8

Environmental Disputes

> 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.[1]

Compared to its extensive practice in territorial or maritime disputes, the International Court of Justice (ICJ, the Court) has had fewer opportunities to resolve environmental disputes between states. Since states acknowledged the scope of issues threatening the well-being of the planet that can only be tackled collectively, international environmental law has largely been developed through multilateral negotiations. However, there has been a recent surge in the judicialisation of international environmental issues. Not only have they been codified as sources of international law, but they have increasingly been the subject of disputes before international courts and tribunals, including the ICJ.

The judicialisation of international environmental law has provided ample opportunities for the Court to develop and clarify the law in this area. It has done so by identifying certain environmental principles – such as the duty to undertake environmental impact assessments (EIAs) or to prevent transboundary pollution – as customary international law.[2] It has also developed certain environmental law principles, such as the duty to prevent and of due diligence.[3] In making such assessments,

[1] *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226, 241–42 [29]. See also *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* (Judgment) [1997] ICJ Rep 7, 77–78 [140] and *Pulp Mills on the River Uruguay (Argentina v. Uruguay)* (Provisional Measures) (Order of 13 July 2006) [2006] ICJ Rep 113, 132 [72].

[2] Daniel Bodansky, 'International Environmental Law' in Carlos Espósito and Kate Parlett (eds), *The Cambridge Companion to the International Court of Justice* (CUP 2023) 389–410.

[3] *Pulp Mills on the River Uruguay (Argentina v. Uruguay)* (Judgment) [2010] ICJ Rep 14, 55–56 [101], 59 [118], 79–80 [197], 82–83 [204]; *Certain Activities Carried Out by Nicaragua in the Border Area* (*Costa Rica v. Nicaragua)* and *Construction of a Road in*

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opportunities have arisen for the Court to draw connections between the environmental matters and the people impacted by environmental harm. This, however, has rarely been undertaken.

An environment of sufficient quality must be maintained to circumvent undesirable effects on human health and living standards and thus violate certain human rights.[4] The connection between the environment and human rights has been increasingly affirmed by regional human rights bodies,[5] the UN Human Rights Council, and the UN General Assembly.[6] If any damage to the environment is potentially harmful towards human health and quality of life, then any complaint regarding harm to the environment that is brought to the Court will likely have the objective of protecting individuals whose human rights have been violated as a result of this harm. Thus, several environment-oriented cases that the Court has entertained, whether contentious or advisory, were brought to its docket in the spirit of protecting individuals, with governments submitting arguments regarding the protection of their own populations.[7] However, opportunities have been missed to draw emphasis on the victims of environmental degradation. Such emphasis is desirable from a socially idealist standpoint, which, *inter alia*, perceives individuals as central members of international society and aspires for just judicial decisions through greater balance between states and individuals. In this context, this translates into stronger acknowledgement that inter-state environmental disputes impact the rights, health, and well-being of people.

Scholars have taken increasing interest in the judicialisation of international environmental disputes.[8] However, this chapter argues that such judicialisation before the ICJ has not developed international

Costa Rica along the San Juan River (Nicaragua v. Costa Rica) (Judgment) [2015] ICJ Rep 665, 706 [104], 712 [121], 737 [217].

[4] Pierre-Marie Dupuy and Jorge E. Viñuales, *International Environmental Law* (2nd edn, CUP 2018) 362; Alan Boyle and Michael R. Anderson (eds), *Human Rights Approaches to Environmental Protection* (OUP 1996) 1–24, 25–42, 43–70.

[5] E.g., *The Environment and Human Rights* (Advisory Opinion) [2017] IACtHR, OC-23/17; *Marangopoulos Foundation for Human Rights (MFHR) v. Greece* (Decision on the Merits) [2007] ECSR, Complaint No. 30/2005; *Gbemre v. Shell Petroleum Development Company of Nigeria Ltd et al.* (Judgment) [2005] ACtHR, FHC/B/CS/53/05.

[6] A/HRC/RES/48/13; A/76/L.75.

[7] *Pulp Mills* (n. 3) 194–93 [158] (Separate opinion of Judge Cançado Trindade).

[8] E.g., Justine Bendel, *Litigating the Environment: Process and Procedure before International Courts and Tribunals* (Edward Elgar Publishing 2023); Edgardo Sobenes, Sarah Mead and Benjamin Samson (eds), *The Environment through the Lens of International Courts and Tribunals* (Springer 2023); Joshua Paine, *The Functions of International Adjudication and International Environmental Litigation* (CUP 2024).

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environmental law in a way favourable to victims of environmental degradation. First, certain promising human rights-focused environmental disputes were discontinued, indicating that other forms of peaceful dispute settlement remain more common in the environmental context (Section 8.1). Second, raising arguments in certain incidental proceedings in environmental disputes, such as counterclaims, have limited the potential for certain decisions to develop peoples' rights in environmental disputes (Section 8.2). Third, the Court's perceived judicial caution has limited its ability to clarify the role of local populations in environmental impact assessments (EIAs) (Section 8.3) and develop certain environmental principles in light of populations, such as the precautionary principle or the principle of intergenerational equity (Section 8.4). Section 8.5 concludes.

8.1 Protecting Victims of Environmental Degradation: Missed Opportunities

The first section presents environment-related contentious cases before the Court whereby states invoked arguments reflecting concern for their affected populations. It argues that the discontinuation of such disputes indicates that other forms of peaceful dispute settlement remain more common in the environmental context. Conversely, certain key environmental decisions rendered by the Court say very little about the relevant impacted populations, as they were not the focus of state litigants' arguments.

First, three cases where state litigants focused extensively on the repercussions of environmental damage for their citizens were discontinued: *Nuclear Tests (New Zealand v. France / Australia v. France)*, *Certain Phosphate Lands in Nauru (Nauru v. Australia)* and *Aerial Herbicide Spraying (Ecuador v. Colombia)*.

In *Nuclear Tests (New Zealand v. France / Australia v. France)*, both Australia and New Zealand instituted separate proceedings against France in 1973, as the latter wished to carry out nuclear tests in the atmosphere in the South Pacific region. Both Australia and New Zealand put forward the well-being of their populations as important arguments in their applications to institute proceedings. Indeed, Australia's decision to seize the Court reflected the conviction of the Australian people.[9] One

[9] *Nuclear Tests (Australia v. France)* (Application instituting proceedings) [1973] [9] and [14].

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of Australia's principal arguments in its application instituting the proceedings was that France was violating its right and the right of its people, in common with other states and their peoples, to be free from atmospheric nuclear weapon tests by any country.[10] More specifically, Australia's motive was to protect the Australian peoples' health and well-being,[11] as it was concerned that the exposure of populations to radiation as a result of the nuclear tests would result in genetic mutations that would affect present and future generations.[12] Furthermore, Australia contended that its people had undergone psychological strain[13] and mental stress resulting from fear and anxiety that the nuclear tests posed.[14] Australia concluded that this was 'a cause of injury to them'.[15]

New Zealand adopted similar rhetoric in its application to institute proceedings. Speaking on behalf of the Cook Islands, Niue, and other Pacific territories in which it monitors levels of radioactivity,[16] it claimed that France's violation had caused harm, including apprehension, anxiety, and concern to its people.[17] It also stated in its application that there had been a 'progressive realisation of the dangers which [nuclear tests] present to life, to health and to the security of peoples and nations everywhere'[18] and that no nation has the right to 'pursue its security in a manner that puts at risk the health and welfare of other people'.[19]

Both Australia and New Zealand's approaches in this case place the individual at the centre of the motive to bring a case and reasons why the Court should uphold their claims. New Zealand argued that France's nuclear tests breached its peoples' rights to live free from radioactive material and, specifically, that such material should not cause them 'harm, including apprehension, anxiety and concern'.[20] As for Australia, it argued that France had breached its people's rights to be free from such tests and to decide whether to be exposed to such radiation.[21] However, the Court

[10] Ibid [49].
[11] Ibid [19] and [36].
[12] Ibid [33]. See also Verbatim record 1973, 178, 180, 196, 226, 227. Australia also stated this in its application instituting proceedings: [34].
[13] *Nuclear Tests (Australia v. France)* (Application instituting proceedings) (n. 9) [47].
[14] Ibid [40], [44], [47]. This was also reiterated in: Verbatim record 1973, 177 and 180.
[15] *Nuclear Tests (Australia v. France)* (Application instituting proceedings) (n. 9) [47].
[16] *Nuclear Tests (New Zealand v. France)* (Application instituting proceedings) [1973] [13].
[17] Ibid [28].
[18] Ibid [23].
[19] Ibid [24].
[20] Ibid [28].
[21] *Nuclear Tests (Australia v. France)* (Application instituting proceedings) (n. 9) [49].

