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Commemorative Event Thirty Years after the Adv Op on Nuclear Weapons (1996)

Introduction

My purpose is to discuss with you various novelties emanating from the 1996 ICJ Advisory Opinion with a lasting impact on international law, in particular on international environmental law.

At the outset I also would like to emphasize the solid way in which the World Court has addressed its propriety of responding to a legal question cast in terms of law notwithstanding its major political implications. That was also done in other earlier landmark Advisory Opinions such as the *Reparations* case in 1949, the *Certain Expenses for Peace-keeping* case in 1962 and in the brave *Namibia* Opinion dealing with decolonization and apartheid issues in 1971. In a way, *Nuclear Weapons* was the first Adv Opinion which also dealt with environmental issues, in addition to the political issue of nuclear weapons, including in terms of arms control law (particularly the NPT and a general duty to pursue in good faith negotiations leading to nuclear disarmament under strict and effective international control) and strict observance of key principles of international humanitarian law.

Notwithstanding the fact that these sensitive nuclear weapons issues were at the root of the request for an advisory opinion by the UNGA, the ICJ did also not shy away to enter the domain of international environmental law in view of the potential disastrous effects resulting from the use of nuclear weapons and their testing on the environment. There is a notable number of novelties to be found in this Advisory Opinion which all have had a lasting impact on the consolidation and further development of international environmental law. I would like to discuss today eight of these with you.

Eight novelties arising from the Nuclear Weapons Advisory Opinion with lasting impact

1. *Recognition of int'l env law and putting it next to IHL, human rights law and arms control law*

First of all, it is one of the first times that the Court took up environmental issues and int'l env law in a judicial decision, ahead of later cases such as the *Danube Dam* case in 1997, the *Pulp Mills* case in 2010. and *Costa Rica/Nicaragua* in 2015. In a way the Court in its

fascinating Adv Op on the *Obligations of States in respect of Climate Change* in July 2025 built upon the environmental elements in its Nuclear Weapons case. Not as far as Judge Weeramantry wanted the Court to do, but he certainly pushed the Court in that direction. In Weeramantry's view it was inescapable that the Court has to deal with principles of environmental protection, because, I quote Judge Weeramantry, they are "so deeply rooted in the conscience of mankind that they have become particularly essential rules of general international law", and he added "violation of which in certain circumstances has been postulated as an international crime" (Weeramantry Diss Opin, p. 502). The Court itself did not go that far but the pioneering way in which the Court took up int'l env law and put it as a relatively young chapter next to, perhaps not yet on an equal footing with int'l humanitarian law and arms control law, was certainly innovative and rendered a major boost to the full recognition of int'l env law as a fully-fledged chapter of public international law. That is my first point.

2. Definition of the term environment

My second point relates to the sensible definition the Court gave of the concept of the environment. No legal definitions of the term "environment" as such exist, but the description of the Court became often quoted and is of paramount interest, politically and legally. In its Advisory Opinion on the *Legality of Nuclear Weapons*, the ICJ stated 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." (par. 29). That is quite a beautiful and impressive statement.

3. Concept of the global environment and the interconnectedness of the environment of States and the environment of areas beyond national jurisdiction

The Court does not limit itself to the environment of States only. It explicitly also mentions the environment of areas beyond jurisdiction, such as the high seas, the international deep seabed, the airspace above it, the atmosphere. Furthermore, the Court also highlights the interconnectedness of the environment of national states as well as those of states and areas beyond national jurisdiction. The emphasis on the global nature of the planet, and its unitary or at least interrelated ecological system and hence the need of an integrated policy, is notable and this is my third point.

4. Collective interest of humankind at stake in protecting the environment

The Court emphasized also the vital nature of the collective interest at stake in legally protecting the environment by stating, I quote from the Adv Op: “The destructive power of nuclear weapons cannot be contained in either space or time. They have the potential to destroy all civilizations and the entire ecosystem of the planet....to cause untold human suffering....and to cause damage to generations to come” (AO, paras. 35 en 36). This is my fourth point.

5. Interests and needs of future generations

My fifth point is that the Court is not only concerned about what is at stake with nuclear weapons for mankind as a whole living now, but it also refers explicitly to the interests of future generations and the lasting genetical and other effects of the use of testing of nuclear weapons of those unborn. Taking up the case of future generations and standing up for their rights and needs is certainly also an innovative and in retrospect pioneering impact of this judicial decisions of the highest world court. Obviously, the Court itself did not explicitly recognize the concept of intergenerational equity as a principle of international law (as judge Weeramantry did), but opened – in the words of Edith Brown Weiss - at least the door to future generations.

