EDITORIAL COMMENTS

Word Made Law:

The Decision of the ICJ in the Nuclear Test Cases

The Nuclear Test cases [1] again remind lawyers of what *Marbury v. Madison* [2] had earlier demonstrated to the U.S. bar: that cases need not have monumental outcomes to make monumental law. It will be recalled that in *Marbury v. Madison* the Supreme Court shied away from issuing a writ of mandamus to the Secretary of State, James Madison, requiring him to deliver up to Mr. Marbury his judicial commission which had been signed and sealed during the last moments of the preceding presidential administration. The delicacy of the issue was heightened because the Chief Justice and author of the Supreme Court's opinion had been acting Secretary of State in that previous (John Adams') administration until just before the announcement of the election of the new President (Thomas Jefferson). That a Supreme Court mandamus was held not to lie against Madison in that particular controversy is, however, just barely of historical interest today. What has survived and become fundamental to U.S. constitutional law is the landmark constructed by the Supreme Court en route to its mouse of a decision. That reasoning procured for the United States the magnificent concept of judicial review in respect of both executive and legislative action.

The *Nuclear Test Ban* case, also, is a judicial avoidance of confrontation with political authority: France and, indirectly, China, both of which have continued the kind of atmospheric tests which Australia and New Zealand asked the Court to declare illegal. In such a confrontation, the Court's decision, if unfavorable to the two nuclear powers, might well have been ignored. (Had the Court taken on the issue of legal responsibility they might also have produced a majority vote that the present treaty created no legal rights *erga omnes* and no binding customary law applicable to nonsignatories. Or, even if there were a legal obligation in customary law not to cause injury, in the sense of the Trail Smelter arbitration, the majority might still have found a lack of convincing evidence of determinable injury to the applicants attributable solely to respondent's conduct.) [3] Thus the Court chose not to confront the issue of illegality and

[1] Nuclear Tests (Australia v. France), Judgment of December 20, 1974, [1974] ICJ 253, see also *infra* p. 668; Nuclear Tests (New Zealand v. France), Judgment of December 20, 1974, [1974] ICJ 457. The judgments in the two cases are essentially identical and page references, hereafter, are to the same text in, first, the Australian and, second, the New Zealand cases.

[2] 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803).

[3] As to this dilemma, *see* Dissenting Opinions of Judge de Castro, Nuclear Test Cases, *supra* note 1, at 375, 389–390.

this case, like *Marbury*, produced only a mouse of a decision as to the specific issue. The majority, in effect, held that the cessation of testing by France, together with French public statements declaring an intention hereafter to test only underground, made moot the issue as to which the Court was asked to rule by providing the relief the parties wanted. Technically, the Court (yet again![4]) decided not to decide.

This led five of the regular judges,[5] together with the applicants' ad hoc judge[6] to voice a strong, even rather persuasive dissent. Basically, they argued that the 1928 General Act for the Pacific Settlement of International Disputes, to which applicants and respondent were parties, gave the Court jurisdiction, that the issues posed were prima facie legal questions to which the Court could address itself, and that, since the applicants wished to exercise their right to have these issues determined, they ought not to be denied. The issue of mootness, as to which it was asserted the parties had not been invited to argue or present evidence in open court, was a matter the dissenters felt could best have been joined to the merits, and which, in any event, could not be disposed of without a specific prior determination by the Court of its jurisdiction in the case.[7]

The majority felt that—at least for purposes of determining "mootness"—they had "inherent jurisdiction" which "derives from the mere existence of the Court as a judicial organ established by the consent of States."[8] In doing this, they avoided a number of undesirable outcomes. They prevented further extensive litigation of a case in which one of the parties—France—felt no obligation to participate. The Court also avoided the possibility of doing another *Barcelona Traction, i.e.*, of having a prolonged and expensive litigation on the merits resulting in an eventual dismissal of the application on an essentially procedural ground.

The majority opinion is quite brief. It constitutes a judicial limitation on the claims submitted by the applicant. But more than that, it stakes out a most significant proposition of law which, in turn, made possible the key finding of fact that the case had been rendered moot by France's unilateral statements concerning cessation of nuclear testing. This finding of law is, in the international law sphere, probably no less significant in its way than the law made by *Marbury v. Madison*. In the words of the Court:

[4] Northern Cameroons Case (Cameroon v. United Kingdom) [1963] ICJ 15; South West Africa Case, Second Phase, (Ethiopa v. South Africa; Liberia v. South Africa) [1966] ICJ 6; Barcelona Traction, Light and Power Company, Limited Case, Second Phase, (Belgium v. Spain) [1970] ICJ 3. The Lachs Court, however, is notably different from its predecessor in that the *Nuclear Test* Cases, while technically not decided in the applicants' or respondent's favor, provide a declaration of law that essentially meets the request of the former. Moreover, the decision not to decide on the substantive merits was in the *Nuclear Test* Cases made early in the proceedings, thereby avoiding the frustration created by the earlier cases.

