# The Aura of Unilateral Statements in International Law: Nuclear Tests Cases Revisited

*Amos O. Enabulele*[*]

In December 1974, the International Court of Justice (ICJ) ruled on two applications brought separately against France by Australia and New Zealand with respect to the same transactions – atmospheric nuclear tests in the South Pacific.[1] The ICJ held that unilateral declarations[2] made by France in press conferences and television interviews, were enforceable *erga omnes*, notwithstanding that the said declarations were never accepted by any State, let alone, New Zealand or Australia, toward which France directed the declarations. Following this line of reasoning, the Court held that the undertakings contained in the declarations sufficed to meet the Applicants' cases. The *Nuclear Tests cases* are germane to this discourse, not only because of the unexplained gaps in the reasoning of the Court but also because they stand out as the first and only decisions wherein the Court has used unilateral declarations of this nature extensively against a State towards which they were directed. The cases raise some salient questions about the legal uses to which unilateral declarations could be put under international law, and under what circumstances. The questions which intrigues us are: (a) was the Court right, in the circumstances of the cases, to hold that the unilateral declarations made by France were binding on New Zealand and Australia, and most importantly, on France itself? If the answer to (a) is in the positive; (b) did the declarations precisely and unequivocally address the claims raised by New Zealand and Australia to render the claims moot?

This piece takes a fresh look at the decisions of the Court in the cases alongside other relevant decisions of the Court and argues that the reasoning of the Court, particularly, the uses to which it put the unilateral statements of France, in the circumstances of the cases, were novel and unjustified by the facts before the Court. It further argues that even if the Court was right to hold that the declarations were legally binding, they did not sufficiently address the claims of the respective Applicants, as there was no evidentiary basis to infer the existence of the bilateral engagements that would have rendered the object of the applications moot. In conclusion, we affirm that the declarations did not attract the necessary legal ingredients that would have justified the legal character attributed to them by the Court, and therefore urge the Court to overrule its reasoning in the cases in clear terms whenever the opportunity presents itself again.

The substantive part of this work is divided into four parts. Part 1 states the facts of the cases and the decisions of the Court; Parts II and III shall discuss the questions raised above; and Part IV states our conclusion.

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[*] LLM, BL, Lecturer, Department of Jurisprudence & International Law, Faculty of Law, University of Benin, Nigeria. (PhD candidate, Brunel University, West London).

[1] *Nuclear Tests Case* (*New Zealand v France*), Judgment of December 20, 1974, ICJ 1974, 457; *Nuclear Tests Case (Australia v France)*, Judgment of December 20, 1974 ICJ Reps, 1974, 253 (In the course of the work, Australia and New Zealand will sometimes be simply referred to as the Applicants).

[2] Unilateral statements and unilateral declarations are used interchangeably throughout the paper to refer to the same thing. The former is consciously used in the heading to define the theme of this paper so as to avoid confusing it with unilateral declarations generally.

**Part I: New Zealand v France; Australia v France**

On May 9, 1973, New Zealand and Australia brought separate applications against France with respect to a dispute concerning the legality of the series of atmospheric nuclear tests conducted by France in the South Pacific Ocean, given the adverse environmental effects of the tests. Each of the Applicants requested the Court to declare, *inter alia*, that the conduct by the French Government of nuclear tests in the South Pacific region constituted a violation of applicable rules of international law.[3] France refused to participate in the proceedings stating in separate letters to the Court that the Court was manifestly incompetent and that it would not accept its jurisdiction in the case. Nonetheless, at the separate requests of New Zealand and Australia, the Court indicated certain interim measures of protection to the effect that the French Government should avoid nuclear tests causing the deposit of radio-active fall-out on New Zealand territory[4] and on Australian territory.[5]

Due to the objection of France to the jurisdiction of the Court and admissibility of the claims in both cases, the Court had to decide on these preliminary issues first, emphasising that it would not delve into the merits of the cases. Despite this assurance, the Court relied on public statements made by France which, if applicable, would have been relevant at the merit stage of the proceedings, to accede to the requests of France that the matters be removed from the list of Court. In reaching this conclusion, the Court reasoned that the said public statements by France created legal obligations which resolved the objects contained in the respective claims of the Applicants. These statements consist of a total of seven statements made by French officials, between June 8, 1974 and October 11, 1974,[6] when proceedings were pending before the Court. For their importance, the reasoning of the Court in this regard is detailed below.

The Court reasoned that it is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations. The Court stated the legal requirements that would guide it to be that a unilateral declaration: (a) must be very specific; (b) the declarant must intend to be bound according to its terms, as it is intention that confers on the declaration the character of a legal undertaking; (c) it needs not be made in the context of international negotiations. It is binding, if given publicly, and with intent to be bound; (d) it does not require anything in the nature of *quid pro quod* nor any subsequent acceptance of the declaration, nor even any reply or reaction from other States, as such a requirement would be inconsistent with the strictly unilateral nature of the juridical act by which the pronouncement by the State was made.[7]

Applying the said principles to the cases, the Court said:

> *The objects of these statements are clear and they were addressed to the international community as a whole, and [...] they constitute an undertaking possessing legal effect. The Court considers that the President of the Republic, in deciding upon the effective cessation of atmospheric tests, gave an undertaking to the international community to which his words were addressed. It is true that the French Government has consistently*

[3] *New Zealand v France, ibid,* at 460, para. 11; *Australia v France, ibid,* at 256, para. 11.
[4] *Nuclear Tests (New Zealand v France), Interim Protection Order of June 22*, 1973, ICJ Rep 1973, 135, 142.
[5] *Nuclear Tests (Australia v France), Interim Protection Order of June 22*, 1973, ICJ Rep 1973, 99, 106.
[6] See 14-16 below.
[7] *New Zealand v France, supra,* at 472, para. 46; *Australia* v *France, supra,* at 267, para. 43.

> *maintained that its nuclear experiments do not contravene any subsisting provision of international law, nor did France recognize that it was bound by any rule of international law to terminate its tests, but this does not affect the legal consequences of the statements examined above.*[8]

Expanding on the basis of obligation of such declarations, the Court pointed out that:

> *Just as the very rule of pacta sunt servanda in the law of treaties is based on good faith, so also is the binding character of an international obligation assumed by unilateral declaration. Thus interested States may take cognizance of unilateral declarations and place confidence in them, and are entitled to require that the obligation thus created be respected.*[9]

Having so determined, the Court did not see any need to adjudicate on the core of the dispute submitted for adjudication, declaring that there was no longer any legal dispute between the Parties as the final objective which the Applicants had maintained throughout, was achieved by means of the said unilateral declarations. This was so irrespective of whether one party 'assert[s] that there is a dispute, since "whether there exists an international dispute is a matter for objective determination" by the Court.'[10] For 'if the declarations of France concerning the effective cessation of the nuclear tests have the significance described by the Court, that is to say if they have caused the dispute to disappear, all the necessary consequences must be drawn from this finding.'[11]
The foregoing shall now form the basis of our analysis.

