

THE CONTRIBUTION OF THE INTERNATIONAL COURT OF JUSTICE TO THE DEVELOPMENT OF INTERNATIONAL ENVIRONMENTAL LAW: A CONTEMPORARY ASSESSMENT

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INTRODUCTION

In an article written in 1996, at the occasion of the fiftieth anniversary of the International Court of Justice (the “ICJ” or the “Court”), Professor Malgosia Fitzmaurice perceptively noted that “compared to other subjects . . . [environmental protection] . . . has been perhaps, *at least until recently*, rather less evident in the records of the Court.”¹ Fitzmaurice’s observation, particularly her welcoming of the fresh opportunities then presented to the ICJ to clarify a number of issues of international environmental law (“IEL”), was very understandable. At that moment, the Court had recently established a Special Environmental Chamber² in light of the increasingly environment-related con-

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1. Malgosia Fitzmaurice, *Environmental Protection and the International Court of Justice*, in *FIFTY YEARS OF THE INTERNATIONAL COURT OF JUSTICE: ESSAYS IN HONOUR OF SIR ROBERT JENNINGS* 293 (Vaughan Lowe & Malgosia Fitzmaurice eds., 1996) (emphasis added); see also Eduardo Valencia-Ospina, *The International Court of Justice and International Environmental Law*, 2 *ASIAN Y.B. INT’L L.* 1 (1992).

2. The Chamber for Environmental Matters was created in July 1993, on the basis of Article 26(1) of the Court’s Statute, which states, “[t]he Court may from time to time form one or more chambers, composed of three or more judges as the Court may determine, for dealing with particular categories of cases; for example, labour cases and cases relating to transit and communications.” See Statute of the International Court of Justice art. 26(1), June 26, 1945, 59 Stat. 1055, 1058; see generally Press Release 93/20, International Court of Justice, Constitution of a Chamber of the Court for the Environmental Matters (July 19, 1993), available at <http://www.icj-cij.org/presscom/files/7/10307.pdf> (last visited Oct. 3, 2008). On the ICJ’s experience in the creation of special chambers, see Eduardo Valencia-Ospina, *The Use of Chambers of the International Court of Justice*, in *FIFTY YEARS OF THE INTERNATIONAL COURT OF JUSTICE: ESSAYS IN HONOUR OF SIR ROBERT JENNINGS* 503 (Vaughan Lowe & Malgosia Fitzmaurice eds., 1996). For a

tent of the cases submitted to it.³ It had further been requested by the UN General Assembly (“GA”)⁴ and the World Health Organization (“WHO”)⁵ to issue an Advisory Opinion potentially raising issues relating to the scope of international environmental norms with respect to the threat and use of nuclear weapons.⁶

Although part of the potential of these opportunities was eventually reduced by subsequent developments,⁷ one should not underestimate the contribution made by the ICJ to IEL during the 1990s. Arguably, the ICJ’s main contribution was embodied in its Advisory Opinion of July 8, 1996 on the *Legality of the Threat or Use of Nuclear Weapons*,⁸ as well as in some of the declarations/opinions appended to it by the members of the Court, above all that of Judge Weeramantry.⁹ Judge Weeramantry further discussed environmental issues in two other dissenting opinions, one in the context of the *Request for an Examination of the*

discussion of the ICJ’s Environmental Chamber and more generally of the need for an international environmental court, see ELLEN HEY, REFLECTIONS ON AN INTERNATIONAL ENVIRONMENTAL COURT 1-25 (2000).

3. The press release announcing the creation of the Chamber expressly stated that, “[a]t present, out of eleven cases in its docket, the full Court is seized of two cases, namely those concerning *Certain Phosphate Lands in Nauru (Nauru v. Austl.)* and the *Gabcikovo-Nagymaros Project (Hung. v. Slov.)* with important implications for international law on matters relating to the environment.” Press Release 93/20 *supra* note 2, at 1.

4. See generally G.A. Res. 49/75[K], U.N. Doc. A/Res/49/75 (Dec. 15, 1994); Press Release 94/24, International Court of Justice, The General Assembly of the United Nations Requests an Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons (Dec. 23, 1994), available at <http://www.icj-cij.org/docket/files/95/10359.pdf> (last visited Oct. 3, 2008).

5. See Health and Environmental Effects of Nuclear Weapons, WHA Res. 46.40, World Health Assembly, 46th Assembly, 13th plen. mtg., at 2 (May 14, 1993); see also Press Release 93/30, International Court of Justice, Request by the WHO for an Advisory Opinion (Sept. 13, 1993), available at <http://www.icj-cij.org/docket/files/93/10317.pdf> (last visited Oct. 3, 2008).

6. These issues were raised in the submissions made to the International Court of Justice (“ICJ” or the “Court”) by a number of States.

7. Of the two cases mentioned that had partly motivated the creation of a Special Environmental Chamber one was settled. See generally *Certain Phosphate Lands in Nauru (Nauru v. Austl.)*, 1993 I.C.J. 322 (Sept. 13). Moreover, the Special Environmental Chamber was never put to use and in 2006, after thirteen years, it was eventually decided that it would not be reconstituted. As for the Advisory Opinions requested by the World Health Organization (“WHO”) and the General Assembly (“GA”), the Court only admitted the request introduced by the latter, dismissing the WHO’s request as exceeding the scope of its mandate. See generally *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 266 (July 8).

8. See generally *id.*

9. See *id.* at 429 (Weeramantry, J., dissenting).

*Situation introduced by New Zealand in relation to the Nuclear Tests case*¹⁰ and the other in the context of the boundary delimitation in the case concerning the *Kasikili/Sedudu Island*.¹¹ These developments alone would warrant renewed attention to the ICJ's contribution to IEL.¹² But that is not all.

More than a decade after the seminal study by Professor Fitzmaurice, the ICJ is again presented with an opportunity to clarify some important issues of IEL through two pending contentious cases. The first of these cases, *Pulp Mills on the River Uruguay (Arg. v. Uru.)*,¹³ was instituted on May 6, 2006, and opposes Argentina to Uruguay, in connection with the construction of two pulp mills on the banks of the River Uruguay facing the Argentine town of Gualeguaychú. Argentina claims, among others, that these mills will, "damage the environment of the River Uruguay and its area of influence zone," affecting a large part of the local population concerned by the "significant risks of pollution of the river, deterioration of biodiversity, harmful effects on health and damage to fisheries resources," and the "extremely serious consequences for tourism and other economic interests."¹⁴ The second case, *Aerial Herbicide Spraying (Ecuador v. Colom.)*,¹⁵ instituted by Ecuador on April 1, 2008, concerns the aerial spraying by Colombia of toxic herbicides at locations near, at and across Colombia's border with Ecuador. Ecuador claims, among others, that such conduct has "caused

10. See generally *Nuclear Tests (Austl. v. Fr.)*, 1974 I.C.J. 253 (Dec. 20); *Nuclear Tests (N.Z. v. Fr.)*, 1974 I.C.J. 457 (Dec. 20); see also Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests Case (N.Z. v. Fr.), 1995 I.C.J. 288, 319-63 (Sept. 22) (Weeramantry, J., dissenting) [hereinafter *Nuclear Tests II*].

11. See *Kasikili/Sedudu (Bots. v. Namib.)*, 1999 I.C.J. 1045, 1153 (Dec. 13) (Weeramantry, J., dissenting).

12. For an assessment conducted by the end of the 1990s, see Alexandre-Charles Kiss, *The International Court of Justice and the Protection of the Environment*, 11 HAGUE Y.B. INT'L L. 1, 1-13 (1998).

