his article on the Arab oil embargo.[1] (I would add however, by way of extenuation, that readers of my note can hardly have been misled into believing that its subject is within the thrust of Dr. Shihata's article, for footnote 1 of my note makes it clear that the implied judgment that I incorrectly laid to him is confined to a footnote of his article.)

To THE EDITOR-IN-CHIEF

Legal Effects of Unilateral Declarations

Professor Rubin's characteristically carefully researched and thoughful study in the January issue of this *Journal*[1] is troubling in the somewhat pessimistic tone of its concluding paragraphs. Thus—"the supporters of such a rule must consider whether its cost is not too heavy for the international order to bear. . . . It is distressing to find the ICJ itself playing a role in this evolution" (p. 30).

In its actual application by the contemporary Court, first in the *Nuclear Tests* cases[2] discussed at length by Professor Rubin, the rule seems to have been used with a large element of pragmatism to correct the then already evident unfortunate political consequences of the Court's earlier majority, eight to six, decision in the same case on the indication of interim measures of protection[3]—a decision rendered in the absence, through illness, of the then President of the Court and one other key judge. In effectively reversing the interim measures decision in its final Judgment on *Nuclear Tests,* the Court majority, by its nine to six decision, in the words of one of the majority judges, Judge Ignacio-Pinto, in his separate opinion, "rightly puts an end to a case one of whose consequences would, in my opinion, be disastrous . . . and would thereby be likely to precipitate a general flight from the jurisdiction of the Court. . . ."[4] It is true, as Professor Rubin points out, that the key dictum of the Court's judgment in *Nuclear Tests* on unilateral declarations of intention,[5] does not command the express support of three of the nine majority judges (Judges Forster, Gros, and Petrén); although Professor Rubin perhaps exaggerates the degree of dissatisfaction of Judge Ignacio-Pinto who does, after all, in terms accept that rationale. The point is, nevertheless, that however unsatisfactory final judgment in the *Nuclear Tests* cases may be to common law students in search of a *ratio decidendi,* any more or less *avant-garde* international law proposition that can command the support of six judges on the contemporary Court, which has been undergoing rapid transition since the "watershed" eight to seven majority decision in *South West Africa* in 1966, may not be doing too badly. The most recent judgments of the Court reflect, in fact, serious philosophical conflicts and also widely different conceptions of the scope of the judicial office and of judicial legislation generally—something that shows up in the plethora of individual judicial opinions, both dissenting and specially concuring, present even in cases decided in voting terms by near unanimity and in the consequent difficulty in extracting clear, agreed majority principles from those cases.[6]

[1] What the footnote does imply (and which led to my error) is that Security Council Resolution 242 (1967) was adopted exclusively in English.

[1] Rubin, *The International Legal Effects of Unilateral Declarations,* 71 AJIL 1 (1977).

[2] [1974] ICJ REP. 253

[3] [1973] ICJ REP. 135.

[4] [1974] ICJ REP. 311.

[5] *Id.* 267.

[6] *See* in this regard this writer's studies *International Law-Making and the Judicial Process,* 3 SYRACUSE J. INT. L. & COMMERCE 9 (1975) (cited by Professor Rubin);

The Court recurs in the *Aegean Sea Continental Shelf* case to the principle of the legal effects of unilateral declarations, and it is an express part of the majority, twelve to one, judgment, although not in fact necessary to the final holding which has already been arrived at, by that stage of the official opinion of Court, on other grounds.[7] This time, aided in part by changes in Court membership in the interval since the final judgment in the *Nuclear Tests* cases two years before, the judicial doubts are stilled. Legal propositions, once successfully asserted even as an, as yet, minority position can, if they appear rational and useful in the practical case-by-case development of international law, seemingly develop an independent momentum of their own.

There is a clear trend in contemporary international law doctrine, reflected also in other Court jurisprudence, away from juridicial formalism, including, among other things, the old, positivistic insistence that a claimed rule, to deserve the accolade of international law, must fit into one or other of the preordained closed categories of formal sources of international law. This trend is in line with the widespread impatience of our times, which is not limited to Third World jurists, over a conceivably highly conservative body of international law doctrine that is seen to lag too far behind rapidly changing societal conditions in the contemporary world community. Who is to criticize the judicial lawmaker if, in the new spirit of legal and societal change, he looks also to the more informal modes of creation of legal norms and to what the parties actually treat as legally binding on themselves in concrete situations? This is in keeping with the thinking of the Scandinavian and general European realist schools on the notion of law as fact, and it is not too far removed from the tradition once represented in U.S. municipal law by the legal realist movement of the 1920's and 1930's. The Court's approach to judgment in both the *Nuclear Tests* and the *Aegean Sea Continental Shelf* cases reflects, it is submitted, this general innovatory spirit in the invocation and application of the principle of the legal effects of unilateral declarations of intention. In both cases, however, so far from there being support for Professor Rubin's fear that such unilateral statements might be used to the detriment of the states actually making them, all the evidence, both before and after the Court decisions, suggests that those states welcomed the Court's inferring of legal effects in the same spirit of pragmatic realism with which the Court itself approached the problems. As the Court judgment in *Nuclear Tests,* citing the earlier judgment in *Northern Cameroons,*[8] notes:

