, such acts bind the state internationally only if

123. Vienna Convention on the Law of Treaties art. 6, May 23, 1969, 1155 U.N.T.S. 331.

124. Kirsten Schmalenbach, *Article 6: Capacity of States to Conclude Treaties*, *in* VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY 107 (Oliver Dörr & Kirsten Schmalenbach eds., 2012) [hereinafter Dörr & Schmalenbach].

125. *See* Cedeño & Cazorla, *supra* note 110, para. 15.

126. Int'l Law Comm'n, Rep. on the Work of Its Fifty-First Session, U.N. Doc. A/54/10, at 135 (1999); Int'l Law Comm'n, Rep. on the Work of Its Fifty-Second Session, U.N. Doc. A/55/10, at 95 (2000); Int'l Law Comm'n, Rep. on the Work of Its Fifty-Eighth Session, U.N. Doc. A/61/10, at 561 (2006); Int'l Law Comm'n, Ninth Rep. on Unilateral Acts of States, by Victor Rodríguez Cedeño, Special Rapporteur, 175 (2006), U.N. Doc. A/CN.4/569; Int'l Law Comm'n, Guiding Principles Applicable to Unilateral Declarations of States Capable of Creating Legal Obligations, with Commentaries Thereto (2006), at 371 [hereinafter ILC Guiding Principles].

127. Int'l Law Comm'n, Ninth Rep. on Unilateral Acts of States, by Victor Rodríguez Cedeño, Special Rapporteur, 175 (2006), U.N. Doc. A/CN.4/569. Draft Guiding Principle 2 reads: "Every State possesses capacity to formulate unilateral acts in accordance with international law." *Id.*

128. Armed Activities on the Territory of the Congo (New Application: 2002) (Dem. Rep. Congo v. Rwanda), 2006 I.C.J. Rep. 6, ¶ 46 (Feb. 3).

129. *See* Arrest Warrant of 11 Apr. 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. Rep. 3, ¶ 53 (Feb. 14).

130. Frank Hoffmeister, *Article 7*, *in* Dörr & Schmalenbach, *supra* note 124, at 127.

they have been made by an authority vested with the power to do so—one of the Big Three.[131] This norm was accordingly set forth in ILC Guiding Principle 4.[132] In the context of the question at hand, therefore, U.S. Secretary of State Baker and West German Minister of Foreign Affairs Genscher were certainly authorized to act unilaterally on behalf of their states and to (potentially) give a promise. The same is true for Kohl as the West German head of government. Hence, the formal requirements with regard to the capacity of the state and persons authorized to formulate promises are all fulfilled and should not constitute any problems in this respect.

2. The Form and Publicity of Promises

This sub-Section discusses the formal requirement that unilateral acts need to be formulated by way of a formal declaration, either written or orally. In general, the ICJ highlighted that under international law, it is the intention of the parties, and not any particular form, which makes specific acts legally valid.[133] International jurisprudence shows the relative unimportance of formalities,[134] and therefore the question of form is not decisive,[135] which means that a promise can be made orally or in writing—a principle that has also been translated into ILC Guiding Principle 5.[136] Prima facie, an example of a written promise could be Baker's notes stating that "[u]nified Ger. anchored in a *changed (polit.) NATO – *whose juris. would not move *eastward!";[137] an oral promise, conversely, could be seen in Genscher's various statements and Kohl's conversation with Gorbachev. Furthermore, a unilateral commitment can also develop through a series of declarations having "the same general thrust," but which are in isolation, incapable of bind-

131. Cedeño & Cazorla, *supra* note 110, paras. 15–16; *see also* Armed Activities on the Territory of the Congo (New Application: 2002) (Dem. Rep. Congo v. Rwanda), 2006 I.C.J. Rep. 6, ¶ 46 (Feb. 3) (highlighting that Article 7 of the VCLT is an expression of customary international law, thereby also binding all those states that are not parties to the VCLT); Suy & Angelet, *supra* note 119, paras. 17–18 (discussing recent case law).

132. See ILC Guiding Principles, *supra* note 126, at 372.

133. Temple of Preah Vihear (Cambodia v. Thai.), Preliminary Objections, 1961 I.C.J. Rep. 17, 31 (May 26).

134. *See, e.g.*, The Mavrommatis Palestine Concessions, Judgment, 1924 P.C.I.J. (ser. A) No. 2, at 34 (Aug. 30); Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bos. & Herz. v. Yugoslavia), Preliminary Objections, 1996 I.C.J. Rep. 595, ¶¶ 24, 26 (July 11).

135. Nuclear Tests Case (Austl. v. Fr.), Judgment, 1974 I.C.J. Rep. 253 ¶ 45 (Dec. 20).

136. *See* ILC Guiding Principles, *supra* note 126, at 374.

137. SAROTTE, *supra* note 7, at 110; BAKER & DEFRANK, *supra* note 65, at 202–06 (providing James A. Baker's point of view on the Kremlin's concerns).

ing a state.[138] Unlike the *Nuclear Tests* case, where diplomatic correspondence lasted over ten years and in which France made numerous assurances to Australia and New Zealand that France would cease all atmospheric nuclear tests,[139] there are only three potential unilateral acts in the case at hand. This suggests that there was no unilateral commitment made through a series of declarations. The formation of a cumulative promise by way of a series of declarations is further undermined because the three statements were made by different states: only one by the United States (Baker), and two by Germany (Genscher and Kohl). Therefore, if a promise has indeed been given, it could only be found in a single statement, not in all of them taken together.

Another issue in the formation of a potential promise is whether the statement must be public, which affects a statement's status as credible evidence. In this context, written promises should not raise any issues, whereas oral promises are rather ephemeral and could prove more problematic. Especially once the Permanent Court of International Justice had recognized oral promises as a source of law in the *Eastern Greenland* case,[140] it became evident that in the absence of a written instrument, purely formal criteria are insufficient in ascertaining whether a legally valid promise has been made.[141] It was accordingly held that promises had to fulfill two criteria to be legally valid: they had to manifest a will to be legally bound and they had to be given publicly.[142] This is now also reflected in ILC Guiding Principle 1 and the appended commentary underlining that it is the public nature of declarations that represents "an important indication of their authors' intention to commit themselves."[143] It is, however, rather doubtful whether only promises made publicly or openly should be legally valid. That a promise is made behind closed doors, if with the requisite intent, should not be detrimental to its legal validity, nor should the number of those who could have witnessed it be decisive. After all, even international treaties can be concluded in closed sessions, and thus there is no plausible reason why promises should not be

138. ILC Guiding Principles, *supra* note 126, at 375; Nuclear Tests Case (Austl. v. Fr.), Judgment, 1974 I.C.J. Rep. 253, ¶ 49 (Dec. 20).

139. *See* Nuclear Tests Case (Austl. v. Fr.), Judgment, 1974 I.C.J. Rep. 253, ¶ 32 (Dec. 20); Nuclear Tests (N.Z. v. Fr.), Judgment, 1974 I.C.J. Rep. 457 ¶ 26 (Dec. 20).

140. *See* Legal Status of Eastern Greenland (Den. v. Nor.), Judgment, 1933 P.C.I.J. (ser. A/B) No. 53, at 71 (Aug. 2).

141. Jean d'Aspremont, Formalism and the Sources of International Law: A Theory of the Ascertainment of Legal Rules 173 (2011).

142. Nuclear Tests Case (Austl. v. Fr.), Judgment, 1974 I.C.J. Rep. 253, ¶ 32 (Dec. 20).

143. ILC Guiding Principles, *supra* note 126, at 370.

allowed to be made in a similar manner in order to be legally valid.[144] Leaving aside the intent of the promisor (discussed *infra*), the correct and more predominant view is that the manifestation of will to become legally bound need only, in one way or another, be "communicated to the addressee" in question.[145] This is also confirmed by the Swiss Federal Department of Foreign Affairs, which argued that statements do not need to be made directly before the eyes of the public to meet the relevant validity requirements.[146] Rather, "it is necessary that it is made to those to which it is of direct interest, be it through a diplomatic note or in the event of a discourse."[147]

Applying these findings to the case at hand, from a purely formal viewpoint, some statements are unproblematic and could be qualified as legally binding promises. First, Baker's potential promise was given in writing,[148] which is in itself unproblematic. Furthermore, it was given in private, but thereby directly communicated to both Shevardnadze and Gorbachev.[149] Because full public disclosure is not required for a promise to be valid, Baker's notes could be seen as satisfying the formal elements of a written promise. Second, even though they were solely expressed orally, the same applies to Kohl's private assurances to Gorbachev.[150] The oral and private nature of these statements is not per se a formal defect in a potential promise. Lastly, however, there is a major issue with Genscher's statements: although they were made in public, they were not directly addressed or communicated to the Soviet Union.[151] Interestingly, the Third ILC Report did not focus on the communication to the addressee, but found a declaration to be a unilateral act if it was "known" to the addressee.[152] If this requirement were indeed sufficient, one could safely assume that Genscher's statements would have somehow become known to the Soviet leaders

144. ECKART, *supra* note 107, at 239.

145. *Id.*; Suy & Angelet, *supra* note 119, para. 14; D'ASPREMONT, *supra* note 141, at 173.

