

ACTA

INTERNATIONAL ENVIRONMENTAL LAW
AND THE INTERNATIONAL COURT OF JUSTICE

*Inaugural Lecture at the Fellowship Programme on
International and Comparative Environmental Law**

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I. Introduction

I feel privileged to be given this opportunity to address the UNITAR's Fellowship Programme on International and Comparative Environmental Law, held at the Pázmány Péter Catholic University of Budapest. As a Judge of the International Court of Justice, I wish to begin this inaugural lecture for the course by drawing your attention to the fact that not only is international environmental law gaining in importance in recent years as part of the public order of the international community, but it is increasingly becoming critically relevant to the work of the Court to which I belong. It is against this background that I am going to address this distinguished academic audience today on the theme of "international environmental law and the International Court of Justice".

The potential scope of international environmental law is vast and diversified. While this UNITAR Fellowship Programme is going to cover quite an extensive range of issues, I believe the task assigned to me should be a limited one; I am going to focus on issues relating to the international law of environment as seen from the International Court of Justice, and the role of the Court in this field.

II. The Evolution of International Environmental Law

The birth of international environmental law as a distinct branch of international law has been a fairly recent one. It is generally believed that it came to its present prominence since the Stockholm Conference of 1972, when the famous Stockholm Declaration on

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the Human Environment was adopted. Needless to say, however, this does not mean that there had been no rules of international law in the field of environment.

Already at the turn of the last century in 1900, in the field of preservation of biodiversity and especially the protection of endangered species we witnessed the birth of the Convention for the Protection of Wild Animals, Birds and Fish in Africa. This convention was followed by the Washington Treaty for the Preservation and Protection of the Fur Seals concluded in 1911, and later the Convention for the Regulation of Whaling which came into force in 1931.

In the field of protection of human environment from pollution, the development of international law has been more recent. Thus the *cause célèbre*, the *Trail Smelter* arbitration was constituted in 1935 by a bilateral agreement between the two parties involved, Canada and the United States. In a landmark decision in this case of 1938, which involved a claim for damages caused by transborder air pollution, the Tribunal enunciated a doctrine which came to be regarded as the classical principle of international environmental law – that “no State has the right to use or permit the use of its territory in such a manner as to cause injury ... in or to the territory of another ...”¹. It was in the post-World War II period, however, that the problem of pollution of environment on land, sea and airspace became the object of serious concern of the international community as a whole. Thus, especially against the background of the growth in super oil tankers, the first International Convention for the Prevention of Pollution of the Sea by Oil was concluded in 1954. This concern about the danger of pollution of human environment further expanded to the area of nuclear material, as evidenced by the conclusion in 1971 of the Convention Relating to Civil Liability in the Field of Maritime Carriage of Nuclear Material.

In spite of this long history of development in international environmental law, it is fair to say that it was the Stockholm Conference of 1972 which truly marked a turning point in the development of international environment law. By drawing the attention of the world community to the seriousness of the deteriorating conditions of human environment, the Stockholm Conference, with its Stockholm Declaration, succeeded in establishing certain guiding principles that should govern the protection of the environment. In the same year, the General Assembly of the United Nations followed up the achievement of the Stockholm Conference by adopting its resolution 2995 (XXVII), which enunciated the “General Principles of Cooperation between States in the Field of the Environment”.

After this epoch-making event, a whole new series of developments followed, as can be evidenced by the adoption of the Convention on the Prevention of Maritime Pollution by Dumping Wastes and other Matter in 1972 and especially a whole series of OECD Decisions and Recommendations on the protection of the environment, such as those on Control of Polychlorinated Biphenyls (PCBs) (1973), on Measures to Reduce all Man-Made Emissions of Mercury to the Environment (1973), on Transfrontier Pollution (1974), on Air Pollution Control (1974), on Multilateral Consultation and Surveillance Mechanism for Sea Dumping of Radioactive Waste (1972), and on Transfrontier Movements of Hazardous Wastes (1988).

¹ Decision of the Trail Smelter Arbitral Tribunal, 16 April 1938 (*Reports of International Arbitral Awards*, Vol. III, 1965.).

Against the background of these developments, a new paradigm shift in the law and policy on environment at the international level came about with the Rio de Janeiro Conference of 1992 on Environment and Development. It was at this conference that the issue of environment for the first time was put into the perspective of the “sustainability of development”, based on the general recognition shared by an overwhelming majority of the international community that there was an inevitable link between the preservation of environment and the promotion of development. Thus the concept of “sustainable development” came to the forefront of the policy debate on environment.

It is significant in this context to find that the Rio Declaration on Environment and Development in its Principle 1 demonstrates this shift towards an anthropocentric approach to environment in combination with development. It declares that human beings are “at the centre of concerns for sustainable development” and that they are “entitled to a healthy and productive life in harmony with nature”. Starting from this premise, other principles of the Rio Declaration are formulated, as one author puts it:

“the heart of the Rio Declaration is found in Principles 3 and 4, which should be read together to understand the political context in which they were negotiated and the trade-off they represent.”²

Thus, within the framework established by Principle 1, a right to development (Principle 3) is tempered by the integration of environmental protection into the development process (Principle 4).

III. Specific Characteristics of International Environmental Law

Against the background of this history of development in international environmental law, it may be legitimate to ask what is the proper standing of this new international environmental law in the context of international law in general, and more specifically what are the specific characteristics of international environmental law in relation to other branches of international law.

As a starting point for this debate, let me state at the outset that international environment law is nothing else than one specific field of international law in general. In this sense, it is on a par with other branches of international law, such as international law of the sea, international law of outer space, international law of armed conflict, or international law of human rights. As such, it shares many common features with other branches of international law. Many general principles applicable to general international law are applicable to this field as well.

The common characteristics that international law of environment shares in common with international law in general can be summarized as follows:

First, this law in its essential aspect is governed by the principle of consent of the parties as sovereign States. Thus, as we have seen, the bulk of the legal régime established in different areas of environmental law are founded on the basis of international treaties. It is due to this factor that a State, refusing to participate in the régime established

² SANDS, PHILIPPE, *Principles of International Environmental Law* (2003), 55.

by the Kyoto Protocol on Climate Change, for example, cannot be held *legally* to account for its non-cooperation, however politically regrettable that may be.

Second, the reverse side of the first point is that the régime created by international treaties is governed by the principle of *pacta sunt servanda*. Once a State commits itself to a régime for environmental protection, a violation of its commitment would *ipso jure* result in an injury to the rights of another State and thus incur international responsibility, where the international law of State responsibility will govern the situation.

Third, a corollary of these two principles is that in this sense the international law of environment has some essentially distinct characteristics that distinguish it from the domestic law of environment. The latter primarily belongs to the domain of public law enacted through legislation, whereas the former is in the nature of an undertaking of a reciprocal nature based on the principle of voluntarism. I am going to elaborate this point further later in this lecture.

Nonetheless, it should also be stressed that international law of environment at the same time presents some legal characteristics of its own that distinguishes it from other branches of international law, justifying its claim that it forms a distinct specialized field of international law.

First and foremost, the protection of the environment, by its very nature, is a concept to which the traditional principle of reciprocity, normally applicable to rights and obligations of States, is difficult to apply. The reason is that the preservation of environment has a dimension that goes beyond the bounds of a process for adjusting different interests among opposing parties through mutual accommodation, which is the characteristic of a legal régime established on the principle of voluntarism of the parties within the framework of the autonomy of the parties. The traditional framework in which international law operates based on the partition of competence in accordance with the principle of exclusivity of sovereignty reserved for national jurisdiction, is simply inadequate to cope with the situation where environmental hazards take place across the national frontiers on a regional or global scale.

Second, the wrong done by a party through the violation of an obligation to preserve environment cannot necessarily be remedied through the traditional means of relief, such as reprisal, restitution or compensation. Reprisal, by way of engaging in an act of the same kind, which would otherwise be in violation of the same obligation if committed in the absence of the original breach in question, is a traditional mode of relief available to the injured party under certain conditions, but this does not offer a satisfactory solution here. Also, the environmental damage, once done, cannot be undone. The basic principle of the international law of State responsibility, i.e., the principle of *restitutio in integrum*, thus is simply physically impossible. Moreover, the system of pecuniary damages by way of compensating for the injury done can also be totally inadequate, once irreparable damage is done to the environment.

