Not a Moot Point: Avoidant Unilateral Declarations in Human Rights Disputes Before the International Court of Justice

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This Article examines the evolving role of unilateral declarations in international dispute settlement, with a particular focus on their use before the International Court of Justice in human rights litigation. Beginning with the Nuclear Tests *cases, where the Court affirmed that unilateral declarations could create binding obligations, the Article traces how this doctrine has since been applied in contemporary disputes involving allegations of grave human rights violations. It argues that although unilateral declarations may expedite proceedings, they can also function as avoidance mechanisms that undermine judicial scrutiny and the protection of rights. Through a comparative analysis of the ICJ and the European Court of Human Rights, the Article highlights the ICJ's underdeveloped framework for evaluating such declarations. Whereas the ECtHR has articulated a clear rights-based test, the ICJ continues to rely on a case-specific and often opaque assessment of states' intentions. Recent ICJ jurisprudence in cases such as* The Gambia v. Myanmar*,* Armenia v. Azerbaijan*, and* South Africa v. Israel *illustrates a gradual, though incomplete, departure from the* Nuclear Tests *precedent toward greater judicial supervision. The Article concludes by calling for the ICJ to adopt a more transparent and principled framework, drawing on the ECtHR's approach, to ensure that unilateral declarations cannot be used to circumvent accountability and that the rights of affected individuals remain effectively safeguarded.*

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Introduction

Unilateral declarations by states represent a complex and increasingly relevant aspect of international adjudication, including in cases before the International Court of Justice ("ICJ"). These declarations, through which states express their intentions or commitments, can positively contribute to more efficient dispute settlement. They can also be used to avoid judicial scrutiny, raising questions about whether courts should so willingly surrender the judicial consideration of a dispute. This Article delves into the evolving jurisprudence surrounding unilateral declarations, scrutinizing the ICJ's approach considering its historical precedents and contemporary challenges.

The analysis begins by revisiting the foundational *Nuclear Tests* cases, in which the ICJ established key principles for determining the binding nature of unilateral

declarations.[1] These principles, centered on the declaring state's intention to be bound, have shaped the subsequent understanding and application of unilateral declarations in international law. However, the Article questions whether the *Nuclear Tests* framework is sufficiently robust to address the complexities of modern human rights litigation, where states may strategically employ unilateral declarations to evade judicial scrutiny or avoid fulfilling their obligations in response to allegations of grave or systematic human rights violations.[2]

The Article then examines the ICJ's more recent engagement with unilateral declarations in human rights cases. By analyzing instances where respondent states have invoked unilateral declarations, the study assesses the extent to which the ICJ has consistently applied the principles established in the *Nuclear Tests* cases.[3] It investigates the effectiveness of these declarations in genuinely resolving disputes and in upholding human rights law, considering the perspectives of both applicant and respondent states.

Subsequently, the Article broadens its scope by comparing the ICJ's approach with that of the European Court of Human Rights ("ECtHR"). This comparative analysis highlights the contrasting methodologies employed by the two courts in evaluating unilateral declarations in the context of human rights law. By drawing on lessons from the ECtHR's practices, the Article identifies potential avenues for the ICJ to enhance its own framework for assessing unilateral declarations, particularly in relation to human rights litigation.

Finally, the Article concludes by calling for a more rigorous and nuanced approach to the ICJ's evaluation of unilateral declarations. It emphasizes the need for the ICJ to ensure that these declarations provide genuine legal security to applicant states and effectively safeguard the rights of individuals in whose name the case before the Court is ostensibly brought.[4]

I. *Nuclear Tests* Cases Revisited

The facts of the *Nuclear Tests* cases are well-established.[5] Between 1966 and 1972, France conducted atmospheric nuclear tests in the South Pacific.[6] In response, Australia and New Zealand initiated separate proceedings against France before the ICJ, arguing that such testing violated international law

1. Nuclear Tests (N.Z. v. Fr.), Judgment, 1974 I.C.J. 457 (Dec. 20) [hereinafter *New Zealand v. France*]; Nuclear Tests (Austl. v. Fr.), Judgment, 1974 I.C.J. 253 (Dec. 20) [hereinafter *Australia v. France*].

2. On these avoidance tactics, see Michael Ramsden, *Strategic Litigation Before the International Court of Justice: Evaluating Impact in the Campaign for Rohingya Rights*, 33 Eur. J. Int'l L. 441, 452–55 (2022).

3. *New Zealand v. France*, *supra* note 1.

4. *See, e.g.*, Rosalyn Higgins, *Human Rights in the International Court of Justice*, 20 Leiden J. Int'l L. 745 (2007).

5. *Australia v. France supra* note 1; *New Zealand v. France*, *supra* note 1; Thomas M. Franck, *Word Made Law: The Decision of the ICJ in the Nuclear Test Cases*, 69 Am. J. Int'l L. 612 (1975); Pierre Lellouche, *The Nuclear Tests Cases: Judicial Silence v. Atomic Blasts*, 16 Harv. Int'l L. J. 614 (1975); R. St. J. Macdonald & Barbara Hough, *The* Nuclear Tests *Case Revisited*, 20 German Y.B. Int'l L. 337 (1977); Taslim O. Elias, *The International Court of Justice and the Nuclear Tests Cases*, *in* The International Court of Justice and Some Contemporary Problems 100 (Springer 1983); Amos O. Enabulele, *The Aura of Unilateral Statements in International Law: Nuclear Tests Cases Revisited*, 6 Hanse L. Rev. 53 (2010).

6. *New Zealand v. France*, *supra* note 1, ¶ 17.

and should be halted.[7] Both countries requested the Court to indicate provisional measures against France.[8] The ICJ responded by ordering France to refrain from conducting tests that would result in radioactive fallout.[9] France, however, chose not to participate in the proceedings. Instead, it issued several unilateral public statements declaring that it would cease atmospheric testing in the region and would henceforth conduct only underground tests.[10] The ICJ ultimately held that these unilateral declarations constituted a legally binding undertaking. Consequently, the applications submitted by Australia and New Zealand no longer had any object, thereby rendering the ongoing proceedings moot.[11] The Court's reasoning advanced three key propositions that reflected a judicial preference for resolving disputes without prolonged litigation.

First, the views of the applicant State, specifically whether they accepted or placed reliance on the unilateral declaration, were immaterial. The Court focused exclusively on whether the declaring State intended to be legally bound.[12] The logic of a unilateral declaration, in this respect, is that an applicant State might even actively oppose such a declaration as a substitute to judicial recourse. This was the position of Australia and New Zealand, which argued that France's statements were ambiguous and conditional, and failed to guarantee the cessation of all nuclear tests, including underground tests.[13] The Court nevertheless upheld the French statements as sufficiently precise and specific, regardless of applicants' objections.[14] Dispensing with the need for reciprocity opened the possibility for respondent States — and indeed the Court — to use this doctrine as a litigation-avoidance tool.[15] In *Nuclear Tests*, this provided a mechanism for the Court to avoid adjudicating the geopolitical interests of nuclear powers (specifically France, although all other such powers given the wider legal implications of the case).[16]

Second, the Court assumed a broad discretion to define the object of the litigation. The Court thus noted that it was its "duty to isolate the real issue in the case and to identify the object of the claim."[17] This included excluding

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7. *Id.* ¶ 12.

8. Nuclear Tests (Austl. v. Fr.), Request for the Indication of Interim Measures of Protection Submitted by the Government of Australia (May 9, 1973); Nuclear Tests (N.Z. v. Fr.), Request for the Indication of Interim Measures of Protection Submitted by the Government of New Zealand (May 14, 1973).

9. Nuclear Tests (Austl. v. Fr.), Interim Protection, 1973 I.C.J. 106, (Jun. 22); Nuclear Tests (N.Z. v. Fr.), Interim Protection, 1973 I.C.J. 142 (Jun. 22).

10. Including a 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.

11. *Australia v. France*, *supra* note 1, ¶ 55; *New Zealand v. France*, *supra* note 1, ¶ 58.

12. *Australia v. France*, *supra* note 1, ¶ 43 (noting that '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').

13. *Id.* ¶¶ 27–28, 39, 48; *New Zealand v. France*, *supra* note 1, ¶ 28; Nuclear Tests (Austl. v. Fr.), Verbatim Record, 259 (July 10, 1974, 10:05 a.m.).

14. *Australia v. France*, *supra* note 1, ¶¶ 48–50; *New Zealand v. France*, *supra* note 1, ¶¶ 50–54.

15. *See* Franck, *supra* note 5, at 612–13.

16. *Id.*

17. *Australia v. France*, *supra* note 1, ¶ 29; *New Zealand v. France*, *supra* note 1, ¶ 30.

contentions that were advanced by a party but which were not "indications of what the party was asking the Court to decide" but were mere "reasons advanced" why the Court should decide in their favor.[18] The Court held that Australia's and New Zealand's claims essentially amounted to a single request: that France refrain from further nuclear tests in the South Pacific.[19] Any request for a declaration that such tests were inconsistent with international law was, in the Court's view, only a means to that end.[20] Given this, there was no value in giving a declaratory judgment, in the sense of the Court generally pronouncing on the legality of such nuclear testing.[21] They would only do so if a "genuine dispute" existed: it does not enter into adjudicatory functions to "deal with issues *in abstracto*."[22] Doing so accorded with the "proper interpretation of its judicial function" which was to resolve real disputes between parties.[23] By contrast, were the Court to prolong a legal dispute, or indeed pronounce upon issues that no longer had any object, there was a danger that this would undermine the cause of international peace. The Court thus noted that litigation might "provide a path to international harmony," but it is also true that the "needless continuance of litigation is an obstacle to such harmony."[24]

Third, grounded in state sovereignty, the ICJ in *Nuclear Tests* adopted a generous presumption of good faith to the performance of unilateral declarations.[25] Once an intention to be bound was established, it was not for the Court to assume non-compliance.[26] Provided that an intention to be bound is established, it thus did not appear open to the Court to look to the declaring State's past record in observing its commitments. Or indeed whether the presence of structural violations in the past might raise alarm that the unilateral declaration will not be complied with. Instead, the Court conceived of its role as reactive: should France fail to comply, the applicants could return to Court.[27]

Although *Nuclear Tests* is now synonymous with the principle that States may bind themselves unilaterally, the Court's reasoning was far from unanimous.[28] Several dissenting judges challenged the majority's characterization of the litigation object, noting that the applicants also sought a determination of their

18. *Australia v. France*, *supra* note 1, ¶ 29.

19. *Id.* ¶ 25 (note, in particular, that Australia's claim was interpreted as a single submission); *New Zealand v. France*, *supra* note 1, ¶ 11.

20. *New Zealand v. France*, *supra* note 1, ¶¶ 11, 30.

21. *Australia v. France*, *supra* note 1, ¶ 56.

22. *Id.* ¶¶ 57, 59.

23. *Id.* ¶ 57.

24. *Id.* ¶ 58; *see also New Zealand v. France*, *supra* note 1, ¶ 61.

25. *Australia v. France*, *supra* note 1, ¶ 60; *see also New Zealand v. France*, *supra* note 1, ¶ 63.

26. *Australia v. France*, *supra* note 1, ¶ 60.

27. *Id. See also New Zealand v. France*, *supra* note 1, ¶ 63.