13. See generally *Pulp Mills on the River Uruguay (Arg. v. Uru.)* (Application of May 4, 2006), available at <http://www.icj-cij.org/docket/files/135/10779.pdf> (last visited Oct. 3, 2008).

14. Press Release 2006/17, International Court of Justice, Argentina Institutes Proceedings Against Uruguay and Requests the Court to Indicate Provisional Measures, para. 5 (May 4, 2006), available at <http://www.icj-cij.org/presscom/index.php?pr=1010&pt=1&p1=6&p2=1>.

15. See generally *Aerial Herbicide Spraying (Ecuador v. Colom.)* (Application of Mar. 31, 2008), available at <http://www.icj-cij.org/docket/files/138/14474.pdf> (last visited Oct. 3, 2008).

serious damage to people, to crops, to animals, and to the natural environment on the Ecuadorian side of the frontier, and poses a grave risk of further damage over time.”¹⁶ Whereas the *Aerial Herbicide* case is only starting, the *Pulp Mills* case is already well advanced. Uruguay’s Rejoinder on the Merits was due on July 29, 2008.¹⁷ In light of the information publicly available, one may therefore expect one or perhaps two ICJ decisions on important topics of IEL in the coming years.

Against this background, it seems pertinent to devote renewed attention to the contribution of the ICJ to IEL, taking into account the Court’s previous case-law relating to this field as well as the potential of the issues currently pending before it. In this regard, after some brief general observations (Part I), this Article examines the main contribution of the two main “waves” of cases decided by the ICJ involving environmental matters (Parts II & III), before turning to the potential of the cases currently pending before it for the development of IEL (Part IV).

I. GENERAL OBSERVATIONS

One may distinguish, for analytical purposes, two main trends or “waves” of cases in the ICJ jurisprudence relating to IEL. The first wave covers essentially two contentious cases, namely the *Corfu Channel case (U.K. v. Alb.)*¹⁸ and the *Nuclear Tests* case,¹⁹ as well as an important *obiter dictum* made in the *Barcelona Traction, Light and Power Company, Limited case (Belg. v. Spain)*.²⁰ The main contribution of this wave is to be found in the confirmation of previous case law on transboundary damages as well as in the introduction of the concept of obligations *erga omnes*, potentially applicable to some environmental norms.

16. See Press Release 2008/05, International Court of Justice, Ecuador Institutes Proceedings Against Colombia with Regard to a Dispute Concerning the Alleged Aerial Spraying by Colombia of Toxic Herbicides over Ecuadorian Territory, para. 2 (Apr. 1, 2008), available at <http://www.icj-cij.org/docket/files/138/14470.pdf> (last visited Oct. 3, 2008).

17. See generally *Pulp Mills on the River Uruguay (Arg. v. Uru.)* (Order of Sept. 14, 2007), available at <http://www.icj-cij.org/docket/files/135/14051.pdf> (last visited Oct. 3, 2008).

18. See generally *Corfu Channel (U.K. v. Alb.)*, 1949 I.C.J. 4 (Apr. 9).

19. See generally *Nuclear Tests (Austl. v. Fr.)*, *supra* note 10; *Nuclear Tests (N.Z. v. Fr.)*, *supra* note 10.

20. See *Barcelona Traction, Light and Power Company, Limited (Belg. v. Spain)*, 1970 I.C.J. 3, 32 (Feb. 5).

As will be discussed, these two components set the basis in general international law for the protection against environmental damage caused to states and to the environment as such, outside the jurisdiction of any state.

The second wave is embodied in two contentious cases, namely *Certain Phosphate Lands in Nauru (Nauru v. Australia)*²¹ and *Gabcikovo-Nagymaros Project (Hungary/Slovakia)*,²² which both prompted the constitution of a Special Environmental Chamber of the ICJ, one Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*,²³ and a number of separate/dissenting opinions, particularly those of Judge Weeramantry in the aforementioned Advisory Opinion as well as in the context of the *Kasikili/Sedudu* and the *Nuclear Tests II* cases.²⁴ This second wave was important in that it consolidated the previous case law and pointed to a number of interconnections between IEL, on the one hand, and both boundary delimitation and international humanitarian law, on the other hand. In other words, what the first wave prepared was confirmed and extended by the second.

To these two waves, one could potentially add a third one, covering the *Pulp Mills* and *Aerial Herbicide* cases currently pending before the Court.²⁵ With respect to these cases, however, one can only attempt to circumscribe a number of issues left open by the second wave that the ICJ will hopefully clarify in its forthcoming decisions.

II. THE FIRST WAVE: THE TWO PILLARS OF ENVIRONMENTAL PROTECTION

The initial conception underlying the protection of the environment was narrow and focused on the consequences of transboundary injury, as opposed to the idea of the environment

21. See generally *Certain Phosphate Lands in Nauru (Nauru v. Austl.)*, *supra* note 7.

22. See generally *Gabcikovo-Nagymaros Project (Hung./Slovk.)*, 1997 I.C.J. 7 (Sept. 25).

23. See generally *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, *supra* note 7.

24. See *id.* at 502-04 (July 8) (Weeramantry, J., dissenting); *Kasikili/Sedudu Island (Bots. v. Namib.)*, *supra* note 11, at 1184, ¶¶ 91-92 (Weeramantry, J., dissenting); *Nuclear Tests II*, *supra* note 10, at 319-63 (Sept. 22) (Weeramantry, J., dissenting).

25. See generally *Pulp Mills on the River Uruguay (Arg. v. Uru.)* (Application of May 4, 2006), *supra* note 13; *Aerial Herbicide Spraying (Ecuador v. Colom.)* (Application of Mar. 31, 2008), *supra* note 15.

as an international common good to be preserved by all states.²⁶ The origins of this conception are usually illustrated with reference to two well-known cases, namely the *Trail Smelter Arbitration (U.S. v. Can.)*²⁷ and the *Affaire du Lac Lanoux (Spain v. Fr.)*.²⁸ Before discussing how the ICJ came initially to uphold this narrow conception, it may be useful to briefly recall the legacy of these two cases.

In the *Trail Smelter* case, the tribunal had to decide whether Canada was responsible for damage caused to the crops and lands of the State of Washington by the sulphur dioxide emissions stemming from a Canadian smelter of zinc and lead ores, based in British Columbia, Canada.²⁹ In its decision of March 11, 1941, the tribunal held that:

[U]nder the principles of international law, as well as 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.³⁰

On this basis, the tribunal held Canada responsible for the damage caused by the Canadian smelter and granted compensation to the United States.³¹ Some fifteen years later, another arbitral tribunal deciding a transboundary dispute between France and Spain relating to the use of the waters of Lake Lanoux, endorsed again the narrow conception of environmental protection:

The Spanish government has also sought to establish the contents of contemporary positive international law Certain principles that it seeks to demonstrate are, assuming it succeeds, without relevance for the issue under review. Thus, assuming there is a principle prohibiting the upstream State from altering the waters of a river in such a way as to seriously harm the downstream State, in any event such principle would not apply in the present case, to the extent that it has

26. See Jochen Sohnle, *Irruption du droit de l'environnement dans la jurisprudence de la C.I.J.: l'affaire Gabčíkovo-Nagymaros*, in 102 REVUE GÉNÉRALE DE DROIT INT'L PUB. 85, 86 (1998).