146. Lucius Caflisch, *La Pratique Suisse en Matière de Droit International Public 1982*, *in* ANNUAIRE SUISSE DE DROIT INTERNATIONAL: VOL. XXXIX, 186 (Schulthess Polygraphischer & Verlag Zürich eds., 1983).

147. ECKART, *supra* note 107, at 240 (citing Swiss Federal Department of Foreign Affairs).

148. *See* BAKER & DEFRANK, *supra* note 65, at 202–06.

149. *Id.* at 206.

150. *See* Spohr, *supra* note 8, at 25–27; *Nr. 174: Gespräch des Bundeskanzlers Kohl mit Generalsekretär Gorbatschow Moskau* (Feb. 10, 1990), *in* Küsters & Hofmann, *supra* note 35, at 806.

151. *See* EUROPE TRANSFORMED, *supra* note 30, 440–41; Spohr, *supra* note 8, at 15–16.

152. Int'l Law Comm'n, Third Rep. On Unilateral Acts of States by Victor Rodríguez Cedeño, Special Rapporteur, U.N. Doc. A/CN.4/505, ¶ 80 (2000).

because his statements were public. Yet, the ILC rightly rejected this approach,[153] because "shifting the focus to the factual knowledge of the addressee . . . would only introduce a[n] [additional] factor of uncertainty," since "the moment of factual knowledge . . . [and thus the moment at which the legal obligation arises], is usually unknown to the declarant."[154] By focusing on the element of *direct communication* to the addressee as the crucial factor, it becomes obvious that Genscher's statements cannot be considered to be a legally binding promise from a formal perspective.

3. Addressees and Their Reaction

In the context of addressees, there are two more issues to be discussed. The first one concerns the addressees themselves and can be resolved rather easily. As declared by ILC Guiding Principle 6, unilateral declarations and promises can be "addressed to the international community as a whole, to one or several States or to other entities"[155] such as international organizations.[156] The question arising in this regard is whether Baker's notes and Kohl's statements can be considered to be promises entailing mere bilateral obligations vis-à-vis the Soviet Union or towards the international community as a whole (erga omnes obligations). This distinction is crucial, because the extent of the obligation and the legal consequences are fundamentally different in each case.[157] Whereas in the former case, only the Soviet Union (and now Russia) would be entitled to react to a broken promise, the latter situation would see all states as having a legal interest in protecting that promise and put them under an obligation not to recognize this breach of the law.[158] In the case at hand, it appears to be quite absurd to assume such an erga omnes situation, particularly when contrasted with the *Nuclear Tests* case in which the ICJ ascertained that the unilateral statements made by France were made erga omnes.[159] Through these statements, France conveyed to the world at large that it would effectively terminate its atmospheric

153. *See* Int'l Law Comm'n, Rep. on the Work of Its Fifty-Second Session, U.N. Doc. A/55/10, at 94, ¶ 558 (2000).

154. ECKART, *supra* note 107, at 241.

155. ILC Guiding Principles, *supra* note 126, at 376.

156. *See* Cedeño & Cazorla, *supra* note 110, para. 20.

157. *See* Barcelona Traction, Light and Power Company, Limited, Judgment (Belg. v. Spain), 1970 I.C.J. Rep. 3, ¶ 33 (Feb. 5).

158. *See id.*; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. Rep. 136, ¶ 159 (July 9).

159. *See* Nuclear Tests Case (Austl. v. Fr.), Judgment, 1974 I.C.J. 253 ¶¶ 50–51 (Dec. 20); Nuclear Tests (N.Z. v. Fr.), Judgment, 1974 I.C.J. Rep. 457, ¶¶ 52–53 (Dec. 20).

tests.[160] Given their environmental impact, a cessation of these tests was undoubtedly in the common interest of the international community,[161] whilst it can be assumed that the question of NATO enlargement is not of immediate concern to the majority of states. We can therefore safely assume that the statements made by Baker and Kohl were only addressed to Shevardnadze and Gorbachev, respectively, in their function as representatives of the Soviet Union.

The second issue is the impact of the addressee's reaction to a potential promise and the question of whether this reaction constitutes an additional legal criterion. In a rather cryptic manner, ILC Guiding Principle 3 states that "[t]o determine the legal effects of such declarations, it is necessary to take account of their content, of all the factual circumstances in which they were made, *and of the reactions to which they gave rise.*"[162] This last clause raises the question as to whether a reaction, e.g. consent, on the part of the addressee is necessary for determining the legal effects of a promise, or whether a unilateral act is sufficient in making promises legally binding.[163] The commentary on ILC Guiding Principle 3 mentions the ICJ's jurisprudence on the content and the factual circumstances of unilateral actions,[164] but fails to mention any cases in relation to the addressee's reactions. It is obvious that such reactions cannot be used in determining whether a unilateral act has manifested an intention to be bound or not. Through its reaction, the addressee cannot transform a vaguely or ambiguously worded declaration into a clearly and unequivocally manifested legal will or vice versa; it can thereby only echo how it understood and construed the declaration in question and then signal whether it was welcome or not.[165] The ICJ clarified that "nothing in the nature of a *quid pro quo* nor even any reply or reaction from other

160. *See* Nuclear Tests Case (Austl. v. Fr.), Judgment, 1974 I.C.J. Rep. 253, ¶¶ 50–51 (Dec. 20); Nuclear Tests (N.Z. v. Fr.), Judgment, 1974 I.C.J. Rep. 457, ¶¶ 52–53 (Dec. 20).

161. *See generally*, Karl Zemanek, *New Trends in the Enforcement of Erga Omnes Obligations*, 4 Max Planck U.N. Y.B. 1, 13 (2000) (discussing erga omnes obligations with respect to international regime reporting systems).

162. ILC Guiding Principles, *supra* note 126, at 371 (emphasis added).

163. Suy & Angelet, *supra* note 119, para. 3.

164. *See* ILC Guiding Principles, *supra* note 126, at 371 (citing Nuclear Tests Case (Austl. v. Fr.), Judgment, 1974 I.C.J. Rep. 253, ¶ 51 (Dec. 20); Nuclear Tests (N.Z. v. Fr.), Judgment, 1974 I.C.J. Rep. 457, ¶ 53 (Dec. 20); Frontier Dispute (Burk. Faso v. Mali), Judgment, 1986 I.C.J. Rep. 554 (Dec. 22); Armed Activities on the Territory of the Congo (New Application: 2002) (Dem. Rep. Congo v. Rwanda), Judgment, 2006 I.C.J. Rep. 6, ¶ 49 (Feb. 3)).

165. Eckart, *supra* note 107, at 248–49.

States is required for the declaration to take effect."[166] Nonetheless, although the addressee cannot influence whether or not a state has manifested an intent to be bound, its behavior can certainly have an impact on the existence of such an intention. More concretely, even if the addressee remains entirely silent or inactive upon learning of the promise, the promise—if it is indeed manifesting an intent to be legally bound—will be binding. This entails that, vice versa, an active acceptance of the declaration by the promisee is not required for a unilateral act to be legally binding. It is, however, important to note that a positive reaction by the promisee that goes beyond a mere statement and consists of concrete actions made in direct reliance on the promise, may have an additional impact under the estoppel doctrine[167] and hence further limit the promise's potential revocability. This means that only the outright rejection of a promise will directly impact the binding effect of the declaration made, since if the addressee displays that no expectations of a certain behavior on the part of the promisor exist, the basis for the act's legally binding nature will necessarily disappear. Thus, in this case, there will be no legal constraints on the statement's revocability.[168]

In the context of the concrete problem at hand, Gorbachev's respective reactions to Baker and Kohl do not appear to evince detrimental reliance.[169] When presented with Baker's statement that NATO would not expand its jurisdiction eastward, Gorbachev reacted and replied that such expansion was not acceptable,[170] which arguably should have further constrained the (alleged) promisor's future actions. Yet, in the meeting with Kohl, Gorbachev did not react to the question of NATO expansion to the GDR at all[171] and left matters entirely open. In fact, it is more plausible to argue that Gorbachev's reaction to the issue of German reunification was to accept financial help from the FRG.[172] There-

166. Nuclear Tests Case (Austl. v. Fr.), Judgment, 1974 I.C.J. Rep. 253, ¶ 43 (Dec. 20).

167. *See generally*, D.W. Bowett, *Estoppel Before International Tribunals and Its Relation to Acquiescence*, 33 BRITISH Y.B. INT'L L. 176 (1957); I.C. MacGibbon, *Estoppel in International Law*, 7 INT'L & COMP. L.Q. 468 (1958) (outlining the application of the estoppel doctrine in international contexts).