28. Notably, *Australia v. France*, *supra* note 1, at 391 (Sir Garfield Barwick, J., dissenting); and *New Zealand v. France*, *supra* note 1, at 494 (Onyeama, Dillard, Jiménez de Aréchaga & Sir Humphrey Waldock, JJ., dissenting).

legal rights.[29] In their view, the Court's interpretation amounted to "a complete revision" of the submissions, i.e., a declaration that atmospheric testing in the South Pacific was unlawful.[30] More importantly, the dissents emphasized that France's unilateral statements did not offer the same legal security as a judicial declaration of illegality.[31] A judgment would have provided certainty as to the parties' legal relations, particularly given the divergence between France's statements and the applicants' specific requests.[32] Contrary to the majority, the dissenting judges appreciated the value of a Court decision and continued judicial supervision in properly resolving disputes, rather than relying on the uncertain implementation of unilateral declarations.

II. Modern ICJ Jurisprudence on Unilateral Declaration in Human Rights Cases

The principle espoused in *Nuclear Tests* cases has stood the test of time, although, as the following analysis will show, there appears to have been some divergence in the application of this principle in relation to the focus here: human rights litigation before the Court.[33] In this regard, there have been five human rights cases in particular where the respondent state has sought to offer a unilateral declaration to render the proceedings moot, primarily at the provisional measures stage. Pursuant to Article 41 of the ICJ Statute, the Court has the power to indicate provisional measures where irreparable prejudice may be caused to rights that are the subject of judicial proceedings, or where the alleged disregard of such rights may entail irreparable consequences.[34] However, the Court will exercise this power only where there is urgency, in the sense that there is a real and imminent risk of irreparable prejudice to the rights claimed before the Court renders its final decision.[35] The condition of urgency is satisfied when acts capable of causing irreparable prejudice may "occur at any moment" before the Court gives its final decision in the case.[36]

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29. *See*, *e.g.*, *Australia v. France*, *supra* note 1, at 312 (Onyeama, Dillard, Jiménez de Aréchaga & Sir Humphrey Waldock, JJ., dissenting); *Australia v. France*, *supra* note 1, (De Castro, J., dissenting); *Australia v. France*, *supra* note 1, at 452–55 (Sir Garfield Barwick, J., dissenting).

30. *New Zealand v. France*, *supra* note 1, ¶ 12 (Onyeama, Dillard, Jiménez de Aréchaga & Sir Humphrey Waldock, JJ., dissenting).

31. *Id.* ¶ 20.

32. *Id.*

33. To date there have been at least 27 cases brought before the Court where the applicant relied on the compromissory clauses contained in the relevant international human rights treaty. *See List of All Cases*, ICJ (last accessed Apr. 24, 2026), https://www.icj-cij.org/list-of-all-cases [https://perma.cc/FM3J-EUN8]; *see also* Michael Ramsden, *Accountability for Crimes against the Rohingya: Strategic Litigation in the International Court of Justice*, 26 Harv. Negot. L. Rev. 153, 158–61 (2021); Ramsden, *supra* note 2, at 443–48.

34. Applications of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (S. Africa v. Isr.), Provisional Measures, 2024 I.C.J. 3, ¶¶ 60–61 (Jan. 26) [hereinafter *South Africa v. Israel*].

35. *Id.*

36. Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukr. v. Russ.), Provisional Measures, 2022 I.C.J. 211, ¶ 66 (Mar. 16).

In the context of this standard, the following Part will take stock of developments in the use of unilateral declarations and consider the extent to which the reasoning in the *Nuclear Test* cases has been adhered to.

A. Questions Relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)

This case concerned Senegal's compliance with its obligations to prosecute or extradite former Chadian President Hissene Habré under the 1984 United Nations Convention against Torture ("CAT") and customary international law.[37] Habré had been residing in Senegal since 1990 after being granted political asylum.[38] Belgium alleged that, despite its repeated requests to Senegal to either extradite Habré to Belgium or to prosecute him in Senegal for crimes in violation of international law, including crimes of torture and crimes against humanity, Senegal had failed to observe its aforementioned obligations.[39] The President of Senegal had stated in an interview he gave to Radio France International that "Senegal could lift [Habré's] house arrest if it fails to find the budget which it regards as necessary in order to hold the trial."[40] Given this, Belgium sought provisional measures on the grounds that there was a real risk that Habré, despite being under house arrest at the time, might leave Senegal and evade prosecution.[41] Belgium thus requested the Court to order Senegal to keep Habré under the control and surveillance of its judicial authorities so that the rules of international law with which it requested compliance may be correctly applied.[42]

It was in these provisional measures proceedings that the possibility of unilateral declarations once again arose as a possibility. During the course of the hearings, Judge Greenwood asked questions of both Belgian and Senegalese counsel about whether this matter could be settled by way of a unilateral declaration.[43] In responding to this suggestion, Senegal declared in open court that it "will not allow Habré to leave the territory while the present case is

37. Questions Relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.), Application Instituting Proceedings, ¶ 7 (Feb. 19).

38. *See id.*

39. Questions Relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.), Provisional Measures, 2009 I.C.J. 139, ¶¶ 3, 6–7 (May 28) [hereinafter *Belgium v. Senegal*]; *see also* Sangeeta Shah, *Questions Relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.)*, 13 Hum. Rts. Rev. 351 (2013); Manuel J. Ventura & Victor Băieşu, *The ICJ's* Senegal v. Belgium *Judgment and the Obligation to Prosecute or Extradite Alleged Torturers*, *in* The President on Trial: Prosecuting Hissène Habré 295, 296 (Sharanjeet Parmar et al. eds., 2020).

40. Questions Relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.), Request for the Indication of Provisional Measures Submitted by the Government of the Kingdom of Belgium [Translation], 1.

41. *Id.*

42. *Id.* at 2.

43. Judge Greenwood at the first round of oral proceedings. He asked if Senegal "give[s] a solemn assurance to the Court that it will not allow Mr. Habré to leave Senegal while the present case is pending before [the] Court?" He also asked if Belgium would "accept that such assurance is a sufficient guarantee of the rights which it claims in the present case." Questions Relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.), Verbatim Record, CR 2009/9, 59 (Apr. 6, 2009).

pending before the Court."[44] On Belgium's part, they also acknowledged that their request for the indication of provisional measures had no further *raison d'être* if Senegal made a clear and unconditional declaration undertaking "to ensure that Mr. Habré did not leave Senegalese territory before the Court delivers its final judgment."[45] Although being consulted on the matter, it is equally clear that Belgium's agreement to the declaration was not part of the Court's reasons to decline to order provisional measures. Rather, the Court noted that Senegal's unilateral declaration had the effect of removing any "risk of irreparable prejudice" to the rights claimed by Belgium, as is required to obtain provisional measures.[46] Although it remains unclear whether Belgium's positive response led the Court to conclude that there was no urgency, given Senegal had committed to not allow Habré to leave its territory, it is still worth noting that at least one judge (Judge Greenwood) regarded the opinion of the other State sufficiently important to solicit their view.

Judge Cançado Trindade dissented from the majority of the Court. He argued that the right in question was the right to the realization of justice, which finds its expression in the corresponding obligations under the Convention against Torture.[47] Thus, he stipulated that the Court's reasoning should have reflected the preservation of that right.[48] He argued that the prevailing situation of impunity during Habré's rule should have been taken into consideration, and the determination of the existence of urgency in the indication of provisional measures should be done on a case-by-case basis.[49] He criticized the majority view that the issue regarding "the present-day home surveillance of Mr. H. Habré in Senegal" was the determining factor in evaluating the urgency of the situation. He argued that the lapse of time seeking the realization of justice made the urgency of a situation more apparent.[50] Further, he maintained that the "prevailing impunity" at the time amounted in fact to a continuing situation of irreparable harm.[51] According to Judge Cançado Trindade, the Court should have indicated provisional measures, "in the faithful exercise of its functions, so as to seek to ensure the prompt realization of justice."[52] In this regard, a comparison can be made to the dissents in *Nuclear Tests*, which similarly expressed concern over the extent to which a unilateral declaration was capable of providing security for the important values and interests at stake in the litigation.[53]

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44. Questions Relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.), Verbatim Record, CR 2009/11 [Translation], ¶ 6 (Apr. 8, 2009, Mr. Demba Kandji); *see also Belgium v. Senegal*, *supra* note 39, ¶¶ 38–39, 68.

45. *Belgium v. Senegal*, *supra* note 39, ¶¶ 33, 69.

46. *Id.* ¶¶ 72–73.

47. *See Belgium v. Senegal*, *supra* note 39, ¶ 60 (Cançado Trindade, J., dissenting) (specifically, Articles 5 (2) and 7 (1) of CAT).

48. *Id.* ¶ 27.

49. *Id.* ¶¶ 29, 52–53.

50. *Id.* ¶¶ 54–56, 59.

51. *Id.* ¶ 62.

52. *Id.* ¶ 64.

53. *See supra* note 1.

B. Application of the Convention of the Prevention and Punishment of the Crime of Genocide (The Gambia v. Myanmar)

The *Gambia v. Myanmar* concerns a dispute regarding alleged breaches of obligations under the Genocide Convention.[54] The Gambia instituted proceedings against Myanmar, seeking protection for the Rohingya people in Myanmar, requesting the Court to adjudge and declare that Myanmar has and continues to breach its obligations, and for Myanmar to comply with its obligations under the Genocide Convention.[55] The Gambia sought provisional measures that requested Myanmar to essentially comply with its obligations under Articles I-III of the Genocide Convention in relation to the Rohingya people, including the preservation of evidence.[56]

At the provisional measures stage (as with *Belgium* v. *Senegal*) an issue arose over the extent to which Myanmar's unilateral assurance that it will observe its international obligations should be used to render the proceedings moot. Myanmar's counsel had, specifically, pointed out in oral proceedings that Myanmar was actively engaged "in repatriation initiatives to support the return of displaced persons presently in Bangladesh" and "in a range of initiatives aimed at bringing stability to Rakhine State, protecting those who are there or who will return there, and bringing to account those responsible for past violence."[57] The counsel maintained that the efforts at repatriating the displaced, undertaken in collaboration with regional and international actors, "evidences a shared understanding that their return does not present imminent danger; and is obviously inconsistent with the existence of an imminent risk of genocide occurring in Myanmar."[58] The intended implication was thus the same as in *Belgium* v. *Senegal*, to make a series of assurances that eliminate the risk as a prerequisite for the ordering of provisional measures.

Although the Court acknowledged statements made by Myanmar during the oral proceedings, it "did not deem them sufficient" to eliminate the risk of irreparable prejudice to the rights at issue.[59] The Court did not fully explain this conclusion, although it did note that "Myanmar has not presented to the Court concrete measures aimed specifically at recognizing and ensuring

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54. Application of the Convention of the Prevention and Punishment of the Crime of Genocide (Gam. v. Myan.), Application Instituting Proceedings and Request for the Indication of Provisional Measures, 2019 I.C.J. 178 (Nov. 11); s*ee also* Michael A. Becker, *The Plight of the Rohingya: Genocide Allegations and Provisional Measures in* The Gambia v Myanmar *at the International Court of Justice*, 21 MELB. J. INT'L. L. 428 (2020); Ramsden, *supra* note 2; Emily Leggett, *Convention on the Prevention and Punishment of the Crime of Genocide* (The Gambia v Myanmar), *Preliminary Objections*, 29 AUSTL. INT'L. L.J. 217 (2022).

55. Application of the Convention of the Prevention and Punishment of the Crime of Genocide (Gam. v. Myan.), Provisional Measures, 2020 I.C.J. 178, ¶ 2 (Jan. 23) [hereinafter *Gambia v. Myanmar*].

56. *Id*. ¶¶ 5, 12.

57. *Gambia v. Myanmar*, *supra* note 55, ¶ 68; Application of the Convention of the Prevention and Punishment of the Crime of Genocide (Gam. v. Myan.), Verbatim Record, CR 2019/19, ¶ 3 at 63–64 (Dec. 11, 2019, 10:00 a.m., Ms. Phoebe Okowa). It is important to note that the undertakings were made by counsel for Myanmar and not the agents.

