International Law and Governance of Natural Resources in Conflict and Post-Conflict Situations

International Law and Governance of Natural Resources in Conflict and Post-Conflict Situations

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To my father, Pieter-Jan de Jong,
and my grandmother, Fokje Bakker-Geertsma,
in loving memory.

"Natural resources are neither a curse nor a blessing; they are simply a source of opportunity. They can be used for tremendous good or they can be wasted."

(Former Secretary-General Kofi Annan, addressing the UN Security Council, 19 June 2013)

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1 Introduction

An abundance of natural resources in a country is conducive to its development. It is precisely this assumption that constitutes the basis for traditional development thinking.[1] The basic premise of this study is that natural resources undoubtedly can and do play an important role in kick-starting the economy of a country. Nevertheless, the last few decades have shown a harsher reality, where natural resources have triggered, financed or fuelled a number of internal armed conflicts. Examples include the armed conflicts in Cambodia, Angola, Sierra Leone, Liberia, Côte d'Ivoire and the Democratic Republic of the Congo, which have been financed with the exploitation of a variety of valuable natural resources, including diamonds, gold, timber, oil and cocoa.[2]

Some of these internal armed conflicts were internationalised with the involvement of foreign States looking for a share in the natural resource wealth of the country where the conflict was taking place. For example, access to the natural resources of the Democratic Republic of the Congo proved to be an important motivation for Uganda and Rwanda to continue their military presence in the DR Congo.[3] Similarly, the involvement of the Liberian president Charles Taylor in the internal armed conflict in neighbouring Sierra Leone was in part motivated by his desire to gain access to high quality diamonds from that country.[4]

These resource-related armed conflicts have had devastating effects on the civilian populations of the afflicted countries. Serious human rights violations have been committed in resource-related armed conflicts, many of which have

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1 See, *e.g.,* the UNCTAD Integrated Programme for Commodities, *UNCTAD Resolution 93(IV)* (1976); as well as documents that are related to the New International Economic Order (NIEO), in particular the Declaration on the Establishment of a New International Economic Order, *UN General Assembly Resolution 3201 (S-VI)* of 1 May 1974.

2 Another example is Colombia, where opium plays a major role in sustaining the armed conflict between the government and the FARC. However, the current study deals only with those natural resources that can be traded on legitimate markets, because of their significance for promoting sustainable development.

3 See the reports of the UN Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo, in particular the Final Report of 16 October 2002, *UN Doc. S/2002/1146* which describes in great detail the involvement of Uganda, Burundi and Rwanda in the illegal exploitation of Congolese natural resources

4 See Special Court for Sierra Leone, Trial Chamber, Judgment of 18 May 2012 in the case against Charles Taylor, *Case No. SCSL-03-01-T*, in particular, paras. 5843-6149 on diamonds.

been extensively documented in reports of UN Panels of Experts and NGOs.[5] Some of these are directly related to the exploitation of natural resources, while other violations have taken place as part of the general conflict situation. Examples include the burning and plundering of villages, the use of forced labour by armed groups for the extraction of natural resources, sexual violence, and the maiming of civilians as part of a campaign of terror. All these violations are in some way linked to natural resources, either because they are committed to gain access to or to retain control over the natural resources or because the natural resources serve as the means to finance the armed conflicts in which atrocities are committed.[6]

In addition, unsustainable patterns of resource exploitation by belligerents have had a severe impact on the natural environment in most of these armed conflicts. In many cases natural resources have been extracted by armed groups with little regard for the protection of the environment. For example, extensive logging by all the parties to the armed conflict in Cambodia significantly diminished the country's forest cover.[7] Similarly, highly organized and systematic exploitation activities within and around UNESCO World Heritage sites in the DR Congo, including ivory poaching, logging and mining, have posed

5 See, *e.g.,* the following reports. On Angola, see, *e.g.,* Global Witness, 'A Rough Trade: The Role of Companies and Governments in the Angolan Conflict' (1998). On Sierra Leone, see, *e.g.,* Human Rights Watch, *Sierra Leone: Sowing Terror: Atrocities against Civilians in Sierra Leone* (1998). On the DR Congo, see, *e.g.,* the Final report of the Group of Experts on the Democratic Republic of the Congo prepared in accordance with paragraph 8 of Security Council Resolution 1857 (2008), *UN Doc. S/2009/603*; and the *Report of the Mapping Exercise Documenting the Most Serious Violations of Human Rights and International Humanitarian Law Committed Within the Territory of the Democratic Republic of the Democratic Republic of the Congo Between March 1993 and June 2003*, Office of the High Commissioner for Human Rights (2010).

6 In this respect, see the *Report of the Mapping Exercise Documenting the Most Serious Violations of Human Rights and International Humanitarian Law Committed Within the Territory of the Democratic Republic of the Democratic Republic of the Congo Between March 1993 and June 2003*, Office of the High Commissioner for Human Rights (2010), p. 350. This report, which was drawn up by a team of human rights officers documenting human rights abuses during the conflict in the DR Congo, identifies three different types of links between natural resources exploitation and human rights abuses. These relate to: (1) violations of human rights and international humanitarian law committed within the context of the struggle by parties to an armed conflict to gain access to and control over the areas of the country rich in natural resources; (2) human rights abuses committed by parties to an armed conflict as part of a regime of terror and coercion established in areas under their control; and (3) the role of natural resources in funding armed conflicts, which are themselves a source and cause of violations of human rights and international humanitarian law. Although the findings of the mapping team are based on the situation in the DR Congo alone, the links identified in the report relate to other resource-related conflicts as well.

7 For more details on the links between logging and the armed conflict in Cambodia, *see* P. Le Billon & S. Springer, 'Between War and Peace: Violence and Accommodation in the Cambodian Logging Sector', in W. de Jong, D. Donovan, and K. Abe (eds.), *Extreme Conflict and Tropical Forests*, New York: Springer 2007, pp. 17-36.

a significant threat to the integrity of these biodiversity reserves.[8] Another example is the land degradation that occurred in Sierra Leone as a result of substantial diamond mining during the conflict. Exhausted mining sites were not restored, resulting in severe environmental degradation.[9] The environmental damage caused by the unsustainable extraction of resources during armed conflict seriously hinders the prospects for the economic reconstruction of conflict-afflicted States.

Some of the conflicts dealt with in this book have come to an end. The Cambodian Khmer Rouge movement has been put to a halt in the late 1990s. The armed conflict in Sierra Leone ended in 2002 and members of the RUF, as well as the former Liberian president Charles Taylor, recently went on trial before the Special Court for Sierra Leone for crimes committed during this civil war. Furthermore, Liberia has implemented significant institutional reforms under the leadership of President Ellen Johnson-Sirleaf.

However, peace is fragile. The leading economist Paul Collier showed that even a decade after an armed conflict has ended, there is an almost 15 per cent chance that a country will relapse.[10] Armed conflicts that involve natural resources are actually twice as likely to re-ignite as those that do not involve natural resources.[11]

Some of the armed conflicts discussed in this book have not yet been resolved. The armed conflict in the DR Congo is a salient example. The growing demand for raw materials on the world market, in particular for rare metals and oil, underscores the need to find lasting solutions to the problems associated with resource-related armed conflict. Disregarding the role played by natural resources in these conflicts will only prolong them and increase the risk of a relapse after the conflict has ended. Conversely, integrating the adequate management of natural resources and the environment into strategies for conflict resolution and post-conflict peacebuilding is imperative for creating the conditions for a sustainable peace.[12]

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8 *Interim report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo*, UN Doc. S/2002/565, paras. 50 and 52.

9 *See* UNEP, *Sierra Leone: Environment, Conflict and Peacebuilding Assessment*, February 2010, p. 45.

10 P. Collier, A. Hoeffler and D. Rohner, 'Beyond Greed and Grievance: Feasibility and Civil War', Working Paper, November 2007, p. 16.

11 M.D. Beevers, 'Forest Resources and Peacebuilding: Preliminary Lessons from Liberia and Sierra Leone', in P. Lujala & S.A. Rustad (eds.), *High-Value Natural Resources and Post-Conflict Peacebuilding*, Oxon/New York: Earthscan (2012), p. 368;

12 *Ibid.*, p. 368; UNEP, From Conflict to Peacebuilding: The Role of Natural Resources and the Environment (2009), p. 19. This was also recognised in a Presidential Statement of the UN Security Council, which stressed that "in countries emerging from conflict lawful, transparent and sustainable management […] and exploitation of natural resources is a critical factor in maintaining stability and in preventing a relapse into armed conflict". See the Statement by the President of the Security Council made in connection with the Council's consideration of the item entitled Maintenance of International Peace and Security, *UN Doc. S/PRST/2007/22*, 25 June 2007.

1.1 Relationships between natural resource wealth and armed conflict

In order to devise strategies for the prevention and resolution of resource-related armed conflicts, it is first of all necessary to have a proper understanding of the relationships between natural resource wealth and armed conflict. There is a large body of academic literature, in particular in the fields of the economic and political sciences, that has studied the so-called "political economy of armed conflict" or the economic dimensions of civil war.[13] The sudden increase in "self-financing"[14] internal armed conflicts during the 1990s highlighted the relationships between natural resource wealth and armed conflict.

Early academic research into the self-financing nature of armed conflicts drew attention to the role of natural resources in providing the *means* to finance an armed conflict as an alternative to other sources of funding. The armed conflicts in Cambodia and Angola, for example, were originally funded with external sponsorship. When this funding dried up as a result of the end of the Cold War, the parties to the conflict turned to natural resources to fund their armed struggle. In Cambodia, the Khmer Rouge movement exploited timber and gemstones to finance its rebellion. In Angola, the rebel movement UNITA turned to diamonds, while the government used oil revenue to suppress the rebellion.

In addition, access by belligerents to natural resource wealth also proved to be an important factor in *prolonging* internal armed conflicts. Natural resources give parties to an armed conflict access to weapons and to political

13 See, *e.g.,* K. Ballentine, K. & H. Nitzschke (ed.), *Profiting from Peace: Managing the Resource Dimensions of Civil War*, Boulder: Lynne Rienner Publishers (2005); K. Ballentine & J. Sherman (ed.), *The Political Economy of Armed Conflict: Beyond Greed and Grievance*, International Peace Academy, Boulder/London: Lynne Rienner Publishers (2003); I. Bannon and P. Collier (eds.), *Natural Resources and Violent Conflict: Options and Actions*, Washington D.C.: World Bank (2003); P. Collier, *The Bottom Billion: Why the Poorest Countries are Failing and What Can Be Done About It*, New York [etc.]: Oxford University Press (2007); P. Collier, A. Hoeffler and D. Rohner, 'Beyond Greed and Grievance: Feasibility and Civil War', Working Paper, November 2007; P. Collier, & A. Hoeffler, 'Resource Rents, Governance, and Conflict', *The Journal of Conflict Resolution*, Vol. 49, No. 4 (2005), p. 625-633; P. Collier and A. Hoeffler, 'Greed and Grievance in Civil War', *Oxford Economic Papers 56* (2004), p. 563-595; P. Collier and A. Hoeffler, 'On Economic Causes of Civil War', *Oxford Economic Papers 50* (1998), p. 563-573; P. Le Billon, *Wars of Plunder: Conflicts, Profits and the Politics of Resources*, New York: Columbia University Press (2012); P. Le Billon, *Fuelling War: Natural Resources and Armed Conflict*, Adelphi Papers, 2nd edition, Abingdon: Routledge (2005); M. Renner, 'The Anatomy of Resource Wars', *Worldwatch Paper 162*, Washington D.C.: Worldwatch Institute (2002); and M. Ross, 'What Do We Know about Natural Resources and Civil War?', *Journal of Peace Research,* Vol. 41 (2004), pp. 337-356.

14 K. Ballentine & J. Sherman (ed.), *The Political Economy of Armed Conflict: Beyond Greed and Grievance*, International Peace Academy, Boulder/London: Lynne Rienner Publishers (2003), pp. 1-3.

support. In addition, the profits obtained from resource exploitation can prove to be a disincentive for armed groups to sit down at the negotiating table.[15]5 Exact data are not available, but it is estimated that the RUF made at least 25 million dollars a year from the trade in diamonds. This is relatively little compared to the revenue generated by the Khmer Rouge from logging, estimated at 120 million dollars a year at least.[16]

Furthermore, more fundamental relationships between natural resource wealth and armed conflict can also be identified. In particular, natural resources have been linked to the *outbreak* of armed conflict.[17] These theories focus on the institutional effects of resource wealth, on the role of natural resources as the motivation for the outbreak of armed conflict and on the role of natural resources in providing the opportunities to start an armed conflict.

According to the "resource curse thesis" described by the economist Richard Auty, resource wealth can lead to economic stagnation and underperformance. Large rents for resources may make governments less accountable, because these rents replace tax revenues for which governments must account to the population. This in turn may lead to the weakening of government institutions, making a country vulnerable to the outbreak of an armed conflict.[18]

Grievances and greed theories focus on the role of natural resources in provoking the outbreak of armed conflicts. According to the "grievances theory", perceived injustices relating to the use of natural resources may be a cause for the outbreak of armed conflict. These perceived injustices may relate to the effects of the exploitation of natural resources on the living environment of particular ethnic or social groups or they may relate to the (unequal) distribution of the benefits obtained from the exploitation of natural resources.[19] According to the "greed theory", the likelihood of armed conflict breaking out is increased if rebel groups try to obtain rent from natural resources. The prospect of gaining access to large deposits of natural resources which these

15 5 See, *e.g.,* I. Bannon and P. Collier (eds.), *Natural Resources and Violent Conflict: Options and Actions*, Washington D.C.: World Bank (2003), pp. 217-218.

16 For these and other estimates, see M. Renner, 'The Anatomy of Resource Wars', *Worldwatch Paper 162*, Washington D.C.: Worldwatch Institute (2002), p. 7.

17 On this subject, see P. Le Billon, *Wars of Plunder: Conflicts, Profits and the Politics of Resources*, New York: Columbia University Press (2012), p. 17.

18 See R. Auty, *Sustaining Development in Mineral Economies: The Resource Curse Thesis*, Routledge: London (1993). In this sense, the concept is related to notions such as the "Paradox of Plenty" and the "Dutch disease". Since then, several studies, both in economics and in political science, have confirmed the hypothesis of the resource curse. See, *e.g.,* M.L. Ross, 'The Political Economy of the Resource Curse', *World Politics* 51(2) (1999), pp. 297-322; and J.D. Sachs and A.M. Warner, 'The Curse of Natural Resources', *European Economic Review* 45 (2001), pp. 827-838.

19 See, *e.g.,* M.T. Klare, *Resource Wars: The New Landscape of Global Conflict*, New York: Metropolitan Books (2001), p. 208; and M. Ross, 'How Do Natural Resources Influence Civil War? Evidence from Thirteen Cases', *International Organization*, Vol. 58 (1) (2004), p. 41.

groups can exploit for their personal gain may be an incentive for them to start an armed conflict.[20]

Unlike grievances and greed theories, which focus on the role of natural resources in provoking armed conflict, the "feasibility thesis" focuses on the opportunities for starting an armed conflict created by natural resource wealth. This theory assumes that a rebellion will occur if it is militarily and financially feasible. According to this theory, an armed conflict is therefore more likely to occur in a country where large quantities of easily accessible natural resources are available to rebels.[21]

A fourth theory about the relationship between natural resource wealth and armed conflict focuses on the opportunities created by the outbreak of an armed conflict for third parties to engage in the looting of the natural resources. Recent incidents of elephant poaching in the Central African Republic where conflict broke out after a coup d'état on 24 March 2013 are an example of this. Poachers were reported to have killed a large number of elephants in the Dzanga-Ndoki national park, a UNESCO World Heritage Site.[22] Although part of the poaching in the Central African region is directly linked to the financing of rebel groups, in particular of the Lord's Resistance Army,[23] the poaching in itself constitutes a broader problem related to weaknesses in law enforcement.[24] The outbreak of an armed conflict is merely a factor that exacerbates these types of situations, in the sense that the chaos and instability created by the outbreak of an armed conflict increases the opportunities for individuals or groups to engage in the looting of natural resources. As the relationship between natural resources and armed conflict is less direct in these situations, it is not of immediate interest to the current study.

In conclusion, natural resources can therefore provide the *means* to finance an armed conflict; they can *prolong* existing armed conflicts; and they can play a role in the *outbreak* of an armed conflict. In addition, the outbreak of an armed conflict may create opportunities for third parties to loot natural resources for their personal gain. Of course, natural resources can also play many different roles in armed conflicts. In Sierra Leone, for example, the Truth and Reconciliation Commission established after the end of the armed conflict concluded that diamonds had provided the RUF with the means to finance

20 P. Collier and A. Hoeffler, 'Greed and Grievance in Civil War', *Oxford Economic Papers 56* (2004), pp. 563-595.

21 M.L. Ross, 'What do we know about natural resources and civil war?', *Journal of Peace Research* 41: 3, 2004, pp. 337-356.

22 See 'Elephant poaching on rise in chaos-hit Central African Republic', 26 April 2013, www.reuters.com (last consulted on 4 June 2013).

23 See the Statement by the President of the Security Council on the Central African Region, *UN Doc. S/PRST/2013/6*, 29 May 2013, para. 10.

24 See Report of the Secretary-General on the Activities of the United Nations Regional Office for Central Africa and on the Lord's Resistance Army-affected Areas, *UN Doc. S/2013/297*, 20 May 2013, paras. 7-9.

– and maybe even prolong – their rebellion.[25] At the same time, the Commission considered that the economic mismanagement of the natural resource wealth in that country – which not only involved diamonds, but also bauxite, coffee and cocoa – and the resulting failure of successive governments to use the proceeds from these exports to enhance the standard of living of the population, were important factors in the outbreak of the armed conflict in 1991.[26]

1.2 THE ACTORS INVOLVED IN RESOURCE-RELATED ARMED CONFLICTS

Strategies for the prevention and resolution of resource-related armed conflicts require a proper understanding of the role and the legal position of the different actors involved in the exploitation of natural resources in situations of armed conflict. Resource-related armed conflicts involve a range of different actors. Most of the armed conflicts discussed in this book are internal armed conflicts involving a State and/or one or more armed groups engaged in the exploitation of the State's natural resources.[27] These armed groups either exploit the natural resources themselves or levy taxes from companies by granting them concessions.

However, in some of the armed conflicts discussed in this book, foreign States are also involved in the exploitation of a State's natural resources. In some cases it is carried out directly by these States, either by their national armies or by companies that are offered access to exploitation sites in territory under the control of these States. In other cases, the involvement of foreign States is limited to assisting the armed groups engaged in the exploitation. For example, this assistance can consist of offering smuggling routes to these armed groups or of trading natural resources with them.

From a legal perspective, the range of actors involved in resource-related armed conflicts entails many challenges, not least with regard to determining the applicable rules. There are relevant rules in several fields of international law, in particular, in international economic, environmental, human rights and humanitarian law.[28] However, as discussed in more detail in Part II of this book, the applicable legal framework varies depending on the actors involved and in addition, depends on the typology of the armed conflict.

The following sub-sections briefly touch upon some of the issues that are of particular relevance for understanding the legal position of the different

25 See 'Witness to Truth', the Final Report of the Sierra Leonean Truth and Reconciliation Commission, Volume Three B, Chapter One.

26 *Ibid*., Volume Three A, Chapter Two.

27 On the typology of armed conflicts, see Chapter 6 of this study.

28 Chapter 5 discusses the general presumption that the outbreak of hostilities does not *ipso facto* affect the operation of treaties.

actors involved, as well as their role in resource-related armed conflicts. In order to illustrate these issues, reference is made as much as possible to existing conflict situations.

1.2.1 Domestic governments

International law accords a right to States and peoples to exercise sovereignty over their natural resources. This right, including the right to exploit the State's natural resources, is exercised by the government, subject to a number of conditions derived principally from international human rights and environmental law. The role of the government is therefore crucial for the legal framework to function properly. Moreover, several of the armed conflicts that are at the heart of this book show that a strong political will to address the links between natural resources and armed conflict at the national level is essential for achieving a sustainable peace. However, at the same time, it is possible to identify several challenges relating to the role of the government.

The first challenge that is relevant to the current study concerns the legitimacy of the government. International law accords the State and its people the right to exploit domestic resources; it does not accord this right to the government. The government can exercise this right only on behalf of the State and its people. The question therefore arises whether a government that does not or can no longer be considered to represent the State and its people is entitled to exercise sovereignty over the State's natural resources. For example, in the armed conflict that raged in Angola for decades between 1975 and 2002, both the ruling MPLA and opposing UNITA claimed to be the legitimate government of Angola. Another example concerns the civil conflict in Libya in 2011, when the Qadhafi government lost its legitimacy during the course of the armed conflict. This issue is discussed in more detail in Part I of this book.

Furthermore, the way in which governments exercise authority over the State's natural resources can also present a challenge. The failure of governments to exercise authority over the State's natural resources in the proper manner underlie many of the armed conflicts examined in this book. The armed conflict in Sierra Leone referred to above is a relevant example. Economic mismanagement and the resulting failure of successive governments to use the proceeds from the exports of the country's natural resources to raise the standard of living of the population have been identified as root causes for the outbreak of the armed conflict in 1991.[29]

Similar patterns can be recognised in the DR Congo, where political elites have used the natural resource wealth of the country for their personal enrichment, leaving the population with very little to survive on. The DRC Mapping

29 *Ibid*., Volume Three A, Chapter Two.

Report, drafted by independent experts under the auspices of the Office of the High Commissioner for Human Rights concluded, for example, that

> "(…) During Mobutu's rule, natural resource exploitation in Zaire was characterised by widespread corruption, fraud, pillaging, bad management and a lack of accountability. The regime's political/military elites put systems in place that enabled them to control and exploit the country's mineral resources, thereby amassing great personal wealth but contributing nothing to the country's sustainable development. […] The two Congolese wars of 1996 and 1998 represented a further major setback to development, causing the destruction of a great deal of infrastructure and propagating the practice of resource pillaging inherited from Mobutu's kleptocratic regime, under the pretext of funding the war effort".[30]

In addition, economic mismanagement can also be a factor in sustaining armed conflicts. Opaque systems of public administration have allowed the governments of Liberia and Côte d'Ivoire, for example, to procure weapons in contravention of UN Security Council sanctions. In Liberia, the Taylor government largely excluded revenues from the timber and rubber sectors from the public administration. The evidence suggests that these revenues were used both for President Taylor's personal expenditure and for the procurement of weapons in contravention of UN Security Council sanctions.[31] In addition, in Côte d'Ivoire, the procurement of weapons was financed with the proceeds from the cocoa and oil industries.[32] In both countries, the natural resources industries were to a large extent controlled by the government.

These examples clearly show the significance of properly functioning institutions for the prevention and resolution of armed conflicts. This issue is examined in more detail in section 1.3 of this introductory chapter.

1.2.2 Foreign States

Foreign States have played a role in several of the armed conflicts examined in this book. In the ongoing conflict in the DR Congo, for example, Uganda and Rwanda have been both directly and indirectly involved in the armed conflict. Between 1998 and 2003 both countries engaged in the exploitation

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30 *Report of the Mapping Exercise Documenting the Most Serious Violations of Human Rights and International Humanitarian Law Committed Within the Territory of the Democratic Republic of the Congo Between March 1993 and June 2003*, Office of the High Commissioner for Human Rights (2010), p. 351.

31 Report of the Panel of Experts pursuant to Security Council Resolution 1343 (2001), paragraph 19, concerning Liberia, *UN Doc. S/2001/1015*, paras. 309-350.

32 See, e.g., Midterm report of the Group of Experts on Côte d'Ivoire submitted in accordance with paragraph 11 of Security Council Resolution 1842 (2008), *UN Doc. S/2009/188*, paras. 59-72; Final report of the Group of Experts on Côte d'Ivoire, prepared in accordance with paragraph 14 of Security Council Resolution 1980 (2011), *UN Doc. S/2012/196*, para. 113.

of the DR Congo's natural resources, while controlling parts of the territory of the DR Congo.[33] The Panel of Experts, set up by the UN Security Council to investigate the illegal exploitation of natural resources and other forms of wealth of the Democratic Republic of the Congo, concluded that the exploitation of natural resources constituted one of the principal reasons for the continued presence of these countries in the DR Congo.[34]

In 2002, the DR Congo initiated proceedings against both countries before the International Court of Justice, but the Court could only exercise jurisdiction in relation to the DRC's case against Uganda.[35] With respect to Uganda, the Court found evidence of the involvement of senior officers of the Ugandan army, as well as of individual soldiers, in the exploitation of the DRC's natural resources.[36] It also found that high-ranking officers of the Ugandan army facilitated the illegal trafficking of natural resources by commercial entities from territories occupied by the Ugandan army. The Court attributed responsibility for the conduct of members of the Ugandan army to the Ugandan State and found that the failure of the Ugandan authorities to take adequate measures to prevent such acts from being committed constituted a breach of Uganda's international obligations.[37]

Although both Uganda and Rwanda have officially left the territory of the DR Congo, there is evidence to suggest that they still play a major role behind the scenes. The 2012 final report of the Group of Experts on the DR Congo, which replaced the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo, points to the role of Uganda and Rwanda in providing direct military support to the rebel movement M23. There are even strong indications to suggest that these countries sent in troops in July 2012 to help M23 gain control over Congolese territory.[38]

Another example of a State providing support to armed groups in a foreign country was the support provided by Liberia under President Charles Taylor to rebel groups operating in Sierra Leone, in particular to the Revolutionary

33 See the Final report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo, *UN Doc. S/2002/1146*, paras. 65-131.

34 *Ibid*.

35 See International Court of Justice, Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment of 19 December 2005, *I.C.J. Reports* 2005. For the judgment of the Court with respect to the determination of jurisdiction in relation to Rwanda, see International Court of Justice, Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Rwanda), Jurisdiction and Admissibility, Judgment of 3 February 2006, *I.C.J. Reports 2006*, p. 6.

36 *Ibid*., para. 242.

37 *Ibid*., para. 243.

38 See the Final Report of the Group of Experts on the DR Congo, prepared in pursuance of paragraph 4 of Security Council Resolution 2021 (2011), *UN Doc. S/2012/843*, 15 November 2012.

United Front (RUF) between 1997 and 2002. A report of the Panel of Experts on Sierra Leone, published in 2000, already pointed to the active involvement of President Taylor in fuelling the armed conflict in Sierra Leone. The report indicated that Taylor and his inner circle were "in control of a covert sanctions-busting apparatus that include[d] international criminal activity and the arming of the RUF in Sierra Leone".[39] The report also noted that this sanctions busting was "fed by the smuggling of diamonds and the extraction of natural resources in both Liberia and areas under rebel control in Sierra Leone".[40] A subsequent report published by the Panel of Experts on Liberia confirmed these conclusions.[41] The issue of Taylor's involvement in the exploitation of diamonds by the RUF in Sierra Leone was also examined in the trial against Charles Taylor before the Special Court for Sierra Leone. The Court held, *inter alia*, that it had been proved beyond reasonable doubt that diamonds were delivered to Taylor in exchange for weapons and ammunition.[42]

These examples show that the involvement of foreign States in the exploitation of natural resources in situations of armed conflict can take many forms. A State can be involved because it is trading with armed groups (Taylor-RUF), but it can also be directly involved in the exploitation of the natural resources (Uganda in the DR Congo). From a legal perspective, a further distinction must be made between a State that exploits natural resources in another State without exercising control over part of that State's territory and a State that exploits natural resources in territory where it is exercising *de facto* authority as an occupying power. Different rules apply to these two different situations. Therefore it is very important to determine the precise role played by a State in an armed conflict. This issue is discussed in more detail in Part II of this book.

1.2.3 Armed groups

Armed groups have been involved in most of the armed conflicts examined in this book. Examples include the Khmer Rouge in Cambodia; the National Union for the Total Independence of Angola (UNITA); the Revolutionary United Front (RUF) and the Armed Forces Revolutionary Council (AFRC) in Sierra Leone; the Forces Nouvelles in Côte d'Ivoire, as well as the Patriotic Forces for the Liberation of Congo (FPLC) and the Mai Mai groups in the DR Congo.

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39 Report of the Panel of Experts appointed pursuant to Security Council Resolution 1306 (2000), paragraph 19, in relation to Sierra Leone, *UN Doc. S/2000/1195*, December 2000, para. 212.

40 *Ibid*.

41 Report of the Panel of Experts pursuant to Security Council Resolution 1343 (2001), paragraph 19, concerning Liberia, *UN Doc. S/2001/1015*, 26 October 2001, paras. 112-124.

42 Special Court for Sierra Leone, Prosecutor v. Charles Ghankay Taylor, *Case No. SCSL-03-01-T*, Trial Chamber II, Judgment of 18 May 2012, paras. 5948 and 6057.

These armed groups have all financed their armed struggle by means of the trade in natural resources.

As regards the legal rules that apply to these armed groups, a distinction must first of all be made between armed groups such as UNITA and the *Forces Nouvelles*, that were able to control large areas of State territory over a long period of time, and other groups, such as the Mai Mai, that are loosely organized militia groups with no control over territory. While the activities of all armed groups are subject to the basic obligations formulated in Article 3 of the 1949 Geneva Conventions, the activities of highly organized armed groups like UNITA and the *Forces Nouvelles* that exercise control over a part of State territory may fall under the scope of Additional Protocol II to the 1949 Geneva Conventions. However, two additional criteria must be met before Additional Protocol II actually applies to an internal armed conflict. The first relates to its material scope of application. Additional Protocol II applies only to armed conflicts to which the government is a party. The second relates to the Protocol's formal applicability. While the 1949 Geneva Conventions have been ratified by all States, the Additional Protocol II has been ratified by far fewer states. Angola, for example, is not a party to Additional Protocol II, while the DR Congo only ratified the protocol in 2002.[43]

The issue of ratification of Additional Protocol II by the State draws attention to another issue that has raised quite a lot of debate in the academic literature, *i.e.*, the legal basis for imposing direct obligations on armed groups without allowing these groups to formally accede to the relevant treaties.[44] The Geneva Conventions are concluded between the "plenipotentiaries of the Governments represented at the Diplomatic Conference", also referred to as the "High Contracting Parties", while Additional Protocol II is only open for signature by the Parties to the Geneva Conventions.[45] At the same time, common Article 3 of the Geneva Conventions and the provisions of Additional Protocol II address armed groups directly. Common Article 3 determines that "each Party to the conflict shall be bound to apply" certain minimum humanitarian standards, while Article 1 (1) of Additional Protocol II states that it "develops and supplements Article 3 common to the Geneva Conventions".

It is not sufficient to assume that, by ratifying a legal instrument, a government not only binds itself, but also the population it represents, including armed groups.[46] As Liesbeth Zegveld argues, this sort of "hierarchical' view

43 See http://www.icrc.org/ for information regarding ratification of the protocol.

44 See L. Zegveld, *Accountability of Armed Opposition Groups in International Law*, Cambridge, Cambridge University Press (2002), p. 14.

45 See L. Zegveld, *Accountability of Armed Opposition Groups in International Law*, Cambridge, Cambridge University Press (2002), p. 14.

46 See the following note, prepared by Claude Pilloud, staff lawyer of the ICRC, for the 1947 preparatory meeting for the 1949 Diplomatic Conference, reported in F. Kalshoven, 'The Undertaking to Respect and to Ensure Respect in All Circumstances: From Tiny Seed to Ripening Fruit', *Yearbook of International Humanitarian Law*, Vol. 2 (1999), p. 12, note 28: "La

of the relationship between the government and non-state armed groups is undermined by the mere fact that non-state armed groups often "seek to exercise public authority, and in doing so they question the authority of the established government, including the government's laws".[47] Therefore if the obligations of armed groups cannot be based on the consent of the State to be bound by relevant instruments, what would then constitute the legal basis for imposing obligations upon these groups? As Lindsay Moir argues, an alternative, more plausible argument would be to consider the obligations of non-state armed groups to be based directly on international rather than domestic law. In his view, non-state armed groups are not bound by international humanitarian law as members of the population of a State but as "individuals under international law", upon whom international law directly confers rights and obligations.[48]

In international practice the inability of armed groups to participate in the process of international law making is not considered to constitute an impediment to imposing direct obligations upon these groups. In several of its cases, the International Court of Justice has confirmed that armed groups are bound by international humanitarian law. In its judgment of 27 June 1986 in the *Case concerning Military and Paramilitary Activities in and against Nicaragua*, the International Court of Justice expressly noted that the acts of the *contras* towards the Nicaraguan Government were governed by the law applicable to non-international armed conflicts.[49] Furthermore, in its judgment of 19 December 2005 in the *Case concerning armed activities on the territory of the Congo*, the Court noted that Uganda should have prevented "violations of […] international humanitarian law by other actors present in the occupied territory,

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formule adoptée par les experts au sujet de la guerre civile ne semble pas donner satisfaction, car elle implique le principe de réciprocité que la Division juridique voudrait, dans toute la mesure du possible, éliminer. C'est pourquoi la Division juridique désirerait mettre sur pied une disposition qui prévoit que les Gouvernements, en signant la Convention, s'engagent non seulement en tant que Gouvernements, mais engagent aussi l'ensemble de la population dont ils sont les représentants. On pourrait alors en déduire que toutes les parties de la population d'un Etat qui entreprend une action en guerre civile est liée ipso facto par la Convention". Also see D. Momtaz, 'Le droit international humanitaire applicable aux conflits armés non internationaux', *Recueil des cours*, Vol. 292 (2001), p. 72. Also see the Report of the Secretary-General on Respect for Human Rights in Armed Conflicts, *UN Doc. A/7720* of 20 November 1969, para. 171.

47 L. Zegveld, *Accountability of Armed Opposition Groups in International Law*, Cambridge, Cambridge University Press (2002), p. 16. Unfortunately, Zegveld does not provide an alternative theory. Rather, she emphasises that there is actually a problem and examines how this problem is dealt with in practice by international bodies.

48 L. Moir, *The Law of Internal Armed Conflict*, Cambridge, Cambridge University Press (2002), p. 56.

49 International Court of Justice, Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Judgment of 27 June 1986, *I.C.J. Reports* 1986, para. 219; L. Zegveld, *Accountability of Armed Opposition Groups in International Law*, Cambridge, Cambridge University Press (2002), p. 10.

including rebel groups *acting on their own account*".[50] Despite the fact that the particular circumstances of the case induced the Court to attribute responsibility for the acts of the armed groups to Uganda, the case suggests that armed groups "acting on their own account" can commit violations under international humanitarian law.

Where there are sufficient indications for the direct applicability of international humanitarian law to armed groups, another question that arises is whether armed groups are bound by other fields of international law as well, in particular by international human rights and environmental law. Unlike international humanitarian law, which directly confers obligations on non-State armed groups, international human rights and environmental law almost exclusively formulate obligations for States. Only a few international human rights and environmental conventions directly confer obligations on private parties. For non-state armed groups, reference can be made to the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict. This Protocol formulates a prohibition for armed groups to "recruit or use in hostilities persons under the age of 18 years".[51] International environmental law, on the other hand, does not formulate any direct obligations for armed groups.

As both international human rights and environmental law primarily formulate obligations for States, most of the obligations for armed groups contained in these fields of international law must be implemented by means of domestic law. Both fields of international law formulate "due diligence" obligations for States, which means that the State must ensure that private actors respect the relevant obligations. Problems arise in situations where States cannot exercise control over the activities of private actors, in particular the activities of armed groups. It can be difficult or even impossible for States to ensure compliance with international human rights and environmental standards in territories that are under the control of armed groups.

The question is therefore whether armed groups that are in control of parts of the State territory can be considered to be directly bound by international human rights and environmental law, especially when they exercise functions

50 International Court of Justice, Armed activities on the territory of the Congo (Democratic Republic of the Congo *v.* Uganda), Judgment of 19 December 2005, *I.C.J. Reports 2005*, para. 179. Author's italics added.

51 Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict, adopted on 25 May 2000, *U.N. Doc. A/54/49 (2000)*, Article 4. It should be noted that the Convention formulates a soft obligation: armed groups "*should* not, under any circumstances, recruit or use in hostilities persons under the age of 18 years". Author's emphasis added. In addition, see C. Ryngaert, 'Human Rights Obligations of Armed Groups', *Revue Belge de Droit International*, Vol. 41, Issue 1-2 (2008), p. 364.

of governmental authority.[52] This is an extremely difficult question to answer *in abstracto*. There are relatively few examples of armed groups that behave like *de facto* authorities, even though they may be highly organized. Mention can be made, for example, to the Forces Nouvelles in Côte d'Ivoire. Although this opposition force was in full control of the north of Côte d'Ivoire, it did not function as a local authority. The Group of Experts established by the UN Security Council to investigate violations of the arms and diamond embargoes concluded in its 2009 final report that, notwithstanding the formal reintroduction of local government in the north of Côte d'Ivoire, "[t]he political situation in northern Côte d'Ivoire currently bears more resemblance to a warlord economy than to a functioning government administration".[53]

A closer look at international practice does not provide direct support for the thesis that armed groups are bound by international human rights or environmental law. However, it does provide some support for the thesis that there is, in the words of Cédric Ryngaert, a "legitimate expectation of the international community" for armed groups to comply with international human rights law, not as a legal but as a moral obligation.[54] In several of its resolutions, the UN Security Council has called upon parties to an internal armed conflict to respect international human rights law. Examples include Resolution 1231 of 11 March 1999 on the situation in Sierra Leone, in which the Council "calls upon all parties to the conflict in Sierra Leone fully to respect human rights and international humanitarian law"; and Resolution 1291 of 24 February 2000 on the situation in the Democratic Republic of the Congo, in which the Security Council calls on all parties to the conflict in the Democratic Republic of the Congo "to protect human rights and respect international humanitarian law and the Convention on the Prevention and Punishment of the Crime of Genocide of 1948".[55]

All in all, current practice does not indicate that the proposition that armed groups are bound by human rights law is accepted, while there is no evidence at all for the proposition that armed groups are bound by international environmental law. Of course, armed groups can always choose to assent to human rights or environmental obligations, either through agreements with the government or through unilateral declarations. In fact, there are several examples of peace agreements between governments and armed groups, where

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52 With respect to human rights, see, *e.g.,* A. Clapham, 'Human Rights Obligations of Non-State Actors in Conflict Situations', *International Review of the Red Cross* Vol. 88, Issue 863 (2006), p. 491-523; and C. Ryngaert, 'Human Rights Obligations of Armed Groups', *Revue Belge de Droit International,* Vol. 41, Issue 1-2 (2008), p. 355-381.

53 Final report of the Group of Experts submitted in accordance with paragraph 11 of Security Council Resolution 1842 (2008) of 9 October 2009, *UN Doc. S/2009/521,* para. 36.

54 For the notion of "legitimate expectations" of the international community as a more realistic alternative to legally binding obligations, see C. Ryngaert, 'Human Rights Obligations of Armed Groups', *Revue Belge de Droit International,* Vol. 41, Issue 1-2 (2008), pp. 355-381.

55 See UN Security Council Resolution 1231 (1999), para. 4; and S/RES/1291 (2000), para. 15.

armed groups agree to respect human rights as well as other international legal obligations.[56]

A final issue that deserves consideration is the question whether non-state armed groups are bound by customary international law. In this respect Yoram Dinstein argues that "[t]he inability of individuals, either singly or as insurgent groups, to participate in custom-formation does not affect the fundamental principle that – once formed […] – customary international law is binding on all human beings without exception".[57] This is a rather bold statement which needs to be put into perspective.

The better view would be that non-state actors can be directly bound by customary international law in the same way as they are directly bound by treaties. In other words, non-state armed groups can be directly bound by customary norms that address these groups, either directly or as parties to an armed conflict. By way of example, reference can be made to the rules embodied in common Article 3 of the 1949 Geneva Conventions, which are considered to apply to all internal armed conflicts, both as a matter of treaty law and as customary international law. According to the International Court of Justice in the Nicaragua case, common Article 3 reflects "elementary considerations of humanity".[58] Other customary international norms that apply to internal armed conflicts, and which therefore can be assumed to bind armed groups directly, include the core principles of international humanitarian law, in particular the principles of humanity, distinction, necessity and proportionality.

In contrast, armed groups cannot be directly bound by those customary norms that are exclusively addressed to States. This means, for example, that armed groups are not directly bound by the international environmental principles of sustainable use and prevention. As explained in Chapter 4 of this book, these principles are addressed to States and must be made effective for other actors through implementation in national law.

As a general rule, it can thus be argued that armed groups can only be directly bound by rules of customary international law that address these groups, while they are not directly bound by those rules that exclusively address States. There appears to be one exception to this general rule. Reference

56 See, *e.g.,* Article 3(3) of the Global and All Inclusive Agreement on the Transition in the Democratic Republic of the Congo concluded between the Congolese government and five armed opposition groups, in which the parties "reaffirm their support for the Universal Declaration of Human Rights, the International Pact on Civil and Political Rights of 1966, the International Pact on Economic and Socio-Cultural Rights of 1966, the African Charter on Human Rights and the Rights of Peoples of 1981, and duly ratified international conventions".

57 Y. Dinstein, 'The Interaction Between Customary International Law and Treaties', *Recueil des Cours,* Vol. 322 (2006), p. 2344. On the notion of customary international law and its formation, see section 1.7.2 of this chapter.

58 International Court of Justice, *Case concerning Military and Paramilitary Activities in and against Nicaragua*, Judgment of 27 June 1986, *I.C.J. Reports 1986*, p. 14, para. 218.

can be made to the Martens clause, as inserted, *inter alia*, in the preamble to Additional Protocol II applicable to internal armed conflicts. This clause, which is discussed in more detail in Chapter 6 of this book, aims to ensure that human beings remain protected in situations of armed conflict, even in the absence of specific treaty rules. It is argued that this clause enables the application to armed groups of some customary international law rules that normally address States only, in particular customary international law rules relating to the protection of human rights. However, it is relevant to note that these customary norms do not then apply to armed groups as a matter of customary international law but rather as a matter of treaty law, *viz.*, through the Martens clause.

1.2.4 Companies

Because of their involvement at every stage of the production and distribution process related to natural resources, companies play a key role in resource-related armed conflicts. They are able to make an important contribution to solving these armed conflicts, but they can also exacerbate the situation with their practices. To illustrate the negative impact of companies on resource-related armed conflicts, reference can be made to the reports of various Panels of Experts established by the UN Security Council in relation to the conflicts in Angola, Sierra Leone, Liberia and the DR Congo. These reports show the involvement of companies in such diverse practices as the extraction of natural resources controlled by rebel groups, the smuggling of natural resources, and breaking weapons embargoes introduced by the UN Security Council.[59]

The Dutchman Guus Kouwenhoven is a well-known example of a businessman who was directly involved in illegal practices related to an armed conflict. He was the director of the Oriental Timber Company, the largest timber company operating in Liberia during the presidency of Charles Taylor. Kouwenhoven is suspected of being involved in the delivery of arms to Taylor in Liberia and the RUF in Sierra Leone in contravention of the embargo imposed by the UN Security Council,[60] a crime for which he is currently standing trial before the Dutch Appeals Court.[61] In addition, the Panel of Experts on Liberia

59 See, *e.g.*, the Final Report of the Monitoring Group on Angola, *UN Doc. S/2000/1225*, in particular, paras. 154-161; and the Report of the Panel of Experts appointed pursuant to Security Council Resolution 1306 (2000), paragraph 19, in relation to Sierra Leone, *UN Doc. S/2000/1195*, December 2000.

60 See the Report of the Panel of Experts appointed pursuant to Security Council Resolution 1306 (2000), paragraph 19, in relation to Sierra Leone, *UN Doc. S/2000/1195*, December 2000, para. 215.

