Transcript

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Nuclear Weapons and International Environmental Law

Thank you Mme. Chair.

My name is Jorge Vinuales, I am a Professor of Law and Environmental Policy at the University of Cambridge. I would first like to say that it is a great honor and a pleasure to address such a distinguished audience.

The background of my presentation is given by the peculiar fact that – unlike its terrible but less destructive cousins, biological weapons and chemical weapons – the international legal framework regulating nuclear weapons is more permissive.

I must also add that my purpose is not here to state what I would like the law to be but more modestly, I would like to state what I believe the law to be and specifically what International Environmental Law (IEL) says about nuclear weapons. It is sometimes safer to say that I am going to state what ten, what perhaps seven out of ten neutral international lawyers would say about it.

As it is well known, the ICJ, the International Court of Justice, the principal body of the United Nations, addressed the issue of the legality of the threat or the use of nuclear weapons under International Law (IL) and the ICJ made its Advisory Opinion in 1996. That is four years after the major Conference of Rio, the Conference on Environmental Development of 1992. It is only natural then that the reasoning of the Court as well the pleadings of the parties take into account environmental norms.

Now, the Court reasoned very simply that – irrespective of whether IEL would apply in a situation of armed conflict – those norms could not be seen or interpreted as entailing a total restraint in the conduct of hostilities. So, in other words, the Court did not need to address whether IEL would be applicable to armed conflict and specifically whether IEL would be applicable to the detonation of nuclear weapons.

Now, I will not dwell on the ICJ’s opinion because it is well known and it has been widely discussed. My purpose here is really to canvas a number of developments over the last almost 20 years as well as to refer to a number of older materials that are relevant in this connection. And I will organize the discussion in two broad parts. The first is: I am going to ask this question: Whether IEL applies in armed conflict and particularly in case of detonation of nuclear weapons and the second question is how.

Let me first start with the first question. The bottom line of this question is whether the outbreak of armed conflict in IL suspends or terminates the treaties that are among the belligerent states or the treaties among the belligerent states and third
parties. In classical IL there was this rule that the outbreak of conflicts would indeed have an effect on the operation of existing treaties. The treaty that regulates the law of treaties, the treaty of treaties, which was concluded in 1969, left that question open. So, it did not address that question, the effects of the outbreak of conflict. That is Article 73 of the Vienna Convention for those who would be looking for the specific provision. So, this question had to be taken over later. Another body of the United Nations, a subsidiary body called the International Law Commission, which is a codification body, took that task on in 2004 I think and it reached a document, a document called Draft articles on the Effects of Armed Conflicts on Treaties. And that document is a document of 2011. Now, what can we gather from this document concerning the continuing operation of IEL in a situation of armed conflict?

Well, the document can be easily summarized in a few points. The first point is that the outbreak of conflict does not automatically suspend or terminates existing treaties. That is the first point. Now, the second point, which is perhaps obvious, is that it will all depend on what the treaty in question says. So, if the treaty says if there is a conflict, the treaty will no longer apply, the treaty will no longer apply. If the treaty says in case of conflict it will continue to apply, the treaty will continue to apply. Now, what if the treaty doesn’t say anything, as it is the case of the majority of international environmental agreements and perhaps, some of the most important ones. Now, in that case of course, one has to interpret the content of the treaty, but this document of the International Law Commission adds a number of useful hints that are backed by a lot of authority, including decisions of the ICJ and that hint is that there is a sort of presumption of continued operation in case of treaties pertaining to certain matters, and those matters include environmental protection, international water courses, human rights and a number of others. So, all in all, what the current codification efforts backed at least by three decisions of the ICJ are saying is that there is no automatic suspension of environmental treaties. There is a presumption of operation, of continued operation of environmental treaties. In other words, environmental treaties in principle apply even in case of armed conflicts unless they provide otherwise. Now, do they provide otherwise? And that takes me to the second part of my presentation which is about the question of how they apply.

How Environmental Law would potentially apply in a case of an armed conflict? I will give you a few examples; I mean there are two examples that are particularly interesting. These are older treaties, one treaty is the World Heritage Convention of 1972. You may have heard about UNESCO sites, world heritage sites. Well, that is the Convention under which these sites are protected. And that Convention has a specific article, art. 11 para. 4 that says that in case of a site, a protected site, is under a serious danger, I mean I am not using the specific words or reading the article, I am just restituting the core content. In case there is a specific danger, and that danger may include armed conflict, that site may be in fact moved to another list, not the usual list that protects sites, but a list that actually gives added protection to sites.
That is called the World Heritage in Danger. So, in other words, what this treaty is doing is, when there is armed conflict, the protection is enhanced.

Now, the other approach which is a treaty which was concluded around the same time, in 1971, that has been discussed lately by the ICJ as well is the Ramsar Convention on Wetlands. That is a treaty of 1971. Wetlands are very broadly defined under that treaty, and it says, it takes a different/the opposite stand. It says that if there is a situation of emergency or public emergency, which one could interpret as including armed conflict, well in that case the protection will not disappear, but will be reduced. So, a site can be cut or reduced, but states have the obligation to compensate for that by protecting wetlands elsewhere. So, these are two treaty-specific-responses and two specific examples of how IEL would apply in case of armed conflict.

Now, more broadly, I would like to flag four or five areas or four or five considerations that have to be taken into account when thinking about the impact of IEL and the regulation of nuclear weapons. These are indirect of course because IEL does not explicitly regulate nuclear weapons, but it does apply, as I was mentioning earlier.

So, the first consideration is a very simple one, but there a number of environmental treaties that provide for participation rights. Those participation rights are important in order to access environmental information, to have a say in environmental decision making, and to access courts in case these two rights are not granted. So, this is an important democratic tool of arms control.

A second way in which IEL is relevant in this area is that it strengthens the content of human rights, including the provisions, there are very few provisions under international agreements relating to a right to healthy environment, there are mostly three or four, but there are a number of other provisions, of human rights provisions, that had been interpreted by different international courts as having an environmental content. And that environmental content is often considered to be a health content. And we saw yesterday the consequences of nuclear weapons on human health.

The third consideration, which I find particularly important, is that IEL applies beyond the protection of humans. So, a detonation in a specific point in the desert with very limited fallout, that would perhaps not breach any sort of human right obligation, at least not immediately, can nevertheless breach environmental agreement because environmental norms are interstate norms that protect the environment as such.

The fourth consideration, which is also I think important, is that environmental law does not only regulates armed conflict or does not only applies in armed conflict. It is what in the terminology of International Humanitarian Law (IHL) or in that sort of circle one would call the Law of Peace. IEL regulates the entire life cycle of nuclear
weapons as a pollutant from production to disposal. So how precisely, well it depends on the treaty, it depends on the weapon, and it depends on the method of production. But it may have relevance for that and there are a number of specific cases where that applies.

And finally, there are at least three important principles of IEL that are customary nature, so they apply to all states, that are well recognized, they have very solid grounding in Customary International Law, and that would be very relevant for the management of nuclear weapons over all, and those principles are of course the principle of prevention which is stated in principle 2 of the Rio Declaration, the principle of Cooperation that appears in a number of principles of the Rio Declaration, including principle 18, 19, and perhaps 7 and 27 as well. Of course the principle or the requirement to conduct an environmental impact assessment which is stated in its current form in principle 17 of the Rio Declaration.

So, over all, in conclusion, the message that I would like to get across in very simple terms is that IEL largely applies to different aspects of nuclear weapons as legal object.

So, I think it deserves more careful consideration when one thinks about the legality of nuclear weapons over all.

So, thank you very much for your kind attention and I would be happy to take any questions later on, thank you.