168. ECKART, *supra* note 107, at 249–50.

169. The question whether the statements made by Baker and Kohl manifested an intent to be legally bound will be deliberately disregarded at this point and discussed below.

170. GORBACHEV, *supra* note 59, at 528–29.

171. *See* Doc. 72, in Galkin & Tschernjajew, *supra* note 26, at 323.

172. *See Nr. 174: Gespräch des Bundeskanzlers Kohl mit Generalsekretär Gorbatschow Moskau* (Feb. 10, 1990), *in* Küsters & Hofmann, *supra* note 35, at 799.

fore, even under the assumption that Baker's statements were made with an intent to be legally bound (which was not the case, as will be shown below), these statements and the Soviet Union's reactions were virtually superseded by Kohl's statements and the respective reactions thereto. Seeing that the Soviet Union did not react in anticipation of the West's alleged promises and its dropping of NATO enlargement from the agenda, no further constraints on the United States and FRG qua estoppel can be presumed here.

C. *The Substantive Requirement: Intent to Be Legally Bound*

Having analyzed the formal requirements for a promise to be legally binding, this Section turns to the most controversial, yet decisive, criterion in this respect: the substantive requirement of unilateral acts, namely, the manifestation of an intent to be legally bound. This criterion is the most important in ascertaining whether Baker's and Kohl's statements can be regarded as legally binding promises or not.

The reason why such a decisive weight is placed on this criterion is because the binding force of a promise depends on the declaring state's intention to be bound. According to the ICJ, this intention can be determined by reference to the statement's content, which must be expressed in "clear and specific" terms, as well as "the context and the circumstances in which it was formulated."[173] Moreover, in situations where the intent to be bound is ambiguous, the scope of the potentially resulting obligations "must be interpreted in a restrictive manner."[174] These conditions are now also reflected in ILC Guiding Principle 7.[175] Seeing that law ascertainment of a unilateral promise is dependent on the intent of the author of such an act and that the identification of a legally valid promise remains a deeply speculative operation aimed at reconstructing this very intent,[176] this Section represents the analytical linchpin of this Article.

Especially concerning the last requirement, the demand for restrictive interpretation, the ICJ rightly held that "[o]f course, not all unilateral acts imply obligation . . . . [T]he intention [of being

173. Nuclear Tests Case (Austl. v. Fr.), Judgment, 1974 I.C.J. Rep. 253, ¶¶ 42–44 (Dec. 20); Cedeño & Cazorla, *supra* note 110, para. 26.

174. *Id.*

175. *See* ILC Guiding Principles, *supra* note 126, at 377.

176. D'Aspremont, *supra* note 141, at 179, 181; Jan Klabbers, The Concept of Treaty in International Law 11 (1996); Gennadii Danilenko, Law-Making in the International Community 57 (1993).

bound] is to be ascertained by interpretation of the act."[177] Consequently, when ascertaining whether a state really intended to bind itself legally, a restrictive interpretation must be applied, which in praxi means that, particularly in cases of doubt, it should be assumed that no legal intention has been expressed.[178] But when can a state consequently be seen to have manifested its intent to commit itself legally? The basis of the interpretation can only be the text or the content the declaration itself, interpreted in a "natural and reasonable way,"[179] which will not differ considerably from the interpretation standards applied to treaties.[180] Beyond that, to be legally binding, a declaration needs to be made in "clear and specific terms."[181] Examples of textual indicators that support the finding that a state has conveyed its intent to legally commit itself in clear terms include, inter alia, declarations speaking of their own "entry into force"; allowing for judicial dispute settlement of future conduct resulting from the promise; and setting forth remedies or allowing for sanctions in the case of breach.[182] There are, however, even more evident examples to deduce a state's clear intent to be legally bound, such as the express use of the words "legal obligations,"[183] "undertakings with legal effect,"[184] "shall," "will," and "hereby ensure to," among others. Nonetheless, this criterion in itself is not sufficient. Besides the clear wording of a statement, the conduct announced must also be "sufficiently specified."[185] As the ICJ ruled in the *Armed Activities* case, the declaration that "past reservations not yet withdrawn will shortly be withdrawn" was simply not precise enough to allow the statement to be understood as a legal commitment, especially the temporal aspect ("shortly").[186] States often commit themselves to "move forward,"

177. Nuclear Tests Case (Austl. v. Fr.), Judgment, 1974 I.C.J. Rep. 253, ¶ 44 (Dec. 20).

178. ECKART, *supra* note 107, at 213.

179. *See* Anglo-Iranian Oil Co. (U.K. v. Iran), Judgment, 1952 I.C.J. Rep. 93, 104 (July 22).

180. *See* Christian Tomuschat, Commentary to ICJ Statute Article 36, *in* THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE: A COMMENTARY 674, para. 65 (Andreas Zimmermann et al. eds., 2d ed. 2012).

181. Armed Activities on the Territory of the Congo (New Application: 2002) (Dem. Rep. Congo v. Rwanda), Judgment, 2006 I.C.J. Rep. 6, ¶ 40 (Feb. 3).

182. KLABBERS, *supra* note 176, at 68–80.

183. *See* Minister for Foreign Affairs of Egypt, Declaration on the Suez Canal and the Arrangements for Its Operation, Letter dated Apr. 24, 1957 from the Minister for Foreign Affairs of Egypt addressed to the Secretary-General, U.N. Doc. A/3576 (July 23, 1957).

184. *See* Ir. v. U.K., 25 Eur. Ct. H.R., 90, ¶¶ 102, 153.

185. ECKART, *supra* note 107, at 220.

186. Armed Activities on the Territory of the Congo (New Application: 2002) (Dem. Rep. Congo v. Rwanda), Judgment, 2006 I.C.J. Rep. 6, ¶ 51 (Feb. 3).

"to respond to a threat," "to fight against," or "to improve their efforts," but they do not thereby manifest a will to legally bind themselves because such statements do not contain pledges that are sufficiently specific so that they could be considered legally binding.[187] Thus, as a rule of thumb, one can conclude that the vaguer a statement is, the less likely it can be understood as a legal commitment. Lastly, any remaining uncertainties could possibly be remedied by taking into account the circumstances in which a clear and specific statement was made,[188] which constitutes an application by analogy of Article 31(2) VCLT.[189] Thus, the crucial criteria to be assessed at this point are extrinsic to the declaration in question, but they must nevertheless somehow relate to it and be made in "a certain temporal proximity."[190] Examples include explanations, ministerial statements, and press communiqués;[191] parliamentary debates and legislative proposals;[192] and "general policy presentations"[193] including certain statements of a legal character. Even though formalities in general do not impact the legal validity of a declaration, a heightened degree of formality can nonetheless be indicative of a state's intention to be legally bound. Registration of a unilateral declaration may corroborate the declarant's legal commitment, but a lack thereof cannot be taken as proving the absence of legal intent.[194] Finally, it also depends on whether a state representative had the time to carefully choose his or her words, or whether they made a statement in the spur of the moment. In such a case, the former will certainly be of greater impact on the issue of legal intent than the latter, and general statements communicated through the press to the public at large and responses to an unforeseen question put forward in an interview or conversation can be easily dismissed as non-legal statements.[195]

187. Eckart, *supra* note 107, at 221.

188. *See* Frontier Dispute (Burk. Faso v. Mali), Judgment, 1986 I.C.J. Rep. 554, ¶ 40 (Dec. 22); Armed Activities on the Territory of the Congo, Judgment, 2006 I.C.J. Rep. 6, ¶ 53 (Feb. 3); Nuclear Tests Case (Austl. v. Fr.), Judgment, 1974 I.C.J. Rep. 253, ¶ 51 (Dec. 20); Nuclear Tests (N.Z. v. Fr.), Judgment, 1974 I.C.J. Rep. 457 ¶ 53 (Dec. 20).

189. ILC Guiding Principles, *supra* note 126, at 378.

190. *See* Oliver Dörr, *Article 31*, *in* Dörr & Schmalenbach, *supra* note 124, at 549–52.