## Part II: The Legal Effects of Unilateral Declarations

In the current state of development of international law, the obligations of States are products of their consent, which is expressed either in treaty or in accepted customary practices. Except for the amorphous *ius cogens* concept, there seem to be no third category – i.e. presumed obligations.[12] Customs accrue from the practice of States accepted as law while treaties are contractual undertakings by States. It thus follows that the intention of a State to create a legally enforceable obligation – be it to confer a benefit or to forbear in relation to another State – must be conveyed in express terms, for which treaties and not customs are most suitable. Treaties are defined as agreements between two States intended to have legal consequences. Treaties, being agreements, are in the nature of contracts and thus largely, though not explicitly, defined by the same ingredients – offer, acceptance and consideration – that define the legally enforceable agreements of individuals under municipal law.[13] Hence the negotiation of treaties are characterised by compromises – a

[8] *New Zealand*, at 474, para. 53; *Australia*, at 269, para. 51.
[9] *New Zealand v France, supra*, at 473, para. 49; *Australia v France, supra*, at 268, para. 46.
[10] *New Zealand v France, supra*, at 476, para. 58; *Australia v France, supra*, at 271, para. 55.
[11] *Ibid.*
[12] The *Case of S.S. Lotus*, PCIJ, Judgment of September 7, 1927; Series A, No. 10 at 18 and 19, (holding that, 'restrictions upon the independence of states cannot [...] be presumed' and that international law leaves to States 'a wide measure of discretion which is only limited in certain cases by prohibitive rules'); Hersch, Lauterpacht, 'The Grotian Tradition of International Law' (1946) 23 Brit Y.B. Int'l L. 1, 1, (noting that international law is 'the product of the will of states as expressed in their consent [....]').
[13] 'Consideration' is not universally an element of a valid contract. But under the common law, except for a few exceptions, it is a requirement of a binding contract that an offeree must furnish consideration for the promise of the offeror for the offeree to be able to enforce the offeror's promise. It is the price for which the promise of the other is bought and must be something of value consisting either a benefit to the offeror or a forbearance on the

*quid pro quod* or a give and take attitude – as well as benefits or forbearance and the intention to create legal relationship.[14] The element of "agreement" is conveyed in the Vienna Convention on the Law of Treaties, which defines treaties as, 'international agreement[s] concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation.'[15] The contractual basis of treaty relations is further emphasised in the Vienna Convention, which variously used the term 'Contracting States', to define parties to a treaty. Indeed as rightly pointed out by Judge Weeramantry:

> *It is true we are considering a question of international law, but this analysis shows us also that we are very much in the sphere of the law of consensual obligations, from which we draw our general principles and foundation requirements. We must not be diverted from the basic principles of this body of law, as universally recognized, by the circumstance that we are operating in the territory of international law. Where any situation in international law depends on consensus, the generally accepted principles relating to consensual obligations would apply to that situation, unless expressly varied or abrogated. How is a consensual obligation formed? The completed legal product results from the classical process of the meeting of minds which follows from a confluence of offer and acceptance. This is accepted by most legal systems, with the rarest of exceptions. This principle is accepted alike by the Anglo-American law and the Romanistic legal systems. There are indeed substantial differences among different legal systems regarding such matters as the status and revocability of the offer, but the basic principle that the minds of offeror and offeree must meet remains unaffected by these considerations, and belongs to the common core of legal systems.*[16]

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part of the offeree. See Paul Richards, *The Definition of Consideration in Contracts* (7th Ed., Pearson Education, Harlow, 2006) 54. The common law definition of the term was given in *Currie v Misa* (1875) LR 10 Ex 153, thus: 'a valuable consideration in the sense of the law, may consist either in some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other.'

[14] However these requirements do not define the validity of a treaty, there being no rule of international law requiring the proof of such ingredients for a treaty to be enforceable as would be required by municipal courts for the validity of contracts in some jurisdictions. In the *Aegean Sea Continental Shelf Case* (*Greece v Turkey*) Judgment of December 19, 1978: ICJ Rep. 1978, 3 at 39, para. 96, a joint communiqué was a binding agreement within the contemplation of Article 2(1) of the Vienna Convention on the Law of Treaties; so were minutes of meetings in the *Case Concerning Maritime Delimitation and Territorial Questions between Qatar v. Bahrain (Qatar v Bahrain* ) *Jurisdiction and Admissibility* Judgment of July 1 1994: ICJ Rep 1994, 112 at 120 ff., para. 22-30. Nonetheless, offer, acceptance and (to a lesser degree) consideration, though may be latent in treaty making, they do supply the underlying motivations for the existence of treaty relations. States seldom act in absolutely altruistic terms; they are constantly seeking to maximize their interests. For this reasons, States seek to know how they stand to benefit from a treaty relation. That benefit supplies the consideration for the existence of that treaty. This is usually implicit in the treaty itself and sometimes seen in the light of reciprocity. Taking the Nuclear Non-Proliferation Treaty (NPT), 1970, 729 UNTS 161, for instance, one would discover a range of benefits and forbearances which define the interests of the Parties. Examples of this include the many Treaties of Friendship, Commerce and Navigation between States.

[15] Article 2(1)(a). This definition conforms to the definition of contract – Jack, Beatson, *Anson's Law of Contract* (29th Ed., Oxford University Press, Oxford, 2002) 12 (defining a contract, 'as a legally binding agreement made between two or more persons, by which rights are acquired by one or mor**e to** acts or forbearance on the part of the other or others.') 'Whichever definition of the law of contract we use, the word, "agreement" will be central to it; put simply, it is the law relating to, and regulating agreements [...] the law also requires that something of value must be given by both parties to an agreement; it will not enforce gratuitous promises. This is the requirement of consideration which is fundamental to simple contracts' – L. Koffman & E. Macdonald, *The Law of Contract*, (6th Ed., Oxford University Press, Oxford, 2007) 10.

[16] Dissenting Opinion of Judge Weeramantry in the *Land and Maritime Boundary between Cameroon and Nigeria*, Preliminary Objections, Judgment of June 11, 1998 p. 275 at 368 ff.

Accordingly, the rules governing unilateral declarations must be situated within the purview of Article 38 (1) of the Statute of the Court which obligates it to decide according to law, which may be: (a) treaties; (b) customs; and (c) general principles of law recognised by civilised nations. Absent any of these, the Court is entitled to invoke (d) the subsidiary means of the jurisprudence of the Court and doctrines of the most highly qualified publicists. Without attempting a discussion of Article 38 (1), it suffices to state that paragraphs (a)-(c) requires the Court to apply rules already existing within the international system or those, which though are yet to be applied in international law are nonetheless suitable of application as a consensus rule of municipal law. On the other hand, the Court could have recourse to jurisprudence and doctrines to fill a lacuna and prevent *non liquet.* At this point the Court becomes innovative resulting in the development of new rules or the extension of pre-existing rules.