Last, but most importantly, the legal interest involved in environmental protection in this situation is very often not so much personal and reciprocal in nature as it is common and communal. In other words, when a breach of obligation under international environmental law—either conventional or customary—takes place, the harm caused is very often, though not always, likely to be not so much the injury to a legal interest proper to another party as to be the injury to the communal interest common to the community at large.

Historically, however, this has not been the way in which environmental issues used to be treated in the international arena. Thus in the *Trail Smelter* case, to which I referred earlier, action was brought against the Dominion of Canada before an arbitral tribunal by the United States on behalf of certain U.S. nationals who had been the victim of environmental deterioration through air pollution caused by a smelter factory in Canada. While the cause of action in this case was environmental damage, the case took the form of a civil action in tort brought by the direct victim of the pollution against the perpetrator of this polluting act in question.

It is not accurate to say that international environmental law nowadays has gone through a metamorphosis in legal thinking in this regard and that the traditional approach has now been abandoned. Nonetheless, we must accept that some significant evolution in our thinking on international environmental law has come to grow, so that it is no longer possible to look at the problem of environment – e.g., the issue of pollution, as was the case with the *Trail Smelter* arbitration – purely as pertaining to the realm of contractual or tortious liability between the parties *inter se*. Much more is involved from the viewpoint of the public policy of the international community. Thus the preservation of environment, whatever aspect of biosphere of this planet earth may be at issue, has to be regarded as possessing some aspect of international public goods to be protected and promoted as a common heritage of mankind.

IV. The Relevance of Public Order to International Environmental Law

This brings me to the issue of what implications international environmental law could have to the problem of public order in the international community of today.

Let me start by stating the obvious by way of a general proposition. Any human society, in order to qualify as society, has to be endowed with certain minimum public order to ensure the safety and welfare of its constituent members. The famous Roman dictum *ubi societas ibi jus* represents this basic notion. International society is no exception in this respect.

However, the way public order is formulated and maintained in society depends very much on the actual structure in which the society in question is organized. In this regard, the problem of public order in international society in which we live is distinct from the same problem in any domestic society in two major respects: first the maintenance of public order in this society has traditionally been left primarily in the hands of sovereign States as the constituent members of this society in accordance with the principle of decentralization built on the partition of competence at the national level; second this order has been organized and maintained at the international level in accordance with the principle of voluntarism based on the consent of these States.

What has characterized this system is the principle that public order in international society is conceived and structured as consisting of a composite of the system of public order of its constituent member States of this society, each maintaining its own public order within the realm of its national competence to govern itself and pursuing at the same time incorporating into it some minimum common interest of the community of States as such on the basis of voluntary co-operation. In this structure, each sovereign State has in principle an unfettered power to conceive its own public order within its

national jurisdiction in its own way on the basis of the principle of the partition of competence, which is exercised through its territorial jurisdiction (national territory) and personal jurisdiction (national citizenship).

What I venture to suggest today is that this basic and obvious point about the essential characteristics of international society, however, is growingly challenged at present in the midst of a societal evolution that is swaying the world as international society. The issue of environment is one typical example of this phenomenon.

I do not have to remind this distinguished audience that this novel evolution in legal thinking has not been so new in its origin. In fact, it was against the backdrop of a tremendous growth in interdependence among States since the turn of the last century that the concept of “public order” of international society as a whole came to be born in the minds of States. Since the early 20th century the consciousness has been growing among States that the international community, *qua society of States*, has to develop its own system of governance based on a common framework of values shared by this society as a whole. Already at the turn of the last century, scholars like Heinrich Triepel pointed out that a shift was taking place in the treaty-making practice of States from “Vertrag” to “*Vereinbarung*”³. It was Manley O. Hudson who coined the expression “international legislation” to describe the emerging new type of multilateral international conventions of law-making character⁴ in the post-World War I world. Clearly these phenomena pointed to a new trend for the realization of a need for international public order to reflect the emerging new reality in the socio-economic life of this community of nations. This development took the form of quasi-legislative actions in the international community, while based on the principle of voluntarism in line with the existing international legal framework.

Since that period, developments in this direction have been growing against the backdrop of ever widening and deepening process of interdependence among nations. The essential characteristic of these developments, however, is that “international public order” as conceived here has primarily been the creation of international society which is made up of sovereign States, and addressed to these sovereign States. It is so *procedurally* in terms of its norm-creating process; the norms of this character can only be brought into being by the sovereign States, who alone as members of this “inter-national community”, through the process of consent, tacit or express, have the capacity to create norms of this character in this society, either through the development of rules of customary international law or through the creation of new rules in the form of multilateral international conventions. It is so also substantively in terms of the contents of the norms; what forms the substance of the norms that constitute this public order is addressed primarily to the sovereign States, who alone are the direct addressees of the norms of this character. In this sense, as Professor Georges Scelle aptly opined, the essential characteristic of this society lies in its character as the system of “*dédoublement fonctionnel*”⁵ of the State, i.e. in its double capacity as the norm-giver and the norm-receiver at the same time.

³ TRIEPEL, HEINRICH, *Völkerrecht und Landesrecht* (1899), 49. *et seq.*

⁴ HUDSON, MANLEY O., (ed.), *International Legislation* (1931–1950), 9 vols.

⁵ SCELLE, GEORGES, *Précis de Droit des Gens: Principes et Systématique*, Vol. 1 (1932), at 43.

The development in the consciousness of States for “international public order” in this context can be illustrated typically by the following two examples.

(1) Evolution in the Character of Dispute Settlement

As a starting point of this enquiry, I wish to point to the significance of the difference that already came about at the philosophical level in the characterization of dispute settlement between what was conceived at the time of the Hague Peace Conferences of 1899–1907 and what was incorporated in the Charter of the United Nations in 1945. At the risk of an oversimplification, one may characterize the mechanism for dispute settlement contained in the Hague Convention on the Peaceful Settlement of International Disputes of 1907 as being based on the philosophy that international disputes are a matter primarily for the States involved and to be left for the settlement *inter partes*, on the basis of the principle of autonomy of the parties.

By contrast, the approach of the Charter of the United Nations to the whole question of international disputes can be said to be essentially different from this in its philosophy, even when the Charter prescribes in Chapter VI basically a similar mechanism for peaceful settlement of international disputes. While the legal instruments to be employed for peaceful settlement of disputes as enumerated in Article 33 of the Charter are fundamentally the same as they were in the 1907 Convention, Chapter VI of the Charter taken as a whole focuses primarily on a *dispute, the continuance of which is likely to endanger the maintenance of international peace and security*, and prescribes in this context the roles and functions of the Security Council. Thus, Chapter VI can be said to be founded not so much on the traditional philosophy that a dispute between States should be settled as *an issue affecting exclusively the States parties to the dispute on the basis of the principle of autonomy of the parties*, as on the new philosophy that such a dispute can be *an issue affecting international public order and must be settled in such a manner that international peace and security, and justice, are not endangered*.

This same logic applies, almost word for word, to the problem of environment. Already in the *Trail Smelter* arbitration, the Tribunal made the following oft-quoted statement:

“under the principles of international law, as well as of the law of the United States, no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence.”⁶

While the language used here by the Tribunal is somewhat ambiguous as to whether the Tribunal was stating a principle of private law on tortious liability pertaining to private rights of an individual affected or a general principle pertaining to public order of society, I believe one can detect here an embryo of the emerging concept of public

⁶ Decision of the Trail Smelter Arbitral Tribunal, 16 April 1938 (*Reports of International Arbitral Awards*, Vol. III, 1965.).

interest of the community, going beyond the particular interest of the private persons who had suffered damage from the act in question.

(2) The Emergence of *jus cogens* and Obligations *erga omnes*

By far the most remarkable development in this respect in the evolution of international public order came about with the emergence of the concept of *jus cogens* in international law and the concept of the obligation *erga omnes*. It is significant that the introduction of these two concepts into the realm of international law came about roughly around the same time. As is well known, the concept of *jus cogens* found its place in positive law for the first time in the Vienna Convention on the Law of Treaties of 1969 in its Article 53, while the concept of an obligation *erga omnes* received its first judicial recognition in the judgment of the International Court of Justice in the *Barcelona Traction* case in 1970.⁷

In the famous *dictum* in this judgment, the International Court of Justice stated that there was “an essential distinction” between two types of international obligations that a State assumes on the international level, i.e., “the obligations of a State towards the international community as a whole” on the one hand, and the obligations “arising vis-à-vis another State in the field of diplomatic protection” in relation to the treatment of foreign investments or foreign nationals on the other. On the basis of this distinction the Court went on to make the following remarks:

“By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.”⁸

By way of examples of the obligation in this category, the Court cited such obligations as those deriving from the outlawing of acts of aggression and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination.