191. Aegean Sea Continental Shelf (Greece v. Turk.), Judgment, 1978 I.C.J. Rep. 3, ¶¶ 69–70, 95–105 (Dec. 19).

192. Fisheries Jurisdiction (Spain v. Can.), 1998 I.C.J. Rep. 432, ¶ 75 (Dec. 4).

193. Armed Activities on the Territory of the Congo (New Application: 2002) (Dem. Rep. Congo v. Rwanda), Judgment, 2006 I.C.J. Rep. 6, ¶ 53 (Feb. 3).

194. Klabbers, *supra* note 176, at 79.

195. *See* Eckart, *supra* note 107, at 227; Suy & Angelet, *supra* note 119, para. 21.

When subsuming the historical events of 1990 to the respective rules of international law, we need to strictly distinguish between a manifested will to undertake a *legal* commitment from "merely" *politically* relevant state conduct. Although Genscher's statements were already discounted as a potential promise under international law from a formal perspective,[196] let us nonetheless have another look at them from a substantive perspective. Drawing the line between the legal and political dimensions of such conduct is sometimes extremely difficult in practice. However, given his focus on German reunification, Genscher's statements should be seen as a display of political goodwill to achieve this goal, and not as statements of intent to legally commit Germany to prevent any future NATO enlargement. In his public speech, Genscher said that there was no interest to extend NATO to the east, as this "would block intra-German rapprochement";[197] and in a subsequent interview, he argued that there was "no intention to extend the NATO area of defense and security toward the East [*i.e.*, the GDR]," but concurrently insisted that there would be no "halfway membership this way or that."[198] Such a blatant contradiction within Genscher's statements obviously fails as the "clear wording" required of an expression of intent to be bound. Yet, even if one interprets this statement generously to mean that NATO's political councils should have jurisdiction over the reunified Germany as a whole, whilst NATO's military command would not encompass the former GDR, it undoubtedly falls afoul of the clearness requirement. Accordingly, the conduct announced cannot reasonably be specified as it was entirely uncertain what such "half-in, half-out status" of Germany would have entailed in legal and political terms. Furthermore, Genscher's choice of words after his meeting with Hurd, namely, that "[t]he [Soviet Union] *must have assurance*"[199] that other East European states would not immediately join NATO, speaks against an intention to be legally bound. Only an unequivocal choice of words along the lines of "we hereby give the Soviet Union the assurance" would have satisfied this condition.[200] Thus,

196. *See* Zelikow & Rice, *supra* note 33, at 176; Spohr, *supra* note 8, at 20.

197. Europe Transformed, *supra* note 30, at 440–41.

198. Zelikow & Rice, *supra* note 33, at 176.

199. Spohr, *supra* note 8, at 20 (emphasis added); Documents on British Policy Overseas, *supra* note 42, at 262.

200. The condition could also be satisfied through a statement such as Norwegian Foreign Minister Ihlen's rather straightforward declaration that "the plans of the Royal [Danish] Government respecting Danish sovereignty over the whole of Greenland . . . would [be met] with no difficulties on the part of Norway." Legal Status of Eastern Greenland (Den. v. Nor.), Judgment, 1933 P.C.I.J. (ser. A/B) No. 53, at 36–37 (Aug. 2).

a very restrictive interpretation is called for in cases of doubt such as this one. Lastly, at this early stage of the emerging post-Cold War order, opportunity structures were changing almost on a daily basis, and any potential treaties "with the Soviet Union . . . concerning Germany were still far off."[201] Accordingly, to issue such a legal commitment at this time would have been not only extremely premature, but also politically highly inopportune for the FRG, as well as the West in general—particularly given the resistance to what Genscher had said to the West German Minister of Defence.[202] In this light, and given the lack of any circumstances supporting a legal reading of these events, Genscher's statements cannot be seen as a legal promise to the Soviet Union to refrain from a future NATO enlargement.

Baker's statement in the form of his handwritten notes, namely, that "[u]nified Ger. anchored in a *changed (polit.) NATO – *whose juris. would not move *eastward,"[203] in contrast, appears to be clearer, but only prima facie. Here, the problem lies in the wording itself, in particular, the words "*would* not move" are extremely cautious and restrained. In line with the findings above, a clear legal intent on the part of Baker could only be ascertained through the use of statements such as "NATO jurisdiction *will/shall* not move eastward" or "we hereby *guarantee/give assurance* that NATO jurisdiction will not move eastward." Again, as above, due to the lack of clear wording, the conduct announced cannot be specified, since it was completely uncertain what Germany's future status in NATO would look like. Furthermore, the language used and ideas floated during the U.S.-Soviet bilateral talks were purely speculative statements, which evolved and transformed as the negotiations progressed. For Baker, the focus had been on paving the way for the Soviet Union's explicit consent to German reunification and the 2+4 framework as a mechanism to resolve the involved external aspects, including Germany's NATO membership, which eventually superseded the early phraseology. After all, Baker had presented and discussed policy concepts still under consideration within the U.S. administration, in which President Bush would have the final word—a fact which also speaks against any supporting circumstances. Moreover, as in Genscher's case, Baker could

201. Spohr, *supra* note 8, at 21.

202. Sarotte, *supra* note 63, at 123; *Nr. 182: Konstituierende Sitzung der Arbeitsgruppe Außen- und Sicherheitspolitik des Kabinettausschusses Deutsche Einheit* (Feb. 14, 1990), *in* Küsters & Hofmann, *supra* note 35, at 830–31.

203. Sarotte, *supra* note 7, at 221.

speak neither on behalf of NATO en bloc nor for West Germany in particular, whose representatives would meet the Soviet leaders on their own just one day after Baker.[204] Hence, by interpreting these statements restrictively, one can conclude that Baker's own actions "were not intended as [legally] binding promises."[205]

Lastly, Kohl also echoed Baker's statements by expressing an offer for a reunified Germany to join NATO, but without expanding NATO territory to the GDR.[206] As in the above cases, this statement also lacks clearness and specificity, and there are no circumstances that would support a potential legal character of this declaration. Yet, even beyond that, it is crucial to note that Kohl offered Gorbachev a quid pro quo for permitting German reunification, namely, generous financial help for the deteriorating Soviet economy.[207] This means that if there indeed was a legally binding act on the part of Kohl, it was not a promise, but an offer. The latter is—in contrast to the former—a conditional or reciprocal, not a unilateral, undertaking, which requires the recipient's additional manifestation of will (the acceptance) "in order to oblige the declarant to do as offered."[208] If this is the case, the declaration in question cannot be a promise, because necessarily, the legal concept of promise is unilateral and does not require a quid pro quo.[209] Distinguishing between a promise and an offer is not always as easy as it seems at first glance. Even *the* leading case in the field of unilateral declarations in international law, the *Eastern Greenland* case, has been alternatively interpreted as an agreement through which a request by Denmark "not to make any difficulties in the settlement of the [Greenland] question"[210] has been accepted by Norway through the Ihlen declaration; specifically, Judge Anzilotti regarded the declaration as part of an agreement by which Denmark assured Norway that it had no special interests at stake in Spitzbergen, whilst Norway accepted this offer by responding that it would not make any difficulties with respect to

204. Spohr, *supra* note 8, at 24.

205. *Id.*

206. Doc. 72, in Galkin & Tschernjajew, *supra* note 26, at 322; *Nr. 174: Gespräch des Bundeskanzlers Kohl mit Generalsekretär Gorbatschow Moskau*, *in* Küsters & Hofmann, *supra* note 35, at 798–99.

207. *Nr. 174: Gespräch des Bundeskanzlers Kohl mit Generalsekretär Gorbatschow Moskau*, *in* Küsters & Hofmann, *supra* note 35, at 799.

208. Eckart, *supra* note 107, at 230.

209. *Id.* at 230–32.

210. Legal Status of Eastern Greenland (Den. v. Nor.), Judgment, 1933 P.C.I.J. (ser. A/B) No. 53, at 70–71 (Aug. 2).

Greenland.[211] Yet, for the purposes of this Article, such an interpretation does not entail any problems. On the contrary, what this "heterodox" interpretation of the *Eastern Greenland* case implies is that the involvement of a quid pro quo rather makes the existence of a promise doubtful and that of an offer more probable, and not vice versa. Moreover, in this case, the temporal proximity of the offer to provide financial help to the Soviet Union and the acceptance of that by allowing for German reunification convincingly speaks against a unilateral promise and in favor of a reciprocal undertaking. Again, therefore, no legally binding promise was made.