61 The trial has been on the roll for several years now. In 2006, Guus Kouwenhoven was convicted by the Dutch district court for the delivery of weapons to Taylor. In appeal, Kouwenhoven was acquitted. The Dutch Supreme Court has finally referred the case back

found evidence to suggest that Kouwenhoven's Oriental Timber Company, as well as other timber companies, helped Taylor to divert revenues from the timber industry for extra-budgetary activities.[62]

Furthermore, several Panels of Experts have reported on companies that had direct business dealings with armed groups. The report of the Panel of Experts on Angola, also known as the Fowler Commission after its chairman, indicated that before the imposition of the diamond sanctions on Angola, UNITA had auctioned off mining permits to foreign companies for the exploitation of mines within UNITA-controlled territory. In addition, the Panel found that UNITA had granted various diamond buyers a licence to operate within the areas under its control in exchange for a commission.[63]

In addition to these examples of direct company involvement in resource-related armed conflicts, there are also many examples of companies that are or have been indirectly involved in resource-related armed conflicts. This is partly due to the character of these conflicts. Natural resources that are used to finance armed conflict clearly have an economic value, which makes them valuable to companies further up the supply chain as well. Companies that produce consumer goods such as jewellery and electronic devices buy their raw materials – such as diamonds, gold and coltan – from other companies. Because of these purchases, these companies can also be indirectly involved in the financing of armed conflicts. Several reports of Panels of Experts have demonstrated the relative ease with which diamonds from countries like Angola, Sierra Leone, Liberia and Côte d'Ivoire were able to enter the legitimate diamond market. The Fowler report specifically pointed to the diamond market's lax controls and regulations to explain the relative ease with which illegal diamonds could find their way onto the market.[64]

While these examples show the negative impact that companies can have on resource-related armed conflicts, they also show the possibilities that exist for companies to make a positive contribution to ending them. In fact, several initiatives have been launched in recent years to end corporate complicity in the trade in resources from countries engaged in conflicts. Important initiatives include the Kimberley Process for the Certification of Rough Diamonds and the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals

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to the Court of Appeal, which is bound to take a decision very soon. For a discussion of this case and the difficulties of exercising extra-territorial jurisdiction, see L.J. van den Herik, 'The Difficulties of Exercising Extraterritorial Criminal Jurisdiction: The Acquittal of a Dutch Businessman for Crimes Committed in Liberia', *International Criminal Law Review 9 (2009)*, pp. 211–226.

62 Report of the Panel of Experts pursuant to Security Council Resolution 1343 (2001), paragraph 19, concerning Liberia, *UN Doc. S/2001/1015*, 26 October 2001, paras. 321-350.

63 See the Report of the Panel of Experts on Violations of Security Council Sanctions against UNITA, *UN Doc. S/2000/203*, 10 March 2000, paras. 78 and 79.

64 Report of the Panel of Experts on Violations of Security Council Sanctions against UNITA, 10 March 2000, *UN Doc. S/2000/203*, paras. 87-93.

from Conflict-affected and High-risk Areas. In addition, initiatives have been launched to address the role of companies in fostering corruption, in particular the Extractive Industries Transparency Initiative. These initiatives are discussed in more detail in Part III of this book.

It is also important to note that all of these initiatives have a voluntary character. Their effectiveness depends on the willingness of companies to implement these instruments. In addition, as discussed in more detail in Part III of this book, these instruments all respond to the particular needs of the State where the natural resources are located. The question therefore arises whether international law could also impose binding obligations on companies. In this respect, reference can be made to the 1969 International Convention on Civil Liability for Oil Pollution Damage, which directly confers responsibility for damage caused by oil pollution to private shipowners.[65] Furthermore, the 1982 UN Convention on the Law of the Sea prohibits natural or legal persons from appropriating parts of the deep seabed and its resources.[66] However, these are among the few examples of international legal instruments that directly impose binding obligations on companies. For the most part, the legal position of companies is regulated by national law, both of the home and the host State. Companies must respect these national laws in their business practices.

1.3 Implications for strategies to address resource-related armed conflicts

The preceding sections showed that there are several links between natural resources and armed conflict. Natural resources can provide the means to finance an armed conflict, they can be associated with the outbreak of an armed conflict and they can prolong armed conflicts. Moreover, there is a wide range of actors involved in these armed conflicts, whose activities are subject to different legal regimes. These factors require a multifaceted and comprehensive approach to the prevention, containment and resolution of resource-related armed conflicts.

Two main challenges can be identified in this respect. The first concerns stopping natural resources from financing or fuelling armed conflicts. This implies, first of all, the adoption of strategies that address the trade in natural resources as well as other forms of financing related to natural resources, such as the issuing of mining and timber concessions by armed groups and foreign States as well as forms of illegal taxes on natural resources. It also implies

65 International Convention on Civil Liability for Oil Pollution Damage, adopted on 29 November 1969, *973 UNTS 3*.

66 United Nations Convention on the Law of the Sea, adopted on 10 December 1982, *1833 UNTS 3*, Article 137.

adopting strategies aimed at returning the control over the State's natural resources to the government.

The second challenge is to improve the governance over natural resources within States in order to resolve existing armed conflicts and to prevent a relapse into armed conflict. Strategies focusing on the financial aspects of natural resources exploitation address only some of the problems associated with resource-related armed conflicts. They do not provide solutions for grievances related to environmental degradation or the misuse or improper distribution of profits obtained from natural resources. Nor do they provide solutions for institutional failures related to the resource curse. These problems require a more structural approach aimed at resolving resource-related armed conflicts and preventing the outbreak of new conflicts.

A key aspect of this sort of structural approach is to address failures in the governance of States with regard to natural resources. For the purposes of the present book, the term 'governance' seeks to denote the broader framework for the exercise of political authority with respect to the management of natural resources within States.[67] Although it is the government of a State that is entrusted with the task of managing the State's natural resources, it does so within a broader social and political framework. First of all, the government exercises authority over the State's natural resources on behalf of the State and its people. Therefore it has to take into account the interests of groups and individuals within society. In addition, international actors can also be involved in the governance of natural resources. For example, the Security Council can use its powers under Chapter VII of the UN Charter to assist a government to implement reforms in its natural resources policies. Therefore the term 'governance' should primarily be understood to refer to this broader participatory framework, or in other words, to the process of governing.

Furthermore, the term 'governance' is often associated with the quality of governance, and reference is made to 'good governance'. Although there is no common definition of the concept of good governance, it is possible to identify certain common elements. These include abiding by the rule of law, public participation, transparency, accountability, control of corruption and

67 On the concept of governance and related concepts, see T. Weiss, 'Governance, Good Governance and Global Governance: Conceptual and Actual Challenges', *Third World Quarterly*, Vol. 2 (2000), pp. 795–814; W.A. Knight, 'Democracy and Good Governance', in T.G. Weiss & S. Daws, *The Oxford Handbook on the United Nations*, Oxford: Oxford University Press (2008), pp. 620-633; E. Brown-Weiss & A. Sornarajah, 'Good Governance', in R. Wolfrum (ed.), *Encyclopedia of Public International Law*, Max Planck Institute for Comparative Public Law and International Law, Oxford: Oxford University Press (2012), Vol. IV, pp. 516-528; and K.H. Ladeur, 'Governance, Theory of', in R. Wolfrum (ed.), *Encyclopedia of Public International Law*, Max Planck Institute for Comparative Public Law and International Law, Oxford: Oxford University Press (2012), Vol. IV, pp. 541-553.

government effectiveness.[68] All these elements can be found in the definition of good governance as incorporated in Article 9(3) of the 2000 Cotonou Convention concluded between the European Union and its member States on the one hand, and the members of the African, Caribbean and Pacific Group of States on the other. The Cotonou Convention defines good governance as:

> "the transparent and accountable management of human, natural, economic and financial resources for the purposes of equitable and sustainable development. It entails clear decision-making procedures at the level of public authorities, transparent and accountable institutions, the primacy of law in the management and distribution of resources and capacity building for elaborating and implementing measures aimed in particular at preventing and combating corruption."[69]

As a comprehensive definition, the Cotonou definition can serve as a benchmark for understanding the concept of good governance and its implications. Furthermore, it provides a very useful point of reference for the present study, which focuses on good governance in relation to natural resources management. For the purposes of the present study, good governance refers to:

> *the sustainable, transparent and accountable management of natural resources for the purposes of equitable and sustainable development. It entails clear and participatory decision-making procedures at the level of public authorities, transparent and accountable institutions, the primacy of law in the management and distribution of natural resources and their revenues, as well as capacity building for elaborating and implementing measures aimed in particular at preventing and combating corruption in the public administration of revenues from natural resources.*

Taking the Cotonou definition as a point of reference, this definition focuses on some of the particular challenges associated with the governance of natural resources, while adding the elements of participation and sustainability to the definition. This book argues that for the management of natural resources good governance requires the active involvement of citizens in decision-making processes as well as due regard for environmental protection, which is reflected in the concept of sustainability. Furthermore, good governance is considered an essential prerequisite for achieving sustainable development. This was

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68 See E. Brown-Weiss & A. Sornarajah, 'Good Governance', in R. Wolfrum (ed.), *Encyclopedia of Public International Law*, Max Planck Institute for Comparative Public Law and International Law, Oxford: Oxford University Press (2012), Vol. IV, pp. 516-528.

69 Partnership Agreement Between the Members of the African, Caribbean and Pacific Group of States of the One Part, and the European Community and Its Member States, of the Other Part, 23 June 2000 (last revised: 2010).

recently confirmed in the Rio+20 Declaration, "The Future We Want".[70] Arguably, good governance constitutes the basis of natural resources governance to prevent and resolve armed conflicts. One of the objectives of this book is to assess whether and to what extent these requirements for good governance are reflected in current approaches to addressing the links between natural resources and armed conflict.

1.4 Definition of terms used in this book

Some terms are used throughout this book without further clarification. One of these terms is 'natural resources'. Natural resources can be defined as "those materials or substances of a place which can be used to sustain life or for economic exploitation"[71] or as "any material from nature having potential economic value or providing for the sustenance of life".[72] These definitions first of all emphasise the economic function of natural resources. In this sense, natural resources constitute primary commodities, *i.e.*, "raw or unprocessed material[s] that [are] extracted or harvested and also require very little processing before consumption".[73] Indeed, for the purposes of this book, their economic value as raw materials is a defining characteristic of natural resources. It is for this reason that natural resources constitute an important source of funding for armed conflicts. Natural resources can often be relatively easily obtained by parties to an armed conflict and can be sold without further processing. The primary focus of this book is therefore on those natural resources that are relatively easy to obtain but are highly profitable, such as timber, minerals and rare metals.

Nevertheless, natural resources are not only economic goods. They also form an integral part of the environment, and may perform an important ecological function as well. For example, trees not only provide timber, but also help to reduce climate change. In addition, forests are the habitat for

70 The relevant section of the Rio+20 Outcome Document reads: "We acknowledge that democracy, good governance and the rule of law, at the national and international levels, as well as an enabling environment, are essential for sustainable development, including sustained and inclusive economic growth, social development, environmental protection and the eradication of poverty and hunger. We reaffirm that to achieve our sustainable development goals we need institutions at all levels that are effective, transparent, accountable and democratic". See UN General Assembly Resolution 66/288 of 11 September 2012, para. 13.

71 *Oxford English Dictionary Online*, Oxford: Oxford University Press (2007).

72 *Black's Law Dictionary*, 8th edition (2004), p. 1056.

73 *Ibid.* UNCTAD distinguishes the following groups of primary commodities: foods and tropical beverages (includes basic foods, coffee, cocoa and tea); vegetable oil seeds and oil; agricultural raw materials (includes timber and rubber); and minerals, ores and metals (includes copper, tin, tungsten, gold and crude petroleum). See UNCTAD, Handbook of Statistics (2012).

numerous different species. This is also expressed in the definitions given above. As elements of the environment, natural resources can be necessary to "sustain life". In this respect, reference can be made to Principle 2 of the 1972 Stockholm Declaration, which refers to "the natural resources of the earth, including the air, water, land, flora and fauna and especially representative samples of natural ecosystems".[74]

The environment, which is another term used throughout this book, can then be defined in relation to natural resources. The environment comprises the air, water, land, flora and fauna, which interact as part of different ecosystems. It can be argued that the environment needs protection for two distinct but interrelated reasons. First, the environment needs protection for the inherent values it represents. Furthermore, human beings are dependent upon the environment. In its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons,* the International Court of Justice stated: "(…) the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn".[75]

In relation to natural resources, reference is often made to the term 'exploitation'. The Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo opted for a very broad definition of this term, to include the extraction, production, commercialization and exports of natural resources and other services such as transport and financial transactions.[76] The present book largely follows this definition, although "other services" are not covered by the term 'exploitation'. Where this book refers to the exploitation of natural resources, it generally refers to the extraction, production and trade in natural resources, unless a further distinction is required.

In some cases this book refers to the 'illicit' or 'illegal' exploitation of natural resources to designate exploitation activities that are conducted in violation of rules of international law. It is important to note that the term 'illegal', as used in legal documents, often fails to distinguish between resource exploitation that is contrary to international law and resource exploitation that is contrary to national law. Mining without an official permit under domestic law constitutes 'illegal exploitation' from the domestic perspective, even if it does not necessarily violate any rule of international law. This is reflected in the definition of the Protocol Against the Illegal Exploitation of Natural Resources, adopted by the International Conference on the Great Lakes Region, which defines illegal exploitation as "any exploration, development, acquisition,

74 Declaration of the United Nations Conference on the Human Environment, Stockholm, 16 June 1972, *11 I.L.M. 1416 (1972)*.

75 *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, 8 July 1996, *I.C.J. Reports* 1996, p. 226.

76 Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo, *UN Doc. S/2001/357*, para. 16.

and disposition of natural resources that is contrary to law, custom, practice, or principle of permanent sovereignty over natural resources, as well as the provisions of this Protocol'.[77] References to 'illegal exploitation' in this book however primarily designate activities that are contrary to international law.

Another term that is sometimes used in this book is 'conflict resources'. There is as yet no legal definition of the term. The only official document that uses a related term is the Kimberley Process Certification Scheme, a voluntary agreement between State, civil society and the diamond sector to combat the trade in 'conflict diamonds'. The definition of 'conflict diamonds' adopted in the Scheme focuses exclusively on the role of rebel movements. According to the Scheme, conflict diamonds are "rough diamonds used by rebel movements or their allies to finance conflict aimed at undermining legitimate governments…".[78]

The NGO Global Witness proposed adopting the following alternative definition of conflict resources: "conflict resources are natural resources whose systematic exploitation and trade in a context of conflict contribute to, benefit from, or result in the commission of serious violations of human rights, violations of international humanitarian law or violations amounting to crimes under international law".[79] The advantage of this definition is that it does not distinguish between natural resources exploited by rebel groups and those exploited by the government, which makes it more neutral. However, in another sense the definition is too narrow. In order to designate natural resources as conflict resources under this definition, it is necessary to establish that the natural resources have contributed to violations of international law. This is problematic in the sense that not all natural resources that contribute to armed conflicts, necessarily contribute to, benefit from, or result in violations of international law. This book therefore prefers to define conflict resources as natural resources whose systematic exploitation and trade finance or fuel-armed conflicts.

1.5 AIM OF THE BOOK

This book addresses the problem of resource-related armed conflicts from an international law perspective. More specifically, it aims to identify and assess the role of international law in ensuring that natural resources are used to promote development as well as sustainable peace in countries that are ex-

77 Protocol Against the Illegal Exploitation of Natural Resources, adopted by the International Conference on the Great Lakes Region on 30 November 2006, Article 1.

78 Kimberley Process Certification Scheme, Section I.

79 Global Witness, 'The Sinews of War: Eliminating the Trade in Conflict Resources', Briefing Document of November 2006, p. 10.

periencing or that have experienced armed conflicts which are either caused, financed or fuelled by natural resources.

For this purpose, the book first of all assesses the general legal framework for the governance of natural resources within States. In this respect, the first role of international law is that it establishes legal rights and obligations with regard to the exploitation of natural resources in States, including legal entitlements to the benefits derived from their exploitation. This book aims to identify these legal rights and obligations deriving from international economic, environmental and human rights law, as the legal framework relevant for the exploitation of natural resources in situations of armed conflict, as well as for the governance of natural resources as part of a strategy for conflict resolution and post-conflict peacebuilding.

Furthermore, this book aims to establish whether and to what extent the general legal framework for the governance of natural resources continues to apply in times of armed conflict. In addition, it aims to assess the extent to which rules from the law of armed conflict address the illicit exploitation, looting and plundering of natural resources by parties to an armed conflict, including the resulting environmental damage. Does international law provide adequate rules to prohibit these practices and to address the related environmental damage?

Finally, the book aims to identify standards for the governance of natural resources in States recovering from armed conflict. Most of these standards have been developed with *ad hoc* approaches, in particular UN Security Council resolutions and informal multi-stakeholder processes. This book assesses the contribution of both types of mechanisms for the legal framework for the governance of natural resources.

These objectives can be translated into the following three research questions that are the subject of the three consecutive parts of this book:

1. *Does current international law provide rules to ensure that natural resources are exploited for the purpose of achieving sustainable development?*
2. *Do these rules continue to apply in situations of armed conflict and does international humanitarian law provide relevant rules?*
3. *Do norms and standards developed with* ad hoc *mechanisms contribute to improving governance over natural resources in States that are recovering from armed conflict?*

1.6 Structure of the book

This book consists of three parts. *Part I* deals with the international legal framework for the governance of natural resources within States. This part comprises three chapters. Chapter 2 discusses the principle of permanent sovereignty over natural resources as the basis for the governance of natural

resources within States. The principle of permanent sovereignty formulates a right for States and peoples to freely exploit their natural resources for the purposes of development. This chapter examines two questions in particular:

- *What rights and obligations does the principle of permanent sovereignty over natural resources entail?*
- *To whom does the right to exercise permanent sovereignty over natural resources accrue: to States, to peoples or both?*

The main conclusion of this chapter is that the principle of permanent sovereignty over natural resources entails a right for governments to exploit the State's natural resources on behalf of the State and its people on condition that it does so for national development and the well-being of the people of the State.

Chapter 3 discusses these conditions in greater detail. The principal questions of this chapter are:

- *Who are the "people"?*
- *What is meant by peoples having a right to freely exploit natural resources?*
- *What is meant by natural resources having to be exploited for the well-being of the people?*

Chapter 3 examines these questions from the perspective of collective or "peoples'" rights. It identifies groups that are eligible to exercise peoples' rights and examines the implications of peoples' rights for the governance of natural resources within States.

Chapter 4 discusses the protection of natural resources under international environmental law. It assesses the obligations imposed by international environmental law on States with regard to the protection of the environment, as well as the implications of these obligations for the governance of natural resources within States. The main question underpinning this chapter is:

- *To what extent does international environmental law qualify the right of States to exploit their natural resources?*

It is argued that the rights and obligations identified in Part I are not only relevant for the governance of natural resources by governments in situations of peace, but that they are also relevant in situations of armed conflict.

Part II of this book discusses the international legal framework regulating the protection and management of natural resources during armed conflict. Chapter 5 examines the question whether and to what extent norms of international human rights and environmental law continue to apply in situations of armed conflict. For this purpose, the chapter looks at how armed conflict affects

treaties, a topic which has been the object of a recent study by the International Law Commission (ILC), resulting in the adoption of a set of articles. The chapter discusses the work of the ILC in this respect. It also looks at the broader issue of how treaties operate during armed conflict. In addition to treaty law, this chapter also analyses the role of customary international law in situations of armed conflict. Even if a particular treaty is considered not to apply in times of armed conflict, specific obligations contained in its provisions may continue to be valid because of their customary international law status. This leads to the following question:

- *To what extent do norms of international human rights and environmental law continue to apply during armed conflict and what are the implications for the legal framework regarding the exploitation of natural resources in situations of armed conflict?*

Chapter 6 assesses the protection afforded to natural resources and the environment by international humanitarian law. This field of law is of particular relevance, as it is the only field of law that contains obligations directly binding non-state armed groups. In addition, it is the principal source of rights and obligations for States with a military presence on the territory of a foreign State. The principal question dealt with in this chapter is:

- *To what extent does international humanitarian law contain rules that prohibit the illicit exploitation, looting and plundering of natural resources by parties to an armed conflict and that address the related environmental damage?*

This chapter argues that international humanitarian law contains only a few rules that were specifically developed to regulate the use of natural resources by parties to an armed conflict. Therefore, for the most part, recourse must be made to more general rules of this body of law relating to the protection of property and civilian objects. In order to address the specific challenges posed by resource-related armed conflicts, these more general rules of international humanitarian law are interpreted in the light of the more specific rules of international environmental and human rights law relating to natural resources.

Part III of this book discusses the international legal and political framework regulating the governance of natural resources as part of conflict resolution and post-conflict peacebuilding strategies. In this respect, Chapter 7 discusses the approach of the Security Council to the role of natural resources in financing armed conflict. In many cases the UN Security Council has resorted to imposing sanctions to address the links between natural resources and armed conflict. The objective of Chapter 7 is to assess whether and to what extent the Security Council resolutions have, in addition, developed standards for

the governance of natural resources. For this purpose, Chapter 7 discusses a range of sanction regimes imposed by the Security Council in order to address resource-related armed conflicts. The principal question underpinning this chapter is:

- *How and to what extent have the Security Council resolutions gone beyond the sanctioning of illegal trafficking of natural resources, in the sense that they have addressed issues related to the governance of natural resources?*

Chapter 8 discusses informal political instruments that have been developed in response to resource-related armed conflicts. In addition to States, the business community and civil society have been involved in the design of these instruments and have been given a stake in their implementation. These instruments are part of a growing trend in international politics for drafting 'guidelines', 'codes of conduct' or other non-binding instruments rather than negotiating formal treaties. Nevertheless, these informal instruments do formulate standards for the management of natural resources in States emerging from armed conflict. The obvious questions are therefore:

- *What standards do these instruments formulate for the management of natural resources in countries emerging from armed conflict?*
- *Do these informal instruments provide a credible alternative to legally binding instruments?*

Finally, Chapter 9 summarises the general conclusions of this book. It assesses the adequacy of the overall international legal framework for the governance of natural resources within States and discusses the way forward.

1.7 The approach to international law adopted in this book

The issue of resource-related armed conflicts is relatively new and has not yet been addressed in a systematic way in formal law-making processes. To determine the applicable rules, it is therefore first of all necessary to rely on the existing rules of international law that pertain to the governance of natural resources within States in general, as well as on the rights and obligations of parties to an armed conflict. Furthermore, relevant standards can be derived from *ad hoc* processes, in particular from Security Council resolutions and from political agreements and codes of conduct adopted to address the issue of resource-related armed conflicts.

1.7.1 Treaties and treaty interpretation

Many of the general rules and standards examined in this book are incorporated in treaties, one of the primary sources of international law as listed in Article 38 of the Statute of the International Court of Justice. The 1907 Hague Regulations, the 1949 Geneva Conventions and their 1977 Additional Protocols formulate rules for parties to an armed conflict, which include rules that are relevant for the exploitation of natural resources by parties to an armed conflict. In addition, the 1966 International Covenant on Economic, Social and Cultural Rights, the 1966 International Covenant on Civil and Political Rights, as well as international environmental conventions, formulate obligations for States which determine their right to exploit their natural resources.

One of the primary aims of this book is to determine the extent to which these existing rules of international law can effectively address problems connected to resource-related armed conflicts. However, the existing rules are part of different subsystems, which to a large extent operate independently from each other. In order to address the problems connected with resource-related armed conflicts in a comprehensive manner, it is necessary to bring these fields of international law closer together. One of the principal methods used in this book to achieve this is treaty interpretation.

In this respect, reference must be made to the traditional rules on treaty interpretation as codified in Articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties.[80] According to the basic rule for treaty interpretation formulated in Article 31(1) of the 1969 Vienna Convention, "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". This basic rule is developed using the rules formulated in the other subsections of Article 31.[81] Article 31 (3) of the Vienna Convention is particularly relevant in this respect. It lists the other elements to be taken into account together with the context of the treaty. These include subsequent

80 These rules are generally considered to represent customary international law. See, *e.g.*, the judgment of the International Court of Justice in *Oil Platforms* (Islamic Republic of Iran v. United States of America), Judgment of 6 November 2003, *I.C.J Reports 2003*, p. 161, para. 41, in which the Court refers to "the general rules of treaty interpretation, as reflected in the 1969 Vienna Convention on the Law of Treaties". Also see the earlier judgment of the International Court of Justice in the *Case Concerning the Territorial Dispute between Libya and Chad* (Libyan Arab Jamahiriya *v.* Chad), Judgment of 3 February 1994, *I.C.J. Reports 1994*, p. 6, para. 41.

81 See the Commentary to the ILC draft Articles on the Law of treaties, which indicates that "the process of interpretation is a unity and that the provisions of the article form a single, closely integrated rule". Reports of the International Law Commission on the second part of its seventeenth session and on its eighteenth session, UN Doc *A/6309/Rev.1*, in Yearbook of the International Law Commission, 1966, Vol. II, p. 220.

agreements and practice as well as "any relevant rules of international law applicable in the relations between the parties" to the treaty.[82]

Both Article 31(1) and (3) of the Vienna Convention contain elements that permit an interpretation of the provisions of a treaty in the light of the broader system of international law. First, rules of international law that are not part of the framework of the treaty can be taken into account when determining the "ordinary meaning" of the terms of treaty provisions in accordance with Article 31(1) of the Vienna Convention, including rules from different subsets of international law. The WTO Appellate Body's reference in the *Shrimp/Turtle case* of 12 October 1998 to environmental treaties for the interpretation of the term "exhaustible natural resources" as used in the 1947 GATT is a well-known example.[83]

Secondly, rules from different subsets of international law as well as general international law can be considered to be "any relevant rules of international law applicable in the relations between the parties" for the interpretation of the substantive obligations. This is often referred to as the systemic method of interpretation. In the *Oil Platforms case*, for example, the International Court of Justice referred to this method in order to interpret the obligations of the parties to a bilateral treaty in the light of their obligations under general international law.[84]

In this respect there are two further issues that merit closer attention. The first concerns the question of inter-temporal law and its application to the interpretation of treaties. Here it must be noted that the obligations contained in the various conventions examined in this book were drafted at different times. Most of the relevant rules of international humanitarian law, for example, were drafted in the first half of the twentieth century, while most relevant rules of international environmental and human rights law evolved in the second half of the twentieth century. Therefore the question arises whether modern environmental and human rights norms, for example, can

82 Article 31 (3) of the Vienna Convention states that "[t]here shall be taken into account, together with the context: (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions; (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation; (c) any relevant rules applicable in the relations between the parties".

83 United States – Import Prohibition of Certain Shrimp and Shrimp Products, Report of the Appellate Body, *WT/DS58/AB/R*, 12 October 1998.

84 International Court of Justice, Oil Platforms case (Iran v. United States of America), Judgment of 6 November 2003, *I.C.J. Reports 2003*, p. 161, para. 41. The Court stated in relevant part: "under the general rules of treaty interpretation, as reflected in the 1969 Vienna Convention on the Law of Treaties, interpretation must take into account "any relevant rules of international law applicable in the relations between the parties" (Art. 31, para. 3 (c)). The Court cannot accept that Article XX, paragraph 1 (d), of the 1955 Treaty was intended to operate wholly independently of the relevant rules of international law on the use of force…".

be used to interpret old norms in the field of international humanitarian law. The inter-temporal interpretation of treaty obligations – also referred to as the dynamic-evolutionary method of treaty interpretation – has certainly received broad recognition in the case law of international tribunals since the adoption of the Vienna Convention, both as regards the interpretation of treaty terms and as regards the interpretation of the substantive obligations.[85]

In its *Namibia Advisory Opinion*, the International Court of Justice ruled that "an international instrument has to be interpreted and applied within the framework of the entire legal system prevailing *at the time of the interpretation*".[86] Similarly, in its judgment in the *Gabcíkovo-Nagymaros* case, the Court added that "new norms have to be taken into consideration, and […] new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past".[87]

Other courts and tribunals have made similar statements. For example, in its landmark *Shrimp/Turtle case* of 12 October 1998 the WTO Appellate Body referred to modern ideas regarding environmental protection in order to interpret the terms of the GATT 1947. In that case the Appellate Body considered that "[t] he words of Article XX(g), 'exhaustible natural resources', were actually crafted more than 50 years ago" and that "[t]hey must be read by a treaty interpreter in the light of contemporary concerns of the community of nations about the protection and conservation of the environment."[88] With reference to the *Namibia Opinion* of the International Court of Justice, the Appellate Body also stated that "the generic term 'natural resources' in Article XX(g) is not 'static' in its content or reference but is rather by definition, evolutionary".[89]

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85 G. Ress, 'The Interpretation of the Charter', in Simma, *The Charter of the United Nations. A Commentary*, Oxford 2002, p.23. For different approaches to evolutionary interpretation, see P-M. Dupuy, 'Evolutionary Interpretation of Treaties: Between Memory and Prophecy', in E. Cannizzaro (ed.), *The Law of Treaties Beyond the Vienna Convention*, Oxford: Oxford University Press (2011), pp. 123-137. For an early critical perspective on the evolutionary approach, see M.K. Yasseen, 'L'Interprétation des Traités d'Après la Convention de Vienne sur le Droit des Traités', *Recueil des Cours,* Vol. 151 (1976), p. 27.

86 International Court of Justice, Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion of 21 June 1971, *I.C.J. Reports* 1971, p. 16, para. 53. Author's emphasis added.

87 For another example of new norms to be taken into account for the interpretation of existing obligations, see International Court of Justice, Aegean Sea Continental Shelf, Judgment of 19 December 1978, *I.C.J. Reports* 1978, p. 3, para. 80.

88 United States – Import Prohibition of Certain Shrimp and Shrimp Products, Report of the Appellate Body, *WT/DS58/AB/R*, 12 October 1998, para. 129.

89 United States – Import Prohibition of Certain Shrimp and Shrimp Products, Report of the Appellate Body, *WT/DS58/AB/R*, 12 October 1998, para. 130. The relevant passage of the Namibia Opinion to which the Appellate Body refers deals with an evolutionary interpretation of generic treaty provisions. In this respect, the International Court of Justice held: "[m]indful as it is of the primary necessity of interpreting an instrument in accordance with the intentions of the parties at the time of its conclusion, the Court is bound to take into account the fact that the concepts embodied in [the relevant provision of the treaty]

Similarly, in the *OSPAR Arbitration* case of 2 July 2003, the arbitral tribunal operating under the auspices of the Permanent Court of Arbitration considered more in general that "[l]est it produce anachronistic results that are inconsistent with current international law, a tribunal must certainly engage in *actualisation* or contemporization when construing an international instrument that was concluded in an earlier period".[90]

These are just a few examples of evolutionary interpretation of treaty obligations by international courts. The examples show the importance that courts attach to interpreting legal instruments in the legal and social context in which these instruments are applied. This brings to the fore the second issue that merits closer attention, concerning the nature of the rules that can be used to interpret treaty provisions. In this respect, a distinction must be made between the application of rules for the purpose of determining the ordinary meaning of treaty terms and the application of "any relevant rules of international law applicable in the relations between the parties" to the treaty in order to interpret the substantive obligations. In order to determine the ordinary meaning of treaty terms, courts can take into account all the relevant rules from other fields of international law, whether or not the parties to the dispute are also parties to these treaties. These rules are not used as legal sources, but rather as a source of information.[91]

However, the reference to "any relevant rules of international law applicable in the relations between the parties" in Article 31(3) of the Vienna Convention calls for a stricter approach. Only those relevant rules that are applicable to the parties to the treaty can be taken into account. This requirement has led to a lively debate in the academic literature, focusing on the meaning of "the parties". The advocates of a strict interpretation argue that "the parties" can only refer to *all* the parties to the treaty under consideration, while the advocates of the broader view argue that Article 31 (3) (c) refers to the parties to a particular dispute about the interpretation of a treaty.[92] In view of this

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were not static, but were by definition evolutionary […]. The parties to the Covenant must consequently be deemed to have accepted them as such". See Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, *I.C.J. Reports 1971*, p. 16, para. 53.

90 Dispute Concerning Access to Information Under Article 9 of the OSPAR Convention (Ireland *v.* United Kingdom), Final Award of the Permanent Court of Arbitration of 2 July 2003, para. 103.

91 In order to determine the ordinary meaning of treaty provisions, courts do not necessarily have to use legal sources. Courts can, for example, also look at standards that do not amount to legal rules or to common practices.

92 See U. Linderfalk, 'Who Are 'the Parties'? Article 31, Paragraph 3(c) of the 1969 Vienna Convention and the 'Principle of Systemic Integration' Revisited', in *Netherlands International Law Review,* Vol. 55, Issue 3 (2008), pp. 343-364; G. Marceau, 'Conflicts of Norms and Conflicts of Jurisdictions: The Relationship between the WTO Agreement and MEAs and other Treaties', *Journal of World Trade,* Vol. 35, Issue 6 (2001), p. 1087; Report of the Study Group of the International Law Commission, Finalized by Martti Koskenniemi, Fragmenta-

controversy, this book adopts a cautious approach. The interpretation rule of Article 31(3) of the Vienna Convention is used primarily as a means to reconcile treaty law with customary international law, the other major primary source of international law as recognised in Article 38 of the Statute of the International Court of Justice.

1.7.2 Customary international law

Customary international law constitutes an important source for this study, first, because it is capable of binding all States, irrespective of their adherence to a particular treaty regime.[93] In this sense, customary international law obligations are therefore basic obligations that are binding on the large majority of States – and possibly on other actors such as non-state armed groups – provided that the obligations address these groups as well. Furthermore, customary international law obligations play an important role in the interpretation of treaty provisions, because by their very nature they constitute "relevant rules that are applicable in the relations between the parties" according to Article 31 of the Vienna Convention. Moreover, a major advantage of customary rules over treaty obligations is related to their operation in situations of legal uncertainty, in particular in situations of armed conflict and in the immediate aftermath of such conflicts. It has been argued that customary international law obligations from all fields of international law continue to apply in situations of armed conflict.[94] In contrast, the continued applicability

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tion of International Law: Difficulties Arising From the Diversification and Expansion of International Law, UN Doc. *A/CN.4/L.682*, 13 April 2006; C. McLachlan, 'The Principle of Systemic Integration and Article 31 (3) (c) of the Vienna Convention', *International Comparative Law Quarterly,* Vol. 54 (2005), pp. 279-320; M. Samson, 'High Hopes, Scant Resources: A Word of Scepticism about the Anti-Fragmentation Function of Article 31(3)(c) of the Vienna Convention on the Law of Treaties', *Leiden Journal of International Law,* Vol. 24 (2011), pp. 701-714; C. McLachlan, 'The Principle of Systemic Integration and Article 31 (3) (c) of the Vienna Convention', *International Comparative Law Quarterly,* Vol. 54 (2005), pp. 310-319; and M.K. Yasseen, 'L'Interprétation des Traités d'Après la Convention de Vienne sur le Droit des Traités', *Recueil des Cours,* Vol. 151 (1976).

93 There are only two exceptions to this rule. The first relates to the existence of local or regional customary law, which is only binding on States that are part of a specified group of States. The other exception relates to the possibility for States to object to being bound by a rule that is still in the process of crystallising into customary international law. If a State is persistent in its objections to an evolving rule, this State is not bound by the rule of customary international law once it has matured. See H. Thirlway, 'The Sources of International Law', in M.D. Evans, *International Law*, Third Edition, Oxford: Oxford University Press (2010), pp. 106-108. Also see Y. Dinstein, 'The Interaction Between Customary International Law and Treaties', *Recueil des Cours,* Vol. 322 (2006), pp. 285-287.

94 This is also the implicit view of the International Law Commission, which has included a provision in its draft articles on the effects of armed conflicts on treaties asserting that "[t]he termination of or the withdrawal from a treaty, or the suspension of its operation, as a consequence of an armed conflict, shall not impair in any way the duty of any State

of treaty obligations is largely dependent upon the operation of the treaty of which they are part. Treaties can be suspended or their operation can be affected in other ways, which also affects the applicability of the individual obligations contained in the treaty, unless these treaty obligations represent customary international law as well.[95]

Of course, it cannot be argued that obligations under customary international law operate in the same manner irrespective of the circumstances in which they apply. For example, the customary international law obligation to conduct an environmental impact assessment for economic projects that are likely to cause damage to the environment does not necessarily give rise to the same procedural obligations in situations of armed conflict as it does in situations of peace.[96] The obligation must then be viewed in the context of the restrictions that apply in situations of armed conflict. However, as a matter of principle, it can be asserted that the core obligation to conduct such an assessment applies in situations of armed conflict as well.

Consequently rules of customary international law can be considered to provide a general legal framework applicable to the exploitation of natural resources in situations of armed conflict, as well as in immediate post-conflict situations. This legal framework applies to the large majority of States – as well as to armed groups if the rules address these groups – and it operates even when specific treaty obligations do not, or when States have not become parties to these treaties. It is for these reasons that this book devotes a great deal of attention to establishing the legal status of rules and principles, even when these rules and principles have been recognised in treaty law as well.

In order to determine the existence of a rule of customary international law, Article 38 (1) (b) of the ICJ Statute requires "evidence of a general practice accepted as law". Therefore it must be demonstrated that there is an established State practice (objective requirement) and that States are convinced that this behaviour is required under international law (subjective requirement). In an often-quoted paragraph of the judgment of the International Court of Justice in the *North Sea Continental Shelf cases*, the Court explains the subjective requirement as follows:

> "[n]ot only must the acts concerned amount to a settled practice, but they must also be such, or to be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule requiring it. The need

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to fulfil any obligation embodied in the treaty to which it would be subject under international law independently of that treaty".

95 On the relationship between treaty law and customary international law, see International Court of Justice, Military and Paramilitary Activities in and against Nicaragua (Nicaragua *v.* United States of America), Merits, Judgment of 27 June 1986, *I.C.J. Reports 1986*, p. 14, paras. 173-179. Also see Y. Dinstein, 'The Interaction Between Customary International Law and Treaties', *Recueil des Cours,* Vol. 322 (2006), pp. 243-427.

96 This obligation is discussed in more detail in Chapter 4 of this study.

> for such a belief, i.e., the existence of a subjective element, is implicit in the very notion of *opinio juris sive necessitates*".[97]

This requirement has special significance for the voluntary agreements entered into by States, as discussed in Part III of this book. In these instances, States do not act upon these agreements from a sense of legal obligation, but rather to honour their political commitments.

As to the objective requirement, the International Court of Justice determined in the *Nicaragua case* that the practice required for the formation of a rule of customary international law does not need to be "in absolutely rigorous conformity with the rules".[98] Rather, "the conduct of States should, in general, be consistent with such rules".[99] Furthermore, the *Nicaragua case* indicates that a State that seeks to defend or justify inconsistent practice with a recognised rule "by appealing to exceptions or justifications within the rule itself" in fact confirms the existence of that rule itself.[100]

One of the factors in determining whether a particular rule of customary international law has developed is therefore to assess the extent of consistent State practice. Do States generally follow a rule? And if States act inconsistently with a given rule, do they explain their conduct by raising doubts about the very existence of the rule, or do they only challenge the application of the rule in particular instances? In the latter case, the attitude of the State in question can be interpreted as an indication of *opinio juris* as to the existence of a rule of customary international law.

Furthermore, the existence of rules of customary international law can often be deduced from treaty law. As the International Court of Justice acknowledged in the *North Sea Continental Shelf cases*, rules of customary international law can evolve from treaty obligations. In these cases it is essential to determine whether States act in a certain way because they believe that such behaviour is required under international law in general, or because they are acting in accordance with their treaty obligations. It is only in the former case that a rule of customary international law can be considered to have been

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97 International Court of Justice, The North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands), Judgment of 20 February 1969, *I.C.J Reports 1969*, p. 4, para. 77.

98 International Court of Justice, Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), Judgment of 27 June 1986, *I.C.J. Reports 1986*, p. 14, para. 186.

99 *Ibid*.

100 *Ibid*. The Court stated in the relevant part: "If a State acts in a way prima facie inconsistent with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule".

established.[101] Furthermore, treaty provisions can also codify existing rules of customary international law. By way of example, reference can be made to the principle of permanent sovereignty over natural resources. This principle notably evolved from UN General Assembly resolutions, but was subsequently recognised in several treaties.

It is important to note that the creation of customary international law is an essentially State-centred process. The practice of other actors – such as non-state armed groups – is not taken into account in the process of the creation of customary international law. This classic view of the creation of customary international law as a State-centred process was also the starting point for the landmark study of the ICRC on customary international humanitarian law. According to the ICRC study, the approach of the study "to determine whether a rule of general customary international law exists is a classic one, set out by the International Court of Justice in a number of cases, in particular in the *North Sea Continental Shelf cases*".[102] The practice of non-state armed groups is examined under the heading of "other practice", but is not expressly taken into account for the determination of rules of customary international humanitarian law.

For the purposes of this book, the customary international law status of rules of international law is in most cases derived from the widespread recognition of relevant norms and principles in treaty law, as well as in binding resolutions adopted by organs of international organizations. In addition, secondary sources of international law, in particular judicial decisions are examined in order to confirm the customary international law status of norms and principles.

1.7.3 Soft law

'Soft law', in particular principles and standards formulated in non-binding documents, constitutes an important reference point for this book.[103]

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101 International Court of Justice, The North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands), Judgment of 20 February 1969, *I.C.J. Reports 1969*, p. 4, paras. 71-74. The Court considered in general that the process of conventional norms generating norms of customary international law constituted "one of the recognized methods by which new rules of customary international law may be formed".

102 J.-M. Henckaerts and L. Doswald-Beck (eds.), *Customary International Humanitarian Law, Volume I: Rules*, Cambridge: Cambridge University Press, p. xxxviii.

103 The phenomenon of 'soft law' is broader and is also referred to in relation to soft norms in otherwise binding treaties. However, this book focuses on soft law in the sense of non-binding documents. For discussions on the notion of soft law, see, *e.g.,* A. Boyle & C. Chinkin, *The Making of International Law*, Oxford: Oxford University Press (2007); D. Shelton, 'International Law and 'Relative Normality'', in M. Evans (ed.), *International Law*, Third Edition, Oxford: Oxford University Press (2010); H. Hillgenberg, 'A Fresh Look at Soft Law',

Although soft law comes in many different forms, most instruments used in this book can be classified in one of the two following categories. The first consists of non-binding instruments adopted by States, either directly or through their representation in an intergovernmental organization, while the second consists of non-binding instruments adopted by other actors with the purpose of influencing State behaviour.

Examples of the first category include non-binding resolutions and declarations adopted by States at international forums, in particular, UN General Assembly resolutions and documents resulting from world conferences, such as the 1972 Stockholm Declaration on the Human Environment and the 1992 Rio Declaration on Environment and Development. It also includes informal agreements entered into by States, containing political or moral commitments. Two arrangements which are very important for this book are the Kimberley Process for the Certification of Rough Diamonds and the Principles of the Extractive Industries Transparency Initiative. Finally, reference can be made to codes of conduct adopted by States but directed at non-state actors. The OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-affected and High-risk Areas is an important example of this.

Examples of the second category include standard-setting instruments adopted by organs of international organizations or non-governmental organizations made up of independent experts. The work of the International Law Commission is relevant in this respect. This commission was established by the UN General Assembly with the specific mandate to promote "the progressive development of international law and its codification".[104] Furthermore, reference can be made to the work of the International Law Association and especially of the New Delhi Declaration of Principles of International Law Relating to Sustainable Development. The second category of soft law also contains instruments adopted by independent treaty bodies, such as the general comments, recommendations and case law adopted by human rights treaty bodies.

The principal question that arises in relation to the concept of soft law is what value – if any – these instruments have for international law. The concept of soft law is subject to an intense debate in the academic literature between

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European Journal of International Law, Vol. 10 (1999), pp. 499-515; J.J. Kirton & M.J. Trebilcock, 'Hard Choices, Soft Law: Voluntary Standards in Global Trade, Environment and Social Governance', Aldershot, etc., Ashgate (2004); J. Ellis, 'Shades of Grey: Soft Law and the Validity of Public International Law', *Leiden Journal of International Law,* Vol. 25 (2012), pp. 313-334; and M. Goldmann, 'We Need to Cut Off the Head of the King: Past, Present, and Future Approaches to International Soft Law', *Leiden Journal of International Law,* Vol. 25 (2012), pp. 335-368. For a critical analysis of the notion of soft law, see J. Klabbers, 'The Redundancy of Soft Law', *Nordic Journal of International Law,* Vol. 65 (1996), pp. 167-182; J. d'Aspremont, *Formalism and the Sources of International Law: A Theory of the Ascertainment of Legal Rules*, Oxford: Oxford University Press (2011).

104 Statute of the International Law Commission, UN General Assembly Resolution 174 (II) of 21 November 1947, last amended by resolution 36/39 of 18 November 1981, Article 1.

authors who attribute legal value to soft law documents and those who adhere to a strictly binary – or positivist – approach to international law.[105] This book does not regard soft law as a source of international legal rights or obligations. An important distinction between soft law and law proper is that soft law does not have legal effect. It cannot be directly relied on in court or in inter-state relations in general, nor does the violation of soft law trigger the application of the secondary rules of international law, such as those relating to State responsibility. In other words, soft law does not create rights or obligations for States and it can be "set aside" without any legal consequences.