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did not end up rendering a judgment on the merits as France made several public statements announcing its intention to refrain from carrying out nuclear tests.[22] Characterised as unilateral statements, these sufficed for the Court to consider that the dispute had disappeared.[23] The case was, in essence, discontinued not by the parties involved but by the Court itself, which deemed a non-judicial, political approach—specifically, a unilateral statement—sufficient to resolve the dispute.

The *Certain Phosphate Lands in Nauru (Nauru v. Australia)* case, which was discontinued after the issuing of preliminary objections, inherently focused on the nexus between environmental law and human rights. Nauru seized the Court against Australia alleging that certain phosphate lands in Nauru that were mined by Australia (prior to Nauru's independence in 1968) were worked out, due to Australia's poor administration of the territory at the time.[24] Therefore, there was a violation of the Nauruan peoples' right to self-determination and sovereignty over its natural resources.[25] Nauru's principle argument was that Australia had breached the trusteeship obligations laid down in Article 5 (2)(1) of the Trusteeship Agreement, which guaranteed the promotion of the indigenous inhabitants' advancement towards independence[26] and the consideration of their customs, usages, rights, and interests.[27]

The phosphate industry was an important means for the Nauruan people to seek 'greater control over their own lives';[28] however, it was exploited by Australia and left in a useless state for habitation, agriculture, and other purposes necessary for the Nauruan people to live, until rehabilitation could be carried out. The repercussions of Australia's actions for the Nauruan people were emphasised in Nauru's Memorial.[29] In the opinion of Judge Antônio Augusto Cançado Trindade, this case placed emphasis on the long-term needs and future of the Nauruan people, revealing that 'the well-being of peoples is not

[22] *Nuclear Tests (Australia v. France)* (Judgment) [1974] ICJ Rep 253, 271–72 [59].
[23] Ibid [51].
[24] *Certain Phosphate Lands in Nauru (Nauru v. Australia)* (Application instituting proceedings) [1989] [15].
[25] *Certain Phosphate Lands in Nauru (Nauru v. Australia)* (Preliminary Objections) (Judgment) [1992] ICJ Rep 240, 243–44 [5].
[26] Charter of the United Nations, 1 UNTS XVI, Article 76 [hereafter, UN Charter].
[27] *Certain Phosphate Lands in Nauru* (Application instituting proceedings) (n. 24) [43].
[28] *Nuclear Tests (New Zealand v. France)* (Application instituting proceedings) (n. 16) [13].
[29] Memorial of the Republic of Nauru (20 March 1990) 144–52.

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devoid of a temporal dimension'.[30] Had the Court rendered a judgment on the merits, it would have undoubtedly developed international law on the environment, human rights, and self-determination. However, Nauru and Australia notified the Court that they had reached a settlement and therefore discontinued proceedings.[31]

A final discontinued case placing people at its core was *Aerial Herbicide Spraying (Ecuador v. Colombia)*. Seizing the Court against Colombia for spraying toxic herbicides at locations near, at, and across their shared border,[32] Ecuador stated, 'the spraying had already caused damage to people, crops, animals and the natural environment on the Ecuadorian side of the frontier, and pose[d] a grave risk of further damage over time'.[33] In its application to institute proceedings, Ecuador also emphasised the severe impact on its communities and indigenous people.[34] This included health issues caused by exposure to the sprays,[35] damage to plants and crops that disrupted local farming needs,[36] and pollution of water sources, which harmed aquatic life and adversely affected river communities relying on rivers for domestic purposes.[37] For instance, Ecuador's population in the northern boundary areas 'reported serious adverse health reactions including burning, itching eyes, skin sores, intestinal bleeding and even death'.[38]

Furthermore, Ecuador pointed to the damage to plants and crops affected the farming needs of the local population[39] – the community of Las Salinas, for example.[40] It reported negative effects on the health and food security of border populations by polluting water sources and aquatic life, particularly for river communities who use rivers for

[30] *Pulp Mills* (n. 3) 196–97 [163]–[164] (Separate opinion of Judge Cançado Trindade).
[31] *Certain Phosphate Lands in Nauru (Nauru v. Australia)* (Order of 13 September 1993) [1993] ICJ Rep 322.
[32] *Aerial Herbicide Spraying (Ecuador v. Colombia)* (Application instituting proceedings) [2008] [2].
[33] Ibid [16].
[34] Ecuador stated in its Memorial that it is among the five Latin American countries with the largest indigenous populations, some of whom have lived for generations along the Ecuador-Colombia border – see Memorial of Ecuador (28 April 2009) 29 [2.18]. See also: *Aerial Herbicide Spraying* (Application instituting proceedings) (n. 32) [26].
[35] *Aerial Herbicide Spraying* (Application instituting proceedings) (n. 32) [4] and [14].
[36] Ibid [4] and [35].
[37] Ibid [29].
[38] Ibid [4].
[39] Ibid.
[40] Ibid [35].

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domestic purposes.[41] Ecuador also reported that people have been forced to relocate as a consequence of the aerial spraying.[42] In Ecuador's Memorial, it included a number of witness statements to substantiate its claims of harm to individuals[43] and included a table listing the Ecuadorian communities, the provinces they come from, and the time period in which they were impacted by the aerial sprays.[44]

This case would have required the Court to examine whether Colombia had breached its obligations to prevent transboundary harm and to comply with international human rights law and the rights of indigenous peoples. Achieving this would have required a thorough evaluation of the presented evidence detailing how these populations were affected. However, the case was eventually discontinued on 13 September 2013, as the parties were able to come to a settlement through negotiation.[45]

In these three discontinued cases, state litigants prioritised their populations in their arguments. In contrast, the Court has issued other significant judgments in environmental law that are not centered on human impacts Rather, the impacts on such cases on state litigants' populations are briefly mentioned, and the legal question does not involve analysis related to local populations.

The first is *Certain Activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua)*, where Costa Rica claimed that Nicaragua had breached its international treaty obligations by committing several incursions on Costa Rican territory, including activities that caused environmental damage to the rainforests, wetlands, and, consequently, the Colorado and San Juan Rivers.[46] The proceedings for this case were joined with *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)* (hereafter, the *Road* case).[47] In the latter case, Nicaragua protested to the Court that Costa Rica had carried out road

[41] Ibid [29].
[42] Ibid [36].
[43] Memorial of Ecuador (28 April 2009) 29, 132, 181, 235, 320–78, 398–400.
[44] *Aerial Herbicide Spraying* (Application instituting proceedings) (n. 32) [17].
[45] *Aerial Herbicide Spraying (Ecuador v. Colombia)* (Order of 13 September 2013) [2013] ICJ Rep 278.
[46] *Certain Activities Carried Out by Nicaragua in the Border Area* (*Costa Rica v. Nicaragua)* (Application instituting proceedings) [2010] [41].
[47] *Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica)* (Joinder of Proceedings) (Order of 17 April 2013) [2013] ICJ Rep 184.

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construction works along the border, causing environmental damage to Nicaragua's territory.