It is interesting to note in passing that this passage of the judgment, while an *obiter dictum*, makes a striking contrast to the *ratio decidendi* of the equally well-known judgment of the Court in the *South West Africa (Second Phase)* cases of 1966.⁹ In a highly controversial decision in this instance, the Court denied the Applicants (the Empire of Ethiopia and the Republic of Liberia, as former members of the League of Nations) “any legal right or interest appertaining to them in the subject-matter of the present claims”¹⁰ – i.e., the obligations of the Respondent (the Republic of South Africa) specified in Article 22 of the Covenant of the League of Nations relating to the mandate system as “a sacred trust of civilization” – and on that ground

⁷ *Barcelona Traction, Light and Power Company, Limited, Second Phase, Judgment*, I. C. J. Reports 1970, 3, *et seq.*

⁸ *Ibid.*, p. 32.

⁹ *South West Africa, Second Phase, Judgment*, I. C. J. Reports 1966, 6, *et seq.*

¹⁰ *Ibid.*, 51.

rejected, by the President's casting vote, the claims of the Applicants. In the course of arriving at this conclusion, the Court stated as follows:

"To sum up, the principle of the sacred trust has no residual juridical content which could, so far as any particular mandate is concerned, operate per se to give rise to legal rights and obligations outside the system as a whole; and, within the system equally, such rights and obligations exist only in so far as there is actual provision for them ... Hence, although, as has constantly been reiterated, the members of the League of Nations had an interest in seeing that the obligations entailed by the mandates system were respected, this was an interest which, according to the very nature of the system itself, they could exercise only through the appropriate League organs, and not individually."¹¹

This passage could be taken, and has usually been taken, as amounting to the denial by the Court of the *erga omnes* character of the obligations under the mandate as "a sacred trust of civilization".¹² It is for this reason that this Judgment has been open to severe criticism from various quarters.¹³

Without going too deeply into the analysis of a case which has no direct bearing on the law of environment, it may be worthy of note for our purposes that the Court here was essentially questioning the "legal right or interest appertaining to [the Applicants] in the subject-matter" and therefore the admissibility of the claim from the viewpoint of the *locus standi in judicio* of the Applicants, i.e., the capacity of the Applicants to advance the claim before the International Court of Justice under Article 22 of the Covenant of the League.¹⁴ If we follow this line of reasoning, the judgment could arguably be regarded as the conclusion strictly limited to the issue of the *locus standi* of the Applicants reached on the basis reached of construction of the "actual provisions" of Article 22 of the Covenant, without necessarily going so far as to deny the *erga omnes* character of the obligations assumed by the Respondent. On this logic, it could be argued that the Court simply questioned whether the corresponding right of the international community to insist on their performance by the Respondent should be exercisable by individual members of the League of Nations.

Whatever may be one's assessment of this controversial judgment, this case is not only interesting but also highly relevant to our consideration of the essential character of international environmental law. The judgment of the International Court of Justice in this case, irrespective of whether one takes a position in support or in rejection of this conclusion of the Court, testifies to the point that a similar situation could arise in relation to issues of international environmental law.

It is one thing to establish that certain provisions of international environmental law contained in a multilateral convention can have an *erga omnes* character, but it

¹¹ *Ibid.*, 35.

¹² Covenant of the League of Nations, Art. 22.

¹³ See, for example, the dissenting opinions of Judges JESSUP and TANAKA in this case (*South West Africa, Second Phase, Judgment*, I. C. J. Reports 1966, 250–324 and 325–442.).

¹⁴ *South West Africa, Preliminary Objections, Judgment*, I. C. J. Reports 1962, 319. *et seq.*

could be quite another to draw from this the conclusion that therefore a party to this convention should have the *locus standi* before the Court even in the absence of concrete damage to itself arising out of the violation of a provision of the convention. Without taking sides on this interesting question, I wish to stress the point in this context that both the possibilities and the limitations of the International Court of Justice in the development of international environmental law are linked with this problem. The role that the International Court of Justice may play in the field of international environmental law should be carefully considered from this angle.

V. The Role of the International Court of Justice in International Environmental Law

It should be axiomatic that the task for ensuring observance of international environmental law should be looked at as much from the angle of the mechanism for preventing and monitoring of possible infractions of norms of international environmental law, as from the angle of the mechanism for dispute settlement and enforcement against such infractions *ex post facto*.

This is particularly true with a dispute settlement mechanism like the International Court of Justice. It is beyond doubt that the International Court of Justice, as the principal judicial organ of the United Nations, constitutes an essential part of the entire machinery for the maintenance of international public order in the United Nations. In this sense, as I am going to expound in a minute, the role that the International Court of Justice has played and will play for the future in the development of international environmental law should not be underestimated.

At the same time, however, it should be kept in mind that the Court, in its essential character as well as in its origin, is primarily a court of civil jurisdiction entrusted with the task primarily of settling disputes that arise between States. It is not as such a court of administrative jurisdiction entrusted with the task of pronouncing on the public order of international society, nor is it a court of criminal jurisdiction entrusted with the task of holding perpetrators to account for an infraction of the public order of this society. In a nutshell, the settlement in its essential aspect is always directed to the resolution of the concrete dispute between the parties.

Thus, as we are now going to see somewhat in detail, in many of the cases which have come before the Court, the problem of direct application of international environmental law has not been at issue.

A. Territorial Jurisdiction of the International Commission of the River Oder (Germany et al v. Poland) case (1929)

This was a case relating to a dispute between Poland and several other States of Europe concerning the question of whether the jurisdiction of the International Commission of the River Oder extended to the tributaries of the Oder, Warthe and Netze rivers, located in Polish territory. As such, therefore, the case did not involve an environmental issue. Nevertheless, the dictum of the Court set out the following principle which, as applicable to the present day, can be regarded as the pronouncement of a general principle of international law applicable to international environmental law:

The Court declared:

“when consideration is given to the manner in which States have regarded the concrete situations arising out of the fact that a single waterway traverses or separates the territory of more than one State, and the possibility of fulfilling the requirements of justice and the considerations of utility which this fact places in relief, it is at once seen that a solution of the problem has been sought not in the idea of a right of passage in favour of upstream States, but in that of a community of interest of riparian States. *This community of interest in a navigable river becomes the basis of a common legal right; the essential features of which are perfect equality of all riparian States in the user of the whole course of the river and the exclusion of any preferential privilege of any one riparian State in relation to the others.*”¹⁵

B. The Corfu Channel (United Kingdom v. Albania) case (1949)

This case related to a dispute between the United Kingdom and Albania concerning the incident in which British naval warships, while passing through the Corfu Channel within the Albanian waters, came into contact with mines and were damaged. It was alleged by the United Kingdom as Applicant that Albania was responsible in international law for having laid the mines or at least having permitted the laying of the mines in question within its own territorial jurisdiction.

In this sense, this case also was not one in which international environmental law was at issue. Nevertheless, it is interesting to note that the principle of *sic utere tuo ut alienum non laedas*,¹⁶ derived from Roman law, and applied in the *Trail Smelter* arbitration of 1938, was confirmed. Specifically, the Court in the *Corfu Channel* case declared the following principle applicable to the situation:

“[E]very State [has] obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States”.¹⁷

It is useful to note that the “Stockholm Declaration” has incorporated this dictum in its Principle 21,¹⁸ and the “Rio Declaration” also endorsed this principle in its Principle 2.¹⁹

¹⁵ *Territorial Jurisdiction of the International Commission of the River Oder, Judgment No. 16, 1929, P. C. I. J., Series A, No. 23, 27.*, emphasis added.

¹⁶ “One should use his own property in such a manner as not to injure that of another.”

¹⁷ *Corfu Channel, Merits, Judgment, I. C. J. Reports 1949, 22.*

¹⁸ Report of the United Nations Conference on the Human Environment, Stockholm, 5–16 June 1972, UN Doc. A/CONF.48/14/Rev. 1, 5.