Nevertheless, soft law is important for international law in a number of ways. Specifically, for the purposes of this book, it performs two important functions. First, soft law is used in this book as a means to interpret and clarify obligations under international law. For example, it is used as a source of information to determine the ordinary meaning of vague or open-ended treaty terms, in accordance with Article 31(1) of the 1969 Vienna Convention on the Law of Treaties. Furthermore, soft law documents are also used in a more general way to give substance and meaning to obligations under international law. The General Comments and case law made by human rights treaty bodies, for example, are used to interpret the provisions of the relevant treaties and clarify the substantive obligations of parties to these treaties.

In addition, soft law documents are used in this book as a source of information to indicate the direction in which international law is developing. This is especially true for soft law that falls into the first category, i.e., non-binding documents adopted by States. Although soft law documents do not as such reflect *opinio juris* – the very fact that soft law documents are non-binding is in conflict with the whole idea of recognising them as reflections of *opinio juris* – soft law documents can be regarded as a form of recognition by States of the importance of certain principles and standards. These documents represent an initial agreement between States to take certain principles or standards as guidelines for their future behaviour. In many cases, the initial proclamation of principles or standards in non-binding documents has subsequently resulted in a formal endorsement of these principles or standards, either through their incorporation in a formal treaty or through their gradual acceptance as norms of customary international law. It is for these purposes that soft law is used in this book.

105 See *supra* for literature on the notion of soft law.

1.7.4 Binding acts of international organizations: UN Security Council Resolutions

Binding acts of international organizations are not included in the list of formal sources of international law set out in Article 38 of the Statute of the International Court of Justice. This is not surprising, as the text of Article 38 of the Statute dates back to the 1922 Statute of the Permanent Court of International Justice, at which time the possibility of international organizations taking binding decisions was not yet foreseen. Apart from this historical reason, there is another reason why binding acts of international organizations are not included in the list of formal sources. Binding acts of international organizations are not original sources of international law, in the sense that these acts derive their legal authority from another source, i.e., the treaty on which they are based. As Philippe Sands notes, they can therefore "be considered as part of treaty law".[106] For the purposes of this book, the most relevant acts of international organizations are the decisions adopted by the UN Security Council, usually as part of resolutions passed pursuant to Chapter VII of the UN Charter. Decisions of the UN Security Council derive their legal authority from the UN Charter, which determines in Article 25 that "the Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter".

As only "decisions" of the UN Security Council are legally binding, this raises an important question, *i.e.*, how to determine whether or not the measures imposed by the UN Security Council are legally binding. The question whether particular paragraphs of a resolution entail binding obligations can be derived first of all from the language used. Where the UN Security Council "decides" on particular measures or "demands" that States or other entities take particular measures, it is clear that these measures constitute binding obligations. In contrast, when the Security Council "urges" or "requests" States or other entities to take particular measures, it cannot be concluded that the measures were intended to be binding.

However, the language used is not decisive for determining whether or not particular paragraphs of Security Council resolutions are legally binding. This is particularly the case when the language used is indeterminate. For example, the status of paragraphs in Security Council resolutions starting with "calls upon" is not entirely clear. In these cases, the binding nature of such paragraphs can only be determined by looking at the specific context of the resolution, including the text, the *verbatim* records and UN Security Council

106 P. Sands & J. Peel, *Principles of International Environmental Law*, Cambridge: Cambridge University Press, Third Edition (2012), p. 109.

discussions on related resolutions.[107] Whether a particular UN Security Council resolution contains decisions must therefore be determined by means of a careful analysis of the text of the Resolution, its objectives and the context in which it was adopted.

UN Security Council resolutions are important to this book for three main reasons. First, decisions taken by the UN Security Council are binding upon States and have priority over conflicting obligations of States under international law. This priority position of UN Security Council resolutions follows from Article 103 of the UN Charter, which determines that "in the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail'.

Furthermore, decisions taken by UN Security Council resolutions can also bind entities other than States, including non-state armed groups, international organizations and companies. Most of the obligations for these entities are formulated indirectly, but sometimes the Council has also formulated direct obligations for such actors. An example is Resolution 811 (1993), adopted in relation to the armed conflict in Angola. In this Resolution, the Council demanded that UNITA "accept unreservedly the results of the democratic elections of 1992 and abide fully by the Acordos de Paz".[108]

In addition to formulating obligations for States and other entities, UN Security Council resolutions are also relevant for this book because they formulate standards for the governance of natural resources. In some of its

107 In this respect, see the approach set out by the International Court of Justice in its *Namibia* and *Kosovo* Opinions. In the *Namibia Advisory Opinion*, the Court determined that a conclusion regarding the binding nature of a Security Council Resolution can be made only after careful analysis of its language. According to the Court, the question whether the powers under Article 25 of the UN Charter have been exercised "is to be determined in each case, having regard to the terms of the resolution to be interpreted, the discussions leading to it, the Charter provisions invoked and, in general, all circumstances that might assist in determining the legal consequences of the resolution of the Security Council". International Court of Justice, Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion of 21 June 1971, *I.C.J. Reports* 1971, p. 53, para 114. In the *Kosovo Advisory Opinion*, the Court explained the differences between the interpretation of treaties and the interpretation of Security Council resolutions, determining that other factors must be taken into account when interpreting Security Council resolutions, especially in relation to their drafting process and legal effects. International Court of Justice, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion of 22 July 2010, *I.C.J. Reports* (2010), p. 403, para. 94. Also see M.C. Wood, 'The Interpretation of Security Council Resolutions', in *Max Planck Yearbook of United Nations Law* (1998), p. 73-95. *Security Council Report*, *Special Research Report 2008, No. 1* on Security Council Action under Chapter VII: Myths and Realities, 23 June 2008, pp. 9-12, available at <www.securitycouncilreport.org>, consulted on 24 June 2008. For a discussion of the Namibia Opinion, see D.W. Greig, *Invalidity and the Law of Treaties*, London: British Institute of International and Comparative Law (2006), pp. 166-180.

108 UN Security Council Resolution 811 (1993), especially para. 2.

resolutions, the UN Security Council has imposed conditions on lifting sanctions with regard to the implementation of certification measures or reform programs by States satisfying a number of requirements related to good governance. The standards set by the UN Security Council are not only relevant in themselves, but have also influenced other approaches to curb the trade in illicit natural resources and to improve the governance of natural resources.

1.7.5 Principles of international law

This book examines several principles of international law, including the principles of self-determination and permanent sovereignty over natural resources as well as a number of principles that are of particular importance to specific fields of international law, such as the precautionary principle in international environmental law and the principles of necessity and proportionality in international humanitarian law. The question arises how to define 'principles', both in terms of their legal implications and in relation to the sources of international law.

It is first necessary to distinguish 'principles' as used in this book from 'general principles of international law' as a source of international law pursuant to Article 38 of the Statute of the International Court of Justice. The latter was originally inserted in the Statute of the Permanent Court of Justice to prevent situations of *non liquet*, when the Court would find no express rule either in treaty law or in customary international law as a basis for its decision.[109] In these cases, the Court could fall back on "the *opinio juris communis* of civilised mankind".[110] Many of these general principles are derived from national legal systems. For example, Article 21 of the Rome Statute of the International Criminal Court, which states the law to be applied by the Court, refers to "general principles of law derived by the Court from national laws of legal systems of the world".[111] In addition, there are general principles that are directly part of international law, but these are often difficult to distinguish from customary international law.[112] For example, in the *DR Congo-Uganda* case, the International Court of Justice referred to the principle

109 See H. Thirlway, 'The Sources of International Law', in M.D. Evans (ed.), *International Law*, third edition, Oxford: Oxford University Press (2010), p. 108.

110 B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, Cambridge: Cambridge University Press (2006).

111 Article 21(1)(c) of the Rome Statute of the International Criminal Court, *2187 UNTS 90*.

112 See B.D. Lepard, *Customary International Law: A New Theory with Practical Applications*, ASIL Studies in International Legal Theory, Cambridge, New York, etc.: Cambridge University Press (2010), pp. 166-167; B. Cheng, *General Principles of Law as Applied by International Courts and Tribunals*, Cambridge: Cambridge University Press (2006), p. 23.

of Permanent Sovereignty over Natural Resources as "a principle of customary international law".[113]

When this book refers to principles of international law, it does not rely on a particular source of international law. The principles examined in this book derive their authority from all sources of international law, but notably from treaty law and customary international law. For example, Article 1(2) of the UN Charter refers to "the principle of self-determination" as a basis for developing friendly relations among States, while it is also widely considered to be part of customary international law. The defining feature of a 'principle' for the purposes of this book is that it has been recognised as such by the international community, in one form or the other. Such recognition can be based on an express reference in a treaty, but it can also be based on other factors, such as extensive reliance in the practice of States on a particular principle or its application by international courts in specific cases.

Secondly, it is important to inquire into the nature of principles of international law. What does it imply to recognise something as a 'principle of international law'? Principles are often regarded as operating on a higher level of generality than rules.[114] Reference can be made in this respect to the classical work of Georg Schwarzenberger, who defined principles as "mere abstractions from actual rules".[115] This book prefers to turn the definition around, regarding rules as concretisations of principles. Where Schwarzenberger's aim was to deduce certain fundamental principles from applicable rules, the purpose of this book is to examine the impact of principles on the development of more concrete rules. Principles are therefore regarded in this book as overarching concepts which form the basis for more detailed rights and obligations.

113 Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment of 19 December 2005, *I.C.J. Reports* 2005, para. 244.

114 See International Law Association, Final Report of the Committee on Formation of Customary (General) International Law, Statement of Principles Applicable to the Formation of General Customary International Law, London Conference (2000), p. 11.

115 G. Schwarzenberger, 'The Fundamental Principles of International Law', *Recueil des Cours* Vol. 87 (1956), p. 210.

Part I

The legal framework for the governance of natural resources in States

Introductory remarks to Part I

The objective of this part of the book is to examine the international legal framework for the governance of natural resources within States. In an independent State it is obviously the government that first and foremost has the right to exercise political authority in relation to the exploitation of natural resources. This is explored in more detail in Chapter 2. That chapter discusses the principle of permanent sovereignty over natural resources as the organizing principle for the governance of natural resources within States and their economic jurisdiction. However, the right of the government to exploit the State's natural resources is qualified by obligations arising from international human rights and environmental law. Furthermore, this chapter discusses the legal position of the government itself. Chapter 3 discusses the obligations for governments under human rights law, while Chapter 4 examines obligations for governments resulting from international environmental law.

2 Defining the right of peoples and States to freely exploit their natural resources: permanent sovereignty over natural resources

2.1 Introductory Remarks

International law establishes a right for States and peoples to freely exploit their natural resources. This right originates in UN General Assembly Resolution 523 (IV) of 12 January 1952, which formulates a right for "under-developed countries" to freely determine the use of their natural resources. Soon after the adoption of this resolution, the right developed along two different but interrelated tracks. First, the right was asserted in terms of the principle of permanent sovereignty over natural resources.[1] In addition, as Chile proposed, the right of peoples to freely dispose of their natural resources was inserted into the two human rights covenants of 1966 as inherent in their right to self-determination.[2]

Today the right of States and peoples to freely dispose of their natural resources is firmly established in the principle of permanent sovereignty over natural resources which incorporates this right. The principle of permanent sovereignty over natural resources constitutes the very foundation on which the protection and management of natural resources in modern international law is based. Its relevance for the protection and management of natural resources has been confirmed in many international legal instruments, as well as in resolutions of the UN Security Council and the UN General Assembly. In addition, the International Court of Justice has recognised the importance of the principle and considers it to constitute a principle of customary international law.[3]

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1 It should be noted that the concept of permanent sovereignty over natural resources itself was for a long time asserted as a right before it received recognition as a legal principle. For example, compare the landmark 1962 Declaration on Permanent Sovereignty over Natural Resources, which designates permanent sovereignty over natural resources as a right accruing to both peoples and nations. See UN General Assembly Resolution 1803 (XVII) on Permanent Sovereignty over Natural Resources, 14 December 1962.

2 The original proposal for Article 1(2) introduced by Chile in 1952 provided in relevant part that "the right of the peoples to self-determination shall also include permanent sovereignty over their natural wealth and resources". For a discussion of the Chilean proposal, see N.J. Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties*, Cambridge: Cambridge University Press (1997), pp. 49-56.

3 International Court of Justice, Case Concerning Armed Activities in the Territory of the Congo (Democratic Republic of the Congo *v.* Uganda), Judgment of 19 December 2005, *I.C.J. Reports 2005*, para. 244.

This chapter first aims to determine the content of the right of States and peoples to freely dispose of their natural resources. For this purpose, this chapter examines the evolution, the nature and the legal status of the principle of permanent sovereignty over natural resources. Furthermore, the principle of permanent sovereignty identifies States and peoples as holders of the right to freely dispose of "their" natural resources. This chapter examines the implications of this dual ownership in relation to the right to freely dispose of natural resources. It argues that the dual ownership construction has two implications. First, it emphasises that the right to exercise permanent sovereignty over natural resources is an essential component of State sovereignty, which other States must respect in their international relations. Secondly, the recognition of peoples as also being subjects of the principle of permanent sovereignty over natural resources in addition to States must be interpreted as qualifying the right of the government of a State to dispose of the State's natural resources. The government exercises this right on behalf of the people of the State.

2.2 Evolution of the principle of permanent sovereignty over natural resources

This section outlines the evolution of the principle of permanent sovereignty over natural resources. It demonstrates that this is a dynamic principle, which has adapted to changing circumstances. For this reason the principle has not only remained relevant over time, but has in fact become the governing principle for the management and protection of natural resources.

2.2.1 Early recognition: permanent sovereignty and the right to self-determination

The principle of permanent sovereignty over natural resources originates in resolutions of the UN General Assembly. It emerged in the 1950s following the decolonisation movement, and was advanced by newly independent and developing countries as a means of protecting their ownership rights over the natural wealth and resources situated within their territory.[4] At the time, the main idea behind – what was then still called – the *right* to permanent sover-

4 For a detailed examination of the principle of permanent sovereignty over natural resources, see N.J. Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties*, Cambridge: Cambridge University Press (1997); D. Rosenberg, *Le Principe de Souveraineté des Etats sur Leurs Ressources Naturelles*, Paris: Librairie Générale de Droit et de Jurisprudence (1983); G. Elian, *The Principle of Sovereignty over Natural Resources*, Alphen aan den Rijn: Sijthoff & Noordhoff (1979).

eignty over natural resources was to provide these countries with the legal tools to regain control over their natural resources and to exploit them for their own benefit. Therefore, initially the principle was primarily associated with such controversial issues as the right of States to regulate foreign investment, and in particular with the right to nationalise natural resources. In this respect, Resolution 626 (VII) was the first resolution to make an express link between the right of peoples to freely exploit their natural resources on the one hand, and the exercise of sovereignty on the other.[5]

A few years later, Resolution 837 (IX) determined that the right to permanent sovereignty over natural resources was an inherent part of the right of self-determination and requested the Commission on Human Rights to make recommendations concerning the right of peoples and nations to self-determination, "including recommendations concerning their permanent sovereignty over their natural wealth and resources".[6] This resolution marked the beginning of a process aimed at the clarification of the concept of permanent sovereignty over natural resources leading up to the 1962 Declaration on Permanent Sovereignty over Natural Resources.[7]

2.2.2 The 1962 Declaration and the following years: regulating foreign investment

The Declaration on Permanent Sovereignty over Natural Resources, adopted by the General Assembly on 14 December 1962 by 87 votes to 2, with 12 abstentions, lays down eight basic principles concerning the exercise of permanent sovereignty over natural resources.[8] The focus of the Declaration is on the regulation of foreign investment in the natural resources sector. In this respect, the Declaration aims to strike a balance between the interests of States

5 UN General Assembly Resolution 626 (VII) of 21 December 1952 on the right to exploit freely natural wealth and resources determines that "the right of people fully and freely to use and exploit their natural wealth and resources is inherent in their sovereignty". This resolution is quite controversial, because of its political context. Although references to a right to nationalise natural resources ultimately have not been inserted in the text, the resolution became known as the "nationalisation resolution". See N.J. Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties*, Cambridge: Cambridge University Press (1997), pp. 41-49.

6 UN General Assembly Resolution 837 (IX) on recommendations concerning international respect for the right of peoples and nations to self-determination of 14 December 1954.

7 Instrumental in this development has been the Commission on Permanent Sovereignty over Natural Resources, set up by the UN General Assembly in Resolution 1314 (XIII) of 12 December 1958 "to conduct a full survey of [permanent sovereignty over natural wealth and resources as a] basic constituent of the right to self-determination".

8 See N.J. Schrijver, 'Natural Resources, Permanent Sovereignty over', in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law*, 3rd ed., available through <http://www.mpepil.com> (2008), para. 10. For the voting records, see *Yearbook of the United Nations* (1962), pp. 502-503. The negative votes were cast by France and South Africa.

exporting capital in protecting their investments and the interests of States importing capital in retaining control over their natural resources.[9]

Furthermore, the Declaration attempts to clarify the nature and scope of the concept of permanent sovereignty over natural resources. In this respect, paragraph 1 of the Declaration asserts a right to permanent sovereignty over "natural wealth and resources", *i.e.*, over every part of the environment.[10] It attributes this right to "peoples and nations" and specifies that it must be exercised "in the interest of their national development and of the well-being of the people of the State concerned".

Arguably this obligation is also incumbent upon States when they nationalise, expropriate or requisition natural wealth and resources. According to paragraph 4 of the declaration, the nationalisation, expropriation or requisitioning of natural wealth and resources is permitted only on "grounds or reasons of public utility, security or the national interest which are recognized as overriding purely individual or private interests, both domestic and foreign". Although the primary objective of this paragraph is the protection of foreign investment, it can also be read as emphasising the obligation to exercise permanent sovereignty in the interest of national development and the well-being of the population of the State.

The final provision that is of interest is paragraph 7 of the declaration, which determines that "violation of the rights of peoples and nations to sovereignty over their natural wealth and resources is contrary to the spirit and principles of the Charter of the United Nations". Although the objective of this provision was originally to protect developing States against foreign investors exploiting their natural resources on unequal terms, it is arguably also relevant for situations in which foreign States plunder a State's natural resources, which happened (and is still happening to some extent) in the DR Congo. In these cases, States are therefore committing an internationally wrongful act, activating the law on State responsibility.[11]

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9 The principal question that was before the Committee discussing the draft resolution was the "achievement of a formula which would safeguard and reconcile two essential principles, namely, respect for the national sovereignty of developing countries in need of foreign capital for the development of their natural resources, and provision of adequate guarantees for potential investors". *Yearbook of the United Nations* (1962), p. 500.

10 See N.J. Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties*, Cambridge: Cambridge University Press (1997), p. 16, who notes that the "concept of natural wealth may come close to what is commonly called 'the environment' as a description of a physical matter, being the air, the sea, the land, flora and fauna and the rest of the natural heritage".

11 Nevertheless, in the Congo-Uganda case, the Court of Justice dismissed the relevance of this principle to the particular situation of looting and plundering of the DRC's natural resources by soldiers of the Ugandan army. See International Court of Justice, Case Concerning Armed Activities in the Territory of the Congo (Democratic Republic of the Congo *v.* Uganda), Judgment of 19 December 2005, *I.C.J. Reports 2005*. These aspects of the case are discussed in more detail in Chapter 5 of this study.

Subsequent General Assembly resolutions focus mainly on the implementation of the principle of permanent sovereignty over natural resources and place it in a more prominent developmental context. In addition, these resolutions increasingly point to States rather than peoples as the subjects of the principle of permanent sovereignty. Resolution 2158 (XXI) of 6 December 1966, for example, "reaffirms the inalienable right of all *countries*", while Resolution 2692 (XXV) of 11 December 1970 is entitled "Permanent sovereignty over natural resources of developing *countries*" and Resolution 3171 (XXVIII) of 17 December 1973 "[s]trongly reaffirms the inalienable rights of *States* to permanent sovereignty over all their natural resources".[12]

At the same time, these resolutions emphasise that States must exercise the right to permanent sovereignty in order to promote development. For example, Resolution 2158 (XXI) determines that countries exercise permanent sovereignty "in the interest of their national development". Similarly, Resolution 2692 (XXV) reaffirms that permanent sovereignty "must be exercised in the interest of their national development and of the well-being of the people of the State concerned".

The political situation changed dramatically as a result of the economic crisis that broke out in the early 1970s. Discontented with the existing international economic order, developing countries advocated the establishment of a New International Economic Order (NIEO), which was aimed at addressing inequities in the economic system. Among the founding principles of this new economic order permanent sovereignty over natural resources figured prominently, and this was to extend to "all economic activities".[13] Therefore the NIEO Declaration significantly extended the scope of the principle of permanent sovereignty over natural resources. This is one of the principal reasons why the NIEO Declaration has continued to be controversial.[14]

Another interesting feature of the NIEO Declaration is that the principle of permanent sovereignty is considered to accrue exclusively to States and that it is no longer explicitly subject to the obligation to use this right in the interest of national development. At the same time, the Declaration expresses "the need for developing countries to concentrate all their resources for the

12 UN General Assembly Resolution 2158 (XXI) on Permanent Sovereignty over Natural Resources, adopted on 6 December 1966, UN General Assembly Resolution 2692 (XXV) on Permanent sovereignty over natural resources of developing countries and expansion of domestic sources of accumulation for economic development, adopted on 11 December 1970, UN General Assembly Resolution 3171 (XXVIII) on Permanent sovereignty over natural resources, adopted on 17 December 1973. Author's emphasis added. It should be noted that contrary to what its title suggests, Resolution 2692 (XXV) reaffirms the right to permanent sovereignty of both nations and peoples, especially in paragraph 2.

13 See the Declaration on the Establishment of a New International Economic Order, UN General Assembly Resolution 3201 (S-VI) of 1 May 1974, para. 4(e).

14 See N.J. Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties*, Cambridge: Cambridge University Press (1997), pp. 96-100.

cause of development".[15] This is considered one of the founding principles of the NIEO.

The NIEO Declaration is accompanied by a programme of action which stipulates the measures that need to be taken for it to become fully effective. One of the measures referred to in the programme of action is the adoption of a Charter of Economic Rights and Duties of States as "an effective instrument towards the establishment of a new system of international economic relations based on equity, sovereign equality, and interdependence of the interests of developed and developing countries".[16]

The purpose of the Charter of Economic Rights and Duties of States, which was adopted later that year by a majority of the UN General Assembly,[17] was to promote "the new international economic order, based on equity, sovereign equality, interdependence, common interest and co-operation among all States".[18] With regard to natural resources, the Charter proclaims the right for "every State" to "freely exercise full permanent sovereignty, including possession, use and disposal, over all its wealth, natural resources and economic activities".[19]

From these resolutions it may be inferred that, in the context of the debate in the UN General Assembly during the 1960s and early 1970s, the principle of permanent sovereignty over natural resources gradually shifted from a right accruing to peoples and nations, as in the 1962 Declaration, to a right accruing to States, as in the 1974 NIEO Declaration and Charter of Economic Rights and Duties of States. In addition, during this same period, the scope covered by the principle was extended from "natural wealth and resources" in the 1962 Declaration to "natural resources and all economic activities" in the NIEO Declaration, and finally to "all its wealth, natural resources and economic activities" in the Charter of Economic Rights and Duties of States. However, the latter continued to be controversial.

15 *Ibid*., para. 4(r).

16 Programme of Action for the Establishment of a New International Economic Order, UN General Assembly Resolution 3202 (S-VI) of 1 May 1974, under VI.

17 The Charter was adopted with 120 votes to 6, with 10 abstentions. It met with considerable opposition from developed States. See N.J. Schrijver, *Development without Destruction: The UN and Global Resource Management*, United Nations Intellectual History Project Series, Bloomington and Indianapolis, Indiana University Press (2010), pp. 50-54.

18 UNGA Resolution 3281(XXIX) of 12 December 1974 on a Charter of Economic Rights and Duties of States.

19 The text was adopted in spite of criticism by the developed states. See N.J. Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties*, Cambridge: Cambridge University Press (1997), pp. 102-103.

2.2.3 From resource rights to duties: permanent sovereignty and sustainable development

Whereas the main focus of the debates in the UN General Assembly during the first two stages of the evolution of the principle was on establishing rights, the principle was increasingly incorporated in declarations and treaties as a duty-based concept in the following decades. As a result of the evolution of international environmental law during the 1970s and 1980s, the exercise of permanent sovereignty over natural resources by States gradually became qualified by obligations pertaining to the protection and management of natural wealth and resources.[20] These obligations relate both to the extraterritorial effects resulting from the use of natural resources by States, as well as to the protection of parts of the environment within State boundaries that represent a value to the international community as a whole.

The first obligation relates to the responsibility of States "to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction". According to the International Court of Justice, this obligation has become part of "the corpus of international law relating to the environment".[21] The obligation not to cause extraterritorial damage to the environment, which was first expressed in the 1941 Trail Smelter case,[22] was formulated in Principle 21 of the 1972 Stockholm Declaration on the Human Environment and in Principle 2 of the 1992 Rio Declaration on Environment and Development as a corollary of the sovereign right of states "to exploit their own resources pursuant to their own environmental and – in the Rio Declaration – developmental policies".[23]

In addition, the sovereign right of States to exploit their natural resources and the corresponding responsibility not to cause transboundary environmental

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20 For a detailed analysis of the impact of international environmental law on the notion of permanent sovereignty over natural resources, see N.J. Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties*, Cambridge: Cambridge University Press (1997), Chapters 8 and 10.

21 According to the Court, "the existence of a general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment". Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, *1996 I.C.J. Reports 66*, para 29.

22 In the Trail Smelter Arbitration, the arbitral tribunal held that "under the principles of international law […] no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence", Trail Smelter Arbitration (United States v. Canada) 16 April 1938, *3 RIAA 1907 (1941)*.

23 Declaration of the United Nations Conference on the Human Environment, Stockholm, 16 June 1972, *11 I.L.M. 1416 (1972)*; Declaration of the United Nations Conference on Environment and Development, Rio de Janeiro, 13 June 1992, *31 I.L.M. 874 (1992)*.

harm has been incorporated in several international environmental conventions, including the 1985 Vienna Convention for the Protection of the Ozone Layer, the 1992 Convention on Biological Diversity (CBD), the 1992 UN Framework Convention on Climate Change (UNFCCC), and the 1994 Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa.[24]

Moreover, some of these conventions formulate more precise obligations aimed at the prevention of extraterritorial damage to the "global commons".[25] For example, the 1985 Vienna Convention for the Protection of the Ozone Layer, obliges parties to "take appropriate measures . . . to protect human health and the environment against adverse effects resulting or likely to result from human activities which modify or are likely to modify the ozone layer".[26] Similarly, the 1992 UNFCCC formulates as a general principle that the parties should "protect the climate system for the benefit of present and future generations" and to that end must, inter alia, "promote sustainable management" of sinks and reservoirs.[27]

While the prohibition against causing extraterritorial damage to the environment relates to the protection of the environment of third States and of areas beyond national jurisdiction, international environmental law also contains obligations for States with regard to the protection of their own natural wealth and resources. These obligations flow from the general obligation to conserve and use natural wealth and resources in a sustainable way for the benefit of current and future generations, which is discussed in more detail in Chapter 4 of this book.[28]

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24 See the second paragraph of the preamble of the Convention for the Protection of the Ozone Layer, Vienna, 22 March 1985, *1513 UNTS 323*; Article 3 of the Convention on Biological Diversity, Rio de Janeiro, 5 May 1992, *1760 U.N.T.S. 79*; paragraph 8 of the preamble of the UN Framework Convention on Climate Change, Rio de Janeiro, 9 May 1992, *1771 U.N.T.S. 107*; and paragraph 15 of the preamble of the United Nations Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, New York, 17 June 1994, *1954 U.N.T.S. 3*.

25 The term 'global commons' refers to what the Stockholm and Rio Declarations call the areas beyond national jurisdiction. For an examination of the concept of 'global commons', see N.J. Schrijver & V. Prislan, 'From Mare Liberum to the Global Commons: Building on the Grotian Heritage', in *Grotiana,* Vol. 30 (2009), pp. 168–206.

26 Article 1 of the Vienna Convention for the Protection of the Ozone Layer, Vienna, 22 March 1985, *1513 U.N.T.S. 323*, while paragraph 2 of the preamble recalls that states have "the sovereign right to exploit their own resources pursuant to their own environmental policies".

27 Articles 3(1) and 4(1)(d) of the UNFCCC, while paragraph 8 of the preamble recalls that states have "the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies".

28 For an examination of the notions of sustainable use, intergenerational equity and other notions related to the concept of sustainable development, see N.J. Schrijver, 'The Evolution of Sustainable Development in International Law: Inception, Meaning and Status', *Recueil des Cours,* Vol. 329 (2007), Leiden/Boston: Martinus Nijhoff Publishers (2008), Chapter 5.

While affirming the sovereignty of states over their natural resources, the 1972 Stockholm Declaration already placed great emphasis on the responsibility of man to protect the environment and the earth's natural resources.[29] The obligation to conserve and use natural wealth and resources in a sustainable way is also inherent in the notion of sustainable development, which is commonly described as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs".[30]

Several international environmental treaties take the sovereignty of states over their natural resources as their starting point, but simultaneously contain obligations which qualify the exercise of this sovereignty for the benefit of the international community as a whole. Examples include the 1972 UNESCO Convention for the Protection of the World Cultural and Natural Heritage, which obliges parties to identify, protect, conserve, present, and transmit to future generations sites that have been designated as "natural heritage", i.e., natural features, geological and physiographical formations and natural sites "for whose protection it is the duty of the international community as a whole to co-operate",[31] and the 1992 Convention on Biological Diversity, which obliges parties to cooperate with other states "for the conservation and sustainable use of biological diversity", i.e., "the variability among living organisms from all sources […] and the ecosystems and ecological complexes of which they are a part", the conservation of which is designated by the convention as a "common concern of humankind".[32] In addition, the 1982 UN Convention on the Law of the Sea (UNCLOS) contains a mixed obligation, referring to parts of the sea both within and outside the jurisdiction of States. UNCLOS's Article 193, one of the convention's environmental provisions, asserts the sovereign right of States to exploit their own natural resources and links this right to the duty to protect and preserve the marine environment.[33]

It can therefore be stated that international environmental law has both expressed and qualified the sovereign right of States to exploit their own

29 In this respect, Principle 1 of the Stockholm Declaration states that "[m]an ... bears a solemn responsibility to protect and improve the environment for present and future generations". In addition, Principle 2 determines that "the natural resources of the earth ... must be safeguarded for the benefit of present and future generations through careful planning or management".

30 Brundtland Commission, *Our Common Future*, Report of the World Commission on Environment and Development (1987).

31 Articles 4 and 6 of the Convention Concerning the Protection of the World Cultural and Natural Heritage, Paris, 23 November 1972, *1037 U.N.T.S. 151*. Article 6 also states that the parties to the Convention fully respect "the sovereignty of the States on whose territory the . . . natural heritage . . . is situated".

32 Article 5, Article 2 and the third paragraph of the preamble of the Convention on Biological Diversity. Article 3 formulates the principle that states have "the sovereign right to exploit their own resources pursuant to their own environmental policies".

33 United Nations Convention on the Law of the Sea, New York, 10 December 1982, *1833 UNTS 3*, Article 193.

natural resources. International environmental law prescribes that States must take due account of the environment when they exercise the rights flowing from the principle of permanent sovereignty, both outside and inside their national jurisdiction.[34]

2.2.4 Other duties: towards a people-oriented concept of permanent sovereignty

During the 1990s and the first decade of this century, international legal and political instruments increasingly emphasised that sovereignty over natural resources should be exercised in the interests of the country and its people. In a way, this development can be regarded as a return to the foundations of the principle of permanent sovereignty. As mentioned before, early resolutions related to permanent sovereignty over natural resources were based on the premise that States and people had the right to freely dispose of their natural resources on condition that the natural resources were exploited for national development and the well-being of the people. The very first principle of the 1962 Declaration on Permanent Sovereignty over Natural Resources proclaims that "[t]he right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned".[35]

As noted by Nico Schrijver, this condition gradually disappeared from the permanent sovereignty-related resolutions.[36] The condition re-emerged in the context of resource-related armed conflicts. It was first referred to in legal and political instruments adopted to address resource-related armed conflicts. In a resolution entitled "Strengthening Transparency in Industries", adopted in 2008, the UN General Assembly reaffirmed that "every State has and shall freely exercise full permanent sovereignty over all its wealth, natural resources and economic activities" and in this respect recalled "its resolution 1803 (XVII) of 14 December 1962, in which it declared that the right of peoples and nations to permanent sovereignty over their natural wealth and resources must be exercised in the interest of their national development and of the well-being of the people of the State concerned".[37] In addition, Article VII of the Lomé Peace Agreement for Sierra Leone provides that "the Government shall

34 These obligations are discussed in more detail in Chapter 2 of this study.

35 Declaration on Permanent Sovereignty over Natural Resources, *UN General Assembly Resolution 1803 (XVII)* of 14 December 1962.

36 See N.J. Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties*, Cambridge: Cambridge University Press (1997), pp. 308-309.

37 UN General Assembly Resolution 62/274 on Strengthening Transparency in Industries, adopted on 26 September 2008, paras. 4 and 5.

exercise full control over the exploitation of gold, diamonds and other resources, for the benefit of the people of Sierra Leone."[38]

These legal and political instruments illustrate a new tendency to qualify the principle of permanent sovereignty over natural resources for the purpose of promoting development. Article 3 of the Protocol of the International Conference of the Great Lakes Region Against the Illegal Exploitation of Natural Resources, a regional treaty adopted by the members of the International Conference on the Great Lakes Region to address the illegal exploitation of natural resources in the Great Lakes Region of Africa, provides first of all that "Member States shall freely dispose of their natural resources" and adds that this right "shall be exercised in the exclusive interest of the people". It then specifies that "in no case, the populations of a State shall be deprived of it".[39] In addition, the Protocol determines that "[m]ember States shall develop and implement a participatory and transparent mechanism for the exploitation of natural resources, according to their respective economic and social systems".[40]

It is interesting to note that Article 3 of the Protocol to a certain extent reproduces Article 21 of the African Charter on Human and Peoples' Rights, which provides: "All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it". However, there are some important textual differences between the Protocol and the African Charter. The Protocol vests the right to freely dispose of natural resources in States and not in peoples. In addition, it determines that "populations" rather than "peoples" may not be deprived of their right. By distinguishing so clearly between States on the one hand, and peoples and populations on the other, the Protocol emphasises the obligation of States to exploit their natural resources for national development and the well-being of the population.

A similar trend to qualify the principle of permanent sovereignty over natural resources can be recognised in resolutions of the Security Council. For example, in Resolution 1457 (2003) on the DR Congo the Security Council reaffirms the sovereignty of the Democratic Republic of the Congo over its natural resources and emphasises that these should be exploited "transparently, legally and on a fair commercial basis, to benefit the country and its people".[41] In the same resolution, the Security Council encourages the Congolese government to reform the natural resources sector "so that the riches of the Demo-

38 Peace Agreement between the Government of Sierra Leone and the Revolutionary United Front of Sierra Leone, 7 July 1999.

39 Article 3(1) of the Protocol Against the Illegal Exploitation of Natural Resources, adopted by the members of the International Conference on the Great Lakes Region of 30 November 2006.

40 *Ibid*., Article 3(4).

41 UN Security Council Resolution 1457 (2003), in particular, paragraph 4.

cratic Republic of the Congo can benefit the Congolese people".[42] Another example is provided by Resolution 1521 (2003) on the situation in Liberia, in which the Security Council emphasises that government revenues from the Liberian timber industry must be used "for legitimate purposes for the benefit of the Liberian people, including development".[43] It also encourages the Liberian government to "establish transparent accounting and auditing mechanisms" for this purpose.[44]

These instruments reveal a trend towards the adoption of a people-oriented interpretation of the principle of permanent sovereignty over natural resources.[45] This people-oriented interpretation strengthens an interpretation of the principle of permanent sovereignty which concentrates on the obligations of governments vis-à-vis the people of the State. Thus, arguably, while the principle of permanent sovereignty has always given rise to horizontal rights and – at a later stage – obligations, a contemporary interpretation of the principle increasingly adds a vertical dimension to the right to exercise permanent sovereignty.[46]

2.3 THE NATURE AND LEGAL STATUS OF THE PRINCIPLE OF PERMANENT SOVEREIGNTY OVER NATURAL RESOURCES

The principle of permanent sovereignty over natural resources has acquired a strong status in international law. While it originated in resolutions of the UN General Assembly, the principle has received recognition in various binding legal instruments as well. First, several international environmental conventions take the sovereign right of States to exploit their natural resources as their starting point. Examples include the 1985 Vienna Convention for the Protection of the Ozone Layer, the 1992 UN Framework Convention on Climate Change (UNFCCC), and the 1994 Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, which all refer to the principle in their preambles. In addition, the 1972 UNESCO Convention for the Protection of the World Cultural and Natural Heritage and the 1992 Convention on Biological Diversity contain references to the principle.

The principle of permanent sovereignty is also reflected in human rights law as a component of the right to self-determination. The 1966 Human Rights

42 *Ibid.*, para. 7.
43 UN Security Council Resolution 1521 (2003), in particular, paragraph 11.
44 *Ibid.*, para. 13.
45 Compare E. Duruigbo, 'Permanent Sovereignty and Peoples' Ownership of Natural Resources in International Law', *George Washington International Law Review*, Vol. 33, p. 33-100 (2006), for a thorough analysis of a people-centred construction of permanent sovereignty and its implications for the management of natural resources in a state.
46 Also see chapter 3 of this study.

Covenants formulate a right for peoples to freely dispose over their natural resources,[47] while a similar provision has been inserted in the African Charter on Human and Peoples' Rights.[48] In addition, the principle has been included in the preamble and the provisions of the Protocol Against the Illegal Exploitation of Natural Resources, referred to in the preceding section.[49]

Furthermore, the principle has found recognition in the practice of the UN Security Council in relation to the maintenance of international peace and security. In its Presidential Statement of 25 June 2007 on natural resources and conflict, the Security Council "reaffirms that every state has the full and inherent sovereign right to control and exploit its own natural resources in accordance with the Charter and the principles of international law".[50] The Security Council has also occasionally referred to the principle, e.g., in Resolution 330 (1973) on "Strengthening of International Peace and Security in Latin America" and in Resolution 1457 (2003) on "The situation concerning the Democratic Republic of the Congo", referred to in the preceding section.[51]

It can be concluded that the principle of permanent sovereignty over natural resources has found widespread recognition in legal and political documents. While not all of the treaties that refer to the principle of permanent sovereignty do so in their provisions, the principle of permanent sovereignty is consistently included as a basic principle for international regulations relating to natural resources found within national jurisdiction. Therefore it can be argued that the principle of permanent sovereignty over natural resources is one of the organizing principles of international law relating to natural resources.

It can also be argued that the principle of permanent sovereignty is part of customary international law. The status of the principle of permanent sovereignty over natural resources as a principle of customary international law was also expressly recognised by the International Court of Justice in the

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47 See the identical Articles 1(2) of the International Covenant on Economic, Social and Cultural Rights (ICESCR), New York, Annex to UNGA Resolution 2200 (XXI) of 16 December 1966, *993 UNTS 3*; and of the International Covenant on Civil and Political Rights (ICCPR), New York, Annex 2 to UNGA Resolution 2200 (XXI) of 16 December 1966, *999 UNTS 171.*

48 See Article 21 of the African Charter on Human and Peoples' Rights, Banjul, 27 June 1981, *21 I.L.M. 58 (1982)*.

49 Protocol Against the Illegal Exploitation of Natural Resources, adopted by the members of the International Conference on the Great Lakes Region of 30 November 2006, Article 3.

50 Presidential Statement on 'Maintenance of international peace and security: natural resources and conflict', *UN Doc. S/PRST/2007/22* of 25 June 2007, para. 2.

51 In Resolution 330 on 'Strengthening of International Peace and Security in Latin America', adopted on 21 March 1973, the Security Council recalls several General Assembly resolutions and notes "with deep concern the existence and use of coercive measures which affect the free exercise of permanent sovereignty over the natural resources of Latin American countries". In Resolution 1457 on 'The situation concerning the Democratic Republic of the Congo', adopted on 24 January 2003, para. 2 of the preamble, the Security Council reaffirmed "the sovereignty of the Democratic Republic of the Congo over its natural resources".

DR Congo-Uganda case.[52] However, the Court did not elaborate on its findings. Instead, it simply recalled that the principle of permanent sovereignty is expressed in the Declaration on Permanent Sovereignty over Natural Resources and is elaborated in greater detail in the NIEO Declaration and the Charter of Economic Rights and Duties of States.

The references of the Court to these three UN General Assembly resolutions raise some important questions. The first concerns the legal basis for the customary international law status of the principle of permanent sovereignty over natural resources. Did the Court imply that the principle of permanent sovereignty derives its status as a principle of customary international law from these UN General Assembly resolutions? This does not seem likely, given their legal status, as well as the controversies regarding the resolutions. Rather it could be argued that the Court referred to these declarations because they comprehensively set out the principle of permanent sovereignty.

The second question concerns what is covered by the customary international law principle of permanent sovereignty. As discussed above, the NIEO Declaration, as well as the Charter of Economic Rights and Duties of States, significantly widened the scope of the principle of permanent sovereignty from "natural wealth and resources" in the 1962 Declaration to "all its wealth, natural resources and economic activities" in the Charter of Economic Rights and Duties. In line with international practice, it is argued here that as a legal principle, the principle of permanent sovereignty applies only to natural wealth and resources.

The final question concerns the rights and obligations related to the principle of permanent sovereignty. Does the customary international law status of the principle extend to all rights and obligations ensuing from the principle? In particular, does it include an obligation to exploit natural resources for national development and the well-being of the people, as formulated in the 1962 Declaration? In his Declaration on the judgment, Judge Koroma argues in favour of such an interpretation. Moreover, he argues that the obligation to exploit natural resources for national development and the well-being of the people, as well as the basic right to exploit natural resources, "remain in effect at all times, including *during armed conflict and during occupation*".[53]

52 Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment of 19 December 2005, *I.C.J. Reports* 2005, para. 244.

53 Declaration of Judge Koroma to the Judgment of the International Court of Justice of 19 December 2005 in the Case concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), *I.C.J. Reports* 2005, para. 11. Emphasis in original.

2.4 LEGAL SUBJECTS OF THE PRINCIPLE OF PERMANENT SOVEREIGNTY OVER NATURAL RESOURCES

The principle of permanent sovereignty over natural resources accrues to States as well as peoples. For States, the principle of permanent sovereignty over natural resources must be regarded as an attribute of State sovereignty. This is how the principle appears in international environmental instruments. Principle 21 of the 1972 Stockholm Declaration, Principle 2 of the 1992 Rio Declaration and Article 3 of the 1992 Convention on Biological Diversity all proclaim that "States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources…" Similarly, Article 6 of the 1972 World Heritage Convention expresses its full respect for "the sovereignty of the States on whose territory the cultural and natural heritage […] is situated".

Furthermore, the principle of permanent sovereignty has developed as part of the right to self-determination of peoples and has been inserted in the identical Articles 1(2) of the ICESCR and the ICCPR as a right for peoples to freely dispose over their natural resources. In this respect, it should be noted that peoples are referred to both as legal subjects and as beneficiaries of the principle of permanent sovereignty. This is particularly clear from the authoritative 1962 Declaration on the Principle of Permanent Sovereignty over Natural Resources, which declares that "the right of *peoples* and nations to permanent sovereignty over their natural resources must be exercised in the interest of their national development and of the well-being of the *people* of the State concerned".[54]

The dual character of peoples as subjects and beneficiaries of the principle of permanent sovereignty has two important implications. First, it implies that natural resources must be exploited for the benefit of the people of a State. Secondly, as legal subjects of the principle of permanent sovereignty, peoples can also assert rights over the State's natural resources. These issues are discussed in more detail in the following chapter, dealing with peoples' rights. This chapter will also deal with the preliminary question of defining the groups that qualify as "peoples" under international law.