58. Application of the Convention of the Prevention and Punishment of the Crime of Genocide (Gam. v. Myan.), Verbatim Record, CR 2019/19, ¶ 11 at 69 (Dec. 11, 2019, 10:00 a.m., Ms. Phoebe Okowa); *Gambia v. Myanmar*, *supra* note 55, ¶ 68.

59. *Gambia v. Myanmar*, *supra* note 55, ¶ 73.

the right of the Rohingya to exist as a protected group under the Genocide Convention."[60] In other words, Myanmar's statements appeared to lack the specificity and precision necessary to constitute a unilateral declaration. Under the standard articulated in *Nuclear Tests* (see Part I above), only statements that clearly and unequivocally demonstrate an intention to be legally bound can give rise to legal effects.[61] Myanmar's statements fall short of that threshold and therefore cannot be understood as to be eliminating the risk of irreparable prejudice.

But of perhaps greater significance was the Court's reliance on the human rights record of Myanmar to date to establish that the risk of irreparable prejudice remained irrespective of Myanmar's assurances before the Court. In this regard, the Court took into account General Assembly Resolution 74/246, which expressed the Assembly's regret that the situation in Rakhine state had not shown sufficient improvement to encourage the return of "'refugees and other forcibly displaced persons to their places of origin voluntarily, safely and with dignity.'"[62] Additionally, the Court also noted the Assembly's "deep distress at reports that unarmed individuals in Rakhine State have been and continue to be subjected to the excessive use of force and violations of human rights and international humanitarian law by the military and security and armed forces . . . . "[63] The Court thus assessed the unilateral declaration against the wider human rights context in Myanmar — the significance of this approach will be returned to below.

C. Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Armenia v. Azerbaijan)

A more substantive consideration of the effect of unilateral declarations in human rights litigation was provided by the ICJ more recently in *Armenia* v. *Azerbaijan*, a case concerning alleged violations of the International Convention on the Elimination of all Forms of Racial Discrimination ("CERD"). Armenia had instituted proceedings before the Court against Azerbaijan, alleging the latter's violation of its obligations under the CERD in relation to "individuals of Armenian ethnic or national origin."[64] Armenia submitted three separate

60. *Id.* It is also important to note that the "undertakings" were made by counsel for Myanmar and not the agent. This distinction might be material in the context as to who is able to bind the state, drawing a difference between "assistance" and "representation." Although the relevant government at issue needs to endorse the assistant's actions for the latter to be valid, the agent possesses the power to bind the represented State. *See generally* Andreas R. Ziegler & Jonathan R. Kabre, *The Legitimacy of Private Lawyers Representing States Before International Tribunals*, *in* Unseen Actors in International Law 544–65 (Freya Baetens ed. 2019).

61. *Australia v. France*, *supra* note 1, ¶ 43; *see also New Zealand v. France*, *supra* note 1, ¶ 46.

62. *Gambia v. Myanmar*, *supra* note 55, ¶ 73, (citing G.A. Res. 74/246, ¶ 20 pmbl., U.N. A/RES/74/246 (Dec. 27, 2019)).

63. *Id.*

64. Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Arm. v. Azer.), Application Instituting Proceedings and Request for Provisional Measures, 2021 I.C.J. 6, ¶ 2 (Sep. 16).

requests for the indication of provisional measures and twice sought the modifications of the Court's existing Orders.[65]

The concern for the purposes of this Article is the fifth request of Armenia for the indication of provisional measures, which was brought after Azerbaijan's military offensive in September 2023 on Nagorno-Karabakh.[66] Armenia alleged that the offensive targeted the capital Stepanakert and civilian establishments, leading to the death and injury of hundreds of people as well as the displacement of thousands of ethnic Armenians.[67] Armenia also alleged that Azerbaijan's measures during and after the military assault amounted to ethnic cleansing, and therefore sought the protection of persons of Armenian ethnic or national origin affected by Azerbaijan's military operation.[68] Accordingly, Armenia's requested measures included a request for Azerbaijan to be required to refrain from violating its obligations under CERD; measures to protect ethnic Armenians in Nagorno-Karabakh from displacement or to refrain from engaging in acts preventing the return of those already displaced, as well as permitting those who sought to leave Nagorno-Karabakh to leave; the facilitation of access of UN agencies and the International Committee of the Red Cross ("ICRC") to Nagorno-Karabakh and, the provision of utilities, recognition of civil registers, identity documents and property titles.[69] Armenia also requested the Court to reaffirm its previous provisional measures orders.[70]

During the course of the oral proceedings, Azerbaijan's agent committed to a series of undertakings and argued that its commitment is "sufficient to address the alleged risk of irreparable prejudice."[71] Azerbaijan thus pledged to ensure the security and humanitarian needs of Garabagh residents, irrespective of national or ethnic origin, through provisions of food, medicine, public utilities, and access to medical treatment.[72] They also guaranteed the right to freedom of movement and residence, including the safe return of those who wish to return and the unimpeded departure of those who wish to leave.[73] Furthermore, Azerbaijan committed to protecting the property of those who

65. *Id*; *see also* Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Arm. v. Azer.), Request for the Modification of the Order Indicating Provisional Measures of 7 December 2021, Order, 2022 I.C.J. 580, ¶ 9 (Oct. 12); Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Arm. v. Azer.), Request for the Indication of Provisional Measures (Dec. 27, 2022); Application of the International Convention on the Elimination of all Forms of Racial Discrimination (Arm. v. Azer.), Request for the Modification of the Order Indicating a Provisional Measure of 22 February 2023, Order, 2023 I.C.J. 405, ¶ 13 (Jul. 6); Request for the Indication of Provisional Measures, 2023 I.C.J (Sep. 28); Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Arm. v. Azer.), Provisional Measures, Order, 2023 I.C.J. 619, ¶ 4 (Nov. 17) [hereinafter *Armenia v. Azerbaijan*].

66. Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Arm. v. Azer.), Request for the Indication of Provisional Measures, 2023 I.C.J (Sep. 28).

67. *Id*. ¶ 2.

68. *Id*.

69. *Id.* ¶ 40.

70. *Id*. ¶ 41.

71. *Armenia v. Azerbaijan*, *supra* note 65, ¶ 53.

72. Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Arm. v. Azer.), Verbatim Record, CR 2023/22, ¶ 27 (Oct. 12, 2023, H.E. Mr. Elnur Mammadov).

73. *Id.* ¶ 27.

have left Garabagh.[74] To facilitate these efforts, Azerbaijan undertook to ensure access and cooperation with the ICRC for humanitarian aid and allow UN inspections to address humanitarian and socio-economic needs.[75] Finally, Azerbaijan committed itself to protecting cultural monuments, artifacts, sites, registration, and private property documents and records found in Garabagh.[76]

The unilateral declaration by the Agent of Azerbaijan was made in line with the Court's stipulation in the *Nuclear Tests* cases. The Agent's undertaking on behalf of Azerbaijan was thus made publicly — during the course of the oral proceedings before the Court and the representatives of the Applicant State. Azerbaijan's undertaking was also indicated in clear and specific terms. Additionally, its intention to be bound by the terms of its undertaking was clearly communicated as "[t]he Republic of Azerbaijan *formally* makes the following representations . . . ."[77] Because the Court had stated in the *Nuclear Tests* cases that the reaction of other States to such declarations was not required for the declaration to take effect, Armenia's reaction toward Azerbaijan's declaration was thus seemingly not a consideration relied on in the provisional measures decision. As a result, the Court noted that the above unilateral declarations were binding and created legal obligations for Azerbaijan.[78]

However, the Court looked beyond the narrower stipulations of *Nuclear Tests* cases to evaluate the wider context when answering the legal question as to whether a risk of irreparable prejudice to the rights existed.[79] In this regard, the Court found that although Azerbaijan's undertakings "contribute to mitigating the irreparable prejudice" at issue, they "do not remove the risk entirely."[80] This was so given that the undertakings did not cover the totality of Armenia's requests, including, in particular, the requested measure regarding "the situation of persons of Armenian national or ethnic origin in Nagorno-Karabakh who do not wish to leave Nagorno-Karabakh but may feel compelled to do so" by direct or indirect actions aimed at or having the effect of displacing them.[81]

Here, therefore, the Court very much construed the object of the litigation to include non-displacement as an element that could not be disregarded in the same manner as other requests in *Nuclear Tests* cases were.[82] The Court, in this respect, construed the right to equality under CERD to include "enjoyment of the right to freedom of movement and residence within a State's borders when the persons concerned are exposed to privation, hardship, anguish and even danger to life and health."[83] Accordingly, the Court was of the view that the Armenians were a protected group under CERD, which in turn included

74. *Id.*
75. *Id.*
76. *Id.*
77. *Id.* at 22 (emphasis added).
78. *Armenia v. Azerbaijan* (Nov. 17, 2023), *supra* note 65, ¶ 62.
79. *Id.* ¶ 64.
80. *Id.*
81. *Id.* ¶ 63.
82. *Id.*
83. *Id.* ¶¶ 57–58.

freedom from being compelled to flee their place of residence, with evidence showing more than one hundred thousand people doing so since the operation commenced by Azerbaijan in Nagorno-Karabakh.[84] Accordingly, the Court ordered provisional measures reflecting the nature of this right under the CERD to be free from being compelled to flee.[85]

But interestingly, the provisional measures also covered those aspects that were covered by Azerbaijan's unilateral declarations.[86] This suggests that although the failure of these unilateral declarations to cover the totality of Armenia's requests was the expressed reason for rejecting the undertakings, the Court wanted to retain supervision over the situation covering a wide range of rights at issue, without explaining this as part of the basis for its decision.

In a dissenting opinion, Judge *ad hoc* Koroma criticized the majority's appreciation of Azerbaijan's undertaking. Judge Koroma noted that the Court had erroneously failed to properly take the unilateral declaration into consideration, intimating that this amounted to window-dressing, the Court having "to be seen as affording some satisfaction to the applicant."[87] In this respect, Judge Koroma's interpretation of *Nuclear Tests* cases differed — namely, that once a state has made a unilateral declaration, it is not for the Court to contemplate whether the undertaking State will comply with its declaration.[88] Be that as it may, this itself provides the clearest indication yet that the Court has undergone a subtle departure from *Nuclear Tests* cases (see keypoint three in Part I above), to one based upon a closer judicial supervision of risk to legal rights and a willingness to evaluate the feasibility of State compliance with a unilateral declaration.

