ON A RECENT STUDY ON THE ICJ JUDGMENT OF December 16, 2015

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The long comment published in the legal review of the environment in 2017 has attracted the interest of readers of this internationalist academic journal. This is actually a study penned by Mrs. Khazar Masoumi, PhD in international law from the University of Strasbourg, on the consecration of the International Court of Justice in part on the obligation to assess environmental impacts in a transboundary context, when a State carries out works likely to cause damage in the territory of another State.

The circumstances surrounding that case originated in two opposing cases: Costa Rica in Nicaragua and vice versa, but the Court decided to join in order to solve both.

This is precisely the subject of the judgment of 16 December 2015. The information on the two cases, as well as the ways in which the Court has come to the solution of the problems are presented with special care. However, unlike the lack of interest highlighted by the comment’s author, the analysis undertaken does not leave one indifferent and invites one to respond from a technical point of view on its premises and findings.

1- Concerning the premises, the analysis is entirely focused on the question of the obligation to evaluate the impact on the environment, as required by each of the two cases applicants, even if it results more widely in the judgment that this procedural requirement must be combined with another resulting procedural requirement, the duty of consultation and information, and the scope of the judgment is even greater as they are tools which the judge can use to make his judgment, such as the use of experts or the indication of provisional measures.

Such premises have inevitably led the author to speak of a "boring environmental judgement". Let’s face it, underestimating the contribution and the ever-continuing development of international environmental law and international rules protecting it that the Court is now responsible for ensuring would be equivalent to ignorance of the importance of this judgment in 2015 on the environment.

While the comment is free and Mrs. Masoumi does not fail to explain the reasons for her anger toward the commented decision, particularly regarding the second case in which environmental issues were at the center of the dispute between Nicaragua and Costa Rica about the construction by the latter of a road along the Bay of San Juan, with a significant risk of causing transboundary damages according to

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2 Some activities carried out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica), ICJ collection 2015, p. 665.
3 See Art. prev. p. 343.
Nicaragua⁴. And precisely because the environment is central in this case, the commentator does not hesitate to write that "it is not a landmark case"⁵.

Regretfully, we must express our disagreement. Certainly, as she herself says, it’s only the fourth judgement on the environment in the ICJ jurisprudence. However, it remains that it is the 2015 judgment that was selected as the one that helped to clarify the position of the ICJ on the rules of international environmental protection, as they are gradually formed in general and conventional international law. However, the author says that the principle, that like the 2010 judgment, this is only a "decision"⁶.

Such assumptions seem highly questionable because they do not take into account all the conditions under which the Court has previously been called upon to rule on the environmental impact of the issues before it. All the author's reasoning is, therefore, canceled by a litigation approach to the environment, which may not meet these conditions.

2 – Therefore, the author’s conclusions can only necessarily be consistent with these assumptions and reasoning. Mrs. Masoumi writes that the judgment "is probably the dullest among those that the High Court has made in environmental protection matters"⁷. However, despite the relentless nature of such a conclusion, the author attempts to qualify her judgment and considers that the commented decision nevertheless opens "(...) a new era in international environmental law"⁸.

This is actually the deeper meaning of the 2015 judgment. It truly informs us, at least as a sketch, on a progressive judicial policy of the ICJ in the field of the environment. Doubtlessly, at first, the solutions adopted over time seem increasingly familiar to the point even of losing some their novelty. Such is, however, a pathway of legal evolution. Whatever the basis of the proceedings, based on the findings, the Court found the opportunity to affirm more strongly the contentious environmental protection. Thus, in the exercise of its material jurisdiction over any legal issue with an environmental dimension, the Court manifests a praetorian power, which allows it to decide the dispute as the "judicial body" that it is.

This finding therefore leads to better measure the true scope of the 2015 judgment and reassess the true place that it now occupies in international environmental litigation that is being consolidated.

3. This is where it seems that Mrs. Masoumi largely underestimated in her analysis of the judgment. Three aspects are particularly revealing of the very strong position that it should now occupy in the formation and development of international environmental litigation before the ICJ.

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⁴ Idem, p.343.
⁵ Ibid.
⁶ Art. prev. p. 345.
⁷ op.cit.p. 362.
⁸ Idem.
The first aspect relates to the conditions of exercise of jurisdiction with respect to environmental matters that may be entered. It appears that it is based on legal bases of referral that will result in examining the nature, content and scope of environmental obligations whose violation is alleged. Here, undoubtedly, lies the author's great misunderstanding as to the environmental significance of the judgment of 2015. This judgment combines the issues of territorial sovereignty and environmental protection. In this regard, everything depends on the basis for the proceedings, which it must remain detached. In all these cases, the Court will nevertheless seek the bases of its jurisdiction, all the consequences for the environment without going beyond what it can say, judging in a somewhat ultra petita manner.