2.5 THE POSITION OF GOVERNMENTS UNDER INTERNATIONAL LAW

International law designates States and peoples as subjects of the principle of permanent sovereignty, and there is an implicit assumption that States and peoples have institutions that exercise the relevant rights and obligations on their behalf. The existence of such institutions even constitutes one of the

54 See UN General Assembly Resolution 1803 (XVII) on Permanent Sovereignty over Natural Resources, 14 December 1962, especially paragraph 1. Author's emphasis added.

defining features of a State, as demonstrated by the definition of a State in the 1933 Montevideo Convention on the Rights and Duties of States. This definition, which is generally considered to be part of customary international law, determines that a State should possess the following qualifications: a permanent population; a defined territory; a government; and the capacity to enter into relations with other States.[55]

In most cases, States do have a government that represents the State and its people. In these cases, the government is also the appropriate body to exercise control over the State's natural resources. Nevertheless, there are also situations where the government of a State does not represent or no longer represents the people of the State. Examples include the illegal white minority regime that ruled Southern Rhodesia between 1964 and 1978, and the Gaddafi regime that lost its legitimacy as a result of its actions against the Libyan population during the armed conflict in 2011.

Furthermore, in most internal armed conflicts the legitimacy of the government is contested by opposition forces. In some cases, there are even parallel government authorities that enjoy a certain measure of recognition by foreign States. One of the most prominent examples of this was the Angolan opposition group UNITA that – until it lost the democratic elections in 1992 – enjoyed some support from western States, notably from the United States and South Africa. During this period, UNITA was in control of part of the territory of Angola, where it exploited diamonds and even issued concessions to companies to mine diamonds.

The question that arises is whether international law contains rules to determine whether particular entities in a State are entitled to exercise permanent sovereignty over natural resources. For the most part, international law remains silent on these matters.[56] Formally, international law deals with the recognition of States, and not of governments. It generally presumes that a government represents the State, even when the government has been installed as a result of an internal revolution.[57] Furthermore, international

55 Article 1 of the Montevideo Convention on the Rights and Duties of States, 26 December 1933, *165 LNTS 19*.

56 For a thorough analysis of issues regarding the recognition of governments in international law, see, in particular, S. Talmon, *Recognition of Governments in International Law: With Particular Reference to Governments in Exile*, Oxford: Clarendon Press (1998); and B.R. Roth, *Governmental Illegitimacy in International Law*, Oxford: Clarendon Press (1999). An older example is H. Lauterpacht, *Recognition in International Law*, Cambridge: Cambridge University Press (1947).

57 See H. Lauterpacht, *Recognition in International Law*, Cambridge: Cambridge University Press (1947; paperback edition 2012), pp. 91-93.

law presumes that the *de jure* government continues to represent the State as a whole, as long as an internal power struggle continues.[58]

The question that arises is whether these long-standing rules of customary international law have retained their relevance over time. An examination of modern State practice in relation to recent changes in government demonstrates the continuing relevance of these rules, but it also demonstrates the importance attached by the international community to the existence of a representative government in States. This can be illustrated with reference to the response of the international community to the coups d'état in Haiti and Sierra Leone on the one hand, and to the revolutions in Libya and Syria on the other.

First, the response of the international community to the coups in Haiti in 1991 and Sierra Leone in 1997 underlines the importance it attaches to upholding democratic governance.[59] In both cases the international community condemned the coup d'état and proceeded to take further action, including military intervention, to restore the democratically elected government.

In response to the coup d'état in Haiti in 1991, which brought down the democratically elected President Jean Bertrand Aristide, the UN General Assembly immediately adopted a resolution in which it strongly condemned "the attempted illegal replacement of the constitutional President", considering "as unacceptable any entity resulting from that illegal situation". It also demanded "the immediate restoration of the legitimate Government".[60] Two years later, in its Resolution 841 (1993), the UN Security Council deplored the fact that "despite the efforts of the international community, the legitimate government of Jean Bertrand Aristide has not been reinstated". It went on to emphasise the "unique and exceptional circumstances" of the situation, notably the requests by the Permanent Representative of Haiti and the Organization of American States to adopt sanctions, as well as the general humanitarian situation in Haiti, as the basis for further Security Council action.[61]

Reference can also be made to the coup d'état which took place in Sierra Leone in 1997. As a result of this coup, a military junta was established by

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58 See H. Lauterpacht, *Recognition in International Law*, Cambridge: Cambridge University Press (1947; paperback edition 2012), p. 93. For the distinction between *de jure* and *de facto* governments, see S. Talmon, *Recognition of Governments in International Law: With Particular Reference to Governments in Exile*, Oxford: Clarendon Press (1998), in particular, pp. 226-231. Talmon defines a *de facto* government as: "an authority which has gained effective control of the State by overthrowing the constitutional government in a coup d'état or a revolution but [which] has not (yet) been recognized as legally qualified to represent the State on the international plane". *De facto* governments should be distinguished from occupation governments, although the latter are also regarded as exercising *de facto* authority. However, in contrast to *de facto* governments, the legal position of occupants is regulated through international law. For more details, see Chapter 6 of this study.

59 See also K.M. Manusama, The United Nations Security Council in the Post-Cold War Era: Applying the Principle of Legality, Leiden: Nijhoff (2006), pp. 153-154.

60 UN General Assembly Resolution 46/7 of 11 October 1991, paras. 1 and 2.

61 UN Security Council Resolution 841 (1993), paragraphs of the preamble.

the opposition group AFRC (and later joined by the RUF) which lasted over a year. The Security Council immediately condemned the coup. In particular, it demanded that the military junta "take immediate steps to relinquish power in Sierra Leone and make way for the restoration of the democratically elected Government and a return to constitutional order".[62]

While the cases of Haiti and Sierra Leone serve as examples of the attitude of the international community with regard to coups d'état against democratically elected governments, the recent revolutions in the Arab region, including the revolution in Libya in 2011 and the current revolution in Syria are examples of the attitude of the international community to popular revolutions against authoritarian regimes.

The response of the international community to the situation in Libya is most telling in this respect.[63] It is relevant to note that during the armed conflict in Libya, neither the UN Security Council nor individual States made any explicit pronouncements about the illegality of the existing *de jure* government. For example, in the resolutions adopted by the UN Security Council in response to the events during the civil war in Libya in 2011, the UN Security Council refrained from making any pronouncements about the legal status of the Gaddafi regime. Even though it imposed economic and diplomatic sanctions against the regime, the Security Council continued to address the Gaddafi government in the role of the official authorities representing the Libyan State in its resolutions. The UN Security Council did not pronounce on the status of the National Transitional Council (NTC), the main opposition group in Libya.

However, individual States started to express their recognition for the NTC during the course of the armed conflict, although these States did not recognise the NTC as the official government of Libya, but rather as the representative of the Libyan people.[64] In other words, the recognition by States of the NTC as the representative of the Libyan people did not affect the legal position of the Gaddafi regime as the official *de jure* government of Libya. The official position of States changed only after the defeat of the Gaddafi regime. In Resolution 2009 (2011), the Security Council implicitly recognised the National Transitional Council, formed by the opposition forces, as the new Libyan authorities.

Similar responses can be observed in relation to the ongoing conflict in Syria. In 2011, protests broke out in Syria, demanding democratic reforms. After these protests were violently repressed by the Syrian President Assad,

62 See the Security Council's Presidential Statements of 27 May 1997 (S/PRST/1997/29), 11 July 1997 (S/PRST/1997/36) and 6 August 1997 (S/PRST/1997/42) as well as Resolution 1132 (1997), especially paragraph 1.

63 For more details on the Libyan conflict, see Chapter 7.

64 See S. Talmon, 'Recognition of the Libyan National Transitional Council', *ASIL Insights*, Vol. 15 (16), 16 June 2011.

an armed conflict broke out in the country. The opposition forces, organized in the National Coalition for Syrian Revolutionary and Opposition Forces (NCS), have gained control over parts of the country. However, the international community has so far been divided on the issue, and consequently the UN Security Council has not been able to adopt any measures. The UN General Assembly, on the other hand, has adopted several resolutions regarding Syria, calling on the Syrian authorities to put an end to the human rights violations committed by the authorities and to embrace a peace plan prepared under the auspices of the League of Arab States.[65] However, while the General Assembly stressed its support "for the aspirations of the Syrian people for a peaceful, democratic and pluralistic society"[66] in several of its resolutions, it has not pronounced on the illegality of the Assad government.

Furthermore, while individual States have expressed their support for the opposition, recognising the NCS as the sole representative of the Syrian people, none of these States – except Libya – has recognised the NCS as the new government of Syria.[67] Nevertheless, as was the case in the Libyan conflict, third States have started to provide the NCS with active support. For example, in a recent decision the European Union decided to ease its embargo on oil from Syria and to allow exports of oil from rebel-held territory in Syria in order to "support and help the opposition".[68] In addition, both the European Union and the United States have expressed their intention to permit the supply of weapons to the Syrian opposition, if scheduled peace talks between the Syrian government and the opposition fail.[69]

These case studies lead to the conclusion that the international community makes a distinction between coups d'état against democratically elected governments and internal revolutions against authoritarian regimes. Whereas coups against democratically elected governments are unanimously condemned by the international community, regime changes that have been brought about through internal revolutions against authoritarian regimes are considered legitimate. This conclusion is supported by regional instruments that deal with the recognition of governments. It is relevant to note that the two regions that have suffered most from coup d'états in recent history, i.e., Africa and Latin America, have both adopted instruments that attach legal consequences to unconstitutional changes in government.

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65 See UN General Assembly Resolution 66/176 of 19 December 2011; Resolution 66/253 of 16 February 2012; and Resolution 67/183 of 20 December 2012.

66 See, *e.g.*, UN General Assembly Resolution 67/183 of 20 December 2012, para. 4.

67 For the position of Libya, see 'Libya NTC says (it) recognises Syrian National Council', Khaleey Times of 11 October 2011.

68 Council of the European Union, Press release: Council eases sanctions against Syria to support opposition and civilians, *EU Doc. 8611/13*, 22 April 2013.

69 See, *e.g.*, the Decision of the Council of the European Union of 27 May 2013 on Syria, available through http://www.consilium.europa.eu/.

Article 7(g) of the 2002 Protocol Relating to the Establishment of the Peace and Security Council of the African Union provides that the African Peace and Security Council shall "institute sanctions whenever an unconstitutional change of Government takes place in a Member State, as provided for in the Lomé Declaration".[70] The Lomé Declaration distinguishes between four situations of unconstitutional changes of government, including a military coup d'état against a democratically elected government, as happened in Sierra Leone in 1997, and the refusal by an incumbent government to relinquish power to the winning party after elections, as happened in Côte d'Ivoire in 2011.[71] Similarly Article 9 of the Charter of the Organization of American States provides that the right to participate in the sessions of the principal organs of the organization may be suspended for a member of the Organization whose democratically constituted government has been overthrown by force.[72]

An important conclusion that can be drawn from these regional instruments is that there is an indirect premise that the legitimacy of governments is based on a popular mandate. Although both instruments clearly show that neither of the regional systems recognises a government that has taken power by force, this applies only to the extent that this force is directed towards the overthrow of a democratically elected government. The instruments therefore leave open the possibility of recognising a government that has been established as a result of a coup d'état directed against an authoritarian regime.

Some cautious conclusions can be drawn from modern State practice in relation to regime change. The first conclusion is that regime change resulting from coups d'état against democratically elected governments is generally not accepted by the international community. In contrast, the international community does recognise governments that are established after a successful internal revolution against an authoritarian regime. This demonstrates the great importance attached by the international community to the representative character of governments. Another conclusion that can be drawn from modern state practice is that, even when States express their support to opposition forces, the *status quo* of a ruling *de jure* government is maintained until the conflict is over.

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70 See Protocol Relating to the Establishment of the Peace and Security Council of the African Union, Adopted by the 1st Ordinary Session of the Assembly of the African Union, on 9 July 2002.

71 The Lomé Declaration distinguishes the following situations as unconstitutional changes in government: i) military coup d'état against a democratically elected Government; ii) intervention by mercenaries to replace a democratically elected Government; iii) replacement of democratically elected Governments by armed dissident groups and rebel movements; iv) the refusal by an incumbent government to relinquish power to the winning party after free, fair and regular elections. See the Lomé Declaration of July 2000 on the framework for an OAU response to unconstitutional changes of government (AHG/Decl.5 (XXXVI).

72 Charter of the Organization of American States, adopted on 30 April 1948 (last amended on 10 June 1993), *119 UNTS 3*.

There is still the question of the implications of modern State practice for the right of opposition groups to exploit natural resources and to issue mining concessions in situations where the legitimacy of the government is contested. The cases of Libya and Syria provide a partial answer to this question. Although official recognition of the opposition forces as the new government of the State has not occurred in either of these situations during the armed conflict, the opposition movements are considered to be entitled to exploit the State's natural resources. This is clearly shown by the decision of the European Union referred to above, which lifted the EU embargo on oil from Syria for exports of oil from rebel-held territory.

How can this decision be explained? Arguably, the most logical explanation is to interpret the support provided to the opposition groups in Libya and Syria in the light of the nineteenth- century theory of recognition of belligerency, discussed in Chapter 6 of this book. According to this theory, third States can recognise an armed group as an official belligerent, thus rendering the armed conflict international. This recognition has the effect of making armed groups that are in effective control of portions of the State territory subject to international occupation law, which grants occupants a qualified right to exploit the natural resources in occupied territory.

In conclusion, it can be stated that the right to exploit a State's natural resources pursuant to the principle of permanent sovereignty is normally vested in the government of a State. However, in those cases where the legality of the government is contested, the right to exploit the State's natural resources can accrue to opposition groups as well, provided that these groups enjoy recognition by a sufficient number of third States as the sole representative of the people. It can be inferred from the case studies and legal instruments referred to above that recognition is granted when the *de jure* government can no longer be considered to represent its people. It can further be inferred from the case studies of Libya and Syria that this occurs when a government deliberately harms its people. This is what happened in Libya and Syria, where the *de jure* governments were accused of gross human rights violations against their own population.

2.6 Concluding remarks

The principle of permanent sovereignty is a typical product of the era of decolonisation. It was established to help newly independent and developing States to regain control over their natural resources. It was intended to provide a shield for these countries to defend their interests against other countries and foreign companies, in particular against inequitable arrangements for the exploitation of their natural resources. Initially permanent sovereignty was therefore primarily a rights-based concept, applicable in inter-state relations.

Over the years, the principle of permanent sovereignty has proved to be a dynamic concept. It has become the organizing principle for the governance of natural resources within States, entailing both rights and obligations for States. States have qualified their right to exercise permanent sovereignty over natural resources, amongst other things, to protect the environment. Moreover, the rights and obligations attached to the principle have increasingly been given a vertical as well as a horizontal dimension. Recent legal and political instruments emphasise the promotion of national development as the central objective of the exercise of permanent sovereignty over natural resources. In addition, these instruments assign a central position to peoples in this regard, and stipulate that natural resources must be exploited for the benefit of the people.

The following chapters examine these issues in more detail. Chapter 3 discusses permanent sovereignty as an inherent part of the right to self-determination. In addition, it examines the closely related right to development. Subsequently, Chapter 4 discusses obligations arising from international environmental law and their impact on the principle of permanent sovereignty over natural resources.

3 A closer look at peoples as subjects and beneficiaries of the principle of permanent sovereignty over natural resources

3.1 Introductory Remarks

The principle of permanent sovereignty accrues to both States and to peoples. For States, the right to freely dispose of their natural resources is an attribute of their sovereignty, while for peoples, the right to freely dispose of their natural resources is an inherent part of their right to self-determination. In both cases, it is the government of a State which has the primary responsibility for exercising the associated rights and for fulfilling the associated obligations on behalf of the State and its people. The responsibility of the government to exercise permanent sovereignty on behalf of the State and its people takes shape in an obligation to exercise the right to permanent sovereignty over natural resources for the purpose of promoting national development and ensuring the well-being of the people. This chapter aims to determine the implications of this obligation for the governance of natural resources within a sovereign State. What is meant by saying that natural resources must be exploited for national development and the well-being of the people? This chapter also examines the implications of considering peoples as subjects of the right to self-determination. What is meant by saying that peoples have the right to freely dispose over their natural resources?

These questions are examined from the perspective of the right to self-determination and the closely related right to development. Both rights have an external and an internal dimension. This chapter argues that the internal dimension of these rights must be interpreted first and foremost as entailing a corresponding obligation for governments to provide the possibility for peoples to participate in a State's decision-making processes. In addition, it is argued that the right to development entails a right for peoples as well as for individuals to enjoy the benefits deriving from development.

In order to fully understand the rights to self-determination and to development, as well as their implications for the governance of natural resources, it is essential to determine first which groups are eligible to exercise these rights. Therefore section 2 examines the notion of "peoples". Sections 3 and 4 of this chapter discuss the evolution, contents, nature and legal status of the right to self-determination and the right to development, as well as the implications of these rights for peoples living in sovereign States. Finally, section 5 draws some final conclusions.

3.2 A MORE DETAILED DEFINITION OF "PEOPLES"

International law does not contain a formal definition of the term "peoples". This section examines some of the definitions that have been elaborated to define peoples in order to identify the groups eligible to exercise peoples' rights.

3.2.1 A definition of "peoples"

International human rights law has granted peoples several rights, including the right to exist, the right to self-determination and the right to development. Over the years, several attempts have been made to identify the groups eligible to exercise the associated rights. Some of these definitions have focused on distinguishing peoples from minorities in order to determine which groups are entitled to exercise the right to external self-determination.[1] However, attempts have also been made to draft more general definitions which would apply to all "third generation" rights.

Most definitions focus on a combination of common characteristics of group members on the one hand, and self-identification as a people on the other. For example, Yoram Dinstein argues that "peoplehood must be seen as contingent on two separate elements, one objective and the other subjective". In his opinion, "the objective element is that there has to exist an ethnic group linked by common history", while the subjective basis for peoplehood consists of "an ethos or state of mind".[2]

While Yoram Dinstein opts for a narrow interpretation of the term people by confining its scope to ethnic groups, a broader definition emerged from an international meeting of experts convened by UNESCO in 1989 under the chairmanship of Justice Michael Kirby. The final report of the group of experts describes a "people" as a group of individuals who enjoy certain common features, such as a common historical tradition, racial or ethnic identity, cultural homogeneity, linguistic unity, religious or ideological affinity, territorial connection and a common economic life. In addition, the group must have a size that exceeds a mere association of individuals within a State, it

1 On the issue of minority rights, see S. Wheatley, *Democracy, Minorities and International Law*, Cambridge: Cambridge University Press (2005); L.A. Thio, *Managing Babel: The International Legal Protection of Minorities in the Twentieth Century*, Leiden: Nijhoff (2005); Y. Dinstein & M. Tabory (ed.), *The Protection of Minorities and Human Rights*, The Hague: Martinus Nijhoff Publishers (1992); P. Thornberry, *International Law and the Rights of Minorities*, Oxford: Oxford University Press, reprint (2001); B. Vukas, 'States, Peoples and Minorities', *Receuil des Cours,* Vol. 231 (1991), pp. 263-524.

2 Y. Dinstein, 'Collective Human Rights of Peoples and Minorities', *International & Comparative Law Quarterly* Vol. 25 (1976), p. 104. It should be noted that Dinstein primarily looked at the notion from the perspective of self-determination.

must either have the will to be identified as a people or the consciousness of being a people and the group must be able to express its common characteristics and will for identity in the form of institutions or by other means.[3]

The first drawback of this definition is that it does not properly recognise that the term people refers to more than a "group of individuals". A people is an entity in itself, which – as a community – can have interests that do not coincide with the interests of each individual member of the group. There may even be a conflict between the interests of the group as a whole and the interests of some individuals in that group.

This is illustrated by a case brought before the Human Rights Committee relating to the traditional right of an indigenous people to engage in reindeer husbandry. This case has not been chosen to discuss the status of indigenous peoples as "peoples" under international law,[4] but rather to illustrate the general point that communities have an identity that is distinct from their individual members.

In the case of *Kitok* v. *Sweden*, Swedish law restricted the right to engage in reindeer husbandry to members of Sami villages in order to protect the culture of the Sami community. There were important reasons for restricting the number of reindeer herders, above all to ensure the survival of the Sami community as a whole. Swedish legislation left it to the Sami community to determine who was a member of the community and who was not. The complainant was of Sami origin, but because his community did not accept him as a member of a particular Sami village, he could not engage in reindeer herding for a living. Therefore there was a clear conflict between the right of Mr. Kitok as a member of the Sami community to engage in an economic activity and the right of the Sami community as a whole to preserve its culture by refusing individual members the right to engage in this economic activity. In this case, the Human Rights Committee considered that the Swedish government had not violated Mr. Kitok's right to enjoy his culture. Specifically, the Committee considered that the method selected by the Swedish government to protect the interests of the Sami community as a whole was reasonable and consistent with Article 27 of the ICCPR.[5]

Despite the wording of Article 27 of the ICCPR, which proclaims a right for individuals belonging to particular minorities to enjoy their culture, it can therefore be concluded from the application of Article 27 in this case that a community is more than a group of individuals. It has a separate identity.

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3 Final Report and Recommendations of the International Meeting of Experts on further study of the concept of the rights of peoples, UNESCO, Doc. SHS-89/CONF.602/7, 22 February 1990, p. 8.

4 It is relevant to note here that indigenous peoples do not constitute 'peoples' for the purpose of exercising a right to external self-determination. However, as this chapter will illustrate, indigenous peoples are eligible to assert particular peoples' rights.

5 Human Rights Committee, Ivan Kitok v. Sweden, Communication No. 197/1985, *CCPR/C/33/D/197/1985* (1988).

This is not adequately recognised in the UNESCO definition of peoples. Furthermore, as acknowledged by the UNESCO report itself, the practical relevance of the definition – or any definition for that matter – is limited. Not only are the elements that the definition identifies not sufficiently specific to distinguish peoples from other groups, but in addition the notion of peoples by its very nature is a dynamic concept which may have different meanings in different contexts.[6] As Budislav Vukas noted: "International practice does not even tend to provide and use one single definition and meaning of the expression 'people'. We witness an always more diversified use of this term simultaneously with the increased interest for the individual and different groups in international relations and in international law".[7]

In fact, depending on the particular context in which it is used, the term "people" can refer to a variety of groups or entities, even within a single document. For example, as regards the UN Charter, there are slight variations in the use of the term throughout. The reference to "We the peoples of the United Nations" in the opening words of the Charter – read together with the reference to "our respective governments" in the closing paragraph of the preamble – may be said to refer to the peoples living in UN member States.[8] Articles 1(2) and 55 of the UN Charter – which indicate that friendly relations among nations should be based on respect for the principle of equal rights and self-determination of peoples – refer to peoples in a generic sense, including peoples living in UN member States as well as other peoples.[9] Finally, Article 73 of the UN Charter uses the term "peoples" exclusively to designate the inhabitants of non-self-governing territories.

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6 In this respect, the UNESCO report indicates that "[I]t is possible that, for different purposes of international law, different groups may be a 'people'. A key to understanding the meaning of 'people' in the context of the rights of peoples may be the clarification of the function protected by particular rights. A further key may lie in distinguishing between claims to desirable objectives and rights which are capable of clear expression and acceptance as legal norms". Final Report and Recommendations of the International Meeting of Experts on further study of the concept of the rights of peoples, UNESCO, Doc. SHS-89/CONF.602/7, 22 February 1990, p. 8.

7 B. Vukas, 'States, Peoples and Minorities', *Recueil des Cours,* Vol. 231 (1991), p. 318.

8 It is relevant to note that the reference to "We the peoples" was inserted at the instigation of the United States delegation, which considered the reference as an expression of the democratic basis on which the new organization was to be founded. However, as pointed out by the Netherlands, not all governments represented in San Francisco could be regarded as deriving their mandate directly from the people. This issue was resolved by establishing a connection between "We the peoples" and "our respective governments". See O. Spijkers, *The United Nations, the Evolution of Global Values and International Law*, School of Human Rights Research Series, Vol. 47, Cambridge, Antwerp, Portland: Intersentia (2011), pp. 66-67.

9 Indeed, the *travaux préparatoires* specify that "peoples" should be understood to designate "groups of human beings who may, or may not, comprise states or nations". See Memorandum of the Secretary on a List of Certain Repetitive Words and Phrases in the Charter, Document WD381, CO/156, 18 June 1945, in *Documents of the United Nations Conference on International Organization* (UNCIO), Vol. 18, New York: United Nations (1954), p. 658.

Another example is provided by the African Charter of Human and Peoples' Rights, which recognises, *inter alia,* the rights of peoples to exist (Article 20), to self-determination (Article 20), to freely dispose of their wealth and natural resources (Article 21), to development (Article 22) and to an adequate environment (Article 24). A closer analysis of the use of the term "peoples" in this legal instrument reveals that it refers to such groups as the populations of non-self-governing territories, to the State itself, to the entire population of a state and to indigenous peoples.[10] Therefore it may be concluded that several groups are eligible to qualify as peoples for the purpose of exercising the rights associated with the term.

In conclusion, the term "peoples" refers to a dynamic concept that can be applied to different groups, depending on the context and the particular right that is invoked. The term "peoples" is used first and foremost to designate those groups that are eligible to exercise a right to external self-determination. In this sense, as explained in the following section, the term "peoples" refers exclusively to colonial peoples and to peoples under external subjugation. Nevertheless, other groups are also eligible to exercise peoples' rights. In particular it is possible to identify two categories of peoples in the context of the sovereign State. These are the population of a State as a whole, as well as specific groups within a State, in particular, indigenous peoples and peoples that constitute a minority in independent States.[11]

All these groups benefit from the general protection provided by human rights law to the population of a State as a whole and to individuals within a society. Moreover, minorities and indigenous peoples have been assigned a special status in international law in order to protect their culture. They are eligible to exercise people's rights only for this purpose. This section briefly discusses the position of indigenous peoples in international law, because these peoples have a special relationship with their lands and the natural resources situated on their lands.

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10 For a detailed analysis of the different meanings of the term 'peoples' in the African Charter on Human and Peoples Rights, see R.N. Kiwanuka, 'The Meaning of "People" in the African Charter on Human and Peoples' Rights', *American Journal of International Law,* Vol. 82, No. 1 (1988), pp. 80-101.

11 As regards minorities, a distinction can be made between four types of minorities, as recognised in the 1992 UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities. See Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, UN General Assembly Resolution 47/135, 18 December 1992. With the exception of national minorities, these groups enjoy the rights referred to in Article 27 of the ICCPR.

3.2.2 "Peoples" in the sense of indigenous peoples

Indigenous peoples are communities in society that are descended from the traditional inhabitants of a country.[12] These communities have their own culture and traditions that differ from the dominant culture in a given society. Examples include the Maori in New Zealand, the Sami in Finland and the San people in Southern Africa. More specifically, indigenous peoples can be defined as:

> "peoples in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonisation or the establishment of present state boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions".[13]

In many cases, indigenous peoples have a special relationship with the land they live on, which is an essential part of their culture. In order to protect their traditional way of life and their identity as a community, indigenous peoples have been granted a number of rights, including rights over land and natural resources.[14]

The principal binding legal instrument in which the rights of indigenous peoples were formulated is ILO Convention 169 concerning Indigenous and Tribal Peoples in Independent Countries.[15] However, this Convention has been ratified by only 20 States. The hesitancy of States to ratify the Convention is indicative of the controversies surrounding the recognition of indigenous

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12 For a more detailed analysis of the special position of indigenous peoples in international law, see A. Xanthaki, *Indigenous Rights and United Nations Standards: Self-Determination, Culture and Land*, Cambridge studies in international and comparative law, Cambridge: Cambridge University Press (2007); and N.J. Schrijver, 'Unravelling State Sovereignty? The Controversy on the Right of Indigenous Peoples to Permanent Sovereignty over their Natural Wealth and Resources', in Boerefijn, I. & Goldschmidt, J. (ed.), *Changing Perceptions of Sovereignty and Human Rights: Essays in Honour of Cees Flinterman*, Antwerp/Oxford/Portland: Intersentia (2008), pp. 85-98. See also the final report of the Special Rapporteur of the Commission on Human Rights, Mrs. Erica Daes, on Indigenous peoples' permanent sovereignty over natural resources, *UN Doc. E/CN.4/Sub.2/2004/30* of 13 July 2004 and its addendum, *UN Doc. E/CN.4/Sub.2/2004/30/Add.1* of 12 July 2004.

13 Article 1(1)(b) of the ILO Convention 169 concerning Indigenous and Tribal Peoples in Independent Countries, Geneva, 27 June 1989 (entry into force: 5 September 1991), *28 ILM 1382 (1989)*.

14 For a general account of the position of indigenous peoples in international law, see A. Xanthaki, *Indigenous Rights and United Nations Standards: Self-Determination, Culture and Land*, Cambridge studies in international and comparative law, Cambridge: Cambridge University Press (2007).

15 ILO Convention 169 concerning Indigenous and Tribal Peoples in Independent Countries, Geneva, 27 June 1989 (entry into force: 5 September 1991), *28 ILM 1382 (1989)*. This Convention has been ratified by only 22 States.

rights. Key provisions of the Convention focus on the protection of the culture of indigenous peoples (Article 5), consultation with indigenous peoples regarding matters that directly affect them (Article 6) and the right of indigenous peoples to control their own development (Article 7).

Furthermore, in order to avoid any misunderstandings regarding the legal status of indigenous peoples under the Convention, Article 1(3) of ILO Convention 169 specifies that "[t]he use of the term 'peoples' in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law". This provision should be interpreted as a safeguard to prevent indigenous peoples from claiming a right to secession.

In 2007, the General Assembly adopted a Declaration on the Rights of Indigenous Peoples.[16] This declaration does not define the term "indigenous peoples", but it does indicate in Article 2 that "indigenous peoples and individuals are free and equal to all other peoples and individuals".[17]

The Declaration carefully defines and outlines the rights of indigenous peoples. Article 3 of the Declaration grants a right to self-determination to indigenous peoples, which, according to Article 4, concerns "matters relating to their internal and local affairs".[18] Other substantive rights regulate specific matters relating to the special position of indigenous peoples, such as the rights to practice their cultural and religious traditions, as formulated in Articles 11 and 12 of the declaration.

The Declaration also contains detailed provisions regarding the protection of indigenous peoples' traditional lands. Article 26, for example, formulates a right for indigenous peoples "to own, use, develop and control the lands, territories and resources that they possess". In addition, Article 27 formulates an obligation for States to establish an impartial, open and transparent process "to recognize and adjudicate the rights of indigenous peoples pertaining to their lands, territories and resources". Finally, and of the utmost importance for the current book, Article 32 determines that States must

> "consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources".

16 United Nations Declaration on the Rights of Indigenous Peoples, Annex to *UN General Assembly Resolution 61/295*, 2 October 2007.

17 Author's emphasis added.

18 In this regard, also see Article 46(1), which determines that nothing in the declaration may be construed as "authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States". This provision thus confirms that for indigenous peoples the right to self-determination does not entail a right to secession.

This provision constitutes the basis for the obligations of governments regarding the exploitation of natural resources on indigenous lands. This obligation was also recognised by the Human Rights Committee and the Committee on Economic, Social and Cultural Rights. The Guidelines of both Committees indicate that a proper implementation of the right to self-determination implies the recognition and protection of the rights of indigenous peoples to ownership of the lands and territories that they traditionally occupy or use for their livelihood. It also requires the establishment of procedures allowing for indigenous and local communities to be duly consulted, as well as the adoption of decision-making processes which seek the prior informed consent of indigenous peoples and local communities regarding matters that affect their rights and interests under the Covenant.[19]

Of course, neither the Declaration on the Rights of Indigenous Peoples nor the Guidelines of these two authoritative human rights committees are legally binding. Nevertheless, the obligation to consult indigenous peoples has also been recognised in the case law of the Human Rights Committee itself and in the case law of other human rights bodies, notably in relation to the protection of minority rights and the right to self-determination. This case law is discussed in section 3 of this chapter in relation to the right to self-determination.

3.2.3 Concluding remarks on the definition of peoples

The notion of "peoples" is a dynamic concept which can apply to different groups.[20] However, in the context of a sovereign State, the term "peoples" refers in particular to all persons within a State as the sum of all the peoples living in the State, *i.e.*, the population as a whole, and to distinct groups within a State possessing certain common characteristics, in particular, minorities and indigenous peoples.

This book focuses on the rights of peoples in relation to the exploitation of natural resources. In this respect, two rights are of particular importance. The first is the right to self-determination, because it is inextricably linked to the principle of permanent sovereignty over natural resources. The second is the right to development, which is both a logical extension of the right to

19 Guidelines for the treaty-specific document to be submitted by States parties under Article 40 of the International Covenant on Civil and Political Rights, *UN Doc. CCPR/C/2009/1* of 22 November 2010, under Article 1; Guidelines for the treaty-specific documents to be submitted by States parties under Articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights, *UN Doc. E/C.12/2008/2* of 24 March 2009.

20 For a study of the implementation of United Nations Resolutions regarding the right of colonial peoples to self-determination, see in particular, H. Gros-Espiell, 'The Right to Self-Determination: Implementation of United Nations Resolutions – A Study', *UN Doc. E/CN.4/Sub.2/405/Rev.1 (1980)*.

self-determination and an expression of the obligation of States to exploit their natural resources for national development and the well-being of the people of the State concerned. The following sections examine both rights in turn and analyse their implications for peoples living in sovereign States.

3.3 THE RIGHT TO SELF-DETERMINATION

The right to self-determination refers to a right for peoples to "freely determine their political status and freely pursue their economic, social and cultural development".[21] The most relevant aspect for this book is the fact that the right to self-determination, as enshrined in the 1966 Human Right Covenants, includes a right for peoples to freely dispose of their natural resources. This section examines the evolution, nature and legal status of the right to self-determination, with an emphasis on its relation to the exploitation of natural resources. It also explores the implications of the right to self-determination for peoples living in independent States.

3.3.1 Evolution of the right to self-determination

Self-determination as a political postulate

The origins of the right to self-determination can be traced back to the birth of the nation state, which was based on the idea that governmental authority should be derived from the consent of the governed. The 1581 Dutch Act of Abjuration was the first document to propose that the government is responsible for its population and that populations whose rights and freedoms are not respected have the right to choose another government.[22]

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21 The identical Articles 1 of the International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights.

22 The Dutch Act of Abjuration (Plakkaat van Verlatinghe) states as follows: "Whereas God did not create the people slaves to their prince, to obey his commands, whether right or wrong, but rather the prince for the sake of the subjects (without which he could be no prince), to govern them according to equity, to love and support them as a father his children or a shepherd his flock, and even at the hazard of life to defend and preserve them. And when he does not behave thus, but, on the contrary, oppresses them, seeking opportunities to infringe their ancient customs and privileges, exacting from them slavish compliance, then he is no longer a prince, but a tyrant […]. And particularly when this is done deliberately […], they may not only disallow his authority, but legally proceed to the choice of another prince for their defence". English translation, available through <http://www.let.rug.nl/~usa/D/1501-1600/plakkaat/plakkaaten.htm>, last consulted on 7 June 2013. The idea that governmental authority should be derived from the consent of the governed was not entirely new. Already in 1215, English barons had forced King John of England, hated for his oppressive government, to sign a document in which their basic freedoms were recognised. However, this document, known as the *Magna Carta*, did not pronounce itself on the relationship between the government and the governed. It is rather a precursor to

Thus in its original form, self-determination refers to the right of a population of a State to choose its own government. This right has an internal and an external dimension. While the internal dimension of the right concerns the right of a population to choose its preferred form of government, the external dimension concerns a nation's right to determine its international status.[23]

These two dimensions of self-determination also form the basis of the 1776 American Declaration of Independence, which states that:

> "to secure certain unalienable rights, governments are instituted among men, deriving their just powers from the consent of the governed; that whenever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it, and to institute new government, laying its foundation on such principles, and organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness."[24]

In contrast, the 1789 French Declaration of the Rights of Man and of the Citizen focuses primarily on internal self-determination, when it determines that any form of governmental authority must be derived expressly from the people.[25] Of course, these differences can easily be explained from a historical perspective. While the American Declaration was a proclamation of independence from the British Empire, the French Declaration was drafted after an internal revolution.

In conclusion, it should be noted that these early expressions of the concept of self-determination give peoples a central place. Peoples have the right to choose the form of government that best represents their interests. Moreover, the declarations postulate the idea that the government must be based on the consent of the governed. These ideas were further developed in later stages during the evolution of the concept of self-determination.

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the idea that 'rule' should be according to 'law'. For the Magna Carta, see J.C. Holt, *Magna Carta*, Cambridge: Cambridge University Press (1992), pp. 441-473.

23 See D. Raič, *Statehood and the Law of Self-determination*, The Hague: Kluwer Law (2002), p. 205, who explains that external self-determination "denotes the determination of the *international* status of a territory and a people", while internal self-determination "refers to the relationship between the government of a State and the people of that State".

24 The American Declaration of Independence, text available through the Avalon Project, <http://avalon.law.yale.edu/18th_century/declare.asp>, consulted on 21 October 2008.

25 *Déclaration des droits de l'Homme et du citoyen*, 26 August 1789, Article 3: "Le principe de toute souveraineté réside essentiellement dans la Nation. Nul corps, nul individu ne peut exercer d'autorité qui n'en émane expressément", accessible through <http://www.textes.justice.gouv.fr>. In French, the word 'nation' is used in the sense of the Latin word 'natio' and designates the population of a state. The Larousse defines 'nation' as a "grande communauté humaine, souvent installée sur un même territoire, qui possède une unité historique, linguistique et constitue une entité politique". See the Dictionnaire Larousse, édition 2010.

Self-determination as a legal principle

The notion of self-determination only became firmly rooted in international law well into the twentieth century.[26] While the concept of self-determination does not appear at all in the Covenant of the League of Nations, despite a proposal by the American President Wilson to insert a provision on self-determination in the Covenant,[27] and is only hinted at in the 1941 Atlantic Charter,[28] the notion finally appeared and was recognised as a legal principle in the UN Charter.[29]

Self-determination figures prominently as one of the main principles on which the new world order is based. Article 1(2) of the UN Charter determines that one of the purposes of the United Nations is to "develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples". Furthermore, Article 55 of Chapter IX of the UN Charter on International Economic and Social Cooperation states that the creation of conditions of stability and well-being are necessary for peaceful and friendly relations among nations "based on the principle of equal rights and self-determination of peoples".

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26 See generally on the right of self-determination, A. Cassese, *Self-Determination of Peoples: A Legal Appraisal*, Cambridge: Cambridge University Press, Hersch Lauterpacht Memorial Lecture Series (1995); P. Alston, 'Peoples' Rights: The State of the Art at the Beginning of the 21st Century', in P. Alston (ed.), *Peoples' Rights*, Academy of European Law, Oxford: Oxford University Press (2001), pp. 259-293; D. Thürer & T. Burri, 'Self-Determination', in R. Bernhardt, Encyclopedia of Public International Law, Max Planck Institute for Comparative Public Law and International Law, available as an online resource (2009); J. Crawford, 'The Right of Self-Determination in International Law', in P. Alston (ed.), *Peoples' Rights*, Academy of European Law, Oxford: Oxford University Press (2001), pp. 7-67; D. Raič, *Statehood and the Law of Self-determination*, The Hague: Kluwer Law (2002).

27 Wilson's proposal stated: "The Contracting Powers unite in guaranteeing to each other political independence and territorial integrity; but it is understood between them that such territorial readjustments, if any, as may in the future become necessary by reason of changes in present racial conditions and aspirations of present social and political relationships, pursuant to the principle of self-determination, and also such territorial readjustments as may in the judgment of three-fourths of the Delegates be demanded by the welfare and manifest interest of the peoples concerned, may be effected if agreeable to those peoples […]". See A. Cassese, *Self-Determination of Peoples: A Legal Appraisal*, Cambridge: Cambridge University Press, Hersch Lauterpacht Memorial Lecture Series (1995), p. 23.

28 The Atlantic Charter expresses the principle that territorial changes must accord "with the freely expressed wishes of the peoples concerned' and proclaims a right of all peoples "to choose the form of government under which they will live". Atlantic Charter, *Yearbook of the United Nations* (1946-47), New York: United Nations (1947), p. 2.

29 Or, as Cassese puts it: "The adoption of the UN Charter marks an important turning-point: it signals the maturing of the political postulate of self-determination into a legal standard of behaviour". A. Cassese, *Self-Determination of Peoples: A Legal Appraisal*, Cambridge: Cambridge University Press, Hersch Lauterpacht Memorial Lecture Series (1995), p. 43. On the debates at San Francisco, see O. Spijkers, *The United Nations, the Evolution of Global Values and International Law*, School of Human Rights Research Series, Vol. 47, Cambridge, Antwerp, Portland: Intersentia (2011), Chapter VII.

However, the Charter does not contain any further indications regarding the implications of the principle of self-determination for inter-state relations. In particular, it does not clarify whether the principle entails a right of secession for peoples. The discussions of the Committee drafting the relevant provision at San Francisco suggest that – at least as regards the opinion of some of the Committee members – the principle of self-determination was supposed to refer only to self-government.[30] In other words, the principle of self-determination was not supposed to entail a right for peoples to establish an independent State.

However, a closer look at the UN Charter as a whole warrants a broader reading of the UN Charter principle of self-determination. This is illustrated by the text of Article 76 of the UN Charter regarding the international trusteeship system, which is aimed at the "progressive development towards self-government or independence" for trust territories. The reference to independence was inserted at the instigation of the USSR, which considered self-government alone, as proposed by the UK, to be an inadequate objective in the context of trustee territories.[31] Interestingly, the USSR stated that the reference in Article 76 to the purposes of the United Nations, including the principle of self-determination, implied that "this principle could hardly be omitted from the trusteeship chapter", thus hinting at a broader definition of self-determination.

In any case, it can be concluded that the drafters of the UN Charter clearly wanted to exclude the possibility that in the UN Charter, self-determination would be interpreted as entailing a right to secession for colonial countries. In order to prevent any confusion on this matter, the term "self-determination" is not mentioned at all in Article 73 of the UN Charter, the provision dealing with colonial countries. Article 73 refers only to "self-government", without any general reference to the purposes of the United Nations as stated in Article 1 of the UN Charter.

Despite the general confusion about the scope of the principle of self-determination in the UN Charter, it is therefore clear that colonial peoples were not considered to have a right to independence. This can be regarded as one of the last manifestations of the era of colonialism. Since then the political landscape has changed considerably as a result of the process of decolonisation. These changes have had a significant impact on the concept of self-determination as well. One of the most profound impacts is related to the recognition of self-determination as a human right, because the internal dimension of self-

30 The records note that "the principle [of self-determination] conform[s] to the purposes of the Charter only insofar as it implie[s] the right of self-government of peoples and not the right of secession". *Documents of the United Nations Conference on International Organization*, Sixth Meeting of Committee I, May 16, 1945, Vol. 6 (1945), p. 296.

31 See *Documents of the United Nations Conference on International Organization*, Fourth Meeting of Committee II/4, May 14, 1945, Vol. 10 (1945), p. 441.

determination was strengthened as a result. Moreover, the range of subjects to which the principle applies was significantly extended.

Self-determination as a human right

Not long after being established as a legal principle, self-determination was also recognised as a human right.[32] At the instigation of the USSR, the right to self-determination was included in the identically formulated Articles 1 of the International Covenants on Economic, Social and Cultural Rights and on Civil and Political Rights.[33]

This Article consists of three components. Article 1(1) of the 1966 Covenants formulates a right for all peoples to "freely determine their political status" and to "freely pursue their economic, social and cultural development". In order to pursue development, States must be in control of their economic means. This is recognised in Article 1(2) of the 1966 Covenants, which formulates a right for peoples to freely dispose of their natural resources and formulates a prohibition against depriving peoples of their means of subsistence. Finally, Article 1(3) formulates a positive obligation for States to promote the realisation of the right to self-determination and a negative obligation to respect the right.

The right to self-determination has civil and political, as well as economic and social dimensions. The inclusion of the right to self-determination in both human rights Covenants emphasises the comprehensive nature of the right to self-determination.[34] This section first takes a closer look at the political dimension of self-determination and subsequently discusses the economic dimension. It should be noted that these two dimensions are mutually interdependent. The right to political self-determination cannot be achieved if the State does not control its own natural resources, while the right to economic self-determination cannot be achieved without proper structures for the governance of natural resources.

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32 Alston calls this development the second phase in the evolution of peoples' rights in international law. See P. Alston, 'Peoples' Rights: Their Rise and Fall', in P. Alston (ed.), *Peoples' Rights*, Academy of European Law, Oxford: Oxford University Press (2001), pp. 262-264.

33 International Covenant on Economic, Social and Cultural Rights (ICESCR), New York, Annex to UNGA Resolution 2200 (XXI) of 16 December 1966, *993 UNTS 3*; International Covenant on Civil and Political Rights (ICCPR), New York, Annex 2 to UNGA Resolution 2200 (XXI) of 16 December 1966, *999 UNTS 171.* For the proposal of the USSR to include a provision on self-determination, see the 1950 Yearbook of the United Nations, pp. 526-527.