> The Court . . . sees no reason to allow the continuance of proceedings which it knows are bound to be fruitless. While judicial settlement may provide a path to international harmony in circumstances of conflict, it is none the less true that the needless continuance of litigation is an obstacle to such harmony.
>
> Thus the Court finds that no further pronouncement is required in the present case. It does not enter into the adjudicatory functions of the Court to deal with issues *in abstracto,* once it has reached the conclusion that the merits of the case no longer fall to be determined.

Judicial Opinion-Writing in the World Court and the Western Sahara Advisory Opinion, 37 ZaöRV 1 (1977); The Aegean Sea Continental Shelf Case (Greece v. Trukey) (to be published).

[7] [1976] ICJ Rep. 3, at 8, 10.

[8] [1963] ICJ Rep. 38.

The object of the claim having clearly disappeared, there is nothing on which to give judgment.[9]

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Article 2(7) of the UN Charter

To THE EDITOR-IN-CHIEF June 16, 1977

One might imagine that J. S. Watson's interpretation of Article 2(7) of the Charter[1] evinces the nearly logical fancies of an Alice-in-Wonderland "rule" dictated approach to law that Felix Cohen denounced so long ago,[2] but Watson's highly imaginative argument lacks too often, through its many erroneous twists and turns, the conceptual foundation and consistency that would have made it nearly logical. Like that famous cat, Watson produces a smile without a body.

To demonstrate, let us focus on one of his "very important" points made "against the teleological approach" to interpretation of Article 2. The logic, we are told, is compelling, quite clearly "stated" by the article itself provided "one reads Article 2 in its entirety" (either several times, upside-down, or, apparently, once over lightly). The teleological approach addresses the "purposes" of the United Nations and the UN Charter but, Watson affirms, "Article 1 and its *purposes* is not superior to Article 2 and the *principles* . . . Rather the reverse is true . . ."[3] Why are *principles* superior to *purposes*? The answer given is that the words of Article 2 demonstrate that the United Nations and UN members, while acting in pursuit of the *purposes*, must act in accordance with the *principles*. "One cannot get a clearer refutation" than that, we are told.

If one can't, however, then I for one am not convinced. Why the purposes have to be superior, or the principles, is nowhere explained. I had thought that they were of similar import, but let us pursue the reasoning a bit further. First, it does not seem evident at all that merely because one must act "in accordance with" *principles* while in pursuit of *purposes*, the *principles* are "superior" to *purposes*. Rather they seem of interdependent import. Second, if one does read Article 2 in its entirety, one would discover in paragraph four that one of the "principles" is that members shall refrain from the threat or use of force in any manner inconsistent with the *purposes*. Now I suppose that Watson would argue that these words in Article 2 make the *purposes* "superior" to the *principles* but, again, I am not convinced.

Third, if one investigates the content of the "principles" (e.g., paragraphs 1, 2, and 3), actual or conceptual differences between Article 1

[9] [1974] ICJ REP. 271–72.

[1] Watson, *Autointerpretation, Competence, and the Continuing Validity of Article 2(7) of the UN Charter*, 71 AJIL 60 (1977).

[2] Cohen, *Transcendental Nonsense and the Functional Approach*, 35 COLUM. L. REV. 807 (1935). Watson's article demonstrates the failure of positivism to address realistic processes of authority, especially the separation of authority from raw power. He also assumes that authority can only exist with the state or some "centralized magisterial organ," thus posing an unrealistic dichotomy. *See also* Suzuki, *The New Haven School of International Law: An Invitation to a Policy-Oriented Jurisprudence*, 1 YALE STUDIES IN WORLD PUB. ORDER 1 (1974); J. Paust, *Human Rights and the Ninth Amendment: A New Form of Guarantee*, 60 CORNELL L. REV. 231 (1975).

[3] *Supra* note 1, at 71 (emphasis added).