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The International Court of Justice and the environment*

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Abstract. This essay illustrates the Court's jurisprudence in environmental matters based on selected cases and including the two Nuclear Tests cases, the Nuclear Weapons Advisory Opinion and the Gabcikovo Nagymars case. The selected cases prove the changing and evolving attitudes of the Court and its judges towards the importance of the environment and secondly, they show how the Court deals with certain contemporary environmental principles and concepts, such as the precautionary principle, environment impact assessment, and intergenerational equity.

Keywords: environment, law of treaties, international customary law, precautionary principle, intergenerational equity

Introduction

In the view of the present author, the judgement in the *Gabcikovo-Nagymaros* case and the Advisory Opinion in the *Nuclear Weapons* case (see below) were the landmark cases in the jurisprudence of the Court in relation to the environment. Despite some critical views, the Court has taken interest in the environment and noted its importance and its potential in shaping the behaviour of States. Prior to these two cases, the Court had dealt with environmental issues only incidentally; in certain other instances the environment featured only in the pleadings of the parties before the Court but was not included in its decisions. By contrast, in both the above-mentioned cases, environmental considerations belonged to the main legal issues and were dealt with directly by the Court.

Of course, we may disagree with the findings of the Court, but this is an altogether different matter and does not alter the fact that the Court recognised the importance of the environment in international law and treated it at a par with other established and classical areas of international law, such as the law of treaties. Dunoff lists the whole catalogue of issues that constitute an impediment for the Court becoming a wider forum for adjudicating disputes with an environmental element.[1] Some relate to the general legal character of the Court's jurisdiction, others have to do specifically with environmental law.

* Part of this essay derives from the author's lecture "International Protection of the Environment," (The Hague Academy of International Law) *RCADI*, vol. 293 (2001).

[1] See e.g. J. Dunoff, "Institutional Misfits: The GATT, The ICJ& Trade-Environmental Disputes", *Mich. J.Int'l L* (1994), p. 1043, see especially, pp. 1064–1074, also available at: <http://www.worldtradelaw.net/articles/dunoffmisfits.pdf>

As to the obstacles of a general character, (that also have a bearing on environmental litigation) Dunoff, first of all refers to the reluctance of States to subject themselves to the adjudication of a third party, secondly to the fact that the judicial proceedings are very inflexible and thirdly that there is usually no doubt who is the winning and who the losing party.[2] Further, the same author refers to a certain disregard of the Court's judgements and to the procedures of the Court as unfriendly, as well as to a general lack of knowledge of the Court, as contributing factors to its unpopularity.[3]

However, it may be said that even if to a certain degree his views are justified, the examples that illustrate them are not contemporary and that the steadily growing Court's docket demonstrates that many States have overcome a certain lack of enthusiasm regarding the Court's adjudication.

As to environmental disputes, according to Dunoff, a State may refrain from having recourse to the Court's jurisdiction due to political reasons, such as having been a polluting State in the past *vis-à-vis* a State that is polluting at present.[4] The same author also blames the unpopularity of judicial settlement on international environmental law itself, as not mature and in some ways not fully formed, both from the substantive and procedural points of view (e.g. *locus standi* in the case of harm to global commons or the impossibility for non-governmental organisations, (NGOs), to participate in the proceedings).[5] Finally, Dunoff mentions a cluster of so-called by him "structural" reasons that are a serious obstacle for the Court's adjudication.[6] In particular, he refers to the often-multilateral character of environmental disputes and stresses that the heart of such disputes is their "polycentric" character, in that they involve many actors and many interrelated issues, which results in "spillover effects" in deciding of only one of them.[7]

An additional problem is the lack of proper scientific knowledge by courts in general.[8] This impediment, however, may be remedied, at least to a certain degree, by the use of experts. In conclusion, Dunoff, is of the view that all the above-described factors, in particular the polycentric and transboundary character (i.e. one that is not defined and confined to the notion of State sovereignty) of international environmental law, makes it very difficult to submit environmental disputes to international adjudication.[9]

All the above are valid arguments. However, as the jurisprudence of the Court evidenced, there are no purely environmental disputes but each and every case is a "mixed bag" of international legal issues, separation of which is impossible and this in turn poses a serious challenge to the Court (especially, considering the complicated nature of international environmental law), but in the view of the present author it does

[2] *Ibid.*, p. 21.
[3] *Ibid.*, pp. 21–22.
[4] *Ibid.*, pp. 22–23.
[5] *Ibid.*, pp. 23–26.
[6] *Ibid.*, pp. 26–29.
[7] *Ibid.*, p. 26.
[8] *Ibid.*, p. 27.
[9] *Ibid.*, p. 28.

not make Court's adjudication impossible. Considering the rapid growth of international environmental law and its fast maturing, the number of cases with environmental aspects is expected to increase, especially taking into account the recent and rapid expansion of the Court's docket.

This essay will illustrate the Court's jurisprudence in environmental matters based on selected cases and including the two *Nuclear Tests* cases, the *Nuclear Weapons* Advisory Opinion and the *Gabcikovo Nagymars* case. The cases were selected in order, firstly, to prove the changing and evolving attitudes of the Court and its judges towards the importance of the environment (see in particular the *Nuclear Test* cases) and secondly, to show how the Court dealt with certain contemporary environmental principles and concepts, such as the precautionary principle, environment impact assessment, and intergenerational equity.[10]

1. The *Nuclear Tests* cases I and II – general issues

It was for first time in the *Nuclear Tests* cases I[11] that the Parties to the dispute pleaded extensively on environmental issues. Regrettably, the Court never decided these cases on their merits, therefore, never made any statements on the environmental issues pleaded in them. Interestingly, however, judges expressed their views on environmental issues in their individual opinions.

1.1. *The* Nuclear Tests *cases I*

In these cases, both Australia and New Zealand pleaded that nuclear tests conducted by France in the Pacific caused nuclear fall-out infringing their sovereignty in a manner contrary to international law and resulting in environmental damage. The pleadings in these cases relied heavily on the damage done to the environment by these nuclear tests. In the submission presented by the Government of Australia, it was expressly stated that the main radioactive contamination of the environment by a nuclear explosion is caused by radioactive fall-out deposited on the surface of the earth, including direct contamination of soil, water, oceans, lakes, rivers and reservoirs and vegetation.

[10] This essay deals with cases in which the issues of environmental protection (either in pleadings or in judgements of the Court) played a central role. In some cases, the Court did make statement that could have some bearing on the environment, such as *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark* v. *Norway)*. In this case the Curt had to consider the presence of ice in the waters in this region. The question was raised as to the effect on access to marine resources of the presence of drift ice, perennial ice, being a possible hindrance to access to the resources of the region-constitution a special geographical feature. In that case, the Court satisfied itself that while "the ice constitutes a considerable restriction of access to the waters, it does not materially affect access to migratory fishery resources in the Southern part of the overlapping claims." *ICJ Reports*, 1993, pp. 72–73.

[11] *Nuclear Tests cases* (Australia v. France; New Zealand v. France), *ICJ Reports* 1974, pp. 253 and 457 respectively.

It was also claimed that nuclear fall-out affected the atmosphere, thus changing meteorological conditions and that the French nuclear explosions resulted in tropospheric fall out on States and territories in the Southern Hemisphere and on the oceans in that Hemisphere. Australia also submitted that the radioactive "cloud" of debris in the troposphere might make several transits around the globe before being depleted by radioactive decay and deposit.[12]

New Zealand stressed in its pleadings the dangers of radiation to people and animals. It was pointed out that nuclear tests conducted by France were causing continued pollution of the territories of Cook Islands, Niue and the Tokelau Islands, as well as of their territorial sea and airspace.[13]

New Zealand and Australia both requested interim measures of protection that were dictated by environmental issues. On 22 July 1973, the Court exercising its powers under Article 41 of the Statute, and Order indicating that the Government of France should avoid nuclear tests causing the deposit of nuclear fall-out.[14]

However, the main arguments put forward by Australia, although, with a strong environmental flavour, were as far as their main points were concerned based on classical international law, i.e. the argument that the deposit of nuclear fall-out and its dispersion in its airspace, absent Australia's consent, constituted a violation of Australian territorial sovereignty.