Both state litigants made reference to the impact of the alleged breaches on their populations. In *Certain Activities*, Costa Rica claimed that Nicaragua had breached, *inter alia*, the SI-A-PAZ agreement (15 December 1990). This agreement sought to put into practice projects for national and sustained management of natural resources (with respect for the sovereign rights of each country), in order to improve the quality of life of the local populations and those of both countries in general.[48] It was signed partly because the border region between Costa Rica and Nicaragua is inhabited by marginalised rural groups that have been unable to achieve sustainable development due to a lack of financial resources and technical advice.[49] In the *Road* case, Nicaragua argued in its Memorial and filing for provisional measures that the construction of the road impacted upon the health of the riparian populations of the San Juan River.[50] Costa Rica, on the other hand, justified its decision to construct the road by claiming that it needed Costa Rican police to have direct and expeditious access to the border area in order to provide the local population with essential services.[51]

However, the Court's legal reasoning in resolving the dispute did not necessitate further consideration of local populations. While it was briefly mentioned that Nicaragua had breached Costa Rica's rights of navigation on the San Juan River,[52] the Court focused on interpreting the Treaty of Limits to determine whether Costa Rica had sovereignty over the disputed territory in *Certain Activities*.[53] The interpretation of sources was also the means to assess the breaches of Costa Rica's territorial sovereignty by Nicaragua.[54] In assessing whether the obligation to prevent significant transboundary harm had been breached in both the *Certain Activities* and *Road* cases, the Court focused on the relevant procedural and substantive obligations that related to the environmental damage.[55]

[48] Memorial of Costa Rica (5 December 2011) vol I 126 [5.41] and vol II 253 Annex 22.
[49] Ibid.
[50] Memorial of Nicaragua (19 December 2012) 19 [2.14].
[51] Memorial of Costa Rica (n. 48) 21–22 [2.2], 22–23 [2.4], 31–32 [2.20], 36 [2.25], 42 [2.37].
[52] *Certain Activities/Construction of a Road Case* (n. 3) 716 [136].
[53] See Chapter 6 for a critique of this approach.
[54] This approach to determine sovereignty over a disputed territory is broadly critiqued in Chapter 6.
[55] *Certain Activities/Construction of a Road Case* (n. 3) 705–12 [101]–[120].

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To determine Costa Rica's substantive obligation not to cause transboundary environmental harm, the Court focused on the sediments dredged from the river and deposited on the Costa Rican bank of the San Juan River, as well as the damage caused to the Humedal Caribe Noreste wetland by the dredging programme.[56]

The second environmental case where state litigants' populations were only briefly mentioned is the *Gabčíkovo–Nagymaros (Hungary/Slovakia)* case. Here, the Court sought to resolve a dispute between the Republic of Hungary and the Czech and Slovak Federal Republic regarding the implementation and termination of a bilateral treaty regulating the construction and operation of the Gabčíkovo–Nagymaros Barrage System. This was 'the first case before the ICJ to be concerned with international environmental law in such a comprehensive manner',[57] and the 'heart of the dispute [was] the actual and anticipated environmental impacts of a major power project (. . .) between the capitals of two States'.[58] The two states had agreed, through a treaty, to construct works on their respective riverbanks in order to produce hydroelectricity and improve navigation along the Danube.[59] Hungary, however, suspended its works and then terminated the treaty due to its concern for the project's impact on the environment,[60] justifying its actions by relying on a state of necessity.[61]

In light of the confluence between environmental law and human rights, it may be interpreted that Hungary's motive to litigate was to safeguard its environment to the benefit of its population. Furthermore, the Court's confirmation that safeguarding the environment is an 'essential interest' of the state, pursuant to Article 33 of the Draft Articles on State Responsibility, signalled the importance of protecting the Hungarian citizens' human rights.[62] However, Hungary only briefly mentioned that it sought, *inter alia*, to repair the 'damages suffered by the Hungarian population on account of the

[56] Ibid 712 [119].
[57] Laurence Boisson de Chazournes and Makane Moïse Mbengue, 'Gabčíkovo-Nagymaros Project (Hungary/Slovakia) (1997)' in Eirik Bjørge and Cameron A. Miles (eds), *Landmark Cases in Public International Law* (Hart Publishing 2017) 435.
[58] Verbatim record 1997/2, 47 [3] (Gábor Vida).
[59] *Gabčíkovo-Nagymaros Project* (n. 1) 17–18 [15] and 20 [18].
[60] Ibid 25–27 [23] and 31 [32].
[61] Ibid 35–36 [40].
[62] Ibid 41 [53].

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increase in the uncertainties weighing on its future *(pretium doloris)*'[63] and that its people had the fundamental rights to its natural resources.[64] Neither party's arguments lingered on the impact of the project on their populations nor did Hungary's requests require a people-focused assessment of any sort. The Court therefore did not dwell on this in its judgment, abiding by the principle of *non ultra petita* ('not beyond the request') (Section 7.5).

In sum, the discontinuation of environmental disputes yielding significance to victims of environmental degradation contextualises judicialisation as one of many ways to resolve environmental disputes in the international legal order. It also sheds light on the prevalence of other forms of peaceful settlement to resolve environmental disputes, such as negotiation. While the judicialisation of environmental disputes is increasing – especially in the wake of the climate crisis – the multiple avenues of dispute settlement might limit the potential for the World Court to develop the human rights–environmental law nexus to the benefit of individuals. Therefore, the judicialisation before the ICJ has not yet developed international environmental law in a way favourable to victims of environmental degradation.

8.2 The Limitations of Counterclaims

Even when arguments with both environmental and human impacts have been presented before the Court, and the cases were not discontinued, procedural obstacles have hindered the Court from developing its jurisprudence to the benefit of individuals. In *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)*, for instance, Colombia raised a counterclaim that Nicaragua failed in its due diligence to protect the rights of the inhabitants of the San Andrés Archipelago, particularly the Raizales, to enjoy a healthy, sound, and sustainable environment.[65] The Court, however, decided by fifteen votes to one that this counterclaim was inadmissible.[66]

This dispute was a follow-up to the 2012 *Territorial and Maritime Dispute (Nicaragua v. Colombia)* case, where the Court was requested to

[63] Ibid 74 [127].
[64] Verbatim record 1997/2 (n. 58) 17 [11] (György Szénási).
[65] *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)* (Counter-Claims) (Order) [2017] ICJ Rep 289, 297–98 [26].
[66] Ibid 314 [82].

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assess which of the two states had sovereignty over a number of territorial and maritime features situated in the Caribbean Sea. The Court awarded all disputed territories to Colombia,[67] while its delimitation of the relevant maritime zones largely favoured Nicaragua.[68] After this judgment was rendered, Colombia enacted a 1946 Presidential decree proclaiming certain maritime boundaries in the Western Caribbean.[69] According to Nicaragua, this decree establishes jurisdictional rights over its maritime zones as confirmed by the Court and thus violates Nicaragua's sovereign rights over its maritime areas.[70] Nicaragua therefore seized the Court in November 2013. In Colombia's Counter-Memorial, in addition to defending its position with regard to the claims brought against it by Nicaragua, Colombia submitted counterclaims (which are, by definition, new claims linked to the principal claim). The second counterclaim was that Nicaragua violated its due diligence to protect the rights of the inhabitants of the San Andrés Archipelago, in particular the Raizales, to benefit from a healthy, sound, and sustainable environment.[71]

At this stage of proceedings, the Court was not tasked with deciding whether the Nicaragua had violated its due diligence to protect the rights of the inhabitants, but rather whether there was a direct connection, pursuant to Article 80 of the Rules of the Court, between Colombia's new counterclaim and Nicaragua's principal claims.[72] If it were to decide that the new counterclaim was valid, it would pave the way for determining, at a later stage of the proceedings (the merits), whether Nicaragua had breached its due diligence obligations.

Under Article 80(1) of the Rules of the Court, for a counterclaim to be admissible, it must fall within the Court's jurisdiction and be directly related to the subject matter of the opposing party's claim.[73] If these requirements are met, the Court 'may' entertain a

[67] *Territorial and Maritime Dispute (Nicaragua v. Colombia)* (Judgment) [2012] ICJ Rep 624, 718–20 [251].
[68] Ibid 680 [153], 716 [243], 718–20 [251]. See also Nienke Grossman, 'Territorial and Maritime Dispute (Nicaragua v. Colombia)' (2013) 107(2) *The American Journal of International Law* 396, 402.
[69] *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea (Nicaragua v. Colombia)* (Application instituting proceedings) [2013] [11].
[70] Ibid [12]–[13].
[71] *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea* (n. 65) 297–98 [26].
[72] Ibid 304 [46] and 313 [78].
[73] Statute of the International Court of Justice, Article 80(1).

