SEPARATE OPINION OF JUDGE CANÇADO TRINDADE

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1. I have accompanied the Court's majority in the decision which it has just taken in the *Pulp Mills* case *(Argentina* v. *Uruguay)*, for understanding that it contains what the Court could have found on the basis of a strict valuation of the evidence produced before it, but I regret not to be able to concur with parts of the Court's reasoning in the present Judgment, in particular its unfortunate overlooking of the general principles of law. I feel thus obliged to leave on the records the foundations of my own personal position in this respect. To this end, I purport, in this separate opinion, to review the process of enunciation of general principles of law in the realm of contemporary international law, for the proper consideration of the issues raised in the *cas d'espèce*. In the course of the examination that follows, it will be clear that my own conception of the matter at issue contrasts with that of the Court's majority, as disclosed in the reasoning developed in the present case of the *Pulp Mills*.

2. My own position is in line with a current of international legal thinking, sedimented over the last nine decades (1920-2010), which, ever since the mid-1970s, has marked presence also in the domain of International Environmental Law. In my understanding, general principles of domestic as well as international law are endowed with autonomy. Their scope of application *ratione materiae* has in recent years been the object of attention of contemporary international tribunals, and I believe an important role is here to be played by the International Court of Justice (ICJ), attentive as it ought to be to the role of general principles, of particular relevance in the evolution of the expanding *corpus juris* of international law in our times. Bearing this in mind, I shall turn my attention to some preliminary points.

I. *Prolegomena*

3. Irrespective of the way a case is presented by the contending parties to the ICJ, this latter is not restrained or bound by their arguments: it is entirely free to proceed to its own determination of the facts and to its own identification of the applicable law. In doing this — as it is entirely free to do, in the faithful exercise of its function — the Court proceeds in such a way that discloses, to a careful observer, its own conception of the law. There are always distinct ways to develop a legal reasoning, and my natural inclination, even in a case like the present one of the *Pulp Mills (Argentina* v. *Uruguay)*, is to dwell to a greater extent on legal principles than on chemical substances, unlike the Court has done in the present case.

4. In the examination of the substantive obligations under the 1975 Statute of the River Uruguay, the Court proceeded, with diligence and zeal, to a long and necessary examination of the impact of the discharges on the quality of the waters of the River Uruguay (Judgment, paras. 234-

264), but that diligence and zeal seem to have vanished in respect of general principles of law (comprising those of International Environmental Law), only mentioned *in passim*, and without elaboration, in a few paragraphs of the present Judgment[1]. I feel thus obliged, in the present separate opinion, to attempt to redress the balance, by concentrating my thoughts on legal principles, and in particular those applicable in the *cas d'espèce*. I do so in a constructive spirit, in the hope (may I dare to nourish it?) that the Court will be more sensitive to legal principles in its future decisions; after all, over the last decades, legal principles have been much more familiar to me than chemical substances.

5. This point is intertwined with that of the identification of the applicable law in the *cas d'espèce* which, in turn, ineluctably leads to the "sources" of law, of international law. Even if the contending parties had not invoked general principles of law before the ICJ, this latter is entirely free to dwell upon them *motu proprio*. It so happens that, in the present case of the *Pulp Mills*, both Parties, Argentina and Uruguay, *did* invoke those principles; yet, the Court, for reasons which escape my comprehension, preferred not to dwell upon them, missing a unique occasion to give a remarkable contribution to our discipline. In the *cas d'espèce*, a key point which promptly comes to one's mind, for the settlement of a case like the present one, is whether an international tribunal like the ICJ can or should have recourse to *principles of environmental law*, under Article 38 (1) *(c)* of its Statute.

6. Such principles, proper to International Environmental Law, comprise the principle of prevention and the precautionary principle, added to the long-term temporal dimension underlying inter-generational equity, and the temporal dimension underlying the principle of sustainable development. Those principles are to be kept in mind also in the judicial determination of the facts of the concrete case. Among some preliminary questions *(questions préalables)* to be addressed, and which do not seem to have been considered with sufficient clarity to date, are the following: *(a)* whether the reference to "general principles of law" found in Article 38 (1) *(c)* of the ICJ Statute refers only to those principles found *in foro domestico* or encompasses likewise those principles identified also at international law level; and *(b)* whether these latter are only those of general international law or whether they comprise also those principles which are proper to a domain of international law.

7. Attention is next turned, in this separate opinion, in the light of the facts of the present case of the *Pulp Mills*, to related aspects beyond the

[1] As to the Court's considerations (not the Parties' arguments), cf. paragraph 101 (principle of prevention), paragraph 145 (principle of good faith), paragraph 162 (principle of *onus probandi incumbit actori*), and paragraph 164 (precautionary "approach").

inter-State dimension (with which this Court is so familiarized), namely: the imperatives of human health and well-being of peoples, the role of civil society in environmental protection; obligations of an objective character, beyond reciprocity; and the legal personality of the Administrative Commission of the River Uruguay (CARU). Last but not least, the relevant general principles of law are considered in their axiological dimension, and as indicators of the *status conscientiae* of the international community. In order to address those points, there is need, at first, to revise the legislative history of Article 38 of the Hague Court (PCIJ and ICJ) — on which so much has been written — as well as the recourse to principles in the case law of the ICJ, for the purposes of consideration of the matter in the framework of the present case of the *Pulp Mills*.

II. "General Principles of Law": The Legislative History of the PCIJ/ICJ Statute Revisited

8. One of the most debated issues within the Advisory Committee of Jurists entrusted with the drafting of the Statute of the old Permanent Court of International Justice (PCIJ), in June-July 1920, pertained to the meaning to be ascribed to, and the material content of, the general principles of law as a (formal) "source" of international law. The original proposal of President Edward Descamps included in the list of (four) sources "the rules of international law as recognised by the legal conscience of civilised nations"[2]. In the debates of 2 July 1920, this proposal found fierce opposition on the part of Elihu Root, to whom principles of justice varied from country to country[3]. President Descamps replied that this might only be "partly true as to certain rules of secondary importance"; however, he added,

> "it is no longer true when it concerns the fundamental law of justice and injustice deeply engraved on the heart of every human being and which is given its highest and most authoritative expression in the legal conscience of civilised nations"[4].

9. Albert de Lapradelle, likewise, opposed Elihu Root's positivist position that judges could only decide in accordance with "recognised rules" and that in their absence they "should pronounce a *non-liquet*"; he regarded this view as "inadmissible", and added that "[t]he competence

[2] PCIJ/Advisory Committee of Jurists, *Procès-verbaux of the Proceedings of the Committee (16 June-24 July 1920) with Annexes*, The Hague, Van Langenhuysen Frères, 1920, point No. 3, p. 306, Ann. No. 3.
[3] *Ibid.*, p. 310.
[4] *Ibid.*, pp. 310-311.

of arbitrators might be limited, but not that of the judges"[5]. Trying to find a breakthrough, Lord Phillimore pondered that "[g]enerally speaking, all the principles of common law are applicable to international affairs. They are in fact part of international law."[6] George Francis Hagerup added that judges should issue their decision according to "rules of law", and should "not declare that it is impossible for them to decide because of the absence of rules. There must be no possibility of a denial of justice."[7]

10. In this line of reasoning, President Edward Descamps also opposed the possibility of *non liquet*, asserting that, if neither conventional law nor custom existed, the judge ought then to apply general principles of law[8]. And he then clearly reasserted his jusnaturalist position, in upholding — besides treaties and custom — the search for

> "objective justice . . . under conditions which are calculated to prevent arbitrary decisions . . . [O]bjective justice is the natural principle to be applied by the judge . . . In the second place I would allow [the judge] to take into consideration the legal conscience of civilised nations, which is illustrated so strikingly. . . ."[9]

11. In the continuing debates of 3 July 1920, Lord Phillimore expressed his own view that general principles (referred in amended point No. 3) were those accepted by all nations *in foro domestico*[10]. Albert de Lapradelle, while admitting that such principles "were also sources of international law", added that they were so if they had obtained "unanimous or quasi-unanimous support"[11]. The original proposal *(supra)* was amended, and, as submitted by Elihu Root, included in the list of (four) sources "the general principles of law recognised by civilised nations"[12]. It was clearly a solution of compromise by the Advisory Committee of Jurists, between the supporters of the jusnaturalist and the positivist outlooks of the matter, led by President Edward Descamps and Elihu Root, respectively.

12. This phraseology was provisionally adopted, to form the basis of what would shortly afterwards become Article 38 (3) of the Statute of the PCIJ, later ICJ (new Article 38 (1) *(c)*). Two significant statements were made, in favour of the insertion of the express reference to

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[5] PCIJ/Advisory Committee of Jurists, *Procès-verbaux of the Proceedings of the Committee (16 June-24 July 1920) with Annexes*, *op. cit.supra* note 2, p. 335.

[6] *Ibid.*, p. 316.
[7] *Ibid.*, p. 317.
[8] *Ibid.*, pp. 318-319, and cf. p. 322.
[9] *Ibid.*, p. 323.
[10] *Ibid.*, p. 335.
[11] *Ibid.*, pp. 313-314.
[12] *Ibid.*, p. 344, Annex No. 1.

general principles of law in the proposed list of formal sources of international law. The day before the provisional adoption, President Edward Descamps eloquently defended his view of the existence of an "objective justice" in the following way:

> "One of the most profound convictions of my life, which has been devoted to the study and application of international law, is that it is impossible to disregard a fundamental principle of justice in the application of law, [where it] indicates certain rules, necessary for the system of international relations, and applicable to the various circumstances arising in international affairs.
>
> . . . . . .
>
> Let us therefore no longer hesitate . . . to insert, amongst the principles to be followed by the judge in the solution of the dispute submitted to him, the law of objective justice . . . [T]he conception of justice and injustice as indelibly written on the hearts of civilised peoples . . . is not only the element *par excellence* making for progress in international law, but an indispensable complement to the application of law, and as such essential to the judge in the performance of the great task entrusted to him."[13]

13. The statement of Raul Fernandes, on the day of the provisional adoption, likewise supported the inclusion, into the part of the draft under discussion, of an express reference to general principles of law, so as to satisfy a need of the judge in order to decide a case. He pondered that "the sentences thus passed" — on general principles of law — "were generally the more just; because the principles are always based on justice, while strict law often departs from it"[14]. Rules emanating from principles are "not established either by convention or custom", and the draft under consideration would, in the opinion of Raul Fernandes, much gain "in giving to the Court of Justice the power to base its sentences — in the absence of any convention or customary law — on [the] principles of international law. . ."[15].

14. Last but not least, in the course of the debates, Albert de Lapradelle commented that the inclusion of the reference to "general principles of law" was sufficient, and did not need the requirement of having to be recognized by "civilised nations"; he deemed this to be "superfluous, because law implies civilisation"[16]. His colleagues, however, missed his point, and

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[13] PCIJ/Advisory Committee of Jurists, *Procès-verbaux of the Proceedings of the Committee (16 June-24 July 1920) with Annexes, op.cit.supra* note 2, pp. 324-325.

[14] *Ibid.*, pp. 345-346.
[15] *Ibid.*, p. 346.
[16] *Ibid.*, p. 335.

the deletion of that requirement was not made. The draft, with the inclusion of such general principles of law, was adopted[17], to become draft Article 35[18], subsequently renumbered Article 38, of the PCIJ Statute.

15. A quarter of a century later, in the debates of the 1945 San Francisco Conference prior to the adoption of the United Nations Charter and the Statute of the ICJ, it was agreed by the participating delegations (IV Commission, Committee I) that the corresponding Article 38 of the new Statute would not undergo a general revision; the time was "not opportune" for that, as *rapporteur* Jules Basdevant pointed out[19]. The only minor change introduced — in the *chapeau* of Article 38 — resulted from a Chilean proposal, unanimously adopted[20].

16. The new Article 38 of the Statute opened, from then onwards, with the provision that "The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:. . ." On the occasion, it was pointed out that this sole small modification in the drafting of Article 38 was meant to be a clarification; yet, the *lacuna* in the previous Statute in respect of the point concerned had not prevented the old PCIJ from "regarding itself as an organ of international law; but the addition will accentuate that character of the new Court"[21].

III. General Principles of Law as a Formal "Source" of International Law: Their Autonomy

17. The *mens legis* of the expression "general principles of law", as it appears in Article 38 (1) *(c)* of the ICJ Statute, clearly indicates that those principles constitute a (formal) "source" of international law, on their own, not necessarily to be subsumed under custom or treaties. The attitude of part of contemporary expert writing, of trying to see if a given principle has attained the "status" of a "norm" of customary international law, or has been "recognized" in conventional international law, simply misses the point, and is conceptually flawed. Such attitude fails to understand that a general principle of law is quite distinct from a rule of customary international law or a norm of conventional international law. A principle is not the same as a norm or a rule; these latter are inspired in the former, and abide by them. A principle is not the same as a custom or a conventional norm.

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[17] PCIJ/Advisory Committee of Jurists, *Procès-verbaux of the Proceedings of the Committee (16 June-24 July 1920) with Annexes*, *op.cit.supra* note 2, p. 584.

[18] *Ibid.*, p. 730.

[19] *Documents of the United Nations Conference on International Organization* (*UNCIO*, San Francisco, 1945), Vol. XIV, p. 843.

[20] *Ibid.*, Vol. XIII, pp. 284-285.

[21] *Ibid.*, Vol. XIII, p. 392.

18. Not seldom general legal principles are expressly invoked, or referred to, not only in treaties and international practice (of States and other subjects of international law), but also in national and international case law (cf. *infra*), and in doctrine. But even if they were not so invoked, they would not thereby be deprived of their condition of an autonomous formal "source" of international law. Furthermore, in our times, they are also invoked, or referred to, in resolutions of international organizations (starting with the United Nations); despite the fact that such resolutions are not listed in Article 38 (1) *(c)* of the ICJ Statute, the ICJ has taken them into account and has applied them (cf. *infra*). Such references or invocations of general principles, in distinct manifestations or formal "sources" of international law, bear witness of their importance, and proclaim it. But even if such invocations or references did not exist, general principles would still be there, at the origins and foundations of any legal system; in my perception, there cannot be any legal system without them. They cannot be overlooked by the ICJ.

19. Furthermore, my own understanding is in the sense that general principles of law — of domestic or international manifestation — stand as a category of their own, conceptually distinct from customary or conventional international law, in the list of "formal" sources under Article 38 of the ICJ Statute. General principles of law stand on their own, as one of the (formal) "sources" of international law (endowed with autonomy), that the judge can resort to, bearing in mind the circumstances of the case at issue. In the drafting of the PCIJ (and ICJ) Statute, those principles were not equated with custom or treaties, they were identified as a separate and additional category, as one of the "formal" sources of international law. And that is how, in my perception, they have been applied by the Hague Court in its *jurisprudence constante* (cf. *infra*).

IV. Recourse to Principles in the Case Law of the ICJ

20. In its case law, the Hague Court [PCIJ and ICJ] has, in the judicial settlement of the cases brought before its attention, often resorted to general principles of law. It has taken the expression to cover general principles of international law as well. The old PCIJ, for example, in the *Oscar Chinn* case (1934), expressly referred to "general principles of international law" (*Judgment, 1934, P.C.I.J., Series A/B, No. 63*, pp. 81 and 87). In the *célèbre Chorzów Factory* case (1928), it took the obligation to make reparation for any breach of an international engagement as amounting to "[a general] principle of international law" (*Merits, Judgment No. 13, 1928, P.C.I.J., Series A, No. 17*, p. 29). And in the *Mavrommatis Palestine Concessions* case (1924), it characterized the protection of nationals or subjects by resort to diplomatic protection as cor-

responding to "an elementary principle of international law" (*Judgment No. 2, 1924, P.C.I.J., Series A, No. 2*, p. 12).

21. As for the ICJ, it has likewise applied general principles of law in the same understanding, i.e., as comprising principles recognized both in *foro domestico* (and transposed into international level) *and* in international law itself. Thus, in the *Corfu Channel* case (1949), the Court invoked "well-recognized principles" of international law (*United Kingdom* v. *Albania, I.C.J. Reports 1949*, p. 22). In its Advisory Opinion on *Reservations to the Convention against Genocide* (1951), the ICJ, after referring to the "conscience of mankind", asserted that the principles underlying the Convention against Genocide are "binding on States, even without any conventional obligation" (*I.C.J. Reports 1951*, p. 23).

22. In the *Nicaragua* v. *United States* case (1986), the Court reiteratedly referred to "fundamental general principles of humanitarian law" (*Military and Paramilitary Activities in and against Nicaragua, I.C.J. Reports 1986*, pp. 113-115, 129-130, paras. 218, 220 and 255). In that same Judgment of 27 June 1986, the ICJ further referred to "principles which the General Assembly declared to be 'basic principles' of international law" (*ibid.*, p. 107, para. 203), and itself invoked "the principle of non-intervention" (*ibid.*, pp. 106-107, paras. 202 and 204). Much earlier on, in the *Right of Passage over Indian Territory* case, the ICJ took note of the invocation by Portugal of "general international custom, as well as the general principles of law" (*Portugal* v. *India, Merits, Judgment, I.C.J. Reports 1960*, p. 43), of course not taking them as synonymous.

23. The Court has, for example, invoked the principle of self-determination of peoples in its Advisory Opinion on *Namibia* (*I.C.J. Reports 1971*, p. 31, para. 52); in its Judgment in the *East Timor (Portugal* v. *Australia)* case (*I.C.J. Reports 1995*, p. 201, para. 29); in its Judgment of 1986 in the *Frontier Dispute (Burkina Faso* v. *Mali)* case (*I.C.J. Reports 1986*, pp. 566-567, para. 25); in its Advisory Opinion on *Western Sahara* (*I.C.J. Reports 1975*, pp. 31 and 33, paras. 55 and 59); and in its Advisory Opinion on *Legal Consequences of the Construction of a Wall* (*I.C.J. Reports 2004 (I)*, p. 271, para. 88). In the aforementioned Judgment in the *East Timor* case, it characterized the principle of self-determination of peoples as "one of the essential principles of contemporary international law" (*I.C.J. Reports 1995*, p. 102, para. 29). In the case of the *Gabčíkovo-Nagymaros Project*, the ICJ used interchangeably the expressions "a principle of international law" and "a general principle of law" (*Hungary/Slovakia, Judgment, I.C.J. Reports 1997*, p. 53, para. 75), as well as "a principle of international law or a general principle of law" (*ibid.*, para. 76).

24. General principles of law applied by the ICJ have encompassed those of both substantive[22] and procedural law. In the (first) *Nuclear Tests* case (1974), the ICJ invoked, e.g., the principle of good faith (*I.C.J. Reports 1974*, p. 472, para. 46). In its Advisory Opinion on the *Application for Review of Judgement No. 158 of the United Nations Administrative Tribunal*, the ICJ relied on the general principle of law of the equality of arms/*égalité des armes* (of the procedural parties), (*I.C.J. Reports 1973*, p. 180, para. 36). On other occasions (e.g., Advisory Opinion on *Effect of Awards of Compensation Made by the United Nations Administrative Tribunal, I.C.J. Reports 1954*, p. 53; *Application of the Convention against Genocide (Bosnia and Herzegovina* v. *Serbia and Montenegro)* case, *I.C.J. Reports 2007 (I)*, p. 90, para. 115), it has invoked the principle of *res judicata*. In the case of the *Frontier Dispute* (*Burkina Faso/Republic of Mali, I.C.J Reports 1986*, pp. 565 and 567, paras. 20 and 26), it resorted to the principle of *uti possidetis*.

25. In its former Advisory Opinion from half a decade ago on *Legal Consequences of the Construction of a Wall* (2004), the ICJ proceeded to identify the "principles of international law" that were relevant to tackle the issue submitted to its cognizance by the United Nations General Assembly (*I.C.J. Reports 2004 (I)*, p. 154, para. 39, p. 171, para. 86 and p. 181, para. 114). The Court made express mention of the principle of the prohibition of the threat or use of force (Article 2 (4) of the United Nations Charter), and of the principle of self-determination of peoples[23] (*I.C.J. Reports 2004 (I)*, p. 171, para. 87). The ICJ also referred to this latter as the right of all peoples to self-determination (as under Article 1 of the two United Nations Covenants on Human Rights, *ibid.*, p. 171, para. 88 and p. 182, para. 118). The ICJ also referred to the principle of peaceful settlement of disputes (*ibid.*, p. 200, para. 161), as well as to the principles of International Humanitarian Law (*ibid.*, p. 199, para. 157).

V. General Principles of Domestic and International Law

1. A Lesson from the Legislative History of the PCIJ (and ICJ) Statute

26. When Article 38 of the Statute of the Hague Court was adopted, there were, within the Advisory Committee of Jurists, two outlooks. The

[22] Cf., e.g., the Advisory Opinion on *Namibia (I.C.J. Reports 1971)*, p. 48, para. 98.

[23] As set forth in the 1970 Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States (General Assembly resolution 2625 (XXV)).

first pursued the identification of those principles as recognized *in foro domestico* (Elihu Root, Lord Phillimore); the other pursued the identification of the principles of international law (Edward Descamps, Raul Fernandes). The first attitude can be understood (not necessarily accepted) in view of the fact that it was at domestic law level that general principles of law (and mainly of procedural law) first found expression, in historical perspective. The law of nations (as we behold it today) emerged later.

27. Yet, to hold this view as inescapable, seems to amount to a static, and dogmatic position, which requires demonstration. It does not appear persuasive to me at all. In our days, given the extraordinary development of the law of nations *(droit des gens)*, there is epistemologically no reason not to have recourse to general principles of law as recognized in domestic as well as international law (cf. *infra*). As early as in 1920, there were those who had an intuition in support of this view. It is, moreover, to my understanding, well in keeping with the letter and spirit of Article 38 of the Hague Court, and it takes into due account the progressive development of international law in our times.

28. In contemporary international law, general principles of law find concrete expression not only *in foro domestico*, but also at international level. There can be no legal system without them. Always keeping their autonomy, they may find expression in other formal "sources" or manifestations of international law (and not only treaties and custom), even though not listed in Article 38 (1) *(c)* of the ICJ Statute, but nonetheless resorted to by the ICJ in practice. It is the case, *inter alia*, of resolutions of international organizations, in particular of the United Nations General Assembly[24]. Bearing this in mind, may I recall, at this stage, some relevant doctrinal developments on general principles of law (found at

[24] Cf., in general, e.g., [Various Authors], *Principles of International Law Concerning Friendly Relations and Cooperation* (M. Sahovic, ed.), Belgrade, Institute of International Politics and Economics/Oceana Publs., 1972, pp. 3-275; M. Sahovic, "Codification des principes du droit international des relations amicales et de la coopération entre les Etats", 137 *Recueil des cours de l'Académie de droit international de La Haye* (1972), pp. 249-310; G. Arangio-Ruiz, "The Normative Role of the General Assembly of the United Nations and the Declaration of Principles of Friendly Relations", 137 *Recueil des cours de l'Académie de droit international de La Haye* (1972), pp. 419-742; [Various Authors], *The United Nations and the Principles of International Law — Essays in Memory of M. Akehurst* (V. Lowe and C. Warbrick, eds.), London, Routledge, 1994, pp. 1-255. And, for the view that United Nations General Assembly resolutions acknowledge general principles of law as universal principles of international law, cf. debates on "The Role of General Principles of Law and General Assembly Resolutions", *Change and Stability in International Law-Making* (A. Cassese and J. H. H. Weiler, eds.), Berlin, W. de Gruyter, 1988, pp. 34, 37, 47-48, 50-52 and 54-55 (interventions by W. Riphagen, J. H. H. Weiler, E. Jiménez de Aréchaga. G. Abi-Saab and A. Cassese); and cf. also G. Balladore Pallieri, *Diritto Internazionale Pubblico*, 8th rev. ed., Milan, Giuffrè, 1962, pp. 25-26 and 95-97; A. Verdross, "Les principes généraux de droit dans le système des sources du droit international public", *Recueil d'études de droit international en hommage à P. Guggenheim*, Geneva, IUHEI, 1968, pp. 526 and 530.

national as well as international levels), as manifested in the times of both the PCIJ and the ICJ.