Consequently, the actions of France, impaired Australia's independent right to decide what acts should take place over its territory and resulted in the exposure of people to radiation from artificial sources. France, according to Australia also infringed the principle of freedom of high seas, by interfering with ships and aircraft on the high seas through radioactive fall-out.[15] Australia was also of the view that the "effects of the French nuclear tests upon resources of the sea or the conditions of the environment can never be undone an would be irremediable by payment of damages."[16]

However, it must be stressed that Australia, made a very important observation regarding the environmental importance of the case before the Court. In particular, Mr Ellicot, Counsel for Australia, was quite forceful in his referring to environmental issues of the case. He cited Principle 21 of the Stockholm Declaration and noted that the obligation contained therein, was absolute and without qualification. He observed that an emerging rule of international customary law prohibits States from engaging in conduct "tending towards pollution and the creation of hazard to human health and the environment in particular a rule prohibiting the conduct of atmospheric nuclear tests."[17] He stated that the Stockholm Declaration reflected changing standards of environmental protection adopted by international community. He referred back to the *Corfu Channel* case as representing the clearest judicial acknowledgement of the

[12] ICJ Pleadings *Nuclear Tests cases (Australia* v. *France)*, Vol. I, pp. 9–10.

[13] ICJ Pleadings *Nuclear Tests cases (Australia* v. *New Zealand)*, Vol. II, pp. 6–7.

[14] *ICJ Reports* 1973, p. 173. Notwithstanding the Order of the Court, in July and August 1973, France carried out further tests that resulted in fall-out recorded in Australian territory.

[15] ICJ Pleadings *Nuclear Tests cases (Australia* v. *France)*, Vol. I, p. 14.

[16] *Ibid.*, p. 44.

[17] *Ibid.*, Oral Argument of Mr Ellicot, Vol. I, p. 185.

inviolability of territorial sovereignty and also alleged the breach by France of the principle of good neighbourliness and the violation of rules of State responsibility by conducting an activity involving risk, that of causing a dangerous level of fall-out on Australian's territory.[18]

Also, pleadings of New Zealand contained strong environmental arguments, in particular as far as the consequences of nuclear tests on the environment were concerned, such as contamination of local, regional and global environment and of natural resources.

In 1973, views on the importance and legal character of environmental law were very imprecise and divided. This is reflected in the individual opinions of Judges. Most illuminating in their extreme approached were opinions of Judge Petrén and Castro. The first of the above-mentioned Judges, posed a question whether there existed a norm of customary international law whereby States were prohibited from causing the deposit of radioactive fall-out on the territory of other States through atmospheric tests.[19] Having analysed existing practice of States, he concluded that such prohibition did not exist. Judge Castro, presented a completely different view. He invoked as a basic rule, the principle of international law *sic utero tuo ut alienum non leades.* He considered as well principles enunciated in the *Corfu Channel* case and the *Trail Smelter* arbitration. Already in 1974, this Judge acknowledged the existence of a rule of international customary law that would prohibit the emissions of noxious fumes from neighbouring properties, thus implying by analogy that the deposit of radioactive fall-out on the territory of another State was also illegal.[20] He further asserted that Principle 21 of the Stockholm Declaration had probably emerged as a norm of international customary law.

1.2. Nuclear Tests *cases II*

In 1995, the Court faced a follow up of the *Nuclear Tests* I.[21] New Zealand filed on 21 August 1995, a Request to examine the situation. The Request "arises out of a proposed action announced by France which will if carried out, affect the basis of the Judgement rendered by the Court on 20 December 1974 in the *Nuclear Tests* I cases *(New Zealand* v. *France).*" The Request further stated that "[t]he immediate circumstances giving rise to the present phase of the Case is a decision announced by the French Republic," according to which "France would conduct a final series of eight nuclear weapons tests in the South Pacific starting September 1995." New Zealand based its claim on paragraph 63 of the 1974 Judgement.[22] New Zealand expressly referred to environmental

[18] *Ibid.*, Vol. I, p. 186.

[19] Separate Opinion of Judge Petrén, *Nuclear Test* cases, (Australia v. France), *ICJ Reports*, 1974, p. 304.

[20] *Ibid.*, Dissenting Opinion of Judge Castro, pp. 388–389.

[21] *Request for Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgement of 20 December 1974 in the Nuclear Tests case*, (New Zealand v. France), Order of 22 September 1995, p. 288.

[22] The relevant paragraph states as follows: "[o]nce the Court has found that a State has entered into a commitment concerning its future conduct it is not the Court's function to contemplate that it will not

considerations in its Request. It stated that the rights of protection that it sought, all fell into the scope of the rights enumerated by it in paragraph 28 of its 1974 Application. In the *Nuclear tests case II*, New Zealand expressly asked the Court to recognise and redress its rights that would be adversely affected by entry into the marine environment of radioactive material as a result of the further underground tests to be carried out at the Mururoa or Fangataufa Atolls and of its entitlement to protection, as well as of the right to benefit from a properly conducted Environmental Impact Assessment.[23]

First of all the Court had to consider whether the 1995 Request fell into the scope of paragraph 63 of the 1974 Judgement. The Court looked into two elements: the first one concerned the course of procedure envisaged in paragraph 63 of the 1974 Judgement (it was stated that "the Applicant could request an examination of the situation within the provisions of the Statute"); the second element concerned the question whether the basis of the Judgement had been "affected" within the meaning of the paragraph 63. The second element is of interest for this essay.

New Zealand asserted that although paragraph 63 dealt with atmospheric testing, whereas the Request concerned underground testing, there were compelling reasons, mostly of an environmental nature to allow nevertheless the case to be re-examined.[24] New Zealand further claimed that the law in relation to environmental protection had developed since 1974, both as regards standards and procedures, reflected in customary and treaty law, such as the Noumea Convention. It was further claimed that under international customary law, especially stringent standards applied to the marine envi-

comply with it. However, the Court observes that if the basis of this Judgement were to be affected, the applicant could request an examination of the situation in accordance with the provisions of the Statute: the denunciation by France by letter dated 2 January 1974, of the general Act for the Pacific Settlement of International Disputes, which is relied on the basis of jurisdiction in the present case, cannot constitute by itself an obstacle to the presentation of such a request."

[23] *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*, (New Zealand v. France), Order of 22 September 1995, *supra* note 21, p. 291: New Zealand asked the Court to adjudge the following: "(i) that a conduct of a proposed test will constitute a violation of the rights under international law of New Zealand, as well as of other States; further, or in the alternative, (ii) that it is unlawful for France to conduct such nuclear tests before it has undertaken an Environmental Impact Assessment according to accepted international standards. Unless such an assessment establishes that the tests will not give rise, directly or indirectly, to radioactive contamination of the marine environment the rights under international law of New Zealand, as well rights of other States, will be violated."

[24] *Ibid.*, pp. 289–290: "Does not expressly identify the 'basis' of the Court's Judgement, it is most likely that the Court intended to refer to the declarations constituting legal obligations, by which France had entered into binding commitment not to carry out atmospheric tests in the South Pacific region; that the dispute concerned nuclear contamination of the environment arising from the nuclear of whatever nature; that the scope of Judgement of 1974 must be measured not be reference to atmospheric testing as such, but rather by reference to the true and stated object of the Application that in 1974, the only mode of testing used by France in the Pacific was atmospheric and such tests were then New Zealand's primary concern; . . . that a shift to underground testing would not remove the risks of contamination; that, according to a variety of scientific evidence, underground nuclear testing at Mururoa and Fangataufa has already led to some contamination of the marine environment, and risks leading to further, potentially significant, contamination; that the basis of the 1975 Judgement has, therefore, been altered and that, consequently, New Zealand is entitled to seek a resumption of proceedings instituted in 1973 . . ."; see also I. Scobie, "The Enigma of the Nuclear Test Cases," 4 *ICLQ* (1992), pp. 807–840.

ronment, amounting in fact to a total prohibition of introduction of nuclear material into the environment and that this prohibition concerned in particular nuclear material from nuclear tests. New Zealand also invoked both the precautionary principle and the obligation to conduct an Environmental Impact Assessment in order to strengthen its case (see below).