27. *Trail Smelter Arbitration (U.S. v. Can.)*, 3 REP. INT'L ARB. AWARDS ("R.I.A.A.") 1905 (1941).

28. *Affaire du Lac Lanoux (Spain v. Fr.)*, 12 R.I.A.A. 285 (1963).

29. See *Trail Smelter Arbitration (U.S. v. Can.)*, *supra* note 27, at 1963.

30. *Id.*

31. See generally *id.*

been admitted by the Tribunal . . . that the French project does not alter the waters of the river Carol. In fact, States are nowadays perfectly aware of the importance of the contradictory interests involved in the industrial use of international watercourses, and of the need to reconcile them through mutual concessions. The only way to achieve such interest compromises is the conclusion of agreements, on an increasingly comprehensive basis.³²

This latter paragraph provides a good illustration of the fact that, at the time, it was still very much unclear whether environmental protection was required as such, i.e., for the sole sake of the environment as a common resource, or rather only to the extent another state was damaged by a given conduct.³³ It seems, in fact, very difficult to infer from either one of these two cases the idea that the environment has an intrinsic value that must be protected irrespective of whether or not a state is injured.

The decision of the ICJ in the *Corfu Channel* case came as a confirmation of this narrow view, stated in more general terms. It is noteworthy, however, that the *Corfu Channel* case was not concerned with any environmental issue. Its relevance for IEL stems from the fact that it provided a factual background allowing for the principle initially asserted in the *Trail Smelter* case to be confirmed and linked to general international law. In-

32. See *Affaire du Lac Lanoux (Spain v. Fr.)*, *supra* note 28, at 308 (1963) (author's translation). The original French text says:

[L]e Gouvernement espagnol s'est efforcé d'établir également le contenu du droit international positif actuel . . . Certains principes dont il fait la démonstration sont, à supposer celle-ci acquise, sans intérêt pour le problème actuellement examiné. Ainsi, en admettant qu'il existe un principe interdisant à l'Etat d'amont d'altérer les eaux d'un fleuve dans des conditions de nature à nuire gravement à l'Etat d'aval, un tel principe ne trouve pas son application à la présente espèce, puisqu'il a été admis par le Tribunal . . . que le projet français n'altère pas les eaux du Carol. En réalité, les Etats ont aujourd'hui parfaitement conscience de l'importance des intérêts contradictoires, que met en cause l'utilisation industrielle des fleuves internationaux, et de la nécessité de les concilier les uns avec les autres par des concessions mutuelles. La seule voie pour aboutir à ces compromis d'intérêt est la conclusion d'accords, sur une base de plus en plus compréhensive.

See id.

33. Antonio Cassese points, in this regard, to the fact that the arbitral tribunal did allude "to the possibility of natural resources such as the water of a lake being exploited 'in the common interests of everybody.'" ANTONIO CASSESE, *INTERNATIONAL LAW* 377 (2001).

deed, the Court grounded the obligations breached by the Albanian authorities not on any specific treaty or convention but on general international law:

The obligations incumbent upon the Albanian authorities consisted in notifying, for the benefit of shipping in general, the existence of a minefield in Albanian territorial waters and in warning the approaching British warships of the imminent danger to which the minefield exposed them. Such obligations are based, not on the Hague Convention of 1907, No. VIII, which is applicable in time of war, but on certain general and well-recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war; the principle of the freedom of maritime communication; and every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States.³⁴

The impact of this latter assertion should not be underestimated. It embodies a principle that, as far as IEL is concerned,³⁵ underlies some of the founding instruments of IEL, such as the 1972 Stockholm Declaration on the Human Environment³⁶ or the work of the International Law Commission on the International Liability of States for the Injurious Consequences of Acts Not Prohibited by International Law.³⁷ Principle 21 of the Stockholm Declaration states, indeed, that:

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 dam-

34. Corfu Channel (U.K. v. Alb.), *supra* note 18, at 22 (emphasis added).

35. The principle has also had a lasting impact on other fields, such as the international responsibility of States for wrongful acts or international investment law. Regarding the first, see Luigi Condorelli, *L'imputation à l'état d'un fait internationalement illicite: solutions classiques et nouvelles tendances*, 189 RECUEIL DES COURS 9 (1984-VI). As to the second field, see, e.g., *Asian Agricultural Products Ltd. v. Sri Lanka*, ICSID Case No. ARB/87/3, Final Award, 4 ICSID Rep. 245 (June 27, 1990).

36. United Nations Conference on the Human Environment, Stockholm Declaration of the United Nations Conference on the Human Environment, *Report of the United Nations Conference on the Human Environment*, princ. 3, U.N. Doc. A/CONF.48/14/Rev.1, (June 16, 1972), *reprinted in* 11 I.L.M. 1416 (1972) [hereinafter Stockholm Declaration].

37. On the evolution of the work of the International Law Commission ("ILC") to explore this topic with an increased focus on environmental issues, see generally Alan E. Boyle, *State Responsibility and International Liability for Injurious Consequences of Acts Not Prohibited by International Law: A Necessary Distinction?*, 39 INT'L & COMP. L.Q. 1 (1990).

age to the environment of other States or of areas beyond the limits of national jurisdiction.³⁸

Principle 21, however, goes further than the principle asserted in the *Corfu Channel* case in that it expressly refers to “damage to the environment . . . of areas beyond the limits of national jurisdiction.”³⁹ As seen before, it is difficult to infer the legal grounding of such an addition from previous case law.⁴⁰

This issue could have been clarified two years later in the *Nuclear Tests* case. In this case, the then Solicitor-General for Australia, R.J. Ellicott, asserted the existence of an emerging rule of customary international law prohibiting nuclear tests by reference to Principle 21 of the Stockholm Declaration.⁴¹ However, the case was eventually settled and the ICJ did not address the matter. Thus the question of the customary status of the addition made by the Stockholm Declaration remained open. Moreover, the appended opinions of Judges Petrán and de Castro reflected opposite stances on this issue.⁴² From these opinions, it is at best possible to infer that, if a customary norm did exist, it would be limited to transboundary pollution, that is, to the protection of the environment to the extent that such protection is necessary to avoid damage to a state.⁴³

38. See Stockholm Declaration, *supra* note 36, princ. 21, at 1420.

39. See *id.* at 1426.

40. Older case law has, in fact, expressly rejected this argument. In the *Pacific Fur Seal Arbitration (U.S. v. U.K.)*, reprinted in 1 J.B. MOORE, HISTORY AND DIGEST OF INTERNATIONAL ARBITRATIONS TO WHICH THE UNITED STATES HAS BEEN PARTY 801 (1898), the arbitral tribunal had to decide whether the United States had “any right . . . of protection or property in the fur seals frequenting the islands of the United States in Behring Sea when such seals are found outside the ordinary three-mile limit [outside the territorial sea].” CASSESE, *supra* note 33, at 376 (quoting 1 MOORE, *supra*, at 801). Casseese further refers to a note sent by the U.S. Secretary of State to France, Germany, the United Kingdom, Japan, Russia, Sweden and Norway, stating among others that, “It is well known that the unregulated and indiscriminate killing of seals in many parts of the world has driven them from place to place, and, by breaking up their habitual resorts, has greatly reduced their number” CASSESE, *supra* note 33, at 376 n.2 (quoting 1 MOORE, *supra*, at 801). The Tribunal, however, rejected the arguments of the United States and held that the United States had no right of protection or property in the fur-seals.