In conclusion, this means that neither Genscher nor Baker manifested any will to be legally bound by a promise, and that Kohl did not unilaterally promise the Soviet Union anything, but engaged in a quid pro quo agreement. Furthermore, the question of NATO enlargement beyond the former GDR to Warsaw Pact countries was never envisaged nor discussed seriously in 1990; consequently, no statements in this respect could be considered to be legally binding promises. On substantive legal terms, the Russian claim must therefore be rejected in its entirety.

D. *The Relationship of a Potential Promise with Other International Principles and Obligations*

Whilst the two foregoing Sections on the formal and substantive requirements of a legally binding unilateral act addressed the question of whether a binding promise was indeed made on its own, the Section at hand investigates another closely related question, namely, whether a legally binding promise could have been made compatible with other separate principles and obligations under international law. Consequently, the following arguments examine the relationship of such a potential promise with the pacta tertiis rule on the one hand, and with any preexisting obligations within the legal framework of NATO on the other hand.

1. Promises and the Pacta Tertiis Rule

The first international legal principle potentially creating a problem for certain promises affecting the obligations of third parties is the so-called pacta tertiis rule. This argument builds on the idea that Moscow might have had in mind a veto to NATO enlargement

211. *Id.* at 87 (J. Anzilotti, dissenting); Hersch Lauterpacht, The Development of International Law by the International Court 210–11 (1958).

in Eastern Europe by way of a kind of Security Council power over Europe.[212] Yet, this raises the question of what legal principle such a veto right could have been justified by if the sovereign states of Central and East Europe wanted to join the alliance.[213] Even if there had been a legally binding promise not to enlarge, this would have blatantly disregarded the fact that these states are sovereign subjects of international law and that they can therefore decide for themselves whether or not to join an international organization[214] (even though limiting other states' options of becoming members of international organizations with certain exclusive membership criteria would probably not amount to a violation of their sovereignty). Furthermore, it needs to be mentioned that after the fall of the Berlin Wall, the Soviet Union and its legal successor—the Russian Federation—officially recognized the right of all European states, including the East European states, to choose their own security arrangements without Soviet interference in, inter alia, the "Charter of Paris for a New Europe" of 1990.[215] Thus, the question pondered at this point is whether the West even had the right under international law to give such a promise and to decide, on behalf of other states, on their then-hypothetical accession to NATO. Overall, this Section argues that any unilateral promise by the West not to enlarge NATO would not have violated the pacta tertiis rule because such a promise not to expand NATO would not create an obligation for the states seeking to join.

Besides the abovementioned argument that neither Genscher, Baker, nor Kohl had the political authority to speak for NATO as a whole, the principal legal argument against a valid promise could be found in the maxim of *pacta tertiis nec nocent nec prosunt*. It is well established in international law that obligations cannot be imposed by one state upon another state without the latter's consent—a rule that has been codified in Article 34 of the VCLT. Accordingly, it can be argued that there is no reason why this principle should not equally apply to unilateral declarations. The consequence is, as ILC Guiding Principle 9 states, that "[n]o obligation may result for other States from the unilateral declaration of a State . . . [unless] the other State or States concerned . . . clearly accepted such a declaration."[216] Prima facie, the Truman Proclamation, by

212. Solomon, *supra* note 90, at 56.
213. Mälksoo, *supra* note 17, at 175–76.
214. *Id.*
215. Bebler, *supra* note 13, at 49.
216. ILC Guiding Principles, *supra* note 126, at 379.

which the United States intended to impose obligations on third states by limiting their rights on the American continental shelf, appears to be an exception to the pacta tertiis rule. More precisely, however, this is not the case as this proclamation was not subject to acceptance by other states and hence did not constitute an exception to the rule later codified in Article 34 of the VCLT.[217] Not only has "this regime [of the continental shelf] furnishe[d] an example of a legal theory derived from a particular source that has secured a general following,"[218] but it also incentivized other states to respond to the proclamation with comparable claims and declarations. These reactions can therefore be seen as examples of acceptance,[219] which further substantiates the pacta tertiis rule.

Applied to the case at hand, one could argue that a hypothetical promise not to enlarge NATO would contravene this rule, as the then-candidate states never agreed *not* to accede to the North Atlantic Treaty. Therefore, such a promise, basically excluding other states as potential allies without any further considerations, would have considerably and adversely affected their legal position. Yet, perhaps the pacta tertiis rule is not applicable here at all, because the question remains whether a potential promise by the FRG or the United States would have indeed imposed an obligation on other states (the then-Warsaw Pact countries) not to accede to NATO in the future. To answer this question, a definition of the term "obligation" seems apposite, since the impact of a unilateral act on a third state may take a plethora of forms and manifest itself in different grades of intensity.[220] In this light, an obligation in the strict sense must, as a matter of logic, be distinguished from a third state being subjected to an adverse effect of (but not bound to) a unilateral act. The reason for this is that not every negative impact resulting from a treaty or unilateral act on a third state actually corresponds to an obligation in terms of Article 34 of the VCLT.[221] Alternatively put, states "have a general duty not to interfere with the due execution of the treaty, so long as it does not violate [i]nternational [l]aw, or their vested rights."[222] If "treaty" is now read as "unilateral act," the critical point is to establish the degree

217. Cedeño & Cazorla, *supra* note 110, para. 24.

218. North Sea Continental Shelf (Ger. v. Den.; Ger. v. Neth.), Judgment, 1969 I.C.J. Rep. 3, ¶ 100 (Feb. 20).

219. Cedeño & Cazorla, *supra* note 110, para. 24.

220. Alexander Proelss, *Article 34*, *in* Dörr & Schmalenbach, *supra* note 124, at 612.

221. *Id.*

222. Ronald Francis Roxburgh, International Conventions and Third States 32 (1917).

of intensity of the negative impact of a unilateral act on a third state to qualify it as an obligation in the strict sense of the word.[223]

In the context of NATO enlargement, it becomes clear that a potential promise not to expand NATO does not constitute an obligation for third states, since accession is not a right and thus non-accession is not an obligation for them. More concretely, NATO membership is based on Article 10 of the North Atlantic Treaty, which represents a classic "invitation clause," reading: "The Parties *may*, by unanimous agreement, invite any other European State in a position to further the principles of this Treaty and to contribute to the security of the North Atlantic area to accede to this Treaty."[224] Article 10 does not state that "[t]he Parties *shall*, by unanimous agreement, invite," but leaves them considerable leeway in deciding whether to invite prospective candidates or not. In this vein, it is impossible to speak of an obligation in terms of Article 34 of the VCLT or ILC Guiding Principle 9 if the impact of a unilateral act is of a purely factual nature.[225] This means that as long as a new unilateral act does not violate a previous treaty or other unilateral act, a third state cannot be regarded as being subject to an obligation deriving from the new unilateral act.[226] If there had indeed been a promise not to expand NATO, this would therefore not impose any legal obligations on third states, but simply subject them to negative factual consequences or "incidentally unfavorable effects,"[227] as their legal position would remain unaffected. To block or prevent eventual treaty membership and accession to an international organization such as NATO qua unilateral acts does not per se violate any rights or impose obligations, nor does it undermine the principle of state sovereignty.[228] Certain international organizations are not open to universal membership and strictly define which states may or may not join.[229] The Euro-

223. Alexander Proelss, *Article 34*, *in* Dörr & Schmalenbach, *supra* note 124, at 612.

224. North Atlantic Treaty art. 10, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243 (emphasis added).

225. *See* Alexander Proelss, *Article 34*, *in* Dörr & Schmalenbach, *supra* note 124, at 613.

226. *See* Christine Chinkin, Third Parties in International Law 19–20 (1993).

227. *See* Special Rapporteur Sir Gerald Fitzmaurice, *5th Report on the Law of Treaties*, at 81, 100, U.N. Doc. A/CN.4/130 (1960), *reprinted in* [1960] 2 Y.B. Int'l L. Comm'n 69, U.N. Doc. A/CN.4/SER.A/1960/ADD.1; Arnold McNair, The Law of Treaties 333–36 (2d ed., 1961).

228. *See* Konstantinos D. Magliveras, *Membership in International Organizations*, *in* Research Handbook on the Law of International Organizations 84–87 (Jan Klabbers & Åsa Wallendahl eds., 2011).

229. *See, e.g.*, Statute of the Council of Europe, art. 4, May 5, 1949, 87 U.N.T.S. 103, E.T.S. 1; Constitutive Act of the African Union, art. 29, July 11, 2000, 2158 U.N.T.S. 3; The

pean Union, for instance, only permits, according to Article 49 of the Treaty on European Union, "[a]ny European State which respects the values referred to in Article 2 and is committed to promoting them . . . to become a member of the Union."[230] If one of these criteria is not satisfied—for example, if a state is not geographically located in Europe, such as Morocco—then application for membership will be rejected[231] without imposing any obligations on this third state.[232]

Therefore, it cannot be assumed that a potential promise not to expand NATO would have imposed obligations on third states and thereby violated the pacta tertiis rule of international law. There is, however, another issue closely related and similar to this. In contrast to the question of imposing *external* obligations (*i.e.*, on non-NATO states), it must also be clarified whether such a potential promise would have related to a lawful object and whether it could have conflicted with another previously undertaken *internal* obligation among NATO members.