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counterclaim, the wording suggesting that it enjoys a certain measure of discretion.[74]

In the present case, with regard to this second counterclaim, the Court concluded that such a connection did not exist factually nor legally. It first reasoned that the facts underlying the counterclaims relate to Nicaragua's failure to protect and preserve the marine environment in the south-western Caribbean Sea (thereby affecting the Raizal community), while the principal claims are based on 'Colombia's Navy's alleged interference with and violations of Nicaragua's exclusive sovereign rights and jurisdiction in Nicaragua's EEZ'.[75] Furthermore, no legal connection existed, as Colombia invoked treaty and customary law regarding environmental protection in its counterclaim. Conversely, it referred to rules of treaty and customary law concerning the UNCLOS provisions on sovereign rights, jurisdiction, and duties of a coastal state within its maritime areas. The Court also determined that no legal connection existed, as it viewed the Parties as pursuing different legal objectives through their respective claims: Nicaragua initially sought to demonstrate that Colombia had violated its sovereign rights and jurisdiction within its maritime areas. In contrast, Colombia, through its counterclaim, aimed to establish that Nicaragua failed to fulfill its obligation to protect and preserve the marine environment in the south-western Caribbean Sea.[76]

Colombia's concerns were not inherently problematic. Rather, it was Colombia's decision to present them as counterclaims that explained their rejection. The requirements of Article 80(1) of the Rules of the Court posed a challenge for Colombia in raising a new claim at this stage of proceedings. This suggests that the judicialisation of environmental harm has limitations: certain procedures may prevent the development of peoples' rights in the environmental context if specific conditions are not met. In this sense, environmental judicialisation before the ICJ has further impeded the development of jurisprudence that could benefit victims of environmental degradation.

[74] *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea* (n. 65) 322 [4] (Joint Opinion of Judges Tomka, Gaja, Sebutinde, Gevorgian and Judge *ad hoc* Daudet).

[75] *Alleged Violations of Sovereign Rights and Maritime Spaces in the Caribbean Sea* (n. 65) 301 [37].

[76] Ibid 301 [38].

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8.3 People and Environmental Impact Assessments

It has thus far been observed that the judicialisation of environmental disputes to protect victims of environmental degradation has been challenging due to the discontinuance of promising cases (Section 8.1) and procedural obstacles (Section 8.2). However, even where promising opportunities have arisen, it is observed in this section that the Court has displayed notable judicial caution, often refraining from addressing questions directly relating to the role of local populations in the environmental dispute. This was notable in the *Pulp Mills on the River Uruguay (Argentina v. Uruguay)* case.

The *Pulp Mills* case is another critical dispute in which individuals' health and well-being formed a crucial part of the parties' arguments. Argentina seized the Court against Uruguay, which it accused of authorising and commissioning the construction of two pulp mills on the River Uruguay without notification,[77] thus violating the 1975 Statute of the River Uruguay.[78] Uruguay also allegedly failed to take precautionary measures, including conducting an environmental impact study.[79]

In this case, Argentina particularly advanced arguments on the negative effects of the pulp mills on its population, namely on human health, well-being, and livelihood.[80] Regarding human health, Argentina went to great lengths to demonstrate that the impacts of the pulp mills on the River Uruguay and on the air were hazardous to human health,[81] not to mention that they incurred civil unrest.[82] The rights of the Argentinian population were also emphasised during oral proceedings, where Argentina's counsel claimed that the rights at stake concerned the riverside populations, most directly affected by Uruguay's compliance with its

[77] *Pulp Mills* (n. 3) 53–54 [90].

[78] The 1975 Statute of the River Uruguay is a treaty between Argentina and Uruguay to "establish the joint machinery necessary for the optimum and rational utilization of the River Uruguay, in strict observance of the rights and obligations arising from treaties and other international agreements in force for each of the parties". *Pulp Mills* (n. 3) 32 [27].

[79] *Pulp Mills* (n. 3) 28 [22], 51–52 [82].

[80] *Pulp Mills on the River Uruguay (Argentina v. Uruguay)* (Application instituting proceedings) [2006] [15].

[81] Memorial of Argentina (15 January 2007) 6–7 [0.18], 74 [3.151], 81 [3.183], 82 [3.191], 85 [3.205], 134 [5.70], 134 [5.72], 146–47 [6.44]–[6.54], 150 [7.3]–[7.4], 156 [7.20], 160 [7.43], 162–63 [7.58], 165 [7.66], 170 [7.94], 185 [7.162], 191 [7.190], 192 [7.196]–[7.197]; *Pulp Mills* (Application instituting proceedings) (n. 80) [15]. For a critical perspective, see *Pulp Mills* (n. 3) 193 [155] (Separate opinion of Judge Cançado Trindade).

[82] *Pulp Mills* (Application instituting proceedings) (n. 80) [15].

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international legal obligations.[83] The general well-being of the local population was also advanced by Argentina on a number of occasions.[84]

Furthermore, Argentina argued that the regions near the River Uruguay had been developed for tourism, a source of revenue for a large number of inhabitants; the pollution of the river was thus damaging to their livelihood.[85] Uruguay, on the other hand, responded that the pulp mills were not a menace to human health[86] – even going as far as advocating in its Rejoinder that social impact monitoring had indicated an improvement in the 'quality of life' in Fray Bentos and 'surrounding communities'.[87] The Court finally ruled that Uruguay had not breached any substantive obligations under Article 41 of the 1975 Statute of the River Uruguay.[88]

But unlike contentious cases seen earlier such as *Gabčíkovo-Nagymaros* or *Certain Activities/Road*, this case raised specific questions regarding aspects of environmental principles and their connection to people. As mentioned earlier, the Court has taken opportunities to consolidate certain environmental law principles as rules of customary international law. One of these principles is the duty to perform an environmental impact assessment (EIAs). Principle 17 of the Rio Declaration on Environment and Development (1992) states that '[e]-nvironmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority'.[89] This established practice in environmental law has the rationale of preventing environmental degradation, by enabling the state to evaluate the environmental consequences of a project and thus decide if the potentially negative impact outweighs the benefits.[90] The Court established in *Pulp Mills* and reaffirmed in *Certain*

[83] Verbatim record 2006/46, 44 [19] and 45 [23] (Marcelo Kohen); 55 [21] (Laurence Boisson de Chazournes); 60 [11] (Alain Pellet).
[84] Memorial of Argentina (n. 81) 77 [3.165] and 81 [3.186].
[85] Ibid 4 [0.14], 147–49 [6.54]–[6.65], 162 [7.58].
[86] It claimed that the project would have "no impacts on the health of the people in the area". See Counter-Memorial of Uruguay (20 July 2007) 30–31 [1.48] and 349 [5.33]–[5.34]. See also *Pulp Mills* (n. 3) 192–93 [154] (Separate opinion of Judge Cançado Trindade).
[87] Rejoinder of Uruguay (29 July 2008) 220 [4.40].
[88] *Pulp Mills* (n. 3) 101 [265].
[89] A/CONF.151/26, Principle 17.
[90] Sumudu Atapattu, *Emerging Principles of International Environmental Law* (Brill 2007) 289–90.

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Activities/Road that the obligation to carry out an EIA is part of customary international law.[91]

While this was a welcome finding, ambiguity persists regarding the finer details of EIAs.[92] As Judge Bhandari opined in *Certain Activities/Road*, international environmental law is 'lamentably silent' on its exact contents.[93] More specifically, the Court was given an opportunity to clarify the role of local populations in the EIA process in *Pulp Mills*. Both Argentina and Uruguay claimed in their Memorials that conducting an EIA includes consulting the affected populations.[94] However, they disagreed on two key points. First, they disagreed on whether consulting affected populations as part of an EIA is an obligation under international law. The second point was the extent to which the affected populations must be consulted. I argue in this section that the Court's approach to such questions is marked by judicial caution.

Judicial caution is an approach or an attitude of 'prudence' when applying the law in force,[95] out of concern that judges may overstep their authority or render decisions with far-reaching implications. Sir Gerald Fitzmaurice observed that this may involve deciding the case at hand 'with the minimum of verbiage necessary for this purpose'.[96] While judges may still develop international law, Hersch Lauterpacht described that they may do so 'without admitting it; (. . .) while guided at the same time by existing law; (. . .) while remembering that stability and uncertainty are no less of the essence of the law than justice'.[97] In *Pulp Mills*, judicial caution was evident in the Court's handling of clarifying the role of local populations in EIAs.

Firstly, the Court demonstrated judicial caution in this case when asked to determine whether conducting an EIA entails an international

[91] *Pulp Mills* (n. 3) 82–83 [204]; *Certain Activities/Construction of a Road Case* (n. 3) 707–8 [106].

[92] Owen McIntyre, 'The Proceduralisation and Growing Maturity of International Water Law: *Case Concerning Pulp Mills on the River Uruguay (Argentina v Uruguay)*' (2010) 22 (3) *Journal of Environmental Law* 475, 486.