41. Nuclear Tests (Austl. v. Fr.), 1974 I.C.J. Pleadings 163, 185-87 (May 21, 1973), available at <http://www.icj-cij.org/docket/files/58/9445.pdf> (last visited Oct. 3, 2008).

42. See Fitzmaurice, *supra* note 1, at 299.

43. In his dissenting opinion, Judge de Castro notes, in particular, that: [T]he Applicant’s complaint against France of violation of its sovereignty by introducing harmful matter into its territory without its permission is based on a legal interest which has been well known since the time of Roman law. The

With this context in mind, it is easier to understand why the work undertaken by the International Law Commission on International Liability in 1978⁴⁴ was to focus on transboundary environmental harm.⁴⁵ As noted by a prominent commentator:

When the matter reached its agenda as a separate item, however, the Commission avoided exclusive identification with environmental protection, and sought rules of a more general nature, which could also include forms of harm arising out of economic or monetary activities It quickly became apparent, however, that the precedents on which the Commission would have to rely came exclusively from the environ-

prohibition of *immissio* (of water, smoke, fragments of stone) into a neighbouring property was a feature of Roman Law The principle *sic utere tuo ut aliaenum non laedas* is a feature of law both ancient and modern In international law, the duty of each State not to use its territory for acts contrary to the rights of other States might be mentioned (*I.C.J. Reports* 1949, p. 22). The arbitral awards of 16 April 1938 and 11 March 1941 given in a dispute between the United States and Canada mention the lack of precedents as to pollution of the air, but also the analogy with pollution of water If it is admitted as a general rule that there is a right to demand prohibition of the emission by neighbouring properties of noxious fumes, the consequence must be drawn, by an obvious analogy, that the Applicant is entitled to ask the Court to uphold its claim that France should put an end to the deposit of radioactive fall-out on its territory.

Nuclear Tests (Austl. v. Fr.), 1974 I.C.J. 253, 388-89 (Dec. 20) (de Castro, J., dissenting). Thus, the reasoning is limited to those damages to the environment resulting in damages to a particular State. The more general question of damages to the environment irrespective of damages to a given State is discussed by Judge de Castro from the standpoint of "infringement of the principle of freedom of the high seas as the result of restrictions on navigation and flying due to the establishment of forbidden zones" as distinct from norms of environmental protection. *Id.* at 390. In any case, it is significant that Judge de Castro seems to resume with the narrow conception of environmental protection when he notes, "[i]t seems to me that this third complaint is not admissible in the form in which it has been presented. The Applicant is not relying on a right of its own disputed by France, and does not base its Application on any material injury, responsibility for which it is prepared to prove lies upon France." *Id.*

44. See International Law Commission, *Report of the International Law Commission on the Work of its Thirtieth Session*, ¶¶ 170-78, U.N. Doc. A/33/10 (1978), reprinted in [1978] 2 Y.B. INT'L L. COMM'N pt. 2, at 1, 149, U.N. Doc. A/CN.4/SER.A/1978/Add.1.

45. For a detailed account of the evolution of this topic at the ILC see the ILC's Analytical Guide, see generally U.N. CODIFICATION DIVISION, OFFICE OF LEGAL AFFAIRS, ANALYTICAL GUIDE TO THE WORK OF THE INTERNATIONAL LAW COMMISSION, 1949-1997 (1998), available at <http://untreaty.un.org/ilc/guide/9.htm>. See also Julio Barboza, *International Liability for the Injurious Consequences of Acts Not Prohibited by International Law and Protection of the Environment*, 247 RECUEIL DES COURS 291, 291-405 (1994); Julio Barboza, *La Responsabilité (causale) à la Commission du Droit International*, 34 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL (Centre National de la Recherche Scientifique) 513, 513-22 (1988).

mental field or dealt only with physical transboundary harm.⁴⁶

In the meantime, however, the ICJ had taken a step the importance of which, both for IEL and for other sub-fields of international law, would only become clear many years later. Indeed, in a now famous *obiter dictum* included in its decision of February 5, 1970, in the *Barcelona Traction* case, the ICJ noted that some international obligations had an *erga omnes* effect, in that “all States can be held to have a legal interest in their protection.”⁴⁷ As in the *Corfu Channel* case, the Court did not refer explicitly to environmental matters. But the potential of such an assertion for the development of norms relating to the protection of the environment irrespective of any specific harm caused to a state

46. See Boyle, *supra* note 37, at 3-4. In the twelfth and last report presented by the former Special Rapporteur, Prof. Julio Barboza, at the ILC's 48th session in 1996, it was recalled that: “[T]wo complete reports of the Special Rapporteur have yet to be considered: the tenth report, which concerns harm to the environment, and the eleventh, which proposes a liability regime for cases of transboundary harm,” adding that, “[a]lthough it is true that harm to the environment is an interesting item, it is also true that, basically, the Commission need only determine what this category comprises, since it has already agreed in principle that the concept of harm should include harm to the environment.” The Special Rapporteur, International Law Commission, *Twelfth Report on International Liability for Injurious Consequences Arising Out of Acts Not Prohibited by International Law*, ¶¶ 6, 7, U.N. Doc. A/CN.4/475 (May 13, 1996). Thereafter, the work on this topic was split in two, namely “prevention of transboundary damages from hazardous activities” and “international liability in case of loss from transboundary harm arising out of hazardous activities,” and a new Special Rapporteur was appointed, in the person of Pemmaraju Sreenivasa Rao. This approach resulted in two sets of draft articles, the Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities (International Law Commission, Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities, *Report of the International Law Commission on the Work of Its Fifty-Third Session*, U.N. Doc. A/56/10 (2001), available at http://untreaty.un.org/ilc/texts/instruments/english/commentaries/9_7_2001.pdf [hereinafter Draft on Prevention]) and the Draft Principles on the Allocation of Loss in Case of Transboundary Harm Arising Out of Hazardous Activities (International Law Commission, Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising Out of Hazardous Activities, *Report of the International Law Commission on the Work of Its Fifty-Eighth Session*, U.N. Doc. A/61/10 (2006), available at http://untreaty.un.org/ilc/texts/instruments/english/draft%20articles/9_10_2006.pdf [hereinafter Draft on Loss]). The conception underlying both Drafts is a narrow one, as reflected in the definition of “transboundary harm” as “harm caused in the territory of or in other places under the jurisdiction or control of a State other than the State of origin, whether or not the States concerned share a common border” (Draft on Prevention, *supra*, art. 2(c)) or of “transboundary damage” as “damage caused to persons, property or the environment in the territory or in other places under the jurisdiction or control of a State other than the State of origin.” See Draft on Loss, *supra*, princ. 2(e).