The Court, however, reached the conclusion that the 1974 Judgement dealt exclusively with atmospheric tests, which made it impossible for the Court to take into consideration questions relating to underground nuclear testing. For that reason, the Court could not address the general environmental issues raised by New Zealand relating to nuclear underground testing. The Court, however, made an important statement, predating its future pronouncements as regards environmental protection, namely that "the present Order is without 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".[25]

The Court in this case took an approach as purely of a "court of law" (as noted by Judge Shahabudeen).[26] The Court decided that case from the point of view of classical international law and interpreted its jurisdiction very narrowly. Judges Weeramantry, Koroma and Judge *ad hoc* Sir G. Palmer, viewed the Court's role from a broader perspective, *inter alia*, as a trustee of rights of future generations. In relation to its jurisdiction, Judge Weeramantry observed that the operative part of the 1974 Judgement constituted only part of the Judgement, since, "the term Judgement goes beyond the merely operative part of it. The basis of a Judgement goes deeper still into the area of underlying principles on which it rests, rather than the external orders used to implement it."[27]

Judge Weeramantry disagreed with the French contention that the case instituted in 1974 was no "Legal Lazarus" and no one could revive it. Judge Weeramantry as well analysed the case under the light of the precautionary principle, the conduct of environmental impact assessment and the doctrine of intergenerational equity (see below). He stressed the changes that occurred in international law through treaties and the impact of cases such as the *Corfu Channel* case, the *Trail Smelter* arbitration and the *Lac Lanoux* arbitration.

The decision of the Court in this case may be both criticised for missing the opportunity to make a fundamental statement in the field of international environmental law and applauded for the cautious approach adopted by the Court by according full respect to State sovereignty and scrupulously observing its jurisdiction.[28]

The wider role of the Judge was advocated by Sir G. Palmer who was unable to accept an approach that represented the "triumph of formalism over substance" and that was substantiated by the Court's reasoning that was "laconic" and of "highly

[25] *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*, (New Zealand v. France), Order of 22 September 1995, *supra* note 21, p. 288, paragraph 64.

[26] *Ibid.*, Separate Opinion of Judge Shahabudeen, p. 315.

[27] *Ibid.*, Dissenting Opinion of Judge Weeramantry, p. 327.

[28] On the role of the Judge see, Sir G.Fitzmaurice, *The Law and Procedure of the International Court of Justice*, Vol. II, Grotius Publications, 1986, pp. 647–648.

mechanical quality." He dissented from the majority Judgement due to the fact that he could not support the distinction maintained by the ICJ as between atmospheric and underground nuclear tests. He also expressed his regret that for the second time, the Court missed the opportunity to contribute to the development of international environmental law.

1.3. *The Advisory Opinion in* Nuclear Weapons *case*

Two requests have been submitted to the Court to render Advisory Opinion on nuclear weapons. The first was by the World Health Organisation (the "WHO"). The question posed by the WHO was as follows: "[i]n view of the Health and Environmental Effects, would use of Nuclear Weapons by a State in War or Other Armed Conflict be a Breach of its Obligation under International Law including the WHO Constitution?" The Court exercising its right to refuse Advisory Opinion on the basis of judicial propriety, refused to comply with the WHO request since, according to the Court, the request was outside the scope of the activities of the WHO.[29]

The second request for Advisory Opinion was submitted by the United Nations General Assembly. This request was admitted and the question was as follows: "[i]s the Use of Nuclear Weapons in Any Circumstances Permitted under International Law?" [30] This Opinion dealt with many complicated and interesting matters that relate to the environment. The environmental concerns were a subject of numerous submissions made by Governments.[31] Certain Governments took the stand of general illegality of the threat or use of nuclear weapons in armed conflict. According to them the use of nuclear weapons would violate general norms of customary international law such as the prohibition of transboundary damage, as codified in Principle 21 of the Stockholm Declaration. It would be also against treaty norms relating to globally shared resources and to global commons, such as those contained in the 1985 Convention on Protection of the Ozone Layer and the 1992 United Nations Convention on Climate Change.[32] For example the Government of Egypt derived illegality of the use of nuclear weapons in armed conflict in relation to the environment from the rules on armed conflict and the environment such as Article 35, paragraph 3 and Article 55 of the Additional Protocol I to the Geneva Conventions and from the Convention on the Prohibition of Military Use of Environmental Modification Techniques (the "ENMOD Convention"). The usefulness and permissibility of norms of environmental treaties that primarily regulate environmental protection in the time of peace applied to the environment in the time of armed conflict with or without the use of nuclear weapons

[29] On advisory opinions see, e.g., R. Higgins, "The Current Health of Advisory Opinions," in *Fifty Years of the International Court of Justice*, V. Lowe & M. Fitzmaurice (eds.), Cambridge University Press, 1966, p. 571.

[30] Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons*. *ICJ Reports* 1996, p. 3.

[31] Such as the Written Statement by Solomon Islands, 35 *I.L.M.* (1996), paragraphs 4.16–4.20, also available at: <http://212.153.43.18/icjwww/icases/iunan/iunan_ipleadings/iunan_ipleadings_199506_WriStats_25_SolomonIslands.pdf>.

[32] Written Statement of Egypt, paragraph 22, available at: <http://212.153.43.18/icjwww/icases/iunan/iunan_ipleadings/iunan_ipleadings_199506_WriStats_11_Egypt.pdf>.

was put in doubt by States that allowed the use of nuclear weapons under certain circumstances, such as the United Kingdom and the United States.[33]

The Court in relation to the environment said as follows:

> [t]he use of nuclear weapons could constitute a catastrophe for the environment. The Court also recognises that the environment is not an abstraction, but represents the living space, the quality of life and the health of human beings, including generations unborn. The existence of a general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States and of areas beyond national control is now part of the corpus of international law relating to the environment.[34]

The Court thus acknowledged the general duty to protect the environment. Further it analysed the relevant treaties. The question posed by the Court in this respect was whether "the obligations stemming from these treaties were intended to be obligations of total military restraint during military conflict?"[35]

The Court answered that question in the following manner:

> [t]he Court does not consider that the treaties in question could have intended to deprive a State of the exercise of its rights of self-defence under international law because of its obligation 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 action is in conformity with the principles of necessity and proportionality.[36]

The Court thus approached the obligation to protect the environment, as deriving from certain environmental treaties, in the situation of armed conflict, from the point of view of the right of self-defence (it strongly confirmed the existence of such a right, despite the obligation to protect the environment) as being one of the elements to be considered when assessing whether the military action is in conformity with the principles of necessity and proportionality. Therefore, both the exercise of the right to self-defence and of military action in accordance with the principles of necessity and proportionality allows under certain circumstances some degree of damage to the environment.

Thus in relation to the protection of the environment during armed conflict with the use of nuclear weapons, the Court reached the following conclusions:

> [w]hile 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.[37]

[33] Written Statement of the Government of the United States, pp. 34–42, available at: <http://212.153.43.18/icjwww/icases/iunan/iunan_ipleadings/iunan_ipleadings_199506_WriStats_18_USA.pdf> and the United Kingdom, pp. 68–73, available at: <http://212.153.43.18/icjwww/icases/iunan/iunan_ipleadings/iunan_ipleadings_199506_WriStats_17_UK.pdf>.

[34] *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, *supra* note 30, p. 226 at 241, paragraph 29.

[35] *Ibid.*, p. 242, paragraph 30.

[36] *Id.*

[37] *Ibid.*, p. 243, paragraph 33.

The Court also referred to Principle 24 of the Rio Declaration and the 1992 UN General Assembly Resolution on the Protection of the Environment in Time of Armed Conflict that provides that "destruction of the environment, not justified by military necessity and carried out wantonly, is clearly contrary to existing international law." Principle 24 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 co-operate in its further development, as necessary."

As to the applicability of treaties that are significant in the protection of the environment in the case of nuclear conflict, the Court singled out the Additional Protocol I to the 1949 Geneva Convention and in particular Articles 35 paragraph 3 and 55.

The Court was of the view that these provisions read together

> embody a general obligation to protect the natural environment against widespread, long-lasting and severe environmental damage; the prohibition of methods and means of warfare which is intended, it may be expected, to cause damage; and the prohibition of attacks against the natural environment by the war reprisals . . . These are powerful constraints for all the States subscribed to these provisions.

The Court, however, dismissed the possibility of the application of the ENMOD Convention.