“Principle 21. States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.”

¹⁹ Report of the United Nations Conference on Environment and Development, Annex I, A/CONF.151/26 (Vol. I).

“Principle 2. States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental

C. Nuclear Tests (Australia v. France; New Zealand v. France)
(Interim Measures) cases (1976)

The principle of *sic utere* has also been applied in the *Nuclear Tests Cases* (1976) with a special reference to possible environmental impact of nuclear tests. In its interim order the Court indicated that “the French government should avoid nuclear tests causing the deposit of radio-active fall-out”²⁰ on Australian territory, New Zealand, the Cook Islands, Niue or the Tokelau Islands.

The cases never reached the merits phase as it was considered that the declaration of the French Head of State not to pursue the nuclear tests made in the course of the proceedings was a unilateral declaration with binding effects on the French government, and that therefore the subject-matter of the case had ceased to exist at the time of the proceedings. But in preparation of the oral proceedings, New Zealand and Australia had presented extensive arguments and scientific material on the environmental impact of nuclear tests.

D. Certain Phosphate Lands in Nauru (Nauru v. Australia) case (1992)

In a case brought by the Republic of Nauru against Australia, the Applicant claimed that the Respondent State would bear responsibility for breaches of, inter alia, the following legal obligations:

“*First*: the obligations set forth in Article 76 of the United Nations Charter and Articles 3 and 5 of the Trusteeship Agreement for Nauru of 1 November 1947.

...

Third: the obligation to respect the right of the Nauruan people to permanent sovereignty over the natural wealth and resources.

...

Sixth: the principle of general international law that a State which is responsible for the administration of territory is under an obligation not to bring about changes in the conditions of the territory which will cause irreparable damage to, or substantially prejudice, the existing or contingent legal interest of another State in respect of that territory.”²¹

Since the cause of action by Nauru concerned “a dispute ... over the rehabilitation of certain phosphate lands [in Nauru] worked out before Nauruan independence”,²² this apparently was a case which could involve some points of international environmental law.

and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.”

²⁰ *Nuclear Tests (Australia v. France; New Zealand v. France)*, Order of 22 June 1973, I. C. J. Reports 1973, 106 and 142.

²¹ *Certain Phosphate Lands in Nauru (Nauru v. Australia)*, Preliminary Objections, Judgment, I. C. J. Reports 1992, 243–244.

²² *Ibid.*, 242.

In its Judgment on the Preliminary Objections filed by Australia in the *Certain Phosphate Lands in Nauru* case, the Court rejected Australia's objections based on the concrete circumstances in which the dispute concerning the rehabilitation of the phosphate lands worked out prior to 1 July 1967 arose between Nauru and Australia; it also rejected the objection based on the fact that New Zealand and the United Kingdom were not parties to the proceedings; and lastly, it upheld Australia's objection relating to Nauru's claim concerning the overseas assets of the British Phosphate Commissioners being a new one. The Court thus found that it had jurisdiction to entertain the Application and that the Application was admissible.

Later in 1993, however, Nauru and Australia informed the Court that they had, in consequence of having reached a settlement, agreed to discontinue the proceedings before the Court. Thus the Court did not have the opportunity to address the points of international environmental law raised in this case.

E. Legality of the Use of Nuclear Weapons (Advisory Opinion) case (1996)

A request for an Advisory Opinion on the *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* was filed with the International Court of Justice by the World Health Organization on 14 May 1993. The question on which the Court was invited to give its opinion explicitly referred to "*environmental effects of the use of nuclear weapons*".²³

According to Article 96 (2) of the Charter of the United Nations, the WHO could ask the Court to give Advisory Opinions on matters that lay "within the scope of the activities" of the WHO according to its Constitution.

In examining this request from the WHO, the Court found that:

"The reference in the question put to the Court to the health and environmental effects, which according to the WHO the use of a nuclear weapon will always occasion, does not make the question one that falls within the WHO's functions."²⁴

On this basis, the Court decided to decline the request for an Advisory Opinion on this case declaring the following:

"That the WHO, as a subject of international law, should be led to apply the rules of international law or concern itself with their development is in no way surprising; but it does not follow that it has received a mandate, beyond the terms of its Constitution, itself to address the legality or illegality of the use of weaponry in hostilities."²⁵

Thus this case did not reach the stage where the Court would have examined the issue of "environmental effects of the use of nuclear weapons" as requested by the WHO.

²³ *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion*, I. C. J. Reports 1996 (I), 67., para. 1, emphasis added.

²⁴ *Ibid.*, 77., para. 22.

²⁵ *Legality of the Use by a State of Nuclear Weapons in Armed Conflict, Advisory Opinion*, I. C. J. Reports 1996 (I), 82., para. 27.

F. Legality of the Threat or Use of Nuclear Weapons (Advisory opinion) (1996)

Upon the request of the General Assembly resolution 49/75, filed on 6 January 1995 in accordance with Article 96 (1) of the Charter, the Court was requested to give its Advisory Opinion on the following question: “Is the threat or use of nuclear weapons in any circumstance permitted under international law?”²⁶

It should be noted that this time the question made no explicit reference to the environmental impact of the use of nuclear weapons. But in the course of the proceedings, specific references were made by States that took part in the proceedings before the Court to some international treaties and other instruments, including the Additional Protocol I of 1977 to the Geneva Conventions of 1949, with the argument that the use of nuclear weapons would be unlawful under these legal instruments with regard to their prescription on the protection and safeguarding of the environment.

The Court in its opinion referred, in particular, to three legal instruments cited by these States as follows:

- Article 35, paragraph 3, of the Additional Protocol I of 1977 to the Geneva Conventions of 1949 which prohibits the employment of “methods or means of warfare which are *intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment*”;
- Article 1 of the Convention of 18 May 1977 on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, which prohibits the use of weapons which have “*widespread, long-lasting or severe effects*” on the environment;
- Principle 21 of the Stockholm Declaration of 1972 and Principle 2 of the Rio Declaration of 1992 which express the common conviction of the States concerned that they have a duty “to ensure that activities within their jurisdiction or control *do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction*”.²⁷

Some States argued before the Court that these instruments were to be applied “at all times, in war as well as in peace”, and contended that they would be violated by the use of nuclear weapons “whose consequences would be widespread and would have transboundary effects”,²⁸ while other States either questioned the binding force of some of the precepts of environmental law laid down in these “soft law” instruments, denied the applicability of the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques to the use of nuclear weapons, or, in the case of the Additional Protocol I, denied that they were bound by its terms, recalling that they had reserved their position in respect of its Article 35, paragraph 3.

In relation to these arguments, the Court went into a long discourse in the following words:

²⁶ *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I. C. J. Reports 1996 (I)*, 228.

²⁷ *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I. C. J. Reports 1996 (I)*, 241., emphasis added.

²⁸ *Ibid.*

“29. The Court recognizes that the environment is under daily threat and that the use of nuclear weapons could constitute a catastrophe for the environment. The Court also recognizes that the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn. The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment.

...

... States must take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives. Respect for the environment is one of the elements that go to assessing whether an action is in conformity with the principles of necessity and proportionality.

This approach is supported, indeed, by the terms of Principle 24 of the Rio Declaration, which provides that:

‘Warfare is inherently destructive of sustainable development. States shall therefore respect international law providing protection for the environment in times of armed conflict and cooperate in its further development, as necessary.’

31. The Court notes furthermore that Articles 35, paragraph 3, and 55 of Additional Protocol I provide additional protection for the environment. Taken together, these provisions embody a general obligation to protect the natural environment against widespread, long-term and severe environmental damage; the prohibition of methods and means of warfare which are intended, or may be expected, to cause such damage; and the prohibition of attacks against the natural environment by way of reprisals.

These are powerful constraints for all the States having subscribed to these provisions.

32. General Assembly resolution 47/37 of 25 November 1992 on the “Protection of the Environment in Times of Armed Conflict”, is also of interest in this context. It affirms the general view according to which environmental considerations constitute one of the elements to be taken into account in the implementation of the principles of the law applicable in armed conflict: it states that ‘destruction of the environment, not justified by military necessity and carried out wantonly, is clearly contrary to existing international law’ ...