34 See J. Crawford, 'The Right of Self-Determination in International Law', in P. Alston (ed.), *Peoples' Rights*, Academy of European Law, Oxford: Oxford University Press (2001), p. 27, who argues that " [i]ts inclusion in both Covenants suggests that self-determination is both a civil and political right and an economic, social and cultural right".

The right to political self-determination

The concept of political self-determination, as it developed over time, has two basic tenets, giving rise to two separate yet interrelated rights. The right to external self-determination concerns the right of peoples to determine their international status, while the corresponding right to internal self-determination concerns the right of peoples to choose a political system.[35] While the right to external self-determination is primarily important in inter-state relations, the right to internal self-determination determines the relationship between the government and the peoples living within a State. In the light of the aim of this book, which deals primarily with questions relating to the governance of natural resources within States, the emphasis of this section is therefore on internal rather than on external self-determination. The right to external self-determination is discussed mainly to provide the necessary context for a better understanding of the right to internal self-determination.

If the right to self-determination is interpreted as a right for peoples to determine their international status and/or a right to choose a political system, two questions immediately spring to mind. The first concerns the modalities for exercising the right to self-determination, while the second concerns the legal subjects of the right. Both questions were considered in some detail in two authoritative declarations of the UN General Assembly dealing with the issue of self-determination, i.e., the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples and the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, as well as in the case law of the International Court of Justice.

As regards the modalities for exercising the right to self-determination, the 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples interprets the right to self-determination principally as a right for colonial peoples to gain independence. In particular, the Declaration refers to the need

> "to transfer all powers to the peoples of [Trust and Non-Self-Governing Territories or all other territories which have not yet attained independence], without any conditions or reservations, in accordance with their freely expressed will and desire, without any distinction as to race, creed or colour, in order to enable them to enjoy complete independence and freedom".[36]

35 See R. Higgins, *Problems and Process: International Law and How We Use It*, Oxford: Clarendon Press (1994), p. 120, who argues that the right of peoples to freely pursue their economic, social and cultural development implies their right to choose their government.

36 Declaration on the Granting of Independence to Colonial Countries and Peoples, *UN General Assembly Resolution 1514 (XV)*, 14 December 1960, paras. 2 and 5. In addition, see J-F. Dobelle, 'Article 1 Paragraphe 2', in J-P. Cot, A. Pellet, M. Forteau (éd.), *La Charte des Nations Unies: Commentaire Article par Article*, 3e édition, Paris: Economica (2005), p. 341.

In addition, the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations – which treats self-determination alternatively as a principle and as a right – determines that the principle of equal rights and self-determination entails a right for all peoples to "freely determine, without external interference, their political status and to pursue their economic, social and cultural development".[37] Furthermore, the 1970 Declaration distinguishes between four modes of exercising the right to self-determination. The Declaration determines:

> "The establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people constitute modes of implementing the right of self-determination by that people".[38]

It is important to note that both declarations base the exercise of the right to self-determination on the free expression of the will of the peoples concerned. This interpretation of the right to self-determination as requiring a free and genuine expression of the will of the peoples concerned lies at the heart of the right to self-determination. This is also how the right to self-determination is interpreted by the International Court of Justice, which, in its Advisory Opinion on the *Western Sahara*, expressly provided that self-determination must be understood as "the need to pay regard to the freely expressed will of peoples".[39] This interpretation of the right to self-determination also explains the focus of United Nations practice on organizing elections to determine the will of the people. In the context of decolonisation, the UN has provided assistance for the organization of a number of plebiscites and elections for the purpose of determining the will of the people with regard to their political future.[40]

The right to self-determination is also invoked in relation to UN-supervised elections in States that have suffered from internal armed conflicts. Reference can be made in particular to UN Security Council resolutions in relation to the elections in Cambodia in 1993. In Resolution 745 (1992), the UN Security Council explicitly stated that it desired to assure "the right to self-determination of the Cambodian people through free and fair elections".[41] Furthermore,

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37 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, *UN General Assembly Resolution 2625 (XXV)*, 24 October 1970, principle 5.

38 *Ibid*., para. 4.

39 International Court of Justice, *Western Sahara*, Advisory Opinion of 16 October 1975, *1.C.J. Reports* 1975, para. 59.

40 For examples, see A. Cassese, *Self-Determination of Peoples*: *A Legal Appraisal*, Cambridge: Cambridge University Press, Hersch Lauterpacht Memorial Lecture Series (1995), pp. 76-78.

41 UN Security Council Resolution 745 (1992), paragraph 4 of the preamble.

in a subsequent resolution, the Council recalled that "all Cambodians have […] the right to determine their own political future through the free and fair election of a constituent assembly".[42]

Therefore it can be argued that in UN practice, elections generally serve as the principal means of ascertaining that a people has been able to freely exercise its right to self-determination. However, despite the importance of elections for ascertaining the will of peoples, it is only a way of achieving their right to self-determination. The essence of the modern right to political self-determination, which can be construed as a right to representative government, forms the basis for this. Self-determination in this sense is most clearly described in the 1970 Friendly Relations Declaration, which indicates that the UN Charter principle of equal rights and self-determination requires a government "representing the whole people belonging to the territory without distinction as to race, creed or colour".[43]

This paragraph is important for several reasons. First, it can be interpreted as a confirmation that the right to self-determination accrues to peoples living within independent States, which had been a matter of considerable controversy until the adoption of this Declaration.[44] Secondly, the paragraph emphasises the importance of a representative and non-discriminatory government. This is also why the 1970 Declaration has often been quoted by advocates of the right to external self-determination for oppressed groups within a State. While the right to external self-determination is generally considered to accrue to colonial peoples and to peoples under alien subjugation,[45] some authors have argued in favour of extending the right to external self-determination to oppressed groups within States. These authors often point to the Friendly Relations Declaration and argue that the principle of equal rights and self-determination does not preclude action that would break down or harm the

42 UN Security Council Resolution 792 (1992), paragraph 6 of the preamble.

43 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, *UN General Assembly Resolution 2625 (XXV)*, 24 October 1970, principle 5.

44 See R. Rosenstock, 'The Declaration of Principles of International Law Concerning Friendly Relations: A Survey', *American Journal of International Law,* Vol. 65(5) (1971), pp. 713-735, who argues on p. 732 that "a close examination of its text will reward the reader with an affirmation of the applicability of the principle to peoples within existing states and the necessity for governments to represent the governed".

45 See International Court of Justice, Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, *I.C.J. Reports 1971*, para. 52; International Court of Justice, Western Sahara, Advisory Opinion of 16 October 1975, *1.C.J. Reports 1975*, paras. 54-59; International Court of Justice, East Timor (Portugal v. Australia), Judgment, *I.C.J. Reports 1995*, p. 90.

territorial integrity or political unity of a State which is not "possessed of a government representing the whole population".[46]

The right for oppressed people within States to secede from that State is still an issue of considerable controversy. In the Advisory Opinion regarding Kosovo, the International Court of Justice had an opportunity to pronounce on the matter. In a general sense, the Court considered:

> "Whether, outside the context of non-self-governing territories and peoples subject to alien subjugation, domination and exploitation, the international law of self-determination confers upon part of the population of an existing State a right to separate from that State is, however, a subject on which radically different views were expressed by those taking part in the proceedings and expressing a position on the question. Similar differences existed regarding whether international law provides for a right of "remedial secession" and, if so, in what circumstances".[47]

Instead of taking a stand on the matter, the Court adhered to a strict reading of the question formulated by the General Assembly in its request for an Advisory Opinion. This question concerned the legality of the Declaration of Independence issued by the Provisional Institutions of Self-Government of

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46 It should be noted that the relevant paragraph of the 1970 Declaration reads in full: "Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour". For proponents of an *a contrario* reading of this paragraph, see, *i.e.,* A. Cassese, *Self-Determination of Peoples*: *A Legal Appraisal*, Cambridge: Cambridge University Press, Hersch Lauterpacht Memorial Lecture Series (1995), pp. 109-115; and J-F. Dobelle, 'Article 1 Paragraphe 2', in J-P. Cot, A. Pellet, M. Forteau (éd.), *La Charte des Nations Unies : Commentaire Article par Article*, 3e édition, Paris: Economica (2005), p. 351, who argues that "le droit à l'autodétermination externe est en principe exclu, à condition que le droit à l'autodétermination interne soit garanti. En revanche, la méconnaissance grave et persistante de ce dernier pourrait légitimement déboucher sur le droit à l'indépendance". For a more cautious perspective, see H. Gross Espiell, *The Right to Self-Determination: Implementation of United Nations Resolutions*, UN Publication, Sales No. E/79.XIV.5, 1979, para. 60, who underlines that if "beneath the guise of ostensible national unity, colonial and alien domination in fact exist, whatever legal formula may be used in an attempt to conceal it, the right of the subject people concerned cannot be disregarded without international law being violated". He further posits that the Declaration on Friendly Relations "uses particularly apt language in spelling out this idea: it reaffirms the need to reserve the territorial integrity of sovereign and independent States, but ties this concept to the requirement that the States must be "possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour".

47 International Court of Justice, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion of 22 July 2010, *I.C.J. Reports (2010)*, para. 82.

Kosovo.[48] The Court concluded that international law does not in general prohibit the act of promulgating a declaration of independence.[49]

Although it concerns a national case, a previous judgment of the Supreme Court of Canada in the case of Quebec also illustrates this point. The Supreme Court was faced with the question whether the population of Quebec, a linguistic minority living in Canada, had the right to secede from Canada. In this instance the Supreme Court ruled as follows:

> "Although much of the Quebec population certainly shares many of the characteristics of a people, it is not necessary to decide the 'people' issue [in relation to the right of self-determination] because, whatever may be the correct determination of this issue in the context of Quebec, a right to secession only arises under the principle of self-determination of people at international law where 'a people' is governed as part of a colonial empire; where 'a people' is subject to alien subjugation, domination or exploitation; and possibly where 'a people' is denied any meaningful exercise of its right to self-determination within the state of which it forms a part. In other circumstances, peoples are expected to achieve self-determination within the framework of their existing state. A state whose government represents the whole of the people or peoples resident within its territory, on a basis of equality and without discrimination, and respects the principles of self-determination in its internal arrangements, is entitled to maintain its territorial integrity under international law and to have that territorial integrity recognized by other states".[50]

The Quebec case implies that the right to internal self-determination must first of all be achieved within the framework of the existing State. Whether a right to secession exists for peoples that are not represented through their government remains a matter of considerable controversy, as confirmed by the Kosovo Advisory Opinion. However, it can be argued that under current international law, questions about the representativeness of a government must primarily be resolved within the existing framework of the State. The following sections explain in greater detail how the right to self-determination can be achieved in an existing State.

The right to economic self-determination

The right to freely pursue economic, social and cultural development as enshrined in Article 1(1) of the Covenants not only requires that peoples can

48 See International Court of Justice, Request for Advisory Opinion transmitted to the Court pursuant to General Assembly resolution A/RES/63/3 (A/63/L.2) of 8 October 2008, 'Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo'.

49 International Court of Justice, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion of 22 July 2010, *I.C.J. Reports (2010)*, para. 79.

50 Supreme Court of Canada, Reference re Secession of Quebec, [1998] 2 S.C.R. 217, Judgment of 20 August 1998.

choose the form of government to achieve this objective, but also that they have access to the economic means necessary to pursue development. Therefore, as a corollary of the political component of the right to self-determination, Article 1(2) of the Covenants contains a right for peoples to freely dispose of their natural wealth and resources.

This provision was inserted in 1955 on the initiative of Chile. It proclaims a right for all peoples to "freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law" (…) "for their own ends".[51] Therefore the provision emphasises the freedom of peoples to control their natural resources while at the same time it points to the need to respect their obligations under international law. In this way, the drafters of the Covenants have sought to create a careful balance between the interests of States endowed with natural resources on the one hand, and the interests of foreign investors on the other.

Towards the end of the drafting process of the Covenants, when the composition of the UN had changed considerably as a result of the process of decolonisation, a safeguard provision was inserted in both covenants. Article 25 of the ICESCR and Article 47 of the ICCPR, dealing with the implementation of the covenants, determine that nothing in the Covenants "shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources". Some authors argue that Article 25 of the ICESCR and Article 47 of the ICCPR "were aimed at 'rectifying' Article 1(2) in order to meet new demands in the wake of the evolution of international politics and law that had taken place in the meantime".[52]

However, a more convincing interpretation of Article 25 of the ICESCR and Article 47 of the ICCPR is that the provisions were meant to prevent the erosion of the right of peoples to freely dispose of their natural resources using the argument of "obligations arising out of international economic co-operation". This is reflected in the wording of the provisions, which refer only to the Covenants themselves, and not to international law in general. Obligations

51 For the original proposal made by Chile in 1952, see *supra* note 110.

52 A. Cassese, *Self-Determination of Peoples: A Legal Appraisal*, Cambridge: Cambridge University Press, Hersch Lauterpacht Memorial Lecture Series (1995), p. 57. Similarly, D.J. Halperin, 'Human Rights and Natural Resources', *William and Mary Law Review*, Vol. 9 (1967-1968), pp. 770-787, who demonstrates that Article 25 of the ICESCR and Article 47 of the ICCPR have a strong anti-colonialist connotation and J. Summers, *The Idea of the People: The Right of Self-Determination, Nationalism and the Legitimacy of International Law*, Doctoral Dissertation, University of Helsinki (2004), p. 146 who argues that Articles 25 and 47 formulate an absolute right and "can be seen […] as an attempt to change the interpretation of the balance in article 1(2) without actually being an amendment to the paragraph".

arising from other legal instruments or from general international law cannot be set aside by Article 25 of the ICESCR or Article 47 of the ICCPR.[53]

In addition to formulating a right for peoples to freely dispose over their natural resources, Article 1(2) of the ICESCR and the ICCPR also contains a prohibition stipulating that "[i]n no case may a people be deprived of its own means of subsistence". Although it was originally inserted with the aim of protecting newly independent States and developing countries from developed States and foreign investors, the prohibition is also a human right which can be invoked by peoples against their government. In this sense, the prohibition establishes the ultimate limits for governments with respect to the use of the State's natural resources. It provides that the exercise of permanent sovereignty by the government may never result in peoples being deprived of their means of subsistence.

The provision can also be read as a prohibition for governments to deny peoples the right of access to their means of subsistence. This right of access covers both physical and economic access.[54] For example, this means that local communities and indigenous peoples cannot be denied physical access to hunting grounds, rivers or forests, if this is necessary for their subsistence. In addition, the government is also precluded from denying peoples economic access to their means of subsistence. This means, for example, that governments cannot deny local communities access to mines if these communities are highly dependent on mining to earn a basic living. These issues, as well as their implications in situations of armed conflict, are examined in greater detail in Part II of this book.

The economic dimension of the right to self-determination was notably expressed in resolutions of the General Assembly relating to the principle of permanent sovereignty over natural resources, including the landmark 1962 Declaration on Permanent Sovereignty over Natural Resources and the 1974

53 This applies particularly for obligations arising out of the UN Charter. Article 103 of the UN charter determines that obligations under the UN Charter prevail over obligations under other international agreements. In this respect, Article 1(1) of the UN Charter determines that the purposes of the UN include the maintenance of international peace and security and that international disputes or situations which might lead to a breach of the peace must be adjusted or settled "in conformity with the principles of justice and *international law*". Author's emphasis added. It may be noted that in addition to the general rule contained in Article 103 of the UN Charter, both the ICESCR and the ICCPR contain explicit conflict clauses regulating the relation between the Covenants and the UN Charter. See Article 24 of the ICESCR and Article 46 of the ICCPR.

54 For the distinction between physical and economic access in relation to the right to an adequate standard of living, and in particular to adequate food, protected under Article 11 of the ICESCR, see Committee on Economic, Social and Cultural Rights, General Comment No. 12, *UN Doc. E/C.12/1999/5* of 12 May 1999, para. 13.

Charter on Economic Rights and Duties of States.[55] An early reference can also be found in the 1960 Decolonisation Declaration, albeit in its preamble.[56] It is striking that the 1970 Declaration on Friendly Relations contains no reference whatsoever to economic self-determination. A proposal to insert a reference to natural resources was discussed in relation to the principle of sovereign equality, rather than in relation to the principle of equal rights and self-determination. It therefore seems that the Friendly Relations Declaration considered the economic component of self-determination to be an attribute of state sovereignty rather than a right of peoples.[57] The aim of the Friendly Relations Declaration, to clarify and further develop the principles of inter-state relations, as enshrined in the UN Charter, explains this perspective.

As regards treaty law, the right to economic self-determination was also expressed in Article 21 of the African Charter of Human and Peoples' Rights, which formulates a right comparable to Article 1(2) of the international covenants on economic, social and cultural rights and on civil and political rights. However, instead of formulating an obligation to "respect obligations arising out of international economic co-operation", the provision formulates the much looser obligation to "promote international economic cooperation".

Furthermore, this economic cooperation does not have to be based on "mutual benefit and international law" as stipulated in the covenants, but must be based on "mutual respect, equitable exchange and the principles of international law".[58] It further provides that the right of peoples to freely dispose of their natural resources must be exercised "by States parties" and "in the exclusive interest of the people". In addition, it provides for a right of lawful recovery and adequate compensation for peoples in case of the spoliation of their natural resources.

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55 UN General Assembly Resolution 1803 (XVII) of 14 December 1962 on Permanent Sovereignty over Natural Resources; UN General Assembly Resolution 3281 (XXIX) of 12 December 1974 on a Charter of Economic Rights and Duties of States. These resolutions will be discussed in more detail in the following section. For the relation between the right to self-determination and permanent sovereignty, see, *inter alia,* Gros Espiell who argues that "the economic content of the right of peoples to self-determination finds its expression in particular […] in their right to permanent sovereignty over natural resources". See Commission on Human Rights, 'The Right to Self-Determination: Implementation of United Nations Resolutions', study prepared by H. Gros Espiell (Uruguay), special rapporteur of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities (1980), *UN Doc. E/CN.4/Sub.2/405/Rev.1, para 136*.

56 Declaration on the Granting of Independence to Colonial Countries and Peoples, *UN General Assembly Resolution 1514 (XV)*, 14 December 1960, preamble, para. 8.

57 For the drafting history of the Declaration on Friendly Relations, see M. Šahović, 'Codification des Principes du Droit International des Relations Amicales et de la Coopération entre les Etats', *Recueil des Cours,* Vol. 137 (1972), pp. 243-310.

58 African Charter on Human and Peoples' Rights, Banjul, 27 June 1981, *21 I.L.M. 58 (1982).* Author's emphasis added.

3.3.2 The nature and legal status of the right to self-determination

The concept of self-determination has attained a firm status in international law, both as a principle and as a human right. Since its inclusion in the UN Charter, self-determination has been incorporated in several binding legal instruments, including the 1966 Human Rights Covenants. In addition, several authoritative resolutions of the UN General Assembly refer to self-determination as well, including the authoritative 1960 Declaration on the Granting of Independence to Colonial Countries and Peoples and the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations.[59] Moreover, in the *East Timor* Case, the International Court of Justice confirmed that self-determination "is one of the essential principles of contemporary international law" and that it "has an *erga omnes* character".[60]

This case also implies that the principle of self-determination applies to the international community of States.[61] States have the obligation both to actively promote the right to self-determination – an obligation which is based on the UN Charter provisions regarding trust territories and, in subsequent State practice, non-self-governing territories – and the obligation not to interfere when a people rightfully exercises its right to self-determination, based, *inter alia*, on the Declaration on Friendly Relations.

When it comes to determining the nature of the concept of self-determination, a distinction must be made between its external and internal dimension. As regards the external dimension, self-determination can first of all be inter-

59 Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, *UN General Assembly Resolution 2625 (XXV)*, 24 October 1970. Although the primary aim of the declaration was to elaborate upon the principles laid down in the UN Charter, the International Court of Justice treats the resolution as declaratory of customary international law. In the *Nicaragua* case, the Court determined that the effect of consent to the resolution may be considered as "an acceptance of the validity of the rule or set of rules declared by the resolution by themselves". Case Concerning Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v United States of America), Merits, Judgment of 27 June 1986, *I.C.J. Reports 1986*, p. 14, para. 188.

60 International Court of Justice, East Timor (Portugal v. Australia), Judgment of 30 June 1995, *I.C.J. Reports 1995*, p. 90, para 29. In the *Barcelona Traction* case, the International Court of Justice determined that obligations *erga omnes* are "by their very nature […] the concern of al1 States". International Court of Justice, Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain), Judgment of 5 February 1970, Second phase, *I.C.J. Reports 1970*, p. 3, para 33.

61 As the International Court of Justice held that self-determination has an *erga omnes* character, it can be applied to the international community as a whole. East Timor (Portugal v. Australia), Judgment, *I.C.J. Reports 1995*, p. 90), para 29. For a critical appraisal of this part of the judgment, see D. Thürer & T. Burri, 'Self-Determination', in R. Bernhardt (ed.), *Encyclopedia of Public International Law*, Max Planck Institute for Comparative Public Law and International Law (2012), Vol. IX, pp. 113-128, paras. 24-25. Thürer and Burri argue that the legal consequences of the *erga omnes* qualification are unclear.

preted as giving rise to a right for colonial peoples and for peoples under alien subjugation to establish an independent State, to associate with or integrate with another State, or to develop any other political status. In addition, the concept entails a right to exercise control over the natural resources found within the State territory.

Recently, the existence of the right to external self-determination for colonial peoples and peoples under alien subjugation was confirmed in the Advisory Opinion of the International Court of Justice regarding Kosovo. In the relevant part the Court stated: "During the second half of the twentieth century, the international law of self-determination developed in such a way as to create a right to independence for the peoples of non-self-governing territories and peoples subject to alien subjugation, domination and exploitation".[62] Whether such a right exists for oppressed groups within a State as well, is a matter of considerable controversy. In international law questions about the representativeness of a government must currently be primarily solved within the existing framework of the State.

Once a people has organized itself within an autonomous State, whether through secession, integration or association, it may be argued that the right to external self-determination, including economic self-determination, is mainly assimilated in the principle of State sovereignty and the related principles of territorial integrity and non-intervention, which must be respected by other States. What remains is a right for peoples within the State to internal self-determination.

In this context, the right to self-determination primarily concerns the right of the people of a State to freely choose the State's political and economic system, as well as the right for minorities to govern their local affairs.[63] As Rosalyn Higgins noted: "Self-determination requires the ongoing choice of the people as to their governance, and, in turn, their economic, social and cultural development".[64] In addition, the right to self-determination implies an obligation for the government to exploit the State's natural resources for the benefit of the people. As Antonio Cassese argued,

> "Article 1(2) […] provides that the right to control and benefit from a territory's natural resources lies with the inhabitants of that territory. This right, and the corresponding duty of the central government to use the resources in a manner

62 International Court of Justice, Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion of 22 July 2010, *I.C.J. Reports (2010)*, para. 79.

63 Or, as Cassese argues: " [i]nternal self-determination means the right to authentic self-government, that is, the right for a people really and freely to choose its own political and economic regime", A. Cassese, *Self-Determination of Peoples*: *A Legal Appraisal*, Cambridge: Cambridge University Press, Hersch Lauterpacht Memorial Lecture Series (1995), p. 101.

64 R. Higgins, *Problems and Process: International Law and How We Use It*, Oxford: Clarendon Press (1994), p. 120.

> which coincides with the interests of the people, is the natural consequence of the right to political self-determination".[65]

One of the main ways of achieving the right to internal self-determination is to establish proper procedures for decision-making, which allow for the participation of all the parties concerned. According to the Human Rights Committee, the relevant obligations in the identical Articles 1 of the Covenants include first of all the establishment of constitutional and political processes "which in practice allow the exercise of th[e] right [to self-determination]".[66] The Human Rights Committee's emphasis on "practice" plays a central role in this. It requires States to put in place policies which effectively guarantee the exercise of the right to self-determination. These policies can be examined by the Human Rights Committee as part of its mandate to examine reports submitted by States under the general reporting obligations of the ICCPR.

In addition, these policies can also arguably be judicially scrutinised before international human rights bodies.[67] More specifically, as indicated above, the Guidelines of the Human Rights Committee as well as those of the Committee on Economic, Social and Cultural Rights indicate that a proper implementation of the right to self-determination requires the establishment of procedures which allow for indigenous and local communities to be duly consulted, as well as the adoption of decision-making processes aimed at obtaining the prior informed consent of indigenous peoples and local commun-

65 A. Cassese, *Self-Determination of Peoples: A Legal Appraisal*, Cambridge: Cambridge University Press, Hersch Lauterpacht Memorial Lecture Series (1995), p. 55.

66 See General Comment No. 12: The right to self-determination of peoples (Art. 1), adopted by the Human Rights Committee at its twenty-first session, 13 March 1984, Office of the High Commissioner for Human Rights, para. 3 and Guidelines for the treaty-specific document to be submitted by States parties under article 40 of the International Covenant on Civil and Political Rights, *UN Doc. CCPR/C/2009/1* of 22 November 2010, under Article 1.

67 It should be noted in this regard that the complaint mechanisms of the ICCPR and the ICESCR are only open to individuals, while the right to self-determination is a collective right. Therefore, the Human Rights Committee has consistently stated, both in its General Comments and in relevant cases, that it does not recognise claims by individuals of violations of Article 1 of the ICCPR. It does however accept claims under other provisions of the Charter that are relevant for the realisation of the right of self-determination, in particular Articles 25, 26 and 27 of the ICCPR. See *e.g.* General Comment No. 23: The rights of minorities (Art. 27), *UN Doc. CCPR/C/21/Rev.1/Add.5*, 8 April 1994, para. 3.1, where the Committee explicitly states that "[s]elf-determination is not a right cognizable under the Optional Protocol. Article 27, on the other hand, relates to rights conferred on individuals as such […] and is cognizable under the Optional Protocol".

ities regarding matters which affect their rights and interests under the Covenant.[68]

However, the case law of these bodies relating to natural resources policies does not extend beyond the protection of minority rights. In general, human rights bodies do not accept claims regarding the protection of the public interest. For example, under the Optional Protocol of the ICCPR, individuals have to claim to be the "victim" of violations of the ICCPR.[69] The Optional Protocol of the ICESCR that recently entered into force formulates a similar requirement.[70] This requirement forms an obstacle to challenging government decisions regarding the exploitation of natural resources, because it prevents persons who are not directly affected by a particular project from bringing a claim before a human rights body.

3.3.3 Implementation of the right to economic self-determination in the sovereign State

The right to self-determination requires the establishment of constitutional and political processes "which in practice allow the exercise of th[e] right".[71] The question arises if and to what extent international law has recognised this obligation specifically in relation to government decisions on the exploitation of natural resources and, if so, whether international law offers possibilities for redress regarding such decisions that affect the population or distinct groups in society.

In order to answer these questions, it is necessary to first look at the growing body of concluding observations and case law of human rights bodies regarding violations of the rights of indigenous peoples resulting from natural resources projects conducted within their lands and initiated by governments. The Human Rights Committee has been very active in recent years in protect-

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68 Guidelines for the treaty-specific document to be submitted by States parties under Article 40 of the International Covenant on Civil and Political Rights, *UN Doc. CCPR/C/2009/1* of 22 November 2010, under Article 1; Guidelines for the treaty-specific documents to be submitted by States parties under Articles 16 and 17 of the International Covenant on Economic, Social and Cultural Rights, *UN Doc. E/C.12/2008/2* of 24 March 2009.

69 Article 2 of the First Optional Protocol to the ICCPR, *999 U.N.T.S. 302*, states in the relevant part: "individuals who claim that any of *their* rights enumerated in the Covenant have been violated […] may submit a written communication to the Committee for consideration". Author's emphasis added.

70 Article 2 of the Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, Annex to UN General Assembly Resolution A/RES/63/117, of 10 December 2008.

71 See General Comment No. 12: The right to self-determination of peoples (Art. 1), adopted by the Human Rights Committee at its twenty-first session, 13 March 1984, Office of the High Commissioner for Human Rights, para. 3 and Guidelines for the treaty-specific document to be submitted by States parties under article 40 of the International Covenant on Civil and Political Rights, *UN Doc. CCPR/C/2009/1* of 22 November 2010, under Article 1.

ing the rights of indigenous peoples over their lands and resources with the specific aim of preserving their culture and traditional lifestyle. Although the Human Rights Committee can only assess claims regarding the violation of individual human rights under the Optional Protocol, the Committee has opened the door for indigenous peoples and (other) minorities to invoke the individual rights protected under the ICCPR as communities.

It did so with a broad interpretation of Article 27 of the ICCPR regarding the protection of the right of persons belonging to minorities to enjoy their own culture, to profess and practise their own religion, or to use their own language, in community with the other members of their group. In this respect, the Human Rights Committee linked the individual right embodied in Article 27 to the collective right embodied in Article 1 of the ICCPR.[72] The Human Rights Committee has consistently interpreted Article 27 as containing a right for indigenous peoples to participate in decisions that affect them, such as those regarding the use of their land, including the exploitation of the natural resources found there.[73]

In addition, the rights of indigenous peoples over their lands were recognised to some extent by the Committee on Economic, Social and Cultural Rights, which, in its General Comment 7 on the right to adequate housing and forced evictions, explicitly refers to the vulnerable position of indigenous peoples.[74] In its General Comment No. 20 on non-discrimination in economic, social and cultural rights, the Committee also raises its concerns about "formal and substantive discrimination across a wide range of Covenant rights against indigenous peoples and ethnic minorities".[75]

Furthermore, the African Commission on Human and Peoples' Rights decided in its landmark Ogoniland case that the right of a people to freely dispose of its natural resources, as protected under Article 21 of the African Charter on Human and Peoples' Rights, entails an obligation for the government to monitor and regulate the activities of private operators licensed to

72 See also N.J. Schrijver, 'Unravelling State Sovereignty? The Controversy on the Right of Indigenous Peoples to Permanent Sovereignty over their Natural Wealth and Resources', in I. Boerefijn & J. Goldschmidt (eds.), *Changing Perceptions of Sovereignty and Human Rights: Essays in Honour of Cees Flinterman*, Antwerp/Oxford/Portland: Intersentia (2008), pp. 91-92.

73 See, in particular, the landmark case of Apirana Mahuika et al. v. New Zealand, Communication No. 547/1993, 15 November 2000. Also see the concluding observations of the Human Rights Committee with regard to Surinam (UN Doc. CCPR/CO/80/SUR, 4 May 2004, para. 21); Sweden (UN Doc. CCPR/CO/74/SWE, 24 April 2002, para 15); and Guyana (UN Doc. CCPR/C/79/Add.121, 25 April 2000, para. 21). Also see S.J. Anaya, 'The Human Rights of Indigenous Peoples', in F.G. Isa & K. de Feyter (ed.), 'International Protection of Human Rights: Achievements and Challenges', Bilbao: University of Duesto, HumanitarianNet (2006), pp. 604-605.

74 Committee on Economic, Social and Cultural Rights, General Comment 7 on the right to adequate housing (art. 11.1 of the Covenant): forced evictions, 20 May 1997, para. 10.

75 Committee on Economic, Social and Cultural Rights, General Comment 20 on non-discrimination in economic, social and cultural rights (Art. 2, para. 2, of the International Covenant on Economic, Social and Cultural Rights), *UN Doc. E/C.12/GC/20* of 2 July 2009, para. 18.

exploit the State's natural resources.[76] The complainants also referred to Article 21 of the African Charter and stated that "in all their dealings with the Oil Consortiums, the government did not involve the Ogoni Communities in the decisions that affected the development of Ogoniland". Although the African Commission did not specifically address this issue, it came to the general conclusion that the practice of the Nigerian government did not meet the minimum standard of conduct to be expected of a government, and that it therefore constituted a violation of Article 21 of the African Charter.[77]

Finally, the Inter-American Court of Human Rights has developed an extensive case law regarding the rights of indigenous and tribal peoples over their communal lands. It has done so primarily based on the right to property, protected under Article 21 of the Inter-American Convention on Human Rights. In this respect the case of the Saramaka people *v.* Surinam is particularly relevant.[78] In that case, the Court determined first of all that Article 1 of the ICESCR and the ICCPR, to which Surinam was a party, grants a right to indigenous and tribal peoples to freely dispose of their natural wealth and resources so as not to be deprived of their means of subsistence.[79] In the light of these provisions the Court interpreted Article 21 of the Inter-American Convention relating to the protection of property to "call for the right of members of indigenous and tribal communities to freely determine and enjoy their own social, cultural and economic development […] grant[ing] to the members of the Saramaka community the right to enjoy property in accordance with their communal tradition".[80]

Moreover, the Court determined that if the State wanted to impose restrictions on the property rights of the members of the Saramaka people by issuing concessions within their territory, the State must abide by the following three conditions: 1) the State must ensure the effective participation of the members of the Saramaka people in the project, including a duty to actively consult the community and to obtain their free, prior and informed consent; 2) the State must guarantee that the Saramakas will receive a reasonable benefit from any such project within their territory; 3) the State must perform an environmental and social impact assessment prior to issuing concessions.[81]

In a recent case regarding the Sarayaku people *v.* Ecuador, the Inter-American Court elaborated on the duty to consult indigenous peoples. The most significant aspect of this is that the Court decided that the duty to consult

76 Decision of the African Commission on Human and Peoples' Rights regarding Communication 155/96, Social and Economic Rights Action Center, Center for Economic and Social Rights v. Nigeria, 30st session, Banjul, October 2001, paras. 55-58.

77 *Ibid*.

78 Inter-American Court of Human Rights, Case of the Saramaka People *v.* Surinam, Judgment of 28 November 2007.

79 *Ibid*., para 93.

80 *Ibid*., para. 95.

81 *Ibid*., para. 129, paras. 133-134.

constitutes a general principle of international law.[82] The Court also considered that the consultation process should entail a "genuine dialogue as part of a participatory process in order to reach an agreement" and that the process must be construed as "a true instrument of participation," carried out in "good faith," with "mutual trust" and with the goal of reaching a consensus.[83]

All of the case law of these international human rights bodies to some extent recognises the obligation for a State to engage people in decisions regarding the use of natural resources situated on their lands. This is a strong argument for interpreting the right of peoples to freely dispose of their natural resources as a right to participate in government decision-making relating to the use of natural resources.

Such a right – or obligation – to public participation has been recognised in several instruments in relation to environmental matters. Principle 10 of the 1992 Rio Declaration, for example, proclaims that "[e]nvironmental issues are best handled with participation of all concerned citizens, at the relevant level'.[84] It also determines that individuals must have "appropriate access to information concerning the environment that is held by public authorities […]and the opportunity to participate in decision-making processes".[85] This entails an obligation for the government to make information available and to provide access to justice for their citizens. Recently, the Rio+20 Declaration emphasised that "broad public participation and access to information and judicial and administrative proceedings are essential to the promotion of sustainable development".[86]

In terms of binding legal instruments, reference can be made to the Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, concluded in Aarhus in 1998.[87] The Convention entered into force in 2009 and at present 46 parties, mainly European States, are parties to this convention. The Aarhus Convention is the most comprehensive multilateral treaty dealing with the right to public participation. Its objective is "the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being".[88] Therefore parties to the Convention must "guarantee the

82 Inter-American Court of Human Rights, The Kichwa people of Sarayaku v. Ecuador, Judgment of 26 July 2012, para. 164.

83 *Ibid*., paras. 167, 186 and 200. See also L. Brunner & K. Quintana, 'The Duty to Consult in the Inter-American System: Legal Standards after *Sarayaku*', *ASIL Insight* Vol. 16, Issue 35 (2012).

84 Rio Declaration on Environment and Development, Rio de Janeiro, 13 June 1992, *31 ILM 874 (1992)*.

85 *Ibid*.

86 Rio+20 Declaration: 'The Future We Want', UN General Assembly Resolution 66/288, 11 September 2012, para. 43.

87 Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters, 28 June 1998, *2161 UNTS 447*.

88 *Ibid*., Article 1.

rights of access to information, public participation in decision-making, and access to justice in environmental matters".[89] Relevant obligations for the government include an obligation to provide information to the general public under Article 4 of the Convention, an obligation to provide for the participation of the public concerned in decisions on specific activities, including an obligation to provide information and to be consulted under Article 6 of the Convention, and an obligation to provide access to justice to persons who have not received adequate information under Article 9 of the Convention.

Although the Convention is very ambitious and covers various kinds of industrial activities, including activities relating to the exploitation of natural resources, its geographical scope is limited. The Convention is open to all States, but has mainly been ratified by European States. The objective of the Convention is another limitation. It is not concerned with decisions on the exploitation of natural resources in general, but applies only to natural resource projects that may have an impact on the environment.

Furthermore, reference can be made to two international environmental treaties in terms of binding legal instruments, that include provisions on public participation. Article 14(1)(a) of the 1992 Convention on Biological Diversity provides that States must allow for public participation in the environmental impact assessment procedure. In addition, Article 3(a) of the Anti-Desertification Convention provides that parties "should ensure that decisions on the design and implementation of programmes to combat desertification and/or mitigate the effects of drought are taken with the participation of populations and local communities".

Finally, the right to self-determination, interpreted as a right for peoples to participate in decision making, can also be implemented by means of individual rights protected under the Covenants. After all, the collective right to internal self-determination could be said to entail a right for all human beings living in a State to participate in the organization of that State's political and economic system.[90] One of the key provisions in this respect is Article 25 of the ICCPR, which states:

> "Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in article 2 and without unreasonable restrictions:
> (a) To take part in the conduct of public affairs, directly or through freely chosen representatives;
> (b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;

89 *Ibid*.

90 See, *e.g.*, *The Study of the Historical and Current Development of the Right to Self-Determination*, prepared by A. Cristescu (Romania), Special Rapporteur of the UN Sub-Commission on Prevention of Discrimination and Protection of Minorities, UN publication, Sales No. E.80.XIV.3 (1980).

(c) To have access, on general terms of equality, to public service in his country."

Article 25 of the ICCPR formulates a right for all citizens, i.e., for all the nationals of a State, to participate in the State's decision-making process, a right which can be enforced against the will of the State itself. In its General Comment No. 25 on the right to participate in public affairs, voting rights and the right of equal access to public service, the Human Rights Committee explicitly stated that

> "the rights under article 25 are related to […] the right of peoples to self-determination. By virtue of the rights covered by article 1(1), peoples have the right to freely determine their political status and to enjoy the right to choose the form of their constitution or government. Article 25 deals with the right of individuals to participate in those processes which constitute the conduct of public affairs. Those rights, as individual rights, can give rise to claims under the first Optional Protocol'.[91]

Furthermore, the effectiveness of the right is guaranteed by the requirement of genuine and periodic elections and by the implementation of other human rights, such as the right to freedom of expression formulated in Article 19 of the ICCPR and the right to freedom of association included in Article 22 of the ICCPR and Article 8 of the ICESCR.[92]

In addition, reference can be made to public participation in relation to the right of individuals to an adequate standard of living, as enshrined in Article 11 of the ICESCR. This provision contains an obligation for States to take measures, including specific programmes, which are needed:

> "To improve methods of production, conservation and distribution of food by making full use of technical and scientific knowledge, by disseminating knowledge of the principles of nutrition and by developing or reforming agrarian systems in such a way as to achieve the most efficient development and utilization of natural resources".

In its General Comment on the Right to Adequate Food, the International Committee on Economic, Social and Cultural Rights emphasised that the right to adequate food includes questions regarding the accessibility of natural resources.[93] Furthermore, the Committee provided that "[t]he formulation and implementation of national strategies for the right to food requires full

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91 Human Rights Committee, General Comment No. 25: The right to participate in public affairs, voting rights and the right of equal access to public service (Art. 25), 12 July 1996, *UN Doc. CCPR/C/21/Rev.1/Add.7*, para. 2.

92 *Ibid*, para. 25.

93 International Committee on Economic, Social and Cultural Rights, General Comment No. 12: The right to adequate food (Art. 11), *UN Doc. E/C.12/1999/5*, 12 May 1999, para. 13.

compliance with the principles of accountability, transparency, people's participation, decentralization, legislative capacity and the independence of the judiciary".[94] In addition, the Committee determined that "appropriate institutional mechanisms should be devised to secure a representative process towards the formulation of a strategy, drawing on all available domestic expertise relevant to food and nutrition".[95]

Although Article 11 of the ICESCR approaches the issue of natural resources exploitation from the perspective of the right to have access to adequate food, the provision may also be relevant for broader issues relating to the use of natural resources. In particular, the provision can be linked to the prohibition on depriving a people of its means of subsistence, as enshrined in Article 1(2) of the ICESCR. In its General Comment relating to the Right to Adequate Food, the Committee on Economic, Social and Cultural Rights unambiguously emphasised the importance of involving citizens in the development of national strategies to promote the right to food, including access to natural resources.

It can be concluded that the right of a people to economic self-determination in the context of a sovereign State is primarily implemented through the modern right of communities, as well as of individual members of the population of a State, to take part in national and local decision-making processes. The State is obliged to establish proper procedures which allow for these rights to be exercised in practice. Furthermore, international human rights bodies can, to a certain extent, assess whether States have met their obligation to provide for public participation.[96]

3.4 THE RIGHT TO DEVELOPMENT

The right to self-determination includes a right for peoples to "freely pursue their economic, social and cultural development". The right to development – as it appears in the Declaration on the Right to Development – constitutes one of the principal means to achieve the right to self-determination, because it formulates a right for peoples and individuals "to participate in, contribute

94 *Ibid*., para. 23.

95 *Ibid*., para. 24.

96 On the role of human rights monitoring mechanisms in achieving State compliance with treaty obligations, see I. Boerefijn, 'Establishing State Responsibility for Breaching Human Rights Treaty Obligations: Avenues under UN Human Rights Treaties', *Netherlands International Law Review,* Vol. 56(2) (2009), pp. 167-205; and A. Zimmermann, 'Human Rights Treaty Bodies and the Jurisdiction of the International Court of Justice', *The Law and Practice of International Courts and Tribunals,* Vol. 12 (2013), pp. 5–29.

to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized".[97]

Furthermore, the right to development "implies the full realization of the right of peoples to self-determination", which includes sovereignty over natural wealth and resources.[98] In this sense, it can be regarded as a continuation of the right to self-determination for peoples who have organized themselves in independent States. This section traces the evolution, nature and legal status of the right to development and examines its implications for the governance of natural resources within a sovereign State.

3.4.1 Evolution of the right to development

The UN Charter provisions on economic and social cooperation

The right to development is rooted in the UN Charter provisions on international economic and social cooperation. Article 1(3) of the UN Charter determines that the aims of the United Nations include achieving "international co-operation in solving international problems of an economic, social, cultural, or humanitarian character and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion".[99] This rather broad aim was developed in Chapter IX of the UN Charter on international economic and social cooperation. In this respect, Article 55 specifies *inter alia* that the United Nations shall promote "conditions of economic and social progress and development". To achieve this aim, Article 56 provides that "All Members pledge themselves to take joint and separate action in co-operation with the Organization". Over

97 Article 1(1) of the Declaration on the Right to Development, UNGA Resolution 41/128 of 4 December 1986. On the right to development, see in general, *inter alia,* A. Sengupta, *'On the Theory and Practice of the Right to Development'*, Human Rights Quarterly, Vol. 24 (2002), pp. 837–889; G. Abi-Saab, 'Droits de L'Homme et Développement: Quelques Eléments de Réflexion,' *African Yearbook of International Law,* Vol. 3 (1995), pp. 3-10; I.D. Bunn, 'The Right to Development: Implications for International Economic Law', *American University International Law Review,* Vol. 15 (2000), pp. 1425-1467; N.J. Schrijver, 'The Evolution of Sustainable Development in International Law: Inception, Meaning and Status', *Recueil des Cours,* Vol. 329 (2007), Leiden/Boston: Martinus Nijhoff Publishers (2008), p. 269-274; L. Amede Obiora, 'Beyond the Rhetoric of a Right to Development', *Law and Policy,* Vol. 18, Nos. 3 & 4 (1996), pp. 355-418; A. Pellet, *Le Droit International du Développement*, Collection 'Que sais-je?' deuxième édition, Paris: Presses Universitaires de France (1987); J. Donnelly, 'In Search of the Unicorn: The Jurisprudence and Politics of the Right to Development', *California Western International Law Journal,* Vol. 15 (1985), pp. 473-509.