47. *Barcelona Traction, Light and Power Company, Limited (Belg. v. Spain)*, *supra* note 20, at 32.

cannot be overlooked. Such potential was to be reflected in the attempt to introduce environmental protection as one of the counts allowing for the criminal responsibility of states.⁴⁸ Although this attempt eventually failed, after Article 19 of the preceding project of Articles on State Responsibility was abandoned, it is interesting to note the link made in the Commentary to that project between environmental norms and the idea of obligations *erga omnes*:

More recently, the requirements of economic and social development on all sides and the marvelous achievements, but also the terrible dangers, of scientific and technological progress have led States to realize the imperative need to protect the most essential common property of mankind and, in particular, to safeguard and preserve the human environment for the benefit of present and future generations. New rules of international law have thus appeared, others in course of emergence have become firmly established and yet others, already existing, have acquired new vigour and more marked significance; these rules impose upon States obligations which are to be respected because of an increased collective interest on the part of the entire international community.⁴⁹

Thus, the contribution of the first wave of cases is to some extent ambiguous: (i) on the one hand, the Court made it clear that there was an obligation on States not to knowingly allow their territory to be used for acts contrary to the rights of other states; such obligation was not explicitly stated with respect to transboundary environmental harm, as some had hoped in the context of the *Nuclear Tests* case, but the combination of the *Trail Smelter* award, the ICJ decision in the *Corfu Channel* case, and the suggestions of Judge de Castro in his dissenting opinion in the *Nuclear Tests* case gave a significant indication that such a

48. Article 19(3)(d) of the Draft Articles provisionally adopted on Second Reading by the Drafting Committee (1998-2000) stated, “[s]ubject to paragraph 2, and on the basis of the rules of international law in force, an international crime may result, *inter alia*, from . . . a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas.” International Law Commission, Draft Articles on State Responsibility, *Report of the International Law Commission on the Work of its Forty-Eighth Session*, art. 19(3)(d), at 125, 131, U.N. Doc. A/51/10 (1996).

49. See International Law Commission, *Report of the International Law Commission on the Work of its Twenty-Eighth Session*, ¶ 15, U.N. Doc. A/31/10 (1976), reprinted in [1976] 2 Y.B. INT’L L. COMM’N pt. 2, at 115, U.N. Doc. A/CN.4/SER.4/1976/Add.1 (Part 2).

customary obligation was ripe to be asserted;⁵⁰ (ii) on the other hand, this development, although of great importance, left aside the more fundamental idea that the environment deserved protection *per se*, irrespective of the potential damage directly suffered by a state. This other necessary component of environmental protection, already spelled out in Principle 21 of the Stockholm Declaration,⁵¹ was to receive indirect support from the Court through the introduction of the concept of obligations *erga omnes*.

Therefore, although the ICJ had not yet elaborated on the actual contents and scope of environmental protection, its two underlying components had received, through the *Corfu Channel* and the *Barcelona Traction* decisions, an initial grounding on general international law.

III. *THE SECOND WAVE: THE SCOPE AND CONTENTS OF ENVIRONMENTAL PROTECTION*

What the first wave had heralded was consolidated and further developed by the second wave of cases. A cautious analysis of the corpus of decisions and opinions belonging to the second wave confirms that, not only was the principle asserted in the *Corfu Channel* case expressly acknowledged and formulated specifically with respect to IEL, but in addition the larger component of environmental protection was expressly recognized as part of customary international law. One may add to these fundamental contributions of the ICJ, a number of more progressive statements, some of which have, as I shall point out later, widely influenced the development of international law in areas such as state responsibility, international humanitarian law or the international law of development.

As noted in the Introduction, the most important contribution of the second wave is probably that of the ICJ's Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*.⁵² The Court set out to respond to a very broad question posed by the GA, namely: "Is the threat or use of nuclear weapons in any

50. See *Nuclear Tests (Austl. v. Fr.)*, *supra* note 10, at 388-89 (de Castro, J., dissenting).

51. See Stockholm Declaration, *supra* note 36, princ. 21, at 1424.

52. See generally *Legality of the Use by a State of Nuclear Weapons*, Advisory Opinion, *supra* note 7.

circumstance permitted under international law?”⁵³ After addressing its ability to issue such an opinion and clarifying the scope of the question, the Court turned to the relevant portions of international law that should be called upon to analyze the matter. In this context, the Court was led to discuss the relevance of IEL and, before setting aside this body of law as one which was not part of the “most directly relevant applicable law governing the question,”⁵⁴ it made the following important comment:

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.*⁵⁵

It further noted that:

However, the Court is of the view that the issue is not whether the treaties relating to the protection of the environment are or are not applicable during an armed conflict, but rather whether the obligations stemming from these treaties were intended to be obligations of total restraint during military conflict.

The Court does not consider that the treaties in question could have intended to deprive a State of the exercise of its right of self-defence under international law because of its obligations to protect the environment. Nonetheless, *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.*⁵⁶

The picture that emerges from the preceding paragraphs is a rich and complex one. The *first point* to be noted is that both

53. See *id.* ¶ 1 (July 8) (citing GA Res. 49/75 K, *supra* note 4).

54. *Id.* at 243, ¶ 34.

55. *Id.* at 241, ¶ 29 (emphasis added).

56. *Id.* at 242, ¶ 30 (emphasis added).

the statal and non-statal components of environmental protection are expressly acknowledged as “part of the corpus of international law relating to the environment.”⁵⁷ Thus, the principle originally stated in the *Trail Smelter* and *Corfu Channel* cases, according to which activities within a state’s jurisdiction and control should not damage other states, is re-affirmed by the Court specifically in the area of environmental protection. Moreover, the principle that activities within a state’s jurisdiction and control must be respectful of the environment outside national control, that is, the environment as such, is recognized as part of international law in ICJ case law for the first time. The acknowledgment of these two principles must however be nuanced.

Indeed—and it is our *second point*—what the Court actually says is that such principles (or one principle involving the statal and non-statal components) “is now part of the corpus of international law relating to the environment.”⁵⁸ This is not exactly the same thing as saying that they are part of general international law, particularly if one takes into account that, throughout the paragraphs preceding this assertion, the Court was mostly concerned with treaty law. This narrow interpretation would be further reflected in the Court’s reference to “the treaties in question” one paragraph after. On the other hand, one may note that, among the instruments discussed in this portion of the Court’s opinion, one finds express mention of Principles 21 and 2 of the Stockholm and Rio Declarations, respectively.⁵⁹ Thus, there is ambiguity as to the scope of the Court’s assertion in paragraph 29 of its Advisory Opinion. This ambiguity did not go unnoticed by Judge Weeramantry, who in his dissenting opinion, after referring to a number of substantive principles of IEL, noted that their validity was not dependent on treaty provisions:

Environmental law incorporates a number of principles which are violated by nuclear weapons. The principle of intergenerational equity and the common heritage principle

57. *Id.* at 241, ¶ 29.

58. *Id.*

59. *See id.* at 241, ¶ 27 (referring to Principle 21 of the Stockholm Declaration. *See supra* footnote 51, and Principle 2 of the Rio Declaration on Environment and Development. U.N. Conference on the Environment and Development, *Rio Declaration on Environment and Development*, princ. 2, U.N. Doc. A/Conf.151/5/Rev.1 (June 14, 1992), reprinted in 31 I.L.M. 874 (1992), available at <http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm>).

have already been discussed. Other principles of environmental law, which this request enables the Court to recognize and use in reaching its conclusions, are the precautionary principle, the principle of trusteeship of earth resources, the principle that the burden of proving safety lies upon the author of the act complained of, and, the “polluter pays principle,” placing on the author of environmental damage the burden of making adequate reparation to those affected. There have been juristic efforts in recent times to formulate what have been described as “principles of ecological security”—a process of norm creation and codification of environmental law which has developed under the stress of the need to protect human civilization from the threat of self-destruction

*These principles of environmental law thus do not depend for their validity on treaty provisions. They are part of customary international law. They are part of the sine qua non for human survival.*⁶⁰

This reflects, however, the views of Judge Weeramantry alone, who has often taken very progressive stances with respect to the environment. An important question is, therefore, whether one can find in other decisions of the Court additional elements to support the view that the statal and non-statal components of environmental protection are grounded in general international law. Two other cases seem apposite in this regard, namely the *Nuclear Tests II* and *Gabcikovo-Nagymaros* cases.⁶¹ Regarding the first, in its Order of September 22, 2005 relative to the request for an examination of the situation, the ICJ had observed, before dismissing New Zealand’s application, that the Order was:

[W]ithout prejudice to the *obligations of States to respect and protect the natural environment*, obligations to which both New Zealand and France have in the present instance reaffirmed their commitment.⁶²

The general character of the phrase in italics suggests that these obligations, which are not specified, belong to each and every

60. See Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, *supra* note 7, at 502-04 (Weeramantry, J., dissenting) (emphasis added).