[5] Joint Dissenting Opinions of Judges Onyeama, Dillard, Jiménez de Aréchaga, and Sir Humphrey Waldock, Nuclear Test Cases, *supra* note 1, at 312 and 494; also, Dissenting Opinions of Judge De Castro, 372 and 524.

[6] Dissenting Opinions of Judge Sir Garfield Barwick, *supra* note 1, at 391 and 525.

[7] *Id.* 319–24; 502–06.

[8] *Id.* 259–60; 463.

> 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. Declarations of this kind may be, and often are, very specific. When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration. An undertaking of this kind, if given publicly, and with an intent to be bound, even though not made within the context of international negotiations, is binding. In these circumstances, nothing in the nature of a *quid pro quo* nor any subsequent acceptance of the declaration, nor even any reply or reaction from other States, is required for the declaration to take effect, since such a requirement would be inconsistent with the strictly unilateral nature of the juridical act by which the pronouncement by the State was made.
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> Of course, not all unilateral acts imply obligation; but a State may choose to take up a certain position in relation to a particular matter with the intention of being bound—the intention is to be ascertained by interpretation of the act. When States make statements by which their freedom of action is to be limited, a restrictive interpretation is called for.
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> With regard to the question of form, it should be observed that this is not a domain in which international law imposes any special or strict requirements. Whether a statement is made orally or in writing makes no essential difference, for such statements made in particular circumstances may create commitments in international law, which does not require that they should be couched in written form. Thus the question of form is not decisive. . . .
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> One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international co-operation, in particular in an age when this co-operation in many fields is becoming increasingly essential. Just as the very rule of *pacta sunt servanda* in the law of treaties is based on good faith, so also is the binding character of an international obligation assumed by unilateral declaration. Thus interested States may take cognizance of unilateral declarations and place confidence in them, and are entitled to require that the obligation thus created be respected.[9]

The unilateral statements which the Court took to constitute a binding legal commitment by France include series of communiques, messages, and press interviews in which the President of France, the French Ambassador to New Zealand, the French Foreign Minister, and the Minister of Defense had stated that their country had reached a stage of nuclear development which indicated that the controverted series of atmospheric tests could now be followed by tests conducted only underground. In a message to the New Zealand Ministry of Foreign Affairs, the French Embassy in Wellington had noted that "the atmospheric tests which are soon to be carried out will, in the normal course of events, be the last of this type."[10] At a press conference after the tests, the French Defense Minister again

[9] *Id.* 267–68; 472–73.

[10] *Id.* 266 and 470.

repeated the statement that France would hold no atmospheric tests in 1975 and would concentrate on underground explosions. When the press remarked that he had failed to add the "normal course of events" qualification, he agreed that he had and this led the Court to conclude that "the official statements made on behalf of France concerning future nuclear testing are not subject to whatever proviso, if any, was implied by the expression 'in the normal course of events.'" [11]

The Court's view as to the legal consequences of such statements is an important but not unconscionable extension of prior decisions respecting verbal statements. An earlier editorial comment in this *Journal* has dealt with some historical precedents, including a finding by the Lytton Commission of Inquiry in its report to the League of Nations in 1933 which upheld as binding some unilateral Chinese oral declarations made in Peking to the Japanese representative relative to the railway rights of the two countries in Manchuria.[12]

One case stands out in the jurisprudence. The "Ihlen Declaration" respecting Eastern Greenland was an informal verbal undertaking by the Foreign Minister of Norway, made in the course of regular negotiations on the matter, that his country "would not make any difficulties in the settlement of this question" of Danish plans in respect of Greenland. When, later, Norway sought to contest the Danish rights, the Court held that such a reply in response to the Danish Foreign Minister's inquiry, as long as it was within the ostensible area of responsibility of the Minister, is binding on his country in international law.[13] It must be noted, however, that the Danish inquiry had contained a reciprocal verbal commitment to raise no objections to Norwegian sovereignty over Spitzbergen and this interdependence between the two statements helped influence the Court. To the extent that the *Nuclear Test* case makes new law, it is in recognizing that a written or verbal undertaking may give rise to legal rights even when made without such reciprocal or mutual exchange of commitments, outside the context of formal negotiations, and to the world at large, to the whole community of states, or to unspecified but ascertainable beneficiaries.[14]

This is a most useful step forward in international jurisprudence. It is particularly helpful, at a time when Egypt is indicating a willingness to undertake binding commitments in respect of Israel but not to enter into an agreement *with* Israel, that the theory of law should offer no impedi-

[11] *Id.* 267 and 471; 276 and 472.