[93] *Certain Activities/Construction of a Road Case* (n. 3) 806 [47] (Separate opinion of Judge Bhandari).

[94] *Pulp Mills* (n. 3) 86–87 [215]; Counter-Memorial of Uruguay (n. 86) 306–7 [4.113].

[95] Hersch Lauterpacht, *The Development of International Law by the International Court* (CUP 1982) 75.

[96] Gerald Fitzmaurice, 'Hersch Lauterpacht – The Scholar as Judge' (1961) 37 *British Yearbook of International Law* 1.

[97] Lauterpacht (n. 95).

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obligation to consult local populations. Argentina and Uruguay disagreed on this point. Argentina contended that the provision of the appropriate information and consultation with states concerned and the affected local population are integral parts of the principle.[98] According to Argentina, this obligation requires the state conducting the EIA to fulfill it before obtaining consent from the potentially affected state.[99] Thus, having failed to adequately consult the affected Argentinian populations, Uruguay violated its duty to perform an EIA.[100]

To support that the consultation of affected populations is an international legal obligation under the duty to carry out an EIA, Argentina cited a number of international legal sources:[101] the Convention on Environmental Impact Assessment in a Transboundary Context (Espoo Convention),[102] the African Commission on Human and Peoples' Rights,[103] the Inter-American Commission on Human Rights,[104] and Operational Policy 4.01 on Environmental Assessment of the International Finance Corporation (IFC).[105] These sources indicate that populations must participate in the process of assessing the impact on the environment and that their views must be taken into account. Argentina also referred to the World Bank Inspection Panel, which has underlined the importance of conducting timely and meaningful consultations with the concerned populations.[106] It also mentioned an example of the case taken up by the Aarhus Convention Compliance Committee (an innovation explained later in this chapter) concerning the construction of the Bystroe deep water navigation

[98] Memorial of Argentina (n. 81) 85–86 [3.206]–[3.208]; Reply of Argentina (29 January 2008) 415 [4.101].
[99] Reply of Argentina (n. 98) 415 [4.101].
[100] Ibid 418 [4.105].
[101] Memorial of Argentina (n. 81) 85–86 [3.206]–[3.208]; Convention on Environmental Impact Assessment in a Transboundary Context, 30 ILM 802, Arts 2(2), 2(6), 3(8), 4(2) [hereafter, Espoo Convention]; International Finance Corporation, 'Operational Policy 4.01 on Environmental Assessment' (1998) 4 [12] and 5 [14]; African Commission on Human and Peoples' Rights, 'The Social and Economic Rights Action Center and the Center for Economic and Social Rights v. Nigeria' COMM/A044/1 (27 May 2022) [53]; Inter-American Commission on Human Rights, 'Second Report on the Situation of Human Rights in Peru', OEA/SER.L/V/II 106 (2 June 2000) [26] and [39]; Inter-American Commission on Human Rights, 'Report on the Situation of Human Rights in Ecuador' OEA/Ser.L/V/II.96 (24 April 1997).
[102] Espoo Convention, Articles 2(2), 2(6), 3(8), 4(2).
[103] Memorial of Argentina (n. 81) 86 [3.207].
[104] Ibid 86 [3.208].
[105] Ibid 85 [3.206].
[106] Reply of Argentina (n. 98) 415–17 [4.102].

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canal. The Committee ruled that Ukraine had violated the Aarhus Convention, as it was fully aware of the concerns of the Romanian citizens and could have initiated the participation process through the Romanian authorities.[107] Argentina also made reference to Article 13 of the 2001 International Law Commission (ILC) Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, and Principles 7 and 8 of the United Nations Environment Programme (UNEP) Goals and Principles.[108] Essentially, Argentina insisted that the public must have the possibility to examine all the pertinent details in order to guarantee its transparent participation.[109]

Uruguay, on the other hand, argued more generally that the EIA is a national – and not an international – procedure. It is not a joint procedure to be carried out in cooperation with other states.[110] It cited Principle 17 of the 1992 Rio Declaration on Environment and Development as well as the ILC's commentary on its draft Articles on Prevention of Transboundary Harm from Hazardous Activities, both of which describe the EIA as a national instrument or procedure in and by the state of origin.[111] Uruguay agreed that it must *notify* potentially affected states, pursuant to Principle 12 of the 1987 UNEP Goals and Principles of Environmental Impact Assessment (UNEP EIA Principles), but asserted that such states are not expected to *participate* in a national EIA because it is not an international process.[112] Uruguay also added that even if there were a right to participate, it would only be to the extent of providing information and making representations – but not providing prior approval.[113] Therefore, Uruguay denied that such an international obligation exists altogether – let alone an international obligation towards concerned populations.

The Court, after summarising the positions of the two parties in its judgment, curtly decided that 'no legal obligation to consult the affected populations arises for the Parties from the instruments invoked by Argentina'.[114] This was a manifestation of judicial caution, where the Court avoided the crux of the question. Argentina did not mean to argue

[107] Ibid 417–18 [4.104].
[108] *Pulp Mills* (n. 3) 87 [216].
[109] Reply of Argentina (n. 98) 415–17 [4.102].
[110] Counter-Memorial of Uruguay (n. 86) 293–94 [4.90].
[111] Ibid.
[112] Ibid.
[113] Ibid 294 [4.91].
[114] *Pulp Mills* (n. 3) 87 [216].

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that Uruguay is bound by the specific instruments that Argentina mentioned. Of course, Uruguay could not be legally bound to consult affected populations on the basis of the Espoo Convention, as this is a United Nations Economic Commission for Europe (UNECE) convention that neither Argentina nor Uruguay has signed or ratified. Nor would Argentina argue that Uruguay is bound by anything established by the African Commission on Human and Peoples' Rights, or by non-legal sources such as the Operational Policy 4.01 on Environmental Assessment of the IFC or by the UNEP EIA Principles. Argentina could not have been saying that a legal obligation to consult affected populations arises for Uruguay from these sources.

Rather, Argentina meant to say that the consultation of affected populations has generally become an international legal obligation, most likely in the form of customary international law. This would justify the mentioning of these instruments by way of example to demonstrate the development of this practice by states, and/or their belief that this is a legal obligation (*opinio juris*). Thus, the Court was stating the obvious that no legal obligation arose from the instruments invoked. It chose a very narrow reading of the question in order to avoid responding to the real question, which was whether an international legal obligation to consult the affected populations *generally* existed. This more challenging question would have required the Court to identify the existence of a customary norm.

Apart from customary law, the Court could have also affirmed that consulting affected populations as part of an EIA constitutes an international obligation, based on Uruguay's unilateral statement. Judge *ad hoc* Raúl Emilio Viñuesa mentioned in his dissenting opinion that the Court did not address Uruguay's unilateral obligation to comply with established European standards. These standards mandate public consultation with local populations potentially affected by transboundary projects, ensuring their effective participation at an early stage.[115] Perhaps Uruguay had indeed made a unilateral declaration under international law that could have been examined by the Court, as such declarations are considered to be binding on the state that made it.[116] Thus, both types of international legal obligation – customary law and

[115] Ibid 282 [60] (Dissenting opinion of Judge *ad hoc* Vinuesa).

[116] *Nuclear Tests (Australia v. France)* (n. 22) [46]; Guiding Principles applicable to Unilateral Declarations of States Capable of Creating Legal Obligations with Commentaries [2006] *Yearbook of the ILC*, 2006, vol II, Part Two.

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unilateral declarations – could have established that consulting the local populations is, indeed, an international legal obligation that Uruguay must respect. However, the Court, in its exercise of judicial caution, refrained from addressing this matter altogether.