Unfortunately, the Court did not leave us with many clues, in the *Nuclear Tests* decisions, on the source from which the unilateral declarations in question took their obligatory character. The Court merely declared that, '[i]t is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations',[17] without referring to the authority of any of the items in Article 38. Notwithstanding, the rule applied by the Court, could either be explained as an extension of the rules governing treaties or as a completely new rule enunciated by the Court to meet the exigencies of the *Nuclear Tests cases*.[18]

The attribution of legal force to unilateral declaration is not peculiar to the *Nuclear Tests* decisions. The ICJ and its predecessor, the Permanent Court of International Justice (PCIJ), had, on occasions, adjudicated on unilateral declarations. In 1962, Jessup declared in the *South West Africa Cases,*[19] that it is generally recognized that there may be unilateral agreements, arising out of unilateral acts in which only one party makes a promise and may well be the only party bound; noting that unilateral contracts of the same character are recognized in some municipal legal systems. He cited Professor Brierly, to the effect that, '[a] possible explanation of the binding force of so-called unilateral declarations creative of rights against the declarant is to be found in the theory of presumed consent of the beneficiary.'[20] There are however different types of unilateral declarations with each adapted to its peculiar nature. The most common, is the optional clause declaration made under Article 36 (2) of the Statute of the Court. The unilateral nature of this declaration has, in many cases, given rise to the problem of when it can be said to interlock with other unilateral declarations for a bilateral engagement to arise.[21] To resolve this question, the Court has always sought guidance from the contractual principles of agreements, even while maintaining that the said declarations are not treaties and therefore not strictly

[17] *New Zealand v France*, *supra*, at 472, para. 46; *Australia v France*, *supra*, at 267, para. 43.

[18] This completely rules out customary international law and general principles of law, neither of which the Court would have applied without a detailed analysis of the existence of the rule as a rule of custom or general principles.

[19] Separate Opinion of Jessup in *South West Africa cases* (*Ethiopia v. South Africa) Preliminary Objections*, Judgment of December 21 1962: ICJ Rep 1962, 319 at 401-402.

[20] *Ibid.*

[21] In *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States)*, Jurisdiction and Admissibility, Judgment of 26 November 1984; ICJ Rep. 1984, 392, para. 60, (holding that 'though unilateral declarations accepting the compulsory jurisdiction of the courts are unilateral acts they 'establish a series of bilateral engagements with other states accepting the same obligation of compulsory jurisdiction.').

governed by the same rules.[22] According to the Court, the rule governing this specie of unilateral declarations is that:

> *Any State party to the Statute, in adhering to the jurisdiction of the Court in accordance with Article 36, paragraph 2, accepts jurisdiction in its relations with States previously having adhered to that clause. At the same time, it makes a standing offer to the other States party to the Statute which have not yet deposited a declaration of acceptance. The day one of those States accepts that offer by depositing in its turn its declaration of acceptance, the consensual bond is established [....]* [23]

The PCIJ had occasion to deal with yet another type of unilateral declaration in the *Eastern Greenland case*.[24] Here, the question was whether a declaration made by Mr. Ihlen the Norwegian Minister for Foreign Affairs (the Ihlen Declaration) constituted an engagement obliging Norway to refrain from occupying any part of Greenland. The said declaration was made in a conversation with the accredited Denmark Minister to Norway. The latter had informed Mr. Ihlen on July 14, 1919, that Denmark had no interests in Spitzbergen and had no reason to oppose the wishes of Norway concerning the settlement of the question of Spitzbergen, which Norway might submit at the Peace Conference. The Danish Minister further informed the Norwegian Minister that Denmark was desirous of extending its sovereignty over the whole of Greenland, and concluded that he was 'confident that the Norwegian Government will not make any difficulties in the settlement of this question.' On July 22 1919, the Norwegian Minister responded, declaring that 'the Norwegian government would not make any difficulties in the settlement of the question'.[25]

When in 1931 Norway made a proclamation by which it declared sovereignty over Eastern Greenland, Denmark brought this suit, relying, *inter alia*, on the said Declaration of Mr. Ihlen. In its determination, the Court reasoned that if the two declarations were interdependent, they would fuse into a bilateral agreement, but that even if interdependence is not held to have been established, it was undeniable that Denmark was seeking reciprocal assurances from Norway with regard to Greenland as it was conceding regarding Spitzbergen.[26] Accordingly, the Court held that the undertaking involved in the declaration given by Mr. Ihlen, being definitive and unconditional, obliged Norway to refrain from contesting Danish sovereignty over Greenland as a whole, but that the declaration was not definitive of the recognition of Danish sovereignty over Greenland by Norway.

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[22] *Fisheries Jurisdiction (Spain v Canada)*, Judgement of December 4, 1998: ICJ Rep 1998, 432 at 435, para. 46; *Land and Maritime Boundary between Cameroon and Nigeria*, *supra* at 293, para. 30. However, treaty rules could be applied to unilateral declarations by analogy – *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States) Jurisdiction and Admissibility*, *supra* at 420, para. 63.

[23] *Cameroon* v *Nigeria*, 291, para. 25 citing the *Right of Passage Over Indian Territory*, *Preliminary Objections*, Judgment of November 26, 1957: ICJ Rep 1957, 125, with approval.

[24] *The Legal Status of Eastern Greenland*, PCIJ Judgment of April 5, 1933, Series A/B No. 53.

[25] *Ibid* at 70.

[26] *Ibid* at 71. Although as has been rightly pointed out, international law makes very little uses of such analytical tools as offer, acceptance (and consideration, which is peculiar to the common law) in the general law of treaty, - Malgosia, Fitzmaurice and Olufemi, Elias, *Contemporary Issues in the Law of Treaties*, (Eleven International Publishers, Netherlands, 2005) 15, these tools cannot be completely ignored with respect to unilateral declarations, which the Court hinges, to a very large extent, on offer, acceptance and arguably consideration. This could be seen from the *Eastern Greenland case*, (*supra*) where the Court was prepared to hold that a bilateral engagement had been entered into by Norway and Denmark from their respective unilateral statements, if they are found to be interdependent. i.e., if the concession of the Spitzbergen question by Denmark was in consideration of Norway conceding the Greenland question.

These instances may help illuminate our discourse. In the first instance above, the Court hinged the obligatory character of the optional clause declarations on the contractual principles of 'offer' and 'acceptance.' The Court followed the same line of reasoning in the second case, ostensibly declaring that interdependence of unilateral promises was a prerequisite to the formation of bilateral engagements. These go to show that unilateral declarations, unlike treaties strictly so called, lay more emphasis on the elements of contract as a clear manifestation of intention to enter into legal relationship.[27]

We are however confronted with a different situation in the *Nuclear Tests cases*. As seen above, the Court did not bother to determine whether the declarations established a nexus between France, on the one side, and each of the Applicants on the other. On the contrary, the Court declared that neither acceptance nor *quid pro quod* needed to move from the Applicants, yet, as with treaties, the declarations are equally governed by the rule of *pacta sunt servanda*, though the consent of the beneficiaries, actual or presumed is unnecessary. A peculiar feature of the *Nuclear Tests cases* that distinguish them from all other cases of unilateral declaration, is the fact that in all the other cases, it is the adverse party that requested the Court to hold a declarant State accountable to its declaration – a kind of estoppels.[28] But in the *Nuclear Tests cases*, the Applicants did not ask the Court to hold France accountable to the statements. On the contrary they consistently showed that they attached no legal significance to the statements. One possible way of rationalising the view of the Court is to treat it as a possible recognition of unilateral treaties. At first glance, this may seem a very strange proposition, but it may make sense when we understand that this is not an entirely new concept in international law. The PCIJ applied this concept to a different situation than we confront, though not expressly coining the phrase 'unilateral treaties'. In the case of the *Free Zones of Upper Savoy and the District of Gex*[29] the PCIJ considered a 1829 manifesto issued by the Royal Sardinian Courts of Accounts Organ as a document having the character of a treaty stipulation; France was held bound to respect as a successor in sovereignty over the territory the Manifesto concerned, its unilateral character notwithstanding. Accordingly unilateral declarations, as those made by France, could carry the stipulation of a treaty irrespective of their oral nature, when the requisite intentions are established.[30]

The formation of unilateral treaty can be analogized to the common law notion of unilateral contract, and could thus be understood from the common law perspective. At common law, a unilateral contract relaxes the rule of acceptance to enable the offeror to be bound by a promise through the performance of the stipulation in the offer, without a communication of acceptance or direct consideration flowing from the offeree. In this scenario, there is no mutuality of promises and like France, only the offeror makes a promise.[31] The *locus classicus* for the common law rule is the case of *Carlill v Carbolic Smoke Ball Company*.[32]

[27] See also *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)* Merits, Judgment of June 27, 1986; I.C.J Rep. 1986, 14, at 132, para. 261, where the Court looked for a formal offer which, if accepted would produce a legal obligation from a unilateral declaration.