6. Standard of due diligence and the prevention of harm

My Sixth point. States have an obligation under general international law to prevent harm to the environment of areas beyond national jurisdiction. The ICJ first confirmed 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” in its 1996 Advisory Opinion on the *Legality of Nuclear Weapons* (para. 29). The Court referred for the first time to Principle 21 of the 1972 Stockholm Declaration and Principle 2 of the 1992 Rio Declaration, which it noted “express[ed] the common conviction of States.” The Court quoted the relevant principles as stipulating that States have a duty “to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.” (para. 27). The Court also concluded: “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 jurisdiction is now part of the corpus of international law relating to the

environment.” (para. 29). This standard of due diligence and the obligation of the prevention of harm is my sixth point.

7. Alluding to the concept of obligation erga omnes

In my seventh point I recall that the ICJ did not affirm the *erga omnes* nature of obligations regarding the prevention of harm to the environment but in several places alluded to it. A fully-fledged recognition of international environmental obligations was at that juncture a bit too early in the international legal architecture. During the years before it was an important point in the pleadings concerning the nuclear testing by France which might have harmful biological consequences for the existing and future generations of peoples of other States, by increasing the levels of radioactive fallout. Both Australia and New Zealand made *erga omnes* arguments in their parallel ICJ cases concerning atmospheric nuclear weapons testing by France in the 1970s. Australia asserted its right “in common with other States and their peoples, to be free from atmospheric nuclear weapons tests by any country.” Invoking the *Barcelona Traction* case, Australia argued “in terms of an *erga omnes* obligation,” such that the “duty to refrain from atmospheric nuclear testing is ... owed to the international community” as “a duty of every State towards every other State.” On its turn New Zealand added that these rights “reflect *a community interest* in the protection of the security, life and health of all peoples and *in the preservation of the environment*.” Consequently, “the corresponding obligation ... is an obligation *erga omnes*.”

Since the Court found that France had taken on an obligation not to conduct further atmospheric tests, the ICJ considered in 1974 the case to be moot and did not engage with these arguments. Therefore, it is noteworthy that, some years later, in the context of the Advisory Opinion of 1976 it considered the threat posed by nuclear weapons to the global environment and to humankind and confirmed the obligation to prevent harm to the environment of other States and of areas beyond national jurisdiction is binding on all States under general international law (para. 29). It prefaced this point by recognizing that “the use of nuclear weapons could constitute a catastrophe for the environment” and 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.” In the following year, the Court recalled this passage, stating that it reflected “the great significance that it attaches to respect for the environment, not only for States but also for the whole of mankind.” (*Gabčíkovo-Nagymaros*, ICJ Reports 1998).

8. Protection of the environment during armed conflict

For the first time in its history, the Court made it clear that international environmental obligations must be taken into account in applying laws relating to armed conflict. Here the Court mentioned in particular Article 35, para. 3, and Article 55 van Additional Protocol I to the 1949 Conventions. In the view of the Court the rules contained in these provisions “embody a general obligation to protect the natural environment against widespread, long-term and severe environmental damage; the prohibition of methods and means of warfare which are intended, or may be expected, to cause such damage; and the prohibition of attacks against the natural environment by way of reprisals”. To the regret of many, the Court did not decide that international environmental treaties directly applied to military actions during an armed conflict and could prohibit the use of nuclear weapons. Rather, the Court took these merely into account as “one of the elements” in assessing whether the military operations conform with the principles of necessity and proportionality applicable in armed conflict. Of course, it could well be argued that the use of nuclear weapons can never meet the criteria of necessity and proportionality and hence would be prohibited by international law already by reference to these environmental obligations under multilateral treaties which are *erga omnes* obligations. However, there was only implicit and somewhat scarce reference to the environment through the principles and rules of international humanitarian law. Obviously, this was the first time the Court explicitly referred to environmental considerations in a judicial decision relating to armed conflict. As such this is also a novelty, albeit somewhat disappointing that the Court did not make an explicit reference to international environmental law itself. Yet, half a loaf is better than no bread.

Conclusion

In conclusion, the Court addressed many global issues at stake in the question of the legality of the threat or use of nuclear weapons. In many respects the Advisory Opinion of 1996 had monumental implications. One is no doubt the notable number of novelties the Court established in addressing international environmental obligations in the context of applying the law of armed conflict and international humanitarian law to the issue of the legality of the threat or use of nuclear weapons.

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