So far, the Court could not be referred directly through the arbitration clause and the solutions that it made on the environment result from the widest possible interpretation it could make, closer bases of referral. This jurisdictional requirement imposed in some way on the Court must be qualified, regarding possible implications for the protection of the environment. Through its use of conventional methods available to it by its statute and regulation, the Court will focus its examination of the case to assess its environmental components. The Judge already makes a remarkable effort to adapt its litigation to environmental matters. Here, the judge will simply have the opportunity to clarify the status of the protection due to the environment. It is clear that to ensure direct control of environmental issues, the parties shall use the most appropriate instruments such as the Environment Court that the Court created in 1993 but which, due to a lack of referral, was not renewed by electing its members since 2006.

b- Regarding international obligations in the field of environment, the 2015 judgment belies the analysis of the author. Indeed, the latter severely criticizes the Judge's refusal to admit the existence of the environmental impact assessment requirement and the requirement which relates to information and consultation on the alleged risks. Therefore, the judgment is considered by Mrs. Masoumi as a "judgment, very far from what can be a judgment on a matter of principle."9

This analysis is not accurate. Admittedly, the Court tends to rely on previous solutions to the disputes brought before it by the parties. In doing so, it appears, however, that for the first time, in the 2015 judgment, it determines more clearly the status of obligations on states, even if these are in the background, as the obligation to prevent trans-border damage, which it extends the application of customary international law in the environmental field; these are procedural, such as the requirement of an assessment of the impact on the environment and the result, the duty of consultation and information. Mrs. Masoumi is surprised that the existence of trans-border damage was not recognized in the cases cited, no doubt, she wrote, because of the attraction of the judge's questions of territorial sovereignty, as the compensation for trans-border damage. But it would be wrong to read the judgment, if one ignores the dual criteria that is now introduced in the assessment of the scope of the obligations at issue: criterion of "significant damage" alone could trigger the finding of trans-border harm, and the criterion of "automatic application" of the environmental impact assessment requirement as well as related consulting and information. These two aspects form a logical chain of reasoning whereby, if the damage is not

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9 See p.345.
important, there is no breach of the duty of prevention, and in this case, there is no more requirement of an assessment of the environmental impact\(^\text{10}\) let alone the duty of consultation and information. It is in this sense that it seems to us that the judgment is important for environmental litigation. The Court established this in fact very clearly, the exact scope of the implementation of the obligations of States for trans-border harm, setting a threshold above which it can assess the violation of these obligations. Again, one can be shocked by the resulting chain of consequences from the point of view of liability\(^\text{11}\), the not exceeding this threshold. The solution, however, tends to be constant, as shown by an advisory opinion of the International Tribunal for the Law of the Sea (ITLOS) from 1 February 2011\(^\text{12}\). To understand this solution, we must also analyze the position of the Court regarding its fact-finding strategy.

c- This is the third important aspect of the contribution of the 2015 judgment on environmental litigation. The Court status and rules allow it to use different means of establishing the facts. The use of experts is one of them, whether said experts are appointed by the parties or the Court proceeds with the parties' agreement to the appointment of an independent expert. In the first case, experts enable the Court to deepen its knowledge of the factual and scientific aspects, contained in their reports and studies, or presented at the hearing. Mrs. Masoumi’s analysis of the second case is particularly critical. For her, the differences observed between the parties' experts should have led the Court to appoint an independent expert. However, it should be noted that the use of the independent expert is not an obligation, but a possibility offered to the Court, which uses its discretion. In the 2015 judgment, the Court stated also that it reads and always listens to experts carefully. However, the judgment tends to qualify the scope of such an action. In a formulation close to a dictum, it says that after a "careful examination of all the evidence in the file", that is the Court itself and the Court alone that shall bear "the responsibility (...) to assess its probative value, to determine which facts are to be considered and to draw the necessary conclusions"\(^\text{13}\).

Contrary to Mrs. Masoumi, follows are the roughly selected elements that allow us to see in the 2015 judgment and in the conclusion of the President of the Court before the Sixth Committee of the UNGA, a law-making judgment\(^\text{14}\). While Ms. Masoumi does not see the same scope, it seems to us a rather key judgment in environmental litigation, not just "mundane"\(^\text{15}\). This 2015 judgment can be considered to synthesize elements of environmental jurisprudence of the ICJ which were previously scattered, and they should now be the essential point of clarification of the structure of environmental litigation.

\(^{10}\) These come in two phases: a preliminary risk assessment and the other a real impact study.


\(^{12}\) ITLOS concerning the responsibilities and obligations of States sponsoring persons and entities in connection with activities in the area.

\(^{13}\) See prev stop. p.65 by.176.

\(^{14}\) See speech of Mr. Ronny Abraham, PRESIDENT OF THE ICJ before the Sixth Committee, 2017 www.icj-cij.org.

\(^{15}\) Art. prev.p.362.