The Court's Advisory Opinion proved to disappointment for many, as it regards the environment. For example, Professor Brown-Weiss, argued that:

> [w]hile the Court deserves commendation for addressing environmental issues in its Opinion and for at least incorporating them through the international law related to armed conflict, its Opinion is disappointing in that it makes no reference to environmental considerations in its decision. The Court unanimously decided that a threat or use of nuclear weapons must be compatible with the requirements of the international law applicable in armed conflict, and explicitly referred to 'the principles and rules of international humanitarian law.' Most regrettably in this context, it does not refer to the environment. The Court's caution seems to be unwarranted. By including explicit reference to the environment, it would have an important step in further ensuring the integration of environmental considerations in implementing international law related to armed conflict.[38]

The present author, although sympathetic with the feelings of disappointment of Professor Brown-Weiss, disagrees with such wholly pessimistic assessment of the Court's findings in relation to the environment. The Court, in fact stressed the importance of the environment and in this context the rights of future generations. The Court stated quite forcefully that "the environment is under daily threat and that the use and nuclear weapons could constitute a catastrophe for the environment" (paragraph 29).

1.3. *The* Gabcikovo-Nagymaros *case*

The Court in this case dealt with many environmental issues, as well as issues of the law of treaties and water law. It may be said that despite certain criticism of its judg-

[38] E. Brown-Weiss, "Opening the Door to the Environment and to Future Generations," in L. Boisson de Chazournes and P. Sands, (eds.), *International Law, the International and Nuclear Weapons*, Cambridge University Press (1999), pp. 348–349.

ment, the Court made a valuable contribution to the crystallisation of several points of international law, including environmental law.

It must be, however, stressed that the statements made by the Court concerning the environment were not by any means revolutionary. The Court emphasised the importance of environmental considerations between States and advocated that environmental protection was a point that States were obliged to take into consideration at a par with other issues of international law.

The *Gabcikovo-Nagymaros* case, involved many issues of general international law, namely the law of treaties and the law of State responsibility. All points of law (including environmental law) were linked together. Despite the fact that unravelling them to isolate issues of environmental law is possibly an artificial task, this is however necessary in order to appreciate fully the Court's pronouncements as to the environment. However, it is impossible to describe sufficiently the environmental issues at hand, without a somewhat lengthier analysis of the facts of this case.

The dispute arose from the suspension and subsequent termination of the 1977 Treaty concerning the Construction and Operation of the Gabcikovo-Nagymaros System of Locks, concluded between Hungary and Czechoslovakia ("the 1977 Treaty") that provided for a general framework of the works,[39] supplemented by the "Joint Contractual Plan". The 1977 Treaty provided for the construction and operation of a system of locks by the parties as a "joint investment" (Article 1 paragraph 1). The purpose of the system was to achieve "the broad utilisation of the natural resources of the Bratislava-Budapest section of the Danube River for the development of water resources, energy, transport, agriculture and other sectors of national economy of the Contracting Parties (Preamble). The tasks at hand were to produce hydroelectric power; to improve navigation; and to protect against flooding. The parties to the 1977 Treaty also resumed the obligation not to impair the quality of the water in the Danube River as a result of the planned works.

The construction was to comprise of two series of locks, one at Gabcikovo (situated at the territory of Czechoslovakia) and the other at Nagymaros (situated in the territory of Hungary). The project described the planned works as a "single and indivisible operational system of works" (Article 1 paragraph 2 of the 1977 Treaty). The 1977 Treaty provided for a very extensive and sophisticated system of locks, comprising of many costly elements. The whole system consisted of a reservoir upstream of Dunakiliti in both territories of Czechoslovakia and Hungary; a dam at Dunakiliti in the territory of Hungary; and a by-pass canal, situated at the territory of Czechoslovakia. The Gabcikovo-Nagymaros System of Locks was to be located on the canal, together with a hydroelectric power plant. The erection of this gigantic project required extensive works to be conducted, such as *inter alia*, the deepening of the bed of the Danube downstream of the place at which the by-pass canal was to rejoin the old bed of the Danube (Article 1 paragraph 2 of the 1977 Treaty); and a reinforcement of the flood control works along the Danube upstream of Nagymaros System of Locks, in the territory of Hungary.

[39] The 1977 Treaty between the Hungarian People's Republic and the Czechoslovak Socialist Republic Concerning the Construction and Operation of the Gabcikovo-Nagymaros System of Locks, signed 16 September 1109 *United Nations Treaty Series* 211 and 236 (English Translation).

The 1977 Agreement provided for a "Joint Contractual Plan" that included technical specifications. The 1977 Treaty provided that the construction, financing and management of the works would be organised by sharing equally by both parties (Articles 5, 7, 8 and 12). According to the 1977 Treaty, Hungary was to have control over the water locks at Dunakiliti and Czechoslovakia over the works at Gabcikovo. A detailed schedule of works was designed by the 1977 Agreement on Mutual Assistance.[40] The works started in 1978. In 1983, Hungary proposed to slow down the works and to this effect two Protocols were signed. In 1989, however, another Protocol was signed to accelerate the Project. In 1989, the Czechoslovak part of the project was very advanced but the Hungarian sector was barely started. This situation was caused by the fundamental changes in the Central and Eastern Europe that lead to the collapse of the communist system.

The project was greatly criticised in Hungary, especially as it was claimed that it was economically ill conceived and its completion would lead to major impairment of the environment. In 1989, as a result of the criticism this project had generated and the fact of the imminent collapse of communism, the Government of Hungary suspended the works in Nagymaros. This was followed shortly thereafter by the suspension of the works at the Dunakaliti region. At the same time, protracted negotiations took place between the two Governments. Czechoslovakia introduced the so-called "Variant C" that was a unilateral diversion of the Danube by Czechoslovakia on its territory about 10 kilometres upstream of Dunakiliti. "Variant C" consisted of the construction at Cunovo of an overflow dam and a levee linking that dam to the South bank of the by-pass canal. The reservoir that was to be built was smaller than initially planed. The works envisaged in the "Variant C" plan began in the late 1991. Hungary finally terminated the 1977 Treaty by a Note Verbale transmitted to the Government of Czechoslovakia.

On 1 January 1993, as a result of the so-called "velvet revolution," the Slovak Republic became an independent State and became a party to the project. On 7 April 1993, the Special Agreement for submission to the International Court of Justice of the differences between the Republic of Hungary and the Slovak Republic concerning the Gabcikov-Nagymaros Project was signed.[41] In order for the Court to decide the envi-

[40] Signed 16 September 1977, 32 *I.L.M.* 1978, p. 1263.

[41] The parties submitted the following questions to the Court (Article 2 of the Special Agreement):

"(a) The Court is requested to decide on the basis of the Treaty and rules and principles of general international law, as well as such other treaties as the Court may find applicable, whether the Republic of Hungary was entitled to suspend and subsequently abandon, in 1989, the works;

(b) whether the Czech and Slovak Federal Republic was entitled to proceed, in November 1991, to the 'provisional solution' and to put into the operation from October 1992 this system, described in the Report of the Working Group of Independent Experts of the Commission of the European Commission, the Republic of Hungary and the Czech and Federal Republic dated 21 November 1992 (damming up the Danube at the river kilometre 1851.7 on the Czechoslovak territory) and resulting consequences on water and navigation course;

(c) what the legal effects of the notification on 19 May 1992, of the termination of the Treaty by the Republic of Hungary.

2. The Court is also requested to determine the legal consequences, including the rights and obligations for the Parties, arising from its Judgement on the questions on paragraph 1 of this Agreement."

ronmental questions before it, it was necessary first to determine certain issues of general international law, in particular what constitutes a state of necessity. The plea of Hungary was based on a state of "ecological" necessity that constituted in its view a circumstance precluding wrongfulness, therefore was a justification for the termination of the 1977 Treaty. It also argued that its environmental concerns fell within the scope of Draft Article 33 of Draft Articles on State Responsibility.

The Court admitted that "the existence of a state of 'ecological necessity' could be a valid reason for a state not act in conformity with its international obligations."[42] This was a very important statement of the Court. In this particular case, however, the Court concluded that the perils invoked by Hungary did not amount to sufficient grounds (neither fully established nor eminent) to abandon the project.[43] Moreover, the Court observed that Hungary might have reverted to other remedial means instead of the abandonment of the project. The Court thus concluded that Hungary committed an internationally wrongful act by suspending and subsequently abandoning the project.