D. Application of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (South Africa v. Israel)

Another human rights case before the ICJ that has involved a unilateral declaration is *South Africa* v. *Israel*.[89] South Africa initiated proceedings against Israel, alleging breaches of its obligations under the Genocide Convention in the Gaza Strip, as a result of its military operations in and against Gaza in response to the October 7, 2023 attacks by Hamas.[90] South Africa requested provisional measures, asking the Court to order that Israel comply with its obligations under the Genocide Convention in relation to Palestinians in Gaza. This included suspending its military operation in and against Gaza,

84. *Id.* ¶ 56.
85. *Id.* ¶¶ 69, 74.
86. *Id.* ¶¶ 61, 74.
87. *Armenia v. Azerbaijan*, *supra* note 65, ¶ 18 (Koroma, J., dissenting).
88. *Id.* ¶ 19.
89. *See generally* Applications of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (S. Africa v. Isr.), Application Instituting Proceedings and Request for the Indication of Provisional Measures, 2023 I.C.J. 192 (Dec. 29).
90. *South Africa v. Israel*, *supra* note 34, ¶ 13. For an analysis of this case and its impact *see generally* Michael Ramsden, *Strategic Litigation as a Catalyst for Global Dialogue:* South Africa v. Israel, 46(SI) U. Penn. J. Int'l L. 25 (2025).

and complying with its obligations under Articles I, II, III, and IV of the Convention. South Africa also requested that Israel take measures to ensure the preservation of evidence in relation to acts within the scope of Article II and to submit reports to the Court on all measures it has taken in compliance with the Court's Order.[91]

In the provisional measures hearing, Israel put before the Court a variety of assurances that, they argued, rendered the proceedings as moot due to a lack of irreparable prejudice and urgency.[92] Counsel for Israel argued that, in addition to Israel's efforts to mitigate civilian harm and alleviate suffering, "assurances provided before [the Court] by Israel's Co-Agents" indicate the lack of urgency.[93] These assurances were that any such incitement would be prosecuted and criminalized.[94] In concluding the submissions, the Co-Agent observed that "any statement calling for intentional harm to civilians contradicts the policy of the State of Israel and may amount to a criminal offence, including the offence of incitement. Several such cases are currently being examined by Israeli law enforcement authorities."[95]

In determining the existence of a risk of irreparable prejudice and urgency, the Court took note of the statement regarding steps taken to alleviate conditions faced by Gazans.[96] However, the Court stipulated that even though Israel's efforts "are to be encouraged, they are *insufficient* to remove the risk that irreparable prejudice will be caused before the Court issues its final decision in the case."[97] The Court held that Israel should ensure "with immediate effect that its military forces do not commit" acts falling under Article II of the Genocide Convention and that it "must take all measures within its power to prevent and punish the direct and public incitement to commit genocide in relation to members of the Palestinian group in the Gaza Strip."[98] Additionally, it ordered Israel to take "effective measures to prevent the destruction and ensure the preservation of evidence related to allegations of acts within the scope of Article II and Article III of the Genocide Convention against members of the Palestinian group in Gaza."[99] It observed that there was a real and imminent risk of irreparable prejudice to the rights asserted.[100]

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91. *South Africa v. Israel*, *supra* note 34, ¶ 5.

92. Applications of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (S. Africa v. Isr.), Verbatim Record, CR 2024/2, ¶ 21 at 54 (Jan. 12, 2024, Mr. Omri Sender).

93. *Id.*

94. *South Africa v. Israel*, *supra* note 34, ¶ 73.

95. Applications of the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (S. Africa v. Isr.), Verbatim Record, CR 2024/2, ¶ 16, at 73–74 (Jan. 12, 2024, Mr. Gilad Noam).

96. *South Africa v. Israel*, *supra* note 34, ¶ 74.

97. *Id.* ¶ 73 (emphasis added).

98. *Id.* ¶ 79

99. *See id.* ¶ 81.

100. *Id.* ¶ 74.

Consequently, it concluded that all the conditions required for the indication of provisional measures had been met.[101]

Although the Court did not explain why measures taken by Israel were insufficient to remove the risk of irreparable prejudice, prior to reaching that conclusion, it had referred to the humanitarian situation in Gaza. It cited statements by senior UN officials calling for attention to the situation in the Strip; reiterated that the civilian population remained "extremely vulnerable," that "many Palestinians in the Gaza Strip have no access to the most basic foodstuffs, potable water, electricity, essential medicines or heating."[102] More importantly, it took note of the Israeli Prime Minister's statement that the "war will take many more long months."[103] Accordingly, it is arguable that the Court viewed Israel's measures as insufficient considering the humanitarian situation at the time and anticipated that the situation would not improve quickly, given the Israeli officials' statements that the war would continue. So, if the situation was already bleak a few months into the war — even with the preventive measures Israel claimed to be implementing — the Court may have felt it could not solely rely on the assurances for the prevention of irreparable prejudice to the rights of Palestinians in Gaza if the situation was to continue.

E. Alleged Breaches of Certain International Obligations in respect of the Occupied Palestinian Territory (Nicaragua v. Germany)

Nicaragua v. *Germany* is one of the more recent examples of strategic litigation before the ICJ, in which the Applicant sought to rely on the Court to reshape existing power dynamics in the particular context of Israel's military operations in Gaza following the October 7, 2023 attacks by Hamas.[104] Nicaragua initiated proceedings against Germany alleging that the latter violated its obligations under the Genocide Convention by failing to prevent the commission of genocide and facilitating the commission of genocide against Palestinians in Gaza, by providing military equipment to Israel and defunding the United Nations Relief and Works Agency for Palestine Refugees in the Near East ("UNRWA") — the agency providing humanitarian support to civilians in the enclave.[105] Nicaragua's Application also included a Request for the indication of provisional measures, where it asked the Court to order Germany to suspend its military assistance to Israel, ensure that military equipment already provided is not used to commit genocide or contribute to the commission of acts of genocide, and rescind its decision to defund UNRWA.[106]

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101. *Id.* ¶ 75.
102. *Id.* ¶ 70.
103. *Id.*
104. *See generally* Michael Ramsden, *Litigating the Gaza Crisis: Legal and Political Strategies in* South Africa v. Israel, 8 CARDOZO INT'L & COMP. L. REV. 241 (2025).
105. Alleged Breaches of Certain International Obligations in respect of the Occupied Palestinian Territory (Nicar. v. Ger.), Application Instituting Proceedings containing a Request for the Indication of Provisional Measures, ¶¶ 2–3, 13–18 (Mar. 1, 2024).
106. *Id.* ¶ 101.

During the hearings for the indication of provisional measures, Germany's Agent acknowledged the dire humanitarian situation in Gaza, indicated measures taken by Germany to mitigate the situation, and asserted that Germany's conduct during the conflict "has been firmly rooted in international law."[107] Likewise, counsel for Germany highlighted the rigorous legal framework regulating the export of military equipment, which also categorizes the equipment as 'war weapons' and 'other military equipment', and requires individual licenses for export, which are only granted after a "case by case assessment of an individual application on the basis of binding criteria."[108] Counsel reiterated that the export of 'war weapons' requires two licenses.[109] He noted that Germany carefully evaluates whether exported items could be utilized in the commission of genocide and other breaches of international law.[110] He additionally highlighted that ninety-eight percent of licenses granted since October 7, 2023 concerned 'other military equipment', and asserted that after October "the total volume of exports has dropped sharply."[111] Accordingly, counsel stated that "the Court can trust in German law and in the continuing practice of the authorities responsible for its application: the stringent conditions they impose are sufficient to prevent any risk of prejudice to the rights at issue in this case."[112]

The Court departed from its usual practice by not addressing each condition for provisional measures in its Order. Instead, it emphasized the steps Germany had taken, suggesting that it did not find the requirement of urgency satisfied.[113] The Court explicitly recognized the relevant legal frameworks — the Arms Trade Treaty, the EU Common Position, and Germany's domestic laws governing arms exports — as well as Germany's risk assessment procedures.[114] It also noted the decline in German arms exports to Israel.[115] While observing that contributions to UNRWA are voluntary, the Court highlighted Germany's statement that it continued to support initiatives to fund the agency's work.[116] Overall, the Court focused on the factual circumstances before concluding that "at present the circumstances are not such as to require the exercise of its power under Article 41 of the Statute to indicate provisional measures."[117]

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107. Alleged Breaches of Certain International Obligations in respect of the Occupied Palestinian Territory (Nicar. v. Ger.), Verbatim Record, CR 2024/16, ¶¶ 16–24 at 11–12 (Apr. 9, 2024, Ms. Tania von Uslar-Gleichen).

108. *Id.* ¶ 15 (Mr. Christian J. Tams).

109. *Id.*

110. *Id.* ¶ 17.

111. *Id.* ¶¶ 19, 24; *see also id.* ¶ 37.

112. *Id.* ¶ 29 (Mr. Paolo Palchetti) [Translation]; *see* Alleged Breaches of Certain International Obligations in respect of the Occupied Palestinian Territory (Nicar. v. Ger.), Provisional Measures, 2024 I.C.J. 193, ¶ 4 (Apr. 30) (Tladi, J., Declaration).

113. Alleged Breaches of Certain International Obligations in respect of the Occupied Palestinian Territory (Nicar. v. Ger.), Provisional Measures, 2024 I.C.J. 193, ¶¶ 16–20 (Apr. 30), [hereinafter *Nicaragua v. Germany*].

114. *Id.* ¶¶ 16–17.

115. *Id.* ¶ 18.

116. *Id.* ¶ 19.

117. *Id.* ¶ 20.

Several individual judges underscored the absence of urgency in Nicaragua's request for provisional measures. Judge Iwasawa emphasized that Germany's robust framework for regulating military equipment exports, combined with Nicaragua's failure to demonstrate a real and imminent risk of irreparable prejudice, meant that the requirement of urgency was not satisfied.[118] Similarly, Judge Cleveland pointed to Germany's extensive export controls and to recent data on the value, content, and volume of transfers and licenses issued, concluding that the evidence before the Court did not establish a real and imminent risk of irreparable prejudice arising from Germany's actions.[119]

Judge Tladi stressed that Germany, fully aware of its obligations under international law, would exercise due diligence — both under those obligations and its domestic legislation — to ensure that no transfer of military equipment contributes to violations of the Genocide Convention.[120] He acknowledged that Germany's submissions did not amount to explicit "assurances" of the kind seen in *Belgium v. Senegal* or *Armenia v. Azerbaijan*. Nonetheless, he considered Germany's representations to function as a unilateral declaration before the Court.[121] According to Judge Tladi, by setting out its robust regulatory framework, Germany effectively convinced the Court that the obligation to prevent genocide would not be undermined.[122] This, in turn, eliminated the real and imminent risk of irreparable prejudice to Nicaragua's claimed rights, rendering its request for provisional measures moot.

As noted above, the Court's reasoning relied largely on Germany's assurances. At the same time, it reminded all States of their obligations under the four Geneva Conventions and the Genocide Convention in relation to arms transfers. These obligations, the Court emphasized, bind Germany as a party to those treaties in its supply of arms to Israel.[123] Further, the Court did not reject Nicaragua's request outright. Instead, it found that "the circumstances, as they now present themselves to the Court, are not such as to require the exercise of its power under Article 41."[124] As Professor Talmon notes, this softer language leaves the door open: because the decision rests on the current facts, the Court could indicate measures in the future if the situation changes.[125]

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118. *Id.* (Iwasawa, J., Separate Opinion).
119. *Id.* ¶ 13 (Cleveland, J., Declaration).
120. *Id.* ¶ 4 (Tladi, J., Declaration).
121. *Id.* ¶ 10. *See also* Matei Alexianu, *Effectiveness Beyond Compliance: Examining the Goal-Based Impact of the International Court of Justice's Provisional Measures*, 38 Hague Y.B. Int'l L. (2025) (forthcoming) at 27; Stefan Talmon, *Why the Provisional Measures Order in Nicaragua v. Germany Severely Limits Germany's Ability to Transfer Arms to Israel*, VerfBlog (May 2, 2024), https://verfassungsblog.de/why-the-provisional-measures-order-in-nicaragua-v-germany-severely-limits-germanys-ability-to-transfer-arms-to-israel/ [https://perma.cc/99Y5-7YVU].
122. *Nicaragua v. Germany*, *supra* note 113, ¶ 10 (Tladi, J., Declaration).
123. *Id.* ¶ 24.
124. *Id.* ¶¶ 20, 26.
125. Talmon, *supra* note 121.