[12] James W. Garner, *The International Binding Force of Unilateral Oral Declarations*, 27 AJIL 493 (1933).

[13] Denmark v. Norway, [1933] PCIJ, ser. A/B, No. 53; 3 HUDSON, WORLD COURT REPORTS 148 (1938).

[14] This distinguishes a unilateral binding undertaking from a formal agreement made between several parties, which, according to Article 102 of the Charter of the United Nations, must be registered with the UN Secretariat to be invoked by a party to the treaty. The proviso is obviously inapplicable to unilateral undertakings where the invoking beneficiary is never a "party."

ments to such unilateral but legally binding accommodations.[15] More broadly, we live in an age of the potential nuclear miscalculation. It is crucial to the avoidance of such miscalculations that states should signal to each other in such a way as to engender reliance and diminish the chance of false expectations. "Watch what I do, not what I say" is a cultural predisposition of some—particularly the Anglo-Saxon—societies which is extraordinarily dysfunctional amidst the realities of contemporary international politics.

Thanks to the Court's decision, each state must now recognize that what it solemnly says it will do, or, more important, what it says it will not do, becomes a part of that trellis of reciprocal expectations on which the fragile international system grows. Professor Weisband and I have elsewhere examined this phenomenon of verbal behavior and come to the same conclusion now adopted by the Court:

> Among reasonable men it is customary and, indeed, necessary to presume that a person means what he says. Where this presumption fails, the resultant loss of credibility shuts the disbelieved individual off from normal social intercourse and leads him and those with whom he deals to miscalculations and chaos. So, too, when a state speaks. If a national official, vested with the ostensible power to commit and bind his country, speaks in his formal capacity, others in the international community have a right to assume that he intends his words to be a deliberate expression of state policy. . . . In the community of states, when a nation speaks to explain why it is embarking on a course of action, it is ordinarily understood by other states also to be proposing a principle for future conduct or reinforcing an existing principle. Other states have a right to assume that the speaker knows and intends this level of his meaning and that he knows that the listening states make this assumption. On this shared mutual expectation rests the element of predictability that prevents relations between states in the nuclear era . . . from being chaotic and far more dangerous than they usually are.[16]

Reason leads one to agree, also, with the Court's caveat that not all public statements by states are henceforth to be treated as constituting binding legal obligations. Intentionality, as the Court said, must be the test. But intention cannot be determined solely by reference to the speaker's state of mind but must also take into account that of the listeners. A spokesman for state policy—like the President of France, who speaks with the solemn voice of "acts of the French State"—must be taken to intend the natural consequences of his words just as actors are assumed,

[15] It will be recalled that Egypt made a unilateral declaration, intended to create legal obligations, upon the reopening of the Suez Canal in 1957. *See* Egyptian Declaration of April 24, 1957, annexed to letter to the Secretary-General of the United Nations from the Egyptian Minister for Foreign Affairs of the same date, UN Doc. A/3576, S/3818 (1957).

[16] THOMAS M. FRANCK and EDWARD WEISBAND, WORD POLITICS: VERBAL STRATEGY AMONG THE SUPERPOWERS 120–21 (1971).

in law, to intend the natural consequences of their acts.[17] If a state speaks, through an ostensible agent, and the statement contains an express commitment to a course of future conduct by that state, it should not be necessary to inquire whether the state intends to be bound but merely whether other states with an interest at stake could reasonably assume that the statement constituted a commitment.

Is it also reasonable to assume that a unilateral statement is not to be regarded as law unless there has been some element of (1) *mutuality* or (2) *reliance*? The decision in the Eastern Greenland case was not very specific about the role Denmark's promise regarding Spitzbergen had in making binding Norway's promise respecting Greenland. But there can be no doubt that the Court was impressed by the fact that Denmark, relying on Norway's unilateral "promise" of noninterference, thereafter proceeded to execute plans and projects for its remote colony. This was a kind of either mutuality or reliance.