Other arguments elaborated by Hungary in order to justify the termination of the 1977 Treaty were based on the impossibility of performance; fundamental change of circumstances; the material breach of the 1977 Treaty by Czechoslovakia; and the development of new norms of international environmental law.[44] The ICJ did not accept any of these arguments.[45] Hungary also pursued the line of reasoning that it was entitled to terminate the 1977 Treaty in order to accommodate new requirements of international law in the field of environmental protection. The Court has noted that neither of the parties claimed that new norms of *jus cogens* of environmental law have emerged that would justify application of Article 54 of the VCLT.

The Court, however, relied on Articles 15, 19 and 20 of the 1977 Treaty that provided that a newly developed norm of international environmental law relevant for the implementation of the 1977 Treaty could have been incorporated through application of the above Articles. These Articles required the parties, to ensure, when agreeing upon means to be specified in the Joint Contractual Plan, by taking into consideration newly emerged environmental norms, that the quality of the water of the Danube is not impaired and that nature is protected:

> [b]y inserting these evolving provisions in the treaty, the parties recognised the potential necessity to adapt the Project. Consequently, the treaty is not static, but is open to adapt emerging norms of international law. By means of Articles 15 and 19, new norms can be incorporated in the Joint Contractual Plan.[46]

The Court analysed the nature of responsibility specified above. It said that it was a joint responsibility. It also stated that the obligations provided for in Articles 15,

[42] *Case Concerning the Gabcikovo-Nagymaros Project* (Hungary/Slovakia), Judgment, ICJ Reports 1997, p. 7 at 41–43, paragraphs 53–54 of the Judgement; see also R. Lefeber, "The *Gabcikovo-Nagymaros Project* and the Law of State Responsibility", 11 *LJIL*, (1998), p. 615.

[43] *Ibid.*, paragraph 57 of the Judgement.

[44] See in-depth J. Lammers, "The *Gabcikovo-Nagymaros* Case Seen in Particular from the Perspective of the International Watercourses and the Protection of the Environment." 11 *LJIL*, (1998), pp. 287–320; see also M. Fitzmaurice, "*The Gabcikovo-Nagymaros* Case: The law of Treaties," 11 *LJIL*, (1998), pp. 321–345.

[45] *Supra* note 42, paragraphs 89–115 of the Judgement.

[46] *Ibid.*, paragraph 110 of the Judgment.

19 and 20 of the 1977 Treaty were general and had to be transformed into concrete obligations through the process of consultation and negotiation: "[t]heir implementation thus requires a mutual willingness to discuss in good faith actual and potential environmental risks."[47] The Court emphasized further, in connection with environmental risks, that current standards must also be taken into consideration. The Court reached this conclusion by interpreting the above-cited Articles, "since they 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."[48]

The Court made a very forceful statement as to the importance of taking into consideration new environmental standards and norms. It said that:

> [s]uch 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 which began in the past. Such new standards emerge due to scientific development and also due to growing awareness of the risks for the mankind.[49]

Professor Lammers was somewhat critical and disappointed as to the conclusions and in his view "modest" general findings of the Court regarding the legal effects of environmental considerations on the obligations of the parties deriving from the 1977 Treaty, claimed by Hungary not to be in tune with modern environmental requirements.[50] Nonetheless, it would appear that the Court's decision to follows the principle *pacta sunt servanda*, while taking into consideration environmental matters, is in accordance with fundamental principles of international law, and is therefore correct. The Court interpreted this principle in a flexible manner, enabling the parties to apply it with full regard to their interests. The Court said as follows:

> [w]hat is essential, therefore, is that the factual situation as it has developed since 1989 shall be placed in the context of the preserved and developing treaty relationship, in order to achieve its object and purpose in so far as this is feasible.[51]

Further the Court said:

> [w]hat is required in the present case by the rule of *pacta sunt servanda*, as reflected in Article 26 of the Vienna Convention of 1969 on the Law of Treaties, is that Parties find agreed solutions within the co-operative context of the Treaty.

And finally,

> [a]rticle 26 combines two elements, which are of 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

[47] *Ibid.*, paragraph 112 of the Judgment.
[48] *Ibid.*, paragraph 140 of the Judgement.
[49] *Ibid.*, paragraph 140 of the Judgement.
[50] J. Lammers, *supra* note 44, p. 311.
[51] *Supra* note 42, paragraph 133 of the Judgement.

it, which should prevail over its literal application. The principle of good faith obliges the Parties to apply the Treaty in a reasonable way and in such a manner that its purpose can be realised.[52]

The present author, however, would disagree with Lammers' highly critical assessment of the Court's input in the development and crystallisation of environmental law, who intimated that "seen from the perspective of *general* international law of international watercourses or protection of the environment the present Judgement brought little new."[53]

The Court recognised the importance of environmental considerations in the interpretation of treaty provisions; it elucidated certain principles of general international law, such as *pacta sunt servanda*, as seen from the perspective of evolving rules of international environmental law. The Court, in the view of the present author wisely did not specify any new norms and standards of international environmental law to be considered by the parties, but left the matter to be decided by the parties themselves. It must observed that new norms and standards of international environmental law are still ill defined and some of them, one may say, *in statu nascendi.*

The uncertainty as to the principles of international environmental law is clearly reflected in the Judgment in the *Gabcikovo-Nagymaros* case. The Court noted as follows: "[b]oth Parties agree on the need to take precautionary concerns seriously and to take required precautionary measures, but fundamentally disagree on the consequences this has for the joint Project."[54]

The Court has always approached the principle of stability of treaties very seriously.[55] The Court has noted the fluid and evolving nature of treaty obligations and advised the parties to interpret them accordingly. This is a very progressive statement, developing a step further the classical rule of *pacta sunt servanda*. The Court, in the view of present author balanced interests of all parties involved and came up with a decision that considered all aspects of law in an evolutionary manner.

2. Other points of environmental law raised by the Court

2.1. *Precautionary principle*

A lot has been written on the precautionary principle. In this essay, however, this principle will be only discussed from the point of view of the Court's jurisprudence.

This principle was raised in the *Gabcikovo-Nagymaros* case. First of all Hungary relied on this principle in its pleadings.[56]

[52] *Ibid.*, paragraph 142 of the Judgement.

[53] Lammers, *supra* note 44, p. 318.

[54] *Supra* note 42, paragraph 113 of the Judgement.

[55] In the *Fisheries Jurisdiction* case the ICJ was equally cautious as admitting the principle of fundamental change of circumstances to terminate the treaty. *Fisheries Jurisdiction* case *(United Kingdom* v. *Iceland); (Federal Republic of Germany* v. *Iceland), ICJ Reports*, 1973, p. 18.

[56] It said as follows: "[s]tates shall take precautionary measures to anticipate, prevent or minimize damage to their transboundary resources and mitigate adversary effects. Where are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing such measures.

Hungary characterised this principle as a link between the principle of co-operation and the principle that establishes responsibility of a State for transboundary damage. Furthermore, Hungary claimed that Article 12 (of the then Draft Law of Non-Navigational Uses of International Watercourses) and Article 3, on notification of measures that may have possible appreciable adverse effects, of the 1991 Espoo Convention on Environmental Impact Assessment in Transboundary Context,[57] represent the law as it stood then. The obligation of notification also includes the duty to consult and negotiate.

It may be said that the customary law obligation not to cause transboundary harm (as codified in Principles 21 and 2 of the Stockholm and Rio Declarations) is underlined by the principle of preventive action that includes an obligation to co-operate with regard to transboundary environmental damage and to seek to prevent, reduce, limit or control such damage. The Court in its Judgement did not address directly this principle, however, but stated that:

> [t]he 1977 Treaty – in particular its Articles 15, 19 and 20 actually made available to the parties the necessary means to proceed at any time by negotiation, to the required readjustments between economic imperatives and ecological imperatives . . . [t]hat newly developed norms of environmental law are relevant for implementation of the Treaty and that the parties could, by agreement, incorporate them through the application of Article 15, 19 and 20 of the Treaty. These articles do not contain specific obligations of performance, but require the quality of water in the Danube is not impaired and the nature is protected, to take new environmental norms into consideration when agreeing upon means to be specified in the Joint Contractual Plan. By inserting these evolving provisions in the Treaty, the Parties recognised the 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.[58]

This statement may be interpreted that the Court has shown the possibility for the Parties to rely on newly developed principles of environmental law, including the precautionary principle, if they so deem necessary. In the *Nuclear Tests* case *II*, New Zealand relied on this principle. It pleaded:

> [t]hat France's conduct was 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 new underground nuclear tests, to provide evidence they will not result in the introduction of such material to the environment, in accordance with the 'precautionary principle' very widely accepted in contemporary law.[59]

Article 2, paragraph 5 (a), of the Convention on Protection and use of Transboundary Watercourses and International Lakes, signed in Helsinki on 17 March 1992, as well as the IUCN Draft Article 6 and Brundtland Report, Article 10, provide support for the obligation in general international law to apply the precautionary principle to protect transboundary source. . . ." Application of the Republic of Hungary v. Czech and Slovak Republic on the Danube River, reprinted in P. Sands, R. Tarassofsky and M. Weiss, *Principles of International Environmental Law, Documents of International Environmental Law*, Manchester University Press, 1994, pp. 693–698.