F. Synthesis

Although these cases constitute small sample size, there has been some general development, since *Nuclear Tests* cases in the ICJ's approach toward the evaluation of unilateral declarations in the human rights context, even if such development is not always expressly acknowledged or clearly based upon a pre-formulated principle. In particular, the Court has now expressly rejected unilateral declarations in three human rights cases before it: *Armenia v. Azerbaijan*, *Gambia v. Myanmar*, and *South Africa v. Israel*.[126] The Court in all these cases has found that such undertakings were insufficient or did not entirely remove the risks to the protected rights.[127] Yet these conclusions essentially mask different conceptions of the unilateral declaration doctrine, from one based purely on ascertaining the declaring state's intention (as in *Nuclear Tests* cases) to one that embraces a wider set of community and institutional factors in evaluating whether a unilateral declaration should be used to defeat ongoing litigation before the Court.

On the one hand, it is certainly apparent that the Court has regarded the undertaking state's intention to be bound as central to the assessment as to whether to accept the unilateral declaration. This arises both in the construction as to the specificity and scope of the undertakings. The Court in *Nuclear Tests* cases noted that a unilateral declaration needs to be formulated in specific terms to evince an intention to be bound.[128] The specificity and precision with which the undertaking was formulated in *Belgium v. Senegal* (i.e., that Habré will be prevented from leaving Senegal while the case was pending) was seemingly the decisive factor that led to the Court refusing to indicate provisional measures.[129] By the same token, even if Germany's presentation in *Nicaragua v. Germany* did not necessarily "amount to assurances within the meaning of the Court's jurisprudence," the presentation was specific enough in addressing concerns raised in Nicaragua's Request, to the extent that some of the judges clearly stated that there was no real and imminent risk of irreparable prejudice to the rights invoked by Nicaragua.

In a similar manner, two cases in which unilateral declarations were rejected by the Court could also be explained by the lack of specificity in the undertakings. The assurances in *Gambia v. Myanmar* and *Israel v. South Africa* were thus framed in quite general terms, failing to specify concrete measures to give effect to the unilateral declarations at issue.[130] In short, based on this conception of unilateral declarations, the only problem with the statements

126. In two of these cases (*Gambia v. Myanmar* and *South Africa v. Israel*) it did not use the phrase 'unilateral declaration', although it was apparent that the respondent states were seeking to use these as a way to avoid the litigation by seeking to remove the source of any risk that would justify the indication of provisional measures.

127. *Gambia v. Myanmar*, *supra* note 55, ¶ 73; *Armenia v. Azerbaijan*, *supra* note 65, ¶ 64; *South Africa v. Israel*, *supra* note 34, ¶ 73.

128. *Australia v. France*, *supra* note 1, ¶ 43; *New Zealand v. France*, *supra* note 1, ¶ 46.

129. *Belgium v. Senegal*, *supra* note 39, ¶ 72.

130. Application of the Convention of the Prevention and Punishment of the Crime of Genocide (Gam. v. Myan.), Verbatim Record, CR 2019/19, ¶ 3 at 63–64 (Dec. 11, 2019, Ms. Phoebe Okowa); Applications of

in these cases is they were not specific enough. Had they been, the Court would have had reason to deny the issuance of provisional measures on the basis that these states had allayed fears as to the existence of a risk to the rights at issue in Myanmar and Gaza. A different — but related — issue arose in *Armenia v. Azerbaijan*, in that the assurances were not wide enough, in failing to specifically assuage concerns over the possibility of constructive displacement, despite Azerbaijan providing undertakings in relation to all of Armenia's other requests.[131] Again, the implication here is that had Azerbaijan been more comprehensive in its undertaking then the Court would have refused to indicate provisional measures.

On the other hand, it is arguable that the Court has taken into account a wider set of considerations in the evaluation of unilateral declarations, even if not expressly acknowledged. Judge Trindade's dissent in *Belgium v. Senegal* speaks to this approach as involving the Court assessing more generally whether it should accept a unilateral declaration in light of factors beyond the declaring state's intention to be bound: in that case, the interests of victims to have continual judicial supervision over Habré and for this not to be denied by a mere state promise.[132] As will be developed in the Parts that follow, these wider factors might include community interests (be that direct victims or a wider *erga omnes* interest), the Court's institutional role in promoting UN goals (such as the maintenance of international peace and security, and advancement of human rights), the scale and extent of the alleged offending state's conduct, and indeed the likelihood that the undertaking will be observed in light of the alleged offending state's past conduct. Although the ICJ has not been so explicit on the relevance of some or indeed all of these factors, both the *Gambia v. Myanmar* and *South Africa v. Israel* (as discussed above) seemingly include wider assessments than the undertaking state's mere intention to be bound.[133]

Be that as it may, an essential difficulty with the reasoning in ICJ cases is that it is, to use Cass Sunstein's phrase, often "incompletely theorized."[134] There is certainly strategic advantage in ambiguity, particularly for a Court that lacks compulsory jurisdiction and, to some, still resembles an arbitral-type proceeding rather than a court of law.[135] In this regard, judgment ambiguity provides the Court with a way to promote the acceptability of its decisions while avoiding elements that are likely to cause backlash and disincentivize engagement or compliance.[136] Nonetheless, it is argued here that the Court would best aid its legitimacy and promote the consistent application of international law by developing a more transparent framework for assessing unilateral

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the Convention on the Prevention and Punishment of the Crime of Genocide in the Gaza Strip (S. Africa v. Isr.), Verbatim Record, CR 2024/2, ¶ 21 at 54 (Jan. 12, 2024, Mr. Omri Sender).

131. *Armenia v. Azerbaijan*, *supra* note 65, ¶ 63.

132. *Belgium v. Senegal*, *supra* note 39, ¶ 29 (Cançado Trindade, J., dissenting).

133. *Gambia v. Myanmar*, *supra* note 55, ¶ 73; *South Africa v. Israel*, *supra* note 91, ¶ 73.

134. Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 HARV. L. REV. 1733 (1995).

135. Robert J. Delahunty & John Yoo, *Executive Power v. International Law*, 30 HARV. J.L. & PUB. POL'Y 73, 92 (2007).

136. *See, e.g.*, Ramsden, *supra* note 2, at 447–48; Franck, *supra* note 5, at 612.

declarations in human rights cases.[137] As the following Parts consider, this will involve clearly articulating the factors considered relevant, such as the clarity and specificity of the declaration, the extent to which it addresses the underlying human rights concerns, and the good faith of the declarant state. A more transparent approach would enhance predictability, ensure fairer outcomes for applicants, and ultimately strengthen the rule of law in the international arena, to which the next Part turns.[138]

III. A Rights-Based Test for Unilateral Declarations: Lessons from the European Court of Human Rights

In contrast to the ICJ, where the concept of unilateral declarations has only been minimally defined, the ECtHR has offered a more exacting set of factors to consider when assessing whether such declarations are to be accepted.[139] It is argued here that these factors could also provide the ICJ a more appropriate set of tools in which to evaluate the acceptability of unilateral declarations, not merely from the perspective of the declaring state (as found in *Nuclear Tests* cases), but when balanced against other factors supporting the continuation of the litigation notwithstanding the respondent's undertaking. Unlike the ICJ, which does not explicitly specify the need for a balance between competing exigencies, the use of a unilateral declaration at the ECtHR is regarded as requiring strict scrutiny, given that they are "issued against the will of the applicant."[140]

In *Tahsin Acar v. Turkey*, the Grand Chamber of the ECtHR first indicated which factors would be taken into consideration in examining the validity of a unilateral declaration by a respondent State.[141] There are also some factors included under Rule 62A of the Rules of Court, which will be discussed below.[142]

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137. *See*, *e.g.*, Nienke Grossman, *Legitimacy and International Adjudicative Bodies*, 41 Geo. Wash. Int'l L. Rev. 107 (2009).

138. *Id.*

139. *See* Tahsin Acar v. Turkey [GC], Preliminary Issue, App. No. 26307/95, ¶¶ 64, 75–76 (Eur. Ct. Hum. Rts., May 6, 2003) [hereinafter *Tahsin Acar v. Turkey*]; Jeronovičs v. Latvia [GC], Judgment, App. No. 44898/10, ¶ 64 (Eur. Ct. Hum. Rts., Jul. 5, 2016) [hereinafter *Jeronovičs v. Latvia*]. Although not the focus here, the Inter-American human rights system also accepts and regulates unilateral declarations, albeit that the caselaw is less developed on the factors relevant to this assessment. *See* Natalia Saltalamacchia Ziccardi, Jimena Álvarez Martínez et al., *Friendly Settlements in the Inter-American Human Rights System: Efficiency, Effectiveness and Scope*, in The Inter-American Human Rights System Impact Beyond Compliance 60–62 (Par Engstrom ed., 2019); Jorge Contesse, *Settling Human Rights Violations*, 60 Harv. Int'l L.J. 317, 331 (2019).

140. Lize Glas, The Theory, Potential and Practice of Procedural Dialogue in the European Convention on Human Rights System 289 (2018).

141. *Tahsin Acar v. Turkey*, *supra* note 139, ¶¶ 64, 75–76. *See also* Helen Keller, Magdalena Forowicz & Lorenz Engi, Friendly Settlements before the European Court of Human Rights, Theory and Practice 120 (2010).

142. *Rules of Court*, Eur. Ct. Hum. Rts. (Mar. 28, 2024), Rule 62A [hereinafter Rules of Court].

In a response to a rising caseload, it is quite evident that the ECtHR has increasingly resorted to unilateral declarations (and indeed friendly settlement more generally) to more efficiently manage its caseload.[143] This has been explained as necessary so as to enable the ECtHR to "free up time . . . to dedicate to cases raising new issues."[144] Given the advantages of unilateral declarations in this regard, their frequent use was "strongly encouraged" at the various High Level Conferences on the Future of the European Court of Human Rights.[145]

Rule 62A was thus inserted into the Rules of Court on April 2, 2012. This provides an opportunity for a contracting party, where a friendly-settlement proposal with the applicant has been unsuccessful, to file with the ECtHR a request to strike out the application on the list.[146] However, to do so, any such request must be accompanied by a declaration clearly acknowledging that there has been a violation of the Convention in the applicant's case, together with an undertaking to provide adequate redress and, as appropriate, to take necessary remedial measures.[147] This filing of a unilateral declaration must be made in public.[148] Furthermore, attempts at reaching a friendly settlement might be dispensed with in 'exceptional circumstances', thereby allowing the contracting state to file a unilateral declaration regardless of any attempt to first settle.[149] As to the basis for the ECtHR to accept a unilateral declaration, this is provided in the terms that it must offer "sufficient basis for finding that respect for human rights as defined in the Convention and the Protocols thereto does not require it to continue its examination of the application."[150] If it does so, then the Court might strike the case from the list, "either in whole or in part, even if the applicant wishes the examination of the application to be continued."[151] In addition to this provision, the jurisprudence of the ECtHR also sets out essentially seven factors relevant to a rights-based assessment of unilateral declarations.

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143. Eur. Ct. Hum. Rts., Unilateral Declarations: Policy and Practice 1 (July 2023). In 2024 alone, 1,164 cases were struck out on the basis of a friendly settlement reached between the parties and 397 cases were struck out in a decision following a unilateral declaration. *See* Eur. Ct. Hum. Rts., Annual Report 2024 of the European Court of Human Rights 36 (2025). In the period between 2020–2024, over 2,300 cases were struck out in a decision following a unilateral declaration, with 2023 seeing the highest number – 624. *See* Eur. Ct. Hum. Rts., Friendly Settlements and Unilateral Declarations, (Apr. 5, 2023), https://public.tableau.com/app/profile/echr/viz/FriendlysettlementsandUnilateraldeclarations/OverviewFSDU [https://perma.cc/644L-V992].