61. See generally *Nuclear Tests II*, *supra* note 10; *Gabcikovo-Nagymaros Project* (Hung./Slovk.), *supra* note 22.

62. See *Nuclear Tests II*, *supra* note 10, at 306 (emphasis added).

state, irrespective of their having signed a particular treaty.⁶³ The ICJ's remarks in the *Gabcikovo-Nagymaros* case tend to confirm the customary nature of at least part of IEL, again, without referring to any specific norm:

The Court has no difficulty in acknowledging that the concerns expressed by Hungary for its natural environment in the region affected by the Gabcikovo-Nagymaros Project related to an "essential interest" of that State, within the meaning given to that expression in Article 33 of the Draft of the International Law Commission

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.⁶⁴

Confirmation of the customary nature of at least part of IEL is given here in three ways. It is first acknowledged that environ-

63. It should be recalled, in this regard, that New Zealand had invoked in support of its application not only treaty provisions but also customary international law:

In its "Request for an Examination of the Situation" New Zealand contends that, both by virtue of specific treaty undertakings (in the Convention for the Protection of the Natural Resources and Environment of the South Pacific Region of 25 November 1986 or "Noumea Convention") and customary international law derived from widespread international practice, France has an obligation to conduct an environmental impact assessment before carrying out any further nuclear tests at Mururoa and Fangataufa; and it further contends that France's conduct is illegal in that it causes, or is likely to cause, the introduction into the marine environment of radioactive material, France being under an obligation, before carrying out its new underground nuclear tests, to provide evidence that they will not result in the introduction of such material to that environment, in accordance with the "precautionary principle" very widely accepted in contemporary international law.

Id. at 290, ¶ 5.

64. *Gabcikovo-Nagymaros Project (Hung./Slov.)*, *supra* note 22, at 41, 67, ¶¶ 53, 112.

mental interests may amount to “essential interests” in the meaning of the customary rule providing for the state of necessity defense. While an interest is conceptually different from a norm, the existence of a legally protected interest assumes that such interest has legal relevance irrespective (in this case) of any treaty. Second, the Court speaks of “newly developed norms of environmental law . . . relevant for the implementation of the Treaty.”⁶⁵ This seems a clear reference to norms belonging to international customary law. Third, and perhaps more tellingly, in order to buttress its conclusion that environmental interests can in fact amount to “essential interests,” the Court expressly refers to paragraph 29 of its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*, thus suggesting that the “general obligation” mentioned in paragraph 29 had the same basis as the essential character of environmental protection. Thus, all in all, it seems possible to infer from these observations made by the Court that the statal and non-statal components of environmental protection enjoy a customary grounding.

A *third point* to be noted is the interconnection mentioned by the Court in paragraph 30 of its Opinion between environmental protection and international humanitarian law.⁶⁶ It is interesting to see that the Court was in some way inaugurating a fuller understanding of the potential ramifications of IEL as part of general international law. In this particular case, the interconnection was analyzed through the lens of the requirements of necessity and proportionality. As pointed out by Michael Matheson, such interconnection means that:

[E]lements of the natural environment cannot be made the object of attack, unless their destruction would give direct military advantage in the particular circumstances in question, which seems a rare situation. It [also] means that an attack cannot be made if the risk of collateral damage to the environment is disproportionate to the direct military advantage of the attack. These principles apply to both nuclear and conventional attacks that may cause environmental damage.⁶⁷

65. *See id.* at 67, ¶ 112.

66. On this interconnection, see generally Michael J. Matheson, *The Environmental Effects of Nuclear Weapons and the 1996 World Court Opinion*, 25 VT. L. REV. 773 (2001).

67. *Id.* at 776; see generally Neil A.F. Popovic, *Humanitarian Law, Protection of the Environment, and Human Rights*, 8 GEO. INT'L ENVTL. L. REV. 67 (1995); Yoram Dinstein,

In addition to international humanitarian law, the jurisprudence of the ICJ points to other interconnections between IEL and a sub-field of international law. Thus, in the *Gabcikovo-Nagymaros* case, the Court referred, for instance, to the interactions between economic development and the preservation of the environment:

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.⁶⁸

In his Separate Opinion appended in this same case,⁶⁹ Judge Weeramantry gave his views on the hierarchy between the two fields, and the rights and obligations that may result from such hierarchy, namely a right to development (conditioned by the protection of the environment),⁷⁰ a “human right” to the protection of the environment,⁷¹ and a duty of environmental impact

Protection of the Environment in International Armed Conflict, 5 MAX PLANCK Y.B. UNITED NATIONS L. 523 (2001).

68. *Gabcikovo-Nagymaros Project* (Hung./Slovk.), *supra* note 22, at 78, ¶ 140.

69. *Id.* at 92, 112, 114 (separate opinion of Weeramantry, J.).

70. On the concept of sustainable development in public international law, see generally Astrid Epiney & Martin Scheyli, *Le concept de développement durable en droit international public*, 7 REVUE SUISSE DE DROIT INTERNATIONAL ET DE DROIT EUROPÉEN 247 (1997). On the origins of this concept, see generally Peter H. Sand, *International Environmental Law After Rio*, 4 EUR. J. INT'L L. 377 (1993).

71. On this much discussed and controversial issue see, e.g., HUMAN RIGHTS APPROACHES TO ENVIRONMENTAL PROTECTION (Alan E. Boyle & Michael R. Anderson eds., 1996); A. A. Cançado Trindade, *The Contribution of International Human Rights Law to Environmental Protection, with Special Reference to Global Environmental Change*, in ENVIRONMENTAL CHANGE AND INTERNATIONAL LAW: NEW CHALLENGES AND DIMENSIONS 244 (Edith Brown Weiss ed., 1992); Dinah Shelton, *Human Rights, Environmental Rights, and the Right to Environment*, 28 STAN. J. INT'L L. 103 (1991); Malgosia Fitzmaurice, *The Right of the Child to a Clean Environment*, 23 S. ILL. U. L.J. 611 (1999); Sueli Giorgetta, *The Right*

assessment and monitoring:

After the early formulations of the concept of development, it has been recognized that development cannot be pursued to such a point as to result in substantial damage to the environment within which it is to occur. Therefore development can only be prosecuted in harmony with the reasonable demands of environmental protection. Whether development is sustainable by reason of its impact on the environment will, of course, be a question to be answered in the context of the particular situation involved.