[57] Text in: 30 *I.L.M.*1999, p. 802.

[58] *Supra* note 42, paragraphs 103 and 112 of the Judgement.

[59] *Request For Examination of the Situation in Accordance with Paragraph 63 of the Judgement of 20 December 1974 in Nuclear Tests* case, *supra* note 21, paragraph 5.

The Court did not address this issue, but it gave rise to many important statements in individual opinions of Judges. Judge Weeramantry made a very forceful argument for the application of this principle. He stressed the growing support for the precautionary principle as part of the international law of the environment. Following the evidential principle of the reverse burden of proof, he expected France to submit evidence negating the claims of New Zealand. Judge Weeramantry asserted that New Zealand established *prima facie* the case in the absence of proof by France that the proposed nuclear tests were environmentally unsafe[60] and that:

> [i]t may be that France has a material with which it can satisfy the Court on that issue, but no such material has been offered. Having regard to the course of geological events, a guarantee of stability of such an island formation for hundreds of thousands years does not seem within the bonds of likelihood or possibility.[61]

Other Judges adopted a more cautious attitude. According to Judge *ad hoc* Palmer, it was difficult to make any statements concerning the status of the precautionary principle in the absence of French arguments addressing this issue.[62] He, however, in his capacity as a Judge, was of the view that both the precautionary principle and the Environmental Impact Assessment should be carried out in cases where "activities may have a significant effect on the environment" and that this may be a customary law principle also pertaining to the environment.

Judge Koroma expressed the view that New Zealand presented, based on scientific evidence, a *prima facie* case that the marine environment was at risk from underground tests and that there may already exist a duty "not to cause gross or serious damage which can be reasonably avoided."[63]

The individual opinions of Judges in this case, generally adhered to the view that the legal character and the role of the precautionary principle were not sufficiently specified. Judge Weeramantry proved to be the most ardent supporter of this principle. However, other Judges showed a certain degree of restraint and less enthusiasm as to the unconditional applicability of this principle.

2.2. *Environment Impact Assessment (the "EIA")*

This principle appears to be the least controversial and the most widely applied in international environmental law. It was again in the *Nuclear Tests* case *II* that New Zealand argued that no nuclear tests might be affected without an EIA. The argument submitted by New Zeland was supported by the 1986 Noumea Convention (Article 16), which provides that in major projects that might affect the environment an EIA must conducted.[64]

[60] *Ibid.*, Dissenting Opinion of Judge Weeramantry, p. 345.

[61] *Ibid.*, p. 357.

[62] *Ibid.*, Dissenting Opinion of Judge Palmer, p. 412.

[63] *Ibid.*, Dissenting Opinion of Judge Koroma, p. 378.

[64] Article 16 (2) and (3) of the Noumea Convention: "2. Each Party shall, within its capabilities, assess the potential effects of such projects on the marine environment, so appropriate measures can be taken to

New Zealand claimed that a prospective EIA should focus on, *inter alia*, the topography of the atolls; a shallow seismic testing programme; a comprehensive sampling campaign to investigate the concentration of radio nuclides in fish, planktonic organisms, sediments and coralline structures; an epidemiological study; the potential for radio nuclides releases from the site by reference to standards for civil nuclear installations and the strength and radioactive yield of the proposed detonations.[65]

The assessment should be made public in order to allow identification of considerations taken into account in effecting the EIA, so they could also be subject of independent scrutiny. The process should indicate consideration of benefits and balancing of benefits against risks.[66]

Similarly to the precautionary principle, Judge Weeramantry, was a strong supporter of the EIA. In many of his opinions (in *Nuclear Tests II* case, in the *Nuclear Weapons Advisory Opinion* and *Gabcikovo-Nagymars* case), he observed that this principle was gathering strength and international acceptance and had reached the level of general recognition, which warrants it to be recognised by the Court. He also noted a very important element of the EIA, namely that it

> means not merely an assessment prior to the commencement of the project, but a continuing assessment and evaluation as long as the project is in operation. This follows from the fact that the EIA is a dynamic principle and is not confined to a pre-project evaluation of possible environmental consequences.[67]

The same question as in the case of the precautionary principle may be asked, namely whether the EIA has entered the body of customary international law. In the view of the present author, the case of the EIA is stronger. It features in many international environmental documents and numerous national laws. It is in fact the very basis of contemporary environmental law and is in the heart of prevention. It has been observed that about seventy percent of the world States have adopted the EIA requirements.[68]

2.3. *Intergenerational equity*

This theory has gained currency in recent years.[69] For the first time this theory was developed and expounded in a holistic and coherent manner in the book of

prevent any substantial pollution of, or significant and harmful changes within the Convention area. 3. With respect to the assessment referred to in paragraph 2, each Party shall, where appropriate, invite (a) public comment according to its national procedures; (b) the Parties that may be affected to consult with and submit comments."

[65] CR/95/20, paragraph 81, cited in P. Sands, "Pleading and Pursuit of International Law: *Nuclear Test II (New Zealand* v. *France)*" in: A. Anghie and G. Sturgess (eds.) *Legal Visions of the 21st Century: Essays in Honour of Judge Christopher Weeramantry* (Kluwer Law International, 1998), p. 621.

[66] *Request For Examination of the Situation in Accordance with Paragraph 63 of the Judgement of 20 December 1974 in Nuclear Tests* case, Order, *supra* note 21, paragraph 85.

[67] *Ibid.*, Separate Opinion of Judge Weeramantry, pp. 330–331.

[68] K.R. Gray, "International Environmental Impact Assessment, Potential for Multilateral Environmental Agreements," *Colorado Journal of International Environmental Law & Policy*, Vol. II, (2000), p. 89.

[69] For a most comprehensive study on the topic trust in international and national laws see: C. Redgwell, *Intergenerational Trusts and Environmental Protection* (Manchester University Press, 1999), pp. 106–114.

Professor Brown-Weiss, entitled *In Fairness to Future Generations: International Law, Common Patrimony, and Intergenerational Equity*.[70]

It has to be observed from the outset that the rights of future generations were not entirely unknown. Already in the *Fur Seal* arbitration, the concept of trust, which is one of the foundations of the concept of intergenerational equity, was very persuasively expounded. Numerous conventions recognise the interests of future generations, such as the 1946 International Convention for the Regulation of Whaling.[71]

The concept of intergenerational equity, as conceptualised by Professor Brown-Weiss was subject to some criticism as to its doctrinal foundations[72] as well as to its practical application.[73] Practical difficulties connected with its application were observed in the *Oposa* case, thus far the only case before a national Court that this principle was invoked.[74] Especially, there were problems concerning the *locus standi* (the very general approach evidenced by the Supreme Court to a class action presupposed that everyone who might have been expected to benefit from the proceedings had *locus standi)* and the lack of specific legal interest.[75] Other attempts to invoke this principle before Supreme Courts of other States, such as Bangladesh, were not successful and the petition was dismissed for the reasons specified above.

The International Court of Justice in the 1996 *Nuclear Weapons* Advisory Opinion referred to "generations unborn" saying: "The Court also recognises 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."[76]

Judge Weeramantry was a staunch supporter of this principle in the *Nuclear Tests* case *II*. In his Dissenting Opinion, he observed that the doctrine of intergenerational equity was an important and rapidly developing principle of international law. In relation to this principle, Judge Weeramantry saw the Court as being the trustee of intergenerational rights to the same degree as domestic courts are trustees of the interests of the infants unborn who cannot speak for themselves and he took the view that the Court should not ignore the concept that has found its way into the corpus of international law, only because of the lack of precedent on which it may rest.[77]

[70] Transnational United Nations University, (1989).