In its recent Order in the *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court’s Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v. France) Case*, the Court stated that its conclusion was ‘without prejudice to the obligations of States to respect and protect the natural environment’ (*Order of 22 September 1995, I.C.J. Reports 1995*, p. 306, para. 64). Although that statement was made in the context of nuclear testing, it naturally also applies to the actual use of nuclear weapons in armed conflict.

33. The Court thus finds that while the existing international law relating to the protection and safeguarding of the environment does not specifically prohibit the use of nuclear weapons, it indicates important environmental factors that are properly to be taken into account in the context of the implementation of the principles and rules of the law applicable in armed conflict.”²⁹

²⁹ *Ibid.*, 241–243.

The final conclusion reached by the Court, as contained in its *dispositif*, makes no explicit reference to environmental law. It states, *inter alia*, as follows:

- "A. ... There is in neither customary nor conventional international law any specific authorization of the threat or use of nuclear weapons;
 - B. ... There is in neither customary nor conventional international law any comprehensive and universal prohibition of the threat or use of nuclear weapons as such;
 - C. ... A threat of force by means of nuclear weapons that is contrary to Article 2, paragraph 4, of the United Nations Charter and that fails to meet all the requirements of Article 51, is unlawful;
 - D. ... A threat or use of nuclear weapons should also be compatible with the requirements of the international law applicable in armed conflict, particularly those of the principles and rules of international humanitarian law, as well as with specific obligations under treaties and other undertakings which expressly deal with nuclear weapons;
 - E. ... It follows from the above-mentioned requirements that the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law;
- However, in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of selfdefence, in which the very survival of a State would be at stake".³⁰

G. Gabčíkovo–Nagymaros Project (Hungary/Slovakia) case (1997)

This is virtually the first instance in which a case involving an environmental problem as the direct issue in dispute came before the International Court of Justice. In 1977, Hungary and Czechoslovakia concluded a treaty for the construction of a large dam project on the Danube which had four main objectives: generate power, control of floods, enhance navigability on the river, and preserve the eco-system of the island Delta.

In the beginning of the 1980's, Hungary stopped working on the project and claimed that it did so, mainly, on environmental grounds. Two grounds for this action were invoked: firstly, the pollution of underground water reserve on two different locations and, second, damage to unique wetland because the dam would deprive it of 90 per cent of its water supply.

After the examination of respective treaty obligations, the Court considered the question of whether there was, in 1989, a state of necessity which would have permitted Hungary, without incurring international responsibility, to suspend and abandon works that it was committed to perform in accordance with the 1977 Treaty and related instruments in the following terms:

"The Court considers, first of all, that the state of necessity is a ground recognized by customary international law for precluding the wrongfulness of an act not in conformity with an international obligation. It observes moreover that such ground for precluding wrongfulness can only be accepted on an exceptional basis. The International Law Commission

³⁰ *Ibid.*, 266.

was of the same opinion when it explained that it had opted for a negative form of words in Article 33 of its Draft

‘in order to show, by this formal means also, that the case of invocation of a state of necessity as a justification must be considered as really constituting an exception – and one even more rarely admissible than is the case with the other circumstances precluding wrongfulness ...’

([Yearbook of the International Law Commission, 1980, Vol. II, Part 2], 51., para. 40)

Thus, according to the Commission, the state of necessity can only be invoked under certain strictly defined conditions which must be cumulatively satisfied; and the State concerned is not the sole judge of whether those conditions have been met.

In the present case, the following basic conditions set forth in Draft Article 33 are relevant: it must have been occasioned by an “essential interest” of the State which is the author of the act conflicting with one of its international obligations; that interest must have been threatened by a ‘grave and imminent peril’; the act being challenged must have been the ‘only means’ of safeguarding that interest; that act must not have ‘seriously impair[ed] an essential interest’ of the State towards which the obligation existed; and the State which is the author of that act must not have ‘contributed to the occurrence of the state of necessity’. Those conditions reflect customary international law.”³¹

The Court acknowledged that the concerns expressed by Hungary for its natural environment in the region affected by the Gabčíkovo–Nagymaros Project related to an “essential interest” of that State.

It was of the view, however, that, with respect to both Nagymaros and Gabčíkovo, the perils invoked by Hungary, without prejudging their possible gravity, were not sufficiently established in 1989, nor were they “imminent”; and that Hungary had available to it at that time means of responding to these perceived perils other than the suspension and abandonment of works with which it had been entrusted. What was more, negotiations were under way which might have led to a review of the Project and the extension of some of its time-limits, without there being need to abandon it.

The Court further noted that Hungary, when it decided to conclude the 1977 Treaty, was presumably aware of the situation as then known; and that the need to ensure the protection of the environment had not escaped the parties as could be seen from some articles of the Treaty. Neither could it fail to note the positions taken by Hungary after the entry into force of the 1977 Treaty. In 1983, Hungary asked that the words under the Treaty should go forward more slowly; in 1989, it asked for the works to be speeded up, and then decided, three months later, to suspend them and subsequently to abandon them. The Court inferred from all these elements that, even if it had been established that there was, in 1989, a state of necessity linked to the performance of the 1977 Treaty, Hungary would not have been permitted to rely upon that state of necessity in order to justify its failure to comply with its treaty obligations, as it itself had helped by act or omission to bring about that situation.

³¹ *Gabčíkovo–Nagymaros Project (Hungary/Slovakia)*, Judgment, I. C. J. Reports 1997, 40–41.

In the light of the conclusions reached, the Court found that Hungary was not entitled to suspend and subsequently abandon, in 1989, the works on the Nagymaros Project and on the part of the Gabčíkovo Project for which the 1977 Treaty and related instruments attributed responsibility to it.

Finally, the Court took up Hungary's claim that it was entitled to terminate the 1977 Treaty because "new requirements of international law for the protection of the environment precluded performance of the Treaty".³² On this point, the Court had this to say:

"Neither of the Parties contended that new peremptory norms of environmental law had emerged since the conclusion of the 1977 Treaty, and the Court will consequently not be required to examine the scope of Article 64 of the Vienna Convention on the Law of Treaties. On the other hand, the Court wishes to point out that newly developed norms of environmental law are relevant for the implementation of the Treaty and that the parties could, by agreement, incorporate them through the application of Articles 15, 19 and 20 of the Treaty. These articles do not contain specific obligations of performance but require the parties, in carrying out their obligations to ensure that the quality of water in the Danube is not impaired and that nature is protected, to take new environmental norms into consideration when agreeing upon the means to be specified in the Joint Contractual Plan.

By inserting these evolving provisions in the Treaty, the parties recognized the potential necessity to adapt the Project. Consequently, the Treaty is not static, and is open to adapt to emerging norms of international law. By means of Articles 15 and 19, new environmental norms can be incorporated in the Joint Contractual Plan.

The responsibility to do this was a joint responsibility. The obligations contained in Articles 15, 19 and 20 are, by definition, general and have to be transformed into specific obligations of performance through a process of consultation and negotiation. Their implementation thus requires a mutual willingness to discuss in good faith actual and potential environmental risks. It is all the more important to do this because as the Court recalled in its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, 'the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn'

(*I. C. J. Reports* 1996, 241., para. 29 ...)

The awareness of the vulnerability of the environment and the recognition that environmental risks have to be assessed on a continuous basis have become much stronger in the years since the Treaty's conclusion. These new concerns have enhanced the relevance of Articles 15, 19 and 20."³³

Coming to the issue of legal consequences of the judgment, the Court noted that the Project's impact upon, and its implications for, the environment were of necessity a key issue. It stated that in order to evaluate the environmental risks, current standards must be taken into consideration. The Court emphasized the following points in this context:

"It is clear that the Project's impact upon, and its implications for, the environment are of necessity a key issue. The numerous scientific reports which have been presented to the

³² *Ibid.*, 67., para. 111.

³³ *Ibid.*, 67–68., para. 112.

Court by the Parties – even if their conclusions are often contradictory – provide abundant evidence that this impact and these implications are considerable.

In order to evaluate the environmental risks, current standards must be taken into consideration. This is not only allowed by the wording of Articles 15 and 19, but even prescribed, to the extent that these articles impose a continuing – and thus necessarily evolving – obligation on the parties to maintain the quality of the water of the Danube and to protect nature.