98 Article 1(2) of the Declaration on the Right to Development, UNGA Resolution 41/128 of 4 December 1986.

99 See O. de Frouville, 'Article 1 Paragraphe 3', in Cot, J-P., Pellet, A., Forteau, M. (ed.), *La Charte des Nations Unies : Commentaire Article par Article*, 3e édition, Paris : Economica (2005), p. 358. De Frouville calls Article 1(3) the second pillar of the positive dimension of peace, together with the principle of equal rights and self-determination of peoples.

the years, these provisions have become the legal foundation for a wide range of UN efforts in the field of international development cooperation.[100]

International Bill of Human Rights

In addition to the provisions of the UN Charter, the human rights instruments which were drawn in the decades after the establishment of the UN also form the legal basis for the right to development. Although neither the Universal Declaration of Human Rights (UDHR) nor the International Covenants on Economic, Social and Cultural Rights (ICESCR) and on Civil and Political Rights (ICCPR) contains an express reference to a human right to development, constituent elements of such a right, as well as modalities for its realisation can be found in all three instruments. Substantive elements of a right to development comprise first of all the right of peoples to "freely pursue their economic, social and cultural development" and the right not to be deprived of their own means of subsistence, both of which are part of the right to self-determination included in the identical Articles 1 of the ICESCR and the ICCPR.

Furthermore, Article 25 of the UDHR and Article 11 of the ICESCR formulate a right for all human beings to an adequate standard of living, which includes a right to "adequate food, clothing and housing, and to the continuous improvement of living conditions". In addition, there is also the right to education incorporated in Article 26 of the UDHR and Article 13 of the ICESCR. In a general statement on the importance and relevance of the right to development, the Committee on Economic, Social and Cultural Rights emphasised the complementary character of the rights included in the Covenant and the right to development.[101]

As regards the modalities, Article 22 of the UDHR formulates a right for everyone to "the realization, through national effort and international cooperation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality". In addition, Article 28 of the UDHR

100 See the Repertory of the Practice of United Nations Organs, in particular with regard to Article 55, available at <http://www.un.org/law/repertory/>. From the early beginnings of the world organization, practice of UN organs relating to the promotion of development under Article 55 has covered a broad range of issues, including technical and financial assistance of developing countries, international trade and finance, natural resources and the protection of the environment. As Pellet noted, from the very start, the UN adopted an integrated approach to development issues. A. Pellet, 'Article 55, alinéas a et b', in J-P. Cot, A. Pellet, M. Forteau (éd.), *La Charte des Nations Unies: Commentaire Article par Article*, 3e édition, Paris: Economica (2005), p. 1464.

101 Committee on Economic, Social and Cultural Rights, Statement on the importance and relevance of the right to development, adopted on the occasion of the twenty-fifth anniversary of the Declaration on the Right to Development, 12 July 2011, *UN Doc. E/C.12/2011/2*, para. 5.

formulates a right for everyone to a conducive social and international order.[102] Article 2(1) of the ICESCR also formulates an obligation for parties "to take steps, individually and through international assistance and co-operation […] with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means", including the above-mentioned right to an adequate standard of living.[103]

Towards the formulation of a right to development

In the years following the adoption of the 1966 human rights covenants, the right to development started to materialise, notably through resolutions of the UN General Assembly and the work of the Commission on Human Rights. First, the UN General Assembly adopted a substantive Declaration on Social Progress and Development in 1969, which identified development as one of the "common concerns of the international community".[104] This reference to the notion of "common concern" is significant. In international environmental law, the notion of "common concern" has gained currency as a principle which forms the basis for imposing binding obligations for States in specific cases. These obligations not only concern affected States, but the international community as a whole (*erga omnes* obligations). It is one of the guiding principles of the 1992 UN Framework Convention on Climate Change and the 1992 Convention on Biological Diversity.[105] Therefore by referring to the notion of "common concern", the Declaration not only emphasises the fundamental importance of development for the international community as

102 Universal Declaration of Human Rights, *UN General Assembly Resolution 217 (III)* on an International Bill of Human Rights, adopted on 10 December 1948. In Alston's view, Article 28 of the UDHR must be seen as "a fact of fundamental importance in establishing the principle that respect for human rights is not a narrowly focused obligation applying only within strict limits to relations between individuals and their States, but rather is an open-ended obligation applying to all societal relations whether at the local, national or international level". P. Alston, 'The Shortcomings of a ''Garfield the Cat'' Approach to the Right to Development', *California Western International Law Journal,* Vol. 15 (1985), p. 515.

103 In this respect, the Committee on Economic, Social and Cultural Rights has issued a general comment in which it emphasised that "in accordance with Articles 55 and 56 of the Charter of the United Nations, with well-established principles of international law, and with the provisions of the Covenant itself, international cooperation for development and thus for the realization of economic, social and cultural rights is an obligation of all States". General Comment 3 of the Committee on Economic, Social and Cultural Rights on the nature of States parties obligations (Art. 2, para. 1 of the Covenant), para. 14, Report of the Fifth Session, *UN Doc. E/1991/23*, 14 December 1990.

104 Declaration on Social Progress and Development, *UN General Assembly Resolution 2542 (XXIV)*, adopted on 11 December 1969, Article 9.

105 For an analysis of the notion of 'common concern', see D. Shelton, 'Common Concern of Humanity', *Environmental Policy and Law*, Vol. 39, issue 2 (2009), pp. 83-90; and J. Brunnée, 'Common Areas, Heritage, Concern', in D. Bodansky, J. Brunnée & E. Hey, *The Oxford Handbook of International Environmental Law*, Oxford: Oxford University Press (2007), pp. 564-567.

a whole, but also, arguably, lays the foundation for imposing binding obligations upon States.

The Declaration also incorporates some basic elements for a right to development. It formulates a right for all peoples and human beings to "live in dignity and freedom and to enjoy the fruits of social progress".[106] In addition, it includes a list of elements that are considered "primary conditions of social progress and development", including permanent sovereignty over natural wealth and resources.[107]

The promotion of development is also the underlying rationale for the resolutions related to the call for a New International Economic Order (NIEO). One of the principal aims of the proposed new international economic order was to "ensure steadily accelerating economic and social development […] for present and future generations".[108] The Charter of Economic Rights and Duties of States, adopted in the same year, lists "[i]nternational cooperation for development" among the fundamental principles of international economic relations.[109] In addition, Article 17 of the Charter formulates an obligation for States to cooperate for development, while Article 7 assigns the primary responsibility "to promote the economic, social and cultural development of its people" to the national State.

Although these resolutions can be said to pave the way for the right to development, they approach development as an objective rather than as a right. In fact, development was not mentioned as a human right until 1977, when the Commission on Human Rights adopted a resolution in which it requested the UN Secretary-General to carry out a study on

> "the international dimensions of the right to development as a human right in relation with other human rights based on international cooperation, including the right to peace, taking into account the requirements of the New International Economic Order and the fundamental human needs".[110]

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106 Declaration on Social Progress and Development, *UN General Assembly Resolution 2542 (XXIV)*, adopted on 11 December 1969, Article 1.

107 *Ibid*., Article 3.

108 Declaration on the Establishment of a New International Economic Order, *UN General Assembly Resolution 3201 (S-VI)*, adopted on 1 May 1974, third paragraph of the preamble.

109 Charter of Economic Rights and Duties of States, *UN General Assembly Resolution 3281 (XXIV)*, adopted on 12 December 1974, Chapter I, under (n).

110 Resolution 4 (XXX-III) of the UN Commission on Human Rights, *UN Doc. E/CN.4/SR.1389 (1977)*, 21 February 1971. The report on the international dimensions of the right to development, published in 1979, was complemented with a report on the regional and national dimensions of the right to development as a human right in 1981. However, neither of these reports, although both affirming the existence of a right to development, sheds any light on the contents of such a right. See Report of the Secretary-General on the International Dimensions of the Right to Development, *UN Doc. E/CN.4/1334 (1979)*; Report of the Secretary-General on the Regional and National Dimensions of the Right to Development, *UN Doc. E/CN.4/1421(Part I)* and *E/CN.4/1488 (PART II and III) (1981)*.

This Resolution has served as a catalyst for successive efforts to determine the contents of the right to development as part of the so-called "structural approach to human rights" which emerged in the late 1970s.[111] These efforts resulted in the 1986 Declaration on the Right to Development.

The 1986 Declaration on the Right to Development

The 1986 Declaration on the Right to Development, adopted with 146 votes in favour, eight abstentions and one negative vote from the United States, defines the human right to development as an "inalienable human right" that entitles "every human person and all peoples to participate in, contribute to, and enjoy economic, social and political development, in which all human rights and fundamental freedoms can be fully recognized".[112] In this respect, "development" is defined as a "comprehensive economic, social, cultural and political process, which aims at the constant improvement of the well-being of the entire population and of all individuals on the basis of their active, free and meaningful participation in development and in the fair distribution of benefits resulting therefrom".[113] Thus, the right to development may be defined as a collective and individual right to participate in the process of development and to enjoy the benefits resulting from it.

Article 1 also provides that the right to development "implies the full realization of the right of peoples to self-determination, which includes, subject to the relevant provisions of both 1966 human rights Covenants, the exercise of their inalienable right to full sovereignty over all their natural wealth and resources". Thus, the realisation of the right to self-determination is regarded as an essential precondition for exercising the right to development. After all, how can the right to development be realised if people do not control their own economic means or have the political power to shape their own developmental policies?

Conversely, it could be argued that the right to self-determination can only be realised by exercising the right to development. It should be remembered that the right to self-determination is defined in the identical Articles 1(1) of the 1966 Covenants as a right for peoples to "freely determine their political status and freely pursue their economic, social and cultural development".

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111 On the structural approach to human rights, see *e.g.* M.E. Salomon, *Global Responsibility for Human Rights: World Poverty and the Development of International Law*, Oxford: Oxford University Press (2007).

112 Declaration on the right to development, *UN General Assembly Resolution 41/128*, adopted on 4 December 1986, Article 1. For voting information, see the 1986 Yearbook of the United Nations, pp. 717-721. On the declaration, see R.N. Kiwanuka, 'Developing Rights: The UN Declaration on the Right to Development', *Netherlands International Law Review,* Vol. XXXV (1988), pp. 257-272. On the United States position towards the right to development, see S. Marks, 'The Human Right to Development: Between Rhetoric and Reality', *Harvard Human Rights Journal,* Vol. 17 (2004), pp. 141-160.

113 Declaration on the Right to Development, preamble, second paragraph.

In order to be able to freely pursue their economic, social and cultural development, peoples must have a right to shape their development process, and, both as individuals and communities, participate in this process and enjoy its benefits. This is precisely what the right to development seeks to achieve.[114] Therefore the right to development and the right to self-determination must be regarded as being mutually reinforcing.

The Declaration also defines the subjects of the right to development. According to Article 1 of the Declaration, the right to development accrues to individuals and peoples. In this respect, Article 2(1) of the Declaration emphasises that the human person is both the "central subject of development" and "the active participant and beneficiary of the right to development". As such, the human person is also responsible for the implementation of the right to development, both individually and collectively. However, primary responsibility for the implementation of the right to development is assigned to States. According to Article 3(1) of the Declaration, "States have the primary responsibility for the creation of national and international conditions favourable to the realization of the right to development".

At the international level, States have an obligation, *inter alia,* to take steps to formulate international development policies and must cooperate to promote, encourage and strengthen universal respect for and observance of human rights.[115] At the national level, Article 8 of the Declaration provides that States should take all necessary measures for the realisation of the right to development and that they have an obligation to ensure, *inter alia,* equality of opportunity for all in their access to basic resources and the fair distribution of income. In addition, it provides that "States should encourage public participation in all spheres as an important factor in development and in the full realization of all human rights".

From the 1986 Declaration to the 1993 Vienna Declaration and beyond

The 1993 World Conference on Human Rights, which produced the Vienna Declaration and Programme of Action, was the next benchmark in the evolu-

114 Declaration on the Right to Development, Article 1: "The right to development is an inalienable human right by virtue of which every human person and all peoples are entitled *to participate in, contribute to, and enjoy* economic, social and political development…", and Article 2(3): "States have the right and the duty to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals, *on the basis of their active, free and meaningful participation in development and the fair distribution of the benefits resulting therefrom*". Author's emphasis added. Also see M. Bedjaoui, 'The Right to Development', in M. Bedjaoui (ed.), *International Law: Achievements and Prospects*, Paris: UNESCO (1991), p. 1188: "There is little sense in recognizing self-determination as a superior and inviolable principle if one does not recognize at the same time a 'right to development' for the peoples that have achieved self-determination. This right to development can only be an 'inherent' and 'built-in' right forming an inseparable part of the right to self-determination".

115 Articles 4 and 6 of the Declaration.

tion of the right to development.[116] Like the Declaration on the Right to Development, the Vienna Declaration points to the human person as the central subject of development and assigns responsibility for the realisation of the right to States, both at the national and international level.[117]

The Declaration also designates the right to development "as a universal and inalienable right and an integral part of fundamental human rights" and underlines the interrelationship between human rights and development by stipulating that "while development facilitates the enjoyment of all human rights, the lack of development may not be invoked to justify the abridgement of internationally recognized human rights".[118]

In addition, the Declaration establishes a direct link between the right to development on the one hand, and the protection of the environment on the other. In this respect, paragraph 11 of the Vienna Declaration reiterates principle 3 of the 1992 Rio Declaration on Environment and Development which determines that "[t]he right to development should be fulfilled so as to meet equitably the developmental and environmental needs of present and future generations".

In the years following the adoption of the Vienna Declaration, the right to development was confirmed in several important outcome documents, such as the Millennium Declaration, the Monterrey Consensus, the 2005 World Summit Outcome and the 2012 Outcome Document of the United Nations Conference on Sustainable Development.[119] Moreover, it served as a stimulus to the formulation of new development strategies, such as the Millennium Development Goals (MDGs), which are aimed at integrating all the aspects of the development process.[120] Nevertheless, it seems as though the idea of

116 Vienna Declaration and Programme of Action, *UN Doc. A/CONF.157/23*, adopted on 12 July 1993.

117 Paragraph 10 of the declaration determines that "States should cooperate with each other in ensuring development and eliminating obstacles to development. The international community should promote an effective international cooperation for the realization of the right to development and the elimination of obstacles to development". In addition, it stipulates that "lasting progress towards the implementation of the right to development requires effective development policies at the national level, as well as equitable economic relations and a favourable economic environment at the international level".

118 *Ibid.*

119 See paragraph 11 of the Millennium Declaration, *UN General Assembly Resolution 55/2 (2000)*, adopted on 18 September 2000; paragraph 11 of the Monterrey Consensus, Report of the International Conference on Financing for Development, *UN Doc. A/CONF.198/11*, adopted on 22 March 2002; paragraph 24(b) of the 2005 World Summit Outcome, *UN General Assembly Resolution 60/1*, adopted on 24 October 2005; and paragraph 8 of the Outcome Document of the 2012 United Nations Conference on Sustainable Development, 'The Future We Want', *UN General Assembly Resolution 66/288*, adopted on 11 September 2012.

120 On the relationship between the MDGs and human rights, including the right to development, see P. Alston, 'Ships Passing in the Night: The Current State of the Human Rights and Development Debate Seen Through the Lens of the Millennium Development Goals', in *Human Rights Quarterly*, 27 (2005), pp. 755-829.

development as a human right has shifted to the background to some extent in favour of development as an all-encompassing objective.

3.4.2 The nature and legal status of the right to development

The right to development has evolved in particular in the resolutions of the UN General Assembly and other UN organs. The only legally binding instrument which formulates a right to development is the African Charter on Human and Peoples' Rights.[121] The lack of recognition of the right to development in legally binding instruments has led to a fierce debate in the legal literature on the status of the right to development as an autonomous legal right. As Nico Schrijver noted, advocates of the right to development have sometimes elevated it "to lofty heights", while opponents regard it as "a dangerous smokescreen".[122] Moreover, some authors, such as Arjun Sengupta, try to avoid the issue altogether by making a distinction between human rights and legal rights. In Arjun Sengupta's opinion, it is perfectly possible for a right to be a human right without being a legal right.[123] However, in the present author's opinion, the significance of a moral right devoid of legal meaning is questionable.

Arguably it would be going too far to consider the right to development to be a fully-fledged human right, but that is not to say that the right is without legal relevance. In Kiwanuka's words: "[e]ven if the Declaration [on the Right to Development] cannot be endowed with legal authority, in positivist terms, that would not necessarily mean that it is stripped of all relevance and

121 Article 22 of the African Charter determines that "All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind" and that "States shall have the duty, individually or collectively, to ensure the exercise of the right to development".

122 N.J. Schrijver, 'The Evolution of Sustainable Development in International Law: Inception, Meaning and Status', *Recueil des Cours,* Vol. 329 (2007), Leiden/Boston, Martinus Nijhoff Publishers (2008), p. 271. Proponents of a right to development include P. Alston, 'The Shortcomings of a ''Garfield the Cat'' Approach to the Right to Development', *California Western International Law Journal,* Vol. 15 (1985), pp. 510-518; A. Sengupta, 'On the Theory and Practice of the Right to Development', *Human Rights Quarterly,* Vol. 24 (2002), pp. 837–889, and M. Bedjaoui, 'The Right to Development', in M. Bedjaoui (ed.), International Law: Achievements and Prospects, Paris, UNESCO (1991), pp. 1177-1203. Opponents include Y. Ghai, 'Whose Human Right to Development?', Human Rights Unit Occasion Paper, Commonwealth Secretariat (1989); and J. Donnelly, 'In search of the Unicorn: The Jurisprudence and Politics of the Right to Development', *California Western International Law Journal,* Vol. 15 (1985), pp. 473-509.

123 A. Sengupta, 'On the Theory and Practice of the Right to Development', *Human Rights Quarterly*, Vol. 24 (2002), pp. 859-860.

utility in international law".[124] On the contrary, in the present author's view, the right to development has two dimensions which add to the existing core of human rights and which give the right some legal significance.

First of all, at the very least, the right to development can be characterized as "the sum of existing human rights", which include the right to life, to an adequate standard of living and to education.[125] By extension, the right to development may be defined as an umbrella right which integrates these individual economic, social and cultural rights, as well as some dimensions of civil and political rights, most notably empowerment rights such as the rights to freedom of opinion and association. The added value of the right to development would then primarily be its emphasis on the interrelated and indivisible qualities of these individual rights. In this sense, the right to development can first be characterised as a "participatory right" aimed at the realisation of human rights pertaining to development.[126] At the national level, the right to development would then give rise to a right for all individuals to participate in the realisation of economic, social and cultural rights, as well as a corresponding obligation for the State to implement economic, social and cultural rights in such a way as to give due weight to the interests of all individuals in a State, and not only to a small segment of society.[127]

The legal basis for this obligation is found, in the first place, in Article 2 of the ICESCR concerning the obligations of States parties to the ICESCR and in

124 R.N. Kiwanuka, 'Developing Rights: The UN Declaration on the Right to Development', *Netherlands International Law Review,* Vol. XXXV (1988), p. 271. Bunn even argues that "the prevailing view is that the right to development is, at the very least, on the threshold of acceptance as a principle of positive international law", but she does not sufficiently elaborate her argument. I.D. Bunn, 'The Right to Development: Implications for International Economic Law', *American University International Law Review,* Vol. 15 (2000), p. 1436.

125 N.J. Schrijver, 'The Evolution of Sustainable Development in International Law: Inception, Meaning and Status', *Recueil des cours*, Vol. 329 (2007), Leiden/Boston, Martinus Nijhoff Publishers (2008), p. 271.

126 For the idea of the right to development as a participatory right, see A. Orford, 'Globalization and the Right to Development', in P. Alston (ed.), *Peoples' Rights*, Academy of European Law, Oxford: Oxford University Press (2001), p. 138.

127 Compare Georges Abi-Saab, who argues that "si la réalisation du droit collectif est une condition nécessaire pour garantir la pleine jouissance des droits individuels qui s'y rattachent, elle n'en est pas une condition suffisante. Ainsi, la plupart des pays ayant accédé à l'indépendance après la seconde guerre mondiale, le respect des droits civils et politiques laisse beaucoup à désirer. Et le même danger guette le droit au développement, si les élites coercitives et exploitantes qui ont confisqué le pouvoir politique une fois l'indépendance acquise, réussissent à détourner à leur bénéfice exclusif les fruits du droit au développement ainsi conçu (c'est-à-dire les bienfaits d'un environnement économique plus favorable), plutôt que de les laisser se répandre à toutes les couches de la population". G. Abi-Saab, 'Droits de L'Homme et Développement: Quelques Eléments de Réflexion', *African Yearbook of International Law,* Vol. 3 (1995), pp. 6-7.

Article 25 of the ICCPR concerning public participation in decision-making.[128] At the international level, it can be argued that the right to development is reflected in the collective obligation of States to cooperate for the realisation of economic, social and cultural rights as incorporated in Article 2(1) and Article 23 of the ICESCR.

Furthermore, the right to development develops the principle of permanent sovereignty over natural resources, as well as the right to self-determination, in more detail. For the purposes of this book one of the essential aspects is that the right to development not only entails a right to participate in the development process, but also entails a right to enjoy the fruits of development.[129] In this way, it extends the obligation of a government to exercise the right of permanent sovereignty over natural resources for national development and the well-being of the people, as well as the right to "pursue economic, social and cultural development" as part of the right to self-determination. The principle of permanent sovereignty over natural resources and the right to self-determination should then be interpreted as entailing a right for peoples to enjoy the fruits of development.

Therefore it may be concluded that despite the present uncertainties regarding its precise content and legal implications, the right to development can play an important role in realising development. It can do so in four different ways. First, by means of its integrating function. As an umbrella right, the right to development can play an important role in connecting different human rights with the aim of realising economic, social and cultural development. Secondly, the collective dimension of the right to development emphasises the inclusive approach that is necessary to realise development. It clearly shows that the right to development can only be realised if all sectors of society are included in the development process. Thirdly, the dual nature of the right to development as a collective as well as an individual right can be instrumental

128 In this respect, see General Comment No. 3 of the Committee on Economic, Social and Cultural Rights on the nature of States parties' obligations (Art. 2, par.1), Report of the Fifth Session, *UN Doc. E/1991/23*, para. 8: "The Committee notes that the undertaking 'to take steps ... by all appropriate means including particularly the adoption of legislative measures' neither requires nor precludes any particular form of government or economic system being used as the vehicle for the steps in question, *provided only that it is democratic and that all human rights are thereby respected*". Author's emphasis added. Also see General Comment No. 20 on Non-discrimination in economic, social and cultural rights (Art. 2, para. 2), UN Doc. *E/C.12/GC/20*, 2 July 2009, which explains the different forms of and grounds for discrimination and which contains guidelines to assess the legitimacy of differential treatment.

129 See the Declaration on the Right to Development. Article 1 of the Declaration formulates a right "to participate in, contribute to, and *enjoy* economic, social, cultural and political development", while Article 2(3) formulates a duty for States "to formulate appropriate national development policies that aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development *and in the fair distribution of the benefits resulting therefrom*". Author's emphasis added.

in facilitating interaction between collective and individual rights. Finally, the right to development can be instrumental in shaping the contents of other human rights related to development, such as the right to education. This was also recognised by the chairs of different UN treaty bodies, when they resolved in a joint statement "to make a concerted effort to promote a development-informed and interdependence-based reading of all human rights treaties, so as to highlight and emphasize the relevance and importance of the right to development in interpreting and applying human rights treaty provisions".[130]

3.4.3 The implementation of the right to development within the sovereign State

The right to development implies that States should implement procedures in their domestic legislation which permit individuals and communities to participate in the development process, while ensuring a fair distribution of the benefits of development in society. Nevertheless, there is rarely any practice or case law at the international level that develop these basic obligations.

As stated above, the African Charter on Human and Peoples' Rights is the only legally binding instrument that recognises a right to development. Some practice relating to the right to development can be found within the framework of this Convention. The most notable example is the case of the Endorois people *v.* Kenya before the African Commission on Human Rights. The Endorois people, an indigenous people living in Kenya, alleged that their right to development had been violated as a result of the State's creation of a Game Reserve in Endorois lands and its failure to adequately involve the Endorois in the development process. The African Commission stated that "recognising the right to development requires fulfilling five main criteria: it must be equitable, non-discriminatory, participatory, accountable, and transparent, with equity and [freedom of] choice as important, over-arching themes in the right to development".[131]

It also noted that consultation is an important element of the right to development. In this respect, consultation should be interpreted in terms of participation in government policies that concern those involved, rather than a mere right to be informed of such policies.[132] If a project carried out by a government on indigenous lands were to have a major impact on the

130 United Nations Office of the High Commissioner for Human Rights, *Joint Statement of Chairpersons of the UN Treaty Bodies*, 1 July 2011.

131 African Commission on Human and Peoples' Rights, Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya, 276/2003, para. 277.

132 *Ibid*., para. 281.

territory, consultation should even be interpreted as implying a requirement to obtain the free, prior and informed consent of the indigenous people.[133]

The Commission also touched on the issue of sharing benefits, which it linked to the right of property and compensation for the loss of property, rather than directly to the right to development.[134] In relation to the right to development, the Commission merely stated that "the right to development will be violated when the development in question decreases the well-being of the community".[135] Although it is unfortunate that the Commission did not expressly state that the issue of sharing benefits is a constituent element of the right to development, the Commission's statement does have an interesting implication for the purposes of the present book. Arguably, it implies that a government that decreases the well-being of the population as a result of its governance of natural resources violates the right to development.

3.4 APPRAISAL

The current chapter has examined "peoples" as subjects and beneficiaries of the principle of permanent sovereignty over natural resources. It addressed this issue from the perspective of peoples' rights, in particular from the perspective of the right to self-determination, which incorporates the principle of permanent sovereignty over natural resources, and from the perspective of the closely related right to development.

In relations between States the right to self-determination entails first of all a right for peoples to choose their political organization, including – under exceptional circumstances –secession. In view of the major implications of this right, it accrues to very narrowly defined categories of peoples, mainly colonial peoples and peoples under foreign domination. In this sense, the right is addressed to "other" States, in the sense that other States have to respect a people's right of self-determination. As soon as a people has organized itself in an independent State, the right to external self-determination becomes vested in the State. As such, it falls under State sovereignty and becomes subject to the principle of non-intervention. This sovereign dimension includes the State's right to freely dispose of its natural resources, excluding other States. The right to development is a logical continuation of the right to self-determination. Arguably, it entails an obligation for other States to assist each other with the development process. However, this right does not yet have a firm basis in international law.

Furthermore, this chapter has argued that the right to self-determination and the right to development have an internal dimension as well. In the context

133 *Ibid*., para. 291.
134 *Ibid*., para. 294.
135 *Ibid*.

of the sovereign State, the right to self-determination refers first of all to the right of the population of a State, as the sum of the peoples of the State, to freely choose the State's political and economic system. It also includes the right for minorities and indigenous peoples to govern their local affairs.

In addition, the right to internal self-determination includes a right to freely pursue economic, social and cultural development. This right is expressed in the right to economic self-determination, which includes a right to have access to the economic means to achieve development. The right to freely pursue economic, social and cultural development can become effective based on the right to development, understood as a right for peoples and individuals to participate in, contribute to, and enjoy economic, social, cultural and political development.

As regards implementing the right to internal self-determination and the right to development, it is argued that the main way to give effect to these rights is by means of public participation in decision-making. This implies, for example, that a government should consult local communities that may be affected by particular resource projects. However, it is striking that the relevant case law of human rights bodies on public participation focuses in particular on the protection of indigenous peoples. Those communities are given a right to participate in decision-making with the specific aim of preserving the culture and traditional lifestyle.

One important drawback of most complaint mechanisms of human rights bodies is that they are open only to individuals who claim to be directly affected by government decisions. This requirement stands in the way of claims that serve a more general interest. For example, if concessions are issued in areas that are remote from human habitation, it is not possible to file a complaint before a human rights body, even if the concessions have a serious impact on the environment. Furthermore, on the same grounds, it is not possible to challenge a government's failure to provide for public participation regarding decisions on the expenditure of resource revenues.

The realisation of the right to self-determination and the right to development therefore depends largely on whether or not individual States implement the ensuing obligations in national law. According to the Human Rights Committee, the implementation of the right to self-determination requires States to put in place procedures that permit this right to be exercised in practice. The Human Rights Committee, as well as the Committee on Economic, Social and Cultural Rights, has the formal mandate to oversee the implementation of the identical Articles 1 of the 1966 Covenants. Both committees have devoted a great deal of attention to securing the right of indigenous peoples to self-determination through a combined reading of Article 1 and Article 27 of the ICCPR.

It would therefore be laudable if these – and other – human rights bodies were to adopt a more active approach to ensuring the proper implementation of the right to internal self-determination for other communities as well, most

notably by emphasising the importance of public participation for the realisation of the right in their reports and comments. One possible avenue for these human rights bodies would be to interpret treaty provisions that have a bearing on participation of citizens in decisions affecting their well-being in the light of identical Articles 1 of the ICESCR and the ICCPR. Relevant provisions include the right to an adequate standard of living enshrined in Article 11 of the ICESCR and the right to participate in a State's decision-making processes, enshrined in Article 25 of the ICCPR.

4 Environmental law obligations relevant for the governance of natural resources

4.1 INTRODUCTORY REMARKS

This chapter discusses the role of international environmental law in determining the right of States and peoples to freely dispose of their natural resources. It examines two principal ways in which international environmental law impacts upon this right. First of all, this chapter examines principles formulated by international environmental law for the exploitation of natural resources and the protection of the environment. Relevant principles include the obligation to conserve and sustainably use natural wealth and resources, to safeguard natural resources for future generations, to prevent damage to the environment of other States, and to adopt a precautionary approach to the protection of the environment and natural resources.[1]

Secondly, international environmental law contains several "common regimes" aimed at protecting natural resources or parts of the environment because of the importance they have several States. The number of States with a stake in a common regime may vary from two, in the case of shared natural resources, to the entire community of States, in the case of world heritage. A general feature of these common regimes is that they impose obligations upon States to protect the interests of the larger community of States. The aim of this chapter is to assess how and to what extent all these obligations under international environmental law qualify the right of States to freely dispose of their natural resources.

One of the principal reasons for examining the principles and regimes discussed in this chapter is related to the hypothesis that they are not only relevant for the protection of natural resources and the environment in times of peace, but that they are also relevant in situations of armed conflict. This

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1 For different categorisations of the principles of international law, see S.A. Atapattu, *Emerging Principles of International Environmental Law*, Transnational Publishers, Series on International Law and Development, New York (2006); P. Birnie, A.E. Boyle and C. Redgwell, *International Law and the Environment*, Third Edition, Oxford: Oxford University Press (2009); P. Sands and J. Peel, *Principles of International Environmental Law*, Cambridge: Cambridge University Press, Third Edition (2012); N.J. Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties*, Cambridge: Cambridge University Press (1997); and N.J. Schrijver, 'The Evolution of Sustainable Development in International Law: Inception, Meaning and Status', *Recueil des Cours,* Vol. 329 (2007), Leiden/Boston: Martinus Nijhoff Publishers (2008), pp. 221-412.

is discussed in more detail in Chapter 4 of this book, while the current chapter focuses on the contents of the obligations arising from these principles and common regimes and their implications for the principle of permanent sovereignty.

Section 2 of this chapter discusses the origins and structure of international environmental law in order to provide the necessary context. Section 3 then discusses the relevant principles of international environmental law and their legal status. Section 4 discusses several common regimes and the obligations ensuing from them. Finally, section 5 draws some final conclusions about the role of international environmental law and the limits it places on the right of States and peoples to freely dispose of their natural resources.

4.2 Origins and structure of international environmental law

This section briefly introduces international environmental law as a field of international law. International environmental law has some distinctive characteristics, and this section discusses some of them for a proper understanding of this field.

4.2.1 Origins of international environmental law

International environmental law has evolved relatively recently. Although early efforts aimed at the protection of particular ecosystems, such as rivers and forests, can be traced back to the nineteenth century, modern international environmental law originated particularly in the United Nations.[2] In this respect, the United Nations Conference on the Human Environment held in Stockholm in 1972 is usually seen as the catalyst for the development of a body of law pertaining to the protection of the environment.[3]

The principal objective of this modern international environmental law is to protect and conserve the environment for the benefit of present and future generations of mankind. The 1972 Stockholm Declaration of the United Nations Conference on the Human Environment rather poetically emphasised the

2 For a brief outline of the evolution of international environmental law, see P.H. Sand, 'The Evolution of International Environmental Law', in D. Bodansky, J. Brunnée & E. Hey, *The Oxford Handbook of International Environmental Law*, Oxford: Oxford University Press (2007), pp. 29-43; and P. Sands & J. Peel, *Principles of International Environmental Law*, Third Edition, Cambridge: Cambridge University Press (2012), chapter 2.

3 See M. Ragazzi, *The Concept of International Obligations Erga Omnes*, Oxford: Clarendon Press (1997), p. 154; and P.H. Sand, 'The Evolution of International Environmental Law', in D. Bodansky, J. Brunnée & E. Hey, *The Oxford Handbook of International Environmental Law*, Oxford: Oxford University Press (2007), pp. 33-34, who emphasises that the Stockholm Conference was the "culmination of an intense preparatory process".

importance of the environment for human life and development by stating that "Man is both creature and moulder of his environment, which gives him physical sustenance and affords him the opportunity for intellectual, moral, social and spiritual growth" and it added that the environment is "essential to his well-being and to the enjoyment of basic human rights – even the right to life itself".[4]

Since the late 1980s, international environmental law has become integrated with international development law. These two fields of law have been connected by the principle of sustainable development, which was coined by the World Commission on Environment and Development, the Brundtland Commission, in its report *Our Common Future* as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs".[5] The principle of sustainable development evolved to become one of the basic aims of international environmental law.[6] ConverselyE environmental protection constitutes an integral part of sustainable development, which also embraces economic and social development.[7] This is especially clear from Principle 4 of the Rio Declaration, which proclaims that "[i]n order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it".[8]

The need to strike a balance between economic development and the protection of the environment in order to preserve the long-term development potential of mankind is central to the principle of sustainable development.

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4 Declaration of the United Nations Conference on the Human Environment, Stockholm, 16 June 1972, *11 ILM 1416 (1972)*, para. 1 of the preamble.

5 World Commission on Environment and Development, *Our Common Future*, Oxford: Oxford University Press 1987, p. 8.

6 Bodansky, Brunnée and Hey even refer to it as "the organizing principle for international environmental law". See D. Bodansky, J. Brunnée & E. Hey, International Environmental Law: Mapping the Field', in D. Bodansky, J. Brunnée & E. Hey (eds.), *The Oxford Handbook of International Environmental Law*, Oxford: Oxford University Press (2007), p. 15. Sustainable development has also been referred to as a "meta-principle". In this respect see V. Lowe, 'Sustainable Development and Unsustainable Arguments', in A. Boyle and D. Freestone (eds.), *International Law and Sustainable Development*, Oxford: Oxford University Press (1999), p. 31.

7 In this respect, the Johannesburg Declaration has identified three "interdependent and mutually reinforcing pillars of sustainable development", i.e. "economic development, social development and environmental protection". Johannesburg Declaration on Sustainable Development, Annex to the Report of the World Summit on Sustainable Development, A/CONF.199/20, 26 August - 4 September 2002, para. 5. In addition, see P. Sands & J. Peel, *Principles of International Environmental Law*, Cambridge: Cambridge University Press, Third Edition (2012), p. 10, who argue that sustainable development law is broader than international environmental law, in that it includes, apart from environmental issues, "the social and economic dimension of development, the participatory role of major groups, and financial and other means of implementation".

8 Rio Declaration on Environment and Development, Rio de Janeiro, 13 June 1992, *31 ILM 874 (1992)*, Principle 4.

Arguably, this approach not only entails obligations for States regarding the use of natural resources which directly contribute to development, but also an obligation to conserve particular ecosystems or species because of the role they play in maintaining a balance in nature, which is essential to sustain human life in the long term.[9] This can be achieved by adopting an ecosystem approach to sustainable development. This approach is central to the 1992 Convention on Biological Diversity and can be described as "a strategy for the integrated management of land, water and living resources that promotes conservation and sustainable use in an equitable way".[10]

During the 1990s and early 2000s the principle of sustainable development was also promoted at a number of important international summits, including the 2000 Millennium World Summit, the 2002 Johannesburg Summit on Sustainable Development, the 2005 World Summit and, most recently, the 2012 Rio+20 Summit on Sustainable Development.[11] These summits have contributed to strengthening the legal status of the principle of sustainable development.

Reference should also be made to the New Delhi Declaration of Principles of International Law Relating to Sustainable Development, adopted by the International Law Association (ILA) in 2002.[12] Although this declaration is not legally binding in any way, it can be considered to be an authoritative statement regarding the state of the law in relation to sustainable development as it is based on an extensive study of State practice, judicial decisions and treaty law.[13]

This Declaration identifies seven principles that are considered "instrumental in pursuing the objective of sustainable development in an effective way". These are the duty of States to ensure the sustainable use of natural resources, the principle of equity and the eradication of poverty, the principle of common but differentiated responsibilities, the principle of the precautionary approach to human health, natural resources and ecosystems, the principle of public participation and access to information and justice, the principle of good governance and the principle of integration and interrelationship, in

9 This is expressed through the concept of inter-generational equity. See E. Brown-Weiss, *In Fairness to Future Generations: International law, Common Patrimony, and Intergenerational Equity*, Tokyo: United Nations University (1989).

10 See http://www.cbd.int/ecosystem/ for more information on the ecosystem approach in relation to the Convention on Biological Diversity.

11 See N.J. Schrijver, 'The Evolution of Sustainable Development in International Law: Inception, Meaning and Status', *Recueil des Cours,* Vol. 329 (2007), Leiden/Boston: Martinus Nijhoff Publishers (2008), pp. 221-412. For the Rio+20 Summit, see the outcome document of the 2012 United Nations Conference on Sustainable Development 'The Future We Want', annexed to UN General Assembly Resolution 66/288 of 11 September 2012.

12 ILA New Delhi Declaration of Principles of International Law Relating to Sustainable Development, adopted on 2 April 2002, *UN Doc. A/57/329* of 31 August 2002.

13 See the fifth and final report of the ILA Committee on Legal Aspects of Sustainable Development (2002), the ILA Committee which prepared the New Delhi Declaration.

particular in relation to human rights and social, economic and environmental objectives. Some of these principles are examined in the current chapter, in particular the principle of sustainable use, the principle of equity and the precautionary principle, while others, in particular the principle of public participation and the principle of good governance, were discussed in previous chapters.

4.2.2 The structure of international environmental law

A proper understanding of international environmental law requires a brief introduction to its characteristics. One of the characteristics of international environmental law concerns its creation. In addition to the traditional sources of international law formulated in Article 38 of the ICJ Statute, the concept of "soft law" is particularly important in international environmental law. Soft law processes play a major role in the development of rules in the field of international environmental law.[14]

The world conferences convened by the UN General Assembly and held in Stockholm in 1972 and in Rio de Janeiro in 1992, were particularly instrumental in this respect. These conferences produced important declarations that have had a great impact on the development of international environmental law. While the character of these declarations is partly declaratory in the sense that they formulate some well-established rules of customary international law, they have also had an important programming function.[15] Many of the principles expressed in the declarations subsequently found their way into international treaties or have crystallised as norms of customary international law.

Other examples of soft law instruments that have stimulated the development of international environmental law include (non-binding) decisions taken by the conferences of the parties (COP) in particular treaty regimes. Although COP decisions generally concern the implementation of obligations which are already binding under international treaties, some have also substantively and progressively developed the treaty obligations concerned.[16] In addition, reference can be made to the work of United Nations organs, such as UNEP, and

14 For the notion of soft law, see Chapter 1 of this study.

15 For a discussion of these terms and the impact of particular UN resolutions on the formation of international environmental law, see R.J. Dupuy, *Droit déclaratoire et droit programmatoire de la coutume sauvage a la «soft law»*, Toulouse: Société française pour le droit international (1974).

16 On the role of COP decisions in the development of international environmental law, see T. Gehring, 'Treaty-making and Treaty Evolution', in D. Bodansky, J. Brunnée & E. Hey, *The Oxford Handbook of International Environmental Law*, Oxford: Oxford University Press (2007), pp. 469-497.

non-governmental organizations such as the International Law Association (ILA), which have formulated important rules and guidelines for States.[17]

Another characteristic of international environmental law is directly related to the object it is protecting. Environmental problems often not only affect the interests of individual States, but also the interests of the larger international community of States. Examples include climate change, atmospheric pollution, pollution of the high seas and over-fishing. This is the reason why a relatively large number of environmental obligations either operate *erga omnes partes*, i.e., between the parties to a particular treaty regime, or sometimes even *erga omnes*, i.e., between all States whether or not they are party to a particular treaty.[18]

In other words, such international environmental obligations are characterised by their legal indivisibility, in the sense that they "simultaneously [bind] each and every State concerned with respect to all the others", at least within the context of particular treaty regimes.[19] Thus with respect to these obligations, several or even all States are deemed to have a legal interest in their observance.

This has important implications for the situation of armed conflict, because, arguably, the indivisibility of particular environmental obligations restricts the options for parties to an armed conflict to suspend their treaty obligations. For example, reference can be made to particular obligations for States under the Convention on Biological Diversity, which aims to protect the Earth's biological diversity in the interests of the international community. Article 8 (c) of this Convention, for example, prescribes that States "[r]egulate or manage

17 Compare the UNEP Draft Principles of Conduct in the Field of the Environment for the Guidance of States in the Conservation and Harmonious Utilization of Natural Resources Shared by Two or More States, *17 ILM 1097 (1978)*, discussed in section 2.3.5 below, and the ILA New Delhi Declaration of Principles of International Law Relating to Sustainable Development, in *ILA Report of the Seventieth Conference*, New Delhi (2002).

18 For the distinction between *erga omnes* and reciprocal obligations, see the Case Concerning the Barcelona Traction, Light and Power Company, Limited, Judgment of 5 February 1970, *I.C.J. Reports,* 1970, p. 3, para. 33, where the Court stated that "an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of al1 States. In view of the importance of the rights involved, al1 States can be held to have a legal interest in their protection; they are obligations erga omnes".

19 See the definition of the concept of *erga omnes* obligation by Special Rapporteur Mr. Gaetano Arangio-Ruiz, Fourth Report on State responsibility, *UN Doc A/CN.4/444 and Add. 1-3*, para. 92, in Yearbook of the International Law Commission 1992, Vol. II, Part One, p. 34. See also the commentary of the ILC on Article 48 of the Draft Articles on State Responsibility, which mentions obligations under environmental treaties as an example of obligations *erga omnes partes*. See the Report of the International Law Commission on the work of its fifty-third session, *UN Doc. A/56/10* (2001), p. 126. The concept of *erga omnes* and the resulting indivisibility is not to be confused with the concept of 'integral agreements' discussed in Chapter 6.

biological resources important for the conservation of biological diversity".[20] It can be assumed that States are expected to continue to respect this obligation unless they are completely prevented from doing so.

A third characteristic of international environmental law is that environmental obligations can, to a certain extent, be invoked by entities other than States. The evolution of international law in the field of sustainable development has facilitated the interaction between international environmental law and international human rights law. Today international environmental law obligations of States are increasingly invoked by individuals and minority groups claiming a right to a decent, healthy or satisfactory environment, either directly or as part of their rights to life, private life, property or access to information and justice.[21]

Similarly, the emergence of the rights of future generations as part of the concept of sustainable development has also encouraged a human rights approach in international environmental law. The rights of future generations must expressly be taken into account by States as part of their environmental obligations. The fact that representatives of future generations cannot directly enforce their rights at the international level does not preclude the existence of these rights as such. Moreover, as discussed below, the rights of future generations have been expressly addressed by some national courts.

4.3 Principles resulting from international environmental law

International environmental law formulates several principles, some of which lay down obligations for States with regard to the use of natural resources and the environment. This section reviews those principles of international environmental law that have a special resonance for the situation of armed conflict. These are the obligations to conserve and sustainably use natural wealth and resources, to promote the equitable allocation of natural resources between generations, to adopt a precautionary approach to the protection of the environment and natural resources, a prohibition against causing extraterri-

20 However, it must be noted that Article 8 of the Biodiversity Convention formulates a conditional obligation which provides lenience to States that find themselves in a difficult situation. States are only to implement the obligations contained in the provision "as far as possible and appropriate".