In U.S. law, it is recognized that, even absent an exchange of unilateral promises, "there have always been many informal promises that are enforceable without any expression of assent by the promisee and without any consideration in the sense of an equivalent given in exchange. These informal contracts are not 'bargains' and are not made by the process of offer and acceptance. They are 'unilateral' and not 'bilateral' contracts."[18] But common lawyers, reared in the culture of "consideration," have difficulty accepting as truly binding a unilateral commitment wholly devoid of anything like a grain of mutuality. They strive mightily to find such a grain, if only, absent a concurrent mutual exchange of commitments, in the occurrence of a dependent event subsequent to the making of the unilateral statement. Such a subsequent act must be one which suggests that it would not have taken place but for the prior unilateral commitment; and the act must have been undertaken by one to whom the prior commitment may reasonably be held to be applicable.[19] The American Law Institute summarizes the position as follows:

> A promise which the promisor should reasonably expect to induce action or forbearance of a definite or substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.[20]

At common law, reliance is a necessary ingredient: acts or abstentions based on the assumption that the unilateral promisor will keep his word.

[17] Nuclear Test Cases, *supra* note 1, at 269; 474. For the general proposition in U.S. law, see: Burr v. Adam Eidemiller, Inc., 386 Pa. 416, 126 A.2d 403 (1956); Garratt v. Dailey, 49 Wash. 2d 499, 304 P.2d 681 (1956); Jost v. Dairyland Power Co-op., 45 Wis. 2d 164, 172 N.W.2d 647 (1969).

[18] 1A A. L. CORBIN, CONTRACTS 188 (1963).

[19] Central London P. Trust v. High Trees House [1947] 1 K.B. 130. Here a tenant continued to occupy and do business in a premises, relying on the landlord's promise to reduce the rent. Martin v. Meles 179 Mass 114, 60 N.E. 397 (1901). In Re Estate of Griswold 113 Neb. 256, 202 N.W. 609, 38 A.L.R. 858 (1925).

[20] Restatement of Contracts, §90 (1932).

"It is now quite clear," Corbin has pointed out, "that an informal promise may be enforceable by reason of action in reliance on it, even though that action was not bargained for by the promisor and was not performed as an agreed exchange for the promise." [21] However, the reliant action or forbearance "must amount to a substantial change of position. . . . Of course, in every case the question will arise, What is substantial? It cannot be answered by a formula. It is a matter of fact, to be determined by court. . . . Beyond doubt, it is relative to the other circumstances and especially to the content of the promise and the cost to the promisor of his promised performance." [22] It has been held, for example, that to make binding a unilateral promise of a donation to a charity, it is sufficient for the charity merely to go on doing its usual work.[23]

Is reliance, in this Anglo-Saxon sense, part of the Court's decision? It seems not.

It would have been easier to find reliance in the *Nuclear Test* cases if Australia and New Zealand, upon reading the French disclaimers of intent to conduct further testing, had withdrawn their suit. In fact, however, they did quite the opposite, arguing that the French statements were inconclusive. This may have been good legal tactics, for it produced a decision by the Court that definitively interprets the legally binding character of the unilateral French declarations and precludes the possibility that France can later claim to have been misunderstood by its antipodean listeners. But it also manifests Australia's and New Zealand's nonreliance on the French statements. To overcome this, the Court declared that it would "form its own view of the meaning and scope intended by the authors of a unilateral declaration which may create a legal obligation, and cannot in this respect be bound by the view expressed by another State which is in no way a party to the text." [24] Technically, then, reliance was placed on the French statements not by applicants but by the majority of the International Court. Moreover, it is the Court, not the applicants, which acted in reliance on the French unilateral declarations, relinquishing jurisdiction and determining the case to be moot.

The issue of reliance arises in a related matter. In dismissing the case, the Court's majority added that, if the French failed to comply with their oral undertaking, the applicants could "request an examination of the situation" by the Court and that this would in effect be regarded as a revival, *nunc pro tunc,* of the terminated proceedings. This is the first time the ICJ has contemplated the possibility of noncompliance and made provision accordingly. That such follow-up litigation should later be regarded as a continuation of the present case, rather than a new action, is made important by France's petulant renunciation in 1974, after the commencement of the present case, of the 1928 General Act for the Pacific Settlement of International Disputes on which the Court's jurisdiction was implicitly founded in the present action and on which it would again rely

[21] CORBIN, *supra* note 18, at 193. [22] *Id.* 215–16.