[28] See *Eastern Greenland case, supra*; the *Case Concerning the Temple of Preah Vihear (Cambodia v Thailand),* Merits, Judgment of June 15, 1962: ICJ Rep 1962, 6 (holding that Thailand, having by its conduct, demonstrated that the disputed Temple was under the sovereignty of Cambodia, was bound by its conduct).

[29] Series A/B No. 46 (1932) 145.

[30] Form, 'there is no rule of international law which prevents an oral agreement from constituting a binding international agreement' – *Separate Opinion of Jessup in South West Africa cases, supra* at 402.

[31] See Judge Jessup in the *South West Africa Cases, supra,* at 401 ff.

[32] [1893] 1 QB 256 CA (hereafter the 'Carlill case').

In the case, the Defendants, the proprietors of a medical preparation called 'The Carbolic Smoke Ball', issued an advertisement in which they offered to pay £100 to any person who contracted the influenza after having used one of their smoke balls in a specified manner and for a specified period. The Plaintiff, on the faith of the advertisement, bought one of the balls; used it in the manner and for the period specified, and nevertheless contracted the influenza. The Court of Appeal, affirming the lower court, held that the facts established an enforceable contract irrespective of the absence of an actual meeting of the minds. Expectedly, the Defendants had argued that there was no contract, absent the elements of a valid contract – offer, acceptance and consideration.

In reaching its decision the Court found that there was indeed a valid offer in the unmistakable language of the advertisement. And being an offer to the whole world, acceptance did not need to be communicated to the Defendants, as performance of the condition is sufficient acceptance without notification. The court made it clear that consideration consisted in the inconveniences the plaintiff suffered in using the product as well as the benefits the Defendants received from higher sales.

It is clear from the reasoning of the English Court above that the Court was not interested in creating a distinct subject of law but rather to accommodate the peculiar facts of the case within the law of contract. Hence towards establishing a meeting of the minds, the Court's evaluation of evidence geared towards the cardinal ingredients of the law of contract – offer, acceptance and consideration – which the Court found to have been fully established in evidence, though not in the conventional way,[33] just as the PCIJ and the ICJ tailored the principles governing unilateral declarations after those of the law of treaty.[34]

It may be argued that the ICJ had this common law principle in mind when it held that the declarations of France were binding irrespective of the absence of acceptance by the Applicants and the absence of a *quid pro quo*[35] flowing from them to France. For this to be however, there must be established that mutuality of a set goal from which the Court discovered the existence of an agreement in the *Carlill case.*

## Part III. The Nuclear Tests Unilateral Declarations Reconsidered.

We shall now examine the text of the declarations with the above discussions in mind. As described above, the Court relied on seven different statements made by France during the pendency of the case, in which it was stated, sometimes equivocally, that France will stop conducting atmospheric nuclear testing in the South Pacific Ocean.[36] The first statement was contained in the communiqué issued by the Office of the President of the France on June 8, 1974, stating that, '[...] in view of the stage reached in carrying out the French nuclear defence programme, France will be in a position to pass on to the stage of underground explosions as soon as the series of tests planned for this summer is

[33] This is also the understanding of English text writers, who understand unilateral contracts to mean which possess all the ingredients of a valid contract except that: (a) the offeree need not communicate acceptance; and (b) consideration is furnished by performance of the condition(s) set by the offeror. See Brian A. Blum, Contracts: Examples & Explanations (Aspens Publishers Online 2007) 79-80; Michael H Whincup, *Contract Law and Practice: The English System with Scottish, Commonwealth* (5th Ed., Kluwer Law International, Netherlands, 2006) 59 ff.

[34] See 8-12 above.

[35] Which arguably, imports the common law requirement of consideration.

[36] For details of the statements, see *New Zealand v France, supra,* 469 ff., para. 36-43; *Australia v France, supra,* 265 ff., para. 34-41.

completed.' The second is contained in a Note of June 1974 10, from the French Embassy in Wellington to the New Zealand Ministry of Foreign Affairs, reaffirming the earlier statement but with the addendum that, '[...] the atmospheric tests which will be carried out shortly will, in the normal course of events, be the last of this type. The French authorities express the hope that the New Zealand Government will find this information of some interest and will wish to take it into consideration.' The third French statement was contained in a reply to a letter from the Prime Minister of New Zealand, on July 1, 1974, wherein the President of France stated, '[i]n present circumstances, it is at least gratifying for me to note the positive reaction in your letter to the announcement in the communiqué of June 8, 1974 that we are going over to underground tests. There is in this a new element whose importance will not, I trust, escape the New Zealand Government.' The fourth was made by the French President in a press conference on July 25, 1974, giving the assurance that, 'I had myself made it clear that this round of atmospheric tests would be the last, and so the members of the Government were completely informed of our intentions in this respect [....]' The fifth was made by the French minister of defence on 16 August, 1974, during a television interview that: '[...] the French Government had done its best to ensure that the 1974 nuclear tests would be the last atmospheric tests.' The sixth was made on September 25, 1974, by the French Minister for Foreign Affairs, addressing the United Nations General Assembly, that: '[w]e have now reached a stage in our nuclear technology that makes it possible for us to continue our programme by underground testing, and we have taken steps to do so as early as next year.' The seventh was made on October 11, 1974, by the Minister of Defence in a press conference stating that there would not be any atmospheric tests in 1975 and that France was ready to proceed to underground tests.

Having mentioned the statements relied on by the Court, the question now arises: do these statements constitute unilateral treaty following the common law unilateral contract model? Or could they be said to create bilateral engagements, following the Eastern Greenland approach? The facts of the cases and the reasoning of the Court do not justify the former in that unlike in the english case,[37] there was no evidence to show that either France regarded the statements as legally binding or that the Applicants regarded them as such.[38] Better still, to use the words of Brierly, as adopted by Jessup, there was no presumed consent of the beneficiaries.[39] If the statements do not fall within the purview of unilateral treaties, could it then be said that they concurred with the requests of Applicants in a manner contemplated

[37] There is also the question of whether the Court is permitted to apply a rule that is peculiar to a particular system, since Article 38 (1)(c) speaks of laws generally recognised by civilised nations. This does not preclude the court from being influenced by just principles from a particular jurisdiction through Article 38 (1)(d).