It is thus the correct formulation of the right to development that that right does not exist in the absolute sense, but is relative always to its tolerance by the environment. The right to development as thus refined is clearly part of the modern international law. It is compendiously referred to as sustainable development

Environmental law in its current state of development would read into treaties which may reasonably be considered to have a significant impact upon the environment, a duty of environmental impact assessment and this means also, whether the treaty expressly so provides or not, a duty of monitoring the environmental impacts of any substantial project during the operation of the scheme

Environmental rights are human rights. Treaties that affect human rights cannot be applied in such a manner as to constitute a denial of human rights as understood at the time of their application. A Court cannot endorse actions which are a violation of human rights by the standards of their time merely because they are taken under a treaty which dates back to a period when such action was not a violation of human rights.⁷²

In another Dissenting Opinion, this time in the context of the *Kasikili/Sedudu* case, Judge Weeramantry also stressed the impact of environmental protection on boundary delimitation, to the extent that a Court proceeding to such a delimitation should, in his opinion, take into account the interests of the ecosystem and even seek solutions deviating from a geometric path set in a boundary treaty:

to a Healthy Environment, Human Rights and Sustainable Development, 2 INT'L ENVTL. AGREEMENTS: POL. L. & ECON. 173 (1999); Alan Boyle, *Human Rights or Environmental Rights? A Reassessment*, 18 FORDHAM ENVTL. L. REV. 471 (2007).

72. Gabcikovo-Nagymaros Project (Hung./Slovk.), *supra* note 22, at 92, 112, 114 (separate opinion of Weeramantry, J.).

If there is a natural reserve which, in the interests of the ecosystem and of biological diversity cannot be divided without lasting damage, this is a factor which the Court can no less ignore than a sacred site or archaeological preserve which must be maintained in its integrity if it is to be preserved.

There is more than one way in which equitable considerations can be given effect in such situations.

One is that the Court should consider itself empowered to make a slight deviation from the strict geometric path indicated by the boundary treaty, but always preserving a balance between the entitlements of the two parties to the enjoyment of this precious asset.

Another is to constitute, in the larger interests of both parties and indeed of the world community, a joint regime over the area so that neither party is deprived of its use. In this category, a multitude of possibilities and precedents are available which I shall briefly consider later.⁷³

The extent to which such an argument can be followed remains unclear. It was already discussed, although in a somewhat different version, and set aside by the ICJ in *Delimitation of the Maritime Boundary in the Gulf of Maine Area*⁷⁴ in relation to the existence of a natural maritime boundary. One may, however, consider that such an argument is and will be increasingly relevant at least in the area of equitable boundary delimitation.⁷⁵

73. *Kasikili/Sedudu Island (Bots. v. Namib.)*, *supra* note 11, at 1184, ¶¶ 91-92 (Dec. 13) (Weeramantry, J., dissenting).

74. *See generally* *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Can. v. U.S.)*, 1984 I.C.J. 246 (Oct. 12).

75. As noted by Fitzmaurice, however:

The Chamber did not go so far as to deny that a delimitation line could follow a discernible natural boundary; but it stated that, in the case under consideration, there were no geological, geomorphological, ecological or other factors sufficiently important, evident or conclusive to represent a single, incontrovertible natural boundary.

Fitzmaurice, *supra* note 1 at 300; *see also* Barbara Kwiatkowska, *Economic and Environmental Considerations*, in *INTERNATIONAL MARITIME BOUNDARIES* 75-113 (Jonathan I. Charney & Lewis M. Alexander eds., 1993); Barbara Kwiatkowska, *Equitable Maritime Boundary Delimitation*, in *FIFTY YEARS OF THE INTERNATIONAL COURT OF JUSTICE: ESSAYS IN HONOUR OF SIR ROBERT JENNINGS* 264-92 (Vaughan Lowe & Malgosia Fitzmaurice eds., 1996). The environmental argument was further discussed in other cases of maritime delimitation, although essentially from the standpoint of the Parties' access to the resources rather than the protection of such resources. *See, e.g.*, *Maritime Delimitation in the Area between Greenland and Jan Mayen (Den. v. Nor.)*, 1993 I.C.J. 38, 73, ¶ 78 (June 14).

At this point, it may be useful to summarize and put in perspective the contribution to IEL we have been discussing. One may state the different aspects of this contribution as follows: (i) 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 has become a norm of customary international law; (ii) among the larger implications of this general principle, one must note the need to take into account environmental considerations when assessing what is necessary and proportionate in the pursuit of legitimate military objectives, when evaluating the occurrence of a state of necessity, and possibly also when proceeding to an equitable delimitation of a (maritime) boundary; and (iii) in the years to come, other more specific rights and obligations may gain recognition as part of customary international law, including duties of environmental impact assessment and monitoring of any substantial project with potential implications for the environment. These latter issues can also be seen as potential issues to be clarified by the Court in the context of the two cases currently pending before it. As discussed next, these cases may provide a rich basis for the discussion of a number of both specific and more fundamental issues relating to IEL.

IV. PROSPECTIVE ISSUES: A THIRD WAVE?

In order to understand the potential of the two aforementioned cases currently pending before the ICJ as a basis for the development of IEL, it appears useful to provide a brief account of the respective facts and the legal issues that may arise in this context. This is, of course, a conjectural exercise to the extent that the information available on these two cases is still very limited.

In the *Pulp Mills* case, Argentina claims, in essence, that by authorizing the construction of two pulp mills on the banks of the River Uruguay, in front the Argentine town of Gualeguaychú, Uruguay has engaged its international responsibility to Argentina by reason of its violation of the Statute of the River Uruguay of February 26, 1975 as well as of the other rules of international law to which this Statute refers, including “the obligation to take all necessary measures for the optimum and

rational utilization of the River Uruguay,”⁷⁶ a number of procedural obligations such as that of prior notification to the Administrative Commission of the River Uruguay (“CARU”), 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,”⁷⁷ and “the obligation to co-operate in the prevention of pollution and the protection of biodiversity and of fisheries.”⁷⁸ Both parties have requested provisional measures, which the Court has rejected in both instances. The potential of the arguments submitted so far should, however, not to be underestimated. Indeed, in its application for provisional relief Argentina observed that:

Article 41 (a) of the 1975 Statute imposed substantive obligations and created for Argentina at least two distinct rights: first, “the right that Uruguay shall prevent pollution” and, second, “the right to ensure that Uruguay prescribes measures ‘in accordance with applicable international standards’” [And] that the substantive obligations under the Statute included “Uruguay’s obligation not to cause environmental pollution or consequential economic losses, for example to tourism.”⁷⁹

Argentina is therefore claiming, among other things, that the 1975 Statute incorporated international environmental standards, thus giving the opportunity to the Court to say what these standards actually are, namely to specify at least part of their content. As discussed in the preceding section, this is an issue that the second wave has left largely open.

At this preliminary stage of the procedure, the Court has only noted, by reference to its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons* and the *Gabcikovo-Nagymaros* case, that it attaches great importance to the protection of the environment.⁸⁰ This is encouraging as a first step. One may, however, read in the Court’s reasoning a subtle preference for

76. Pulp Mills on the River Uruguay (Arg. v. Uru.), ¶ 4 (Summary of the Order of July 13, 2006), available at <http://www.icj-cij.org/docket/files/135/11237.pdf> (last visited Oct. 3, 2008).

77. *Id.* ¶ 11.

78. *Id.*

79. *Id.* ¶ 33.

80. *Id.* ¶ 72.

narrowing the “applicable international standards” that it would potentially have the task to analyze, and this by means of a slightly limitative restatement of the substantive rights claimed by Argentina.⁸¹

It goes without saying that there is no point in trying to guess whether or not the Court will take the opportunity offered by this case to further clarify the contents of IEL. What seems sufficiently clear, even from the preliminary analysis so far conducted, is that such opportunity does exist and could potentially set the basis for an authoritative assessment not only of the contents of (a number of) international environmental norms, but also of their enforceability and even of the specific relations between environmental treaties and customary international law.⁸² Thus, three main open questions could potentially be addressed by the Court.