2. Relevant Doctrinal Developments on General Principles of Law

(a) *In the PCIJ times*

29. The review that follows is not meant to be exhaustive, but rather selective, to illustrate the point I am making, as advanced in doctrinal writings in the periods of operation of both the old PCIJ and the ICJ. In his study of the case law of the old PCIJ on the sources of international law, for example, Max Sørensen, while subscribing to the then prevailing view that general principles of law were those crystallized *in foro domestico*[25], did not fail to point out that, however, already at that time, there were jurists (like Jules Basdevant and Frede Castberg) who thought differently. The minority view of expert writing, already in the twilight of the old PCIJ, was that those principles allowed the Court to decide also on the basis of the *general principles of international law* itself[26].

30. In fact, in the minority — and in my view more enlightened — position, already in 1936, Jules Basdevant, for example, sustained that "the general principles of law recognized by civilized nations may be sought not only in domestic law, but also in private or related international law through the use of the comparative method"[27] *[translation by the Registry]*. To look for those principles only *in foro domestico* would hardly be adequate, as not always would such principles be transposed onto international level without difficulties; hence the inescapable need to identity or acknowledge them also at international level itself, though this was, at that time, still a somewhat "unexplored" exercise[28].

31. Likewise, Frede Castberg, as early as in 1933, in assessing the work of the Advisory Committee of Jurists which drafted in 1920 the Statute of the PCIJ (cf. *supra*), challenged the promptly prevailing view that — in the line of a remark by Lord Phillimore — general principles of law were those applied *in foro domestico*. Distinctly, Frede Castberg beholding in them true *principles of justice*, contended that

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[25] Max Sørensen, *Les sources du droit international*, Copenhagen, E. Munksgaard, 1946, p. 113.

[26] *Ibid*., p. 113.

[27] Jules Basdevant, "Règles générales du droit de la paix", 58 *Recueil des cours de l'Académie de droit international de La Haye* (1936), p. 504.

[28] *Ibid*., pp. 498-504.

> "It would be far too unreasonable to allow the Court to seek the rules to be applied in its decisions from among the general principles in any field of domestic law, without allowing it to rule in accordance with the general principles of international law. There is no reasonable ground to assume that, of all the general principles of law, it is precisely those of international law that are precluded from providing the basis for decisions of the Permanent Court of International Justice. It is true that general principles of domestic law are indeed applicable also in relations between States.
>
> . . . . . .
>
> Some years ago, we were perhaps overly inclined, in the theory of international law, to exclude any application of the principles of domestic law. But we should not now go to the other extreme and seek even to exclude the principles of international law in favour of the principles of domestic law. Such an irrational system is unacceptable, unless expressly established by a treaty . . ."[29] *[Translation by the Registry.]*

32. May I, in addition, recall the views of two other jurists on the matter at issue, made public also in the years of operation of the old PCIJ. In his thematic course of 1935 at The Hague Academy of International Law, Alfred Verdross pondered that, in approaching the "sources" of international law, there are ultimately two basic opposing conceptions: one, which starts from the *"idée du droit"*, and the other, which privileges consent or the will; the latter is found in (philosophical) positivism, while the former upholds that the *"idée du droit"*, emanating from human conscience, paves the way for a universal *jus gentium*[30].

33. This approach, starting from the idea of an "objective justice", sustains the autonomy of principles, thus opposing the typical positivist outlook, which insists that they ought to be manifested through treaties or custom[31]. General principles of law, as set forth in Article 38 (3) of the Statute of the PCIJ, are thus an autonomous "source" of international

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[29] Frede Castberg, "La méthodologie du droit international public", 43 *Recueil des cours de l'Académie de droit international de La Haye (RCADI)* (1933), pp. 370 and 372. Precisely four decades later, in 1973, Frede Castberg, referring to "the great principle *pacta sunt servanda*", as a "fundamental principle of public international law", observed that the confines between this latter and domestic law had at that time "become blurred", and insisted on his view that there was "not sufficient reason to separate ... the general principles of law from their attachment" to the two "traditional" main branches of the law, namely, "internal law and public international law"; Frede Castberg, "International Law in Our Time", 138 *Recueil des cours de l'Académie de droit international de La Haye* (1973), pp. 5 and 8. In other words, general principles of law can be identified at the levels of both domestic law and public international law itself.

[30] A. Verdross, "Les principes généraux du droit dans la jurisprudence internationale", 52 *Recueil des cours de l'Académie de droit international de La Haye* (1935), pp. 195-197 and 202-203.

[31] *Ibid*., pp. 216 and 221.

law[32], and can be applied concomitantly with treaties and custom, and be resorted to in order to interpret provisions of treaties and rules of customary law[33].

34. For his part, in a study published one decade later, in 1944, Charles Rousseau expressed his view that the concept of "general principles of law" is not limited only to those of domestic law, but comprises likewise the general principles of international law[34]. He insisted that the concept encompasses "the principles universally accepted in domestic law and the general principles of the international legal order", thus "clearly including both international law and domestic law"[35] *[translation by the Registry]*.

35. General principles of law, thus understood — he proceeded — are an autonomous "source" of international law, distinct from customary rules and conventional norms[36]. He further pointed out that, already at that time, expert writing seemed divided on the matter: "positivist writers, who believe that international law is of an exclusively voluntarist nature, have naturally sought to downplay the role of general principles of law"[37] *[translation by the Registry]*; those who opposed the positivist dogma ascribed greater importance to general principles of law, "deriving directly from objective law"[38] *[translation by the Registry]*.

36. Those were some of the more penetrating reflections devoted to the general principles of law (comprising the principles of international law) in the times of the old PCIJ. As already pointed out, they were not the only ones, as other doctrinal works were dedicated particularly to the study of the matter at issue, a subject which attracted considerable attention at that time[39]. Such was the case of Alejandro Alvarez, who, in an *exposé de motifs* of a proposed declaration of principles of international law, published on the eve of the outbreak of the Second World War, called for a reconstruction of international law bearing in mind not only positive law, but also the *principles*, which oriented legal norms and rules, and which, in his view, prevailed in the whole of international law, and appeared as "manifestations of the juridical conscience of the peoples"[40].

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[32] A. Verdross, "Les principes généraux du droit dans la jurisprudence internationale", *op. cit. supra* note 30, pp. 223, 228, 234 and 249.

[33] *Ibid.*, p. 227.

[34] Ch. Rousseau, *Principes généraux du droit international public*, Vol. I *(Sources)*, Paris, Pedone, 1944, p. 891.

[35] *Ibid.*, p. 901.

[36] *Ibid.*, pp. 913-914.

[37] *Ibid.*, p. 926.

[38] *Ibid.*, p. 927.

[39] Cf. further, *inter alia*, T. J. Lawrence, *Les principes de droit international*, 5th ed. (transl. J. Dumas and A. de Lapradelle), Oxford University Press, 1920, pp. 99-120; P. Derevitzky, *Les principes du droit international*, Paris, Pedone, 1932; Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, London, Stevens, 1953; G. Scelle, *Précis de droit des gens: principes et systématique*, Paris, Rec. Sirey, 1934.

[40] A. Alvarez, *Exposé de motifs et déclaration des grands principes du droit international moderne*, 2nd ed., Paris, Eds. Internationales, 1938, pp. 8-9 and 16-23, and cf. pp. 27 and 51.

(b) *In the ICJ times*

37. Considerably more attention was devoted to the principles of international law some decades ago (including the times of the PCIJ) than in our days. Yet, those principles retain, in my view, their utmost importance, as they inform of and conform to the legal norms of any legal system. In the past, successive doctrinal works were dedicated particularly to the study of the principles of international law, in the framework of the foundations of the discipline and the consideration of the validity of its norms. In the 1950s[41] and the 1960s[42] some courses delivered at The Hague Academy of International Law addressed the theme of the principles of international law, which was retaken in monographs in the 1960s[43] and the 1970s[44]. Subsequently, except for a few works[45], there appeared to occur, rather surprisingly, a decline in the interest in the study of the matter, parallel to the dissemination of a seemingly — and regrettably — pragmatic approach to the study of international law.

38. Although concern with the need to consider the principles of international law appears to have declined in the last quarter of century, those principles have, nevertheless, always marked their presence in the doctrine of international law, including the contemporary one[46]. Principles of inter-

[41] Cf. H. Rolin, "Les principes de droit international public", 77 *Recueil des cours de l'Académie de droit international de La Haye (RCADI)* (1950), pp. 309-479; G. Schwarzenberger, "The Fundamental Principles of International Law", 87 *RCADI* (1955) pp. 195-385; P. Guggenheim, "Les principes de droit international public", 80 *RCADI* (1952) pp. 5-189; Ch. Rousseau, "Principes de droit international public", 93 *RCADI* (1958), pp. 369-549; G. Fitzmaurice, "The General Principles of International Law Considered from the Standpoint of the Rule of Law", 92 *RCADI* (1957), pp. 1-223.

[42] Cf. M. Sørensen, "Principes de droit international public", 101 *RCADI* (1960), pp. 1-251; P. Reuter, "Principes de droit international public", 103 *RCADI* (1961), pp. 429-656; R. Y. Jennings, "General Course on Principles of International Law", 121 *RCADI* (1967), pp. 327-600.

[43] Cf. M. Miele, *Principi di Diritto Internazionale*, 2nd ed., Padova, Cedam, 1960; L. Delbez, *Les principes généraux du contentieux international*, Paris, LGDJ, 1962; L. Delbez, *Les principes généraux du droit international public*, 3rd ed., Paris, LGDJ, 1964; H. Kelsen, *Principles of International Law*, 2nd ed., N.Y., Holt Rinehart & Winston, 1966; W. Friedmann, "The Uses of 'General Principles' in the Development of International Law", 57 *American Journal of International Law* (1963), pp. 279-299; M. Virally, "Le rôle des 'principes' dans le développement du droit international", *Recueil d'études de droit international en hommage à P. Guggenheim*, Geneva, IUHEI, 1968, pp. 531-554; M. Bartos, "Transformations des principes généraux en règles positives du droit international", *Mélanges offerts à J. Andrassy*, The Hague, Nijhoff, 1968, pp. 1-12.

[44] Cf., e.g., B. Vitanyi, "La signification de la 'généralité' des principes de droit", 80 *Revue générale de droit international public* (1976), pp. 536-545.

[45] Cf., e.g., I. Brownlie, *Principles of Public International Law*, 6th ed., Oxford, Clarendon Press, 2003, pp. 3 *et seq*.

[46] Cf., e.g., *inter alia*, H. Thierry, "L'évolution du droit international: Cours général de droit international public", 222 *RCADI* (1990), pp. 123-185; G. Abi-Saab, "Cours général de droit international public", 207 *RCADI* (1987), pp. 328-416.

national law permeate the entire international legal system, playing an important role in international law-making as well as in the application of international law. In some cases (such as, e.g., in the Law of Outer Space), they have paved the way for the construction of a new *corpus juris*, in a new domain of international law which required regulation, and the principles originally proclaimed have fully retained their value to date[47]. This is the case, e.g., of International Environmental Law in our times (cf. *infra*).

39. Principles of international law are guiding principles of general content, and, in that, they differ from the norms or rules of positive international law, and transcend them. As basic pillars of the international legal system (as of any legal system), those principles give expression to the *idée de droit*, and furthermore to the *idée de justice*, reflecting the conscience of the international community[48]. Irrespective of the distinct approaches to them, those principles stand ineluctably at a superior level than the norms or rules of positive international law. Such norms or rules are binding, but it is the principles which guide them[49]. Without these latter, rules or techniques could serve whatever purposes. This would be wholly untenable.

40. Already in the era of the United Nations, Grigori Tunkin perspicaciously went forward in his support for the application by the ICJ of general principles of international law. Attentive to the sole change (proposed by Chile) introduced into Article 38 (1) *(c)* of the new ICJ Statute in 1945 *(supra)*, to the effect that the ICJ has the function "to decide in accordance with international law such disputes as are submitted to it", G. Tunkin contended that that amendment clarified that general principles of law comprised those principles *common* to national legal systems *and* to international law: they are legal postulates followed "in national legal systems and in international law", and resorted to in the process of interpretation and application of pertinent rules in concrete cases[50].

41. In the mid-1950s, Hildebrando Accioly stressed the "pre-eminent character" of general principles of law, at domestic and international levels, emanating directly from natural law, and rendering concrete the norms and rules of positive law, in conformity with them[51]. Shortly afterwards, by the late 1950s, C. Wilfred Jenks expressed his belief that an

[47] Cf. M. Lachs, "Le vingt-cinquième anniversaire du traité régissant les principes du droit de l'espace extra-atmosphérique, 1967-1992", 184 *Revue française de droit aérien et spatial* (1992), No. 4, pp. 365-373, especially pp. 370 and 372.

[48] G. M. Danilenko, *Law-Making in the International Community*, Dordrecht, Nijhoff, 1993, pp. 7, 17, 175 and 186-187, and cf. p. 215.

[49] Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals, op. cit. supra* note 39, p. 393.

[50] G. Tunkin, "'General Principles of Law' in International Law", *Internationale Festschrift für A. Verdross* (R. Marcic, H. Mosler, E. Suy and K. Zemanek, eds.), Munich/Salzburg, W. Fink Verlag, 1971, pp. 526 and 531.

[51] H. Accioly, *Tratado de Direito Internacional Público*, 2nd ed., Vol. I, Rio de Janeiro, M.R.E., 1956, pp. 33 and 37.

inquiry into the general principles of law (found in distinct legal systems, and further encompassing the principles of international law itself) could much contribute to provide the "basic foundations of a universal system of international law"[52]. One decade later, Antoine Favre sustained, in 1968, that general principles of law are "the expression of the idea of justice", having a universal scope and expressing the "juridical conscience of humankind"; rather than deriving from the "will" of States, they have an "objective character" and constitute a "fonds juridique commun pour l'ensemble des états"[53], thus securing the unity of law and enhancing the idea of justice to the benefit of the international community as a whole. It is in the light of those principles that the whole *corpus* of the *droit des gens* is to be interpreted and applied.

42. In the mid-1980s, Hermann Mosler observed that general principles of law have their origins either in national legal systems or at the level of international legal relations, being consubstantial with *jus gentium*, and applied to relations among States as well as relations among individuals. To him, those principles, endowed with autonomy and conforming to the *jus gentium*, do not emanate from positive law-making, but rather by their awareness which gives them expression: those principles are ethical "commandments" emanating from the "conscience of mankind", which considers them "indispensable for the co-existence of man in organized society"[54].

43. The sustained validity of the principles of international law has been upheld in the evolving law of the United Nations. The ICJ, as "the principal judicial organ of the United Nations" (Article 92 of the United Nations Charter), cannot prescind from them in the exercise of its contentious function. As proclaimed in the United Nations Charter (Article 2) in 1945, and restated in the 1970 United Nations Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States[55], the general principles of international law retain their full and continuing validity in our days. A violation of a

[52] C. W. Jenks, *The Common Law of Mankind*, London, Stevens, 1958, pp. 106 and 120-121, and cf. p. 172.

[53] A. Favre, "Les principes généraux du droit, fonds commun du droit des gens", *Recueil d'études de droit international en hommage à P. Guggenheim*, Geneva, IUHEI, 1968, pp. 369, 374-375, 379, 383 and 390.

[54] H. Mosler, "General Principles of Law", *Encyclopedia of Public International Law* (R. Bernhardt, ed.), Vol. 7, Max Planck Institute for Comparative Public Law and International Law/Ed. North-Holland, Amsterdam, 1984, pp. 90-92 and 95. For his part, in his later years, Alfred Verdross pondered that general principles of law "illuminate the whole international legal order"; A. Verdross, *Derecho Internacional Público* (5th Spanish ed., 1st reimpr., transl. from 4th ed. of *Völkerrecht*, 1959), Madrid, Ed. Aguilar, 1969, p. 98.

[55] United Nations, General Assembly resolution 2625 (XXV).

norm or rule of international law does not affect the validity of its *corpus juris* and its guiding principles.

44. Given the overriding importance of those principles, it is not surprisingly that they found expression in the United Nations Charter (Article 2), adopted in 1945. A quarter of a century afterwards, the 1970 Declaration of Principles was meant to be a law-declaring resolution as to those basic principles, so as to serve as a guide for all States in their behaviour. While the traditional general principles of law (found *in foro domestico*) disclosed a rather procedural character, the general principles of international law — such as the ones proclaimed in the 1970 Declaration — revealed instead a substantive content (so as to guide State conduct), proper of the very foundations of international law; such general principles of international law (as set forth in the 1970 Declaration of Principles) are thus vested with universal importance for the international community itself[56].

45. Principles of international law constitute altogether the pillars of the international legal system itself. By the turn of the century, the *United Nations Millenium Declaration*, adopted by the United Nations General Assembly (resolution 55/2) on 18 September 2000, has stated that the principles of the United Nations Charter "have proved timeless and universal" (para. 3). Half a decade later, in its recent *2005 World Summit Outcome* (of 15 September 2005), the United Nations General Assembly had again evoked the principles of the United Nations Charter, expressly referring to the aforementioned 1970 Declaration of Principles (para. 73).

46. As already seen, the Hague Court (PCIJ and ICJ) has often applied general principles of law in its *jurisprudence constante* (cf. *supra*). It has applied them as an autonomous formal "source" of international law. Yet, the Hague Court, always so sober in applying them, has apparently not felt it necessary to dwell further upon them, or to stress their utmost importance; in its present Judgment in the *Pulp Mills* case, it has not even asserted or endorsed the general principles of International Environmental Law (such as those of prevention and of precaution). I thus feel it my duty to do so, particularly in the *cas d'espèce*, as, in addition, *both* contending Parties, Argentina and Uruguay, have expressly invoked such principles in the contentious proceedings before this Court.

47. It is indeed significant — and it should not pass unnoticed — that Uruguay and Argentina, concurring in their invocation of

[56] Cf. debates on "The Role of General Principles of Law and General Assembly Resolutions", *Change and Stability in International Law-Making* (A. Cassese and J. H. H. Weiler, eds.), Berlin, W. de Gruyter, 1988, pp. 47-48 and 54-55 (interventions of J. H. H. Weiler, E. Jiménez de Aréchaga and A. Cassese).

general principles of law, were both being faithful to the long-standing tradition of Latin American international legal thinking, which has always been particularly attentive and devoted to general principles of law, in the contexts of both the formal "sources" of international law[57] as well of codification of international

[57] Andrés Bello, *Principios de Derecho Internacional* (1832), 3rd ed., Paris, Libr. Garnier Hermanos, 1873, pp. 3 *et seq.*; C. Calvo, *Manuel de droit international public et privé*, 3rd rev. ed., Paris, A. Rousseau Ed., 1892, Chap. I, pp. 69-83; L. M. Drago, *La República Argentina y el Caso de Venezuela*, Buenos Aires, Impr. Coni Hermanos, 1903, pp. 1-18; L. M. Drago, *La Doctrina Drago: Colección de Documentos* (pres. S. Pérez Triana), London, Impr. Wertheimer, 1908, pp. 115-127 and 205; A. N. Vivot, *La Doctrina Drago*, Buenos Aires, Edit. Coni Hermanos, 1911, pp. 39-279; II Conférence de la Paix, *Actes et discours de M. Ruy Barbosa*, The Hague, W. P. Van Stockum, 1907, pp. 60-81, 116-126, 208-223 and 315-330; Ruy Barbosa, *Obras Completas*, Vol. XXXIV (1907), II: *A Segunda Conferência da Paz*, Rio de Janeiro, MEC, 1966, pp. 65, 163, 252, 327 and 393-395; Ruy Barbosa, *Conceptos Modernos del Derecho Internacional*, Buenos Aires, Impr. Coni Hermanos, 1916, pp. 28-29 and 47-49; Clovis Bevilaqua, *Direito Público Internacional* (A Synthese dos Princípios e a Contribuição do Brazil), Vol. I, Rio de Janeiro, Livr. Francisco Alves, 1910, pp. 11-15, 21-26, 90-95, 179-180 and 239-240; Raul Fernandes, *Le principe de l'égalité juridique des Etats dans l'activité internationale de l'après-guerre*, Geneva, Impr. A. Kundig, 1921, pp. 18-22 and 33; J.-M. Yepes, "La contribution de l'Amérique latine au développement du droit international public et privé", 32 *Recueil des cours de l'Académie de droit international de La Haye (RCADI)* (1930), pp. 731-751; J.-M. Yepes, "Les problèmes fondamentaux du droit des gens en Amérique", 47 *RCADI* (1934), p. 8; Alejandro Alvarez, *Exposé de motifs et déclaration des grands principes du droit international moderne*, *op. cit. supra* note 40, pp. 8-9, 13-23 and 51; C. Saavedra Lamas, *Por la Paz de las Américas*, Buenos Aires, M. Gleizer Ed., 1937, pp. 69-70, 125-126 and 393; Alberto Ulloa, *Derecho Internacional Público*, Vol. I, 2nd ed., Lima, Impr. Torres Aguirre, 1939, pp. 4, 20-21, 29-30, 34, 60, 62 and 74; Alejandro Alvarez, *La Reconstrucción del Derecho de Gentes — El Nuevo Orden y la Renovación Social*, Santiago de Chile, Ed. Nascimento, 1944, pp. 19-25 and 86-87; Ph. Azevedo, *A Justiça Internacional*, Rio de Janeiro, MRE, 1949, pp. 24-26, and cf. pp. 9-10; J.-C. Puig, *Les principes du droit international public américain*, Paris, Pedone, 1954, p. 39; H. Accioly, *Tratado de Direito Internacional Público*, 2nd ed., Vol. I, Rio de Janeiro, IBGE, 1956, pp. 32-40; Alejandro Alvarez, *El Nuevo Derecho Internacional en Sus Relaciones con la Vida Actual de los Pueblos*, Santiago, Edit. Jurídica de Chile, 1961, pp. 155-157, 304 and 356-357; A. Gómez Robledo, *Meditación sobre la Justicia*, Mexico, Fondo de Cultura Económica, 1963, p. 9; R. Fernandes, *Nonagésimo Aniversário — Conferências e Trabalhos Esparsos*, Vol. I, Rio de Janeiro, M.R.E., 1967, pp. 174-175; A. A. Conil Paz, *Historia de la Doctrina Drago*, Buenos Aires, Abeledo-Perrot, 1975, pp. 125-131; E. Jiménez de Aréchaga, "International Law in the Past Third of a Century", 159 *Recueil des cours de l'Académie de droit international de La Haye (RCADI)* (1978), pp. 87 and 111-113; L. A. Podestá Costa and J. M. Ruda, *Derecho Internacional Público*, 5th rev. ed., Vol. I, Buenos Aires, Tip. Ed. Argentina, 1979, pp. 17-18 and 119-139; E. Jiménez de Aréchaga, *El Derecho Internacional Contemporáneo*, Madrid, Ed. Tecnos, 1980, pp. 107-141; A. A. Cançado Trindade, *Princípios do Direito Internacional Contemporâneo*, Brasília, Edit. University of Brasília, 1981, pp. 1-102 and 244-248; Jorge Castañeda, *Obras Completas* — Vol. I: *Naciones Unidas*, Mexico, S.R.E./El Colegio de México, 1995, pp. 63-65, 113-125, 459, 509-510, 515, 527-543 and 565-586; [Various Authors], *Andrés Bello y el Derecho* (Colloquy of Santiago de Chile of July 1981), Santiago, Edit. Jurídica de Chile, 1982, pp. 41-49 and 63-76; D. Uribe Vargas, *La Paz es una Trégua — Solución Pacífica de Conflictos Internacionales*, 3rd ed., Bogotá, Universidad Nacional de Colombia, 1999, p. 109; A. A. Cançado Trindade, *O Direito Internacional em um Mundo em Transformação*, Rio de Janeiro, Edit. Renovar, 2002, pp. 91-140, 863-889 and 1039-1071.

law[58]. Even those who confess to reason still in an inter-State dimension, concede that general principles of law, in the light of natural law (preceding historically positive law), touch on the origins and foundations of international law, guide the interpretation and application of its rules, and point towards its universal dimension; those principles being of a general character, there is no sharp demarcation line between those recognized in domestic law *(in foro domestico)* and those of international law proper[59].