2. Preventing Invitations, Lawfulness, and Normative Conflicts

This sub-Section discusses whether a potential promise not to expand NATO by either the United States or West Germany could, first, be interpreted as an internal obligation to prevent any future invitations under Article 10 of the North Atlantic Treaty and by this means effectuate non-enlargement; and second, whether such a maneuver would conflict with another previously undertaken obligation within the NATO framework.

The response to the first question is fairly straightforward: given the legal findings above that no representative involved manifested an intent to be legally bound by their statements vis-à-vis the public

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Treaty of Amity and Cooperation in Southeast Asia, art. 18, Feb. 24, 1976, 1025 U.N.T.S. 317.

230. Treaty on European Union art. 49, Feb. 7, 1992, 1992 O.J. (C 191) 1. The values include, for instance, "human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities," societal "pluralism, non-discrimination, tolerance, justice, solidarity, and equality between women and men." *Id.* art. 2.

231. *See* European Parliament Secretariat, *Briefing No. 23, Legal Questions on Enlargement*, at 5, PE 167.617 (May 19, 1998).

232. Equally, the Protocol to the North Atlantic Treaty on the Accession of Greece and Turkey, which amended Article 6 of the Treaty and thus the geographical scope of Article 5 to include the non-European territory of Turkey, visibly shows that such geographical obstacles can be overcome in the case of consensus among the existing members. *See* North Atlantic Treaty, Protocol: Accession of Greece and Turkey art. 2, Oct. 17, 1951, 3 U.S.T. 43, 126 U.N.T.S. 350.

or the representatives of the Soviet Union, it can also be assumed that they did not intend to legally commit to specific future acts in their internal dealings within NATO. Moreover, it also seems safe to say that a legal commitment to prevent any future invitations to NATO under Article 10 is too complex a matter to be possibly covered by the statements made. In this sense, it would be far-fetched to construe the statements by Genscher, Baker, and Kohl as such a promise to refrain from inviting any then-Warsaw Pact countries.

Concerning the second question, there are additional crucial legal issues against such a move. Even assuming that a promise in the shape of a unilateral declaration was indeed made in 1990, the question remains whether such a promise was lawful and therefore valid. In analogy to Article 53 of the VCLT, ILC Guiding Principle 8 holds that "[a] unilateral declaration which is in conflict with a peremptory norm of general international law is void."[233] Although this stance on the invalidity of legal acts in contravention of jus cogens norms is entirely uncontroversial and thus generally accepted,[234] it is also not applicable to the situation at hand, since a promise not to invite certain states to join an international organization is definitely not a breach of a peremptory norm of international law. What was not codified in the ILC Guiding Principles, but was nonetheless widely discussed in the ILC, was the question of what the legal consequence of a unilateral act incompatible with another previously undertaken obligation of non-peremptory character would be[235]—a legal scenario that is much more plausible in the case at hand. Arguments pondered by the ILC ranged from the ab initio invalidity of the later undertaking[236] to its continuing validity and triggering the defaulting state's international responsibility.[237] In parallel with the law of treaties and the VCLT, preference is usually given to the latter approach, as it safeguards the

233. ILC Guiding Principles, *supra* note 126, at 378.

234. *See* Vienna Convention on the Law of Treaties arts. 53, 64, May 23, 1969, 1155 U.N.T.S. 331.

235. *See* Int'l Law Comm'n, Fifth Report on Unilateral Acts of States by Special Rapporteur Victor Rodríguez Cedeño (Apr. 4, 2002, Apr. 17, 2002 & May 10, 2002), ¶ 94, U.N. Doc. A/CN.4/525 (Incorporating A/CN.4/525/Add.1/Corr.1 & 2).

236. Krzysztof Skubiszekwski, *Unilateral Acts of States*, *in* INTERNATIONAL LAW: ACHIEVEMENTS AND PROSPECTS 22 (Mohammed Bedjaoui ed., 1991); Int'l Law Comm'n, Second Report on Unilateral Acts of States by Special Rapporteur Victor Rodríguez Cedeño (Apr. 14, 1999 & May 10, 1999), ¶ 116, U.N. Doc. A/CN.4/500 & Add.1.

237. Jean-Didier Sicault, *Du Caractere Obligatoire des Engagements Unilateraux en Droit International Public*, 83 REVUE GÉNÉRALE DE DROIT INT'L PUB. 633, 662 (1979); Jean d'Aspremont Lynden, *Les Travaux De La Commission du Droit International Relatifs Aux Actes Unilateraux Des Etats*, 109 REVUE GÉNÉRALE DE DROIT INT'L PUB. 163, 185–87 (2005).

legal position of the non-defaulting state by allowing it to claim compensation for any damages incurred.[238]

Yet again, the focus is not on the external relations outside of NATO, but on its internal workings. Therefore, the question is not about possible claims to compensation by third states (which would have been excluded anyway, given the above findings on the inapplicability of the pacta tertiis rule), but about the analogous problem of whether a later undertaking that is incompatible with a previous obligation under the North Atlantic Treaty is unlawful. Again, assuming that a legal promise has been given not to enlarge NATO, this later undertaking could possibly conflict with a previously undertaken obligation, namely, Article 10 of the North Atlantic Treaty. Although this provision does not bestow any rights in its external dimension on prospective NATO candidates, it can be interpreted as imposing obligations in NATO's internal relations on other member states. The reason for this is NATO's general "open door policy" based on Article 10, which—as already mentioned above—offers membership to any European state "in a position to further the principles of this Treaty and to contribute to the security of the North Atlantic area."[239] In this context, the word "position" means that prospective NATO members must fulfill the obligations and responsibilities of membership, and other material requirements similar to the European Union's Copenhagen Criteria,[240] including a functioning democratic political system based on a market economy, the fair treatment of minority populations, a commitment to the peaceful resolution of conflicts, the ability and willingness to make a military contribution to NATO operations, and a commitment to democratic civil-military relations and institutional structures.[241] If these criteria are satisfied, then by unanimous agreement, which will be achieved through political negotiations and consensus,[242] NATO may extend an invitation to another country. A crucial factor in these negotiations and the unanimous agreement remains that no third country has a say in

238. Eckart, *supra* note 107, at 244.

239. North Atlantic Treaty art. 10, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243.

240. European Council, *Conclusions of the Presidency*, SN 180/1/93 REV 1 (June 21–22, 1993).

241. *Study on NATO Enlargement*, NATO (Sept. 3, 1995), http://www.nato.int/cps/en/natohq/official_texts_24733.htm (last visited Dec. 28, 2017) [https://perma.cc/54ZX-BSPL].

242. *See* Stuart Croft, *Guaranteeing Europe's Security? Enlarging NATO Again*, 78 Int'l Aff. 97, 104 (2002) (discussing problems and disagreements involved).

such deliberations.[243] A previous promise not to enlarge NATO by one of its members, however, would give a third country a considerable say in these deliberations and accordingly conflict with Article 10.

Given these discrepancies between a potential promise not to enlarge NATO and the implications of Article 10, the promisor would be in breach of Article 8 of the North Atlantic Treaty, which states that each party "undertakes not to enter into any international engagement in conflict with this Treaty."[244] The North Atlantic Treaty does not specify any legal consequences for such an act, but it is evident that this provision was designed to prevent individual NATO member states from providing actual or implied security guarantees to other non-NATO members, and thus from undermining NATO's collective security mechanism by engaging in other international obligations.[245] This would indeed be the case if one member state promised a non-member state (the Soviet Union) not to invite certain third states (the former Warsaw Pact countries). In practice, this means that any subsequently undertaken international obligations such as a unilateral act or promise would not be allowed to detract from the respective state's NATO obligations, and any actions subsequent to the posterior undertaking would need to recognize the primacy of NATO over them.[246] Thus, in the case of conflict, the later undertaking would become legally ineffective in the same way that Article 103 of the U.N. Charter prevails over any posterior conflicting international agreement.[247] Any potential promise would therefore have been legally insignificant within NATO's internal decision-making process.

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243. *Enlargement*, NATO (June 16, 2017), http://www.nato.int/cps/en/natohq/topics_49212.htm (last visited Dec. 28, 2017) [https://perma.cc/6BVX-GSZQ].