The Court's second display of judicial caution emerged in addressing a point of contention between Uruguay and Argentina regarding the extent to which the affected populations must be consulted. Uruguay claimed in its Counter-Memorial that its EIA summary was made available for public comment from 7 December 2004 to 3 January, and a Public Meeting was held on 21 December 2004 to that end.[117] It also argued that it gave Argentina sufficient information about the second pulp mill (referred to as Botnia). For instance, on 9 December 2005, it gave an outline presentation on the evaluation of the medium prepared by MVOTMA (*Ministerio de Vivienda Ordenamiento Territorial y Medio Ambiente*), examining the impact of pulp mills on human communities, specifically examining populations. The presentation stated that Uruguay's implementation plan 'shall define concrete measures for the impacts on the environment from noise, disturbing odour, and effects on tourism, fishing and leisure activities in the area surrounding Fray Bentos'.[118]

Argentina retorted that Uruguay's decisions were based on unsatisfactory environmental assessments.[119] It argued that the Compliance Advisor/Ombudsman[120] of the World Bank's IFC reported that Uruguay's EIA did not adequately address the concerns of potentially affected local people.[121] Indeed, its method reflected a lack of consultation with the public.[122] The November 2005 report stated that Uruguay's consultation process seemed 'rushed', 'presented as a *fait accompli* to those being consulted', without 'sufficient acknowledgment of the legitimacy of concerns and fears of communities that are local to the project'.[123] It encouraged Uruguay to implement specific efforts to 'ensure that people who believe that they will be impacted are able to have trust in the process'.[124]

[117] Counter-Memorial of Uruguay (n. 86) 316–17 [4.128].
[118] Ibid 211–22 [3.100].
[119] Memorial of Argentina (n. 81) 131 [5.62].
[120] Compliance Advisor Ombudsman, 'About Us' www.cao-ombudsman.org/about-us.
[121] Memorial of Argentina (n. 81) 131 [5. 62]; Reply of Argentina (n. 98) 417 [4.103].
[122] Reply of Argentina (n. 98) 415–17 [4.102].
[123] Ibid.
[124] Ibid.

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The Court, in addressing this question, noted all the instances in which Uruguay consulted the affected populations on both the Argentine and Uruguayan sides of the river: meetings with the participation of Argentine NGOs on 2 December 2003 in Rio Negro and on 26 May 2004 in Fray Bentos; a public hearing with inhabitants of Fray Bentos and nearby regions on 21 December 2004; and interviews conducted in Fray Bentos, Gualeguaychú, Montevideo, and Buenos Aires between June and November 2005 with civil society groups.[125] Upon the basis of these events, the Court concluded that consultation of the affected populations 'did indeed take place'.[126]

However, this bypassed the initial question. The parties were not in dispute that Uruguay had taken measures to consult affected populations, but rather whether Uruguay's actions were sufficient. For this, the objective was to know to what degree local populations are to be consulted for an EIA under international law and whether Uruguay had met this standard in the present case. Judge *ad hoc* Viñuesa described in his dissent that '[t]he Parties' disagreement concern[ed] the results of the consultation of the affected populations, the extent to which concerns raised were taken into consideration and whether the consultation was meaningful'.[127]

It is undisputed that public participation and consultation is a critical component of EIAs – even described by one author as 'its soul'.[128] Professor Alan Boyle commented that '[t]here should have been no difficulty persuading the Court (. . .) that public consultation is a necessary element of the EIA process (. . .)'.[129] The right of public participation in EIAs is well-recognised in international environmental law and considered a symbol of its 'democratisation'.[130] However, the extent to which local populations should be consulted is unclear in international environmental law. This raises further questions regarding the timing, manner, and duration of the consultation process.

[125] *Pulp Mills* (n. 3) 87 [217]–[218].
[126] Ibid 87–88 [219].
[127] Ibid 282 [59] (Dissenting opinion of Judge *ad hoc* Vinuesa).
[128] Neil Craik, *The International Law of Environmental Impact Assessment: Process, Substance and Integration* (CUP 2008) 31. See, more generally, on public participation and EIAs: 58, 80, 146–50, 198.
[129] Alan Boyle, 'Developments in the International Law of Environmental Impact Assessments and Their Relation to the Espoo Convention: Developments in International Law of EIA' (2011) 20(3) *Review of European Community & International Environmental Law* 227, 231.
[130] Atapattu (n. 90) 294, 353.

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The question of when local populations should be consulted is particularly challenging. This is not helped by the fact that it is unclear at what stage an EIA should be carried out in international law. One issue to be clarified is whether an EIA should be carried out before any authorisations to commence the project are granted.

Argentina argued in its Memorial in *Pulp Mills* that 'without *prior* assessment there can be no meaningful notification and consultation in most cases of environmental risk'[131] and that 'the project sponsor supplies relevant material in a timely manner prior to consultation'[132] for such consultations to be meaningful. The Court ruled that Uruguay failed to give *prior* notification to CARU (*Comisión Administradora del Río Uruguay*), the binational commission tasked with monitoring the river pollution – and to Argentina, as required by Article 7 of the 1975 Statute.[133] The Court made it clear that with regard to CARU, the notification must be carried out in order for CARU to determine 'on a preliminary basis',[134] with the aim of obtaining 'initial environmental authorization and before the granting of that authorization'.[135] With regard to the state, the Court also clarified that 'the notification must take place before the State concerned decides on the environmental viability of the plan, taking due account of the environmental impact assessment submitted to it'.[136]

However, these conditions are strictly applicable to the 1975 Treaty in question. What does general international law say about when to carry out an EIA? Doctrine is not clear on this, but some lean towards the view that EIAs should be carried out before any authorisations to commence the project are granted.[137] This would mean that affected populations would be consulted as part of the EIA process, before the granting of an authorisation. Boyle explains that while it may normally take place before authorisation is granted, it may actually occur in several stages or

[131] Memorial of Argentina (n. 81) 83 [3.198], referring to: Patricia W. Birnie and Alan E. Boyle, *International Law and the Environment* (2nd edn, OUP 2002) 133.
[132] Memorial of Argentina (n. 81) 85–86 [3.206].
[133] *Pulp Mills* (n. 3) 28 [22].
[134] Ibid 56 [104].
[135] Ibid 56–57 [105].
[136] Ibid 59–60 [119].
[137] Department of the Environment, Transport and the Regions, *Public Participation in Making Local Environmental Decisions: The Aarhus Convention Newcastle Workshop. Good Practice Handbook* (2000); Craik (n. 128) 31–32.

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schemes – for instance, an initial assessment followed by a full one if the likelihood of harm is identified.[138]

In *Pulp Mills*, the Court acknowledged that Uruguay had indeed consulted the affected populations between June and November 2005.[139] However, Uruguay issued the initial environmental authorisations to construct the first pulp mill (referred to as CMB) on 9 October 2003 and to construct the second pulp mill (Botnia) on 14 February 2005.[140] It granted an authorisation for the first phase of construction of the Orion (Botnia) mill on 12 April 2005. Thus, authorisation to commence the project had already been granted before populations were consulted. Only one authorisation was granted after consultations had begun: on 5 July 2005: an authorisation to construct a port terminal for its exclusive use and to utilise the river bed for industrial purposes.[141] Therefore, populations should have been consulted prior to any action for it to be considered meaningful.[142] It was not, despite the Court's assertion to the contrary.[143] However, the Court's cautious approach, reflected in its use of the 'minimum of verbiage necessary',[144] left its reasoning leading to this conclusion unclear. Further elaboration on this point would have been helpful to clarify the ambiguous yet critical practice of conducting EIAs.

Timing is only one element in an assessment of the extent to which local populations should be consulted for an EIA. Other questions may also be raised, such as the extent of consultation, the method of consultation, and its duration. Regardless, the Court refrained from addressing these questions in its judgment due to its judicial caution. They are essential, given the importance of human rights in the international environmental regime.

8.4 People and Environmental Principles

Judicial caution has not been to EIAs alone. Opportunities have been lost to draw connections between people and two environmental principles

[138] Boyle (n. 129) 228.
[139] *Pulp Mills* (n. 3) 87 [218].
[140] *Certain Activities/Construction of a Road Case* (n. 3) 707–8 [106].
[141] Ibid 708 [107].
[142] *Pulp Mills* (n. 3) 282 [59], 283 [63], 283 [66] (Dissenting opinion of Judge *ad hoc* Vinuesa).
[143] Ibid 87–88 [219].
[144] Fitzmaurice (n. 96) 1.

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that have been raised in disputes: the precautionary principle and the principle of intergenerational equity.