VI. "General Principles" of International Law: Scope of Application *Ratione materiae*

48. There are, in fact, general principles of law proper to international law in general, and there are principles of law proper to some domains of international law, such as, *inter alia*, International Environmental Law. In our days, international tribunals are called upon to pronounce on cases, for the settlement of which they do need to have recourse to general principles of law, including those which are proper to certain domains of international law. This has often taken place, particularly in the recent case law of, e.g., the *ad hoc* International Criminal Tribunal for the former Yugoslavia (mainly period 1998-2005) and the Inter-American Court of Human Rights (mainly period 1997-2006).

49. It may well happen that an international tribunal of universal

[58] Lafayette Rodrigues Pereira, *Princípios de Direito Internacional*, Vols. I-II, Rio de Janeiro, J. Ribeiro dos Santos Ed., 1902-1903, pp. 1 *et seq.*; A. S. de Bustamante y Sirvén, *La II Conferencia de la Paz Reunida en La Haya en 1907*, Vol. II, Madrid, Libr. Gen. de v. Suárez, 1908, pp. 133, 137-141, 145-147, 157-159, and cf. also Vol. I, pp. 43, 80-81 and 96; Epitacio Pessôa, *Projecto de Código de Direito Internacional Público*, Rio de Janeiro, Imprensa Nacional, 1911, pp. 5-323; F.-J. Urrutia, "La codification du droit international en Amérique", 22 *Recueil des cours de l'Académie de droit international de La Haye (RCADI)* (1928), pp. 113, 116-117 and 162-163; G. Guerrero, *La codification du droit international*, Paris, Pedone, 1930, pp. 11, 13, 16, 152, 182 and 175; J.-M. Yepes, "La contribution de l'Amérique Latine au développement du droit international public et privé", 32 *RCADI* (1930), pp. 714-730 and 753-756; Alejandro Alvarez, "Méthodes de la codification du droit international public — Rapport", *Annuaire de l'Institut de droit international* (1947), pp. 38, 46-47, 50-51, 54, 64 and 69; J.-M. Yepes, *Del Congreso de Panama a la Conferencia de Caracas (1826-1954)*, Caracas, M.R.E., 1955, pp. 143, 177-178, 193 and 203-208; R. J. Alfaro, "The Rights and Duties of States", 97 *Recueil des cours de l'Académie de droit international de La Haye* (1959), pp. 138-139, 145-154, 159 and 167-172; G. E. do Nascimento e Silva, "A Codificação do Direito Internacional", 55/60 *Boletim da Sociedade Brasileira de Direito Internacional* (1972-1974), pp. 83-84 and 103; R. P. Anand, "Sovereign Equality of States in International Law", 197 *RCADI* (1986), pp. 73-74; A. A. Cançado Trindade, "The Presence and Participation of Latin America at the II Hague Peace Conference of 1907", *Actualité de la Conférence de La Haye de 1907, II Conférence de la Paix* (Colloque du centenaire, 2007, ed. Yves Daudet), La Haye/Leiden, Académie de droit international de La Haye/Nijhoff, 2008, pp. 51-84.

[59] G. Herczegh, *General Principles of Law and the International Legal Order*, Budapest, Akadémiai Kiadó, 1969, pp. 9, 36, 42, 69, 90, 120 and 122.

scope and vocation, such as the International Court of Justice, in pronouncing on cases brought into its cognizance, makes recourse to general principles of law to settle the cases at issue without elaborating further on such principles. This has often happened in its practice (cf. *supra*). The ICJ is entirely free to do so. Yet, this corresponds to one particular conception of the exercise of the international judicial function, which is not the only one which exists.

50. It is my view that it is perfectly warranted, and necessary, for the ICJ to dwell upon the principles it resorts to, and to elaborate on them, particularly when such principles play an important role in the settlement of the disputes at issue, and when these latter pertain to domains of international law which are undergoing a remarkable process of evolution in time. This is precisely the case of the present dispute concerning the *Pulp Mills*, and of the evolving International Environmental Law in our times, there being, in my view, no apparent reason for the Court not to elaborate on the applicable principles.

51. There have been occasions, in other contexts, as already seen, wherein the ICJ paid due regard to general principles, and pointed this out (cf. *supra*). It is thus all too proper, at this stage, first, to move on to the consideration of the general principles of International Environmental Law that have application in the present case of the *Pulp Mills*, and, secondly, to turn, then, to the acknowledgement by *both* contending Parties, Argentina and Uruguay, of those principles (in particular the principles of prevention and of precaution) throughout the proceedings of the *cas d'espèce*.

VII. General Principles of International Environmental Law

52. General principles of law emanate, in my perception, from human conscience, from the universal juridical conscience, which I regard as the ultimate material "source" of all law. A clear illustration is provided by the gradual acknowledgment, in the last decades, of the principles proper to a domain like that of International Environmental Law (cf. *infra*) — such as those of prevention and of precaution — as consciousness has emerged of the pressing need to secure the protection of the environment, given its vulnerability, the risks surrounding everyone, and the harmful consequences of irreparable damages caused to it. The awakening of such consciousness has accounted for the assertion of those principles. This turns my attention to the scope of application of these latter.

53. I find it necessary to develop these reflections in the present separate opinion, as, in its Judgment in the present case of the *Pulp Mills,* the Court did not elaborate on the general principles of International Environmental Law. I would have surely preferred that the Court had done

so, as, to my perception, this is what was generally expected from it. Had it done so, as I think it should, it would have contributed to the progressive development of international law in the present domain of the international protection of the environment. In fact, the contending Parties themselves had seen it fit to invoke those general principles, in a distinct way, but *both of them* significantly did invoke them, in their respective arguments put before the Court. Before summarizing the approaches of the contending Parties to those principles, may I briefly review them, in particular the preventive and precautionary principles, followed by that of sustainable development, in addition to intergenerational equity.

1. Principle of Prevention

54. With the gradual awakening, during the 1960s, half a century ago, of human conscience to the pressing need to secure the protection of the environment, International Environmental Law — as we know it today — began to take shape. Attention was promptly turned to the identification of the general principles to orient or guide the newly-emerging *corpus juris*. The *célèbres* United Nations Conferences of Stockholm (1972) and of Rio de Janeiro (1992) became milestones in this evolution. At the time of the former, early doctrinal endeavours had already identified the long-term temporal dimension, and the *principle of prevention*, as proper to the discipline.

55. That principle was articulated in relation to damage and in face of scientific certainty as to its occurrence; yet, it was conceded that prevention could be exercised in distinct ways, according to the nature of the source of pollution[60]. Another landmark in these early endeavours was the 1982 United Nations World Charter for Nature (adopted by General Assembly resolution 37/7, of 28 October 1982) — with its great effort in the identification of principles — wherefrom the conception was propounded that

> "mankind is a part of nature, civilization is rooted in nature, every form of life is unique, warranting respect, regardless of its worth to man. (. . .) Since man can alter nature and exhaust natural resources, he must maintain the stability and quality of nature and conserve natural resources. It is accordingly necessary to maintain essential ecological processes and life support systems, and the diversity of life forms. The very survival of the economic, social and political framework of civilization, and ultimately the maintenance of peace,

[60] A.-Ch. Kiss, *Droit international de l'environnement*, Paris, Pedone, 1989, p. 202.

> depend on the conservation of the natural world and its resources."[61] *[Translation by the Registry.]*

56. Although International Environmental Law, guided by principles proper to its own domain, such as that of prevention, has emerged and developed only in the last half-century, the awareness of the need to secure the harmony between man and nature is deep-rooted in human thinking, going back in time centuries ago. Thus, the unfinished dialogue *Critias*, of Plato — who lived approximately between 427-347 BC — written shortly after *Timaeus*[62], contains descriptions of an island (associated with the island of Atlantis) which ranked among the most fertile in the world, before having been devastated by many deluges and having disappeared in the deep sea.

57. One of the four persons in the dialogue, Critias himself, describes the harmony between man and nature, the care peasants and artisans (clearly apart from warriors) had with their rich and beautiful lands (110c-111c, 111d-112d), their rivers and lakes and forests and plains, which provided them the means to survive (food, water, and the quality of the ambiance (114e-115e) before degeneration took place. Critias's description sounds like a warning to the need of sustaining peacefully that natural beauty and the harmony between man and nature, and a warning against the surrounding threats and dangers.

58. For his part, Aristotle (384-322 BC), in his *Politics* (Book I), pondered that the *modus vivendi* of men is intertwined with nature, which provides them a living from the cultivated fruits of the soil (1256a23-1256b9), and which furnishes food to all those who were born (1258a34-36). In sum, already in his times, Aristotle believed that the fate of men and of their surroundings, — of nature itself — were inseparable. Over the centuries, the ineluctable relationship between man and nature did not pass unnoticed; it captured the attention, not of lawyers, but of thinkers, poets and philosophers. As lucidly narrated by the learned historian Jacob Burckhardt,

> "From the time of Homer downwards, the powerful impression made by nature upon man is shown by countless verses and chance expressions. . . . By the year 1200, at the height of the Middle Ages, a genuine, hearty enjoyment of the external world was again in existence, and found lively expression in the minstrelsy of different nations, which gives evidence of the sympathy felt with all the simple phenomena of nature . . . The unmistakable proofs of a deepening effect of nature on the human spirit begin with Dante. Not only does he awaken in us by a few vigorous lines the sense of the morning air

[61] A.-Ch. Kiss, *Droit international de l'environnement, op.cit. supra* note 60, p. 43, and cf. pp. 39 and 60.

[62] The two dialogues, *Timaeus* and the fragmentary *Critias*, belong to the later years of Plato's life.

> and the trembling light on the distant ocean, or of the grandeur of the storm-beaten forest, but he makes the ascent of lofty peaks, with the only possible object of enjoying the view – the first man, perhaps, since the days of antiquity who did so."[63]

59. With the advent of the age of International Environmental Law in the second half of the 20th century (from the 1960s onwards), already by the early 1970s the principle of prevention was acknowledged, so as to avoid environmental harm *in genere*, and to prohibit transfrontier environmental harm in particular; the principle of prevention found expression in Principle 21 of the 1972 Stockholm Declaration, and Principle 2 of the 1992 Rio Declaration, and provided support to the general obligations of information, notification and consultation (as foreseen in Principle 19 of the 1992 Rio Declaration)[64].

60. One decade earlier, the principle of prevention permeated the World Charter for Nature, adopted by the United Nations General Assembly, on 28 October 1982. And half a decade after the Rio Declaration, the 1997 United Nations Convention on the Law of Non-Navigational Uses of International Watercourses, in the same line of thinking, provided that "[w]atercourse States shall, in utilizing an international watercourse in their territories, take all appropriate measures to prevent the causing of significant harm to other watercourse States" (Article 7 (1)). Yet, prevention alone was to prove insufficient for the guidance and development of this domain of international law, turned to environmental protection.

61. As human conscience became gradually aware of the continuing vulnerability of human beings and the environment in face of persisting risks, and of insufficiencies of scientific knowledge to avoid threats and dangers likely to take place, the *precautionary principle* began to flourish, from the late 1980s onwards. It was, however, not to replace prevention, but to add a new dimension to it; as it will be seen later, a series of International Environmental Law instruments were to capture the *rationale* of the principle of prevention and the precautionary principle *together* (cf. *infra*).

2. Precautionary Principle

62. We have before us two key elements which account for this evolution, namely, the awareness of the existence or persistence of *risks*, and the awareness of *scientific uncertainties* surrounding the issue at stake.

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[63] J. Burckhardt, *The Civilization of the Renaissance in Italy*, New York, Barnes & Noble Books, 1992, pp. 178-179.

[64] J. Juste Ruiz, *Derecho Internacional del Medio Ambiente*, Madrid, McGraw-Hill, 1999, pp. 72-73.

These two elements have occupied a central position in the configuration of the *precautionary principle*. In the light of the principle of prevention, one is facing threat or dangers to the environment, whilst in the light of the precautionary principle, one is rather before likely of potential threats and dangers to the environment. In these distinct circumstances, both principles are intended to guide or orient initiatives to avoid harm or probable harm to the environment.

63. Over the years, the precautionary principle has been emerging also in consideration of contentious cases lodged with this Court, in the form of invocations to it by the contending parties in the course of international legal proceedings. Thus, in the (second) *Nuclear Tests* case (underground testing, *New Zealand* v. *France*), the Court was faced (in the proceedings concerning its Order of 22 September 1995) with New Zealand's contention that, under conventional and customary international law, there was an obligation to conduct an environmental impact assessment before carrying out nuclear tests, and an obligation to provide prior evidence that planned nuclear tests

> "will not result in the introduction of such material to [the] environment, in accordance with the 'precautionary principle' very widely accepted in contemporary international law" (*I.C.J. Reports 1995*, p. 290, para. 5).

In any circumstances — New Zealand insisted — the "precautionary principle" required an environmental impact assessment "as a precondition for undertaking the activities, and to demonstrate that there was no risk associated with them" (*ibid.*, p. 298, para. 35).

64. More than two decades earlier, in the (first) *Nuclear Tests* case (atmospheric testing, *Australia* and *New Zealand* v. *France*), in an oral argument before the ICJ, of 24 May 1973, advanced in a language which seemed ahead of its time, counsel for New Zealand began by warning that the intensification of nuclear weapons testing in the 1950s presented "the dangers of radio-active fall-out to the health of present and future generations", accompanied by a growing awareness of the "grave threat" that the continuation of such a situation raised "ultimately to the very survival of mankind"[65]. He then invoked the "danger to mankind" and the need "to minimize the risk to health", the need of protection of "the peoples of the area", mankind's hope to secure its own welfare, the growth of "a regional consciousness" of the surrounding risk and of the health hazards affecting "the whole population" and the "rights of peoples"[66], and added that "an activity that is inherently harmful

[65] *I.C.J. Pleadings, Nuclear Tests (Australia* v. *France)*, Vol. II (1973), p. 103.

[66] *Ibid.*,pp. 104, 106-107 and 110-111.

is not made acceptable even by the most stringent precautionary measures"[67].

65. The use of this language in an argument before the Court, as early as 1973, seems to have passed unnoticed even in contemporary expert writing on the subject. Yet, with foresight, it reveals the importance of the awakening of conscience as to the need to resort to precaution, beyond prevention. Finally, in the same statement, counsel for New Zealand, recalling the (then) recently adopted final document of the Stockholm United Nations Conference on the Human Environment (with emphasis on Principle 21), laid emphasis on the "heightened sense of international responsibility for environmental policies", and asserted the existence of "a moral duty" to the "benefit of all mankind", to be complied with, so as to "meet the requirements of natural justice"[68].

66. In the more recent *Gabčíkovo-Nagymaros Project* case *(Hungary/Slovakia)*, the ICJ took note of Hungary's invocation of the "precautionary principle" (*Judgment, I.C.J. Reports 1997*, p. 62, para. 97), and recognized 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" (*ibid.*, p. 68, para. 113). The ICJ unfortunately refrained from acknowledging the precautionary principle as such, and from elaborating on the legal implications ensuing therefrom.

67. The Court had a unique opportunity to do so, in the present case of the *Pulp Mills*, when *both* contending Parties, Uruguay and Argentina, expressly referred to both the preventive principle and the precautionary principle. Yet, the Court, once again, preferred to guard silence on this relevant point. It escapes my comprehension why the ICJ has so far had so much precaution with the precautionary principle. I regret to find that, since 1973, the Court has not displayed more sensitiveness to the invocation of precaution before it, when it comes to protecting human beings and their environment, even well before the corresponding precautionary principle began to take shape in contemporary International Environmental Law.

68. Yet, this latter has indeed taken shape, in our days, moved above all by human conscience, the universal juridical conscience, which is, in my view — may I reiterate — the ultimate material "source" of all law, and of the new *jus gentium* of our times. Be that as it may, the fact that the Court has not expressly acknowledged the existence of this general principle of International Environmental Law does not mean that it does not exist. There is nowadays an abundant literature on it — which is not

[67] *I.C.J. Pleadings, Nuclear Tests (Australia* v. *France)*, Vol. II (1973), p. 108.

[68] *Ibid.*, pp. 113-114.

my intention to review in this separate opinion — but, irrespective of that, one can hardly escape acknowledging the relevance of the consideration of at least its constitutive elements, as I proceed to do now.

(a) *Risks*

69. The last decades have indeed witnessed a growing awareness of the vulnerability of human beings and of the environment, requiring care and due diligence in face of surrounding risks, incurred by man himself. That vulnerability has led to the acknowledgement of the need to take initiatives and decisions, even without a thorough knowledge of the relevant factors in a given situation, so as to protect human life and the environment. Prevention envisaged risks, but assumed they were certain. Precaution thus emerged, as an ineluctable principle, to face also uncertain risks, given the uncertainties of life itself, and the intuition of surrounding death.

70. This development had to do not only with the inescapable limitations of human knowledge, but also, beyond that, with human fallibility, and — one has to admit it — with human wickedness. Looking back in anger[69], we realize how the recent advances in specialized scientific knowledge have led not only to remarkable achievements, but also to devastating catastrophes, to the detriment of humankind and the environment, as illustrated by the arms race, for example. The twentieth century has witnessed an unprecedented growth in scientific knowledge and technology, accompanied tragically by an also unprecedented display of cruelty and destruction.

71. For the first time in human history, human beings became aware that they had acquired the capability to destroy the whole of humankind. In so far as the environment is concerned, the emergence of the precautionary principle brought about the requirement to undertake complete environmental impact assessments, and the obligations of notification and of sharing information with the local population (and, in extreme cases, even with the international community). Moreover, the reckoned need of consideration of alternative courses of action, in face of probable threats or dangers, also contributes to give expression to the precautionary principle, amidst the recognition of the limitations in scientific knowledge on ecosystems.

72. While the principle of prevention *(supra)* assumed that risks could be objectively assessed so as to avoid damage, the precautionary principle

[69] To paraphrase the title of the renowned theatrical play by the dramatist John Osborne.

arose, to face with anticipation, probable threats, surrounded by uncertainties; risks were to be reasonably assessed. In addition, the precautionary principle went beyond the logic — or lack of it — of the *homo oeconomicus* (of attributing an economic value to everything), as environmental goods are not mere commodities, and risks cannot be assessed by means of cost-benefit techniques only[70].

73. In considering the element of probable *risk*, proper to the precautionary principle, I have so far detected two related aspects, namely, the growing awareness of the vulnerability of human beings and the environment, and the recognition of the need to take precautionary action, prompted by the probability of irreversible environmental harm. The growth of scientific knowledge came to be appreciated with the awareness of human fallibility. Such aspects were kept in mind in the formulation of the precautionary principle, as asserted in the landmark 1992 Rio de Janeiro Declaration on Environment and Development (Principle 15), in face of the probability of harm. The States' duty to counter environmental hazards was at last reckoned.

(b) *Scientific uncertainties*

74. The element of *risks* has been ineluctably linked to the other element of *scientific uncertainties*. In order to approach this latter, in my view four other aspects are to be considered, in addition to that of the aforementioned knowledge and awareness of human fallibility, namely: *(a)* the formation and growth of scientific knowledge; *(b)* the emergence of specialized knowledge; *(c)* the persisting *décalage* between knowledge and wisdom; and *(d)* the humane ends of knowledge. I shall go briefly through them, to the extent they may fulfil the purpose of the present separate opinion.

75. It may, first of all, be asked, why has it taken so long for precaution to find its place and be articulated amidst the growth of human knowledge over centuries? After all, around 24 centuries ago it had been reckoned that human knowledge was far too limited (unsurprisingly), and even more scarce was, and is, human wisdom. This latter, in fact, looked alien to humans, as conceded in the *Apology of Socrates* (399 BC):

> "I know that I have no wisdom, small or great. . . . Accordingly, I went to one who had the reputation of wisdom . . .; he was a politi-

[70] N. de Sadeleer, *Environmental Principles: From Political Slogans to Legal Rules*, Oxford University Press, 2002, pp. 91, 127, 164 and 170.

> cian whom I selected for examination – and the result was as follows: When I began to talk to him, I could not help thinking that he was not really wise, although he was thought wise by many, and still wiser by himself; and thereupon I tried to explain to him that he thought himself wise, but was not really wise; and the consequence was that he hated me, and his enmity was shared by several who were present and heard me.
>
> . . . . . .
>
> After the politicians, I went to the poets; . . . I knew that not by wisdom do poets write poetry, but by a sort of genius and inspiration; . . . upon the strength of their poetry they believed themselves to be the wisest of men in other things in which they were not wise.
>
> . . . . . .
>
> At last I went to the artisans. . . . They did know many things of which I was ignorant, and in this they certainly were wiser than I was. But I observed that even the good artisans fell into the same error as the poets; because they were good workmen they thought that they also knew all sorts of high matters, and this defect in them overshadowed their wisdom.
>
> . . . . . .
>
> This inquisition has led to my having many enemies of the worst and most dangerous kind . . . The truth is, O men of Athens, is the wisest, who, like Socrates, knows that his wisdom is in truth worth nothing."[71]

76. One is led to imagine that, if experts existed in those times, the times of Socrates, they would most probably have also been consulted, and their views would most likely not have changed Socrates's conclusion at all. The wise message of the *Apology of Socrates* lies in the warning as to the need to have conscience of one's own limits. This humanist outlook was captured centuries later, in the writings published in the sixteenth century by humanists like Erasmus (1465-1536), Rabelais (*circa* 1488-1553) and Montaigne (1533-1592), among others.

77. In the seventeenth century, modern science (as it became known) had already emerged: the new age of reason was marked by the rise of physical sciences, *pari passu* with the decline of the medieval conception of knowledge. Later on, in the eighteenth century — the age of enlightenment *(pensée illuministe)* — in the same line of concern as that of Socrates, Voltaire (1694-1778) warned, in his *Dictionnaire philosophique* (1764), as to the uncertainties surrounding human beings (despite scientific advances) and the limits of the human mind *(l'esprit humain)*[72].

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[71] Plato, *Apology of Socrates* [399 BC], 21b-d; 22a-c; 22d; 23a-b.

[72] Entries on "certitude, certainty" and on "limits of the human mind", respectively, of his *Dictionnaire philosophique*.