[71] The Preamble of the Convention states as follows: "[r]ecognising the interest of the nations of the world in safeguarding for the future generations the great natural resources represented by the whale stocks . . .;" see e.g. the 1992 United Nations Framework Convention on Climate Change. See also soft law documents, such as the 1992 Rio Declaration on Environment and Development.

[72] E.g. A.D. D'Amato, "Do we Owe a Duty to Future Generations to Preserve the Global Environment," 84 *AJIL* (1990), pp. 124–194.

[73] A.E. Boyle, "Review of the Book of Brown-Weiss," in 40 *ICLQ*, (1991), p. 230.

[74] *The Supreme Court in Minor Oposa* v. *Secretary of the Department of Environment and Natural Resources (DENR)*, the Philippines, 30 July 1993, 33 *I.L.M.* 1994, pp. 174–206.

[75] See the very illuminating Concurring Opinion of Judge Feliciano, 33 *I.L.M.*1994, p. 201.

[76] "The Court also recognises 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", paragraph 29.

[77] Dissenting Opinion of Judge Weeramantry, *Request For Examination of the Situation in Accordance with Paragraph 63 of the Judgement of 20 December 1974 in Nuclear Tests* case, Order, *supra* note 21, p. 345.

The Court, however, was subject to certain criticism by Professor Brown-Weiss for a rather perfunctory treatment of this principle. Professor Brown-Weiss said that "[t]he Court, however, stopped far short of explicitly relying on a principle or of recognising explicitly the rights of future generations."[78]

2.4. *Conclusions on this part*

The jurisprudence of the Court concerning the environment can be criticised for not being more forceful and precise. However, in the view of the present author, it reflects the extent of the development of contemporary environmental law, which is still imprecise, lacks coherence and does not give many straightforward answers. Many of these principles, such as intergenerational equity are aspirational in nature and are probably not suited for practical implementation within the existing legal structures.

Therefore, it may be said that it is quite obvious that although the ethics of the concept are attractive, the practical legal side of the problem remains to be solved. The precautionary principle is of course much more accepted as one of the fundamental principles of international environmental law. However, its legal content is not completely clear and for example the question of the reversal of proof is still met with reluctance from certain States. Likewise, the difference between the preventive approach and the precautionary principle remains a quite confusing issue. The opinions of Judges as illustrated by the *Nuclear Tests* case *II* clearly evidence its complex character. It appears therefore, that the Court is reasonably cautious not to dwell at length at issues that are still evolving, and especially bearing in mind its lack of jurisdiction in the above case.

As to the general approach of the Court to environmental matters, the present author represents the view that the Court accorded a significant weight to this issue. In the *Nuclear Tests* cases *I* some judges treated the environment as not a very important problem. However, in the *Nuclear Weapons Advisory Opinion*, the Court emphasised its importance and the ensuing tragedy when it is destroyed. Similarly, in the *Gabcikovo-Nagymaros* case, the Court confirmed the necessity of the environmental protection and accorded to it an evolving character, which requires States involved in a joint project to periodically assess environmental protection measures in light of new scientific research.

It may also be reminded that in 1993, the Court established a Chamber for Environmental Matters. In the Communiqué issued, the Court said as follows:

> [I]n the past the Court has considered the question of the possible formation of a chamber to deal with environmental matters. On these occasions it took the view that it was not yet necessary to set up a standing special chamber emphasizing that it was able to respond rapidly to requests for constitution of a so-called 'ad-hoc' Chamber (pursuant to Article 26, paragraph 2, of the Statute) which could deal also with an environmental case. In view of the developments in the field of environmental law and protection which have taken place in the last years, and considering that it should be prepared to the fullest possible extent

[78] E. Brown-Weiss, "Opening he Door to the Environment and to Future Generations," *International Law, the International Court of Justice*, (1966), pp. 349–350.

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.[79]

The necessity of the establishment of such a Chamber may be questioned of course, due to the fact that the cases before the Court represent the whole range of legal issues deriving from different fields of international law, not just one isolated issue, and requires the application of various principles of international law in a single case. The view was expressed that the usefulness of such a Chamber may be doubted considering that access to it is governed by the general rules of access to the Court; that non state actors were not accorder access and that the Chamber was not well equipped to protect the community of interests in cases where the private interests of a State were not involved.[80]

Likewise, as pointed out above, the *Gabcikovo-Nagymaros Project* combined the legal problems of environmental protection, of watercourse law, of the law of treaties and of the law of State responsibility. However, the very fact of the existence of such a Chamber indicates that the Court accords a great importance to environmental issues.

3. Some comments on the possible broadening of the scope of the Court's jurisdiction

The Court is equipped with jurisdiction to deal with classical international law disputes based on bilateral relations, but as Professor Chinkin observed, "bilateralism is no longer appropriate as the paradigm model for the regulation of activities in the international arena."[81]

However, it may happen that the Court is involved in the development of these aspects of international law that relate to the protection of international ecosystems as a whole and where the concept arises of legally enforceable obligations towards the environment itself, in which all mankind, including future generations, may have interest, something akin to *actio popularis* and corresponding to obligations *erga omnes.* These issues were brought to the attention of the Court in the 1974 *Nuclear Tests Case I* by New Zealand in its pleadings. New Zeland pleaded that nuclear tests conducted by France not only violated its rights, but also the rights of other States not to be contaminated by radioactive fallout, therefore giving them *locus standi* before the Court to object to French testing.[82] In the 1995 *Nuclear Tests Cases II*, on the occasion of the request for the permission to intervene, Australia observed that although the dispute between New Zeland and France was bilateral in nature, the determination on merits of this case would result on the pronouncements on the rights of all States. Therefore,

[79] Communiqué of the International Court of justice, 19 July 1993.

[80] P. Okowa, "Environmental Dispute Settlement: Some Reflections on Recent Developments," in M. Evans, (ed.), *Remedies in International Law* (Hart Publishing, 1998), p. 168.

[81] C. Chinkin, *Third Parties in International Law* (Clarendon Press, Oxford, 1993), p. 2.

[82] *Pleadings Oral Arguments, Nuclear Tests cases I*, Vol. II, p. 209.

Australia reasoned that the legal interests of each and every member of international Community, even States outside the proceedings before the Court, would be affected or encased within the meaning of Article 62 of the ICJ Statute.[83] It should be added that there are two types of intervention under Articles 62 and 63 of the ICJ's Statute. Australia, Samoa and the Solomon Islands intervened under Article 62, whereas the Marshall Islands and the Federated States of Micronesia under Article 63.

However, a proposition that intervention is a suitable mechanism for redressing obligations *erga omnes* appears to be not without controversy, in particular as it regards intervention under Article 62. Such an intervening State is not even a party to the dispute, therefore not bound by the judgement and not subject to the principle of *res judicata.* Intervention under Article 63 is treated as a "right" in instances where the construction of a convention to which States other than those involved in the case are parties. In such occasions, these States will be notified by the Registrar. Every State so notified has the right to intervene in the proceedings and the Judgment will equally binding for all parties involved. It may be observed, however, that the legal character of the institution of intervention under the ICJ's Statue is not fully clear.[84]

It is clear from the jurisprudence of the Court that intervention is treated as an exception rather than the rule and is allowed in very rare occasions and only to protect the individual interests of States.[85] There are views, however, that the mechanism of intervention could be used in questions of public interest.[86] In the *Nuclear Tests II*, Judge *Ad Hoc* Sir G. Palmer stated that the lack of the Court's action regarding these applications was a great omission: "[t]he Court has disregarded environmental concerns, the concerns of the region and missed the opportunity to add valuable assistance to the Court's consideration." [87]

The strict policy of the Court regarding intervention may deter States from coming to the Court as intervenors in cases with important environmental issues. In the *Nuclear Tests Case II*, the smaller nations were denied the possibility to submit their claims before the Court and to present their regional concerns.

Another issue that in some ways is an impediment for the Court's jurisdiction in environmental matters is that its jurisdiction is confined only to States. With regard to environmental interests that spread across the borders and effect individuals belonging in various groups (indigenous peoples, cultural groupings, geographical groupings), the nation State is not always the best party to represent interests before the Court. We may accept that, for practical rather than doctrinal reasons, the Court is

[83] Application for Permission to Intervene by the Government of Australia, *ibid.*, Vol. I, paragraph 20.