244. North Atlantic Treaty art. 8, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243.

245. Ulrich Franke, Die NATO nach 1989: Das Rätsel ihres Fortbestandes 156 (2010).

246. For example, when Turkey, which had become a NATO member in 1952, signed the Baghdad Pact (or Central Treaty Organization, CENTO, dissolved in 1979) in 1955, the question of how to reconcile contradicting obligations from both treaties arose. *See* Merlin W. Anderson, Turkey, CENTO vs. NATO: Mutually Supporting or a Conflict of Interests? (Apr. 8, 1966), at 21–22 (unpublished thesis, U.S. Army War College) (on file at http://www.dtic.mil/dtic/tr/fulltext/u2/a510152.pdf) [https://perma.cc/5HPE-U7BX].

247. Rain Liivoja, *The Scope of the Supremacy Clause of the United Nations Charter*, 57 Int'l & Comp. L.Q. 583, 605 (2008); Christopher J. Borgen, *Treaty Conflicts and Normative Fragmentation*, *in* The Oxford Guide to Treaties 448, 458 (Duncan B. Hollis ed., 2012); Carlo Focarelli, International Law as a Social Construct: The Struggle for Global Justice 293–94 (2012).

E. *Interim Conclusion*

The foregoing Sections of this Article intended to demonstrate that no legally binding promise not to extend NATO was given by the West to the Soviet Union in 1990. And indeed, when subsumed under the respective rules of international law, one can see that any statements given after the fall of the Berlin Wall do not amount to such. From a formal perspective, it is beyond doubt that both the United States and the FRG (and their representatives, respectively) as sovereign states certainly had the capacity to give a potential promise and that the form of such a promise is principally indecisive for its validity. Yet, while Baker's and Kohl's announcements were directly communicated to the Soviet leaders and therefore fulfilled the formal requirement of "publicity," Genscher's statements were made in public, but never directly reached their potential addressees.[248] Thus, his declaration must be disregarded as a legally binding promise on the formal level. Lastly, even though the addressee's reaction is not constitutive for a promise's ultimate validity, Gorbachev's passivity vis-à-vis the West's alleged promises and his dropping of NATO enlargement from the overall political agenda in subsequent negotiations is highly indicative of the Soviet Union not considering the statements made to be legally binding promises in the first place.

More important than formalities are the substance of the declarations and the intent of the potential promisors. This is exactly the point where it is evident that no legally binding promise was given: the statements made were neither sufficiently clear and specific, nor were there any supporting circumstances for a genuine intent to be legally bound. And if no such intent was manifested, then the West's declarations were mere expressions of political conduct and not indicative of a legally binding promise. Furthermore, the result of Kohl's conversation with Gorbachev especially fails to amount to a promise because of the agreed quid pro quo (financial help for German reunification), which turns the potential unilateral promise into a reciprocal undertaking.[249] Hence, any claims that a legally binding promise was given must be entirely rejected from a substantive perspective. Although the pacta tertiis rule could technically allow the opposite result, the conclusion that

248. *See* Zelikow & Rice, *supra* note 33, at 176 (regarding Genscher); Sarotte, *supra* note 7, at 110 (regarding Baker); *Nr. 174: Gespräch des Bundeskanzlers Kohl mit Generalsekretär Gorbatschow Moskau*, *in* Küsters & Hofmann, *supra* note 35, at 798–99 (regarding Kohl).

249. This issue will also be discussed in Part III below in the context of the *clausula rebus sic stantibus* and the question of under which conditions a promise is revocable or not.

no obligation against enlarging NATO existed is also corroborated by Articles 8 and 10 of the North Atlantic Treaty, which would render such a promise legally ineffective in light of previously undertaken obligations of NATO members.

III. The Revocability of Unilateral Acts in Context

Another legal problem needs discussion, namely, that of the legal consequences and potential revocability of promises under international law. The promisee—in this case, the Soviet Union, and its successor state, the Russian Federation—argues that a promise was made, but subsequently revoked in breach of the law.[250] In other words, the question is: how much trust should be protected under the principle of good faith, and under which conditions can a promise be lawfully revoked?[251] Or applied to the issue at hand: assuming that a promise has indeed been given, is there any legal rule that would have allowed the West (*i.e.*, NATO and/or the respective states) to revoke it?

Today, the extreme position regarding promises to be irrevocable[252] has been given up in favor of analogously applying the rules on the terminability of treaty obligations to unilateral declarations,[253] especially Article 61 (supervening impossibility of performance) and Article 62 (fundamental change of circumstances) of the VCLT. However, given the lack of state practice or any ICJ decisions in this respect, it should be noted that ILC Guiding Principle 10, which basically copies a scrap of the *Nuclear Tests* case,[254] is the only legal basis available in relation to the possible "revocability of promises."[255] In a nutshell, this principle states that a legally binding unilateral declaration cannot be revoked arbitrarily, and in "assessing whether a revocation would be arbitrary, considera-

250. *See* Shifrinson, *supra* note 21, at 40–41; Jeffrey A. Larsen, *NATO Nuclear Policy, the Ukraine Crisis, and the Wales Summit*, *in* Nuclear Threats and Security Challenges 88–89 (Samuel Apikyan & David Diamond eds., 2015); *Gorbachev: West Breaks Word with NATO Expansion Plans*, Moscow Times (May 23, 1996).

251. Skubiszekwsi, *supra* note 251, at 234, 238 (providing a general discussion of revocability); Rubin, *supra* note 107, at 10–11; Eckart, *supra* note 107, at 251–76.

252. Jean-Paul Jacqué, Eléments Pour Une Théorie de L'acte Juridique en Droit International Public 256.

253. *See* Sergio M. Carbone, *Promise in International Law: A Confirmation of Its Binding Force*, 1 Italian Y.B. Int'l L. 172 (1975).

254. *See* Nuclear Tests Case (Austl. v. Fr.), Judgment, 1974 I.C.J. Rep. 253, ¶ 51 (Dec. 20) ("The Court finds that the unilateral undertaking resulting from these statements cannot be interpreted as having been made in implicit reliance on an arbitrary power of reconsideration.").

255. Eckart, *supra* note 107, at 254–58.

tion should be given to: (a) [a]ny specific terms of the declaration relating to revocation; (b) [t]he extent to which those to whom the obligations are owed have relied on such obligations; [and] (c) [t]he extent to which there has been a fundamental change in the circumstances."[256] Accordingly, "[t]here can be no doubt that unilateral acts may be withdrawn or amended in certain specific circumstances"[257] and if this is the case, the rescinding state is not acting arbitrarily and therefore unlawfully.

When applying these criteria to the case at hand, one can see that condition (a) is not applicable, as the declarations made did not include any specific terms relating to their revocation.[258] Conditions (b) and (c), conversely, are much more interesting in this context and deserve some closer scrutiny. Scenario (b) concerns the estoppel doctrine and entails that a state is no longer allowed to alter its earlier (promised) position on account of the addressee having not only relied on the statement made, but if it "also had caused another state or states, in reliance on such conduct, detrimentally to change position or suffer some prejudice."[259] Yet, as already briefly discussed above,[260] Gorbachev did not react to Baker's and Kohl's statements by implementing a policy or decisions in regard to NATO's non-enlargement. Therefore, it is not plausible to argue that the Soviet Union relied on the statements made, had to detrimentally change its position, or suffered some prejudice. The estoppel doctrine does not apply here, which means that any potential promise was not arbitrarily revoked. Furthermore, when taking into consideration scenario (c), it is also likely that any potential promise could have been lawfully revoked in accordance with the *clausula rebus sic stantibus*,[261] that is, in the event of a fundamental change of circumstances which has occurred regarding those circumstances existing at the time of the conclusion of the treaty, and which was not foreseen by any of the parties, thus allowing for terminating or withdrawing from the treaty. Even if Baker or Kohl had first promised not to expand

256. ILC Guiding Principles, *supra* note 126, at 380.

257. *Id.*

258. Certainly, this is only logical, because the declarations made cannot be considered legally binding promises, and therefore, there would have been no reason to include such terms.

259. Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.), Judgment, 1984 I.C.J. Rep. 392, ¶ 51 (Nov. 26).

260. *See infra* Section III.B.3.

261. *See* ILC Guiding Principles, *supra* note 126, at 380 (explaining the concept of *clausula rebus sic stantibus*, a doctrine that allows rescission where there has been a "fundamental change of circumstances").