78. With the gradual advent of the age of technology and the industrial revolution, science was largely equated with a techno-science; associated with pure technique and the illusion of unlimited material progress or economic growth. This proved disastrous for man and his environment, as recognized only much later, in the second half of the twentieth century. But still at the end of the eighteenth century, when Condorcet, another humanist, professed, in his inspired and moving *Esquisse d'un tableau historique des progrès de l'esprit humain* (1793), his faith in progress (and in the *droits de l'humanité*), he had in mind progress not strictly limited to the accumulation of knowledge, but also encompassing the moral improvement of man, that is, progress duly attentive to ethics and values.

79. Regrettably, his philosophy of progress was taken up by thinkers of the nineteenth century who, under the new influence of positivism and "modernity", reduced it to material progress or economic growth, moved by a techno-system[73]. This reductionist outlook of progress generated problems which seemed soluble only with more progress[74]. In this vertiginous spiral, stimulated by the new conception of material progress, man lost sight of ethical values, and acquired, for the first time in human history, the capacity to destroy the whole of humankind (as attested by today's arsenals of weapons of mass destruction). Man and his environment became victims of the putting into practice of this deplorable and distorted vision of material progress, devoid of values. By losing sight of the demands of reason and ethics, man became a serious threat to himself and his environment.

80. The formation and growth of scientific knowledge generated at first a generalized belief in science, which was to be reckoned, in recent decades, as an illusion. It did not last long enough. Successive man-made disasters began to dissipate the old belief in scientific knowledge and in its assumed capacity even to predict and to avoid likely threats and dangers to human beings and the environment; that old belief gradually yielded to *uncertainties*, to a recognition of the limitations of scientific knowledge to predict, with some degree of accuracy, those threats and dangers, and to avoid them. Scientific uncertainties gave a strong impetus to the emergence of the precautionary principle.

81. This new awareness, however, faced many obstacles before it at last emerged in our times. During the nineteenth and twentieth centuries

[73] G. H. von Wright, *Le mythe du progrès*, Paris, L'Arche éd., 2000, pp. 10-12, 34-37, 42, 61 and 64-65.

[74] R. Wright, *Breve História do Progresso*, Lisbon, Dom Quixote, 2006, pp. 19-21, 35 and 75, and cf. pp. 90 and 104.

(from the times of Auguste Comte onwards), positivism — with its characteristic self-sufficiency — kept on maintaining that the only valid propositions were the ones which were scientifically verifiable; it kept on upholding all knowledge empirically obtained from the method of observation, believing it capable of solving problems indefinitely. Yet, problems it thought were solved, proved not to have been. But the myth of unending progress had already been diffused.

82. The relentless belief in scientific knowledge, professed by positivism, as being capable of solving all problems, had become almost an ideology. Gradually, in all branches of knowledge and everywhere, so-called "experts" began to appear, knowing more and more about less and less. And the general belief flourished that the cultivation of specialized knowledge was the most adequate path to human safety and even happiness. Only in our times — the times of the growth of International Environmental Law — after so much destruction occurred in the twentieth century — including man-made destruction — the pressing need has been acknowledged of controlling the uses of scientific knowledge, and of thinking and acting with moderation and care.

83. In so far as the environment was concerned, such awareness has led to the formulation of the principles of prevention — to avoid environmental damage — and of precaution, to take action so as to foresee probable and even long-term harmful consequences to the environment, amidst scientific uncertainties. Given the recurring prevalence of these latter, the epistemology of the precautionary principle is geared to the duty of care, of due diligence. Unlike the positivist belief that science can reduce uncertainties by carrying on further scientific research, its presumption is invariably in support of the conservation of the environment and the protection of public health [75], identified with the common good.

84. However, the assertion and acknowledgement of those principles are not the end of the saga. Have human beings really learned all they could from the errors and sufferings of preceding generations? I have my doubts. They have apparently not learned as much as they could. Twenty-four centuries after the *Apology of Socrates*, the *décalage* between knowledge and wisdom remains as vivid as ever. And surrounding threats and dangers have become more formidable than ever, given the incapacity of man to generate knowledge and to utilize it *with wisdom*. The accumulation of knowledge, and mainly of specialized knowledge, has lately taken

[75] N. de Sadeleer, *Environmental Principles: From Political Slogans to Legal Rules*, *op. cit. supra* note 70, pp. 178, 203, 207 and 212.

place again, in a recurrent way, tragically losing sight of the humane ends of knowledge. From time to time warnings have been expressed as to this dangerous state of affairs, but they seem to have soon been forgotten.

85. Thus, to recall but one example, only half a century ago, in 1960, the learned twentieth-century humanist, Bertrand Russell, pondered:

> "There are several factors that contribute to wisdom. Of these I should put first a sense of proportion: the capacity to take account of all the important factors in a problem and to attach to each its due weight. This has become more difficult than it used to be owing to the extent and complexity of the specialized knowledge required of various kinds of technicians. (. . .) You study the composition of the atom from a disinterested desire for knowledge, and incidentally place in the hands of powerful lunatics the means of destroying the human race. In such ways the pursuit of knowledge may become harmful unless it is combined with wisdom; and wisdom in the sense of comprehensive vision is not necessarily present in specialists in the pursuit of knowledge.
>
> Comprehensiveness alone, however, is not enough to constitute wisdom. There must be, also, a certain awareness of the ends of human life. (. . .) The disastrous results of hatred and narrow-mindedness to those who feel them can be pointed out incidentally in the course of giving knowledge. I do not think that knowledge and morals ought to be too much separated. It is true that the kind of specialized knowledge which is required for various kinds of skill has little to do with wisdom. . . . Even the best technicians should also be good citizens; . . . I mean citizens of the world and not of this or that sect or nation. With every increase of knowledge and skill, wisdom becomes more necessary, for every such increase augments our capacity for realizing our purposes, and therefore augments our capacity for evil, if our purposes are unwise. The world needs wisdom as it has never needed it before; and if knowledge continues to increase, the world will need wisdom in the future even more than it does now."[76]

86. In the same epoch of this ponderation, another learned thinker of the twentieth century, Karl Popper, also grasping the message of the *Apology of Socrates*, and dwelling upon the growth of scientific knowledge, contended, in his *Conjectures and Refutations*, that scientific knowledge advances by means of anticipations or conjectures, which are controlled by the critical spirit, that is, by refutations; therefrom we can

[76] Bertrand Russell, "Knowledge and Wisdom", *Essays in Philosophy* (H. Peterson, ed.), N.Y., Pocket Library, 1960 [reprint], pp. 499 and 502.

learn from our own mistakes[77]. To him, all sources of knowledge — including the method of observation, the empirical solutions, which positivists continue to defend — are susceptible of sometimes leading us into errors; there are ultimately no sure sources, and the progress of knowledge is essentially a transformation of previous knowledge, and the relevance of discoveries lies generally in "their capacity to modify our own previous theories", with human knowledge remaining only limited (and ignorance unlimited)[78].

87. Not even accumulated knowledge can be entirely mastered by human beings. Technological progress, leading, for example, to environmental degradation, or being used in modern warfare, has raised serious doubts as to whether scientific knowledge alone can really satisfy all human needs, and has led to the crisis of spiritual values we live in today[79]. Be that as it may, the development of scientific specialized knowledge has by no means amounted to growth of human wisdom.

88. Behind the uses of knowledge stands another element, namely, State policies, together with all sorts of interests: economic, industrial, technocratic, not excluding competition, with all its consequences. Are pulp mills built nowadays by European industrial enterprises in the southern cone of South America, and their technology, an exception to that? I have my doubts. Such industrial and other interests — material interests — rather than being moved by a scientific mind, are those of *homo oeconomicus*, they rather often utilize all powers and influence they can gather, in order to obtain whatever science can provide them[80], for their own purposes (including profits). Pragmatism and utilitarianism, generating risks, should thus not be forgotten or overlooked here.

89. It is not at all surprising that, as a result of all that, scientific advances have been surrounded by uncertainties and complexities, also due to the limitations of the human mind and its manifest lack of wisdom. This is the brave new world[81] wherein we live today. Precaution is, more than ever, necessary, in face not only of human fallibility, but also

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[77] K. R. Popper, *Conjecturas e Refutações — O Progresso do Conhecimento Científico*, 5th ed., Brasília, Edit. University of Brasília, 2008, pp. 31-449.

[78] K. R. Popper, *Des sources de la connaissance et de l'ignorance*, Paris, éd. Payot & Rivages, 1998 (reed.), pp. 112-113, 133-135, 143, 146 and 149-152.

[79] G. H. von Wright, *Le mythe du progrès*, *op. cit. supra* note 73, pp. 65-66, 73, 76 and 83, and cf. pp. 95 and 98.

[80] E. Morin, *Science avec conscience*, 2nd ed., Paris, Fayard/Seuil, 2003, pp. 8-11, 17, 19, 23, 35 and 38.

[81] To paraphrase a well-known allegory of another lucid thinker of the twentieth century.

of human wickedness. Given the vulnerability of human kind, the risks surrounding everyone, the insufficiencies of scientific knowledge — surrounded by uncertainties — and the unpredictability and likely irreversibility of probable environmental harms, we cannot prescind from the precautionary principle. This latter has already been forcefully asserted in certain areas of International Environmental Law (such as in atmospheric and marine pollution issues), and it permeates this whole domain of contemporary international law. It has had an impact on legal philosophy at large, taking necessarily into account ethical values.

90. The precautionary principle, furthermore, discloses, in my perception, the ineluctable inter-temporal dimension, which has been somewhat overlooked by the ICJ in the present Judgment. This dimension is necessarily a long-term one, since the decisions taken by public authorities of today may have an impact on the living conditions of not only present, but also future generations. It is a particularly compelling fact of inter-generational ethics that at least part of the abundant literature on environmental law issues nowadays recognizes or concedes to being situated in the realm of natural law thinking[82]. In my own understanding, it is not possible to conceive the legal order making abstraction of the moral order, just as it is not possible to conceive the advancement of science making abstraction of the ethical order either.

91. Among the great legacies of the thinking of the ancient Greeks is the acknowledgement of the *chiaroscuro* of human existence, as in the continuous succession of nights and days. With the considerable advancement of specialized knowledge in modern times, that *chiaroscuro* discloses a new dimension in our times, unknown to the ancient Greeks. Specialized knowledge has shed light on specific points (to the benefit of human beings), in all areas of human knowledge, unknown or insufficiently known before.

92. But it so happens that this focused light is surrounded by dark shadows, as to the impact of the new discoveries upon other areas of human activity, and as to the uses which will be made of those discoveries, which will, in turn, affect directly our *modus vivendi* and even our cultural identity, our relationship with the outside world. This

[82] Cf., *inter alia*, e.g., J. M. MacDonald, "Appreciating the Precautionary Principle as an Ethical Evolution in Ocean Management", 26 *Ocean Development and International Law* (1995), pp. 256-259 and 278; (T. O'Riordan and J. Cameron, eds.) "The History and Contemporary Significance of the Precautionary Principle", *Interpreting the Precautionary Principle*, London, Earthscan Publs., 1994, pp. 18 and 22; Nagendra Singh, "Sustainable Development as a Principle of International Law", *International Law and Development* (P. de Waart, P. Peters and E. Denters, eds.), Dordrecht, Nijhoff, 1988, pp. 1 and 4.

appears to me as a new, contemporary dimension, of the *chiaroscuro* of human existence, which clearly conveys the warning that technical and economic progress alone, devoid of ethics, may throw us into greater darkness.

3. The Principles of Prevention and of Precaution Together

93. In the domain of environmental protection, just as there are international instruments, as we have seen, that give expression to the principle of prevention[83] *(supra)*, there are also those which lean towards the precautionary principle, like, e.g., the 1985 Vienna Convention for the Protection of the Ozone Layer (preamble and Article 2 (1), and the 1997 Montreal Protocol on Substances that Deplete the Ozone Layer (preamble), among others. Yet, the aforementioned 1985 Vienna Convention for the Protection of the Ozone Layer determines also prevention, besides precaution (Article 2 (2) *(b)*). References to both principles, together, are also found, at regional level, e.g., in the 1991 OAU Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movement and Management of Hazardous Wastes within Africa (Article 4 (3) *(f)*), in the 1992 Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention, Article 2 (2) *(a)*), and in the 1992 Convention on the Protection of the Marine Environment of the Baltic Sea Area (Article 3 (1) and (2)).

94. In fact, some of the environmental law Conventions referred to in the file of the present case of the *Pulp Mills* give expression to both the principle of prevention and the precautionary principle. It is the case, e.g., of the 1992 Convention on Biological Diversity, which reflects the principle of prevention (preamble and Article 3) as well as the precautionary principle (preamble), and of its 2000 Cartagena Protocol on Biosafety (preamble and Articles 2 and 4). It is also the case of the 2001 Convention on Persistent Organic Pollutants (POPs Convention), which invokes both prevention (preamble) and precaution (preamble and Article 1).

95. Other examples, to the same effect, are afforded by the 1992 United Nations Framework Convention on Climate Change (preamble and Article 3 (3)), and the 1997 Kyoto Protocol to the United Nations Framework Convention on Climate Change (preamble). These are just a

[83] The aforementioned United Nations Convention on the Law of Non-Navigational Uses of International Watercourses, providing for prevention, was the object of an exchange of views between the contending Parties in the present case of the *Pulp Mills*; cf. Counter-Memorial of Uruguay, para. 4.67, followed by the Reply of Argentina, paras. 4.43-4.45, and the Rejoinder of Uruguay, para. 5.53.

few illustrations, not intended, of course, to be exhaustive. They display, however, the intended linkage between preventive and precautionary measures, so as to enhance environmental protection. The two principles, far from excluding each other, serve their purposes together. The phraseology whereby they are given expression is not uniform, but the *rationale* of one and the other is clearly identifiable.

96. May I only add that the precautionary principle, in my view, is not to be equated with over-regulation, but more properly with *reasonable* assessment in face of probable risks and scientific uncertainties *(supra)*. This may take the form of carrying out complete environmental impact assessments, and of undertaking further studies on the environmental issues at stake, as well as careful environmental risk analysis, before the issuance of authorizations. At the end, it has to do with common sense, seemingly the least common of all senses. This also brings to the fore the *objective* character of environmental obligations, which I shall consider later on (cf. *infra*).

VIII. The Acknowledgement by the Contending Parties of the Principles of Prevention and of Precaution

97. In effect, as already pointed out in the present case of the *Pulp Mills (Argentina* v. *Uruguay)*, *both* the complainant and the respondent States invoked the aforementioned general principles of International Environmental Law. This is hardly surprising (being in the best tradition of international legal thinking in Latin America), and it promptly brings to the fore — for the consideration of the obligations under the 1975 Statute of the River Uruguay — the general rule of treaty interpretation, set forth in Article 31 the 1969 Vienna Convention on the Law of Treaties. The constitutive elements of that general rule, enunciated in Article 31 (1) — namely, the text (ordinary meaning of the terms), the context, and the object and purpose of the treaty — are those which currently more often appear in the interpretation of treaties[84]; such elements are set forth jointly in the same formulation, thus pointing out the unity of the process of treaty interpretation.

98. Article 31 (2) of the 1969 Vienna Convention indicates the elements comprised by the context of a treaty, while Article 31 (3) adds

[84] Cf., for some of the works following the aforementioned 1969 Vienna Convention, *inter alia*, W. Lang, "Les règles d'interprétation codifiées par la Convention de Vienne sur le droit des traités et les divers types de traités", 24 *Osterreichische Zeitschrift für öffentliches Recht* (1973), pp. 113-173; Maarten Bos, "Theory and Practice of Treaty Interpretation", 27 *Netherlands International Law Review* (1980), pp. 3-38 and 135-170; C. H. Schreuer, "The Interpretation of Treaties by International Courts", 45 *British Year Book of International Law* (1971), pp. 255-301.

further elements to be taken into account, *together with the context*; amongst such additional elements, Article 31 (3) refers to "any relevant rules of international law applicable in the relations between the parties". In the present case, if any such rules are found in other (multilateral) treaties ratified or adhered to by the two Parties at issue, they can be accounted as an *element of interpretation*, for the purposes of application of the 1975 Statute of the River Uruguay[85].

99. Yet, treaties are living instruments, and the development of international law itself may have effect upon the application of the treaty at issue; such a treaty ought then to be considered in the light of international law at the moment its interpretation is called for[86]. General principles of law are thus to be taken into account, and it is significant that the contending Parties in the present case, pertaining to International Environmental Law, do not have any basic disagreement on this particular point, even if their perception or interpretation of one particular principle may not coincide. It is further significant, in this respect, that both Argentina and Uruguay refer, for example, to the principles of prevention and of precaution, as well as to the concept of sustainable development (which permeates the whole of environmental protection), though their reading of such principles and concept by the two Parties in the context of the present case is not the same.

1. Principle of Prevention

100. As to the *principle of prevention*, both Parties referred to its *formulation*, embodied in Principle 21 of the 1972 Stockholm Declaration on the Human Environment, i.e., the principle of prevention as pertaining to the responsibility incumbent upon States to ensure that activities performed within their jurisdiction or control do not cause damage to the environment of other States (also Principle 2 of the Rio Declaration on Environment and Development) or of areas beyond the limits of national jurisdiction[87]. Moreover, as to its *legal status*, both Parties agreed on the customary nature of the principle of prevention[88]; they diverged, however, as to the scope of the principle in the present case.

101. In its Memorial, Argentina identified the principle of prevention as part of the law applicable to the present dispute under the 1975 Statute

[85] Article 60 of which provides the basis of jurisdiction for the ICJ.

[86] M. K. Yasseen, "L'interprétation des traités d'après la convention de Vienne sur le droit des traités", 151 *Recueil des cours de l'Académie de droit international de La Haye (RCADI)* (1976), p. 62, and cf. p. 59.

[87] Cf., e.g., Memorial of Argentina, para. 3.189, and Rejoinder of Uruguay, para. 5.52.

[88] Cf. *ibid.*, paras. 3.189 and 5.52, respectively.

(para. 3.188). Uruguay, for its part, claimed, in its Counter-Memorial, that the principle of prevention under international law — and as embodied in the 1975 Statute — imposes in its view an obligation of conduct (due diligence) rather than an obligation of result (requiring full avoidance of pollution) (paras. 4.68-4.69); it added that prevention, *in casu*, ought to be assessed by reference to Article 7 (1) of the United Nations Convention on International Watercourses, which provides that States shall "take all appropriate measures to prevent the causing of significant harm to other watercourse States" (para. 4.67).

102. In its Reply, Argentina dismissed Uruguay's narrower interpretation of Article 41 of the Statute and claimed that "[t]he obligation to prevent significant damage to the other party, to the quality of the waters and to the ecosystem of the River Uruguay and the areas affected by it has its own particular features", to be assessed in light of the "regime for overall protection" established by the 1975 Statute (para. 4.45). Uruguay, in turn, in its Rejoinder, retorted that "it is not plausible to suggest that anything more can be read into the Statute than was subsequently codified by the ILC in the Watercourses Convention", as the object and purpose of Articles 36, 41, 42 and 56 *(a)* (4) of the 1975 Statute was "to give effect to the obligation [of due diligence] to prevent transboundary damage in the Uruguay River" (para. 5.53). In sum, Argentina gave a broader interpretation to the principle of prevention, though both Argentina and Uruguay significantly relied upon such principle, recognizing its relevance in the *cas d'espèce.*

2. Precautionary Principle

103. Moving on to the *precautionary principle*, once again both contending Parties referred to this principle as well, and based their distinct arguments in this respect, to start with, on its *formulation* as embodied in the 1992 Rio Declaration on Environment and Development (Principle 15), namely:

> "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."[89]

In its Memorial, Argentina argued that "the 1975 Statute must be interpreted and applied in the light of the precautionary principle as a rule of international law" (para. 5.13). Furthermore, counsel for Argentina

[89] Cf., e.g., Memorial of Argentina, para. 3.195; and Counter-Memorial of Uruguay, para. 4.80.

expressed the hope that the Court would in the present case "declare Principle 15 to reflect customary law"[90].

104. To Uruguay, in turn, the precautionary principle is "a 'soft law' principle", which ought to be taken into account when interpreting treaties in accordance with Article 31 (3) *(c)* of the Vienna Convention on the Law of Treaties. Even so — Uruguay added — that principle "does not appear to meet the requirements of customary international law", and international case law has not yet treated it as "an obligatory rule of customary law"[91]. In any case, in its view, Argentina "failed to identify any significant risk" in respect of which measures were to be taken pursuant to the precautionary principle[92].

105. As to the *applicability* of the principle, Argentina, on its part, submitted in its Memorial that the precautionary principle should guide the interpretation of the 1975 Statute (para. 5.13). The principle would be applicable in the *cas d'espèce* as a result of the remaining areas of "scientific uncertainty" (as to the environmental impact of the Botnia plant) and the corresponding "risk" of serious or irreversible damage. Areas of scientific uncertainty would include "the implications of reverse flow for the concentration of pollutants, wind direction, climate change and the likely impact of the presence of pollutants on the fish in the river" (paras. 5.17-5.18).

106. Uruguay, in turn, reckoned, in its Rejoinder, that the principle at issue played a role in the interpretation of certain environmental law treaties (para. 5.66), but argued that it was not relevant in the context of the present dispute, first, because there was no scientific uncertainty in the operation of pulp mills, and also, because risks associated with their operation "are monitored comprehensively and can be empirically tested" so that any uncertainties be removed or dealt with (para. 5.58). Argentina, for its part, recalled, in its Memorial, that, pursuant to Principle 15 of the 1992 Rio Declaration *(supra)*, "[t]he precautionary principle is applicable to the protection of the environment once there exists a 'risk of serious or irreversible harm'" (para. 5.14). Uruguay retorted, in its Counter-Memorial, that there was in its view no reason to believe that the pulp mills might cause "serious or irreversible harm" to the environment, and, in particular, to the water quality of the River Uruguay (para. 4.81).

107. Last but not least, as to the *content* of the precautionary principle, Argentina sustained in its Memorial that, within the framework of the 1975 Statute, such principle means that "the parties to the 1975 Stat-

[90] CR 2009/14, p. 58, para. 8.
[91] Rejoinder of Uruguay, para. 5.66.
[92] *Ibid*., para. 5.67.

ute are required to notify each other of all the probable environmental consequences of their actions which may cause serious or irreversible damage *before* such actions are authorized or undertaken" (para. 5.14). Precaution would thus require the parties to the 1975 Statute "to comply with their obligations of notification and consultation before authorizing the construction" of pulp mills (para. 5.14) and — it added in its Reply — to take account of "the risks of harm in the design, preparation and implementation of any project or 'form of use' relating to the River Uruguay and the areas affected by it" (para. 4.54). Argentina, thus, did not agree with Uruguay's view that the principle at issue would only apply in case of risks of "serious or irreversible harm" (cf. *supra*).

108. Argentina's claim on the basis of the precautionary principle was thus twofold: *(a)* it was first linked to its general allegation that Uruguay violated the procedural obligations laid down in the 1975 Statute, especially by commencing construction and operation of the mill before having informed Argentina of all the "*probable* environmental consequences" of actions which might cause environmental harm[93]; and *(b)* the precautionary principle, in its view, required Uruguay not to authorize the construction and operation of the mill before having conducted comprehensive studies on the river's capacity to dispel pollutants[94].

109. In the oral proceedings, counsel for Argentina invited the ICJ to apply the principle, in view of

> "the fact that Uruguay, faced with Argentina's claims in 2004 and 2005 and 2006, as to the limited capacity of the river to cope with the intended new pollutants, should have postponed its authorization until it had a good basis for concluding that the river could effectively disperse of these pollutants",

bearing in mind that, in the present case, what precaution meant was "further studies, complete assessments", rather than "acting on the basis of unfounded assumptions about the flow of the river"[95]. In addition, counsel for Argentina argued that the risks posed by the Botnia mill ha[d] not been controlled"[96].