144. Veronika Fikfak, *Against Settlement Before the European Court of Human Rights*, 20 Int'l J. Const. L. 942, 943 (2022); *see also* Eur. Ct. Hum. Rts., Unilateral Declarations: Policy and Practice, *supra* note 143, at 1.

145. Eur. Ct. Hum. Rts., Unilateral Declarations: Policy and Practice, *supra* note 143, at 1; *see also* Interlaken Declaration, ¶ 7(a) (Feb. 2010); Izmir Declaration, *Repetitive Applications*, ¶¶ (1)–(2) (Apr. 2011); Copenhagen Declaration, ¶ 54(b) (Apr. 2018).

146. Rules of Court, *supra* note 142, Rule 62(A)(1)(a).

147. *Id.* Rule 62(A)(1)(b).

148. *Id.* Rule 62(A)(c).

149. *Id.* Rule 62(A)(2).

150. *Id.* Rule 62(A)(3).

151. *Id*.

A. Audi Alteram Partem

The need to provide the applicant with the opportunity to make representations on a unilateral declaration is the first factor which, although not explicitly recognized in the caselaw, arguably arises as a matter of procedural practice.[152] This arises despite the possibility of a unilateral declaration being accepted by the Court against the applicant's wishes: at the ECtHR the views of the applicant are "always sought."[153] This could be because, despite an applicant initially rejecting the terms offered by the respondent State during the friendly settlement stage, they may accept the terms of the offer at a later stage. When this happens, the ECtHR strikes out the application in line with Article 39 of the European Convention on Human Rights ("ECHR").[154] It is then up to the applicant to mount an objection to the terms of the declaration, be that due to its scope in relation to violations being too limited or due to the sums proposed being insufficient to cover the extent of injury.[155] Indeed, there is a particular onus on the applicant to specify the reasons for rejecting the declaration where the case in question concerns a legal issue previously determined by the ECtHR and since resolved (of which see the other factors below).[156] In these types of cases, the ECtHR is likely to see less utility in proceeding with a case that covers ground that they have already authoritatively determined as a matter of law.

B. Norm Development Imperative

This leads to the utility of the ECtHR in proceeding with the case to advance its objectives as a supranational tribunal engaged in the elucidation, development, and safeguarding of rules under the ECHR.[157] The ECtHR will thus look at the nature of the complaints made and whether the issues raised are comparable to issues already determined by the court.[158] This examination itself ties into the last sub-paragraph of Article 37(1) of the ECHR, which requires the Court to continue examining applications "if respect for human rights as defined in the Convention . . . so requires."[159] The Court itself

152. Eur. Ct. Hum. Rts., *Unilateral Declarations: Policy and Practice*, *supra* note 143, at 2.

153. *Id.*

154. *Id.* at 2. (citing *Bilalova and Others v. Poland*).

155. Lize Glas, *Unilateral Declarations and the European Court of Human Rights: Between Efficiency and the Interests of the Applicant*, 25 Maastricht J. Eur. & Comp. L. 607, 617 (2018); *see, e.g.*, Topičić-Rosenberg v. Croatia, Judgment, App. No. 19391/11, ¶ 26 (Eur. Ct. Hum. Rts., Nov. 14, 2013) [hereinafter *Topičić-Rosenberg v. Croatia*].

156. Eur. Ct. Hum. Rts., *Unilateral Declarations: Policy and Practice*, *supra* note 143, at 2 (citing *Ryabkin and Volokitin v. Russia*, Decision, App. Nos. 52166/08 & 8526/09 (Eur. Ct. Hum. Rts., Jun. 28, 2016)).

157. Philip Leach, *The European Court of Human Rights: Achievements and Prospects*, *in* International Human Rights Institutions, Tribunals, and Courts 423 (Gerd Oberleitner ed., 2018).

158. *Tahsin Acar v. Turkey*, *supra* note 139, ¶ 76; *see also* Christos L. Rozakis, *Unilateral Declarations as a Means of Settling Rights Disputes: A New Tool for the Resolution of Disputes in the ECHR's Procedure*, *in* Promoting Justice, Human Rights and Conflict Resolution through International Law, Liber Amircorium Lucius Caflisch 1009 (Marcelo G. Kohen ed., 2007).

159. Convention for the Protection of Human Rights and Fundamental Freedoms, art. 37(1), Nov. 4, 1950, 213 U.N.T.S. 221.

has indicated that, prior to its decisions to strike out a case, it "must verify" whether this requirement has been fulfilled.[160] It observed that beyond simply settling cases before it, the Court's judgments also "elucidate, safeguard and develop the rules instituted by the Convention."[161] Therefore, even if the primary purpose of the Convention system is to afford individual relief, "its mission is also to determine issues on public-policy grounds in the common interest, thereby raising the general standards of protection of human rights and extending human rights jurisprudence throughout the community of the Convention States."[162] Accordingly, the Court may refuse to strike out cases brought before it in instances where the case raises "questions of a general character affecting the observance of the Convention which require further examination."[163]

In this regard, it is apparent that the ECtHR receives applications concerning allegations of a wide range of human rights abuses in which unilateral declarations have been proffered by the respondent state. With occasional deviations, the Court in almost all rulings determines whether there is clear and extensive case law on the subject of the complaint.[164] It also evaluates unilateral declarations in cases it considers "sensitive or complex" as well as "those concerning the most serious human rights abuses."[165] In *Vyerentsov v. Ukraine*, in rejecting Ukraine's unilateral declaration, the Court stated that it took into account that the issues raised in the application "have not been previously examined by this Court in respect of Ukraine."[166] In another prominent example, *Rantsev v. Cyprus and Russia*, the ECtHR refused to accept the unilateral declaration made by Cyprus in relation to allegations of human trafficking: the Court regarded the continuation of this case as important due to the "serious nature of allegations of trafficking in human beings."[167] Accordingly, "respect for human rights" required the examination of the case.[168] In this regard, both the absence of case law and the seriousness of the issues have provided justification for the ECtHR, in pursuit of its wider institutional mission as a supranational

160. *See, e.g.,* Konstantin Markin v. Russia, App. No. 30078/06, ¶ 89 (Eur. Ct. Hum. Rts., Mar. 22, 2012), https://hudoc.echr.coe.int/eng#{%22appno%22:[%2230078/06%22],%22itemid%22:[%22001-109868%22]} [https://perma.cc/DZ56-QBMR] [hereinafter *Konstantin Markin v. Russia*].

161. *Id*; *see also* Rantsev v. Cyprus and Russia, Judgment, App. No. 25965/04, ¶ 97 (Eur. Ct. Hum. Rts., Jan. 7, 2010) [hereinafter *Rantsev v. Cyprus and Russia*]; Tahirov v. Azerbaijan, Judgment, App. No. 31953/11, ¶ 37 (Eur. Ct. Hum. Rts., Jun. 11, 2015) [hereinafter *Tahirov v. Azerbaijan*].

162. *Rantsev v. Cyprus and Russia*, *supra* note 161, ¶ 197; *Konstantin Markin v. Russia*, *supra* note 160, ¶ 89; *Tahirov v. Azerbaijan*, *supra* note 161, ¶ 37; *Jeronovičs v. Latvia*, *supra* note 139, ¶ 109.

163. *See, e.g.*, PHILIP LEACH, TAKING A CASE TO THE EUROPEAN COURT OF HUMAN RIGHTS [2.166] (4th ed., 2017), (citing Tyrer v. U.K., Judgment, App. No. 5856/72, (Eur. Ct. Hum. Rts., Apr. 25, 1978)).

164. Glas, *supra* note 155, at 615.

165. *Id*.

166. Vyerentsov v. Ukraine, Judgment, App. No. 20372/11, ¶ 45 (Eur. Ct. Hum. Rts., Apr. 11, 2013).

167. *Rantsev v. Cyprus and Russia*, *supra* note 161, ¶ 199.

168. *Id.* ¶ 202. On severity of allegations leading to the rejection of a unilateral declaration see also *Tahirov v. Azerbaijan*, *supra* note 161, ¶ 41.

court charged with the development of European-wide human rights law, in rejecting unilateral declarations.

C. Nature and Scope of Measures Taken in the Context of the Execution of Previous Judgments

The ECtHR, as illustrated in cases such as *Tahsin Acar v. Turkey*, will take into account a state's efforts to comply with previous judgments when assessing whether to accept a unilateral declaration.[169] A respondent State may stipulate in a declaration that it is taking a broad range of measures to comply with a previous judgment of the Court.[170] The Court has noted in *Gergely v. Romania* that, in these instances, it "is not convinced of the usefulness of another judgment on the merits."[171] This also arose in *Gambar and others v. Azerbaijan,* where the issues before the ECtHR were essentially identical to those already decided in *Namat Aliyev v. Azerbaijan*.[172] Accordingly, the Court found that "had it decided to proceed with the examination of the present cases and delivered judgments finding a similar violation of the Convention, the general measures to be adopted in the framework of the execution of such judgments would, in any event, be the same as those adopted under the [previous] judgment."[173] It therefore concluded that it was not justified to continue examining the applications further, in accordance with Article 37 (1) (c) of the Convention, and that it found no special circumstances regarding respect for human rights as defined in the Convention and its Protocols.[174]

D. Existence of Disputed Facts

Another consideration relevant to the ECtHR's assessment as to whether to accept a unilateral declaration will be the existence of disputed facts that require resolution in the proceedings. In turn, the existence of disputed facts in *Tahsin Acar v. Turkey* contributed to the Court's rejection of the unilateral declaration in that case.[175] The Grand Chamber in *Tahsin Acar v. Turkey* observed that "the facts were to a large extent in dispute between the parties."[176] Recalling the unilateral declaration made by Turkey in *Akman v. Turkey*, the Grand Chamber noted that the facts in that case were not in dispute between the parties — as the Government had admitted a violation of Article 2 of the ECHR. Accordingly, further investigation into the facts in that case "either by domestic authorities or by the Court was less pressing as the

169. *See Tahsin Acar v. Turkey*, *supra* note 139, ¶ 76.
170. GLAS, *supra* note 140, at 293.
171. Gergely v. Romania, Judgment, App. No. 57885/00, ¶ 26 (Eur. Ct. Hum. Rts., Apr. 26, 2007).
172. Gambar and others v. Azerbaijan, App. Nos. 4741/06, 19552/06, 22457/06, 22654/06, 24506/06, 36105/06 & 40318/06, at 18 (Eur. Ct. Hum. Rts., Dec. 9, 2010).
173. *Id.* at 19.
174. *Id.* at 18–20.
175. *Tahsin Acar v. Turkey*, *supra* note 139, ¶ 78; GLAS, *supra* note 140, at 294.
176. *Tahsin Acar v. Turkey*, *supra* note 139, ¶ 78.

respondent State had already assumed liability for the killing under Article 2 of the Convention."[177] The Grand Chamber in *Akman v. Turkey* recognized that the Government, in connection with the execution of the Court's previous judgments, had taken measures to address shortcomings identified previously by the Court. However, in *Tahsin Acar*, the Grand Chamber observed that the unilateral declaration did not sufficiently address the grievances under the Convention, including the failure to mention concrete measures taken to address the specific complaints.[178] The Grand Chamber ultimately rejected Turkey's request to strike out the Application. This was because Turkey's admission of liability contained a number of shortcomings. Specifically, it did not contain an admission as to the shortcomings in the domestic investigation of the disappearance nor did it contain an undertaking by the Government to conduct an investigation in line with its obligations under the Convention "as defined by the Court in previous cases." In turn the Grand Chamber concluded the declaration did not provide enough security that it would ensure "respect for human rights" pursuant to Article 37 (1) of the Convention.[179]

The Grand Chamber's reasoning in *Tahsin Acar* thus highlights the limits of unilateral declarations before the ECtHR. Where key facts remain disputed and the respondent State fails to commit to concrete remedial measures, a declaration will not provide a "sufficient basis" for striking a case out. By contrasting *Tahsin Acar* with *Akman*, the Court underscored that unilateral declarations can only be accepted where liability is clearly acknowledged, factual disputes are resolved, and specific undertakings are made to address underlying violations. Absent these elements, the respect for human rights continues to demand judicial scrutiny.