[38] This is so because it is hardly conceivable that, from the perspective of France, it considered itself to have assumed a legally binding obligation towards the Applicants, as it continuously maintained that it had not acted illegally. Seeing in this light, its declarations could at best have moral or political implications. This view was also shared in the Joint Dissenting Opinion of Judges Onyeama, Dillard, Jimenez de Arechaga, Sir Humphrey Waldock, where they considered that the findings of the Court did not afford the Applicants legal security of the same kind or degree as would result from a declaration of the Court specifying the rights the parties (*Australia v France, supra,* at 320, para. 20,); *(New Zealand v France, supra,* at 503, para. 19). More decisive is the view expressed by Judge Sture Pretren in his Separate Opinion in both cases, where he would have preferred a finding of *non liquet* from the outset because, according to him, the issue sought to be litigated by the applicants were outside the purview of law, as there was neither customary international law nor conventional law prohibiting atmospheric nuclear tests (*New Zealand v France, supra,* at 489 ff.); (*Australia v France, supra,* at 305 ff.). Judge Sture Pretren's view is perhaps expressive of the view of the majority.

[39] *South West Africa cases, supra* at 402.

by the PCIJ in the *Eastern Greenland case* to the extent of fusing into bilateral engagements? This question can also only be answered in the negative.

If the statements did not actually constitute an offer for which acceptance and ultimately legal obligations were envisaged by France; they are incapable of being accepted by the Applicants;[40] if they do not form bilateral engagements, on what basis was intention superimposed? As rightly stated by Judge Ajibola:

> *It is difficult to perceive of a situation whereby a contract is considered as binding on a party when that party is unaware of the content and terms of that contract. There is therefore a cardinal prerequisite condition that the other party be notified that its offer had been accepted.*[41]

It is a common feature of both municipal and international law that the requisite intention for the formation of an agreement is usually established by some outward objective indication of the existence of an agreement, rather than a subjective assessment of the actual intentions of the parties.[42] Indeed beyond the subjective intention of the offeror, there must be some cogent outward manifestation of that intention by words or by actions or both;[43] this is most essential to unilateral declarations. In the *Carlill* case, the English Court found the objective element in the unilateral offer of the Defendants to pay £100 to anyone who contacts influenza after using the product in the prescribed manner, in the statement of the Defendants that '[£]1000 is deposited with the Alliance Bank, shewing our sincerity in the matter.' In the *Eastern Greenland case,* the Court located the outward elements in subsequent statements of the Parties as contained, first: in a November 7, 1919 statement of the Norwegian Minister that 'it was a pleasure to Norway to recognise Danish sovereignty over Greenland'; and the report of the accredited Danish Minister to the Danish Foreign Affairs Minister, that Mr. Ihlen had told him that Danish plan 'in regard to the sovereignty of Denmark over the whole of Greenland would not encounter any difficulties on the part of Norway'[44] No such outward elements proceeded from France, which continued to maintain, even in defiance of an interim measure of the court, that it will conduct an atmospheric test in the summer of 1974, which 'in the normal course of events will be the last.'

What is more, as acknowledged by the Court, some of the statements made by France were made at large, in press conferences and television interviews for which it expected no reply or benefit, as against the expectations of the Defendants in the *Carlill case* and the *Eastern Greenland case*. Such statements ought to be treated with sober circumspection. Thankfully, the Court did so warn in the latter case of *Burkina Faso* v *Mali*, though without

[40] In which case, a unilateral treaty cannot emerge. It is pertinent to reiterate that these elements do not generally define a treaty; a treaty is binding upon the intention of the parties, but the elements are fertile evidence from which intention may be garnered. i. e., their presence constitutes an outward manifestation of intention. This is more so, in unilateral treaties, which relies on presumed consent – Judge Jessup, in the *South West Africa cases supra*. The Court itself stirred up these requirements in the *Nuclear Tests cases* when it held that the statements met the demands of the Applicants. In other words, the Court presumed a meeting of the minds which comes about from offer and acceptance.

[41] Dissenting opinion of Judge Ajibola in *Cameroon v Nigeria*, *supra* at 396.

[42] See Paul Richards, *Law of Contract*, (8th Ed., Pearson Education, Harlow, 2007) 13; M. Fitzmaurice, O.A. Elias and Olufemi Elias, *supra*, at 5.

[43] Judge Kreca alluded to this in his Separate Opinion in the case *Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Merit* (*Bosnia Herzegovina v Serbia and Montenegro*), Judgment of February 26, 2007, 31, para. 63**,** where he said: 'the unilateral nature of an act is but one extrinsic element which, when coupled with other elements, both extrinsic and intrinsic forms a unilateral legal act in terms of international law'.

[44] *Supra* at 72 ff.

criticising the *Nuclear Tests cases*. The Court noted that although such unilateral declaration may be treated as an undertaking *erga omnes*, the Court has 'a duty to show even greater caution when it is a question of a unilateral declaration not directed at any particular recipient';[45] and that such caution requires the Court to apply a higher degree of certainly in assessing the intention of the declarant. For it is intention that confers on the declaration the character of a legal undertaking.[46] For instance, the Court would not hold a unilateral obligation as creating a legal obligation against the declarant State, if the latter had continuously refused to bind itself by agreement in respect of the same subject matter, there being evidence that the State had the opportunity to reach such an agreement[47] – an outward manifestation that the State did not intend its statements to create a legal obligation. This was also emphasised in the *North Sea Continental Shelf cases.*[48] Here, Denmark and the Netherlands argued that the Geneva Convention on the Continental Shelf, 1958, was, by conduct, binding on Germany. They maintained that though Germany was not a party to the Convention, it nonetheless had, through public statements and proclamations, unilaterally assumed the obligations of the Convention or had manifested its acceptance of the conventional regime. Rejecting this argument, the Court emphasised:

> *[...] it is clear that only a very definite, very consistent course of conduct on the part of a State in the situation of the Federal Republic could justify the Court in upholding them; and, if this had existed-that is to say if there had been a real intention to manifest acceptance or recognition of the applicability of the conventional regime-then it must be asked why it was that the Federal Republic did not take the obvious step of giving expression to this readiness by simply ratifying the Convention. In principle, when a number of States, including the one whose conduct is invoked, and those invoking it, have drawn up a convention specifically providing for a particular method by which the intention to become bound by the regime of the convention is to be manifested-namely by the carrying out of certain prescribed formalities (ratification, accession), it is not lightly to be presumed that a State which has not carried out these formalities, though at all times fully able and entitled to do so, has nevertheless somehow become bound in another way. Indeed if it were a question not of obligation but of rights, – if, that is to say, a State which, though entitled to do so, had not ratified or acceded, attempted to claim rights under the convention, on the basis of a declared willingness to be bound by it, or of conduct evincing acceptance of the conventional regime, it would simply be told that, not having become a party to the convention it could not claim any rights under it until the professed willingness and acceptance had been manifested in the prescribed form.*[49]

If this reasoning had been applied by the Court in the *Nuclear Tests cases*, it would invariably have come to the conclusion that France did not intend to create any legal obligation. The Court would have garnered this contrary intention from the fact that France consistently maintained that its conduct, which it refused to subject to judicial scrutiny, was lawful. Besides, there was nothing stopping France from entering into agreements with the Applicants, and on that basis, bringing about an out-of-court settlement;[50] neither was it

[45] *Frontier Dispute (Burkina Faso v Mali),* Judgment of December 22, 1986; ICJ Rep 1986, 554, 574, para. 39.
[46] *New Zealand v France, supra,* at 472, para. 46.
[47] *Burkina Faso v Mali, supra,* at 574, para. 40.
[48] (*Federal Republic of Germany v Netherlands/Denmark)* Judgment of February 20, 1969, ICJ Rep 1969, 3 at 25 ff., para. 28.
[49] *Ibid,* at 25 ff., para. 28.
[50] This point was particularly made by Sir Garfield Barwick in his dissenting opinion, where he reasoned that if France was willing to give such an unqualified and binding promise as Australia finds satisfactory for its protection, the case should have been compromised and the case withdrawn (Australia *v France, supra* at 392).

impossible for France to formally present arguments before the Court that the claim of the Applicants had been overtaken by events by virtue of its unilateral undertakings. Consequently the statements of France could not have been intended to constitute legal undertakings.