110. Uruguay, in its turn, submitted, in its Counter-Memorial, that it would have complied with the precautionary principle "if it were applicable" to the present dispute. The principle at issue, in the terms of the 1992 Rio Declaration, requires States "not to use scientific uncertainty to postpone 'cost-effective measures to prevent environmental degradation'" (para. 4.82); that much Uruguay would have accomplished. Yet — Uru-

[93] Reply of Argentina, paras. 4.55-4.56.
[94] Memorial of Argentina, para. 7.128.
[95] CR 2009/14, p. 58, para. 8; and cf. also Memorial of Argentina, para. 7.128.
[96] CR 2009/12, p. 71, para. 29.

guay added — Argentina misinterpreted the precautionary principle by suggesting that it required "measures that address risks that are remote, unlikely to result in significant harm, or purely hypothetical" (para. 4.83). Such an interpretation would, in its view, be contradicted by "the very reference to 'cost-effective measures' in Principle 15" of the Rio Declaration. Moreover, in Uruguay's view, States only have a responsibility to act on the basis of the precautionary principle when there is "some objective scientific basis for predicting the likelihood of significant harmful effects, some 'reason to believe' or 'reasonable grounds for concern'" (para. 4.83); Argentina seemed — to Uruguay — not to have presented any "significant or credible evidence" in this respect, nothing that would amount to "serious or irreversible damage" [97].

111. Uruguay further added, in its Rejoinder, that Argentina misconstrued "the role of the precautionary principle in relation to uncertainty and risk", in having suggested that "the more unlikely a risk the more uncertain it becomes and thus the greater the role for the precautionary principle" (para. 5.61); the principle at issue, in Uruguay's view, can only find application when there is some evidence that the risk exists (para. 5.61). In sum, according to Uruguay, "[t]he real issue is not whether environmental risk has been eliminated, but whether it has been properly managed and minimized to the fullest extent possible using cost-effective measures" (para. 5.62); having provided evidence that it had taken

> "all the measures that are reasonable and necessary to counter the Botnia plant's actual potential — however small — for serious adverse effects on the river in the real world, then there remains no basis for suggesting that the precautionary principle has any further role to play" (para. 5.61).

112. From the exchange of views above, between Argentina and Uruguay, it so results that there does not emerge therefrom a clear distinction between a general principle and customary law, as formal "sources" of the applicable law in the *cas d'espèce*. Yet, it appears significant to me that Uruguay, even though arguing that constitutive elements of the principle at issue were not in its view consubstantiated in the present case, never questioned or denied the existence or material content of the principle concerned. In sum, the *existence* itself of the *principles* of prevention and of precaution, general principles of law proper to International Environmental Law, was admitted and acknowledged by the contending Parties themselves, Uruguay and Argentina.

113. Only the ICJ did not acknowledge, nor affirmed, the existence of

[97] Rejoinder of Uruguay, para. 5.59.

those principles, nor elaborated on them, thus missing a unique occasion for their consolidation in the present domain of contemporary international law. The fact that the Court's Judgment silenced on them does not mean that the principles of prevention and of precaution do not exist. They do exist and apply, and are, in my view, of the utmost importance as part of the *jus necessarium.* We can hardly speak of International Environmental Law nowadays without those general principles. The Court had a unique occasion, in the circumstances of the case of the *Pulp Mills*, to assert the applicability of the preventive as well as the precautionary principles; it unfortunately preferred not to do so, for reasons which go beyond, and escape, my comprehension.

IX. The Long-term Temporal Dimension: Inter-generational Equity

114. May I move on to inter-generational equity. The long-term temporal dimension marks its presence, in a notorious way, in the domain of environmental protection. The concern for the prevalence of the element of *conservation* (over the simple exploitation of natural resources) reflects a cultural manifestation of the integration of the human being with nature and the world wherein he or she lives. Such understanding is, in my view, projected both in space and in time, as human beings relate themselves, in space, with the natural system of which they form part (and ought to treat with diligence and care), and, in time, with other generations (past and future)[98], in respect of which they have obligations.

115. The temporal dimension, so noticeable in the field of environmental protection, is likewise present in other domains of international law (e.g., Law of Treaties, Peaceful Settlement of International Disputes, International Economic Law, Law of the Sea, Law of Outer Space, State Succession, among others). The notion of time, the element of foreseeability, inhere in legal science as such. The predominantly *preventive* (and *precautionary*) character of the normative *corpus* on environmental pro-

[98] Future generations promptly began to attract the attention of the contemporary doctrine of international law: cf., e.g., A.-Ch. Kiss, "La notion de patrimoine commun de l'humanité", 175 *Recueil des cours de l'Académie de droit international de La Haye (RCADI)* (1982), pp. 109-253; E. Brown Weiss, *In Fairness to Future Generations: International Law, Common Patrimony and Intergenerational Equity*, Tokyo/Dobbs Ferry N.Y., United Nations University/Transnational Publs., 1989, pp. 1-351; A.-Ch. Kiss, "The Rights and Interests of Future Generations and the Precautionary Principle", *The Precautionary Principle and International Law — The Challenge of Implementation* (D. Freestone and E. Hey, eds.), The Hague, Kluwer, 1996, pp. 19-28; [Various Authors], *Future Generations and International Law* (E. Agius and S. Busuttil *et al.*, eds.), London, Earthscan, 1998, pp. 3-197; [Various Authors], *Human Rights: New Dimensions and Challenges* (J. Symonides, ed.), Paris/Aldershot, UNESCO/Dartmouth, 1998, pp. 1-153; [Various Authors], *Handbook of Intergenerational Justice* (J. C. Tremmel, ed.), Cheltenham, E. Elgar Publ., 2006, pp. 23-332.

tection, stressed time and time again, is also present in the field of human rights protection.

116. Its incidence can be detected at distinct stages or levels, starting with the *travaux préparatoires*, the underlying conceptions and the adopted texts of some human rights instruments[99]. The incidence of the temporal dimension can also be detected in the "evolutionary" *interpretation* of human rights treaties (which has ensured that they remain living instruments), as well as in their *application* (as exemplified by international case law, under certain human rights treaties, bringing to the fore the notion of *potential* or *prospective* victims, i.e., victims claiming a valid potential personal interest thereunder, thus enhancing the condition of individual applicants).

117. In fact, the incidence of the temporal dimension can be detected not only in the interpretation and application of norms of protection of the human person but also in the conditions of the *exercise* of guaranteed rights (as in, e.g., public emergencies); and it can be detected in the safeguard of all rights, including the right to development and the right to a healthy environment — extending in time. Here, the evolving jurisprudence (e.g., on the aforementioned notion of potential victims, or else on the duty of prevention of violations of human rights or of environmental harm) may serve as inspiration for the progressive development of international law in distinct domains of protection (of the human person as well as of the environment).

118. In fact, concern with future generations underlies some environmental law conventions[100]. In addition, in the same line of reasoning, the 1997 UNESCO Declaration on the Responsibilities of the Present Generations Towards Future Generations, after invoking, *inter alia*, the 1948 Universal Declaration of Human Rights and the two 1966 United Nations

[99] E.g., the three Conventions — the Inter-American, the United Nations and the European — against Torture, of an essentially preventive character: the 1948 Convention against Genocide, the 1973 Convention against Apartheid, besides international instruments turned to the prevention of discrimination of distinct kinds. The temporal dimension is further present in international refugee law (e.g., the elements for the very definition of "refugee" under the 1951 Convention and the 1967 Protocol on the Status of Refugees, namely, the well-founded fear of persecution, the threats or risks of persecutions as well as the United Nations "early warning" efforts of prevention or forecasting of refugee flows).

[100] E.g., the 1992 United Nations Framework Convention on Climate Change, the 1997 Kyoto Protocol to the United Nations Framework Convention on Climate Change, the 1985 Vienna Convention for the Protection of the Ozone Layer, the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer, among others.

Covenants on Human Rights, recalls the responsibilities of present generations to ensure that "the needs and interests of present and future generations are fully safeguarded" (Article 1 and preamble). The 1997 Declaration added, *inter alia*, that "the present generations should strive to ensure the maintenance and perpetuation of humankind with due respect for the dignity of the human person" (Article 3). Almost two decades earlier, the United Nations General Assembly adopted, on 30 October 1980, its resolution proclaiming "the historical responsibility of States for the preservation of nature for present and future generations" (para. 1); it further called upon States, in "the interests of present and future generations", to take "measures . . . necessary for preserving nature" (para. 3).

119. In the same year of the 1997 UNESCO Declaration, in the *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* case, the ICJ acknowledged the incidence of the time (long-term temporal) dimension, in referring to "present and future generations" (the long-term perspective), and to the "concept of sustainable development" (*Judgment, I.C.J. Reports 1997*, pp. 53-54, para. 77); yet, the Court preferred not to dwell further upon it. After over a decade, it seemed to me that the occasion had come to do so, in the framework of the present case of the *Pulp Mills*. It was indeed high time for that, but, to my disappointment, the Court's present Judgment preferred to guard silence on this particular issue.

120. May I recall that the subject at issue was originally taken up by the Advisory Committee to the United Nations University (UNU) on a project on the matter, in early 1988, so as to provide an innovative response to rising and growing concerns over the depletion of natural resources and the degradation of environmental quality and the recognition of the need to conserve the natural and cultural heritage (at all levels, national, regional and international; and governmental as well as non-governmental). The Advisory Committee, composed of Professors from distinct continents[101], met in Goa, India[102], and issued, on 15 February 1988, a final document entitled "Goa Guidelines on Intergenerational Equity[103]", which stated:

[101] Namely, Professors E. Brown Weiss, A. A. Cançado Trindade, A.-Ch. Kiss, R. S. Pathak, Lai Peng Cheng, and E. W. Ploman.

[102] In the meeting held in Goa, India, convened by the United Nations University (UNU), the members of the UNU Advisory Committee acted in their own personal capacity.

[103] These Guidelines, adopted on 15 February 1988, were the outcome of prolonged discussions, which formed part of a major study sponsored by the UNU. It is not my intention to recall, in the present separate opinion, the points raised in those discussions, annotated in the unpublished UNU *dossiers* and working documents, on file with me since February 1988.

"One innovative response to these concerns is represented by the present project which attempts to introduce for the first time in a systematic and comprehensive manner, a long term temporal dimension into international law as a complement to the traditional spatial dimension.

This temporal dimension is articulated through the formulation of the theory of 'intergenerational equity'; all members of each generation of human beings, as a species, inherit a natural and cultural patrimony from past generations, both as beneficiaries and as custodians under the duty to pass on this heritage to future generations. As a central point of this theory the right of each generation to benefit from this natural and cultural heritage is inseparably coupled with the obligation to use this heritage in such a manner that it can be passed on to future generations in no worse condition than it was received from past generations. This requires conservation and, as appropriate, enhancement of the quality and of the diversity of this heritage. The conservation of cultural diversity is as important as the conservation of environmental diversity to ensure options for future generations.

Specifically, the principle of intergenerational equity requires conserving the diversity and the quality of biological resources, of renewable resources such as forests, water and soils which form an integrated system, as well as of our knowledge of natural and cultural systems. The principle requires that we avoid actions with harmful and irreversible consequences for our natural and cultural heritage . . . without unduly shifting the costs to coming generations.

The principles of equity governing the relationship between generations . . . pertain to valued interests of past, present and future generations, covering natural and cultural resources . . . There is a complementarity between recognized human rights and the proposed intergenerational rights."[104]

121. And the aforementioned UNU document moved on to propose strategies to implement inter-generational rights and obligations. From then onwards, the first studies on this specific topic of inter-generational equity, in the framework of the conceptual universe of International Environmental Law, began to flourish[105]. From the late 1980s onwards,

[104] The full text of the "Goa Guidelines on Intergenerational Equity" is reproduced in Annexes to the two following books, whose authors participated in the elaboration of the document: E. Brown Weiss, *In Fairness to Future Generations: International Law, Common Patrimony and Intergenerational Equity*, *op. cit. supra* note 98, App. A, pp. 293-295; A. A. Cançado Trindade, *Direitos Humanos e Meio Ambiente: Paralelo dos Sistemas de Proteção Internacional*, Porto Alegre/Brazil, S. A. Fabris Ed., 1993, Ann. IX, pp. 296-298.

[105] Cf., *inter alia*, note 98, *supra*.

inter-generational equity has been articulated amidst the growing awareness of the vulnerability of the environment, of the threat and gravity of sudden and global changes, and, ultimately, of one's own mortality.

122. The need has thus been keenly felt to give clear expression to inter-generational equity, so as to fulfil the pressing need to assert and safeguard the rights of present as well as future generations, pursuant to — in my perception — an essentially anthropocentric outlook. Here, in the face of likely risks and threats, the precautionary principle once again comes into play. Nowadays, in 2010, it can hardly be doubted that the acknowledgement of inter-generational equity forms part of conventional wisdom in International Environmental Law.

123. It is not surprising that, in the course of the proceedings before the ICJ in the present case of the *Pulp Mills (Argentina* v. *Uruguay)*, inter-generational equity has significantly been kept in mind by *both* contending Parties, Uruguay and Argentina, in their arguments presented to the Court in the written and oral phases. Argentina, for example, asserted in its oral arguments that [a]n effective application of the principle of prevention and the precautionary principle by Uruguay would have made it possible to comprehend the risks of grave harm for present and future generations"[106]. Uruguay, in its pleadings, maintained that sustainable development is "a matter of inter-generational equity, requiring that economic development proceed in a manner that integrates protection of the environment, which is the human life-support system on which both present and future generations depend"[107].

124. Inter-generational equity thus came to the fore in connection with the acknowledgement, by both Parties, of the "principle of sustainable development", which, in their views, played a role in the interpretation and application of the 1975 Statute (cf. *infra*), displaying concern for seeking to secure the welfare not only of present but also of future generations. In this respect, in approaching the "continuing obligations" of "monitoring" in the present Judgment (para. 266), the Court should have expressly linked this important point to inter-generational equity. As it did not, it unnecessarily and unfortunately deprived its own reasoning of the long-term temporal dimension, so noticeably present in the domain of environmental protection.

125. May I add another aspect, to which I attach particular importance, in respect of the long-term temporal dimension proper to inter-generational equity. In my own perception, the message of *solidarity* in

[106] CR 2009/20, p. 35, para. 22.
[107] CR 2009/17, p. 57, para. 30.

time — conveyed by inter-generational equity — projects itself both ways, into the future and the past, encompassing future as well as past generations (these latter, in so far as, e.g., the preservation of cultural identity is concerned). In this connection, in the leading case of the *Community Mayagna (Sumo) Awas Tingni*, concerning Nicaragua, the members of the indigenous community at issue successfully challenged, before the Inter-American Court of Human Rights (IACtHR), a governmental concession to an industry for wood exploitation in their communal lands (which had not yet demarcated), causing environmental harm and disturbing their *modus vivendi*.

126. In the memorable public hearings before the IACtHR of 16 to 18 November 2000, members of the community concerned[108] stressed the importance they attached to their communal lands, not only for their own subsistence, but also for their "cultural, religious and family development". The hills of their lands were "sacred" to them, being the place where they rendered tribute and respect to their dead. Their lands — they insisted — belonged to them, as much as they belonged to their lands. Theirs was not the language of the *homo oeconomicus* of "modernity" and "post-modernity". Not at all. Preservation of their harmony with their natural environment was of the utmost importance to them.

127. The members of the Mayagna community did not believe in globalization, nor in privatization, nor were they after material gain. They had their own awareness of living in time and space. They cared about the future as much as about the past. And to them, living in harmony with their natural environment was priceless, and absolutely *necessary*, it gave meaning to their lives. Theirs was the logic of *homo sapiens*, they were aware of their own limitations, and wanted to keep on living within their own possibilities. In doing so, they never changed the ends for the means, as "modernists" and "post-modernists" tend to do.

128. The IACtHR's Judgment (merits) of 31 August 2001 in the *Community Mayagna (Sumo) Awas Tingni* case — which forms today part of the history of the international protection of human rights and of the environment in Latin America — extended protection to the right to communal property of their lands to the members of the whole indigenous community concerned, and determined the delimitation, demarcation and issuing of title to the lands of the community, to be undertaken in conformity with its customary law, its uses and habits. In reaching this significant decision, the IACtHR took into account the fact that

[108] As recalled by the IACtHR's Judgment of 31 August 2001 (merits), para. 83.

> "among the indigenous persons there exists a communitarian tradition about a communal form of the collective property of the land, in the sense that the ownership of this latter is not centred in an individual but rather in the group and his community. (. . .) To the indigenous communities the relationship with the land is not merely a question of possession and production but rather a material and spiritual element that they ought to enjoy fully, so as to preserve their cultural legacy and transmit it to future generations." (Para. 149.)

129. The IACtHR's decision upheld the indigenous cosmovision, with attention to due diligence and to cultural diversity. Half a decade after the leading case of the *Community Mayagna (Sumo) Awas Tingni*, the IACtHR was faced with two new cases wherein, as a result of State-sponsored commercialization of their lands in the past, the members of two indigenous communities were forcefully displaced, having been driven into a situation of great vulnerability, social marginalization and abandonment at the border of a road; the IACtHR's decisions in the cases of the *Indigenous Community Yakye Axa* (6 February 2006) and of the *Indigenous Community Sawhoyamaxa* (29 March 2006), both concerning Paraguay, determined the devolution of the communal or ancestral lands to the members of those two communities, so as to secure the survival of their cultural identity in their natural *habitat*.

130. The positive attitude of procedural collaboration displayed by the respondent States in those three cases led to their peaceful settlement. In so far as the preservation of cultural identity is concerned (inter-generational solidarity, bearing in mind future as well as past generations), in my separate opinion in the case of the *Indigenous Community Sawhoyamaxa*, I saw it fit to ponder that:

> "The concept of *culture*, — originated from the Roman 'colere', meaning to cultivate, to take into account, to care and preserve, — manifested itself, originally, in agriculture (the care with the land). With Cicero, the concept came to be used for questions of the spirit and of the soul *(cultura animi)* [109]. With the *passing of time*, it came to be associated with humanism, with the attitude of preserving and taking care of the things of the world, including those of the past [110]. The peoples — the human beings in their social *milieu* — develop and preserve their cultures to understand, and to relate with, the outside world, in face of the mystery of life. Hence the importance of cultural identity, as a component or aggregate of the fundamental right to life itself." (Para. 4.)

[109] H. Arendt, *Between Past and Future*, N.Y., Penguin, 1993 [reprint], pp. 211-213.

[110] *Ibid.*, pp. 225-226.

131. In other cases of great cultural density brought before the IACtHR, the same spirit of *solidarity* in time, projecting itself onto future as well as past generations, was duly valued by the Court — as in its Judgment on reparations in the impressive case of *Bámaca Velásquez*, of 22 February 2002, concerning Guatemala in the light of the wealth of the Maya culture — so as to secure the fulfilment of the spiritual needs of descendants and the respect for the legacy of predecessors[111]. This is — as I have been insisting in another international jurisdiction since the mid-1990s — one of the many illustrations of the historical process of *humanization* of contemporary international law, which nowadays covers the whole of its *corpus juris*.

X. The Underlying Temporal Dimension: Sustainable Development

1. The Formulation and the Implications of Sustainable Development

132. The temporal dimension underlies likewise sustainable development, which, ever since propounded by the 1987 Brundtland Commission Report as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs"[112], has come to be regarded as encompassing the fostering of economic growth, the eradication of poverty and the satisfaction of basic human needs (such as those pertaining to health, nutrition, housing, education)[113]. Sustainable development came to be perceived, furthermore, as a link between the right to a healthy environment and the right to development; environmental and developmental considerations came jointly to dwell upon the issues of elimination of poverty and satisfaction of basic human needs. As the whole matter came to be addressed by both the 1992 Rio Conference on Environment and Development (UNCED) and the 1993 United Nations Second World Conference on Human Rights

[111] In that Judgment on reparations in the *Bámaca Velásquez* case, the very first resolutory point of the *dispositif* ordered the identification of the mortal remains of the direct victim, their exhumation in the presence of his widow and relatives, and the rendering of his mortal remains to his widow and relatives. In my separate opinion, I saw it fit to dwell upon four specific aspects pertaining to the Court's decision, namely: *(a)* the time, the living law, and the dead; *(b)* the projection of human suffering in time; *(c)* the passing of time, and the repercussion of the solidarity between the living and the dead in the law; and *(d)* the precariousness of the human condition and of universal human rights (paras. 1-26).

[112] Cf. World Commission on Environment and Development, *Our Common Future*, Oxford University Press, 1987, pp. 8-9, 40, 43-66 and 75-90.

[113] UNEP, *Beijing Symposium on Developing Countries and International Environmental Law* (August 1991), *Final Report*, Beijing, UNEP/Ministry of Foreign Affairs of China, 1992, pp. 1-8 (co-*rapporteurs* A. A. Cançado Trindade and Ajai Malhotra).

(held in Vienna), it became clear that human beings remain at the centre of concerns for sustainable development[114].

133. The 1992 Rio Declaration on Environment and Development gave considerable projection to the formulation of sustainable development turned to the fulfilment of the necessities of present and future generations[115] (Principle 3), whilst the 1993 Vienna Declaration and Programme of Action focused on sustainable development in relation to distinct aspects of International Human Rights Law (Part I, para. 27), also bearing in mind the satisfaction of current and future needs of protection (Part II, para. 17). Sustainable development disclosed an ineluctable temporal dimension, in bringing to the fore present and future generations altogether.

134. The 1993 Vienna Declaration and Programme of Action stated that "the right to development should be fulfilled so as to meet equitably the developmental and environmental needs of present and future generations" (para. 11). The major concern of that final document of the 1993 Vienna Conference, as well as of Agenda 21 of the 1992 Rio Conference — as I well recall from their *travaux préparatoires*, as well as their adoption at the two United Nations World Conferences — was directed towards the improvement of the socio-economic conditions of living of the population, and in particular of its vulnerable groups[116], so as to meet their special needs of protection. This is reflected in the *corpus* of those two final documents of the two landmark United Nations World Conferences of 1992 and 1993.

135. This outlook was much cultivated in successive academic events, held in different latitudes, sponsored by the United Nations throughout the *United Nations Decade of International Law* in the 1990s, which provided some insights for refining the conceptual universe of contemporary International Environmental Law. When emphasis was drawn into the promotion of sustainable development and the much needed reduction

[114] A. A. Cançado Trindade, "Relations between Sustainable Development and Economic, Social and Cultural Rights: Recent Developments", *International Legal Issues Arising under the United Nations Decade of International Law* (N. Al-Nauimi and R. Meese, eds.), The Hague, Kluwer, 1995, pp. 1051-1052, 1056, 1065, 1068 and 1075-1076.

[115] Cf., for a general overview, on the eve of UNCED, [Various Authors], *Human Rights, Sustainable Development and Environment/Derechos Humanos, Desarrollo Sustentable y Medio Ambiente/Direitos Humanos, Desenvolvimento Sustentável e Meio Ambiente* (Proceedings of the Brasília Seminar of March 1992, (A. A. Cançado Trindade, ed.), 2nd ed., Brasília/San José of Costa Rica, BID/IIHR, 1995, pp. 1-405 (in particular, interventions by E. Brown Weiss, A. A. Cançado Trindade, S. McCaffrey, A.-Ch. Kiss, G. Handl and D. Shelton).