E. Filed After a Friendly Settlement

Although not stipulated by the Court in *Tahsin Acar v. Turkey*, Rule 62A(1)(a) provides that the attempts at a friendly settlement should fail before the respondent State files a request with the Court seeking the striking out of an application, which is then accompanied by the unilateral declaration.[180] However, in exceptional circumstances, the respondent State may file a request to have the application struck out and an accompanying unilateral declaration, even before attempts are made to achieve a friendly settlement.[181] Accordingly, the absence of negotiations to achieve a friendly settlement may not necessarily lead to the Court's rejection of the unilateral declaration.[182] This point arose in *Union of Jehovah's Witnesses v. Georgia* where the failure to first engage in negotiation

177. *Id.* ¶ 82.
178. *Id.* ¶ 83.
179. *Id.* ¶¶ 84–86. *But see* Glas, *supra* note 155, at 616. Glas indicates doubt as to the importance of this factor in the jurisprudence of the ECtHR given that "*Tahsin Acar* was the first and only judgment where this factor was a problem." Glas, *supra* note 140, at 234.
180. *See* Rules of Court, *supra* note 142, Rule 62A(1)(a).
181. *Id.* Rule 62A(2).
182. *See* Glas, *supra* note 155, at 616.

did not undermine the validity of the unilateral declaration given that such declaration was comprehensive in its admissions and proposed compensation that was commensurate with awards made in similar cases.[183] In other words, the unilateral declaration itself might render any attempt at friendly settlement as redundant where the terms of the declaration were commensurate with the probable outcome if the applicant was successful on the merits.

F. Clear Acknowledgment of a Violation

The ECtHR, in cases like *Tahsin Acar v. Turkey*, considers a respondent government's admissions regarding alleged Convention violations when deciding whether to accept a unilateral declaration.[184] Although *Tahsin Acar v. Turkey* suggests this is a relevant factor, Rule 62A mandates a *clear* acknowledgment of a Convention violation in the specific case.[185] Without it, payments are considered *ex gratia* and not compensation.[186] Without a clear acknowledgment, the Court cannot fully ascertain the declaration's scope to evaluate whether respect for human rights allows it to cease examining the case.[187] Even with the rule requiring a clear acknowledgment, a unilateral declaration's limited scope is not necessarily grounds for rejection.[188] The Court can strike out part of the application based on the declaration and address the remainder separately, as seen in *De Tommaso v. Italy*.[189] Similarly, in *Ielcean v. Romania*, where the applicant had alleged a violation of his rights under Article 6 of the ECHR, the Court accepted the Government's unilateral declaration, which acknowledged a breach of Article 6 (1) of the Convention, and struck out part of the applicant's complaints.[190]

The ECtHR's case law shows that unilateral declarations must contain a clear acknowledgment of the specific violation to be effective. Where this is missing, the declaration risks being rejected, as in *Tahsin Acar*. However, when such acknowledgment is made, as in *Ielcean* and *De Tommaso*, the Court may accept the declaration in whole or in part. The decisive factors are clarity of admission, scope of remedial action, and whether acceptance of the declaration would still safeguard respect for human rights under the Convention.

183. Union of Jehovah's Witnesses and others v. Georgia, App. No. 72874/01, ¶¶ 17, 23, 28, 30 (Eur. Ct. Hum. Rts., Apr. 21, 2015).

184. *Tahsin Acar v. Turkey*, *supra* note 139, ¶ 76.

185. *See* Rules of Court, *supra* note 142, Rule 62A; *see also* Eur. Ct. Hum. Rts., *Unilateral Declarations: Policy and Practice*, *supra* note 143, at 2 (emphasis added).

186. Fikfak, *supra* note 144, at 971.

187. *Id.* (citing Bazjaks v. Latvia, App. No. 71572/01, ¶¶ 51–52 (Eur. Ct. Hum. Rts., Oct. 19, 2010)).

188. Glas, *supra* note 155, at 617.

189. De Tommaso v. Italy, Judgment, App. No. 43395/09, ¶ 133 (Eur. Ct. Hum. Rts., Feb. 23, 2017).

190. Ielcean v. Romania, Decision, App. No. 76048/11, ¶¶ 8, 18–19, 21–22 (Eur. Ct. Hum. Rts., Oct. 7, 2014) (while also declaring the remainder of the case inadmissible for other reasons).

G. Manner by Which the State Seeks to Provide Redress

Finally, the manner in which the declaring state intends to provide redress to the applicant has also been identified by the ECtHR as a factor in assessing whether to accept the unilateral declaration at issue.[191] The respondent state's undertaking to provide redress to the applicant in its unilateral declaration must be in line with the Court's case law on just satisfaction.[192] Accordingly, the Court may accept unilateral declarations despite objections by the applicant, if the compensation proposed bears a reasonable relationship of proportionality to the amount that the Court would award, with reference to previous awards.[193] On the other hand, the Court has rejected unilateral declarations because the sum of money proposed by the respondent government was inadequate.[194] States may also commit to take non-monetary individual measures, for instance, the "enforcement of a domestic judgment that has remained unenforced."[195] However, these undertakings should be described sufficiently clearly and certainly.[196]

IV. Toward a More Explicit Framework for the ICJ to Evaluate Unilateral Declarations

The seven factors identified in Part III provide a useful and more transparent framework for the ICJ to assess unilateral declarations in future human rights cases, with some recognition and indeed adaptation to the different institutional context. There are some similarities in the manner by which both Courts evaluate unilateral declarations. Particularly, both courts have stipulated that unilateral declarations should be made publicly and with specificity, with the applicant's acceptance unnecessary.[197] As outlined in the previous Part, unilateral declarations before the ECtHR were introduced to enable the Court to efficiently dispose of repetitive applications.[198] Although it may appear that reliance on unilateral declarations may compromise the interests of the applicants, the ECtHR (unlike the ICJ) has adopted clear, specific factors to be taken into consideration in evaluating unilateral declarations. These factors, at least theoretically, serve as safeguards for the interests of the applicants and recognize the need to balance their interests against those of the declaring state.

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191. Rules of Court, *supra* note 142, Rule 62A(1)(b); *Tahsin Acar v. Turkey*, *supra* note 139, ¶ 76.

192. *See* Glas, *supra* note 155, at 618.

193. *Topčic-Rosenberg v. Croatia*, *supra* note 155, ¶ 29; Wygoda v. Poland, App. No. 6738/12, ¶ 24 (Eur. Ct. Hum. Rts., Nov. 22, 2016).

194. *See, e.g., Topčic-Rosenberg v. Croatia*, *supra* note 155, ¶ 29; *see also* Glas, *supra* note 155, at 618.

195. Glas, *supra* note 155, at 620 (citing Yegupova and Others v. Ukraine, Judgment, App. No. 21013/07 (Eur. Ct. Hum. Rts., Jun. 5, 2012); Kobylynsky and Others v. Ukraine, Judgment, App. No. 1632/13 (Eur. Ct. Hum. Rts., Apr. 15, 2014); Manukian v. Georgia, Judgment, App. No. 49448/08 (Eur. Ct. Hum. Rts., May 3, 2016)).

196. *See id.*

197. See *Australia v. France*, *supra* note 1, ¶ 43; *New Zealand v. France*, *supra* note 1, ¶ 46; *Tahsin Acar v. Turkey*, *supra* note 139, ¶ 76; Rules of Court, *supra* note 142, Rule 62A.

198. See *supra* note 143.

A. Audi Alteram Partem

First, it was noted in Part III that the ECtHR observes *audi alteram partem* in the consideration of unilateral declarations. The ICJ, by contrast, has no clear procedure in which to obtain the views of the applicant state. This drew some criticism in the *Nuclear Tests* cases, given the Court's active role in defining the objects of the litigation without much engagement of the applicants.[199] In contrast, Judge Greenwood in *Belgium* v. *Senegal* asked both parties whether a unilateral declaration would settle the matter, with both agreeing that it would do so.[200] By not allowing the applicant to comment on a unilateral declaration, the Court risks depriving itself of valuable insight — both into whether the declaration genuinely supports the resolution of the dispute in line with the litigation's objectives, and whether it may instead be an attempt to pre-empt an unfavorable ruling. The applicant is uniquely positioned to provide context that could inform the Court's assessment of the declaration's sincerity and impact.

Although the Court generally presumes that declarations are made in good faith, relying solely on this presumption — particularly in human rights cases — can have serious consequences. This underscores the importance of incorporating the applicant's perspective into the evaluation process. Inviting submissions from the applicant on any proposed declaration would enhance the procedural legitimacy of the Court's decision. It would also provide the Court with deeper insight into whether continuing the litigation might serve broader objectives, such as clarifying or advancing international law.

B. Norm Development Imperative

Second, a key tenet of the ECtHR's approach to unilateral declarations is to consider whether the acceptance of it would advance the objectives that this judicial body is entrusted to promote. In this regard, although not entirely without disagreement, the ICJ has been said to exist to advance four main goals.[201] The first, rooted in the UN Charter and its own Statute, is dispute resolution.[202] A secondary, related objective is to contribute to a rules-based international order by clarifying international law, thereby fostering peaceful

199. *New Zealand v. France*, *supra* note 1, ¶ 13 (Onyeama, Dillard, Jiménez de Aréchaga and Sir Humphrey Waldock, JJ., dissenting); *Australia v. France*, *supra* note 1, ¶¶ 14, 23 (Onyeama, Dillard, Jiménez de Aréchaga and Sir Humphrey Waldock, JJ., dissenting) (At the very least, since the Judgment attributes intentions and implied waivers to the Applicant, that Party should have been given an opportunity to explain its real intentions and objectives, instead of proceeding to such a determination *inaudita parte*.)

200. *See supra* note 43; *see also Belgium v. Senegal*, *supra* note 39, ¶¶ 33, 38–39.

201. Rotem Giladi & Yuval Shany, *Assessing the Effectiveness of the International Court of Justice*, *in* The Cambridge Companion to The International Court of Justice 101 (Carlos Espósito & Kate Parlett eds., 2023).