8.4.1 *The Precautionary Principle*

The precautionary principle holds that even when there is scientific uncertainty, states must adopt measures to prevent environmental damage.[145] It was notably formulated in Principle 15 of the 1992 Rio Declaration on Environment and Development: 'In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.'[146] Almost all environmental law instruments adopted since the Rio Declaration refer to the precautionary principle,[147] which is widely accepted in the international legal system.[148]

The precautionary principle must be distinguished from the preventive principle, which requires states to prevent *foreseeable* environmental harm[149] and therefore assumes that risks can be objectively assessed to avoid damage.[150] The precautionary principle, by contrast, assesses risks at an even earlier stage,[151] where there is scientific uncertainty,[152] and mandates environmental action in face of such uncertainty.[153]

The precautionary principle is a customary international norm. In the ITLOS Seabed Disputes Chamber's 2011 *Responsibilities and Obligations of States sponsoring persons and entities with respect to activities in the area* advisory opinion, the Chamber notes that the incorporation of this principle 'into a growing number of international treaties and other instruments (. . .) has initiated a trend towards making this approach part of customary international law'.[154] While the Chamber employs the

[145] Atapattu (n. 90) 204.
[146] A/CONF.151/26 (n. 89) Principle 15.
[147] Atapattu (n. 90) 234–41.
[148] Philippe Sands et al, *Principles of International Environmental Law* (4th edn, CUP 2018) 234.
[149] Atapattu (n. 90) 206.
[150] *Pulp Mills* (n. 3) 157–58 [55] (Separate opinion of Judge Cançado Trindade).
[151] Atapattu (n. 90) 206.
[152] Ibid 207.
[153] *Pulp Mills* (n. 3) 157–58 [55] (Separate opinion of Judge Cançado Trindade).
[154] *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area* (Advisory Opinion) [2011] 47 [135].

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term 'approach' instead of 'principle', it recognises that the precautionary principle is in the process of customary crystallisation.

The precautionary principle must be distinguished from the EIA, examined earlier. The concepts are complementary, as they are both predicated on addressing uncertainty about environmental impact through influencing decision-making in environmental matters. However, they differ in their nature: the EIA is the concrete procedure by which states may respect the overarching precautionary principle. Thus, the EIA is a means by which the precautionary principle may be exercised. This is why, in *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v. France) Case*, New Zealand aptly contended that the precautionary principle required an EIA 'as a precondition for undertaking the activities, and to demonstrate that there was no risk associated with them'.[155]

As EIAs are a means by which the precautionary principle is carried out, and EIAs require public participation, it can be understood that public participation is a component of the precautionary principle at large. In fact, no matter how states decide to implement the precautionary principle (through an EIA or through other means), public participation remains a critical component. This is because even in the wake of scientific uncertainty, local populations are key stakeholders who will bear the costs of any potential environmental threat. They are therefore expected to represent themselves and their interests.[156] This idea is expressed in Principle 10 of the Rio Declaration on Environment and Development:

> Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available.

[155] *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in the Nuclear Tests (New Zealand v. France)* [1995] ICJ Rep 288, 298–99 [35].

[156] Laurence Boisson de Chazournes, 'New Technologies, the Precautionary Principle and Public Participation' in Thérèse Murphy (ed), *New Technologies and Human Rights* (OUP 2009) 161, 179.

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> Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.[157]

The EIA is a concrete procedure by which states may respect the overarching precautionary principle. Therefore, public participation and consultation – a core component of the EIA – is a feature in the implementation of the precautionary principle. While observed by Judge Cançado Trindade, however, this was not stated by the full bench in *Pulp Mills*.[158] Despite both parties invoking it,[159] it only noted that 'while a precautionary approach may be relevant in the interpretation and application of the provisions of the Statute, it does not follow that it operates as a reversal of the burden of proof'.[160]

The Court has generally been very reluctant to mention or develop the precautionary principle in its jurisprudence. While New Zealand explicitly brought this up in *New Zealand v. France*,[161] the Court did not address this matter in its Order.[162] In *Gabčíkovo–Nagymaros,* Hungary argued that the precautionary principle was applicable to Slovakia.[163] While the Court acknowledged that 'both Parties agree on the need to take environmental concerns seriously and to take the required precautionary measures, but they fundamentally disagree on the consequences this has for the joint Project',[164] it neither explicitly acknowledged nor developed this principle.[165] Nor did the Court take this opportunity in *Pulp Mills*. While New Zealand referred to the principle in *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)*, claiming that it entails reversing the burden of proof, the Court did not comment on

[157] A/CONF.151/26 (n. 89) Principle 10.
[158] *Pulp Mills* (n. 3) 193 [156] (Separate opinion of Judge Cançado Trindade). See also *Certain Activities/Construction of a Road Case* (n. 3) 776 [55] (Separate opinion of Judge Cançado Trindade).
[159] Memorial of Argentina (n. 81) 82–83 [3.194]–[3.197], 113–14 [5.4], 117–20 [5.13]–[5.19], 178 [7.128], 179 [7.132]; Counter-Memorial of Uruguay (n. 86) 28–29 [1.45], 247–48 [4.7], 288–92 [4.79]–[4.87], 303–4 [4.106].
[160] *Pulp Mills* (n. 3) 71 [164].
[161] *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment* (n. 155) 290 [5] and 298 [34].
[162] Ibid 342–44 (Dissenting opinion of Judge Christopher Weeramantry); 412 (Dissenting opinion of Judge *ad hoc* Sir Geoffrey Palmer).
[163] *Gabčíkovo-Nagymaros Project* (n. 1) 62 [97].
[164] Ibid 68 [113].
[165] *Pulp Mills* (n. 3) 161 [66] (Separate opinion of Judge Cançado Trindade). See also Sands et al (n. 148) 235–36.

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this.[166] The opportunity was also not seized in the *Road* case, despite Nicaragua's claim that Costa Rica breached Article 3 of the Regional Agreement on the Transboundary Movement of Hazardous Wastes by failing to adopt and implement the precautionary approach to pollution outlined in that instrument.[167] The Court dismissed this claim on the ground that Nicaragua failed to prove how this instrument had been breached.[168]

Judge Cançado Trindade has commented that '[i]t escapes my comprehension why the ICJ has so far had so much precaution with the precautionary principle'.[169] In my view, the Court's general caution towards individual inclusion, combined with its reluctance to fully develop the precautionary principle, helps explain why it refrained from clarifying the principle's relationship with people. Doing so, however, would offer greater guidance to states on how to consult affected populations in their measures taken to prevent, mitigate, or avoid environmental degradation. This would be appropriate considering the strong implications that such measures may have for local populations. Given the widespread acceptance of the precautionary principle, recognising the human dimension and the participation of individuals in respect of this principle would carry more weight in international environmental law and complement such recognition with regard to EIAs.

8.4.2 *The Principle of Intergenerational Equity*

A second promising environmental principle for the protection of people, which the Court has yet to elaborate on, is the principle of intergenerational equity. This principle holds that people are not only beneficiaries of the environment but trustees or custodians with an obligation to preserve it for future generations.[170] The principle finds

[166] *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)* (Judgment) [2014] ICJ Rep 226, 240–41 [27].
[167] *Certain Activities/Construction of a Road Case* (n. 3) 737 [218].
[168] Ibid 737–38 [220].
[169] *Pulp Mills* (n. 3) 161 [66] (Separate opinion of Judge Cançado Trindade). See also Yann Kerbrat and Sandrine Maljean-Dubois, 'Les juridictions internationales et le principe de précaution, entre grande prudence et petites audaces' in Denis Alland et al (eds), *Unité et diversité du droit international: Écrits en l'honneur du Professeur Pierre-Marie Dupuy* (Martinus Brill/Nijhoff 2014) 929.
[170] Edith Brown Weiss, 'Intergenerational Equity', *Max Planck Encyclopaedia of Public International Law* (2021).

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its origins in the 1972 Stockholm Declaration[171] and features sources such as the United Nations Framework Convention on Climate Change (UNFCCC)[172] and the Paris Agreement.[173] It refers to both relations between different living generational cohorts and presently living versus future unborn ones.[174] It therefore intimately and directly relates to people as victims of environmental degradation. While the importance of the principle has been emphasised in separate opinions of judges, the full bench has not incorporated it into its legal reasoning to reach its conclusions.