Assuming the statements actually constituted legal undertakings to the whole world, was the Court right in holding that there was no need for these statements to be addressed to any particular State? Was the Court right in holding that acceptance by any other State was not required?[51] The views of the Court in this regard are hardly tenable. If the statements did not require acceptance; on what basis were they binding? Particularly in the circumstances of the case where the Applicants continuously stated that they did not agree with the assurances given by France. Holding the Applicants bound to these statements, to their detriment, by dismissing their case, infringed on the rule of sovereign equality *vis a vis* the Applicants and France and subjected them to the whims and caprices of France without their consent. Besides, the invocation of the rule of *pacta sunt servanda*, as the basis of obligation of the statements, evinces the existence of agreement – actual (treaty) or presumed (a unilateral treaty). Otherwise it would be contradictory for the Court, in one breath, to invoke the binding principle in treaty and, in another breath, declare that it does n*ot require acceptance (agreemen*t) by States – an essential element of the law of treaty. What then is the basis of the invocation of the rule which enjoins States to honour their agreements in good faith,[52] as a gloss on the unilateral statements of France? This view is in tandem with that of Anthony D'Amato, who noted, concerning the *Nuclear Tests cases*, that:

> *The court based its conclusion in this regard solely upon the basic principle of good faith. However, it is not clear whether the international community regarded the French declarations as creating a binding obligation nor whether France intended herself to be bound by them. Accordingly, the question of good faith would not apply, since a nation may retract a declaration that neither it nor other nations considered binding when it was made. Indeed, Australia and New Zealand, the other parties to the nuclear tests cases, argued that the French unilateral declarations did not give them the same degree of security as would a judgment on the merits that the French nuclear tests were illegal.*[53]

This naturally takes us into inquiring whether, in spite of the view of the Court, there were reasons to believe that the Applicants accepted the undertakings of France. For this purpose, references to some of the responses of New Zealand to the above statements would suffice. On June 11, 1974, the Prime Minister of New Zealand, in response to the French Embassy Note of June 10, 1974 stated, inter alia, that '[...] the terms of the announcement do not represent an unqualified renunciation of atmospheric testing for the future....' In yet another response contained in a Note of June 17, 1974, the New Zealand Embassy in Paris categorically stated: that, '[t]he announcement that France will proceed to underground tests in 1975, while presenting a new development, does not affect New Zealand's fundamental opposition to all nuclear testing, nor does it in any way reduce New Zealand's opposition to the atmospheric tests set down for this year: the more so since the

[51] *New Zealand v France*, *supra* at 474, para. 52.

[52] I. I. Lukashuk, 'The Principle of Pacta Sunt Servanda and the Nature of Obligation Under International Law,' (1989) 83(3) AJIL 513, 513 (noting that, 'the principle of good faith fulfilment of obligations derives from, and is kept in force by, the general consent of States. The detailed content of the principle can also be seen to be developing on a consensus basis. Consent is the only way to establish rules that legally bind sovereign states.')

[53] D'Amato, Anthony, *Good Faith,* in *Encyclopedia of Public International Law*, (1992) 599, 601.

French Government is unable to give firm assurances that no atmospheric testing will be undertaken after 1974.' Also on November 1, 1974, the Prime Minister of New Zealand, Mr. W. E. Rowling, made the position of New Zealand, on the unilateral statements of France, abundantly clear, when he stated:

> *It should [...] be clearly understood that nothing said by the French Government, whether to New Zealand or to the international community at large, has amounted to an assurance that there will be no further atmospheric nuclear tests in the South Pacific. The option of further atmospheric tests has been left open. Until we have an assurance that nuclear testing of this kind is finished for good, the dispute between New Zealand and France persists [....]*[54]

The responses of the Applicants to the statements of France clearly show that whatever France was offering, assuming the statements were categorical enough to qualify as an offer, did not address the conflict between the parties and thus, were not acceptable to the Applicants. The responses negated all elements of agreements making clear that the declarations of France had addressed the issues before the Court. The requisite concurrence of intention between the contending parties for a legal agreement to arise being absent,[55] it seems clear that the Court arrived at the conclusion that the statements carry a legal obligation from a fortuitous speculation of the subjective intent of France. The difficulty in the approach of the Court was well articulated in the dissenting opinions. In the strong dissenting opinion of Judge De Castro, the Judge opined:

> *[...] that not every statement of intent is a promise. There is a difference between a promise which gives rise to a moral obligation (even when reinforced by oath or word of honour) and a promise which legally binds the promiser. This distinction is universally prominent in municipal law and must be accorded even greater attention in international law.*[56]

The Judge further noted that:

> *The identification of the necessary conditions to render a promise animo sibi vinculandi legally binding has always been a problem in municipal law and, since Grotius at least, in international law also. When an obligation arises whereby a person is bound to act, or refrain from acting, in such and such a way, this results in a restraint upon his freedom (alienatio cuiusdam libertatis) in favour of another, upon whom he confers a right in respect of his own conduct (signum volendi ius proprium alteri confirri); for that reason, and with the exception of those gratuitous acts which are recognized by the law (e.g., donation, pollicitatio), the law generally requires that there should be a quid pro quo from the beneficiary to the promiser. Hence – and this should not be forgotten – any promise (with the exception of pollicitatio) can be withdrawn at any time before its*

[54] (*New Zealand*, 464 ff., para. 26 – 29). Similarly, Australia held the same view stating that declarations of France fell short of a commitment or undertakings that there will be no more atmospheric tests in the south pacific. With particular reference to the communiqué of June 8, the attorney general of Australia declared: 'the recent French Presidential statement cannot be read as a firm, explicit and binding undertaking to refrain from further atmospheric tests.' (*Australia v France, supra,* 261 ff., para. 27-29).

[55] Indeed, '[i]n all legal systems under consideration, the first requirement of a 'contract' in the core meaning of the word, is the existence of an agreement, i.e., the manifestation of mutual assent on the part of two or more persons [...] these manifestations as a rule must be referable to each other' – Dissenting Opinion of Judge Weeramantry in *Cameroon v Nigeria, supra,* at 370, citing, with approval, Rudolf B. Schlesinger (ed.) *Formation of Contracts: A Study of the Common Core of Legal Systems*, 2 Vols., 1968, 71.