The Court is mindful that, in the field of environmental protection, vigilance and prevention are required on account of the often irreversible character of damage to the environment and of the limitations inherent in the very mechanism of reparation of this type of damage. Throughout the ages, mankind has, for economic and other reasons, constantly interfered with nature. In the past, this was often done without consideration of the effects upon the environment. Owing to new scientific insights and to a growing awareness of the risks for mankind – for present and future generations – of pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past. This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development.

For the purposes of the present case, this means that the Parties together should look afresh at the effects on the environment of the operation of the Gabčíkovo power plant. In particular they must find a satisfactory solution for the volume of water to be released into the old bed of the Danube and into the side-arms on both sides of the river.”³⁴

Thus the Court concluded as follows:

“What is required in the present case by the rule *pacta sunt servanda*, as reflected in Article 26 of the Vienna Convention of 1969 on the Law of Treaties, is that the Parties find an agreed solution within the cooperative context of the Treaty. Article 26 combines two elements, which are of equal importance. It provides that ‘Every treaty in force is binding upon the parties to it and must be performed by them in good faith’. This latter element, in the Court’s view, implies that, in this case, it is the purpose of the Treaty, and the intentions of the parties in concluding it, which should prevail over its literal application. The principle of good faith obliges the Parties to apply it in a reasonable way and in such a manner that its purpose can be realized.”³⁵

On 3 September 1998, Slovakia filed in the Registry of the International Court of Justice a request for an additional Judgment in the *Gabčíkovo–Nagymaros Project (Hungary/Slovakia)* case, relating to the construction and operation of dams on the river Danube for the production of electricity, flood control and improvement of navigation.³⁶

³⁴ *Ibid.*, 77–78., para. 140.

³⁵ *Ibid.*, 78–79., para. 142.

³⁶ Request for an Additional Judgment Pursuant to Article 5 (3) of the Special Agreement of 7 April 1993, filed in the Registry of the International Court of Justice on 3 September 1998.

According to Slovakia, such an additional Judgment was necessary, because of the unwillingness of Hungary to implement the Judgment delivered by the Court in that case on 25 September 1997.

The case is still pending before the Court.

H. Pulp Mills on the River Uruguay (Argentina v. Uruguay) (Interim Measures) case (2006)

In more recent years, the Court has had another case in which problems of international environmental law are at issue as the direct subject of the dispute. On 4 May 2006, Argentina seized the International Court of Justice of a dispute between itself and Uruguay concerning alleged breaches by Uruguay of obligations incumbent upon it under the Statute of the River Uruguay, a treaty signed by Argentina and Uruguay on 26 February 1975.

The Statute was agreed upon in implementation of Article 7 of the Treaty concerning the Boundary Constituted by the River Uruguay of 7 April 1961, and its main purpose was “to establish the joint machinery necessary for the optimum and rational utilization of the River Uruguay”,³⁷ which is shared by the two States and partially constitutes their joint boundary.

Under the Treaty of 1961 the parties had agreed to establish a régime for the use of the river, covering, *inter alia*

- “(a) Common standard regulations for the safety of navigation;
- (b) A pilotage regime taking present practices into account;
- (c) Regulations governing the maintenance of dredging and buoying in accordance with article 6;
- (d) Reciprocal facilities for hydrographic surveys and other studies connected with the river;
- (e) Provisions for the conservation of living resources;
- (f) Provisions for preventing water pollution.”³⁸

This régime was subsequently established in the 1975 Statute in the form of an Administrative Commission of the River Uruguay³⁹ (CARU in its Spanish acronym), which has functions of regulation and co-ordination specified in the Statute, in accordance with Article 7 of the 1961 Treaty.

In its Application Argentina charged the Government of Uruguay with having, in October 2003, “unilaterally authorized ... [the construction] of a pulp mill near the city of Fray Bentos” and having “failed to comply with the obligatory prior notification and consultation procedures”⁴⁰ provided for by the 1975 Statute.

³⁷ Statute of the River Uruguay, signed at Salto on 26 February 1975, Chap. I, Art. 1.

³⁸ Treaty between the Argentine Republic and the Eastern Republic of Uruguay concerning the Boundary Constituted by the River Uruguay. Signed at Montevideo on 7 April 1961 (*United Nations Treaty Series*, 1968, 98.).

³⁹ *Ibid.*, Chap. XIII, Art. 49.

⁴⁰ *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Application Instituting Proceedings filed in the Registry of the Court on 4 May 2006, para. 9 (text available at www.icj-cij.org).

Argentina stated that, despite its repeated protests, both directly to the Government of Uruguay and to CARU, “the Uruguayan Government ha[d] persisted in its refusal to follow procedures prescribed by the 1975 Statute”. According to the Application, Uruguay had in fact “aggravated the dispute”⁴¹ by subsequently authorizing the construction in the same area of a second pulp mill and of a port for that mill.

Argentina claimed that these mills, which were to be constructed on the banks of the river facing the Argentine town of Gualeguaychú, would “damage the environment of the River Uruguay and its area of influence zone”, affecting over 300,000 residents, who were concerned at the “major risks of pollution of the river, deterioration of biodiversity, harmful effects on health and damage to fish stocks”, and the “extremely serious consequences for tourism and other economic interests”.⁴²

In its Application, Argentina further stated that, following the change of government in Uruguay in March 2005, the two States had set up a High-Level Technical Group (GTAN in its Spanish acronym) in order to resolve the dispute between them. According to the Application, the 12 meetings of that body between August 2005 and late January 2006 had not, however, enabled the two countries to reach agreement.

Argentina accordingly requested the Court to adjudge and declare:

- “1. that Uruguay has breached the obligations incumbent upon it under the 1975 Statute and the other rules of international law to which that Statute refers, including but not limited to:
 - (a) the obligation to take all necessary measures for the optimum and rational utilization of the River Uruguay;
 - (b) the obligation of prior notification to CARU and to Argentina;
 - (c) the obligation to comply with the procedures prescribed in Chapter II of the 1975 Statute;
 - (d) the obligation to take all necessary measures to preserve the aquatic environment and prevent pollution and the obligation to protect biodiversity and fisheries, including the obligation to prepare a full and objective environmental impact study;
 - (e) the obligation to co-operate in the prevention of pollution and the protection of biodiversity and fisheries; and
2. that, by its conduct, Uruguay has engaged its international responsibility to Argentina;
3. that Uruguay shall cease its wrongful conduct and comply scrupulously in future with the obligations incumbent upon it; and
4. that Uruguay shall make full reparation for the injury caused by its breach of the obligations incumbent upon it.”⁴³

Argentina also filed a request for the indication of provisional measures pursuant to Article 41 of the Statute of the Court, in which it explained that “the continued construction of the works at issue under present conditions [would] significantly aggravate their harmful economic and social impact”.⁴⁴ The Argentine Government further stated that the harmful consequences of these activities would be “such that they could not simply be made good

⁴¹ *Ibid.*, paras. 11 and 12.

⁴² *Ibid.*, para. 15.

⁴³ *Ibid.*, para. 25.

⁴⁴ *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Request for the indication of provisional measures submitted by the Government of the Argentine Republic, para. 12.

by means of financial compensation or some other material provision”.⁴⁵ It added that the “the commissioning of the ... mills before a final judgment [was] rendered [by the Court] would seriously and irreversibly prejudice the conservation of the environment of the River Uruguay and of the areas affected by the river, as well as the rights of Argentina and of the inhabitants of the neighboring areas under its jurisdiction”.⁴⁶ According to Argentina, the continued construction of the mills would set the seal on Uruguay’s unilateral effort to create a “fait accompli” and to render irreversible the current siting of the mills.⁴⁷

Argentina accordingly requested the Court, pending final judgment in these proceedings, to indicate provisional measures requiring Uruguay to suspend forthwith all authorizations for construction of the mills in question, to take all necessary measures to halt building work on the mills, to co-operate in good faith with Argentina in order to ensure the optimum and rational utilization of the River Uruguay, to refrain from taking any further unilateral action with respect to the construction of the mills which did not comply with the 1975 Statute, and to refrain from any other action which might aggravate or extend the dispute which was the subject-matter of the present proceedings or render its settlement more difficult.⁴⁸

The Court in its Order of 13 July 2006, 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 of the Statute to indicate provisional measures”.⁴⁹ It stated as follows:

[I]n the Court’s view, there is however nothing in the record to demonstrate that the very decision by Uruguay to authorize the construction of the mills poses an imminent threat of irreparable damage to the aquatic environment of the River Uruguay or to the economic and social interests of the riparian inhabitants on the Argentine side of the river;

Argentina has not persuaded the Court that the construction of the mills presents irreparable damage to the environment; whereas it has also not been demonstrated that the construction of the mills constitutes a present threat of irreparable economic and social damage; whereas, furthermore, Argentina has not shown that the mere suspension of the construction of the mills, pending final judgment on the merits, would be capable of reversing or repairing the alleged economic and social consequences attributed by Argentina to the building works;

Argentina has not provided evidence at present that suggests that any pollution resulting from the commissioning of the mills would be of a character to cause irreparable damage to the River Uruguay; whereas it is a function of CARU to ensure the quality of water of the river by regulating and minimizing the level of pollution; whereas, in any event, the threat of any pollution is not imminent as the mills are not expected to be operational before August 2007 (Orion) and June 2008 (CMB);

[O]n the basis of the present evidence before it the Court is not persuaded by the argument that the rights claimed by Argentina would no longer be capable of protection if the Court

⁴⁵ *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Request for the indication of provisional measures submitted by the Government of the Argentine Republic, para. 12.