[116] Such as, among others, those formed by the poorest segments of society.

and eradication of poverty, for example, such considerations were advanced in the light of both *inter*- and *intra*-generational equity.

136. In this connection, the comprehensive *Agenda 21*, adopted at the close of UNCED in Rio de Janeiro in 1992, pertinently warned, in its preamble, that

> "Humanity stands at a defining moment in history. We are confronted with a perpetuation of disparities between and within nations, a worsening of poverty, hunger, ill health and illiteracy, and the continuing deterioration of the ecosystems on which we depend for our well-being. However, integration of environment and development concerns and greater attention to them will lead to the fulfilment of basic needs . . . No nation can achieve this on its own; but together we can — in a global partnership for sustainable development.
>
> Agenda 21 addresses the pressing problems of today and also aims at preparing the world for the challenges of the next century." (Paras. 1 and 3.)

137. Half a decade later, the aforementioned 1997 UNESCO Declaration on the Responsibilities of the Present Generations toward Future Generations, in acknowledging the current threats to "the very existence of humankind and its environment" (preamble), singled out the need to act on the basis of a spirit of *intra-generational* and *inter-generational* solidarity for the "perpetuation of humankind" (Article 3). And one decade after UNCED in Rio de Janeiro, the World Summit on Sustainable Development, held in Johannesburg (September 2002), adopted the Johannesburg Declaration on Sustainable Development, whereby the international community reasserted its "commitment to sustainable development" (para. 1), keeping in mind "the future of humanity". Once again, attention was turned to considerations in the light of both *inter*- and *intra*-generational equity, calling for the overcoming of inequities in time and space.

138. This outlook, bringing together the protection of the environment and the protection of human rights, continues to be cultivated today, at the end of the first decade of the twenty-first century[117]. Numerous international instruments have captured today the *rationale* of sustainable

[117] Cf., e.g., resolutions 7/23 (of 28 March 2008) and 10/4 (of 25 March 2009) of the United Nations Human Rights Council (addressing human rights and climate change), preceded by, e.g., resolution 2005/60 of the former United Nations Commission on Human Rights (para. 8), among others.

development. Contemporary expert writing is also gradually recognizing its relevance; while a great part of that writing continues, somewhat hesitantly, to refer to sustainable development as a "concept", there are also those who seem today to display their preparedness and open-mindedness to admit that it has turned out to be a general principle of International Environmental Law[118]. On the occasion of the reform of the United Nations, by the end of 2005, in addition to the two documents already mentioned in the present separate opinion (para. 45, *supra*), the *Millennium Development Goals* were also adopted, endorsing the "principles of sustainable development" (in the plural)[119].

139. There are strong reasons for recognizing sustainable development as a guiding general principle for the consideration of environmental and developmental issues. Both the 1992 Rio Conference and the 1993 Vienna Conference clarified, for the ongoing cycle of United Nations World Conferences during the 1990s, that the implications of *placing people at the centre of concerns* were considerable, and called for a reassessment of traditional concepts (e.g., *inter alia*, models of development and international co-operation), so as to safeguard the environment and to achieve the sustainability of human life itself. More recently, in 2008, an approach has been advanced with the aim of "aligning" the aforementioned *Millennium Development Goals* with human rights[120].

140. In the light of the considerations above, the present outcome of the case of the *Pulp Mills* leaves, in this respect, much to be desired, on three accounts, namely: first, in relation to the insufficiency of the arguments of the contending Parties on, concretely, the *social impacts* of the pulp mills, despite having addressed sustainable development (cf. *infra*); secondly, in respect of the insufficiency of attention on the part of the Court to the particular point at issue; and thirdly, with regard to the absence of any express acknowledgement by the Court of the guiding role of general principles of International Environmental Law. Having pointed this out, may I now turn to the contentions of Argentina and Uruguay on sustainable development, in the ambit of the *cas d'espèce*.

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[118] Cf., e.g., Ph. Sands, *Principles of International Environmental Law*, 2nd ed., Cambridge University Press, 2003, pp. 252, 260 and 266; C. Voigt, *Sustainable Development as a Principle of International Law*, Leiden, Nijhoff, 2009, pp. 145, 147, 162, 171 and 186. As States cannot rely on scientific uncertainties to justify inaction, in face of possible risks of serious harm to the environment, the precautionary principle has a role to play, as much as "the principle of sustainable development"; P. Birnie, A. Boyle and C. Redgwell, *International Law and the Environment*, 3rd ed., Oxford University Press, 2009, p. 163.

[119] Targets 7.A and 7.B of the *Millennium Development Goals*.

[120] United Nations/Office of the High Commissioner for Human Rights, *Claiming the Millennium Development Goals: A Human Rights Approach*, Geneva, United Nations, 2008, pp. 1-52.

2. The Awareness of the Contending Parties of the Implications of Sustainable Development

141. In the present case of the *Pulp Mills*, the contending Parties addressed *sustainable development* interchangeably as a "concept" and as a "principle". In its Memorial, Argentina argued that the two Parties were "linked by respect for the principle of sustainable development" when they undertook "activities on the River Uruguay" [121]. Yet, they did not coincide as to the application of that "concept" or "principle", which, in Argentina's view, required an integrated approach to, and "a balance to be achieved" between the objectives of socio-economic development and of environmental protection, as was solemnly declared in the 1992 Rio Declaration on Environment and Development (Principles 3 and 4 [122]), ranking among "the principles which are supposed to guide the interpretation and application of the 1975 Statute" [123].

142. Argentina further contended, in its Memorial, that "[o]ne of the key elements of the principle of sustainable development is that meeting the developmental needs of current generations must not jeopardize the well-being of future generations" [124]. Insisting on Principles 3 and 4 of the 1992 Rio Declaration, Argentina added that

> "Under the principle of sustainable development, States fulfil their right to development while complying with the obligations incumbent on them as regards the promotion and protection of the environment. This includes the obligations . . . to which that Statute refers . . . The concept of 'sustainable development' cannot be relied upon to justify giving the objectives of economic development any priority over essential environmental needs." [125]

143. Thus, in maintaining that the "principle of sustainable development" applies to the 1975 Statute, Argentina recalled, in its Memorial, Principle 3 of the 1992 Rio Declaration on Environment and Development, whereby "the *right to development* must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations" [126]. Moreover, still in its Memorial, Argentina referred to the 2002 Environmental Protection Plan for the River Uruguay (celebrated by CARU with 15 Argentine and Uruguayan local authorities),

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[121] Memorial of Argentina, para. 3.177.
[122] *Ibid.*, para. 3.179.
[123] Reply of Argentina, para. 4.32, and cf. also para. 1.48.
[124] Memorial of Argentina, para. 3.180.
[125] *Ibid.*, paras. 5.6-5.7, and cf. also para. 5.8.
[126] *Ibid.*, para. 5.5.

which approached the obligations set out by the 1975 Statute as providing "a *collective, participative and collaborative* framework" for co-operation and co-ordination to protect the River Uruguay "for future generations" [127].

144. On its part, Uruguay, evoking, in its Counter-Memorial, the "principles of general international law" [128], argued that

> "The right of all States to pursue sustainable economic development is enshrined in Principle 2 of the 1992 Rio Declaration . . . [which] affirms both the sovereign right of States to exploit their own resources 'pursuant to their own environmental and developmental policies' and their responsibility 'to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or to areas beyond the limits of national jurisdiction'." [129]

145. In its view, like Principle 4, Principle 2 of the Rio Declaration "requires integration or accommodation of development and environmental protection" [130]. And Uruguay added that

> "Argentina's arguments about the 1975 Statute entirely fail to address this need to accommodate economic development and environmental protection when utilizing the waters of the Uruguay River. Indeed, Argentina's Memorial studiously cultivates the impression that the 1975 Statute subjugates considerations of economic development to unyielding environmental concerns." [131]

146. Uruguay further stated, in its Rejoinder, that

> "[d]evelopment is permitted (indeed, required under Article 1 of the United Nations Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, among other places) so long as the environment is protected for the benefit of future generations" [132].

In acknowledging its need to improve the "living conditions" of "present and future generations of its population" [133], Uruguay argued that

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[127] Memorial of Argentina, para. 3.153.
[128] Counter-Memorial of Uruguay, para. 1.26.
[129] *Ibid.*, para. 2.30.
[130] *Ibid.*, para. 2.32.
[131] *Ibid.*, para. 2.33.
[132] Rejoinder by Uruguay, para. 2.130.
[133] CR 2009/17, pp. 46 and 48, paras. 1 and 5, and cf. also p. 50, para. 11.

"Argentina has not challenged the right of Uruguay to develop economically, and thus to meet the needs of present and future generations of her citizens" [134].

147. This last remark was made by Uruguay in the course of the oral phase of proceedings in the present case of the *Pulp Mills*, wherein counsel for both Uruguay and Argentina retook and insisted on their respective points advanced in the written phase of the proceedings in the *cas d'espèce*. Both Argentina and Uruguay were quite aware of the intertemporal dimension underlying sustainable development as a principle of International Environmental Law, and the ICJ should, in my view, have taken note of, and endorsed [135], sustainable development *as such*, thus contributing to the progressive development of International Environmental Law.

XI. Judicial Determination of the Facts

148. The aforementioned general principles, and temporal dimension, are to be kept in mind, in the exercise of the international judicial function, which also includes the judicial determination of the facts. As to this latter, conflicting evidence assumed noticeable proportions in the present case of the *Pulp Mills*. In fact, by and large, conflicting evidence seems to make the paradise of lawyers and practitioners, at national and international levels. It seems to make, likewise, the purgatory of judges and fact-finders, at national and international levels. Consideration of this issue cannot be avoided in the present case of the *Pulp Mills*.

149. May it here be recalled that, for the determination of the facts, the Court has accumulated some experience in receiving the testimony of experts or witnesses, though not a particularly extensive one [136]. In turn, expert-witnesses — a category not foreseen in the Statute or the Rules —

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[134] CR 2009/17, p. 58, para. 32.

[135] The Court could, for example, have taken up, and further developed, bearing in mind the contentions of the Parties in the present case of the *Pulp Mills*, its own *obiter dictum* in the *whole* (not only in part, as it did) of paragraph 140 of its Judgment in the *Gabčíkovo-Nagymaros Project* case *(Hungary/Slovakia)* (*Judgment, I.C.J. Reports 1997*, p. 77).

[136] The ten occasions to date, when it did, are the following: *Corfu Channel* case *(United Kingdom* v. *Albania)* (1949), *Temple of Preah Vihear* case *(Cambodia* v. *Thailand)* (1962), *South West Africa* cases *(Ethiopia* v. *South Africa; Liberia* v. *South Africa)* (1966), *Continental Shelf* case *(Tunisia* v. *Libya)* (1982), *Gulf of Maine* case *(Canada* and *United States of America)* (1984), *Continental Shelf* case *(Libya* v. *Malta)* (1985), *Nicaragua* v. *United States of America* case (1986), *Elettronica Sicula S.p.A. (ELSI)* case *(United States of America* v. *Italy)* (1989), *Land, Island and Maritime Frontier Dispute* case *(El Salvador* v. *Honduras)* (1992), *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* case *(Bosnia and Herzegovina* v. *Serbia and Montenegro)* (2007).

were object of attention of the Court on very few occasions[137], by a functional necessity. On-site visits — Article 66 of the Rules — were undertaken once by the old PCIJ (case of the *Diversion of Waters from the Meuse*, 1937), and once by the ICJ (*Gabčíkovo-Nagymaros Project (Hungary/Slovakia)* case, 1997), but without involving actual fact-finding. Only on two occasions so far, fact-finding as such (Article 50 of the Statute and Article 67 of the Rules) was contemplated by the Hague Court *motu propio*.

150. The first occasion occurred in the *Chorzów Factory* case (*Germany* v. *Poland*, 1928), when the PCIJ designated (citing Article 50 of the Statute) a committee of experts in September 1928, but, as the case became object of a friendly settlement, that committee was dissolved before it could render its report. The second occasion was the *Corfu Channel* case (*United Kingdom* v. *Albania*, 1949), which became the leading case on the subject: the appointed experts presented two reports, in January and February 1949 (having visited the area concerned wherein they conducted further inquiries), which were taken into account by the ICJ in its Judgment on the merits, of 9 April 1949. Still in the same *Corfu Channel* case, the designated experts submitted another report in December 1949 to the Court, which, after questioning them, took their conclusions into full account in its Judgment on reparations, of 15 December 1949, in the case at issue[138].

151. Thus, in the light of the Court's own experience so far, in the present *Pulp Mills* case, not all the possibilities of fact-finding were exhausted. I am of the view that paragraph 170 of the present Judgment should have pointed out also the additional possibility opened to the Court, if it deemed it necessary, namely, that of obtaining further evidence *motu propio*. Yet, if the Court would have made use of this additional possibility (e.g., by means of *in loco* fact-finding) — as I think it should have — would its conclusion as to substantive obligations under Articles 35, 36 and 41 of the 1975 Statute of the River Uruguay have been different? Any answer to this question would be to a large extent conjectural.

XII. Beyond the Inter-State Dimension: Related Aspects

152. Previous considerations concerning general principles of law, as well as the temporal dimension, bring me, in the present separate opinion,

[137] E.g., in the *Corfu Channel* case *(United Kingdom* v. *Albania)* (1949), in the *Temple of Preah Vihear* case *(Cambodia* v. *Thailand)* (1962), and in the *South West Africa* cases *(Ethiopia* v. *South Africa; Liberia* v. *South Africa)* (1966).

[138] On yet a third occasion, somewhat distinctly, in the *Gulf of Maine* case *(Canada/United States)*, the ICJ Chamber *was required*, under the special agreement, to appoint an expert; after his appointment (again citing Article 50 of the Statute), his "explanatory report" was annexed by the ICJ Chamber, to its Judgment of 12 October 1984.

to keep on looking well beyond the inter-State dimension despite the strictly inter-State structure of the international *contentieux* before the ICJ. In doing so, I shall review related aspects to which I attribute particular significance, namely: *(a)* the imperatives of human health and the well-being of peoples; *(b)* the role of civil society in environmental protection; *(c)* the objective character of obligations, beyond reciprocity; and *(d)* CARU's international legal personality. I shall next turn to each of them.

1. The Imperatives of Human Health and the Well-being of Peoples

153. Already in 1974, two years after the adoption of the Stockholm Declaration, the United Nations Charter on Economic Rights and Duties of States (which resulted from a Latin American initiative[139]) warned that the protection and preservation of the environment for present and future generations were the responsibility of *all* States (Article 30). The reference to succeeding generations in time disclosed, first, an awareness of the long-term temporal dimension, and, secondly, a concern beyond the strictly inter-State dimension, prompted by the goal of securing human health and the well-being of peoples. The United Nations General Assembly resolution 44/228 of 1989, deciding to convene a United Nations Conference on Environment and Development in Rio de Janeiro in 1992, for example, affirmed in fact that the protection and enhancement of the environment were major issues that affected the well-being of peoples, and singled out, as one of the environmental issues of major concern, the "protection of human health conditions and improvement of the quality of life" (paragraph 12 *(i)*).

154. International Environmental Law is attentive to human health. In the present case of the *Pulp Mills* the point was touched upon by the two contending Parties. In so far as the social impacts of the pulp mill (the Botnia plant) are concerned, Argentina, in its Memorial, displayed attention to "the health and well-being of the neighbouring communities" (paras. 6.44-6.45), while Uruguay, in its Rejoinder, referred to social impact monitoring indicating an improvement in the "quality of life" in Fray Bentos and "surrounding communities" (para. 4.40). But while Uruguay, in its Counter-Memorial, contended that the pulp mill did not constitute a threat to public health (paras. 5.33-5.34), Argentina, in turn, sought to demonstrate that eutrophication of the river and air pollution may be hazardous to human

[139] Launched on the occasion of the III UNCTAD, on 1 April 1972; the Charter was adopted by the United Nations General Assembly on 12 December 1974.

health [140], and referred to incidents involving workers and other employees of the Botnia plant and other persons living nearby [141].

155. Yet, one is left with the impression that the Parties did not advance full-fledged arguments on general issues of *public health* that might be raised by the operation of the pulp mill. Arguments were rather focused on environmental effects (water quality and ecological balance) and aspects of impacts on life quality, such as tourism. In fact, particular attention was devoted to the impact on tourism (tourist activity and products) [142]. One is thus further left with the impression that considerations proper to the *homo oeconomicus* played here an important role.

156. In any case, attention is to be drawn also to the points made by the ICJ itself, in the present Judgment in the *Pulp Mills* case (paras. 219-224), concerning the consultation to the affected populations. As already pointed out in the present separate opinion, the obligation to notify and share information with the affected populations is one which ensues from the precautionary principle (cf. *supra*). This is what the Court did not expressly state. But, in any case, attention is turned to the affected populations, beyond the strictly inter-State dimension.

157. It should not pass unnoticed that, in a recent Judgment (of 13 July 2009) — recalled in the present Judgment (para. 204) — in the case concerning the *Dispute regarding Navigational and Related Rights (Costa Rica* v. *Nicaragua)*, the Court upheld the customary right of subsistence fishing (*Judgment, I.C.J. Reports 2009*, p. 266, paras. 143-144) from the inhabitants of *both* banks of the San Juan River. The respondent State had commendably reiterated that it had "absolutely no intention of preventing Costa Rican residents from engaging in subsistence fishing activities" (*ibid.*, p. 265, para. 140). After all, those who fish for subsistence are not the States, but the human beings struck by poverty. The Court further held that that customary right would be "subject to any Nicaraguan regulatory measures relating to fishing adopted for proper purposes, particularly for the protection of resources and the environment" (*ibid.*, p. 266, para. 141).

158. That case, like the present one, also concerned Latin American countries. In both cases the ICJ looked beyond the strictly inter-State dimension, into the segments of the populations concerned. The contending States, in both cases, advanced their arguments in pursuance of their vindications, without losing sight of the human dimension underlying

[140] Cf. Memorial of Argentina, paras. 5.52, 5.70, 7.96 and 7.162; Reply of Argentina, paras. 3.212 and 4.176, and Vol. III, Ann. 43, paras. 4.4.2-4.4.3; as well as CR 2009/14, pp. 43-44, para. 14.

[141] Cf. Reply of Argentina, para. 0.10.

[142] Cf. Memorial of Argentina, paras. 6.54-6.63; Rejoinder of Uruguay, paras. 6.82-6.87.

their claims. Once again, Latin American States pleading before the ICJ have been faithful to the already mentioned deep-rooted tradition of Latin American international legal thinking, which has never lost sight of the relevance of doctrinal constructions and the general principles of law. I dare to nourish the hope that the ICJ is prepared to change its vision, to the effect of proceeding to look with more determination beyond the strictly inter-State dimension whilst also taking into account the relevant legal principles, in the exercise of its function in contentious cases; after all, in historical perspective, it should not be forgotten that the State exists for human beings, and not vice versa.

159. Just as concern for human rights protection (e.g., rights to food and to health) can be found in the realm of International Environmental Law[143], concern for environmental protection can also be found in the express recognition of the right to a healthy environment in two human rights instruments[144]. Contemporary human rights protection and environmental protection thus display mutual concerns[145]. A reflection of this lies, e.g., in the outlook of the 1992 Rio Declaration on Environment and Development, adopted by UNCED: it places human beings at the centre of concerns for sustainable development, whereas the 1993 Vienna Declaration and Programme of Action, adopted by the Second World Conference on Human Rights, for its part, addresses *inter alia* sustainable development in relation to distinct aspects of International Human Rights Law.

160. The unequivocal recognition by UNCED in Rio de Janeiro in 1992, and by the Second World Conference on Human Rights in Vienna in 1993, of the legitimacy of the concern of the whole international community with, respectively, environmental protection and human rights

[143] E.g., Preamble and Principle 1 of the 1972 Stockholm Declaration on the Human Environment, Preamble and Principles 6 and 23 of the 1982 World Charter for Nature, Principles 1 and 20 proposed by the World Commission on Environment and Development in its 1987 Report.

[144] Namely, the 1988 Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights (Art. 11), and the 1981 African Charter on Human and Peoples' Rights (Art. 24); in the former, it is recognized as a right of "everyone" (Art. 10, para. 1), to be protected by the States parties (Art. 10, para. 2), whereas in the latter it is acknowledged as a peoples' right.

[145] International human rights tribunals (such as the European and the Inter-American Courts), as well as United Nations supervisory organs (such as the Human Rights Committee) have decided cases, in recent years, which have a direct bearing on the right to a healthy environment in particular, and on environmental protection in general. It is beyond the scope and purpose of the present separate opinion to dwell upon those decisions; suffice it here to point out that the outlook pursued therein is an anthropocentric, rather than cosmocentric, one.

protection, constitutes one of the main legacies of those two World Conferences (of which I keep the best memories, engaged as I was in the work of both), which will certainly accelerate the construction of a universal culture of respect for human rights and care for the environment. That international law is no longer exclusively State-oriented can be seen from reiterated references to humankind, not only in extensive doctrinal writings in our days, but also and significantly in various international instruments[146], possibly pointing towards an international law for mankind, pursuing preservation of the environment and sustainable development to the benefit of present and future generations. This calls for a reconsideration of the basic postulates of international law bearing in mind the superior common interests and concerns of humankind.

161. It may here be recalled that, already almost four decades ago, the need to look beyond the inter-State dimension was asserted by the complainants before this Court, in a case where it was felt that human health and the well-being of peoples were seriously at risk. In its Application instituting proceedings (of 9 May 1973), in the aforementioned (first) *Nuclear Tests* case (atmospheric testing), Australia contended that it purported to protect its people and the peoples of other nations, and their descendants, from the threat to life, health and well-being arising from potentially harmful radiation derived from radio-active fall-out generated by nuclear explo-

[146] Thus, the notion of *cultural heritage of mankind* can be found, e.g., in the UNESCO Conventions for the Protection of Cultural Property in the Event of Armed Conflict (1954), for the Protection of the World Cultural and Natural Heritage (1972), and for the Safeguarding of the Intangible Cultural Heritage (2003). The notion of *common heritage of mankind*, for its part, has found expression in the realms of the Law of the Sea (1982 United Nations Convention on the Law of the Sea, Part XI, especially Articles 136-145 and 311 (6); 1970 United Nations Declaration of Principles Governing the Sea-Bed and Ocean Floor, and the Subsoil Thereof, Beyond the Limits of National Jurisdiction) and of the Law of Outer Space (1979 Treaty Governing the Activities of States on the Moon and Other Celestial Bodies, Article 11; and cf. 1967 Treaty on Principles Governing the Activities of States in the Exploration and Use of Outer Space, Including the Moon and Other Celestial Bodies, Article I). *Common heritage of mankind* has also found expression in the 2005 UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions. And the notion of *common concern of humankind*, in turn, has found expression in the realm of International Environmental Law, e.g., in the preambles of the United Nations Framework Convention on Climate Change (1992) and the Convention on Biological Diversity (1992). On the reasons for the adoption of this new notion, cf. UNEP, *The Meeting of the Group of Legal Experts to Examine the Concept of the Common Concern of Mankind in Relation to Global Environmental Issues* (D. J. Attard, ed. — Proceedings of the Malta Meeting of December 1990), Malta/Nairobi, UNEP, 1991, *Report of the Proceedings*, pp. 19-26 (co-*rapporteurs* A. A. Cançado Trindade and D. J. Attard).

sions[147]. New Zealand, for its part, went even further in its own Application instituting proceedings (also of 9 May 1973): it stated that

> "In the period of 27 years in which nuclear tests have taken place there has been a progressive realization of the dangers which they present to life, to health and to the security of peoples and nations everywhere . . . [t]he attitude of the world community towards atmospheric nuclear testing has sprung from the hazards to the health of present and future generations involved in the dispersal over wide areas of the globe of radioactive fallout . . . With regard to nuclear weapons tests that give rise to radioactive fallout, world opinion has repeatedly rejected the notion that any nation has the right to pursue its security in a manner that puts at risk the health and welfare of other people."[148]

162. New Zealand made clear that it was pleading on behalf not only of its own people, but also of the peoples of the Cook Islands, Niue and the Tokelau Islands[149]. Thus, looking beyond the strict confines of the purely inter-State *contentieux* before the ICJ, both New Zealand and Australia vindicated the rights of peoples to health, to well-being, to be free from anxiety and fear, in sum, to live in peace.