[56] Dissenting Opinion of Judge De Castro, *Australia* v *France, supra,* at 374, para. 3, as adopted in the *New Zealand v France*).

> *regular acceptance by the person to whom it is made (ante acceptationem, quippe iure nondum translatum, revocari posse sine iniustitia.*[57]

If actually the French declarations amounted to an 'undertaking [offer] to the international community [...] addressed to the whole world', as held by the majority, what outward indication was needed to constitute acceptance of the offer by the applicants or any other interested State? And for what benefit was France willing to give away what it believed was within its legal right? These questions also worried Judge De Castro, who queried:

> *[...] can those statements be said to embody the French Government's firm intention to bind itself to carry out no more nuclear tests in the atmosphere? Do these same statements possess a legal force such as to debar the French State from changing its mind and following some other policy in the domain of nuclear tests, such as to place it vis-à-vis other States under an obligation to carry out no more nuclear tests in the atmosphere?*[58]

Unfortunately the majority did not provide any useful answers to these queries. Perhaps, we will find answers in the subsequent decisions of the Court. In the case *Concerning Military and Paramilitary Activities in and against Nicaragua,*[59] the Court had to construe the legal effects of a communication transmitted by the Junta of National Reconstruction of Nicaragua to the Organization of American States, in which the Junta listed its objectives – one of which was its intention of installing a new regime by peaceful, orderly transition and respect for human rights under the supervision of the Inter-American Commission on Human Rights. The Court declared that it was unable to find anything in that communication 'from which it can be inferred that any legal undertaking was intended to exist.'[60] The Court made it clear that the acceptable form of unilateral statement must comprise a 'formal offer which if accepted would constitute a promise in law, and hence a legal obligation.'[61] Also that the commitment contained in the statement must be of, 'a legal nature.'[62] When the issue arose again in *Burkina Faso v Mali*,[63] the Court simply distinguished *Burkina Faso v Mali* from the *Nuclear Tests cases* and thus avoided making any authoritative pronouncement on the issue.[64] Be that as it may, however, the Court in the *Nicaragua case* touched on two salient elements – a formal offer which if accepted would constitute a promise in law; and an obligation that must be of a legal nature. Absent these elements from the facts of the *Nuclear Tests cases*, we cannot but adopt the answers provided by Judge Castro, that there is **'**no indication warranting a presumption that France

[57] *Ibid*, at 374, para. 3.
[58] *Ibid*, at 375, para. 4.
[59] *(Nicaragua v United States of America)* Merits, *supra.*
[60] *Ibid*, at. 132, para. 261.
[61] *Ibid.*
[62] *Ibid.*
[63] *Supra.*
[64] In distinguishing the cases, the Court unconvincingly stated that, given the fact that the applicants in the *Nuclear Tests cases*, were not the only States concerned at the possible continuance of atmospheric testing by France, the French Government could not have expressed an intention to be bound otherwise than by unilateral declarations, and that it was not possible for France to have accepted the terms of a negotiated solution with each of the applicants without jeopardizing its contention that the conduct was lawful. For this reason the Court noted that the circumstances of the case were different from the facts of *Mali v Burkina Faso (supra)*, where, in the view of the Court, there was nothing to hinder a negotiated settlement. Therefore, the reasoning of the Court in the *Nuclear Tests cases* could not apply to clothe the unilateral statements of the Malian Head of State with legal implications.

wished to bring into being an international obligation, possessing the same binding force as a treaty – and vis-à-vis whom, the whole world?'[65]

Having determined that the Court was, with respect, wrong in ascribing a legal character to the unilateral declarations of France, there is yet the ancillary question of whether the Court was entitled to strike out the Applicants claims on the basis of the declarations, even if the Court was right in holding that they were binding. This brings us to the issue of legal dispute, which the Court approached, not from its traditional approach of ascertaining the existence of a dispute as a perquisite for the assumption of jurisdiction, [66] but from a reverse position of holding a legal claim which existed as at the time the cases were filed to have been obliterated by subsequent extrajudicial events, other than by a determination of the dispute by the Court, notwithstanding the insistence of the Applicants that the events did not satisfy their claims. This was the situation in the *Nuclear Tests cases*, where the Court held that the legal dispute which existed between the Applicants and the France, had been obliterated in consequence of the above unilateral declarations, because the Applicants had,

> *[...] repeatedly sought from the Respondent an assurance that the tests would cease, and the Respondent has, on its own initiative, made a series of statements to the effect that they will cease. Thus the Court concludes that, the dispute having disappeared, the claim advanced by New Zealand no longer has any object. It follows that any further finding would have no raison d'être.*[67]

In reaching this decision however, the Court refused to attach any importance to the consistent view of the Applicants that the legal dispute over which they sought the view of the Court persisted, particularly, in view of the continuous controversy between the parties over the legality of the testing. It is true, as pointed out by the Court, that the Court can form its own conclusion on the meaning and effect of those statements. Such conclusion must, however, be based on the claim of the parties and the facts before the Court and not on some abstract supposition or wide speculations. It seems to us that for a claim, which was alive when it was first brought before the Court, to be adjudged moot in the course of proceedings, it must have been substantially affected by subsequent events to the extent that, had that been the position *ab initio*, the applicant would not have sought judicial intervention in the first place. The claims of the Applicants in these cases cannot be said to have been so affected, as it was canvassed before the court that:

> *Since France has not agreed ... that nuclear weapons testing in the atmosphere of the South Pacific be brought to an end, and since the French Government does not accept New Zealand's view that these tests are unlawful, the New Zealand Government sees no alternative to its proceeding with the submission of its dispute with France to the International Court of Justice.*[68]

This notice contains a two-prong claim: the first was the cessation of atmospheric tests in the South Pacific and the second was the legality of the tests. Even, if it was agreed that the statements covered the first ambit of the claim, the second prong was still a matter of

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[65] *Supra.*

[66] *Northern Cameroons case (Cameroon v United Kingdom)*, Preliminary Objections, Judgment of 2 December 1963; 1963 ICJ Rep, 33 ff.; (holding that the Court, 'may pronounce judgment only in connection with concrete cases where there exists at the time of the adjudication an actual controversy involving a conflict of legal interests between the parties.'); *The Mavrommatis Palestine Concessions,* Series A – No. 2 of August 30th, 1924 at 11 (holding that there must be 'a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons'.)

[67] *New Zealand v France, supra,* at 476, para. 59; *Australia v France, supra,* at 271, para. 56.