⁴⁶ *Ibid.*, para. 13.

⁴⁷ *Ibid.*, para. 15.

⁴⁸ *Ibid.*, para. 16.

⁴⁹ *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Provisional Measures, Order of 13 July 2006, para. 87 (text available at www.icj-cij.org).

were to decide not to indicate at this stage of the proceedings the suspension of the authorization to construct the pulp mills and the suspension of the construction work itself; [I]n view of the foregoing, the Court finds that the circumstances of the case are not such as to require the indication of a provisional measure ordering the suspension by Uruguay of the authorization to construct the pulp mills or the suspension of the actual construction work; [I]n proceeding with the authorization and construction of the mills, Uruguay necessarily bears all risks relating to any finding on the merits that the Court might later make; whereas the Court points out that their construction at the current site cannot be deemed to create a *fait accompli* because, as the Court has had occasion to emphasize, ‘if it is established that the construction of works involves an infringement of a legal right, the possibility cannot and should not be excluded *a priori* of a judicial finding that such works must not be continued or must be modified or dismantled’ *Passage through the Great Belt (Finland v. Denmark)*, *Provisional Measures*, *Order of 29 July 1991*, *I.C.J. Reports 1991*, p. 19, para. 31).⁵⁰

In this Order, the Court emphasized that the present case highlighted the importance of the need to ensure environmental protection of shared natural resources, while allowing for sustainable economic development, that it was in particular necessary to bear in mind the reliance of the Parties on the quality of the water of the River Uruguay for their livelihood and economic development, and that from this point of view account must be taken of the need to safeguard the continued conservation of the river environment and the rights of economic development of the riparian States.

In particular, the Court cautioned that

“notwithstanding the fact that the Court has not been able to accede to the request by Argentina for the indication of provisional measures ordering the suspension of construction of the mills, the Parties are required to fulfil their obligations under international law it stressed ‘the necessity for Argentina and Uruguay to implement in good faith the consultation and co-operation procedures provided for by the 1975 Statute, with CARU constituting the envisaged forum in this regard’; and encouraged both Parties ‘to refrain from any actions which might render more difficult the resolution of the present dispute’.”⁵¹

While the Court rejected the request of Argentina to indicate interim measures of protection, the case is still pending before the Court, waiting for its proceedings on the merits. The Court is expected to address directly the issues of international environmental law involved in this case.

VI. The Role of the Court in International Environmental Law

From the somewhat cursory examination of the cases before the International Court of Justice (including its predecessor the Permanent Court of International Justice), we can draw the following two conclusions on the role of the International Court of Justice in relation to international environmental law.

⁵⁰ *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, *Provisional Measures*, *Order of 13 July 2006* (text available at www.icj-cij.org).

⁵¹ *Ibid.*

The first is that until quite recently, there had been comparatively few cases that had come before the Court which involved issues of international environmental law as their direct cause of action. Nevertheless, a number of pronouncements of the Court given so far, either given in a context which had no link whatsoever with environmental issues or in a context where environmental points were raised in a peripheral way in the arguments of the parties, have had significant impact upon the development of the law relating to environment, inasmuch as they constitute pronouncements of general law applicable to international environmental law.

The second is that in more recent years, however, we have been witnessing a new trend for an increase of cases that come before the Court which confront the Court with issues of international environmental law in a direct way. The last two examples that I have dealt with somewhat more extensively – i.e., the *Gabčíkovo–Nagymaros Project (Hungary/Slovakia)* case and the *Pulp Mills on the River Uruguay (Argentina/Uruguay)* case – are the cases in point.

In fact, against this background of a new emerging trend, the International Court of Justice in 1993 took the initiative for the establishment of a special chamber exclusively directed to environmental matters.

Already in 1986, the idea of establishing a special Chamber for cases concerning problems of the environment, on the basis of Article 26, paragraph 1, of the Statute of the Court was initially put forward. Nagendra Singh, at the time a member of the “World Commission on the Environment and Development”, established by the United Nations in response to General Assembly resolution A/38/161 (1983) in order to draft a report on “long-term environmental strategies for achieving sustainable development to the year 2000 and beyond”⁵² (the so-called “Brundtland-Commission”), was instrumental in bringing about this initiative.

At that time, the Court took the view that it was not necessary to set up a standing special Chamber, while emphasizing that it was always able to respond rapidly to the requests for the constitution, pursuant to Article 26, paragraph 2, of the Statute, of a special Chamber to which any case, and therefore any environmental case, could be submitted.⁵³

⁵² The mandate of the Commission was set out in paragraph 8 of the resolution:

“8. Suggests that the Special Commission, when established, should focus mainly on the following terms of reference for its work:

(a) To propose long-term environmental strategies for achieving sustainable development to the year 2000 and beyond;

(b) To recommend ways in which concern for the environment may be translated into greater cooperation among developing countries and between countries at different stages of economic and social development and lead to the achievement of common and mutually supportive objectives which take account of the interrelationships between people, resources, environment and development;

(c) To consider ways and means by which the international community can deal more effectively with environmental concerns, in the light of the other recommendations in its report;

(d) To help to define shared perceptions of long-term environmental issues and of the appropriate efforts needed to deal successfully with the problems of protecting and enhancing the environment, a long-term agenda for action during the coming decades, and aspirational goals for the world community, taking into account the relevant resolutions of the session of a special character of the Governing Council in 1982.”

The full text of the Report can be found as UN Doc. A/42/427

⁵³ *I. C. J. Yearbook 1985–1986*, 14.

However, the discussion about the establishment of a special Chamber on environmental matters restarted in 1992–1993 in the wake of the United Nations Conference on Environment and Development that had taken place in Rio de Janeiro in 1992.⁵⁴

During the summit meeting of the Rio Conference, the draft project of the “Rio Declaration” was discussed. In its first draft, it contained a section on dispute resolution in which the International Court of Justice was to be allocated a central role. The choice for States was limited to two means of dispute settlement: the first would be to refer the dispute to the International Court of Justice, the second to submit it to an arbitral tribunal. The reason for abandoning a more detailed provision on the procedures for dispute resolution was due to the reluctance of the States which did not want to recognize the principles of state responsibility within the framework of the “Rio Declaration”. During the discussion of this issue, a movement for the setting-up of an Environmental Tribunal (along the line of the Law of the Sea Tribunal) also came up.

In its final form, the Declaration came to contain only a very general principle of peaceful settlement of disputes. Principle 26 reads as follows:

“States shall resolve all their environmental disputes peacefully and by appropriate means in accordance with the Charter of the United Nations.”

It was in response to these developments in the Rio Conference that the International Court of Justice in July 1993 decided to create the Chamber for Environmental Matters. One explanation given for the creation of the Chamber, according to the press release of the Court, was that two cases on the docket of the Court had important implications for international law on matters relating to the environment, i.e., the *Certain Phosphate Lands in Nauru (Nauru v. Australia)* case and the *Gabčíkovo–Nagymaros Project (Hungary/Slovakia)* case.