[84] S. Rosenne, *The Law and Practice of the International Court 192–1996, vol. III, Procedure* (Martinus Nijhoff Publishers, The Hague, Boston, London, 1997), pp. 1481–1551.

[85] *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras, Nicaragua intervening), Judgement, ICJ Reports* 1992, p. 351.

[86] C. Chinkin, *supra* note 81, p. 215; see also Dissenting Opinion of Judge Schwebel in *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States), ICJ Reports 1984, Jurisdiction, p. 611.

[87] Dissenting Opinion of Judge *Ad hoc* Sir G. Palmer, *Request For Examination of the Situation in Accordance with Paragraph 63 of the Judgement of 20 December 1974 in Nuclear Tests* case, Order, *supra* note 21, p. 412.

unlikely to be able to allow single individuals to become normal parties to proceedings. But there is a number of ways in which the Court's proceedings could be developed, so these individual interests are better represented, in particular through allowing access to the Court to organisations, including non-governmental (NGOs) or private organisations. These ways may include, *inter alia*, the use of Article 66 of the ICJ Statute (organisations as *amici curiae*). This Article provides that when a request for an Advisory Opinion is received, all States entitled to appear and "any international organisation" considered to be able to furnish information in question, "shall be notified . . . that the Court will be prepared to receive . . . written statements, or to hear at a public sitting to be held for that purpose, oral statements relating to his question." In relation to contentious proceedings, Article 34 paragraph 2 provides that the Court "subject to and in conformity with its Rules, may request of public international organisations information relevant to cases before it, and shall receive such information presented by such organisations on their own imitative." The Rules define a "public international organisation" as an "international organisation of States."

The only case in which the Court has ever allowed the submission of information by a non-governmental organisation was in the *South-West Africa* 1950 advisory proceedings, when it allowed the International League for Human Rights to submit information. However, the same organisation was refused permission to submit information in the 1950 *Asylum* case, on the basis of exercise of discretion. Again, in the proceedings in *Nuclear Weapons* Advisory Opinion, the Court has refused, as a matter of discretion, a request to submit information by the International Physicians for the prevention of Nuclear War.[88] It is suggested that the Court should find a way to accept more readily the assistance, by means of *amicus* briefs, of international bodies.

Judge Higgins expressed the view that, although there is no real possibility of NGOs being admitted as litigants before the ICJ, they can play a useful role by submitting briefs *amici curiae*.[89]

During the proceedings in the *Nuclear Weapons* case, NGOs played a prominent role. They were behind the official requests for an opinion from the WHO and the UN General Assembly. They were well organised and lobbied intensively. The Court did not make part of the docket numerous briefs and submissions from NGOs, since they were not authorised to be a party to the proceedings. Nonetheless, they were placed in the library and the Judges could read them, if they wished to.[90]

Professor Shelton in her seminal article, highlighted the problems of what she termed as "opening the floodgates to participation by every individual and association

[88] D. Shelton, "The Participation of Non-Governmental Organisations in International Judicial Proceedings," 85 *AJIL* (1994), p. 623.

[89] R. Higgins, "Remedies and the International Court of Justice: An Introduction," in M. Evans (ed.), *supra* note 80, p. 203.

[90] Judge Higgins made the following observation: "[a]t one level this seems to be progressive and desirable. But it is not without problems. There is always a possibility that the judge may be influenced by something that these actually making written or oral statements may know about and have the opportunity to challenge. But, as things stand at the moment, practitioners who advice NGOs should follow the work of the Court closely to see if there is a possibility of making an input, at least on issues which come before the Court in advisory form." R. Higgins, *supra* note 89, p. 2.

interested in its [the Court's] proceedings" and suggested a useful compromise, namely, that there might be a limitation to international public interest organisations that have achieved consultative status at the United Nations, to be admitted as litigants.[91] A proposal of particular interest for international environmental law would be to grant *locus standi* before the ICJ in contentious cases to organisations. This possibility might concern in particular cases brought against States in the field of obligations *erga omnes* relating to common interests, such as the World Health Organisation or the International Labour Organisation.

The Court could use as well technical methods that are at its disposal in order to broaden its ways to decide the facts, as for example, expert evidence under Article 50 of the Statute.[92] In a field where factual issues are of great importance, the Court needs to make more use of this facility. In this area, various UN bodies and NGOs may have an important role to play. In particular, UN agencies such as the WHO and the ILO should be regularly called upon in their capacity as experts or *amicus curiae*. Article 50 also allows the Court to set up fact-finding missions in any form it wishes, such missions could take the form of a chamber of judges in order to arrive to the facts of a particular case, or even *in situ* inspections. In this context it may be mentioned that the first site visit made by the Court was in the *Gabcikovo-Nagymaros* case.[93] The legal basis of this visit was Article 48 in conjunction with several other provisions of the ICJ Statute such as Articles 50 and 67 and Articles 66 of its Rules. In conclusion, it may be said that as far as the protection of the "community of interests" is concerned, the Court's jurisdiction has narrow limits, defined by the *Monetary Gold Principle* case and further specified in the *East Timor case*[94] and is based on a strictly interpreted consensual basis. Therefore the Court has adopted the following stand:

> . . . that the right of peoples to self-determination, as evolved from the Charter and from the United Nations Practice, has an *erga omnes* character, is irreproachable. The principle of self-determination of peoples has been recognised by the United Nations Charter and the jurisprudence of the Court . . . However, the Court considers that the *erga omnes* character of a norm and the role of consent to jurisdiction are two different things. Whatever the nature of the obligation invoked, the Court could not rule on the lawfulness of the conduct of a State which in not a party to the case. Where that is so, the Court cannot act, even if the right in question is a right '*erga omnes*.'[95]

This decision of the Court was met with criticism from Judge Weeramantry.[96]

[91] D. Shelton, *supra* note 88, p. 625.

[92] See, G. White, "The International Court of justice: Efficiency of Procedures and Working Methods", in V. Lowe and M. Fitzmaurice (Cambridge University Press, 1996), pp. 528–541.

[93] See on this subject: P. Tomka and S. Wordsworth, "The First Site Visit of the International Court of Justice in Fulfilment of its Judicial Function," 11 *AJIL*, (1998), pp. 603–608.

[94] *Case of Monetary Gold Removed from Rome in 1943 (Italy v. France, United Kingdom, United States), ICJ Reports* 1954, (Preliminary Question), p. 32; *East Timor (Portugal v. Australia), ICJ Reports*, 1995, p. 90. See, C. Chinkin, "The East Timor Case *(Portugal v. Australia)*," 45 *ICLQ*, (1996), pp. 712–725.

[95] *East Timor* case, *supra* note 94.

[96] Dissenting Opinion of Judge Weeramantry, *East Timor case, supra* note 94, p. 172. He said as follows: "[a]n *erga omnes* right, is needless to say, a series of separate rights *singulum*, including, *inter alia*, a separate right *erga singulum* against Indonesia. These rights are in no way dependent on each other. With the violation by any State of the obligation so lying upon it, the tights enjoyed *erga omnes* become opposable *erga singulum* to the State so acting."

In the classical international law of *locus standi*, in order to appear before the Court on the basis of an obligation *erga omnes*, a State must have shown a substantive legal interest. This *condito sine qua non* of legal standing before the Court was confirmed in the *South-West Africa* cases, where the issue was that of *actio popularis*. Of course, the institution of *actio popularis* cannot be treated in its substantive aspects as an obligation *erga omnes*, nevertheless, these two concepts encompass the idea of a common legal interest, and thus from the point of view of procedural aspects of *locus standi* are basically the same. However in this case the Court stated that in order to bring a claim, "rights [of protection] must be vested in those who claim them, by some text or instrument or rule of law."[97]

In the view of the present author it would be legally incorrect, and indeed against all rules of the Court, to expect the Court to depart from the strict consensual basis of its jurisdiction. In light of the Rules of the Court as they stand at present, the Court cannot override the *Monetary Gold* principle. Therefore, a total departure from bilateralism should be considered impossible.

[97] *South-West Africa* case, *Second Phase. ICJ Reports*, 1966, *Judgement*, p. 32, paragraph 44.