[68] *Ibid*, at 464, para. 26 (*Australia v France, supra,* at 261, para. 26).

controversy between the parties, because both parties disagreed on the legality of the testing, which was the core issue submitted for adjudication.[69]

But against the jurisprudence of the Court that, when the claims of parties are clear, the Court has no right to 'substitute itself for them and formulate new submissions simply on the basis of arguments and facts advanced',[70] the Court assumed that the claims of the Applicants were limited to the cessation of atmospheric testing, to the exclusion of the legality of that action. Once again, this error was pointed out in the joint dissenting opinion of Judges Onyeama, Dillard, Jimenez De Arechaga and Sir Humphrey Waldock. The dissenting Judges maintained the view that the basic premise of the Judgment, which limited the Applicant's submissions to a single purpose, and narrowly circumscribed its objective in pursing the proceedings, was untenable.[71] They further maintained that a submission asking for a judicial declaration may be formulated either as a request to the Court to decide that the conduct of a State is not in accordance with, or is contrary to the applicable rules of international law or as a request to declare that a party possesses a certain right or is subject to a certain obligation. And that in both cases, what is requested from the Court is a definition of the legal situation existing between the parties, expressed either in terms of objective rules of law or of subjective rights and obligations resulting from those rules.[72]

There is no doubt that a judgment on the legality of atmospheric nuclear tests would, as stated by the Court in the *Northern Cameroons* case, '[...] have [had] some practical consequence in the sense that it can affect existing legal rights or obligations of the parties, thus removing uncertainty from their legal relations'[73] – perhaps the uncertainties that led the Court to state in its judgement, 'that if the basis of this Judgment were to be affected, the Applicant[s] could request an examination of the situation in accordance with the provisions of the Statute.'[74] This uncertainty materialised shortly after the judgement, when New Zealand had cause to request the Court for examination of the situation in *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the* Nuclear Tests *Case,*[75] following the proposal by France to conduct underground tests in the area. This request, we believe, would not have arisen had the Court made a pronouncement in the *Nuclear Tests cases*, or had the binding character of the unilateral declarations been hinged on the consent of the parties, actual or implied.

[69] See the memorial of each Applicants in the Joint dissenting opinion of Judges Onyeama, Dillard, Jimenez de Arechaga and Sir Humphrey Waldock, (*New Zealand v France, supra,* at 502, para. 18); same was Australia's (*Australia v France, supra,* at 246, para. 11 of the Judgment).

[70] *Certain German Interests in Polish Upper Silesia* P.C.I.J., Series A, No. 7, 35.

[71] *Supra,* at 493, para. 2.

[72] *Ibid,* at 495, para. 6.

[73] *Supra,* at 34. In the *Competence of the International Labour Organization to Regulate, Incidentally, the Personal Work of the Employer,* Advisory Opinion No. 13 of July 23, 1926, Series B., No. 13, 19, the PCIJ stated: 'But, so far as concerns the specific question of competence now pending, it may suffice to observe that the Court, in determining the nature and scope of a measure, must look to its practical effect rather than to the predominant motive that may be conjectured to have inspired it.' This approach was best for the ICJ in the cases being discussed; the court should have looked at the practical effects of the unilateral statements rather than conjecture on the subjective motives which inspired France to make the statements.

[74] *New Zealand v France, supra,* at 477, para. 63; *Australia v France, supra,* at 272, para. 60

[75](*New Zealand v. France*) Order of September 22, 1995; ICJ Reps 1995, 288.

## Part IV: Conclusion

The decisions of the Court in the *Nuclear Tests cases* are indefensible. They represent a complete failure of the Court to carry out its judicial function – a technical declaration of *non liquet*. The Court, whose judicial function is to decide the rights and obligations of parties in accordance with international law,[76] failed in that duty when it relied on extrajudicial declarations to refuse to pronounce on the legality or otherwise of the nuclear tests in question.[77] Little wonder why the Court has so far tactically refused to attach such obligation to unilateral declarations of this nature, in cases[78] where it has been so urged after the *Nuclear Tests Cases*.

We should not be understood as saying that unilateral declarations should never give rise to legal obligations;[79] all we have laboured to say is that the *Nuclear Tests cases* did not fulfil the elements that will make such declarations binding. For such declarations to be binding, they must cogent and irresistibly lead to the conclusion that the State making the declarations intended them to be legally binding, when acted upon by other States. As a corollary, other States must equally share the view that the declarations create binding obligations through clear objective acts from which consent can be presumed.[80] The objective acts must not necessarily be reciprocal declaration of acceptance from the State(s) to which the declarations are directed; the requisite intention could be garnered from the conducts of either of the parties. Where an addressee relies on the strength of the declarations with the acquiescence of the declarant State, the Court would be entitled to hold that a legal character was attached to the declaration by both parties. In the same vein, where the declarant State takes the additional step of making its declaration a State policy – by either incorporating same in its foreign policy objectives or enacting it into law – the Court should be entitled to conclude that the declarant State intended its declarations to be binding. This would not however mean that the Court should not seek some elements of acceptance as a sign of consent proceeding from the addresses, so as to avoid a situation where the declarant State indirectly legislates for the addressee State. It is appreciated, due to the impossibility of foreseeing all circumstances in which declarations could be made, that it is impossible for the Court to precisely itemise the conducts from which intention could be garnered, the Court can do more than the hazy state in which it left the governing principles in the *Nuclear Test cases*. The Court can do this by laying a general framework after the contractual analogy of offer and acceptance. Though the Court came close to doing this in the Nicaragua case by insisting on objective evidence of intention arising from an acceptance of the declarations by the addressee, it did not plug all the gaps in the *Nuclear*

[76] Article 38 of its Statute.

[77] In the joint dissenting opinion, it was clearly pointed out that it was 'the duty of the court to pronounce on the legality of the tests which have taken place'; the Court clearly failed to perform this duty (note 69, para. 13).

[78] Such as the *Nicaragua case* (*supra*) and the *Frontier Dispute case* (*supra*).

[79] Of course, the Court will be justified to rely on unilateral conducts, when the conduct irresistibly met the justice of the case, otherwise it should be rejected. In the *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Judgment of February 26, 2007, the Court held that although it is entitled, for the purpose of making a finding, to 'take into account any statements made by either party that appear to bear upon the matters in issue, and have been brought to its attention [...] and may accord to them such legal effects as may be appropriate.'(at 135, para. 378). Nonetheless, the Court held that the declaration in question 'was of a political nature [...] not intended as an admission, which will have a legal effect.' (*ibid*).

[80] There has to be that 'meeting of the minds'; a mutuality of obligation, which refers to the mutual understanding of the parties. They must agree to the same thing, in the same sense and with the same understanding.

*Tests cases*. It did not expressly overrule the principles established in the *Nuclear Tests cases*. Hence the Court was yet called upon to follow the *Nuclear Tests* decisions in the subsequent case of *Burkina Faso v Mali*. Here again, though the Court refused to accede to the application of the *Nuclear Test cases*, it yet preserved the principles therein, thus giving the impression that the principles in the *Nuclear Tests cases* could still have application in some cases to hold both the declarant and the addressee bound without a clear manifestation of intention to be bound.

In the final analysis, if the decisions of the ICJ in the *Nuclear Tests cases* hold sway, they would create a situation where a party, which is unwilling to negotiate with the aggrieved party and unwilling to submit its conduct to judicial scrutiny, can further ignore the authority of the Court and the rights of the Applicants by legally deficit statements, not minding whether or not it is acceptable to the aggrieved party, or whether the declarant party actually fulfils its declaration. This was, by no means, a case where the Court would have been entitled to casually dismiss the claim of the applicants on the guise of the absence of a legal dispute, without a clear and authoritative statement on the legality of the activities in question, given the Court's own finding that 'the French Government has consistently maintained that its nuclear experiments [did] not contravene any subsisting provision of international law, nor did France recognize that it was bound by any rule of international law to terminate its tests.' It is therefore our hope that, at the soonest opportunity, the court will muster the judicial will to permanently sound the death knell of whatever remains of the jurisprudence it enunciated in the *Nuclear Tests cases*.