The Court explained its decision as follows:

“In view of the developments in the field of environmental law and protection which have taken place in the last few years, and considering that it should be prepared to the fullest possible extent to deal with any environmental case falling within its jurisdiction, the Court has now deemed it appropriate to establish a seven-member Chamber for Environmental Matters”.^{55, 56}

⁵⁴ In Rio, 108 Governments adopted three “soft law” instruments aimed at changing the traditional approach to development: Agenda 21 – a comprehensive programme of sustainable development; the *Rio Declaration on Environment and Development*; the *Statement of Principles on Forests* (non-legally binding authoritative statement of principles for a global consensus on the management, conservation and sustainable development of all types of forests, UN Doc. A/CONF.151/26/Rev.1, Vol. I, Annex III, 480). In addition, two legally binding Conventions aimed at preventing global climate change and the eradication of the diversity of biological species were opened for signature at the Summit: *United Nations Framework Convention on Climate Change* and the *Convention on Biological Diversity*.

⁵⁵ See ICJ Press Release No. 1993/20 of 19 July 1993.

⁵⁶ As it has turned out, after the delivery of this lecture, it was announced that the Court had taken a decision not to hold elections for a Bench for the Chamber for Environmental Matters this year. In the words of the President of the Court who spoke on this issue in her annual speech to the General Assembly of the United Nations, the reason for the decision was explained as follows:

VI. Conclusion

It can safely be concluded from what we have seen that the role the International Court of Justice can and does play in the field of international environmental law has been growing especially in recent years, parallel with the rapidly expanding fields of international law, where international environmental law has come to occupy a significant place. It is my belief that the role of the Court in international environmental law would seem to be increasingly significant in the following three dimensions.

First, it is fair to say that the International Court, through the process of settling a bilateral dispute involving environmental issues between States, can contribute to identifying and confirming the points of law that pertain to international environmental law as an important component of the public order of this community. In fact, it can even be said that one of the important functions of the ICJ lies precisely in this “dual role” that the Court can play of settling a concrete dispute between the parties *inter se* and, in so doing, of enunciating the general principles involved and thus contributing to the development and elaboration of the law. Arising as it did in a field which had no direct relevance to international environmental law, the *South West Africa* case of 1966 clearly highlighted the nature of the problem involved, even though the majority decision unfortunately avoided to address that point.⁵⁷ In relation to a situation which had more direct relevance to international environmental law, the *Nuclear Tests* cases (1974) did touch upon some aspect of this same problem. This point is important, even though it is inevitable that the Court, being a court of law entrusted with the task of settling a concrete bilateral dispute between States, has to direct its attention to issues of international environmental law involved primarily through the prism of rights and obligations of the parties *inter se* under the law of State responsibility in the specific context of the case in question.

“The Court noted in recent times the growing interest of States, reflected in its docket, in issues relating to human rights, international humanitarian law, and environmental law. In 1993, a Chamber for Environmental Matters was created by the Court and has been periodically reconstituted. But in its 16 years of existence, no State has yet asked for a case to be heard by this Chamber. Cases such as the *Gabčíkovo–Nagymaros Project (Hungary/Slovakia)* and *Pulp Mills on the River Uruguay (Argentina v. Uruguay)* have been submitted to the plenary Bench. A survey of State practice suggests that States prefer environmental law not to be compartmentalized, but to find its place within international law as a whole. Indeed, environmental law has now become an important part of what we may term the mainstream of international law. Accordingly, this year the Court decided not to hold elections for a Bench for the Chamber for Environmental Matters. At the same time, should parties in future cases request a chamber for a dispute involving environmental law, such a chamber could be constituted under Article 26, paragraph 2, of the Statute of the Court.”

It would be safe to say under the circumstances that this decision was not based on the assessment of the Court that environmental matters no longer required a special attention of the Court. Based on its most recent experiences in the *Gabčíkovo–Nagymaros Project (Hungary/Slovakia)* case and the *Pulp Mills on the River Uruguay (Argentina v. Uruguay)* cases, the Court has now come to the view that the parties to environmental disputes prefer to have their case heard by the Plenary Bench rather than by a Chamber and that given the growing importance of environmental issues coming before the Court, the Court should try to address disputes involving environmental matters in full Court rather than in a special Chamber.

⁵⁷ On this point, see *supra*, 12. *et seq.*

Second, no less important as a function of the Court in its contribution to the development of international environmental law is the capacity of the Court to make pronouncements which are of general application as an enunciation of principles of international law, which as such would be applicable to international environmental issues. In this context, it is of particular significance that, under the Charter of the United Nations (Article 96) and the Statute of the Court (Article 65), the Court is empowered to give an Advisory Opinion at the request of the General Assembly and the Security Council of the United Nations on any legal question, as well as other organs of the United Nations and Specialized Agencies which, subject to the authorization by the General Assembly, can seek for an Advisory Opinion of the Court on legal questions arising within the scope of their activities.⁵⁸ Even in the absence of a concrete dispute between States, the Court through such advisory proceedings can function as a quasi-administrative Court entrusted with the task of enunciating a principle of law involved in consolidating public order of international society in the field of international environmental law. It is true that the function of the Court in this respect has not been fully developed in theory nor fully utilized in practice. Nevertheless, it would seem that here is a fertile territory to cultivate in the future for the development of international law relating to environment.

Third, it is to be emphasized that the Court, aware of the growing importance of the issue of environment in contemporary international life and the potential service that it can offer to the development of the law in this field, has been conscious of the need to strengthen its capacity for dealing with cases pertaining to disputes specifically relating to international environmental law as such.⁵⁹

Indeed, the foregoing analysis of the jurisprudence of the Court testifies to the points made above. Progress in international environmental law can be achieved through the clear enunciation and application of general principles involved and this is amply demonstrated by the jurisprudence of the Court as reviewed above through pertinent cases. I wish to recapitulate them in their salient elements to illustrate these conclusions of mine.

In the *Corfu Channel* case, what was laid down by the Court contained a principle which was applicable not just to the dispute at issue, which had nothing to do with environmental issues, but more broadly to issues of environmental law in general, when it stated that "every State [has an] obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States".⁶⁰ This is an obligation which would acquire particular relevance in environmental matters.

The same goes for the Court's obiter dictum in 1970 in the *Barcelona Traction* case. This case, which did not involve issues of environmental law either, demonstrated that certain obligations regarding the preservation of the environment would constitute "obligations of States towards the international community as a whole".

Again in 1996, in the Advisory Opinion concerning the *Legality of the Threat or Use of Nuclear Weapons*, the Court also made an interesting declaration of a general principle applicable to environmental issues. The Court, noting that while certain States

⁵⁸ Charter of the United Nations, Article 96.

⁵⁹ The recent decision not to hold elections this year for a Bench for the Special Chamber for Environmental Matters should be understood in this light. (See footnote 56 above).

⁶⁰ *Corfu Channel, Merits, Judgment of 9 April 1949, I. C. J. Reports 1949, 22.*

had argued that such threat or use must be regarded as illegal in view of the limits imposed by current norms in regard to the protection and safeguarding of the environment such norms did not specifically prohibit the use of nuclear weapons, at the same time declared as follows:

“the existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment.”⁶¹

More recently in a case which directly involved issues of environment, the Court had occasion to refer to this statement of the Court in the Nuclear Weapons case and cited this principle in the context of an environmental dispute in the *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* case and emphasized “the great significance that it attaches to respect for the environment, not only for States but also for the whole of mankind”.⁶²

In summing up the jurisprudence of the International Court of Justice in this context, a former President of the Court, in his speech to the United Nations on the role of the International Court of Justice, had this to say:

“Law and justice have made immense progress over the century which has just ended. New branches of international law have sprung up and there has been a proliferation of specialized international courts. These developments correspond to those in society as a whole and in international relations. In this new scenario the International Court of Justice, principal judicial organ of the United Nations, retains an essential role. It alone can address all areas of the law and accord them their proper place within an overall scheme. Its jurisprudence in the fields of human rights and environmental law seems to me to show that it has so far achieved this.”⁶³

This is also my conclusion with which I wish to close my lecture, as it presents a fair and balanced summing-up on the theme of the “Role of the International Court of Justice in International Environmental Law.”

⁶¹ *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion of 8 July 1996, I. C. J. Reports 1996, 241–242., para. 29.*

⁶² *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment of 25 September 1997, I. C. J. Reports 1997, 41., para. 53.*

⁶³ Speech by Judge Gilbert Guillaume, President of the International Court of Justice (2000–2003), to the Sixth Committee of the General Assembly of the United Nations, 30 October 2002.