163. Years later, in its Application instituting proceedings (of 13 May 1989) and in its Memorial in the case concerning *Certain Phosphate Lands in Nauru (Nauru* v. *Australia)*, Nauru complained before the ICJ that, in the past, the Administering Authority had conducted mining operations in the phosphate lands on the island with a "profit-making mentality", without providing Nauruans independent advice until 1964. It had thus failed to look after "the long-term needs of the Nauruan people", and to restore the island for habitation by the Nauruan people by rehabilitating its phosphate lands. Now that the trusteeship period was over (without a sense of real public accountability), Nauru came to vindicate the satisfaction of the "long-term needs" of its inhabitants, and the restoration of the island (by means of the rehabilitation of its phosphate lands) so as "to ensure the long-term future of the Nauruan people"[150].

164. The episode reveals the awareness that the well-being of peoples is not devoid of a temporal dimension. Quite on the contrary, it has even

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[147] It further referred to the populations being subjected to mental stress and anxiety generated by fear; *I.C.J. Pleadings, Nuclear Tests* cases *(Australia* v. *France)*, Vol. I, pp. 11 and 14.

[148] *I.C.J. Pleadings, Nuclear Tests (New Zealand* v. *France)*, Vol. II, p. 7.

[149] *Ibid.*, pp. 4 and 8.

[150] *I.C.J. Pleadings, Certain Phosphate Lands in Nauru (Nauru* v. *Australia)*, Vol. I, pp. 10-11, 17, 170, 174, 245 and 247.

a *long-term* temporal dimension, as illustrated by the case concerning *Certain Phosphate Lands in Nauru*. A combination of factors contributes nowadays to such widespread awareness, namely, the emergence of the principles of prevention and of precaution, as well as the principle of sustainable development, together with inter-generational equity, as already examined (cf. *supra*). International Environmental Law, crystallized in the light of those general principles, duly values sustainable productivity[151], with due attention to the imperatives of human health and the well-being of peoples.

2. The Role of Civil Society in Environmental Protection

165. In the *cas d'espèce*, of the *Pulp Mills*, Argentina identified the origin of the present *inter-State contentieux* against Uruguay in the fact that "on 9 October 2003 the Government of Uruguay unilaterally authorized" the construction of one of the two pulp mills (Spanish company ENCE, project CMB) near the city of Fray Bentos, without the required "prior notification and consultation" under the 1975 Statute of the River Uruguay[152]. In October 2004 the inter-State dispute was "aggravated" when the Finnish company Botnia "informed the Uruguayan authorities of its plans to construct a second pulp mill in the same area on the left bank of the River Uruguay, less than 7 km from CMB, to be called 'Orion'"[153]. Yet, beyond the inter-State optics, the real origin of the case goes further back in time, as a result of an initiative of an Argentine non-governmental organization (NGO) taken on 14 December 2001.

166. In fact, in its Counter-Memorial, Uruguay noted that CARU was informed of the commissioning of the ENCE plant in its plenary meeting of 14 December 2001, when it considered "a letter from a local non-governmental organization in Argentina expressing concern about reports that a cellulose plant would be built in the vicinity of Fray Bentos" (para. 3.16). This NGO was called "Movement for Life, Work and Sustainable Development" (*Movimiento por la Vida, el Trabajo y un Desarrollo Sustentable* — MOVITDES); the NGO's letter to CARU, dated 16 November 2001, appended to the Counter-Memorial of Uruguay[154], expounded on "the environmental risk posed by the installation and operation of a

[151] Cf., to this effect, H. Hohmann, *Precautionary Legal Duties and Principles of Modern International Environmental Law — The Precautionary Principle: International Environmental Law between Exploitation and Protection*, London/Dordrecht, Graham & Trotman/Nijhoff, 1994, pp. 4, 334, 340-341 and 344-345.

[152] *Pulp Mills on the River Uruguay (Argentina* v. *Uruguay)*, Application instituting proceedings of 4 May 2006, para. 9.

[153] *Ibid.*, para. 12.

[154] Counter-Memorial of Uruguay, Vol. IV, Ann. 92, p. 2185 (Comisión Administradora del Rio Uruguay [CARU], Acta No. 14/01, Reunión Plenaria Ordinaria, of 14 December 2001).

cellulose paste plant in the area of M'Bopicuá", in Uruguay[155]. In this respect, Argentina, in its Reply, pointed to the "quite indirect way in which CARU became aware of the existence of the pulp mill projects in the Fray Bentos region", since it was "an Argentine NGO from the Entre Ríos province that drew CARU's attention to rumours about pulp mills being built on the opposite bank" (para. 2.33).

167. Thus, in the real origin of the present case, opposing Argentina to Uruguay, we find, by the end of 2001, a non-State entity, an Argentine NGO, expressing its concern to an international entity, CARU, on a matter of considerable public interest, affecting the local population, such as the alleged risks for the environment. The Governments of the two States concerned only stepped in two years later, when the dispute became an *inter-State* case, from October 2003 onwards *(supra)*. This shows, to my perception, the artificiality of the purely inter-State outlook, when it comes to face challenges of general public interest, such as those concerning environmental protection.

168. In any case, in its Reply, Argentina took note of the role that NGOs can play in the fulfilment of the principle of environmental impact assessment (EIA), of which "public consultation is an integral part" (para. 4.105). In this connection, Argentina noted that in order to hold "*meaningful consultations* with the population concerned", it was necessary to have NGOs involved in the process[156]. During the procedure before the Court in the present case of the *Pulp Mills*, at distinct moments both Argentina and Uruguay referred to the role of NGOs in environmental impact assessment[157] as well as environmental monitoring[158]. It is, in my view, much to the credit of both Uruguay and Argentina to have done so, thus expressly acknowledging the ineluctable partnership between public power and entities of the civil society when it comes to matters of general public interest, such as environmental protection.

169. This is what has happened in the present case of the *Pulp Mills*. As time went on, a number of Argentine and Uruguayan NGOs indeed

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[155] Counter-Memorial of Uruguay, Vol. IV, Ann. 92, p. 2185 (Comisión Administradora del Rio Uruguay [CARU], Acta No. 14/01, Reunión Plenaria Ordinaria, of 14 December 2001), p. 2185.

[156] It further referred to the practice of the World Bank, in particular the Investigation Report of the Inspection Panel in *Paraguay: Reform Project for the Water and Telecommunications Sectors*, wherein it was stated that the policy on EIA required that "the views of the affected people and local NGOs [be] taken fully into account in particular while preparing the EIA" (para. 4.102, note 1030). Cf. also Memorial of Argentina, para. 4.104, note 1036.

[157] Cf. Memorial of Argentina, para. 5.62; Counter-Memorial of Uruguay, paras. 5.41 and 7.28.

[158] Cf. Counter-Memorial of Uruguay, paras. 7.28-7.29.

made observations regarding the two projected pulp mills, the CMB and the Orion projects *(supra)*: those included files with documents from, besides the already mentioned MOVITDES, the *Redes Amigos de la Tierra*, the *Fundación Movimiento Mundial por los Bosques Tropicales*, the *Asociación Soriano para la Defensa de los Recursos Naturales*, the *Grupo Ecológico de Young*, the *Grupo Guayubira* (Forest and Forestry Environmental Group), and the *Redes Socioambientales de Entre Ríos*[159]. This is a *fact*, which should not pass unnoticed, and well-documented in the materials submitted to the ICJ by the contending Parties in the written phase of the procedure. The Governments concerned counted on the co-operation provided by entities of the civil society of the two respective countries, Uruguay and Argentina.

170. It follows, from the aforementioned episode, that NGOs from the two States concerned contributed effectively to the elucidation of the matter under contention in the present case of the *Pulp Mills*. And, in addition, as already pointed out, they marked presence in the process of consultation to the local population (cf. *supra*). Thus, in so far as the construction of one of the two pulp mills — that of Orion (Botnia) — is concerned, public consultations of segments of the affected populations (in the form also of numerous interviews, including with NGOs and other civil society groups) were undertaken, both before and after the granting of the initial environmental authorization, on both sides of the River Uruguay — and this has been taken note of, by the Court, in the present Judgment (paras. 213-214).

171. The fact that NGOs and other entities of civil society have marked their presence in the very origins and in the course of the present *Pulp Mills* case, is in my view yet another confirmation that, in the present domain of protection, NGOs and other entities of the civil society have, in the last decades, indeed contributed to awaken the environmental awareness also of States themselves, to crystallize the principles of prevention and of precaution, and to shape the *opinio juris communis* as to environmental protection. This is a domain which surely transcends the traditional inter-State dimension. And States have benefitted from such contribution of NGOs and other entities of civil society, to the ultimate benefit of their populations.

3. Beyond Reciprocity: Obligations of an Objective Character

172. The evolution of environmental protection likewise bears witness of the emergence of obligations of an objective character without reciprocal advantages for States. The 1972 Stockholm Declaration on the Human Environment expressly refers to the "common good of mankind" (Principle 18). The 1992 Rio Declaration on Environment and Develop-

[159] Cf. Memorial of Argentina, Vol. V, Ann. 12, p. 704; and Counter-Memorial of Uruguay, Vol. II, Ann. 12, p. 1.

ment begins by asserting that "[h]uman beings are at the centre of concerns for sustainable development" (Principle 1), whilst the United Nations Framework Convention on Climate Change, also adopted in Rio de Janeiro in 1992, states that the duty to protect the climate system is to "the benefit of present and future generations of humankind" (Article 3 (1)).

173. Rules on the protection of the environment are adopted, and obligations to that effect are undertaken, in the common superior interest of humankind. This has been expressly acknowledged in some treaties in the field of the environment[160]; it is further implicit in references to "human health" in some environmental law treaties[161]. Furthermore, the 1997 United Nations Convention on the Law of Non-Navigational Uses of International Watercourses, e.g., foresees the need for watercourse States to "consult with a view to negotiating in good faith" watercourse agreements (Article 3 (5)). In several environmental law treaties, the obligations of States parties are clearly set forth in mandatory terms (verb "shall"). One example, among many others, is afforded by the 1991 ECE Espoo Convention on Environmental Impact Assessment in a Transboundary Context (Article 2-7). In the 1975 Statute of the River Uruguay, applicable in the present case of the *Pulp Mills*, the same mandatory language appears (verb "shall") in relation to procedural obligations (Articles 7-8 and 10-12) as well as substantive obligations (Article 36); and Articles 35 and 41, also covering substantive obligations, lay down, likewise, clear commitments on the part of the States parties (verb "undertake").

174. In domains of *protection*, such as that of the environment, it is the *objective* character of obligations that ultimately matters. There cannot be here much space for *laisser faire, laisser passer*. I am not really entirely convinced of any presumed ontological distinction between procedural and substantive obligations (remindful of the sterile and endless polemics between lawyers schooled in procedural and substantive

[160] E.g., preambles of the 1971 Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Sea-bed and the Ocean Floor and in the Subsoil Thereof; the 1972 Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction; the 1977 Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques; the 1972 Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter; the 1974 Convention for the Prevention of Marine Pollution from Land-Based Sources; the 1972 Convention for the Prevention of Marine Pollution by Dumping from Ships and Aircraft; the 1972 UNESCO Convention for the Protection of the World Cultural and Natural Heritage.

[161] E.g., the 1985 Vienna Convention for the Protection of the Ozone Layer, preamble and Article 2; the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer, preamble; Article 1 of the three aforementioned marine pollution Conventions.

branches of the law); more often that one realizes, *la forme conforme le fond*. Nor am I persuaded by the need to resort to the unsatisfactory distinction between obligations of conduct and of result, particularly in domains of *protection*, such as that of the environment. In the present Judgment in the *Pulp Mills* case, the Court has at least admitted that there is a "functional link" between procedural and substantive obligations under the 1975 Statute of the River Uruguay, in regard to prevention (para. 79).

175. For the appreciation of the objective character of obligations in a domain of protection such as that of International Environmental Law, one needs, again, to turn attention to the relevance of principles of law. Unfortunately, the Court has not done so in the present Judgment. For example, when it briefly invokes, *in passim*, the principle of good faith (in relation to the operation of the mechanism of co-operation under the 1975 Statute, para. 145), it immediately links its brief invocation of that principle to customary international law, as if general principles were subsumed under this latter. They are not. On the contrary, in my conception those principles orient the evolution of both customary and conventional international law.

176. In effect, the principle of good faith in the compliance with international obligations *(pacta sunt servanda)* is generally regarded as providing the foundation of the international legal order itself[162]. The principle *pacta sunt servanda* — asserted by that of good faith *(bona fides)*[163] — effectively transcends both customary and conventional international law, being characterized as a general principle of international law[164]. Its insertion into the 1969 Vienna Convention on the Law of Treaties (Article 26 and preamble) was endowed with a clearly axiomatic character: it came to appear in a convention of codification, which asserted in an incontrovertible way its wide scope. Yet, already well before its acknowledgement in the 1969 Vienna Convention referred to, the principle *pacta sunt servanda* effectively appeared, as already indicated, as a true general principle of international law, endowed with widespread jurisprudential recognition[165].

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[162] G. White, "The Principle of Good Faith", *The United Nations and the Principles of International Law — Essays in Memory of M. Akehurst* (V. Lowe and C. Warbrick, eds.), London/N.Y., Routledge, 1994, pp. 231 and 236.

[163] M. Lachs, "Some Thoughts on the Role of Good Faith in International Law", *Declarations on Principles, a Quest for Universal Peace — Liber Amicorum Discipulorumque B. V. A. Roling*, Leyden, Sijthoff, 1977, pp. 47-55; Clive Parry, "Derecho de los Tratados", *Manual de Derecho Internacional Público* (M. Sørensen, ed.), 5th reimpr., Mexico, Fondo de Cultura Económica, 1994, pp. 200-201 and 229.

[164] Ian Brownlie, *Principles of Public International Law*, 5th ed., Oxford University Press, 1998, p. 620.

[165] E. de la Guardia and M. Delpech, *El Derecho de los Tratados y la Convención de Viena*, Buenos Aires, La Ley, 1970, p. 276.

177. The scope of application of the principle *pacta sunt servanda*, as well as the ultimate question of the validity of the norms of international law, naturally transcend the particular ambit of the law of treaties[166]; the principle *pacta sunt servanda* is, in any case, deeply rooted in the international legal system as a whole[167]. Good faith is, in fact, inherent to any legal order, guiding the behaviour of the subjects of law. Four years after the adoption of the 1970 United Nations Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States, the ICJ, in the (first) *Nuclear Tests* case (1974), stressed, in a celebrated *obiter dictum*, the fundamental character of the principle of good faith, pondering that

> "One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international co-operation, in particular in an age when this co-operation in many fields is becoming increasing essential."[168]

178. On several other occasions, in its *jurisprudence constante*, the ICJ has drawn attention to the principle of good faith, in the most diverse circumstances[169], including in respect of the duty to negotiate[170]. As to

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[166] Cf., J. L. Brierly, *The Basis of Obligation in International Law*, Oxford, Clarendon Press, 1958, p. 65; J. L. Brierly, *The Law of Nations*, 6th ed., Oxford, Clarendon Press, 1963, p. 54.

[167] For the historical and doctrinal evolution of the principle *pacta sunt servanda*, cf., e.g., M. Sibert, "The Rule *Pacta Sunt Servanda*: From the Middle Ages to the Beginning of Modern Times", 5 *Indian Yearbook of International Affairs* (1956) pp. 219-226; J. B. Whitton, "La règle *pacta sunt servanda*", 49 *Recueil des cours de l'Académie de droit international de La Haye (RCADI)* (1934), pp. 151-268.

[168] *Nuclear Tests* cases (atmospheric testing, *Australia and New Zealand* v. *France*), *ICJ Reports 1974*, p. 473, para. 49.

[169] Cf., the following cases: *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America), Judgment, I.C.J. Reports 1984*, p. 305, para. 130; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, p. 414, para. 51, p. 418, para. 60 and p. 419, para. 63; *Border and Transborder Armed Actions (Nicaragua* v. *Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 105, para. 94; *Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, p. 66, para. 109, p. 67, para. 112 and p. 78, para. 142; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria), Preliminary Objections, Judgment, I.C.J. Reports 1998*, p. 296, para. 38.

[170] Cf., the following cases: *Fisheries Jurisdiction (United Kingdom* v. *Iceland), Merits, Judgment, I.C.J. Reports 1974*, p. 30, paras. 69-70; *Interpretation of the Agreement of 25 March 1951 between the WHO and Egypt, Advisory Opinion, I.C.J. Reports 1980*, p. 92, para. 43 and p. 95, para. 48; *Delimitation of the Maritime Boundary in the Gulf of Maine Area (Canada/United States of America), Judgment, I.C.J. Reports 1984*, p. 292, para. 87; *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, I.C.J. Reports 1996 (I)*, p. 263, para. 99 and p. 264, para. 102; *Land and Maritime Boundary between Cameroon and Nigeria (Cameroon* v. *Nigeria: Equatorial Guinea intervening), Judgment, I.C.J. Reports 2002*, p. 424, para. 244.

this latter, the Court pondered, in the *North Sea Continental Shelf* cases *(Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands)*, in another *obiter dictum*, that "[o]n a foundation of very general precepts of justice and good faith, actual rules of law are here involved which govern the delimitation of adjacent continental shelves" (*Judgment, I.CJ. Reports 1969*, pp. 46-47, para. 85). There always are the *prima principia*, wherefrom norms and rules emanate; in sum, in my own conception, expressed in the present separate opinion, the principle of good faith occupies a key position in international law and in all legal systems, providing them all with an ethical basis, and surely standing above positive law.

4. CARU's Legal Personality

179. The consideration of the issues under contention in the present case of the *Pulp Mills* takes us, in relation to yet another related aspect, beyond the strictly inter-State dimension, when the Court rightly acknowledged the legal personality of CARU, as from the provision of Article 50 of the 1975 Statute of the River Uruguay. The implications inferred by Uruguay and Argentina, from such legal personality, were, however, not the same. This calls for a review and assessment of their respective arguments in this respect.

180. In his pleadings of 23 September 2009 about the legal nature of CARU, as a joint institutional mechanism, counsel for Uruguay claimed that International River Commissions are created by member States, which remain "free to go outside the joint mechanism when it suits their purposes, and they often do so[171]". While acknowledging that CARU is a legal entity (Article 50 of the Statute), able to "conclude agreements with both parties specifying the privileges and immunities enjoyed by its members and staff under international law" (Article 54), counsel for Uruguay asserted that CARU is not an autonomous body, but in fact *is* the parties themselves, i.e., "CARU is an instrument of the two parties' Foreign Ministries"[172]. He stressed that the way CARU takes decisions is strictly dependent on the will of the two parties; thus, in his view, Argentina and Uruguay were free to deal with the matter of the Botnia project directly, at the highest political level, and not through CARU.

181. Argentina, in turn, claimed that CARU has a vital role in maintaining the integrity of the 1975 Statute and the proper administration of the machinery for co-operation. Argentina considered that Article 7 of the 1975 Statute specifically confers a power of determination to

[171] CR 2009/18, p. 42, para. 21 (McCaffrey).
[172] *Ibid.*, p. 43, para. 30.

CARU[173], which constitutes a *decision*[174]. Argentina asserted, in its Memorial and Reply, that the terms employed demonstrate CARU's ability to take a (binding) decision for the purposes of Article 7 of the 1975 Statute[175].

182. Uruguay, on its part, retorted that CARU serves solely as a vehicle for facilitating communication between the parties, but it does not have a decision-making authority over the project[176]. Uruguay, thus, in its arguments, restricted the role of CARU, under Articles 7-12 of the 1975 Statute, to the undertaking of a preliminary technical review, a screening function. In its view, CARU — an intergovernmental entity, whose "executive" consists of the two delegations appointed by the two member States — contributes to conciliation between the parties, as a channel for the implementation of the scheme of co-operation set forth in the 1975 Statute.

183. Yet, Article 50 of the 1975 Statute determines that CARU "shall be made a legal entity in order to perform its functions", and the parties "shall provide it with the necessary resources and all the information and facilities essential to its operations". CARU is thus endowed with legal personality, as the ICJ rightly pointed out in the present Judgment in the *Pulp Mills* case (para. 87). In a report of 1987, by a former President of CARU (from the delegation of Argentina), analysing the competences of the organ and the extent whereto they were fulfilled (within CARU's Subcommittee on Juridical and Institutional Affairs), it is stated that Article 7 of the Statute

> "[m]akes it obligatory for each Party to notify CARU if it plans to construct new channels, modify or alter already existing channels in any significant way, or perform any work on a scale sufficient to affect navigation, the river regime, or its *water quality, so that CARU makes a declaration in the first instance*"[177].

184. The 1975 Statute, furthermore, grants CARU the prerogatives of celebrating agreements with both parties regulating "privileges and immunities enjoyed by its members and staff under international law" (Article 54), and of setting up "whatever subsidiary bodies it deems necessary" (Article 52). Thus, in addition to its conciliatory and co-ordinating functions, CARU has also these executive, technical and regulatory functions. And CARU's conciliation procedure is set up in mandatory terms (Arti-

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[173] Article 7 of the 1975 Statute states "shall determine".

[174] As the 2nd paragraph sets forth: "If the Commission *finds this to be the case* or if a *decision* [in Spanish *decisión*] cannot be reached in that regard, the party concerned shall notify the other party of the plan through the said Commission."

[175] Memorial of Argentina, paras. 3.66-3.70; and Reply of Argentina, paras. 1.158-1.160.

[176] Counter-Memorial of Uruguay, paras. 2.189-2.205, and cf. Vol. IV, Anns. 82 and 84.

[177] *Ibid.*, Vol. IV, Ann. 85; emphasis added.

cles 58-59). The co-ordination measures effected by CARU, and its participation in the regime of consultation, make it the ideal *forum* wherein the parties can present and state their differences and disputes, without having to go directly to other instances for the settlement of their disputes, such as the ICJ.

185. Uruguay has seen it fit to annex, to its Counter-Memorial, the minutes of a technical-legal symposium *(Encuentro Técnico-Jurídico)*, held at CARU's headquarters on 17-18 September 1987[178]. The proceedings of this symposium contain successive acknowledgements of the legal personality of CARU[179], distinct and independent of that of the two States parties — to the 1975 Statute — that created it[180]. Its legal capacity is also acknowledged[181]. The same symposium also considered River Commissions in a comparative perspective; thus, a renowned specialist on the matter, Julio Barberis (quoted by both Argentina and Uruguay during the proceedings of the present case of the *Pulp Mills* before the ICJ), stated on that occasion, on 18 September 1987, that there have been distinct systems of co-operation between riparian States, ranging from direct contacts between the Foreign Ministries, or other entities, of the States concerned, to the creation of International River Commissions, also operating each one with its own characteristics[182].

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[178] Counter-Memorial of Uruguay, Vol. IV, Ann. 72.