202. Article 38 of the ICJ Statute notes the Court's function is "to decide in accordance with international law such disputes as are submitted to it." *See* Statute of the International Court of Justice, Arts. 4, ¶ 2; 36, ¶ 2; 38, ¶ 1; 40.

dispute settlement.[203] A third goal, as the UN principal judicial organ, is regime support by assisting other organs, including the Security Council and General Assembly, in their decision-making.[204] This is evident in the UN Charter's aim to resolve disputes peacefully, suggesting the ICJ is integral to maintaining international peace and security, including the advancement of human rights.[205] Finally, the ICJ contributes to regime legitimization: the UN aims to operate by 'peaceful means', based on 'principles of justice and international law.'[206] In turn, the very existence of the ICJ as a court of justice, with the status as a principal organ, symbolizes and underscores the centrality of justice, law, and peace as goals of the UN system.[207]

Quite how these four goals should shape the ICJ's consideration of a unilateral declaration in a human rights case will involve a value judgment and a balancing of these factors, dependent on the context. Some question the power of the Court to use a discrete dispute to advance such wider goals, particularly where they do not directly relate to the dispute: on this basis, state consent being central to dispute resolution, the Court ought to give weight to the intention behind a unilateral declaration, as it did in *Nuclear Tests* cases.[208] On the other hand, cases such as *Gambia v. Myanmar* and *South Africa v. Israel* are suggestive of a broader approach, with the Court arguably being cognizant of its wider UN institutional role when preferring to indicate provisional measures (rather than accept unilateral declarations) over situations that have been recognized by the international community as constituting a threat to international peace and security. Sometimes the Court will be direct and explicit on its wider institutional role; other times this will be implicit.[209] However, greater transparency regarding how the ICJ perceives and integrates its role as a UN organ into its assessment of unilateral declarations would be beneficial.[210] Explicitly acknowledging this broader context would enhance the legitimacy and perceived impartiality of the Court's

203. *See* Rosalyn Higgins, *Aspects of the Case Concerning the Barcelona Traction, Light, and Power Company, Ltd*., 11 VA. J. INT'L L. 327, 341 (1971); *see also* Robert Y. Jennings, *The Role of the International Court of Justice*, 68 BRIT. Y.B. INT'L. L. 1 (1997).

204. *See* U.N. Charter, Article 96, ¶1; Statute of the International Court of Justice, Article 65. "The purpose of the advisory function is . . . to offer legal advice to the organs and institutions requesting the opinion." Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226 (July 8); Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, ¶ 60 (July 9). "[A]dvisory opinions have the purpose of furnishing to the requesting organs the elements of law necessary for them in their action." BERTRAND RAMCHARAN, MODERNIZING THE ROLE OF THE INTERNATIONAL COURT OF JUSTICE (2022); *see generally* Ramsden, *supra* note 2, at 446; Giladi & Shany, *supra* note 201. As to the link between ICJ provisional measures decision in human rights cases and subsequent consideration/action by the Security Council and General Assembly, see generally, Michael Ramsden & Zixin Jiang, *The Dialogic Function of I.C.J. Provisional Measures Decisions in the U.N. Political Organs: Assessing the Evidence*, 37 AM. U. INT'L L. REV. 901.

205. Giladi & Shany, *supra* note 201.

206. *Id*.

207. *Id.*

208. *Australia v. France*, *supra* note 1, ¶ 43; *see also New Zealand v. France*, *supra* note 1, ¶ 46.

209. Allegations of Genocide under the Convention on the Prevention and Punishment of the Crime of Genocide (Ukr. v. Russ.), Preliminary Objections, Judgment, 2024 I.C.J. 409, ¶ 108 (Dec. 8).

210. *See, e.g.*, Grossman, *supra* note 137, at 152–54.

decisions.[211] It would also provide clearer guidance to states regarding the factors that influence the Court's reasoning, potentially fostering greater compliance and reinforcing the principles of international law and the UN's overarching goals of peace, justice, and human rights. Although balancing the need for state consent with broader international objectives is delicate, a more transparent approach would, if it is submitted, ultimately strengthen the ICJ's contribution to the international legal order.

C. Nature and Scope of Measures Taken in the Context of the Execution of Previous Judgments

Third, with regard to the nature and scope of measures taken in the context of the execution of previous judgments, although the ECtHR may accept unilateral declarations if the respondent state has taken general measures in the framework of execution of its previous judgments, the ICJ has not expressly stated that it would consider this factor in evaluating unilateral declarations. In instances where the state has indeed taken concrete measures to comply with previous judgments of the Court, it may seem more reasonable to rely on the declaration and strike out the application. However, in situations of systemic human rights violations, the ones that the ICJ has recently confronted, this factor warrants even more scrutiny. For instance, in *Armenia v. Azerbaijan*, Armenia repeatedly requested the Court to indicate provisional measures or to modify its existing Orders.[212] This illustrates the persistence and the evolving nature of alleged violations, notwithstanding the Court's previous Orders. Because the stakes are especially high in cases concerning structural human rights violations in ongoing situations, the recurrence of such requests may signal the insufficiency of the measures indicated in preventing the irreparable harm to the protected rights. Consequently, accepting unilateral declarations in such circumstances could risk exacerbating already sensitive situations — rather than resolving them. The advantage of the Court issuing another judgment, even if the situation is already covered in another case, lies in its potential to provide more specific and targeted guidance tailored to the evolving circumstances on the ground. Although previous judgments might establish general principles or condemn certain practices, a new judgment can address evolving patterns, reinforce compliance, contribute to accountability, and offer scope for dialogue among relevant actors, thereby reinforcing the ICJ's wider goals above.

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211. *Id.*

212. *See generally*, Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Arm. v. Azer.), Provisional Measures, Order, 2021 I.C.J. 131 (Dec. 7); Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Arm. v. Azer.), Provisional Measures, Order, 2022 I.C.J. 578 (Oct. 12); Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Arm. v. Azer.), Provisional Measures, Order, 2023 I.C.J. (Feb. 22); Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Arm. v. Azer.), Provisional Measures, Order, 2023 I.C.J. (Jul. 6); Application of the International Convention on the Elimination of All Forms of Racial Discrimination (Arm. v. Azer.), Provisional Measures, Order, 2023 I.C.J. (Nov. 17).

D. Existence of Disputed Facts

Fourth, the existence of disputed facts should be a factor that is considered more explicitly by the ICJ, much like in the ECtHR. On this basis, the Court should balance the advantages of a unilateral declaration against the possible non-resolution of substantial factual disputes at the heart of the case. This is particularly material in cases involving systemic human rights violations and those of an *erga omnes* character, where part of the objective in bringing the case will be to obtain from the ICJ a thorough examination of the facts and a legal determination of them.[213] This is of paramount importance because the Court's factual findings can serve to augment other efforts at accountability and truth seeking, as well as victims' reparations.[214] In this respect, allowing a state to unilaterally avoid or indeed resolve disputed facts through a declaration undermines the Court's ability to provide an accurate and impartial account of events, potentially denying victims a judicial determination of these contested facts. In these circumstances, the need for an authoritative and independent determination of the facts might outweigh the efficiency gains that might be achieved by accepting a unilateral declaration. This is not to say that this will always be the case. Still, the Court's explicit weighing and balancing of this factor against the acceptance of the unilateral declaration will, again, promote greater transparency and indeed reasoning that engages in this balancing exercise.

E. Filed After a Friendly Settlement

Fifth, regarding the factor requiring that unilateral declarations be filed after failed attempts at a friendly settlement, even though the ICJ may not have a similar requirement for accepting unilateral declarations, some human rights treaties (CERD and CAT) that provide the Court with jurisdiction require attempts at settling the dispute through alternative dispute settlement mechanisms prior to seizing the Court. Accordingly, even if the Court itself has not provided for the requirement, a number of human rights treaties, which provide for recourse to the Court, prioritize attempts at settling the dispute outside the Court. Therefore, attempts at reaching a friendly settlement as a precondition to the acceptance of unilateral declarations by the Court may already have been adequately addressed by the relevant treaties.

F. Clear Acknowledgment of a Violation

Sixth, for the ECtHR, a clear acknowledgment of a violation is required prior to the Court's decision to accept a unilateral declaration. On the contrary, the ICJ does not require the admission of a breach on the part of the State making the declaration. This in turn could encourage avoidant unilateral declarations. The State could simply undertake to act or refrain from acting in a certain manner, without acknowledging breaches of its obligations. In

213. Ramsden, *supra* note 2, at 450–51.

214. *See, e.g.*, *Belgium v. Senegal*, *supra* note 39 (Cançado Trindade, J., dissenting).

instances where the dispute concerns obligations under human rights treaties, the acknowledgment of a violation itself plays an important role, as a form of satisfaction. In turn, the failure to require states to make a clear admission of a breach or a violation potentially deprives the applicant state and victims of such satisfaction. Accordingly, there is a good argument, grounded in international human rights law itself, that the Court should consider whether the unilateral declaration is capable of amounting to a satisfaction of the claim where it is made without an acknowledgment of a violation.[215] This omission is not merely procedural; it risks fundamentally undermining just satisfaction under international human rights law, which encompasses both the recognition of the wrong suffered and the moral vindication that follows from an explicit acknowledgment of responsibility.[216]

G. Manner by Which the State Seeks to Provide Redress

Seventh, the ECtHR has clearly indicated that the manner by which the State intends to provide redress is another factor it takes into consideration in evaluating unilateral declarations. On the other hand, the ICJ has not explicitly indicated that it requires States making unilateral declarations to include an undertaking to provide adequate redress and to take as appropriate, necessary remedial measures similar to Rule 62A (1)(b) of the Rules of Court of the ECtHR. Even though the ICJ has not specified it clearly like the ECtHR, the Court has noted in *Nuclear Tests* cases that unilateral declarations are normally "very specific" and that the State making the declaration would be "legally required to follow a course of conduct consistent with the declaration."[217] Although this may be interpreted to also refer to an undertaking to provide adequate redress and take the necessary remedial measures, the augmentation of predictability and certainty would yield more substantial benefits if the Court would clearly articulate the expected actions of the State making the declaration, mirroring the practice of the ECtHR.

Conclusion

This Article has considered the continued scope and relevance of the *Nuclear Tests* cases in the context of contemporary human rights litigation before the ICJ. Although the principles established in *Nuclear Tests* have been reaffirmed in subsequent jurisprudence, this case was criticized here for narrowly

215. *See, e.g.,* G.A. Res. 60/147, ¶22, Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (Dec. 16, 2005); International Law Commission, *Responsibility of States for Internationally Wrongful Acts*, Article 37, *in* Report of the International Law Commission on the Work of Its Fifty-Third Session, UN GAOR, 56th Sess., Supp. No. 10, ch. IV.E.1., UN Doc. A/56/10 (2001).

216. *See* note 215; *see generally* Alyssa Yamamoto, *UN-Apologetic: International Organization Accountability and Apologies for Human Rights Violations*, 37 Harv. Hum. Rts. J. 117 (2024) (on what constitutes a meaningful apology, drawing upon international law materials).

217. See *Australia v. France*, *supra* note 1, ¶ 43.

interpreting the applicants' objectives and, in retrospect, for potentially overemphasizing the declaring state's intentions at the expense of other objectives in the adjudication of international disputes.

Considering its more recent jurisprudence, the ICJ appears to be more reluctant to accept unilateral declarations, particularly in disputes concerning the interpretation, application, and fulfilment of human rights treaties. However, the Court has not definitively ruled out the possibility of accepting such declarations, and it still lacks clear, well-defined guidelines for their evaluation. This stands in contrast to the ECtHR, which, despite engaging with unilateral declarations more recently (beginning with *Akman v. Turkey* in 2001), established a framework for their assessment. The ECtHR thus laid down principles, initially articulated in *Tahsin Acar v. Turkey*, and subsequently incorporated them into its Rules of Court.

For an institution that had a significant head start in evaluating unilateral declarations, the ICJ lags behind the ECtHR in establishing clear and specific principles. The lack of defined factors for evaluating unilateral declarations before the ICJ could inadvertently encourage states to use avoidant declarations — declarations designed to evade judicial scrutiny without genuinely addressing the underlying issues. This, in turn, could negatively impact the applicant state's interests and, more importantly, the rights of victims for whom remedies are sought. Accordingly, the ICJ should emulate the ECtHR's proactive approach and introduce clear, comprehensive guidelines and principles to be applied when evaluating unilateral declarations in the human rights context. These guidelines should prioritize the need for a thorough examination of the facts, the interests of the applicant, and the rights of victims, ensuring that unilateral declarations are not used as a tool to frustrate the objectives in human rights litigation before the ICJ.