The principle of intergenerational equity has mainly been discussed in separate opinions of judges before the World Court. It was raised in the dissenting opinions of two minority judges in *New Zealand v. France*. This case followed the aforementioned *Nuclear Tests* judgment, wherein the Court stated 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'.[175] New Zealand considered that the basis of the judgment was affected as France had, since this judgment, recommenced nuclear testing in the South Pacific – this time, conducting underground nuclear tests. The Court concluded that the basis of the *Nuclear Tests* judgment was atmospheric nuclear testing, and it was therefore not possible to reexamine the situation.[176]

The Court stated that it was unable to consider developments in international law in its legal reasoning – for instance, the conclusion of the Convention for the Protection of Natural Resources and Environment of the South Pacific Region.[177] However, two judges, in their dissenting minority opinions, argued that the basis of the *Nuclear Tests* judgment had been affected by developments in international environmental law, such as the growing recognition of the principle of intergenerational equity. Indeed, according to Judge Weermantry, New Zealand's affected rights '[did] not relate only to the rights of people

[171] A/CONF.48/14, preamble cl 6; Articles 1 and 2.
[172] United Nations Framework Convention on Climate Change, 1771 UNTS 107, Article 3.
[173] Paris Agreement to the United Nations Framework Convention on Climate Change, 3156 UNTS 79, preamble cl 11.
[174] Stephen Humphreys, 'Against Future Generations' (2022) 33(4) *European Journal of International Law* 1061, 1066.
[175] *Nuclear Tests (Australia v. France)* (n. 22) 272 [60].
[176] *Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment* (n. 155) 306 [63].
[177] Ibid 306 [63].

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presently in existence. The rights of the people of New Zealand include the rights of unborn posterity'.[178] Sir Geoffrey Palmer, in his dissent in the same case, stated that nuclear testing and accidents indicate that states are unwilling to act as 'good stewards for the environment' for future generations.[179] Had the Court considered such developments in international environmental law, its understanding of the basis of the *Nuclear Tests* judgments may have been different. Weermantry has referred to the principle of intergenerational equity in disputes beyond the environment: in *Jan Mayen*, where the Court adjusted its delimited line for equitable considerations (Section 6.3.2), he reflected that equity should develop a broader meaning, allowing for planetary resources to be shared by present and future generations.[180]

Judge Cançado Trindade is also known to have referred to the principle of intergenerational equity in his separate or dissenting opinions. In the *Whaling* case, Australia argued that Japan's whaling programme breached the International Convention for the Regulation of Whaling (ICRW), while Japan considered that its programme fell under an exception in Article VIII of the Convention, authorising states parties to issue permits to its nationals to kill whales for scientific research. Judge Cançado Trindade considered that the principle of intergenerational equity formed part of the foundations of his position,[181] as the ICRW's preamble acknowledged 'the interest of the nations of the world in safeguarding for future generations the great natural resources represented by the whale stocks'.[182] He argued that this principle had a long-term temporal dimension[183] and that it 'marks presence nowadays in a wide range of instruments of international environmental law, and indeed of contemporary public international law'.[184] It is, however, unclear in his dissenting opinion how the ICRW's preamble may have been factored into the Court's task to define 'scientific research' under

[178] Ibid 341 (Dissenting opinion of Judge Weeramantry).
[179] Ibid 420 [115] (Dissenting opinion of Judge Sir Geoffrey Palmer).
[180] *Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v. Norway)* (Judgment) [1993] ICJ Rep 38, 277 [242] (Separate opinion of Judge Weeramantry).
[181] *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)* (n. 166) 349 [1] (Separate opinion of Judge Cançado Trindade).
[182] International Convention for the Regulation of Whaling, 161 UNTS 72, preamble cl 1.
[183] *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)* (n. 166) 362–63 [41]–[42] (Separate opinion of Judge Cançado Trindade).
[184] Ibid 366–67 [47] (Separate opinion of Judge Cançado Trindade).

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Article VIII and to assess whether lethal methods in Japan's whaling programme were necessary or reasonable.[185] Nonetheless, the dissent shed light on the development of the principle and its potential to factor into the Court's legal reasoning in environmental disputes.

While individual judges have commented on the importance of the principle of intergenerational equity for people, the Court has done so less frequently and more implicitly. When it has, the principle has not influenced the conclusions it has reached. For instance, the principle was merely alluded to in the *Legality of the Threat or Use of Nuclear Weapons* advisory opinion, which held relevance for victims of environmental degradation as a result of nuclear weapons. The original requested advisory opinion – *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* – was more explicit and direct in its concern for peoples' health and well-being. The World Health Organization (WHO) asked the Court: 'In view of the health and environmental effects, would the use of nuclear weapons by a state in war or other armed conflict be a breach of its obligations under international law including the WHO Constitution?' The Court, however, rejected the request to provide an advisory opinion as it considered that the question was outside of the scope of WHO's activities: it was asking about the *legality* of the use of such weapons in view of their health and environmental effects, as opposed to the effects of the use of nuclear weapons on health.[186] Therefore, WHO request was impeded from going forward.

Nonetheless, the UN General Assembly took up the matter and requested an advisory opinion from the Court soon thereafter on the question: 'Is the threat or use of nuclear weapons in any circumstance permitted under international law?' Unlike WHO's question, this one made no reference to human health. However, the Court did note that in order to respond to the legal question, it must take account of the 'unique characteristics of nuclear weapons',[187] including, *inter alia*, that the radiation released would affect health over a very wide area, damage the environment, and cause genetic defects and illness in future generations.[188] It also stated that '[t]he environment is not an abstraction but represents

[185] Makane Moïse Mbengue, 'Between Law and Science: A Commentary on the Whaling in the Antarctic case' (2015) 2 *QIL* 178, 179.

[186] *Legality of the Use by a State of Nuclear Weapons in Armed Conflict* (Advisory Opinion) [1996] ICJ Rep 66, 76 [22].

[187] *Nuclear Weapons* (Advisory Opinion) (n. 1) 226 and 244 [36].

[188] Ibid 243 [35].

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the living space, the quality of life and the very health of human beings, including generations unborn'.[189] These are clear acknowledgements for the principle of intergenerational equality and the ways in which environmental degradation can unjustly harm unborn populations. However, it was concluded that based on existing international law, the use of nuclear weapons could not be considered unlawful in all circumstances.[190]

In *Gabčíkovo–Nagymaros*, discussed earlier, the Court acknowledged the Project's impact upon and its implications for the environment.[191] It also acknowledged that the risks that mankind's interference with nature has led to risks for present and future generations, which have grown in awareness.[192] This can be interpreted as an application of the principle of intergenerational equity. However, the Court ultimately concluded that while Hungary's concerns for the environment related to its 'essential interest',[193] its suspension of their shared treaty could not be justified by necessity pursuant to Article 25 of the Draft Articles on State Responsibility.[194] Therefore, despite minor acknowledgement of the principle of intergenerational equity, this principle did not lead the Court to conclude that there was indeed an ecological necessity.

The principle of intergenerational equity was explicit in the request for an advisory opinion in *Obligations on Climate Change*. The Court was asked, 'What are the obligations of States under international law to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases for States and for present and future generations?'. It was also asked what the legal consequences are for states that have caused significant harm not only to states but to 'peoples and individuals of the present and future generations affected by the adverse effects of climate change?'. This clearly invites more careful consideration for the principle of intergenerational equity. It also demonstrates the importance of framing legal questions in the advisory context in a way that refers to the human impacts of environmental degradation, thereby giving the Court permission to address such concerns.

[189] Ibid 241–42 [29]. See also *Gabčíkovo-Nagymaros Project* (n. 1) 77–78 [140] and *Pulp Mills* (n. 1) 132 [72].
[190] *Nuclear Weapons* (Advisory Opinion) (n. 1) 263 [97].
[191] *Gabčíkovo-Nagymaros Project* (n. 1) 77–78 [140].
[192] Ibid 77–78 [140].
[193] Ibid [53].
[194] Ibid [57].

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8.5 Conclusion

There have not been many environmental disputes to appear before the Court and some key human-focused ones have been discontinued (Section 8.1). While opportunities have been impeded by counterclaim requirements (Section 8.2), other prospects to develop jurisprudence on individuals' rights in the environmental context have been noted, particularly regarding the scope and details of EIAs (Section 8.3). The Court has also had opportunities to create linkages between these rights and the principles of precaution and of intergenerational equity in its reasoning (Section 8.4). In brief, the development of international environmental law to the benefit of human beings has been limited before the Court.

In the context of the climate crisis, the judicialisation of environmental disputes will only continue to surge. Given the increasing recognition of the connections between the environment and the human experience, the human–environment nexus also continues to grow in the judicial context. In light of this, judicial caution might be difficult for the Court to sustain. A stronger acknowledgement of the relevance of individuals in environmental disputes, along with efforts to balance the interests of individuals and states in this context, would enable the Court to more effectively address global environmental challenges with no end in sight.

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