21 See, *e.g.*, P. Birnie, A.E. Boyle and C. Redgwell, *International Law and the Environment*, Third Edition, Oxford: Oxford University Press (2009), pp. 271-287; P. Sands & J. Peel, *Principles of International Environmental Law*, Cambridge: Cambridge University Press, Third Edition (2012), pp. 775-789. K.S.A. Ebeku, 'Constitutional Right to a Healthy Environment and Human Rights Approaches to Environmental Protection in Nigeria: Gbemre v. Shell Revisited', *RECIEL*, Vol.16, issue 3 (2007), pp. 312-320; M. Fitzmaurice & J. Marshall, 'The Human Right to a Clean Environment–Phantom or Reality? The European Court of Human Rights and English Courts Perspective on Balancing Rights in Environmental Cases', *Nordic Journal of International Law*, Vol. 76 (2007), pp. 103-151.

torial damage; and an obligation to cooperate for the protection of the global environment.

4.3.1 The obligation to conserve and sustainably use natural wealth and resources

The obligation to conserve and sustainably use natural wealth and resources, or the principle of sustainable use, seeks to set limits on the way in which States use the natural wealth and resources situated within their territory and beyond the limits of national jurisdiction, with the aim of safeguarding their capital for the benefit of present and future generations. The obligation is reflected in several of the principles of both the 1972 Stockholm and the 1992 Rio Declaration. Principle 2 of the Stockholm Declaration, for example, provides that "[t]he natural resources of the earth […] must be safeguarded for the benefit of present and future generations through careful planning or management, as appropriate". In addition, Principle 7 of the Rio Declaration imposes an obligation on States to "cooperate in a spirit of global partnership to conserve, protect and restore the health and integrity of the Earth's ecosystem".

Arguably, the obligation to conserve and use natural wealth and resources in a sustainable way constitutes the core of the concept of sustainable development and of international environmental law in general.[22] This is reflected in the large number of international environmental and other resource-related treaties in which the obligation is enshrined. Some of these indicate specific measures required for the implementation of the obligation, or provide definitions of the terms 'conservation' or 'sustainable use', others contain more general references to the obligation. For example, more general references are included in the 2006 International Tropical Timber Agreement, which aims, *inter alia,* to encourage the members of the International Tropical Timber Organization to "develop national policies aimed at sustainable utilization and conservation of timber producing forests".[23]

The 1992 Convention on Biological Diversity is an example of a more explicit treaty. It defines the term 'sustainable use' as "the use of components of biological diversity in a way and at a rate that does not lead to the long-term decline of biological diversity, thereby maintaining its potential to meet the needs and aspirations of present and future generations".[24] In addition, Article 6 of the convention obliges parties to develop or adapt "national strategies,

22 See D. French, *International law and policy of sustainable development*, Melland Schill Studies in International Law, Manchester: Manchester University Press (2005), p. 38.

23 Article 1(m) of the International Tropical Timber Agreement, 27 January 2006.

24 Article 2 of the Convention on Biological Diversity, Rio de Janeiro, 5 May 1992, *1760 U.N.T.S. 79*.

plans or programmes for the conservation and sustainable use of biological diversity", as well as to "integrate […] the conservation and sustainable use of biological diversity into […] plans, programmes and policies". In Articles 8 and 9 it also outlines specific measures which parties need to adopt to conserve biological diversity and contains in Article 10 a provision on the sustainable use of components of biological diversity.

The 1979 Convention on the Conservation of Migratory Species of Wild Animals, although focused mainly on conservation and not so much on sustainable use, also contains specific measures for the implementation of the obligation to conserve and sustainably use natural wealth and resources. Parties to the convention are required to take specific measures to conserve migratory species, especially those which are endangered (listed in Appendix I to the convention) or whose conservation status is unfavourable (listed in Appendix II to the convention).[25] In addition, the convention provides a definition of the term "conservation status of a migratory species", thus also providing an indirect definition of the term "conservation". The conservation status of a migratory species is defined as "the sum of the influences acting on the migratory species that may affect its long-term distribution and abundance".[26]

The obligation to conserve and sustainably use natural wealth and resources takes different forms. In the 1971 Ramsar Convention on the Protection of Wetlands, it is expressed in the principle of the "wise use" of wetlands and of migratory stocks of waterfowl.[27] The 1973 Convention on International Trade in Endangered Species of Wild Flora and Fauna (CITES) refers merely to the need to protect endangered species against "overexploitation".[28] International freshwater law uses the terms "equitable and reasonable" as well as "optimal and sustainable utilization".[29] Furthermore, in international fisheries law as well as in the law of the sea, the principle of sustainable use takes the form of an obligation to preserve the "maximum" or "optimum sustainable yield".[30]

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25 The convention contains in Article 1(1) (d) and (e) express definitions of the terms "unfavourable conservation status" and "endangered".

26 Article 1(1)(b) of the Convention on the Conservation of Migratory Species of Wild Animals, 23 June 1979, *1651 UNTS 333.*

27 Articles 3 and 2(6) of the Convention on Wetlands of International Importance especially as Waterfowl Habitat, 2 February 1971, *996 UNTS 245.*

28 Fourth paragraph of the preamble and Article II of the Convention on International Trade in Endangered Species of Wild Fauna and Flora, 3 March 1973, *993 UNTS 243.*

29 Articles 5(1) and 6(1)(f) of the UN Convention on the Law of the Non-Navigational Uses of International Watercourses, 21 May 1997, *36 ILM 700 (1997).*

30 See, *e.g.,* the Convention on Fishing and the Conservation of the Living Resources of the High Seas, 29 April 1958, *559 UNTS 285*, Article 1(2) and 2; UN Convention on the Law of the Sea, 10 December 1982, *1833 UNTS 3*, Article 61; United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, 4 August 1995, *2167 UNTS 88*, Article 5. For more on this topic, see D. Freestone, R. Barnes & D.M. Ong (ed.), *The Law of the Sea: Progress and*

Although these terms entail specific obligations in the fields in which they operate, they all imply the use of natural resources in such a way and at such a rate that the long-term survival and/or protection of the resources concerned is ensured. Moreover, in some cases, an evolution in the meaning of the terms can be detected. For example, this applies to the terms "maximum" or "optimum sustainable yield" in international fisheries law. While the 1958 Fisheries Convention used the term "optimum sustainable yield" primarily in the context of guaranteeing a continuous and maximum supply of food,[31] the 1995 UN Straddling Fish Stocks Agreement refers to the "long-term sustainability of straddling fish stocks and highly migratory fish stocks", as well as "the objective of their optimum utilization" in relation to measures to protect marine ecosystems and the biodiversity of the sea.[32]

The obligation to conserve and to use natural resources in a sustainable way was also recognised in treaties which are not aimed at the protection of specific natural resources. Under the General Agreement on Tariffs and Trade (GATT), which has now become part of the 1994 WTO Agreement, parties can, for example, invoke environmental exceptions to the basic rules of the GATT regarding non-discrimination between trading partners and between foreign and domestic products. These exceptions concern measures "necessary to protect human, animal or plant life or health" and measures "relating to the conservation of exhaustible natural resources".[33]

The 1994 WTO Agreement also emphasises the relationship between sustainable resource use and global economic growth:

> "relations in the field of trade and economic endeavour should be conducted with a view to raising standards of living, ensuring full employment and a large and steadily growing volume of real income and effective demand, and expanding the production of and trade in goods and services, *while allowing for the optimal use of*

Prospects, Oxford: Oxford University Press (2006), R.R. Churchill and A.V. Lowe, *The Law of the Sea*, 3rd edition, Yonkers, New York, Juris Publishing (1999), and N.M.J. van der Burgt, *The Contribution of International Fisheries Law to Human Development: An Analysis of Multilateral and ACP-EC Fisheries Instruments*, The Hague, Martinus Nijhoff Publishers (2012), pp.147-156.

31 Convention on Fishing and the Conservation of the Living Resources of the High Seas, 29 April 1958, *559 UNTS 285*, Article 1(2) and 2. Article 1(2) of this Convention contains a duty for States "to adopt […] such measures […] as may be necessary for the conservation of the living resources of the high seas", while Article 2 defines the expression 'conservation of the living resources of the high seas' as the aggregate of the measures rendering possible the optimum sustainable yield from those resources so as to secure a maximum supply of food and other marine products. Conservation programmes should be formulated with a view to securing in the first place a supply of food for human consumption".

32 United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, 4 August 1995, *2167 UNTS 88*, Article 5.

33 See Article XX (b) and (g) of the General Agreement on Tariffs in Trade, Annex 1A to the WTO Agreement, adopted on 15 April 1994, *1867 UNTS 187*.

> *the world's resources in accordance with the objective of sustainable development*, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development".[34]

Finally, the principle of sustainable use also to some extent forms the basis for the notion of "usufruct" in the international law of armed conflict. The notion of usufruct is central to the exploitation of natural resources in situations of occupation. In this respect Article 55 of the 1907 Hague Regulations provides that an occupier must, amongst other things, "safeguard the capital' of forests and agricultural estates, and that he must "administer them in accordance with the rules of usufruct". However, it should be noted that this provision only reflects the principle of sustainable use to a limited extent. In occupation law the rationale for protecting natural resources is not so much to protect the environment and its natural resources for the benefit of future generations, but rather to preserve the rights of the occupied State and its population to these resources. Therefore the focus is on protecting property rights rather than on ensuring long-term sustainability.

The obligation to conserve and sustainably use natural wealth and resources has also been appealed to in the case law of international tribunals. Although these cases do not clarify the contents or the legal status of the principle of sustainable use in any more detail, they do confirm the existence of the principle itself. In the *Icelandic Fisheries case*, the International Court of Justice confirmed the existence of an obligation in international fisheries law to conserve the living resources of the sea. The Court considered that

> "[i]t is one of the advances in maritime international law, resulting from the intensification of fishing, that the former *laissez-faire* treatment of the living resources of the sea in the high seas has been replaced by a recognition of a duty to have due regard to the rights of other States and the needs of conservation for the benefit of all'.[35]

Furthermore, in the *Gabčíkovo-Nagymaros case*, the International Court of Justice pronounced on the need to take into account modern norms and standards related to sustainable development in a paragraph that is often quoted:

> "Throughout the ages, mankind has, for economic and other reasons, constantly interfered with nature. In the past, this was often done without consideration of the effects upon the environment. Owing to new scientific insights and to a growing awareness of the risks for mankind – for present and future generations – of pursuit

34 Agreement Establishing the World Trade Organization, adopted on 15 April 1994, *1867 UNTS 154*. Author's emphasis added.

35 International Court of Justice, Fisheries Jurisdiction (United Kingdom v. Iceland), Judgment of 25 July 1974, *I.C.J. Reports 1974*, p. 3, para. 72.

> of such interventions at an unconsidered and unabated pace, new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past. This need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development".[36]

In the *Pulp Mills on the River Uruguay case*, the International Court of Justice interpreted the implications of the obligation of optimum and rational utilization in freshwater law. In this respect, the Court considered that

> "the attainment of optimum and rational utilization requires a balance between the Parties' rights and needs to use the river for economic and commercial activities on the one hand, and the obligation to protect it from any damage to the environment that may be caused by such activities, on the other".[37]

The International Tribunal for the Law of the Sea (ITLOS) pronounced on the issue of sustainable use as well. In the *Southern Bluefin Tuna cases* concerning an experimental fishing programme started by Japan, the Tribunal noted that "the conservation of the living resources of the sea is an element in the protection and preservation of the marine environment". It also indicated that "the parties should in the circumstances act with prudence and caution to ensure that effective conservation measures are taken to prevent serious harm to the stock of southern bluefin tuna" and that provisional measures were necessary in order to "avert further deterioration of the southern bluefin tuna stock".[38]

Therefore in the light of this considerable and constantly growing body of case law and the numerous provisions in treaty law relating to the obligation to conserve and sustainably use natural wealth and resources, it is justified to conclude that States are required under international law to properly manage their own natural wealth and resources and to use with restraint the natural wealth and resources that belong to several or all States, such as the fish in the high seas.[39]

This has several implications for the rights of States relating to the exploitation of their natural resources, both directly regarding the exploitation activities

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36 International Court of Justice, Gabčíkovo-Nagymaros Project (Hungary v. Slovakia), Judgment of 25 September 1997, *I.C.J. Reports 1997*, p. 7, para. 140.

37 International Court of Justice, Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment of 20 April 2010, *I.C.J. Reports 2010*, p. 14, para. 175.

38 International Tribunal for the Law of the Sea, Southern Bluefin Tuna Cases (New Zealand *v.* Japan; Australia *v.* Japan), Requests for Provisional Measures, Order of 27 August 1999, paras. 70-85.

39 Furthermore, as discussed in section 4.3.5, States are under an obligation to cooperate for the conservation of these common resources.

themselves and regarding the effects of these activities on the environment. The principle of sustainable use requires States to use their natural resources in a way and at a rate that allows these natural resources to regenerate, or in the case of non-living natural resources, to safeguard these natural resources for long-term development. However, at the same time, the principle leaves States with a broad scope to decide what is sustainable and what is not. This is both a strength and a weakness of the principle.

4.3.2 The obligation to safeguard natural resources for future generations

The obligation to safeguard natural resources for future generations is expressed in the principle of equity. This principle, which is firmly established in general international law, has a particular resonance in the context of international environmental law. The principle of equity as a principle of international environmental law places a dual responsibility on the present generation to ensure, on the one hand, that all people living today have the opportunity to benefit from the natural resources that have been left behind by past generations, and on the other hand, to leave behind for future generations a healthy planet which they can use for their development.[40]

In other words, the principle of equity has two components. The intra-generational component formulates an obligation for the present generation to provide access to the legacy of past generations to all members of their own generation. This component of equity is reflected in particular in concepts such as "optimum utilisation" in the international law of the sea, "optimal use" and "differential and more favourable treatment" in international economic law, and "common but differentiated responsibilities" in international environmental law.

However, the inter-generational component of equity is the most relevant to the current book. It concerns the responsibility of the present generation to safeguard the opportunities of future generations to use the natural wealth and resources for their needs and aspirations by protecting the diversity of

40 On this principle, see, *e.g.,* E. Brown-Weiss, *In Fairness to Future Generations: International law, Common Patrimony, and Intergenerational Equity*, Tokyo: United Nations University (1989); A. D'Amato, 'Do We Owe a Duty to Future Generations to Preserve the Global Environment?' *American Journal of International Law,* Vol. 84 (1990), pp. 190-198; N.J. Schrijver, 'After Us, the Deluge? The Position of Future Generations of Humankind in International Environmental Law', in M.A.M. Salih, *Climate Change and Sustainable Development: New Challenges for Poverty Reduction*, Cheltenham: Edward Elgar (2009), pp. 59-78; D. Shelton, 'Equity', in D. Bodansky, J. Brunnée & E. Hey, *The Oxford Handbook of International Environmental Law*, Oxford: Oxford University Press (2007); M. Fitzmaurice, 'International Protection of the Environment', *Recueil des cours*, Vol. 293 (2001), The Hague, Boston, London: Martinus Nijhoff Publishers (2002), pp. 186-201; S.A. Atapattu, *Emerging Principles of International Environmental Law*, New York: Transnational Publishers, Series on International Law and Development (2006), pp. 113-119.

natural resources, preserving the quality of the planet and maintaining access to the legacy of past generations.[41]

Inter-generational equity is one of the core principles of sustainable development. However, it is often presented as a philosophical or political concept rather than as a legal principle.[42] This may be partly due to some of the inherent difficulties of the principle which relate to the beneficiaries and addressees of the associated rights and obligations.

The principle of inter-generational equity confers responsibilities on the present generation which may be demanded by future generations. With reference to Parfit's paradox and the chaos theory, it can be argued that the present generation cannot have a responsibility to an undefined group of people whose composition is unclear and may alter as a consequence of the actions taken by the present generation by fulfilling their obligations to future generations.[43] Although effectively refuted by Brown-Weiss, who emphasises that the rights of future generations are not individual rights but rather group rights or "*generational* rights, which must be conceived of in the temporal context of generations",[44] problems with regard to this idea do arise with respect to its implementation. It is for this reason that the principle of inter-generational equity cannot be regarded as a legal principle that formulates concrete obligations for States with regard to future generations. Rather, the principle of inter-generational equity formulates a general responsibility for States to take into account the long-term effects of their actions when they contemplate activities that could have negative effects on the environment or natural resources.

For the purposes of the present book, it is relevant to note the following observation of the Experts Group on Environmental Law of the World Commission on Environment and Development, which establishes an explicit connection between equity and the rights and obligations of parties to an armed conflict:

> "the conservation or use of the environment and natural resources for the benefit of present and future generations also implies certain restraints for the parties to an international or non-international armed conflict in that they shall abstain from

41 See in particular, E. Brown-Weiss, *In Fairness to Future Generations: International law, Common Patrimony, and Intergenerational Equity*, Tokyo: United Nations University (1989).

42 See, e.g., D. French, *Law and Policy of Sustainable Development*, Melland Schill Studies in International Law, Manchester: Manchester University Press (2005), p. 28, who distinguishes between equity "as a recognized legal term", referring to the use of the term in jurisprudence, and its "political meaning" within the context of the discussion on sustainable development. For philosophical views on the concept of intergenerational equity, see, *inter alia,* J. Rawls, *A Theory of Justice*, Revised Edition, Oxford: Oxford University Press (1999).

43 See, e.g., A. D'Amato, 'Do We Owe a Duty to Future Generations to Preserve the Global Environment?' *American Journal of International Law,* Vol. 84 (1990), pp. 190-198.

44 E. Brown-Weiss, 'Our Rights and Obligations to Future Generations for the Environment', *American Journal of International Law,* Vol. 84 (1990), p. 205.

> methods or means of warfare which are intended, or may be expected, to cause widespread, long-lasting or severe damage to the environment".[45]

Although the accuracy of this statement can be questioned from a positivist perspective[46] it can be argued in more general terms that parties to an armed conflict must take into account the effects of their actions on future generations. This corresponds to the general line of reasoning of the International Court of Justice in its *Nuclear Weapons Advisory Opinion*. As part of its assessment regarding the legality of the threat or use of nuclear weapons, the Court explicitly took into account the potential effects of nuclear weapons on future generations.[47] Thus the Court recognised that in their decisions and policies, States have to have due regard for the consequences of their actions on future generations. This includes the consequences for future generations resulting from their actions in armed conflict.

Inter-generational equity has been recognised as a guiding principle in several treaties. An early reference to future generations can be found in the 1946 Whaling Convention, which recognises in its preamble "the interest of the nations of the world in safeguarding for future generations the great natural resources represented by the whale stocks".[48] Other examples include the 1973 CITES Convention which recognises that "wild fauna and flora in their many beautiful and varied forms are an irreplaceable part of the natural systems of the earth which must be protected for this and the generations to come", the 1992 UN Convention on Climate Change which states that "[t]he Parties should protect the climate system for the benefit of present and future generations of humankind", and the 1992 Biodiversity Convention, which states that parties are "[d]etermined to conserve and sustainably use biological diversity for the benefit of present and future generations".[49]

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45 R.D. Munro & J.G. Lammers, *Environmental Protection and Sustainable Development: Legal Principles and Recommendations*, Report adopted by the Experts Group on Environmental Law of the World Commission on Environment and Development, London/Dordrecht/Boston: Graham & Trotman/Martinus Nijhoff (1986), p. 45. This issue will be discussed in more detail in Part II of this book.

46 The statement uses the language of Articles 35(3) and 55 of Additional Protocol I relating to international armed conflicts, which does not have an equivalent in Additional Protocol II relating to non-international armed conflicts. These provisions are discussed in more detail in Chapter 6 of this study.

47 International Court of Justice, Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 8 July 1996, *I.C.J. Reports* 1996, p. 226, paras. 35 and 36.

48 First paragraph of the preamble of the International Convention for the Regulation of Whaling, 2 December 1946, *161 UNTS 72*.

49 See the first paragraph of the preamble of the Convention on International Trade in Endangered Species of Wild Fauna and Flora, 3 March 1973, *993 UNTS 243*; Article 3(1) of the UN Framework Convention on Climate Change, 9 May 1992, 1771 U.N.T.S. 107; and the last paragraph of the preamble of the 1992 Biodiversity Convention, 5 May 1992, 1760 U.N.T.S. 79. For other references to future generations in treaty law, see the 1979 Convention on the Conservation of Migratory Species of Wild Animals which states in the second

Reference can also be made to the 1972 World Heritage Convention, which aims to preserve parts of the cultural and natural heritage as part of the world heritage of mankind as a whole. Article 4 of this convention formulates an obligation for parties to ensure "the identification, protection, conservation, presentation and transmission to future generations of the [world] cultural and natural heritage […] situated on its territory".[50] In addition to the references in treaty law, the 1972 Stockholm Declaration and the 1992 Rio Declaration also contain explicit references to responsibilities owed to present and future generations.[51]

While the references to inter-generational equity in these treaties serve to emphasise the general responsibility of States with regard to the rights of future generations, some national decisions have actually expressly recognised the rights of future generations. Furthermore, these decisions have identified corresponding obligations for national government authorities. In the often cited *Minors Oposa case*, the Philippine Supreme Court accorded legal standing to children, as well as unborn generations, to claim a constitutional right to a "balanced and healthful ecology". The Court explicitly recognised the obligation for the government to guarantee that right to future generations.[52] Reference can also be made to the national case of the Fuel Retailers Association of Southern Africa v the Director-General, in which the South African Constitu-

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paragraph of the preamble that parties are "[a]ware that each generation of man holds the resources of the earth for future generations and has an obligation to ensure that this legacy is conserved and, where utilized, is used wisely"; the fifth paragraph of the preamble of the 1976 ENMOD Convention, which states that the parties realise "that the use of environmental modification techniques for peaceful purposes could improve the interrelationship of man and nature and contribute to the preservation and improvement of the environment for the benefit of present and future generations"; Article 4 of the 1979 Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, adopted on 18 December 1979, *1363 UNTS 21*, which states that in the exploration and use of the Moon and other celestial bodies "[d]ue regard shall be paid to the interests of present and future generations"; and the fifth paragraph of the preamble of the 1992 UN Convention on the Law of the Non-Navigational Uses of International Watercourse, which expresses "the conviction that a framework convention will ensure the utilisation, development, conservation, management and protection of international watercourses and the promotion of the optimal and sustainable utilisation thereof for present and future generations".

50 It is further interesting to note that UNESCO's General Conference has adopted a Declaration on the Responsibilities of the Present Generations Towards Future Generations in 1997, which outlines, *inter alia,* the environmental responsibilities of the present generation towards future generations. See UNESCO, *Records of the General Conference*, Twenty-ninth Session, Paris, 21 October to 12 November 1997, Vol. 1, Resolutions, p. 69.

51 Principle 1 of the Stockholm Declaration provides that "Man […] bears a solemn responsibility to protect and improve the environment for present and future generations", while Principle 2 states that "[t]he natural resources of the earth […] must be safeguarded for the benefit of present and future generations"; Principle 3 of the Rio Declaration states that "[t]he right to development must be fulfilled so as to equitably meet developmental and environmental needs of present and future generations".

52 Minors Oposa v. Secretary of the Department of Environmental and Natural Resources, The Supreme Court of the Philippines, Judgment of July 1993.

tional Court considered that "[t]he present generation holds the earth in trust for the next generation. This trusteeship position carries with it the responsibility to look after the environment. It is the duty of the Court to ensure that this responsibility is carried out [by the responsible authorities]".[53] Nevertheless, these cases continue to be exceptional.

The principle of inter-generational equity has therefore been recognised in international law to some extent, in particular in treaty law, where it appears as a guiding rather than a legal principle.[54] Although national judicial decisions show that the principle can entail concrete legal obligations for States as well, it is generally not considered to do so. However, the principle of intergenerational equity has also been expressed in other concepts. It is inextricably linked with and may be considered to be one of the principal rationales behind the obligation of conservation and sustainable use of natural wealth and resources.[55]

4.3.3 The obligation to prevent damage to the environment of other States

The obligation of States to prevent damage to the environment of other States and of areas beyond national jurisdiction can be regarded as one of the fundamental principles of international environmental law.[56] Based on the general rule referred to in the *Corfu Channel Case* that States have an obligation not to use their territory in a way contrary to the rights of other States, the obliga-

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53 Fuel Retailers Association of Southern Africa v Director-General: Environmental Management Department of Agriculture, Conservation and Environment, Mpumalanga Province, and Others, 2007 (6) SA 4 (CC), 2007, (10) BCLR 1059 (CC), para. 102, quoted in the third report of the International Committee on International Law on Sustainable Development of the International Law Association, *Report of the Seventy-Third Conference of the International Law Association*, Rio de Janeiro (2008), p. 904. See also the final report of the International Committee on International Law on Sustainable Development of the International Law Association, Sofia (2012), pp. 14-17.

54 A recent report of the UN Secretary-General on 'Intergenerational Solidarity and the Needs of Future Generations' illustrates this. While the report examines the principle of intergenerational equity in depth, it does not refer to it as a legal principle. See Report of the Secretary-General, 'Intergenerational Solidarity and the Needs of Future Generations', *UN Doc. A/68/322*, 15 August 2013.

55 In addition, see N.J. Schrijver, 'After Us, the Deluge? The Position of Future Generations of Humankind in International Environmental Law', in M.A.M. Salih, *Climate Change and Sustainable Development: New Challenges for Poverty Reduction*, Cheltenham: Edward Elgar (2009), pp. 59-78.

56 See D. Bodansky, J. Brunnée & E. Hey, *The Oxford Handbook of International Environmental Law*, Oxford: Oxford University Press (2007), p. 9, who refer to the obligation as a "cornerstone of international environmental law". On this topic in more detail, see, e.g., X. Hanqin, *Transboundary Damage in International Law*, Cambridge: Cambridge University Press (2003); and G. Handl, 'Transboundary Impacts', in D. Bodansky, J. Brunnée & E. Hey, *The Oxford Handbook of International Environmental Law*, Oxford: Oxford University Press (2007), pp. 531-549.

tion to prevent damage to the environment of other States and beyond national jurisdiction sets limits on the sovereignty of a State regarding the use of its territory in order to protect the sovereignty of other States.[57]

The obligation was formulated for the first time in the 1941 *Trail Smelter Arbitration* case concerning transboundary air pollution. In this case, the arbitral tribunal determined in its final judgment that

> "under the principles of international law […] no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another or the properties or persons therein, when the case is of serious consequence and the injury is established by clear and convincing evidence".[58]

Gradually the nature of the obligation shifted from being purely bilateral into having a more general application, extending not only to the territory of other States but also to areas beyond national jurisdiction.[59] It is in this form that the obligation was inserted in Principle 21 of the 1972 Stockholm Declaration, which formulates a responsibility for states "to ensure that activities within their jurisdiction or control do not cause damage to the environment of other states *or of areas beyond the limits of national jurisdiction*".[60]

This "Principle 21 obligation", as it is often referred to in the literature, has since been recognised in several international conventions, including the conventions on climate change, biodiversity and desertification, and was restated in Principle 2 of the 1992 Rio Declaration.[61] In addition, the existence of the obligation was affirmed in the case law of several international tribunals, including the International Court of Justice and tribunals acting under the auspices of the Permanent Court of Arbitration (PCA).

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57 International Court of Justice, Corfu Channel (United Kingdom v. Albania), Merits, Judgment of 9 April 1949, *I.C.J. Reports 1949*, p. 22. See also G. Handl, 'Transboundary Impacts', in D. Bodansky, J. Brunnée & E. Hey, *The Oxford Handbook of International Environmental Law*, Oxford: Oxford University Press (2007), p. 533.

58 *Trail Smelter Arbitration* (United States v. Canada), Judgment of 11 March 1941, *Reports of International Arbitral Awards* Vol. III, United Nations (2006), p. 1965.

59 See P.W. Birnie, A.E. Boyle and C. Redgwell, *International Law and the Environment*, Third Edition, Oxford: Oxford University Press (2009), p. 145.

60 Principle 21 of the Declaration of the United Nations Conference on the Human Environment, Stockholm, 16 June 1972, *11 ILM 1416 (1972)*. Author's emphasis added.

61 See the preamble of the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, 29 December 1972, *1046 UNTS 120*; Article 194(2) of the United Nations Convention on the Law of the Sea, 10 December 1982, *1833 UNTS 3*; Article 3 of the Convention on Biological Diversity, 5 May 1992, *1760 U.N.T.S. 79*; paragraph 8 of the preamble of the UN Framework Convention on Climate Change, 9 May 1992, *1771 U.N.T.S. 107*; paragraph 15 of the preamble of the United Nations Convention to Combat Desertification in Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, 17 June 1994, *1954 U.N.T.S. 3*; Article 7 of the UN Convention on the Law of the Non-Navigational Uses of International Watercourses, 21 May 1997, *36 ILM 700 (1997),* Principle 2 of the Rio Declaration on Environment and Development, 13 June 1992, *31 ILM 874 (1992)*.

In its *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, the International Court of Justice expressly affirmed "the existence of a general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national control' and stated that this obligation " is now part of the corpus of international law relating to the environment".[62] As Duncan French noted, the Court therefore confirmed the autonomous status of this rule in international environmental law.[63]

In two subsequent contentious cases – the 1997 *Gabčíkovo-Nagymaros case* and the 2010 *Pulp Mills on the River Uruguay case* – the Court took the opportunity to reaffirm its position.[64] In the *Iron Rhine Arbitration*, the arbitral tribunal operating under the auspices of the Permanent Court of Arbitration (PCA) also confirmed this obligation and added that it applies equally to activities undertaken by a State on the territory of another State in the exercise of rights guaranteed by treaty.[65]

As may be inferred from the text of Principle 21, which mentions environmental damage resulting from "activities within [the] jurisdiction *or* control' of States,[66] the obligation to prevent extraterritorial damage applies both to extraterritorial damage caused by activities undertaken within the national jurisdiction of States and to activities undertaken by them outside their jurisdiction but within their control. As Louis Sohn noted, this implies that the

62 International Court of Justice, Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, *I.C.J. Reports 1996*, p. 66, para. 29. For a more detailed analysis of the court's judgment in this respect, see the contributions of Weiss and Momtaz in L. Boisson de Chazournes & P. Sands, *International Law, the International Court of Justice and Nuclear Weapons*, Cambridge: Cambridge University Press (1999). It should be noted that there are some differences between the obligation as formulated by the court on the one hand, and Principle 21 on the other. These relate to the following points. On the one hand, the court constrains the obligation to activities which fall both within the jurisdiction and the control of States. On the other hand, the court extends the obligation to areas beyond national control instead of jurisdiction. Moreover, the court formulates a more general obligation to respect the environment instead of an obligation not to cause damage. See E. Brown Weiss, 'Opening the Door to the Environment and to Future Generations', in L. Boisson de Chazournes & P. Sands, *International Law, the International Court of Justice and Nuclear Weapons*, Cambridge: Cambridge University Press (1999), p. 340.

63 D. French, 'A Reappraisal of Sovereignty in the Light of Global Environmental Concerns', in *Legal Studies*, Vol. 21 (2001), p. 385.

64 International Court of Justice, Gabčíkovo-Nagymaros Project (Hungary v. Slovakia), Judgment, *I.C.J. Reports 1997*, p. 7, para. 53 and International Court of Justice, Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay), *I.C.J. Reports 2010*, para. 193.

65 Permanent Court of Arbitration, Arbitration Regarding the Iron Rhine ("IJzeren Rijn") Railway (Between the Kingdom of Belgium and the Kingdom of the Netherlands), Award of 24 May 2005, paras. 222-224.

66 Author's emphasis added.

obligation "applies clearly to citizens of a state, to ships flying its flag, and perhaps even to corporations incorporated in its territory".[67]

Furthermore, and highly relevant to the current book, it can be argued that the obligation applies to a State which exercises *de facto* control on (part of) the territory of another State as well. This can be inferred from the Commentary of the ILC to its *Draft articles on Prevention of Transboundary Harm from Hazardous Activities*, which noted that "[t]he function of the concept of "control" in international law is to attach certain legal consequences to a State whose jurisdiction over certain activities or events is not recognized by international law; it covers situations in which a State is exercising de facto jurisdiction, even though it lacks jurisdiction de jure".[68] If this is a correct interpretation of the term 'control', it implies that the obligation to prevent damage to the environment of other States applies in situations of occupation.[69]

The duty of prevention is central to the obligation to prevent damage to the environment of other States and to areas beyond national jurisdiction.[70] This duty of prevention, sometimes also designated as the principle of prevention, is referred to in several cases relating to the prohibition against causing transboundary environmental damage.

In the *Gabčíkovo-Nagymaros case*, for example, the International Court of Justice determined that "in the field of environmental protection, vigilance and prevention are required on account of the often irreversible character of damage to the environment and of the limitations inherent in the very mechanism of reparation of this type of damage"[71] In addition, in the *Pulp Mills case*, the Court even referred to the customary nature of "the principle of prevention". In this regard, the Court pointed out that "the principle of prevention, as a customary rule, has its origins in the due diligence that is required of a State in its territory."[72] Similarly, in the *Iron Rhine Arbitration*, the arbitral tribunal determined that "where development may cause significant harm to the environment there is a duty to prevent, or at least mitigate, such harm.

67 L.B. Sohn, 'The Stockholm Declaration on the Human Environment', *Harvard International Law Journal, Vol. 14* (1973), p. 493.

68 Commentary of the ILC on its Draft articles on Prevention of Transboundary Harm from Hazardous Activities, *Yearbook of the International Law Commission*, Vol. II, Part Two (2001), p. 151, para. 12.

69 This was expressly contemplated by the ILC, who referred to cases of "unlawful intervention, occupation and unlawful annexation". *Ibid.*

70 According to Handl, "the obligation of prevention presents itself as an essential aspect of the obligation not to cause significant harm to the environment beyond national jurisdiction or control". G. Handl, 'Transboundary Impacts', in D. Bodansky, J. Brunnée & E. Hey, *The Oxford Handbook of International Environmental Law*, Oxford: Oxford University Press (2007), p. 539.

71 International Court of Justice, Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment, *I.C.J. Reports 1997*, p. 78, para. 140.

72 International Court of Justice, Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay), *I.C.J. Reports 2010*, para. 101.

This duty, in the opinion of the Tribunal, has now become a principle of general international law."[73]

It should be noted that the obligation to prevent transboundary environmental damage does not imply a complete prohibition against States engaging in activities that cause transboundary damage. Although not expressly indicated in Principle 21, it is generally acknowledged that the obligation of States only concerns the prevention of damage that exceeds a certain minimum threshold.[74] This threshold is usually considered to be damage that may be designated as "significant". According to the ILC commentary to the *Draft Articles on Prevention of Transboundary Harm from Hazardous Activities*, this may be defined as "something more than 'detectable', but need not be at the level of 'serious' or 'substantial'".[75]

Furthermore, the obligation to prevent extraterritorial damage must be interpreted by States as an obligation to exercise due diligence with regard to activities undertaken by them.[76] In general, this implies that States are to "use all the means at [their] disposal" or "to take all appropriate measures" to prevent transboundary damage.[77] For this purpose, States are not only to adopt appropriate rules and procedures, but also to take on "a certain level

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73 Permanent Court of Arbitration, Arbitration Regarding the Iron Rhine ("IJzeren Rijn") Railway (Between the Kingdom of Belgium and the Kingdom of the Netherlands), Award of 24 May 2005, para. 59.

74 See A. Trouwborst, *Precautionary Rights and Duties of States*, Leiden: Martinus Nijhoff Publishers (2006), p. 44; See also J. Brunnée, 'Common Areas, Common Heritage, Common Concern', in D. Bodansky, J. Brunnée, & E. Hey, *The Oxford Handbook of International Environmental Law*, Oxford: Oxford University Press (2007), p. 552.

75 Draft articles on Prevention of Transboundary Harm from Hazardous Activities, with commentaries, *Yearbook of the International Law Commission*, vol. II, Part Two (2001), p. 152. See also Article 7 of the UN Convention on the Law of the Non-Navigational Uses of International Watercourses, 21 May 1997, *36 ILM 700 (1997)*; and the judgment of the International Court of Justice in the case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay), *I.C.J. Reports 2010*, para. 101, where the court states that a State "is thus obliged to use all the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing *significant* damage to the environment of another State". Author's emphasis added.

76 See P.W. Birnie, A.E. Boyle and C. Redgwell, *International Law and the Environment*, Third Edition, Oxford: Oxford University Press (2009), p. 147. Also see X. Hanqin, *Transboundary Damage in International Law*, Cambridge: Cambridge University Press (2003), pp. 162-187.

77 International Court of Justice, Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment of 20 April 2010, *I.C.J. Reports 2010*, para. 101; and Article 3 of the *ILC Draft articles on Prevention of Transboundary Harm from Hazardous Activities*. See also Article 194(2) of the United Nations Convention on the Law of the Sea, 10 December 1982, *1833 UNTS 3*, which indicates an obligation for States to "take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment".

of vigilance in their enforcement and the exercise of administrative control applicable to public and private operators".[78]

Arguably, such an obligation to act with vigilance is also relevant for the situation of armed conflict, when armed groups operate in territory under the control of a foreign State. In the *Congo-Uganda case*, the International Court of Justice determined the existence of an obligation of vigilance incumbent upon Uganda in territories occupied by that State. According to the Court, this obligation of vigilance implied a duty for the occupant to prevent acts of looting and plundering of natural resources by armed groups acting on their own account.[79] Arguably, the obligation for States to prevent damage to the environment of other States therefore also includes a duty to prevent environmental damage caused by armed groups in territories under their control.

In addition to these obligations, the due diligence obligation entails several other procedural obligations, including an obligation to notify and to inform the affected States of the potential damage, an obligation to consult with them on actions to be taken and an obligation to conduct a so-called "Environmental Impact Assessment (EIA)" in order to determine the risk and extent of the damage.[80]

These obligations are dealt with in Principles 17 and 19 of the 1992 Rio Declaration. In this respect, Principle 17 of the Rio Declaration states that "[e]nvironmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment", while Principle 19 formulates a duty for States to "provide prior and timely notification and relevant information to potentially affected States on activities that may have a significant adverse transboundary environmental effect and shall consult with those States at an early stage and in good faith".

The obligation to notify and to inform other States has also been recognised in treaty law, *inter alia,* in Article 14(1)(d) of the 1992 Convention on Biological Diversity, and in the case law of international tribunals, including the judgment

78 International Court of Justice, Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment of 20 April 2010, *I.C.J. Reports 2010*, para. 197. See also P.W. Birnie, A.E. Boyle and C. Redgwell, *International Law and the Environment*, Third Edition, Oxford: Oxford University Press (2009), pp. 147-150. See also X. Hanqin, *Transboundary Damage in International Law*, Cambridge: Cambridge University Press (2003), p. 163, who refers to an obligation to exercise "good government", that is "evincing responsibility for its international obligation to exercise proper care so as not to cause such effects or to prevent others in its territory from causing such effects".

79 International Court of Justice, Case concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment of 19 December 2005, *I.C.J. Reports 2005*, p. 168, para. 179. This issue is discussed in more detail in the second part of this study.

80 For more detail on these procedural obligations, see X. Hanqin, *Transboundary Damage in International Law*, Cambridge: Cambridge University Press (2003), pp. 165-178.

of the International Court of Justice in the *Pulp Mills Case*, as well as the order of the International Tribunal on the Law of the Sea in the *Land Reclamation Case* for provisional measures to be taken.[81] The obligation to conduct an EIA to prevent transboundary damage to the environment has similarly attained a strong status in international law. It has been inserted in several treaties, including Article 4(2)(f) and Annex V(A) of the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Article 206 of UNCLOS and Article 12 of the 1997 UN Convention on the Law of the Non-Navigational Uses of International Watercourses.[82]

Moreover, in its judgment in the *Pulp Mills case*, the International Court of Justice even went so far as to state that:

> "the obligation to protect and preserve [the aquatic environment] has to be interpreted in accordance with a practice, which in recent years has gained so much acceptance among States that it may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource. Moreover, due diligence, and the duty of vigilance and prevention which it implies, would not be considered to have been exercised, if a party planning works liable to affect the régime of the river or the quality of its waters did not undertake an environmental impact assessment on the potential effects of such works".[83]

As the obligation to conduct an EIA is not aimed specifically at preventing environmental damage in a transboundary context, it is discussed at greater length in the following section dealing with the obligation to adopt a precautionary approach to protect the environment and natural resources.

In conclusion, for the purposes of the present book, it is possible to identify three different situations in which the obligation to prevent harm to territories outside national jurisdiction or control entails specific responsibilities for States.

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81 See International Court of Justice, Case Concerning Pulp Mills on the River Uruguay (Argentina *v.* Uruguay), Judgment of 20 April 2010, *I.C.J. Reports 2010*, paras. 67-158 concerning the procedural obligations of the parties to the dispute; and International Tribunal for the Law of the Sea, Case Concerning Land Reclamation by Singapore in and around the Straits of Johor (Malaysia *v.* Singapore), Order of 8 October 2003, para. 99. In general on the topic of environmental information and related duties, see P. Sands & J. Peel, *Principles of International Environmental Law*, Cambridge: Cambridge University Press, Third Edition (2012), pp. 624-664.

82 See the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, 22 March 1989, *1673 U.N.T.S. 126*; the UN Convention on the Law of the Non-Navigational Uses of International Watercourses, 21 May 1997, *36 I.L.M. 715 (1997)*; and the UN Convention on the Law of the Sea, 10 December 1982, *1833 U.N.T.S. 3*. For other examples, also see P. Sands & J. Peel, *Principles of International Environmental Law*, Third Edition (2012), pp. 601–623.

83 International Court of Justice, Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay), *I.C.J. Reports 2010*, para. 204.

First, the obligation is relevant for activities relating to resource exploitation which a State undertakes within its own jurisdiction and which result in transboundary damage, such as the pollution of an international river by chemical substances used for the extraction of minerals.

Secondly, the obligation applies to the situation in which a State exploits natural resources outside its jurisdiction but within its control, for example, when a State exploits the natural resources of another State on whose territory it exercises *de facto* control, including the situation in which it has occupied that territory. Moreover, in situations of occupation, the obligation of a State to prevent damage to the environment of other States includes an obligation to prevent other actors, including armed groups, from causing such damage.

The third situation in which the obligation becomes relevant is in the context of the exploitation of natural resources shared by two or more states, so-called shared or transboundary natural resources. Natural resources such as forests, oil fields and natural gas deposits, located on the border between two or more States, are particularly important in this respect.[84] In principle, a State is liable with respect to its neighbouring State(s) for damage caused to the shared resource either through its own activities or through the activities of private parties operating from within its jurisdiction.

4.3.4 The obligation to adopt a precautionary approach to protect the environment and natural resources

The obligation to prevent damage to the environment is also expressed in the precautionary principle which requires States to act with caution, to prevent damage not only to the territory of other States but also to their own domestic environment.[85] At the core of this principle – which is also referred to as an "approach" by States preferring more flexibility, in particular the United States[86] – lies the need to anticipate environmental damage, even in the face of scientific uncertainty.[87]

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84 For the rules relating to the management of shared natural resources, see section 2.3.5 of this chapter.

85 See N.J. Schrijver, 'The Status of the Precautionary Principle in International Law and its Application and Interpretation in International Litigation', in *Liber Amicorum Jean-Pierre Cot: Le Procès International*, Brussels: Bruylant, p. 241-253; P. Sands & J. Peel, *Principles of International Environmental Law*, Cambridge: Cambridge University Press, Third Edition (2012), pp. 217-228; G. Handl, 'Transboundary Impacts', in D. Bodansky, J. Brunnée & E. Hey, *The Oxford Handbook of International Environmental Law*, Oxford: Oxford University Press (2007), p. 539; A. Kiss & D. Shelton, *Guide to International Environmental Law*, Leiden/ Boston: Martinus Nijhoff Publishers (2007), pp. 90-94.

86 See N.J. Schrijver, 'The Status of the Precautionary Principle in International Law and its Application and Interpretation in International Litigation', in *Liber Amicorum Jean-Pierre Cot: Le Procès International*, Brussels: Bruylant, p. 243.

87 *Ibid*.

The precautionary principle requires States, "[w]here there are threats of serious or irreversible damage [not to use] lack of full scientific certainty […] as a reason for postponing cost-effective measures to prevent environmental degradation".[88] In other words, if there are indications that particular activities or policies could cause severe damage to the environment, the precautionary principle requires States to take measures to prevent the damage, even if the scientific evidence does not make it possible to identify the precise risks concerned.