NATO, this would have been superseded by Kohl's later statements and actions in terms of financial help for the Soviet Union in exchange for German reunification. This quid pro quo fundamentally changed the circumstances and would have allowed for the revocation of a potential promise. Thus, even assuming that a legally binding promise was in fact made, its revocation would have been lawful and entirely in accordance with international law, and Russian claims of a subsequently broken promise have no legal basis.

IV. The Impermissibility of the Russian Response

The current debate in Russia is predominated by the perception that since the end of the Cold War, the West has constantly breached international law, in particular, in Kosovo in 1999 and in Iraq in 2003.[262] Moreover, one has to understand that for post-Soviet Russia, the concept of international law differs from that of the West: Russia regards international law in a much more traditional way wherein sovereignty and states take center stage and human rights do not form part of international law. Russia's emphasis lies on formalism and a textual interpretation of the U.N. Charter, the privileged powers of the Security Council as a system of "five oligarchs," and the view that states formerly or currently within Russia's sphere of influence are mere "neighboring" and not "foreign" countries. Accordingly, in their mutual relations, it is a regional legal order, prescribed by Russia, which applies, and not international law.[263] Thus, the ousting of Ukrainian President Yanukovych was considered to be an unconstitutional coup, and the alleged threats against the Russian-speaking parts of the Ukrainian population justified the annexation of Crimea as "remedial secession."[264]

Returning to the central question of this Article, these actions raise the question of whether the breaking of an alleged promise by the West—which is and remains, after all, the crux of the matter and the underlying cause for the currently strained relations between Russia and the West—can justify the Russian response to the crisis in Ukraine. Russia itself argues that if NATO can violate

262. Thomas D. Grant, Aggression against Ukraine 171 (2015).

263. Mälksoo, *supra* note 17, at 153–54, 174–78; Roy Allison, Russia, the West, and Military Intervention 18, 213 (2013).

264. Anatoly Kapustin, *Crimea's Self-Determination in the Light of Contemporary International Law*, 75 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 116 (2015).

international law and make new rules and exceptions for itself, then "Russia has no choice but to follow its example."[265] In 2010, Russian Foreign Minister Sergey Lavrov himself argued, in the context of NATO just consulting the United Nations but not submitting itself to Security Council authorization for the use of force, that "[t]his will provoke the temptation to say: if NATO can do it, why can't we?"[266] More concretely: even assuming that the Russian position is correct and that a promise was given and subsequently broken, is there any rule in international law which would govern and justify the Russian actions in Ukraine and its annexation of Crimea?

If we again assume that the statements made in 1990 indeed represented legally binding promises, then a look into the ILC Guiding Principles reveals that it remains silent on any legal consequences. The topic was discussed in the meetings of the ILC, but the latest result was only a brief and self-evident sentence in the Ninth Report of the Special Rapporteur: "Unilateral acts would, of course, be subject to international law and failure to comply therewith would cause the author state to incur international responsibility."[267] This means, alternatively put, that if a state breaks a promise through which it entered a legal commitment, it breaches an international obligation, which constitutes an internationally wrongful act and entails that state's international responsibility.[268] The law of state responsibility is clear on the legal consequences of an internationally wrongful act, and exhaustively enumerates the measures an injured state may employ to claim reparation for an injury: restitution, compensation (including interest), or satisfaction.[269] If the defaulting state refuses to comply, then the injured state can—in the absence of a centralized international law-enforcing mechanism[270]—only take recourse to the instrument of retorsion or countermeasures.[271] Yet, the central point remains that the

265. *See* MĀLKSOO, *supra* note 17, at 134.

266. *Interview of Russian Foreign Minister Sergey Lavrov*, PERMANENT MISSION RUSSIAN FED'N TO EUROPEAN UNION (June 11, 2010), https://russiaeu.ru/en/news/interview-russian-foreign-minister-sergey-lavrov-we-cant-say-nato-presents-threat-us [https://perma.cc/ER3N-32TF].

267. Int'l Law Comm'n, Ninth Report on Unilateral Acts of States, *supra* note 126, at 173.

268. *See Responsibility of States for Internationally Wrongful Acts*, [2001] 2 Y.B. Int'l L. Comm'n, arts. 1, 2(b), 12, U.N. Doc. A/56/49(Vol. I)/Corr.4.

269. *Id.* arts. 34–48.

270. Philip Allott, *The Concept of International Law*, 10 EUR. J. INT'L L. 42 (1999).

271. JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT, AND COMMENTARIES 281–82 (2002).

scope of countermeasures is especially very limited: inter alia, the injured state must refrain from the threat or the use of force; it must not violate any jus cogens norms of international law; and any countermeasures applied must be proportionate to the injury suffered.[272]

The actions conducted by Russia in the context of the referendum in Crimea, leading to its secession and subsequent annexation—if seen as a reaction to a broken promise—are thus certainly not permissible under international law. By relocating military units to Crimea before the referendum,[273] Russia not only violated the general prohibition of the use of force under Article 2(4) of the U.N. Charter; the 1994 Budapest Memorandum on Security Assurances;[274] the 1997 Treaty on Friendship, Cooperation, and Partnership between Ukraine and Russia;[275] and the 1997 Black Sea Fleet Agreement;[276] but also acted in contravention of Article 50 of the Draft Articles on the Responsibility of States for Internationally Wrongful Acts.[277] These actions relied on the use of force, concurrently violated jus cogens, and were entirely unproportionate to the claimed injury: an alleged promise, given in 1990, not to extend NATO to East Germany. Therefore, even if there had been a legally binding promise, its breach cannot justify the measures carried out by Russia in Ukraine and they are certainly illegal under international law.

Conclusion

The conclusions of this Article are clear-cut and straightforward: NATO enlargement without consulting or involving Russia in developing a post-Cold War European security arrangement was undoubtedly politically unwise, but it was certainly not legally pro-

272. *Responsibility of States for Internationally Wrongful Acts*, *supra* note 268, arts. 50–52.

273. *See, e.g.*, Veronika Bílkova, *The Use of Force by the Russian Federation in Crimea*, 75 Zeitschrift für ausländisches öffentliches Recht und Völkerrecht 27, 30–37 (2015).

274. This obligates Russia to respect the independence, sovereignty, and the existing borders of Ukraine and to refrain from the threat or use of force against it (points 1 and 2). *See* David S. Yost, *The Budapest Memorandum and Russia's Intervention in Ukraine*, 91 Int'l Aff. 505, 538 (2015).

275. *See* Treaty on Friendship, Cooperation and Partnership Between Ukraine and the Russian Federation arts. 2–3, Apr. 1, 1999 (highlighting the mutual respect for territorial integrity, the inviolability of borders, and the non-use of force).

276. See Article 6, stating that military formations stationed in Crimea and Sevastopol carry out their activities while respecting Ukraine's sovereignty, abiding by its legislation, and not allowing interference in Ukraine's internal affairs.

277. *See* Draft Articles on *Responsibility of States for Internationally Wrongful Acts*, [2001] 2 Y.B. Int'l L. Comm'n, art. 50, U.N. Doc. A/56/10(Vol. II(2)).

hibited by a promise, allegedly given by the West to the Soviet Union that NATO would not further expand to East Europe. The main legal argument remains that no intent to be legally bound by the statements given was manifested on the part of the West. The Soviet Union could have struck a deal with the United States, but it did not. Obviously, such an agreement among the United States, West Germany, and the Soviet Union would have required NATO approval, and in the dynamic political climate of 1990, it would have been possible to secure it. Even a written press release would have helped the Soviet cause, but Gorbachev failed to obtain one, and subsequently, the window of opportunity closed.[278]

Furthermore, a united Germany in NATO never constituted a "preconceived stepping stone for later enlargements."[279] All political questions aside, even if there actually had been a legally binding promise, the whole thinking behind this narrative ignores the fact that all Central and East European states are sovereign subjects under international law which could themselves make the choice whether to join NATO or not. "[N]o one else could have given final and binding guarantees *for them*."[280] The current memory politics over NATO's enlargements to East Europe signal not an interest in uncovering what really happened in 1990 and whether these actions are legally relevant, but merely an effort by Russian officials to use history to "legitimize current political positions" and actions, as well as to "persist in preferred memories."[281] Baker presciently wrote in his memoirs as U.S. Secretary of State that "[a]lmost every achievement contains within its success the seeds of a future problem."[282] This appears to be especially true for the post-Cold War politics between the West and Russia, now bearing poisonous fruits in Ukraine.

278. Sarotte, *supra* note 63, at 140.
279. Spohr, *supra* note 8, at 51.
280. Mälksoo, *supra* note 17, at 176.
281. Spohr, *supra* note 8, at 54; Sarotte, *supra* note 7, at 228.
282. Baker & Defrank, *supra* note 65, at 84.