[23] In Re Griswold, note 19 *supra.*

[24] Nuclear Test Cases *supra* note 1, at 269, 473–74.

in a future resumption of its jurisdiction. The majority makes it clear that if France resumed testing "the Applicant could request an examination of the situation in accordance with the provisions of the Statute; the denunciation by France, by letter dated 2 January 1974, of the General Act for the Pacific Settlement of International Disputes, which is relied on as a basis of jurisdiction in the present case, cannot by itself constitute an obstacle to the presentation of such a request." [25] But if a future legal action is to be regarded strictly as a resumption of the 1974 litigation, then the binding obligation of France cannot be founded on reliance by the applicants since such reliance as Australia and New Zealand may currently be exhibiting—the Australian Prime Minister has been quoted in *Le Monde* of January 8, 1975, as accepting the binding nature of the French President's public statement—cannot be said to have been manifested until after the Court had rendered its decision.

The Court appears, therefore, to be acting on the assumption that the French statements are binding because they were made at the time they were made and not because of any subsequent element of reliance. Read strictly, the decision states a simple proposition to the effect that a unilateral commitment becomes binding in law at the moment it is made. It may thus be that the Court believes law can emerge from a unilateral statement whether or not it is subsequently relied upon. If so, this would be a considerably more radical departure, on the part of the Court, from previous concepts of binding commitment at least as these are understood by Anglo-Saxon lawyers.

Another way to look at the majority's decision *quae* reliance is to conclude that the Court found *constructive* reliance, *i.e.*, that the applicants having indicated that they *would* rely *if* France made a binding statement, the Court, by ensuring that the statements are legally binding, has produced the necessary condition for the reliance to have vested retroactively, at the time the statements were made. The reliant act of dropping the case may have been forced on the applicants by the Court, but it is the applicants who could be said to have indicated their willingness to have the case dropped if France made a binding commitment. Obviously, however, this is a conceptual analysis not wholly without difficulties.

Reliance, in common law, may seal a promise much as acceptance seals an offer. If the Court has done away with the ingredient of reliance, some future international court may have to determine whether, and under what circumstances, a unilateral promise may be withdrawn. If reliance were relevant, the unilateral promise could, presumably, be withdrawn until relied upon or for as long as it had not as yet been acted upon by another.[26] But if reliance is not a necessary ingredient, any intended unilateral promise becomes irrevocable even though its maker seeks to repudiate it before any state has taken it up. Perhaps it is only the writer's

[25] *Id.* 272, 477.

[26] For the domestic counterpart rule, see Seavey, *Reliance Upon Gratuitous Promises or Other Conduct*, 64 HARV. L. REV. 913 (1951). Seavey is of the view that a promisor may withdraw his promise by timely notification to the promisee.

Anglo-Saxon attitudes that cause mild distress at the prospect of a party being bound by a commitment made in the absence of any reciprocal or concomitant act or abstention and that is subsequently withdrawn without adversely affecting any other party which can be said to have relied on it. On the other hand, perhaps reliance has become a meaningless concept in a tight little global community, with its crucial interdependence among the actors making it inevitable that everything one state says by way of specific promise is bound to affect the perceived world reality, the future expectations, and thus the planning of all other states.

These are matters that may well be clarified in subsequent cases. For now, it is sufficient to note the extraordinary importance of the law made by a case in which, technically, the court has refused to decide. In all, there is reason to believe that, as with *Marbury v. Madison,* the legal community will welcome and build on the foundation laid in the *Nuclear Test* cases long after the specific outcome of the dispute between France and its antipodean opponents has been forgotten.

The practical consequences for U.S. foreign policymakers should, finally, be underscored. In light of these two decisions, a statement made by President Nixon to President Thieu of South Vietnam to the effect that the United States would "react vigorously" [27] to a new North Vietnamese offensive in violation of the Paris Peace accords, which was an inducement to get Thieu's consent to the agreement, would clearly constitute a case of unilateral commitment followed—if it is, indeed, a necessary element—by reliance. The upshot is, therefore, a binding legal undertaking by the United States, made by a President endowed with the ostensible as well as constitutional authority to make such a commitment. The subsequent action of Congress in limiting the President's power to carry out his promise is irrelevant to vested international legal rights.[28] Leaders are now on notice that, in making such declarations they are not merely expressing a passing fancy, but pledging the good faith and credit of their nations. If they do so rashly, they damage their country's rating as a law-abiding and credible member of the community.

THOMAS M. FRANCK

DUE PROCESS IN THE UNITED NATIONS

Recent events in the United Nations, especially the actions taken against South Africa and Israel have led to two main types of responses. Some conclude that these actions prove that the United Nations has deteriorated to the point that it should be abandoned. Others claim that all the difficulties can be cured by a drastic revision of the Charter.

[27] The New York Times, April 10, 1975, at 1.

[28] *See* Article 46 of the Vienna Convention on the Law of Treaties, UN Doc. A/CONF.39/27 (1969), 63 AJIL 875, 890 (1969).