The second case currently pending, namely the *Aerial Herbicide* case, also seems to have great potential as a basis for the Court to clarify a number of open issues in IEL. The dispute, as described in the application of Ecuador instituting proceedings against Colombia, concerns:

Colombia’s aerial spraying of toxic herbicides at locations near, at and across its border with Ecuador. The spraying has already caused serious damage to people, to crops, to animals, and to the natural environment on the Ecuadorian side of the frontier, and poses a grave risk of further damage over time.⁸³

Ecuador further refers to the fact that the affected border region:

[I]s home to communities of indigenous peoples, including the Awá, who continue to live according to their ancient traditions and are deeply dependant on their natural environment. Most of the population in the region lives in extreme poverty and relies on subsistence farming of traditional crops

81. See *id.* ¶ 65, according to which, “Argentina claims that the substantive obligations the 1975 Statute imposes on Uruguay consist, first, of an obligation not to allow any construction before the requirements of the 1975 Statute have been met; and, second, of an obligation not to cause environmental pollution or consequential economic and social harm, including losses to tourism.” *Id.*

82. For a discussion of this issue, see Alan E. Boyle, *Some Reflections on the Relationship of Treaties and Soft Law*, 48 INT’L & COMP. L.Q. 901 (1999).

83. *Aerial Herbicide Spraying (Ecuador v. Colom.) (Application of Mar. 31, 2008)*, *supra* note 15, at ¶ 2.

like yucca, corn, coffee and other foodstuffs to survive. As a result, their connection to the land is deep. Infrastructure in these areas is underdeveloped, healthcare is rudimentary and formal education is minimal.

Ecuador is also one of just 17 countries in the world designated by the World Conservation Monitoring Centre of the United Nations Environment Programme as “megadiverse.” Although it covers only 0.17% of the Earth’s area, Ecuador possesses a disproportionately large share of the world’s biodiversity

As a consequence, Colombia’s fumigations are being conducted in a particularly vulnerable area in a manner that dramatically heightens the risks involved to people and to the natural environment.⁸⁴

Against this diverse background, Ecuador advances a very broad claim, namely that Colombia has violated, “Ecuador’s rights under customary and conventional international law.”⁸⁵

This seems therefore a very challenging and rich set of facts for the Court to take the opportunity to clarify the contents and enforceability of a number of customary norms of IEL. Moreover, the context in which the dispute arises, namely Colombia’s fight against drug growing and trafficking, and the important implications of such context not only for Colombia but for many other states as well, suggests that the Court may well be required to elaborate on the hierarchy between different norms of international law.⁸⁶ Colombia may well argue a state of necessity to justify the measures taken. In such a hypothesis, the Court would potentially be left with enough basis for evaluating competing “essential interests,”⁸⁷ one of them (Ecuador’s) being of an environmental nature.

84. *Id.* ¶¶ 24-26.

85. *Id.* ¶ 37.

86. On the hierarchy of the sources and/or norms of international law, see generally Michael Akehurst, *The Hierarchy of the Sources in International Law*, 47 BRIT. Y.B. INT’L L. 273 (1974-75); J.H.H. Weiler & Andreas L. Paulus, *The Structure of Change in International Law or Is There a Hierarchy of Norms in International Law?*, 8 EUR. J. INT’L L. 545 (1997); Martti Koskenniemi, *Hierarchy in International Law: A Sketch*, 8 EUR. J. INT’L L. 566 (1997); Juan Antonio Carrillo Salcedo, *Reflections on the Existence of a Hierarchy of Norms in International Law*, 8 EUR. J. INT’L L. 583 (1997); Dinah Shelton, *Normative Hierarchy in International Law*, 100 AM. J. INT’L L. 291 (2006).

87. See generally Ian Johnstone, *The Plea of “Necessity” in International Legal Discourse: Humanitarian Intervention and Counter-terrorism*, 43 COLUM. J. TRANSNAT’L L. 337 (2005); Daniel Dobos, *The Necessity of Precaution: The Future of Ecological Necessity and the Precautionary Principle*, 13 FORDHAM ENVTL. L. REV. 375 (2002); Roman Boed, *State of Necessity*

Summing up, the issues that the Court could potentially address on the basis of the *Pulp Mills* and *Aerial Herbicide* cases are, in my view, the following: (i) contents (specific norms) of IEL, (ii) enforceability of IEL, (iii) relations between treaty and customary IEL, and (iv) hierarchy of part of IEL with respect to other potentially essential interests. Such an agenda is probably far too ambitious for one to expect that it will be fully addressed by the Court, even assuming that all issues are raised in the parties' submissions and that the disputes are not settled. The purpose of our attempt at identifying them nevertheless is rather to give an indication of some of the important issues that remain to be (or could benefit from being further) clarified by the ICJ.

CONCLUSION

On the basis of the preceding considerations, it is submitted that a contemporary assessment of the ICJ's contribution to the development of IEL yields in essence the following results.

First, the existence of a general obligation of states to ensure that activities within their jurisdiction and control respect the environment of other states as well as the environment of areas beyond national control is now well grounded in customary international law. Second, it is consequently necessary to take into account environmental considerations in other fields of international law, for instance, with respect to the assessment of what is necessary and proportionate in the pursuit of legitimate military objectives, or when evaluating whether a state can avail itself of the state of necessity defense as a circumstance precluding the wrongfulness of a given action, or, still, when a tribunal or a commission is called upon to effect an equitable delimitation of a (maritime) boundary. Third, as discussed in Parts III and IV above, the jurisprudence of the ICJ as well as a number of opinions, particularly those of Judge Weeramantry, have raised and may hopefully be expected to address several important issues such as the existence of customary duties to assess and monitor the environmental impact of large projects, the qualification of environmental rights as human rights, the limits of the right to economic development and, more fundamentally, the relations between treaty and customary law in the area of environ-

as a *Justification for Internationally Wrongful Conduct*, 3 YALE HUM. RTS. & DEV. L.J. 1 (2000).

ment, or the specific contents and relative hierarchy of customary IEL.

This contribution may appear relatively modest in the light of the numerous and far-reaching treaties and conventions that have shaped the development of IEL, particularly since the 1970s.⁸⁸ There are, in fact, very few fields of international law that have experienced such a fast-paced progress as IEL.⁸⁹ Such an impression would, however, lose sight of what could be seen as one the most important functions of the ICJ, namely one of integration of specific sub-fields, such as IEL, into both the broader context of general international law and its various other sub-fields. Indeed, the main role of the ICJ with regard to the development of international law is arguably not that of a ground-breaking body but rather that of a stock-taking institution or, to put it in somewhat more colorful terms, that of being the gate-keeper and guardian of general international law.

88. On the development of IEL after the 1970s, see Alexandre Kiss, *Emergence des principes généraux du droit international et d'une politique internationale de l'environnement*, in *LE DROIT INTERNATIONAL FACE À L'ÉTHIQUE ET À LA POLITIQUE DE L'ENVIRONNEMENT* 19-35 (Ivo Rens ed., 1996).

89. One may think, for instance, to the fields of international criminal law or international investment law, which despite their historical precedents in the nineteenth and early twentieth centuries, have only developed in the last two decades.