[179] CARU, *Encuentro Técnico-Jurídico Realizado en la Sede de CARU*, 17-18 September 1987, pp. 16, 39 and 44-45.

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

[181] Cf., *ibid*., p. 35.

[182] In the words of J. Barberis himself, in the aforementioned 1987 symposium held at CARU,

> "Entre las diversas instituciones o sistemas de cooperación que los Estados crean para realizar aprovechamientos hidráulicos, se encuentran las Comisiones Fluviales Internacionales, como las del Rhin y del Danubio. Estas organizaciones poseen una determinada personalidad jurídica internacional. Pero (...) el sistema de la Cuenca del Plata instituído por el Tratado de Brasília carece de personalidad jurídica internacional. (...) El establecimiento de Comisiones Fluviales Internacionales es sólo una forma o modo de cooperar entre los Estados, entre varias otras posibles, para llevar a cabo un aprovechamiento hidráulico. Sin embargo, conviene añadir que la técnica de crear Comisiones Fluviales Internacionales es una forma utilizada con frecuencia y desde antiguo por los Estados, y que, justamente, la primera organización internacional fue una Comisión Fluvial: la Comisión del Rhin, creada en 1804 mediante un tratado entre Francia y el Sacro Imperio." (*Ibid*., p. 64.)
>
> "International River Commissions, such as those of the Rhine and the Danube, are among the various institutions or systems of co-operation which States put in place in order to exploit hydraulic resources. Those organizations have specific international legal personality. However ... the River Plate Basin system, set up by the Treaty of Brasilia, lacks such personality. ... The creation of International River Commissions is but one mode or form of co-operation among others by which States exploit hydraulic resources. However, it should be added that it is one which States use frequently, and have used for a long time, and that the first international organization was in fact a River Commission, the Rhine River Commission, established in 1804 by a treaty concluded between France and the Holy Empire." (*Ibid*., p. 64.) *[Translation by the Registry.]*

186. The 1975 Statute had thus established, beyond the strictly direct bilateral co-operation between the two States concerned, an institutional framework for its conduction. In the present Judgment in the *Pulp Mills* case, the ICJ observed that, "like any international organization with legal personality, CARU is entitled to exercise the powers assigned to it by the 1975 Statute and which are necessary to achieve the object and purpose of the latter"; the novelty in the *cas d'espèce* is that this also applies in the fulfilment of the common interests of the States parties — the Court added — to organizations which, "like CARU, only have two member States" (para. 89).

187. It is, in my view, very hard to reconcile the Court's acknowledgement of CARU's legal personality (paras. 87 and 89) with its lenience in respect of the "understanding" reached by the parties in the Ministerial Meeting of 2 March 2004 (para. 131). As I sustain in the next section (XIII) of the present separate opinion, that "understanding" does not abide by the precautionary principle. Furthermore, there was a procedure laid down in Articles 7-12 of the 1975 Statute, to be followed by the parties. The Court should not have yielded to State voluntarism in paragraph 131 of the present Judgment, as the language of the procedure (in Articles 7-8 and 10-12) set up by the Statute is mandatory (verb "shall"), not permissive.

188. There is nothing in the 1975 Statute of the River Uruguay, regarded by the Court as the applicable law in the *cas d'espèce*, that could have led the Parties — Uruguay and Argentina — to infer the prerogative of reaching an "understanding", as they did, circumventing the procedure of the 1975 Statute. By the same token, there is nothing in the same Statute that could have led the Court to assume, as it did, that the Parties were "entitled to depart" from the statutory procedure (para. 128); CARU could not have been bypassed at all.

189. The mandatory character of the statutory procedure is, moreover, what clearly ensues from the Court's conclusion (para. 266) that both Parties have the obligation to enable CARU "to exercise on a continuous basis the powers conferred on it by the 1975 Statute", and "to continue their co-operation through CARU and to enable it to devise the necessary means to promote the equitable utilization of the river, while protecting its environment" *(ibid.)*. These continuing obligations are in addition to the initial obligation of the parties, under the 1975 Statute, to notify through CARU, before the authorization of construction or the commissioning of works, as "an essential part of the process leading the parties to consult in order to assess the risks of the plan and to negotiate possible changes which may eliminate those risks or minimize their effects" (para. 115), thus avoiding "potential damage" (para. 113).

190. The legal personality of an international organization (whatever the number of its member States might be) ought necessarily to fulfil cer-

tain objective prerequisites, before such organization comes into being as such, and begins to exercise its functions. The organization at issue ought to have been created by an agreement between the States concerned, ought to have a permanent organic structure whereby it is able to express its own views (not necessarily the same as those of the individual member States that compose it), and ought to possess its own common purposes to be fulfilled precisely in the faithful exercise of its functions. It is the case of CARU, as an international entity, standing beyond the strictly inter-State dimension.

XIII. Fundamental Principles as *Substratum* of the Legal Order Itself

191. The general principles of law have thus inspired not only the interpretation and the application of legal norms, but also the law-making process itself of their elaboration. They reflect the *opinio juris*, which, in turn, lies as the basis of the formation of law. Such principles mark presence at both national and international levels. There are fundamental principles of law which identify themselves with the very foundations of the legal system, revealing the values and ultimate ends of the international legal order, guiding it, protecting it against the incongruencies of the practice of States, and fulfilling the necessities of the international community [183].

192. Such principles, as expression of an objective "idea of justice", have a universal scope, requiring the observance of all States, and securing the unity of law, as from an objective "idea of justice". It is evident that those principles of law do not depend on the "will", nor on the "agreement", nor on the consent, of the subjects of law; they touch on the foundations of the necessary law of nations. Above the will of subjects of law, stands their conscience, as the ultimate material source of all law.

193. If, by chance, any doubts are raised as to the extent of application of the fundamental principles which permeate the whole international legal order, it is the function of the jurist to clarify such doubts and not to perpetuate them, so that law may accomplish its fundamental function of providing justice in the settlement of a dispute. It is certain that the norms are the ones juridically binding, but when they move away from the principles, their application is likely to lead to breaches of the rights at stake and to the occurrence of distortions and injustices, and violations of the legal order at issue itself.

194. Turning to the present case of the *Pulp Mills*, the question may now be asked: had the observance of the precautionary principle pre-

[183] G. Cohen-Jonathan, "Le rôle des principes généraux dans l'interprétation et l'application de la convention européenne des droits de l'homme", *Mélanges en hommage à L. E. Pettiti*, Brussels, Bruylant, 1998, pp. 192-193.

vailed all the time would that have made a difference in the contentious situation now settled be the Court by means of its present Judgment? To my mind, most likely, yes. May I refer, in this respect, to the attitude of the two contending Parties as well as of the Court itself. Had the precautionary principle been kept in mind, all the time, by the two States concerned, including in the Ministerial Meeting of 2 March 2004, which led to their "understanding" (as minuted by CARU) examined in the present Judgment (paras. 125-131), this "understanding" — which in a way circumvented or bypassed the procedure laid down in Articles 7-12 of the 1975 (in particular Article 7) — would in all probability not have taken place.

195. That "understanding", which made *tabula rasa* of the statutory procedure, became the source of much subsequent misunderstanding between Argentina and Uruguay. Had the two Parties kept in mind the precautionary principle from the start, the so-called "understanding" would in all probability not have materialized, to the benefit of the integrity of the 1975 Statute and its scheme of environmental protection of the River Uruguay. In any case, shortly after the distraction of that episode, Argentina and Uruguay realized the importance of the precautionary principle, and duly invoked it — though with distinct interpretations — in the proceedings before the ICJ in the present case of the *Pulp Mills* (cf. *supra*).

196. Turning attention now to the attitude of the Court itself, if it likewise had also kept in mind, all the time, the precautionary principle (which it did not), it would have reached a decision distinct from the one it took on 13 July 2006, and would have, in all probability, ordered or indicated the requested provisional measures of protection (to be effective until today, 20 April 2010, date of the present Judgment on the merits of the *Pulp Mills* case). This would have rendered moot all the subsequent discussions and the unnecessary tension surrounding the so-called "no-construction obligation", which also drew the attention of the Court in the present Judgment (paras. 152-154). These points suffice to single out the relevance of keeping in mind the precautionary principle all the time, when it comes to the protection of the environment.

197. Fundamental principles are indeed indispensable, they form the *substratum* of the legal order itself, being prior and superior to the will or consent of individual subjects of law. They serve as the foundations of the *jus necessarium*, as propounded by the founding fathers of international law. Already in the early seventeenth century, Francisco Suárez, in his *De Legibus, ac Deo Legislatore* (1612), beheld the law of nations as a "most necessary" law, grounded in "certain self-evident principles of conduct" of natural law (para. 18), requiring everyone to "live rightly", so as to preserve "peace and justice", and bearing in mind the "common good" (para. 19). In his lucid and elegant warning (as to human fallibility, egoism and wickedness), "it is necessary" that, whatever pertains to the common good, "should be accorded particular care and observance" as

> "individuals have difficulty in ascertaining what is expedient for the common good, and, moreover, rarely strive for that good as a primary object; so that, in consequence, there was a necessity for human laws that would have regard for the common good by pointing out what should be done for its sake and by compelling the performance of such acts" (para. 19)[184].

198. Later on, in the second half of the eighteenth century, in the age of enlightenment, Christian Wolff coined, in a definitive way, the expression *jus necessarium*, in his *Jus Gentium Methodo Scientifica Pertractatum* (1764), likewise grounded on natural law, conferring onto the law of nations the attributes of being "necessary and immutable" (paras. 4-6). All nations are thereby given "mutual assistance in perfecting themselves" and their condition, and fostering "consequently the promotion of the common good" (para. 8). Another classic of that epoch to address the *jus necessarium* was Vattel's *Le droit des gens, ou principes de la loi naturelle* (1758); that *jus* was conceptualized as referring to a law of nations which contained precepts of natural law, the observation of which no nation could escape from (paras. 7-8).

199. In the entirely different world wherein we live nowadays, who would deny that the conservation of the environment is part of the *jus necessarium*? Who would deny that on this depends ultimately the very survival of humankind? The world has much changed — ever since the days of Suárez, Wolff and Vattel — but the necessity to strive towards the promotion of the common good is felt as acutely today as it was in times past. The world has much changed, but human aspirations towards the improvement of the human condition remain the same. It is human conscience that awoke and reckoned the *jus necessarium*, and has persevered in the search for truth, peace and justice, on the basis of the ineluctable relationship between the legal order and the ethical order.

200. Fundamental principles are consubstantial to the international legal order itself, wherein they give expression to the idea of an "objective justice", proper of natural law (cf. *supra*). Principles of international law shed light into the interpretation and application of international law as a whole, they pertain to the very *substratum* of this latter, and are identified with the very foundations of the international legal system. They permeate every legal system. Their continuing validity is beyond question. Principles of international law are essential to humankind's quest for justice, and of key importance to the endeavours of construction of a truly universal international law.

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[184] English translation of F. Suárez's *De Legibus, ac Deo Legislatore* (1612), published in the collection, *The Classics of International Law* (ed. by J. Brown Scott, 1944).

XIV. *Prima principia:* The Axiological Dimension

201. Every legal system has fundamental principles, which inspire, inform and conform to their norms. It is the principles (derived etymologically from the Latin *principium*) that, evoking the first causes, sources or origins of the norms and rules, confer cohesion, coherence and legitimacy upon the legal norms and the legal system as a whole. It is the general principles of law *(prima principia)* which confer to the legal order (both national and international) its ineluctable axiological dimension; it is they that reveal the values which inspire the whole legal order and which, ultimately, provide its foundations themselves[185]. This is how I conceive the presence and the position of general principles in any legal order, and their role in the conceptual universe of law.

202. General principles of law entered into the legal culture, with historical roots which go back, e.g., to Roman law, and came to be linked to the very conception of the democratic State under the rule of law, mainly as from the influence of the enlightenment thinking *(pensée illuministe)*. Despite the apparent indifference with which they were treated by legal positivism (always seeking to demonstrate a "recognition" of such principles in positive legal order), and despite the lesser attention dispensed to them by the reductionist legal doctrine of our days, one will never be able to prescind from them.

203. From the *prima principia*, the norms and rules emanate, which find in them their proper meaning. General principles of law are thus present in the origins of law itself, and disclose the legitimate ends to seek: the common good (of all human beings, and not of an abstract collectivity), the realization of justice (at both national and international levels), and the preservation of peace. Contrary to those who attempt — in my view in vain — to minimize them, I understand that, if there are no principles, nor is there truly any legal system at all.

204. The identification of the basic principles has accompanied *pari passu* the emergence and consolidation of all the domains of law, and all its branches (constitutional, civil, civil procedural, criminal, criminal procedural, administrative, and so forth). This is so with Public International Law itself, as well as with some of its domains (of protection), such as International Environmental Law, the International Law of Human Rights, International Humanitarian Law, International Refugee Law, and with International Criminal Law, the Law of the Sea, the Law of International Watercourses, the Law of Outer Space, among others. However circumscribed or specialized any one of its domains may be, its basic principles can there be found (cf. *infra*), assuring the cohesion and

[185] Cf., to this effect, IACtHR, Advisory Opinion No. 18, on *The Juridical Condition and the Rights of the Undocumented Migrants*, of 17 September 2003, Concurring Opinion of Judge A. A. Cançado Trindade, paras. 44-58.

unity of the law as a whole. There is no "fragmentation" here (a most unfortunate term, and surely one to be avoided and discarded), but rather a reassuring expansion of contemporary international law, asserting its aptitude to regulate relations not only at inter-State, but also at intra-State, levels.

205. Some of the basic principles are proper to certain areas of law, others permeate all areas of law. The *corpus* of legal norms (national or international) operates moved by the principles, some of them ruling the relations themselves between human beings and the public power[186]. Principles enlighten the path of legality as well as legitimacy. Hence the constant reaffirmation or restoration, pursuant to the evolving natural law thinking, of a standard of justice, heralded by general principles of law, whereby positive law has come to be evaluated. This perennial resurgence of the natural law outlook[187] — never fading away — has been much contributing to the affirmation and consolidation of the primacy, in the order of values, of the obligations pertaining to regimes of protection (of the human person and of the environment).

206. The international legal profession in our days, in its large majority, unfortunately admits its adherence to legal positivism. Those who do so, seek to qualify their positivist standing by adding an adjective before it: there are those who are proud to call themselves "modern" or "post-modern" positivists — whatever that means — apparently failing to realize that, by thus labelling themselves, they are doomed to be quickly outdated, surpassed by the implacable and merciless onslaught of time. Others add distinct and self-pleasing adjectives, as if trying to exorcise *a priori* any future guilty feelings for eventual injustices committed *de jure*. Paraphrasing Isaiah Berlin, it is imperative to keep on swimming against the current, to keep on upholding firmly the application of general principles of law, in addition to the pertinent positive law.

XV. "General Principles of Law" as Indicators of the *Status conscientiae* of the International Community

207. To keep on considering general principles of law as encompassing only those of a domestic origin corresponds, in my view, to a static out-

[186] As the principles of natural justice, of the rule of law, of the rights of the defence, of the right to the natural judge, of the independence of justice, of the equality of all before the law, of the separation of powers, among others.

[187] Cf., e.g., L. Le Fur, "La théorie du droit naturel depuis le XVIIe siècle et la doctrine moderne", 18 *Recueil des cours de l'Académie de droit international de La Haye (RCADI)* (1927), pp. 297-399; A. Truyol y Serra, "Théorie du droit international public — Cours général", 183 *RCADI* (1981), pp. 142-143; A. Truyol y Serra, *Fundamentos de Derecho Internacional Público*, 4th rev. ed., Madrid, Tecnos, 1977, pp. 69 and 105.

look of the formal "sources" of international law, in respect of the formulation in 1920 of Article 38 of the PCIJ Statute, regarded as immutable and sacrosanct. Positivist legal thinking has always suffered from this inescapable shortsightedness, in time and space; it faces unsurmountable difficulties to accompany the evolution of international law (in such new domains as, e.g., International Environmental Law, and others), and is incapable to behold universalism. Its limitations are to be regretted, if not pitied.

208. It can be seen, from the considerations above, that the view whereby general principles of law were only those found *in foro domestico* corresponded only to one conception (proper of analytical positivism) which prevailed 90 years ago, and which was challenged by learned jurists of those days. Fortunately, it has never been unanimous. This appears — in my own perception — most commendable, for when everyone is thinking alike, not everyone — if not anyone — is really thinking at all. Attempts to identify general principles of law only within given national systems (or in each of them individually), besides being a static exercise, makes abstraction of the time dimension, and renders it impossible to advance towards a universal international law.

209. General principles of law *(prima principia)* confer upon the legal order itself — both nationally and internationally — its ineluctable axiological dimension (cf. *supra*). It is those principles that reveal the values which inspire the whole legal order, and which, ultimately, provide its foundations themselves. The identification of the basic principles has accompanied *pari passu* the emergence and consolidation of all the domains of law. International Environmental Law provides a good illustration in this respect.

210. Can we, for example, conceive of International Environmental Law without the principles of prevention, of precaution, and of sustainable development, added to the long-term temporal dimension of inter-generational equity? Not at all, in my view. Can we dwell upon the International Law of Human Rights without bearing in mind the principles of humanity, of the dignity of the human person, of the inalienability of human rights, of the universality and indivisibility of human rights? Certainly not. Can we consider International Humanitarian Law without the principles of humanity, of proportionality, of distinction[188]? Surely not. Can we approach International Refugee Law without taking due account of the principles of *non-refoulement*, and of humanity? Not at all.

211. Can we think of International Criminal Law without keeping in

[188] Between combatants and the civil population: the principle whereby the election of methods or means of combat is not unlimited. In International Humanitarian Law, e.g., the 1949 Geneva Conventions and their Protocols of 1977, essentially victim-oriented, are inspired above all by the overriding principle of humanity, which calls for respect to the human person in any circumstances and at all times.

mind the principles of legality[189], and of presumption of innocence? Certainly not. Can we consider the Law of the Sea without taking note of the principles of peaceful uses (of the sea), of equality of rights (in the high seas), of peaceful settlement of disputes[190], of freedom of navigation and of innocent passage, of sharing of benefits (of deep-sea mining), of protection of the seas for future generations? Not at all. Can we consider the Law of Outer Space without paying regard to the principles of non-appropriation, of peaceful uses and ends, of freedom of access and of scientific research, of sharing of benefits (in space exploration)? Surely not.

212. And the examples multiply, to the same effect, if we move on to other domains. Whenever general principles are overlooked, wrongs or injustices are bound to be committed. In my conception, they conform to an autonomous formal "source" of international law, that no international tribunal can minimize or overlook. Their proper consideration cannot at all be limited to verifying whether they have entered the realm of international law through custom or treaties. They disclose the axiological dimension *(supra)* of the applicable law, besides being indicators of the degree of evolution of the *status conscientiae* of the international community as a whole.

213. If we can detect cultural manifestations in previous uses and customs, or even in ancient legal systems, linking environmental concerns to those practices[191], so much the better, as this will reinforce the cause of the applicability of principles in the evolving International Environmental Law of our times, in response to those environmental concerns. I have already referred to four cases in Latin America, decided by the IACtHR, marked by cultural density (cf. *supra*), disclosing the utmost relevance of the preservation of cultural identity (of peoples in their natural *habitat*).

214. But what happens if a new domain of international law emerges in an accelerated way, without apparent traces in support of the corresponding emerging principles in previous cultural manifestations, or uses and customs, or practices, of the kind? This is what happened with the emergence and growth of the domain of Outer Space Law, in an accelerated way, from the 1960s onwards. The search for the identification and formulation of the corresponding principles began promptly, on the occasion. The current and continuing expansion of the scope of interna-

[189] *Nullum crimen sine lege, nulla poena sine lege.*

[190] And of equidistance and of special circumstances (in delimitation of maritime spaces).

[191] E.g., those concerns linked to ancient irrigation practices in distinct regions; cf. *Gabčíkovo-Nagymaros Project* case *(Hungary/Slovakia), Judgment, I.C.J. Reports 1997*, separate opinion of Judge C. G. Weeramantry, pp. 97-111.

tional law *ratione materiae* calls definitively for a more careful consideration of legal principles, rather than for their minimization.

215. To recall two further examples, among others, within the United Nations system as a whole, the International Labour Organization [ILO] itself, driven by functional necessity, sought to identify — to guide its operation in the area — the fundamental principles and rights at work, by means of a declaration adopted in June 1998. More recently, in its turn, UNESCO has devoted its endeavours towards the elaboration, and the adoption, of its 2005 Universal Declaration on Bioethics and Human Rights, in particular to the identification and formulation of principles applicable in this new domain. My point is that, initiatives of the kind rightly aim to conform to the *jus necessarium* in the respective domains of legal knowledge.

216. General principles of law have in fact been in constant review in the law of the United Nations. The ICJ, being "the principal judicial organ of the United Nations" (Article 92 of the Charter of the United Nations), should, in my view, devote more attention to them in the exercise of its contentious function. In my conception, they orient the interpretation and application of the norms and rules of this legal order, be they customary or conventional, or set forth by resolutions of international organs. General principles of law may further be resorted to in the identification of *opinio juris* itself, taking this latter not strictly as a constitutive element of custom, but, more amply, as an indication of the *status conscientiae* of the members of the international community as a whole.

217. Last but not least, it is not surprising to find that voluntarist-positivists, who have always attempted to minimize the role of general principles of law, have always met the opposition of those who sustain the relevance of those principles, as ensuing from the idea of an objective justice, and guiding the interpretation and application of legal norms and rules. This is the position that I sustain. It is the *principles* of the international legal system that can best ensure the cohesion and integrity of the international legal system as a whole. Those principles are intertwined with the very foundations of international law, pointing the way to the universality of this latter, to the benefit of humankind. Those principles emanate from human conscience, the universal juridical conscience, the ultimate material "source" of all law.

XVI. EPILOGUE

218. The ICJ, in settling peacefully the disputes submitted to it, is perfectly entitled to resort to general principles of law (Article 38 (1) *(c)* of its Statute), and should do so. If it, furthermore, wishes, in the faithful

exercise of its functions, to not only settle the disputes brought into its cognizance but concomitantly to foster the progressive development of international law — as in my view it should — it will have to devote greater attention to those general principles, encompassing, as they surely do, the principles of international law as a whole, and the principles proper to particular domains of international law.

219. In my own conception, there is epistemologically no reason at all to take account of, and consider, legal principles only if, and when, subsumed under customary or conventional international law. The inclination, noticeable in most contemporary expert writing to do so, is, in my view, conceptually flawed. General principles of law constitute an autonomous formal "source" of international law, and orient the evolution of customary and conventional international law. Contemporary International Environmental Law bears witness of that. In addressing this matter, the intellectual poverty of the tendency, of a great part of contemporary international legal doctrine, to privilege legal techniques to the detriment of legal principles, should not be embraced by this Court. Quite on the contrary, it should be discarded by it, giving pride of place to legal principles, *comme il faut*.

220. In sum, the applicable law in the present case of the *Pulp Mills*, is, in my understanding, not only the 1975 Statute of the River Uruguay, but the Statute *together with* the relevant general principles of law, encompassing the principles of International Environmental Law. These latter are, notably, the principles of prevention, of precaution, and of sustainable development with its temporal dimension, together with the long-term temporal dimension underlying inter-generational equity. The Hague Court, also known as the World Court, is not simply the International Court of Law, it is the International Court of *Justice*, and, as such, it cannot overlook *principles*.

(*Signed*) Antônio Augusto CANÇADO TRINDADE.