In this way the principle extends the obligation of States to use their natural resources in a sustainable way, in the sense that the precautionary principle requires States to take into account the risks involved in the exploitation of their natural wealth and resources.[89] Therefore the principle significantly extends the standard of care expected of States when undertaking activities that could have a negative impact on the environment. More specifically, the precautionary principle extends the duty of prevention to situations of scientific uncertainty.[90]

At the same time, the principle is in some ways more restrictive than the principle of prevention. While the principle of prevention applies to "significant" damage, the precautionary principle sets a higher standard. It applies only to situations where the potential damage is either "serious" or "irreversible". In addition, precautionary action is required only when the measures to be taken are cost-effective and is dependent on the respective capabilities of States.[91] In a way, these additional requirements are understandable, as

88 Principle 15 of the Rio Declaration on Environment and Development. On the precautionary principle, see in general, A. Trouwborst, *Precautionary Rights and Duties of States, Leiden: Martinus Nijhoff Publishers* (2006); A. Trouwborst, *Evolution and Status of the Precautionary Principle in International Law*, The Hague: Kluwer Law International, International Environmental Law and Policy Series Vol. 62 (2002); N.J. Schrijver, 'The Status of the Precautionary Principle in International Law and its Application and Interpretation in International Litigation', in *Liber Amicorum Jean-Pierre Cot: Le Procès International*, Brussels: Bruylant, pp. 241-253; D. Freestone & E. Hey, *The Precautionary Principle and International Law: The Challenge of Implementation*, The Hague: Kluwer Law International (1996).

89 In this respect, also see P. Birnie, A.E. Boyle and C. Redgwell, *International Law and the Environment*, Third Edition, Oxford: Oxford University Press (2009), p. 199, who argue that "[t]he precautionary principle, endorsed by Principle 15 of the Rio Declaration is also an important element of sustainable utilization, because it addresses the key question of uncertainty in the prediction of environmental effects".

90 In this respect, Kiss and Shelton argue that "the precautionary principle can be considered as the most developed form of prevention that remains the general basis for environmental law". A. Kiss & D. Shelton, *Guide to International Environmental Law*, Leiden/Boston: Martinus Nijhoff Publishers (2007), p. 95.

91 For an analysis of the relationship between the precautionary principle and socio-economic interests, including a detailed account of the ongoing debate on this issue, see A. Trouwborst, *Precautionary Rights and Duties of States,* Leiden: Martinus Nijhoff Publishers (2006), pp. 229-281.

the element of scientific uncertainty makes it more difficult to assess the risks involved in the proposed activities.

The precautionary principle has found recognition in several international environmental conventions, covering such diverse fields as the international law for the protection of the ozone layer, biodiversity and the climate system, as well as freshwater law and fisheries law.[92] Precautionary considerations underlie many of these conventions and constitute a basis for action. This can be illustrated with reference to the legal regime to address climate change. Even though the 1992 Climate Change Convention notes in its preamble "that there are many uncertainties in predictions of climate change", several parties to this Convention have agreed to take concrete measures to reduce the emission of greenhouse gases under the 1997 Kyoto Protocol.

In most environmental conventions the threshold for the application of the precautionary principle is serious or irreversible damage. Examples of conventions that set a lower threshold include the 1992 Biodiversity Convention which calls for precautionary action when there is a risk of 'significant reduction or loss of biological diversity" and its 2000 Cartagena Protocol on Biosafety which refers only to "adverse effects".[93]

Apart from these environmental treaties, elements of the precautionary principle can also be found in treaties in other fields of international law. UNCLOS Article 206 provides, for example, that States must assess the potential effects of planned activities under their jurisdiction or control when they have "*reasonable* grounds for believing" that such activities "*may* cause substantial pollution of or significant and harmful changes to the marine environment".[94] Furthermore, the Agreement on the Application of Sanitary and Phytosanitary

92 See Article 3(3) of the 1992 UN Framework Convention on Climate Change, 9 May 1992, *1771 U.N.T.S.107*; Paragraph 9 of the Preamble to the 1992 Biodiversity Convention, 5 May 1992, *1760 U.N.T.S.79*; Articles 1, 10.6 and 11.8 of the 2000 Cartagena Protocol on Biosafety, 29 January 2000, *2226 U.N.T.S.208*; paragraph 4 of the preamble to the 2010 Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits Arising from their Utilization, 29 October 2010; 2(5)(a) of the 1992 Convention on the Protection and Use of Transboundary Watercourses and International Lakes, 17 March 1992, *1936 U.N.T.S. 269*; Articles 5(c) and 6 of the 1995 United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, 4 August 1995, *2167 U.N.T.S.88*; and Paragraph 8 of the preamble, Articles 1 and 8(9) of the 2001 Stockholm Convention on Persistent Organic Pollutants, 22 May 2001, *40 ILM 532*. Precautionary language can also be discerned in older legal instruments, including paragraph 5 of the preamble of the 1985 Vienna Convention for the Protection of the Ozone Layer, 22 March 1985, *1513 U.N.T.S.323*; paragraph 8 of the preamble to the 1987 Montreal Protocol on Substances that Deplete the Ozone Layer, 16 September 1987 (as amended in 1992), *26 ILM 1550* (1987); and Article IV of the 1968 African Convention on the Conservation of Nature and Natural Resources (revised 11 July 2003).

93 See paragraph 9 of the Preamble to the Biodiversity Convention and Article 1 of the Cartagena Protocol on Biosafety.

94 Author's emphasis added.

Measures (SPS Agreement), one of the treaties of the World Trade Organisation (WTO), also contains some references to precaution, in particular in Article 5.7, which permits members of the World Trade Organisation, to provisionally adopt measures to protect human, animal or plant life or health "[i]n cases where relevant scientific evidence is insufficient".[95]

The concept of precaution is also found in international humanitarian law. In addition to provisions relating to precautions in situations of armed conflict, reference can be made to the environmental provisions of Additional Protocol I to the 1949 Geneva Conventions relating to the protection of victims of international armed conflicts. Both Article 35(3) and 55 of Additional Protocol I prohibit parties to an armed conflict from employing "methods or means of warfare which are intended, *or may be expected*, to cause widespread, long-term and severe damage to the natural environment".[96] The more restrictive approach that emerges from these provisions reflects battlefield practice and, more specifically, the need to give clear instructions to the military officers who make the decisions in the field.

Despite the fact that the principle is fairly firmly rooted in international environmental law, international courts have so far been hesitant to expressly apply the precautionary principle. The International Court of Justice, for example, could have taken the opportunity to pronounce on the principle in two cases relating to the management of shared watercourses. Both cases involved disputes regarding projects which could have affected the aquatic ecosystem of the river. However, in both cases the Court relied on the general obligation of prevention, without clarifying whether this obligation could entail precautionary action.

In the *Case concerning the Gabčíkovo-Nagymaros Project*, the Court determined that "in the field of environmental protection, vigilance and prevention are

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95 See Article 5.7 of the Agreement on the Application of Sanitary and Phytosanitary Measures, 15 December 1993, *1867 UNTS 154*. In the *EC – Hormones case*, the WTO Panel confirmed that "the precautionary principle has been incorporated and given a specific meaning in Article 5.7 of the SPS Agreement". See EC Measures Concerning Meat and Meat Products (Hormones) – Complaint by the United States – Report of the Panel, *Doc. WT/DS26/R/USA*, 18 August 1997. For a more detailed analysis of the role of the precautionary principle in WTO law, see M.W. Gehring & M-C. Cordonnier-Segger, *Precaution in World Trade Law: The Precautionary Principle and Its Implications for the World Trade Organization*, Montreal: CISDL (2002).

96 Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), Geneva, 8 June 1977, *1125 UNTS 3*. Author's emphasis added. It may be noted that international humanitarian law also contains a principle of precaution, but this principle has a meaning which is distinct from the precautionary principle discussed in this section. The international humanitarian law principle of precaution sees to the obligation of parties to an armed conflict to take constant care during military operations to protect the civilian population as far as possible from (the effects of) an attack. On this subject, see F. Kalshoven & L. Zegveld, *Constraints on the Waging of War: An Introduction to international Humanitarian Law*, 3rd edition, Geneva: International Committee of the Red Cross (2001), pp. 107-11.

required on account of the often irreversible character of damage to the environment and of the limitations inherent in the very mechanism of reparation of this type of damage".[97] However, the Court did not pronounce on the standards that parties should adopt in this respect. Instead, the Court insisted on the obligation for the parties to the dispute to look afresh at the matter and to negotiate with a view to finding a solution to the problem. As part of this obligation to negotiate, the Court stressed that parties must take into account modern norms and standards derived from the concept of sustainable development, but left it to the parties to decide which standards to apply.[98]

Similarly, in the *Pulp Mills case*, the International Court of Justice relied entirely on the "principle of prevention, as a customary rule", interpreted as an obligation for States to stop their activities from causing damage to the territory of other States.[99] Moreover, although the Court did acknowledge that "a precautionary approach may be relevant in the interpretation and application of the Statute" – the principal legal instrument referred to by the Court in the case – it did so only because both parties to the dispute agreed that the instrument itself adopted a precautionary approach.[100]

Arguably, the Court's hesitance to expressly rely on the precautionary principle in these cases can be explained with reference to the subject matter of the disputes. Both cases involved a dispute involving a shared natural resource and the obligation to prevent extraterritorial damage to the environment of other States applies to this. As explained earlier, this obligation has a firm status in international law, while the precautionary principle is still controversial. Generally, the Court adopts a conservative approach, meaning that it only embraces principles that are generally accepted by States. In these cases, the Court had such a principle at its disposal, *i.e.*, the principle of prevention, interpreted as an obligation not to cause extraterritorial damage to the environment of other States. Therefore, the Court arguably did not feel the need to pronounce on the status or applicability of the precautionary principle to these disputes.

While the International Court of Justice was able to settle the disputes brought before it without pronouncing on the precautionary principle, the WTO dispute settlement mechanism was expressly called upon to apply the precautionary principle in two cases brought before it. In the *EC – Hormones case* the European Communities relied on the precautionary principle as a general customary rule of international law, or at least as a general principle of international law in order to introduce an import ban on meat treated with

97 International Court of Justice, Gabčíkovo-Nagymaros Project (Hungary v. Slovakia), Judgment of 25 September 1997, *I.C.J. Reports 1997*, p. 7, para. 140.

98 *Ibid*.

99 International Court of Justice, Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment of 20 April 2010, *I.C.J. Reports 2010*, para. 101.

100 *Ibid*., paras. 160-164.

hormones from the US and Canada. Both the Panel and the Appellate Body confirmed that the precautionary principle is reflected in the SPS Agreement, in particular in Article 5.7 concerning the right of States to provisionally adopt sanitary and phytosanitary measures on the basis of available pertinent information. Moreover, the Appellate Body concluded that the precautionary principle is also reflected in the sixth paragraph of the preamble of the APS Agreement, as well as in its Article 3.3, which "explicitly recognize the right of Members to establish their own appropriate level of sanitary protection, which level may be higher (i.e., more cautious) than that implied in existing international standards, guidelines and recommendations".[101]

However, the Appellate Body did not accept the contention of the European Communities that other provisions of the SPS Agreement – *i.e.*, concerning the assessment of risks – must be interpreted in light of the precautionary principle, because, in the view of the Appellate Body, the precautionary principle was not part of the general principles of law and "at least outside the field of international environmental law, still awaits authoritative formulation as a customary principle of international law".[102] This was the point of view of the Appellate Body in 1998.

In 2006, in the *EC – Biotech case* the Panel gave ample consideration to the contention of the European Communities that the precautionary principle had "'by now' become a fully-fledged and general principle of international law".[103] Nevertheless, the Panel still did not find sufficient evidence to conclude that the status of the precautionary principle had changed since the decision of the Appellate Body in the *EC – Hormones case*. Therefore it decided to act with prudence and not to take a stand on this complex issue.[104]

Finally, the International Tribunal for the Law of the Sea (ITLOS) was also called upon to apply the precautionary principle in three cases relating to the effects of activities on the marine environment.[105] ITLOS did not explicitly pronounce on the status of the precautionary principle in any of there cases.

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101 EC Measures Concerning Meat and Meat Products (Hormones) – Complaint by the United States – Report of the Appellate Body, *Doc. WT/DS26/R/USA*, 16 January 1998, para. 124.

102 *Ibid*., para. 123. The Appellate Body refers more specifically to the rules for treaty interpretation as incorporated in Article 31 and 32 of the Vienna Convention on the Law of Treaties. In this regard, Article 31(3)(c) stipulates that "any relevant rules of international law applicable between the parties" should be taken into account when interpreting the treaty. However, according to the Appellate body, it is far from clear that the precautionary principle constitutes a principle of general or customary international law and that it thus constitutes such "a rule of international law".

103 EC – Approval and Marketing of Biotech Products, Panel Reports, *Docs. WT/DS/291/R*, *WT/DS/292/R* , *WT/DS/293/R* , 29 September 2006, para. 786.

104 Ibid., para. 789.

105 These are the Southern Bluefin Tuna Cases (New Zealand v. Japan; Australia v. Japan), Request for Provisional Measures, Order of 27 August 1999; the Mox Plant Case (Ireland v. United Kingdom), Request for Provisional Measures, Order of 3 December 2001; and the Case Concerning Land Reclamation by Singapore In and Around the Straits of Johor (Malaysia v. Singapore), Request for Provisional Measures, Order of 8 October 2003.

However, it did refer to "prudence and caution" as a legal basis for ordering precautionary measures.[106]

In the *Southern Bluefin Tuna Cases*, the decision of ITLOS to impose provisional measures on the parties to the dispute in order "to preserve the rights of the parties and to avert further deterioration of the southern bluefin tuna stock" was based on the existence of scientific uncertainty regarding measures to be taken to conserve the stock of southern bluefin tuna.[107] In addition, in the Mox Plant Case, the tribunal used "prudence and caution" as a legal basis for imposing an obligation on parties to exchange information concerning risks or effects from the operation of a radioactive plant.[108] Finally, in the case concerning the Straits of Johor, ITLOS itself advocated a broader application of the preventive approach when it considered that "given the *possible* implications of land reclamation on the marine environment, prudence and caution require that Malaysia and Singapore establish mechanisms for exchanging information and assessing the risks or effects of land reclamation works and devising ways to deal with them in the areas concerned".[109]

Although these judicial decisions demonstrate that international courts are hesitant to apply the precautionary principle *expressis verbis*, the decisions also demonstrate a general willingness of courts to apply precautionary measures. The reliance of ITLOS on "prudence and caution", as well as the pronouncements of the WTO dispute settlement mechanism on the role of precaution in WTO law, attest to this.

Furthermore, as referred to in the previous section, the International Court of Justice considered in the *Pulp Mills case* that parties "must, for the purposes of protecting and preserving the aquatic environment with respect to activities which may be liable to cause transboundary harm, carry out an environmental impact assessment".[110] Although many uncertainties remain regarding the precise content of the obligation to conduct an Environmental Impact Assess-

106 See the Southern Bluefin Tuna Cases, para. 77; the Mox Plant case, para. 84; and the Land Reclamation case, para. 99.

107 International Tribunal for the Law of the Sea, Southern Bluefin Tuna Cases, (New Zealand v. Japan; Australia v. Japan), Request for Provisional Measures, Order of 27 August 1999, paras. 79-80.

108 International Tribunal for the Law of the Sea, Mox Plant Case (Ireland v. United Kingdom), Request for Provisional Measures, Order of 3 December 2001, para. 84.

109 International Tribunal for the Law of the Sea, Case Concerning Land Reclamation by Singapore In and Around the Straits of Johor (Malaysia v. Singapore), Request for Provisional Measures, Order of 8 October 2003, para. 99. Emphasis added. For a more thorough review of these cases, see N.J. Schrijver, 'The Status of the Precautionary Principle in International Law and its Application and Interpretation in International Litigation', in *Liber Amicorum Jean-Pierre Cot: Le Procès International*, Brussels: Bruylant, pp. 246-250; and A. Trouwborst, *Evolution and Status of the Precautionary Principle in International Law*, The Hague: Kluwer Law International, International Environmental Law and Policy Series Vol. 62 (2002), pp. 156-178.

110 International Court of Justice, Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment of 20 April 2010, *I.C.J. Reports 2010*, para. 204.

ment (EIA),[111] as the Court explicitly recognised in its judgement, it did acknowledge the existence of such a basic obligation for States to prevent extra-territorial damage to the environment.[112] According to the Court, such an obligation exists prior to the implementation of a project, while it continues to exist once "operations have started and, where necessary, throughout the life of the project" in the form of the continuous monitoring of the effects of the operations on the environment.[113]

Although the statement of the Court regarding the obligation to conduct an EIA is limited to the prevention of extraterritorial damage to the environment, the obligation to conduct an EIA also applies to other situations. This is clear from Principle 17 of the 1992 Rio Declaration, which states in general terms that "[e]nvironmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment". Furthermore, Article 14 of the 1992 Convention on Biological Diversity provides that each party shall:

> "[i]ntroduce appropriate procedures requiring environmental impact assessment of its proposed projects that are likely to have significant adverse effects on biological diversity with a view to avoiding or minimizing such effects and, where appropriate, allow for public participation in such procedures".

Guidelines were also adopted by the Conference of the Parties in the context of the 1971 Ramsar Convention on the Protection of Wetlands, calling on parties "to ensure that any projects, plans, programmes and policies with the potential to alter the ecological character of wetlands in the Ramsar List [...] are subjected to rigorous impact assessment procedures".[114] In addition, the World Bank prescribes that environmental impact assessments must be carried out "to examine the potential environmental risks and benefits associated with Bank investment lending operations".[115]

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111 *Ibid*., para 205 and A. Trouwborst, *Precautionary Rights and Duties of States*, Leiden: Martinus Nijhoff Publishers (2006), p. 175.

112 Also see A. Trouwborst, *Precautionary Rights and Duties of States*, Leiden: Martinus Nijhoff Publishers (2006), p. 175, who argues that an "EIA […] can either provide the basis for precautionary action or constitute a precautionary measure in itself". In the first instance, the EIA aims to determine the scale of the potential damage (significant, serious or severe) in order to decide on the measures to be taken. In the latter case, the EIA aims to determine whether at all a particular activity or policy carries a risk of causing of damage to the environment.

113 International Court of Justice, Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment of 20 April 2010, *I.C.J. Reports 2010*, para. 205.

114 Resolution VII.16 of the Conference of the Parties on Impact Assessment (1999).

115 See <http://web.worldbank.org/> under 'Environmental Assessment in Operational Policy'. Also see P. Sands & J. Peel, *Principles of International Environmental Law*, Cambridge: Cambridge University Press, Third Edition (2012), pp. 617-619.

There is no standard procedure for conducting an EIA. As the International Court of Justice noted in the *Pulp Mills case*:

> "it is for each State to determine in its domestic legislation or in the authorization process for the project, the specific content of the environmental impact assessment required in each case, having regard to the nature and magnitude of the proposed development and its likely adverse impact on the environment as well as to the need to exercise due diligence in conducting such an assessment".[116]

The flexibility of an EIA as an instrument to assess risks to the environment resulting from proposed projects makes it suitable for application in situations of armed conflict as well. The precise requirements can be accommodated to the specific circumstances, while leaving intact the basic obligation to assess the impacts of a proposed project on the environment on the basis of available scientific information.

In conclusion it can be argued that the legal status of the precautionary principle, either as a general principle of international law or as a principle of customary international law, has not yet fully materialised. Although it seems that an increasing number of States – including all the States belonging to the European Union – consider the principle to be part of customary international law, there is as yet no worldwide agreement on its precise contents. Nevertheless, there is general agreement on the need to act with precaution in order to preserve and protect the environment. A precautionary approach to environmental damage is reflected in many treaties and has also found recognition in international case law. Moreover, specialised procedures have been developed in order to assess the risks involved in particular projects. Environmental Impact Assessments can be effective tools to implement the precautionary principle.

4.4 COMMON REGIMES

International environmental law contains several specialised regimes aimed at protecting particular species or parts of the environment for the benefit of a larger community of States. Most of these treaties assign a special status to the objects they aim to protect. For example, international environmental law has designated specific areas and their natural resources as "world heritage". Some treaties deal with natural resources that are shared by two or more states. In addition, certain environmental processes such as climate change and the loss of biological diversity have been proclaimed a "common concern of humankind".

116 International Court of Justice, Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay), Judgment of 20 April 2010, *I.C.J. Reports 2010*, para. 205.

In all these cases, States are required to take special measures in order to protect a common interest. Some of these measures have a direct impact on the right of States to use their natural resources freely, while others are aimed at giving States a fair share in the benefits resulting from common resources. A distinction should be made in this respect between natural resources that are situated within the national territory of States and natural resources that fall outside State sovereignty. First, natural resources that are situated within State territory fall under the permanent sovereignty of the State where they are located. If such natural resources are located in more than one territory – or, in the case of species, if they migrate from one territory to another – they should be regarded as shared natural resources. These natural resources fall under the permanent sovereignty of more than one State. Finally, some natural resources do not belong to particular States, because they fall entirely outside State territory.[117]

Natural resources that are located within State territory are protected by regimes for "world heritage", "shared natural resources" and the "common concern of mankind", while natural resources that are located outside the territory of a State are protected either by the notion of the "common heritage of humankind",[118] or by the notion of the "common concern of mankind". This section discusses some of these specialised regimes, focusing on the measures they impose on States for the protection of the common interests of a larger community of States.

4.4.1 Natural resources situated within State territory with special importance for the international community

Some natural resources that are situated within the territory of a State have been attributed a special status because of their outstanding importance for the international community as a whole. Examples of such regimes include those for "wetlands of international importance" under the Ramsar Convention on Wetlands of International Importance and "world heritage" under the UNESCO Convention for the Protection of World Heritage. The primary aim of these regimes is to preserve sites either "on account of their international significance in terms of ecology, botany, zoology, limnology or hydrology"

117 Also see N.J. Schrijver, *Development without Destruction: The UN and Global Resource Management*, United Nations Intellectual History Project Series, Bloomington and Indianapolis: Indiana University Press (2010), pp. 34-113.

118 The notion of the 'common heritage of mankind' is not discussed, because it applies only to natural resources that are located in areas beyond national jurisdiction.

or because of their "outstanding universal value" from the point of view of science, conservation or natural beauty.[119]

The Ramsar and UNESCO Conventions both function on the basis of lists. Under the Ramsar Convention, it is the State itself which decides on the listing, while the UNESCO Convention has designated a committee for this purpose. However, the committee decides only on the basis of a proposal by the State party on whose territory the natural heritage is situated.[120] The primary characteristic of both regimes is that the protection of the sites is based on the principle of sovereignty. Both regimes place the primary responsibility for preserving the sites on the national State and reserve a complementary role for the international community to assist in the protection of the sites.[121]

Under the Ramsar Convention, the role of the international community is limited. International cooperation for the protection of wetlands consists mainly of mutual consultation and coordination of policies and regulations. The World Heritage Convention contains a more far-reaching system of co-operation. While Article 6(1) formulates a general duty of cooperation for the international community as a whole, Article 6(2) formulates an obligation for all States parties to help the State on whose territory the heritage is situated to implement its obligations under the convention, if that State so requests. In addition, the Convention establishes a fund for the protection of the world heritage, financed by the States parties to the Convention. This fund is used to provide assistance to States for the preservation of their world heritage.[122]

The World Heritage Convention also contains some provisions that have special relevance for the protection of world heritage in situations of armed conflict. First, States parties are prohibited from taking "any deliberate measures which might damage directly or indirectly the cultural and natural heritage […] situated on the territory of other States Parties to this Conven-

119 Article 2(2) of the Convention on Wetlands of International Importance especially as Waterfowl Habitat, 2 February 1971, *996 UNTS 245*; Article 2 of the UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage, 16 November 1972, *1037 UNTS 151*. It should be noted that the UNESCO World Heritage Convention does not only protect natural but also cultural properties of special significance. In addition, the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict (14 May 1954, *249 U.N.T.S. 240*) has been specifically adopted to protect cultural properties in situations of armed conflict. A cultural property that is under threat at this moment is the ancient city of Aleppo in Syria, which requires protection under the UNESCO World Heritage Convention. In addition, Syria is a party to the 1954 Hague Convention, referred to above. No specific convention has been adopted to protect natural heritage in situations of armed conflict. See K. Hulme, *War Torn Environement: Interpreting the Legal Threshold*, Leiden: Nijhoff (2004), p. 113-116, on the relevance of the 1954 Hague Convention for the protection of the environment.

120 Article 2 of the Ramsar Convention; Article 11 of the World Heritage Convention.

121 Articles 2(3) and 5 of the Ramsar Convention; Articles 4, 6 and 7 of the World Heritage Convention.

122 See Part IV of the World Heritage Convention.

tion".[123] In other words, States may not deliberately harm the world heritage. A similar prohibition for States with regard to the world heritage situated within their own borders can be deduced from the general obligation contained in Article 4 for States parties to ensure "the identification, protection, conservation, presentation and transmission to future generations" of the world heritage situated within their territories.[124]

The possibility provided by the Convention to enter natural heritage threatened by "the outbreak or the threat of an armed conflict" on a list of "World Heritage in Danger" is of particular interest for the protection of natural resources in situations of armed conflict.[125] The inclusion of a site in this list enables the World Heritage Committee to immediately allocate assistance to the endangered site from the Convention's Fund. Five nature reserves in the DR Congo have been placed on this list.[126]

The last treaty that should be mentioned in this category is the Convention on International Trade in Endangered Species of Wild Flora and Fauna (CITES).[127] This Convention is aimed at protecting endangered species of flora and fauna against over-exploitation in international trade. Some of these species are migratory and therefore fall into the category of shared natural resources, while other species are found exclusively within the jurisdiction of a single State. The Convention recognises that wild fauna and flora are "an irreplaceable part of the natural systems of the earth [and therefore] must be protected for this and the generations to come".[128] The Convention therefore has a listing system similar to the systems of the Ramsar and World Heritage Conventions. It makes a distinction between three categories of species, based on their conservation status. The most threatened species are listed in Appendix I and are subject to particularly strict international regulation, while Appendix II and III species can be traded, provided that national authorities certify that the species have a legal origin and that trade is not detrimental to their survival.

CITES is of particular relevance to this book, because it can be used to curtail the trade in specific conflict resources, especially wildlife and timber. Although

123 Article 6(3) of the World Heritage Convention.

124 It should however be noted that this obligation can only be said to work *erga omnes partes*. See R. O'Keefe, 'World Cultural Heritage: Obligations to the International Community as a Whole?' *International and Comparative Law Quarterly*, Vol. 53 (Jan., 2004), pp. 189-209. Reference should further be made to the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, referred to above.

125 Article 11(4) of the World Heritage Convention.

126 For the role of the World Heritage Convention in protecting the Virunga Park in the DR Congo, see B. Sjöstedt, 'The Role of Multilateral Environmental Agreements in Armed Conflict: 'Green-keeping' in Virunga Park. Applying the UNESCO World Heritage Convention in the Armed Conflict of the Democratic Republic of the Congo', *Nordic Journal of International Law*, Vol. 82 (2013), pp. 129–153.

127 Convention on International Trade in Endangered Species of Wild Flora and Fauna, 3 March 1973, *993 UNTS 243*.

128 *Ibid*., first paragraph of the preamble.

the focus of CITES is on protecting endangered species, including commercial species in the lists covered by the Convention is certainly not out of the question. In fact, almost 200 commercial timber species have been listed in one of the CITES Appendices.[129] The CITES system works on the basis of export and import permits, which must be verified by management and scientific authorities in the countries of origin and destination. CITES can perform two different functions in preventing the trade in conflict resources. First, it can help national authorities to halt the trade in timber by rebel groups, as only the national authorities can grant export permits. Furthermore, the permit system of the Convention can assist the Security Council when it establishes a ban on timber originating from a particular country, provided that other States exporting the species under embargo adhere to CITES as well.[130] In that case, all the timber that is traded without an official permit must be considered suspicious.

4.4.2 Common concern

Other common regimes are based on the notion of "common concern".[131] Common concern regimes are aimed at creating a system of cooperation to address specific problems that concern the international community as a whole by dealing with matters of common concern at an international level. Common concern regimes qualify State sovereignty in a similar way to the World Heritage and Ramsar Conventions in the sense that States retain primary responsibility for the protection of their natural resources.

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129 See International Tropical Timber Organization, 'Tracking Sustainability: Review of Electronic and Semi-Electronic Timber Tracking Technologies', ITTO Technical Series 40, October 2012, p. 3.

130 It is relevant to note that Article X of the Convention contains a provision on trade with non-parties to CITES. This provision stipulates as follows: "Where export or re-export is to, or import is from, a State not a Party to the present Convention, comparable documentation issued by the competent authorities in that State which substantially conforms with the requirements of the present Convention for permits and certificates may be accepted in lieu thereof by any Party". This means, for example, that a party to CITES that imports a particular species must ask the exporting State for documentation proving that the species is traded legally and has been harvested in a sustainable way.

131 For a more detailed analysis of the notion of common concern, see F. Biermann, 'Common Concern of Humankind: The Emergence of a New Concept of International Environmental Law', *Archiv des Völkerrechts*, Vol. 34, issue 4 (1996), pp. 426-481; D. Shelton, 'Common Concern of Humanity', *Environmental Policy and Law*, Vol. 39, issue 2 (2009), pp. 83-90; J. Brunnée, 'Common Areas, Common Heritage and Common Concern', in D. Bodansky, J. Brunnée & E. Hey, *The Oxford Handbook of International Environmental Law*, Oxford: Oxford University Press (2007), pp. 550-573; and P.W. Birnie, A.E. Boyle and C. Redgwell, *International Law and the Environment*, Third Edition, Oxford: Oxford University Press (2009), pp. 128-130.

The Convention on Biological Diversity is a good example. In its preamble, the Convention affirms that "the conservation of biological diversity is a common concern of humankind", while reaffirming that "States have sovereign rights over their own biological resources". In addition, the preamble qualifies these sovereign rights by "[r]eaffirming also that States are responsible for conserving their biological diversity and for using their biological resources in a sustainable manner". The provisions elaborate on this by imposing obligations upon States regarding the conservation and sustainable use of (components of) biological diversity, while defining "the sovereign right [of States] to exploit their own resources pursuant to their own environmental policies" as a principle.

In addition to the conservation of biological diversity, the common concern concept has also been applied to climate change . In its preamble, the UN Framework Convention on Climate Change acknowledges that "change in the Earth's climate and its adverse effects are a common concern of humankind", while it reaffirms "the principle of sovereignty of States in international cooperation to address climate change". Moreover, obligations for States concerning the formulation of policies regarding the mitigation of climate change have been inserted in the provisions. However, despite the application of the concept in these conventions, its significance as a system for international cooperation has remained modest. The concept has not been applied to other environmental problems.

Common concern regimes are important to this book because these regimes impose obligations upon States to protect their natural resources for the benefit of the entire community of States. Relevant obligations in the Convention on Biological Diversity and under the Climate Convention include monitoring and reporting obligations, as well as financial assistance and technology transfer to developing countries. The Convention on Biological Diversity, and in particular the constraints it places on the use of biological diversity and biological resources are the most important for the purposes of the present book. As discussed in greater detail in Chapter 5, States involved in an armed conflict should at the very least refrain from actions that cause a serious threat to biological diversity.

4.4.3 Shared natural resources

Shared natural resources fall into two different categories. The first category concerns natural resources that are situated on the border between two or more States, such as transboundary forests or wetlands. The second category concerns natural resources that are present within different States' borders at different times, such as migratory (land) animals, straddling fish stocks and

fresh water resources.[132] In both cases, States must take special protective measures and must cooperate to protect their interests in the shared natural resources. The protection of shared natural resources has two major objectives: 1) to preserve the natural resources; and 2) to guarantee a fair share in the resources for the States where these natural resources are found. One major difference from the regimes discussed in the previous sections is therefore that the natural resources are not protected in order to protect a special interest of the international community as a whole, but rather to protect the rights of directly affected States.

Although the issue of shared natural resources is also addressed to some extent in older conventions,[133] the 1978 *Draft Principles of Conduct in the Field of the Environment for the Guidance of States in the Conservation and Harmonious Utilization of Natural Resources Shared by Two or More States* are the first to address the issue of shared natural resources in a systematic way. These principles were prepared by UNEP in response to a request by the UN General Assembly to report on measures to be adopted for the implementation of a system for the effective cooperation between States for the conservation and harmonious utilisation of shared natural resources.[134] In its Resolution 34/186 of 18 December 1979, the UN General Assembly took note of the principles while requesting States "to use the principles as guidelines and recommendations in the formulation of bilateral or multilateral conventions regarding natural resources shared by two or more States".[135]

Many of the UNEP principles reflect modern obligations in international law, such as the obligation not to cause transboundary damage and the obligation to conduct an environmental impact assessment. The principles also formulate standards for cooperation between States for the protection of shared

132 See the Convention on the Conservation of Migratory Species of Wild Animals, 23 June 1979, *1651 UNTS 333*; the United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, 4 August 1995, *2167 UNTS 88*; and the UN Convention on the Law of the Non-Navigational Uses of International Watercourses, 21 May 1997, *36 ILM 700 (1997)*.

133 See, in particular, Article 5 of the 1971 Ramsar Convention on Wetlands of International Importance especially as Waterfowl Habitat, 2 February 1971, 996 UNTS 245, which emphasises that a duty of consultation about the implementation of obligations arising from the Convention exists "especially in the case of a wetland extending over the territories of more than one Contracting Party or where a water system is shared by Contracting Parties".

134 Draft Principles of Conduct in the Field of the Environment for the Guidance of States in the Conservation and Harmonious Utilization of Natural Resources Shared by Two or More States, *17 ILM 1097 (1978)*. For the request of the UN General Assembly, see UN General Assembly Resolution 3129 (XXVIII) of 13 December 1973 concerning Co-operation in the field of the environment concerning natural resources shared by two or more States.

135 UN General Assembly Resolution 34/186 concerning Cooperation in the Field of the Environment Concerning Natural Resources Shared by Two or More States, 18 December 1979, especially paragraphs 2 and 3.

natural resources, including the exchange of information, notification and consultation between States which share resources. In addition, they cover the peaceful settlement of disputes relating to shared natural resources and the liability of States for environmental damage resulting from violations of their international obligations with regard to the conservation and utilisation of shared natural resources.

Since the adoption of the UNEP principles, several treaties have been adopted that deal specifically with the management of shared natural resources. One of the most sophisticated legal regimes in this respect relates to the use of international rivers, lakes and groundwater sources. Specific reference can be made to the 1997 UN Convention on the Law of the Non-Navigational Uses of International Watercourses, which formulates a dual obligation for States to utilise the watercourse in an equitable and reasonable manner and to cooperate in its protection and development.[136] Arguably, these obligations not only apply to the use of the watercourse itself, but also have implications for the use of the natural resources found within the watercourse, such as alluvial minerals. The obligation of equitable use implies, *inter alia,* that States must ensure that other States can enjoy the shared resource on the basis of equality.[137] It can be assumed that the obligation of equitable use implies a prohibition for States against seriously upsetting the ecological balance of the watercourse, *e.g.*, by exploiting the natural resources found within the watercourse.

Furthermore, reference can be made to the United Nations Convention on the Law of the Sea (UNCLOS), which contains some basic rules for the protection of enclosed or semi-enclosed seas. Relevant obligations for States bordering on an enclosed or semi-enclosed sea include a duty to coordinate the management, conservation, exploration and exploitation of the living resources of the sea, as well as a duty to coordinate the implementation of their rights and duties with respect to the protection and preservation of the

136 See Article 5 of the UN Convention on the Law of the Non-Navigational Uses of International Watercourses. For an analysis of international law relating to the non-navigational use of international watercourses, see S.C. McCaffrey, *The Law of International Watercourses*, 2nd edition, Oxford: Oxford University Press (2007) and L. Boisson de Chazournes & S.M.L. Salman (ed.), *Les Ressources en Eau et le Droit International*, The Hague: Nijhoff Publishers (2005).

137 See the judgment of the International Court of Justice in the Case Concerning the Gabčíkovo-Nagymaros Project (Hungary/Slovakia), Judgment of 25 September 1997, *I.C.J. Reports 1997*, p. 7, para. 85, in which the court determines the existence of "a common legal right, the essential features of which are the perfect equality of al1 riparian States in the use of the whole course of the river and the exclusion of any preferential privilege of any one riparian State in relation to the others", referring to the 1929 *Lac Lanoux case* rendered by the Permanent Court of Justice, and that "Czechoslovakia, by unilaterally assuming control of a shared resource, and thereby depriving Hungary of its right to an equitable and reasonable share of the natural resources of the Danube […] failed to respect the proportionality which is required by international law".

marine environment.[138] These rules complement the general provisions on the protection and preservation of the marine environment, included in Part XII of the Convention. This part deals primarily with the prevention of pollution in the marine environment.

There are several other regimes for the management and protection of shared natural resources. These include the Convention on the Conservation of Migratory Species of Wild Animals and the 1995 Straddling Fish Stocks Agreement.[139] For other shared natural resources, such as forests, oil or gas there are still no specific rules. There are a few regional treaties concerning transboundary forests, including the Amazon Cooperation Treaty and the Congo Basin Conservation Treaty.[140] In contrast, controversy regarding the delimitation of geographical boundaries between States and political sensitivities have so far prevented the adoption of specific rules for shared oil and natural gas deposits altogether.[141]

In conclusion, legal regimes for the management and protection of shared natural resources are based on a dual obligation to protect these resources and to cooperate with regard to their protection. This obligation to cooperate with regard to the protection and management of shared natural resources is firmly rooted in international law. In the *Pulp Mills* case, the International Court of Justice stated that "the procedural obligations of informing, notifying and negotiating […] are all the more vital when a shared resource is at issue […] which can only be protected through close and continuous co-operation" between the interested States.[142] In the *Mox Plant case*, the International Tribunal for the Law of the Sea (ITLOS) also indicated that "the duty to cooperate is a fundamental principle […] under […] general international law".[143] Arguably, as explored in more detail in Chapter 5, this obligation does not cease to exist in situations of armed conflict.

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138 See Part IX of the UN Convention on the Law on the Sea concerning enclosed or semi-enclosed seas, in particular Article 123. It should be noted that the non-living resources of the sea, such as minerals, oil and gas, are exempted from the regime for cooperation.

139 Convention on the Conservation of Migratory Species of Wild Animals, 23 June 1979, *1651 UNTS 333*; United Nations Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, 4 August 1995, *2167 UNTS 88*.

140 For example, see the Amazon Cooperation Treaty of 3 July 1978, concluded between the States on whose territory the Amazon is situated.

141 The topic of oil and natural gas was originally envisaged by the ILC in 2002 as part of its work on shared natural resources, but in the end it was not considered feasible to draft articles relating to the use of such shared oil and gas deposits.

142 International Court of Justice, Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay), *I.C.J. Reports 2010*, para 81.

143 The Mox Plant Case (Ireland v. United Kingdom), Request for provisional measures, Order of 3 December 2001, para. 82. The tribunal confirmed this judgment in its Case Concerning Land Reclamation by Singapore In and Around the Straits of Johor (Malaysia v. Singapore), Provisional Measures, Order of 8 October 2003, para. 92.

4.5 CONCLUSIONS

This chapter has discussed several principles arising from the field of international environmental law that qualify the right of States to exploit their natural resources. These principles formulate obligations of care for States with regard to the use of their own natural resources and those of other States. Relevant principles include the principle of conservation and sustainable use of natural resources, the principle of inter-generational equity, the principle of prevention, and the precautionary principle.

Of the principles discussed in this chapter, two can be considered to have become part of customary international law. These are the principles of sustainable use and the principle of prevention. While the principle of sustainable use is aimed at preserving natural wealth and resources for long-term development, the principle of prevention formulates an obligation of due diligence for States with regard to the prevention of damage to the environment of other States. These principles apply even when States have not subscribed to the relevant treaties in which the principles are embodied.

The principles of inter-generational equity, as well as the precautionary principle, do not have such a firm status in international law. Nevertheless, the principle of inter-generational equity can be regarded as an important argument for most measures that aim at protecting the environment. The precautionary principle for its part has also become increasingly important in the last decade. It has been inserted in several international environmental treaties, while elements of the principle can also be found in treaties in other fields of international law. Furthermore, international courts are cautiously starting to attach more weight to the principle. The most important development is that there is now an obligation under international law to perform an environmental impact assessment in order to assess the risks of a proposed activity on the environment.

Arguably, these principles are not only relevant for the exploitation of natural resources by States in times of peace, but also in situations of armed conflict. Only a few of the armed conflicts examined in this book have amounted to full-scale wars affecting the whole territory of a State. In most of the armed conflicts examined in this book the violence was limited to specific parts of the State territory. In these situations, national authorities must continue to respect their obligations under international environmental law when conducting commercial activities in parts of the territory under their control.

In addition, some of the principles examined in this chapter are also relevant for territories that are occupied by other States. As explained in more detail in Part II of this book, occupants are *de facto* authorities whose legal position can be compared in many ways with that of the national authorities of a State. Although their legal position is primarily governed by international

humanitarian law, international environmental law is relevant to situations of occupation as well, both directly and indirectly.

Furthermore, this chapter has examined legal regimes aimed at protecting a common interest of two or more States. Some of these common regimes are aimed at protecting natural resources that are only important to specific States, while others are aimed at protecting natural resources that are important to the international community as a whole. This chapter has examined three categories of common regimes. These are regimes aimed at protecting specific natural resources situated within the territory of a single State, but which have special importance for the international community as a whole, regimes that are aimed at addressing a concern that is common to the international community, and regimes for the management of shared natural resources. All these regimes are based on an obligation to individually and collectively protect the natural resources in the interests of all the States concerned. Arguably, this obligation does not cease to exist in situations of armed conflict. Furthermore, the common interest that these regimes are aimed at protecting entails a presumption that they will not be susceptible to unilateral suspension in situations of armed conflict.

Concluding remarks to Part I

This part examined the legal framework for the governance of natural resources within sovereign States. Chapter 2 examined the principle of permanent sovereignty over natural resources, which is the organizing principle for the governance of natural resources within States. This principle formulates a right for States and peoples to freely dispose of their natural resources. Normally this right is exercised by the government of a State on behalf of the State and its people. This only changes when a government is not or is no longer recognised by the international community.

The principle of permanent sovereignty over natural resources can first of all be upheld vis-à-vis other States. In this sense, the principle of permanent sovereignty over natural resources formulates a right for both States and peoples that have not yet organized themselves within sovereign States to exercise control over their natural resources, without interference from other States. This is the horizontal, or external, dimension of the principle of permanent sovereignty over natural resources.

A vertical – or internal – dimension can be added to this horizontal dimension. The 1962 Declaration on the Principle of Permanent Sovereignty over Natural Resources assigns permanent sovereignty not only to States but also to peoples. In addition, the 1962 Declaration formulates an important condition for the exercise of permanent sovereignty by States, viz. that natural resources must be exploited for national development and the well-being of the people of the State. This condition was repeated in several subsequent resolutions and treaties, including those relating to armed conflicts involving natural resources. On the basis of the 1962 Declaration and subsequent instruments, peoples can therefore be identified as subjects and beneficiaries of the principle of permanent sovereignty.

Chapter 3 examined the implications of peoples as subjects and beneficiaries of the principle of permanent sovereignty for the governance of natural resources within sovereign States. It did so from the perspective of human rights law, as this field of international law formulates rights for 'peoples', to be exercised in their relations with States. The chapter concluded that the notion of 'peoples' is a dynamic concept that can designate different groups depending on the precise right that is invoked. With regard to the right to external self-determination, the term 'peoples' is reserved for colonial peoples and peoples under foreign subjugation. As soon as these peoples have attained an international status, the right to self-determination becomes: 1) a right of

the State and its peoples to be free of foreign interference; and 2) a right for the peoples living within the State to freely determine their political system, also referred to as internal self-determination.

Chapter 3 argued that the right to internal self-determination accrues in particular to four groups. These are first, the whole population of a State, both as the sum of the peoples living in that State and as succeeding the people who attained the right to external self-determination. Furthermore, the right to internal self-determination accrues to specific communities within a State – including in particular, peoples, minorities and indigenous peoples.

Furthermore, the right to self-determination as enshrined in the identical Articles 1 of the ICESCR and the ICCPR entails a right for peoples "to freely pursue their economic, social and cultural development". It was argued that within an independent State, this right must be interpreted as a right to be involved in decision-making processes pertaining to development, including decision-making processes regarding the use of the State's natural resources as the capital for development.

The special position of peoples as subjects and beneficiaries of the principle of permanent sovereignty over natural resources therefore has two important implications for the governance of natural resources. First, it entails an obligation for the government to put in place procedures that allow for public participation in decision-making regarding the exploitation of natural resources. Public participation can be defined broadly so as to include access to information and to justice. These participatory rights must be regarded as a logical consequence of the right to self-determination of peoples. In addition, the right to freely pursue economic, social and cultural development, as embodied in the right to self-determination and the emerging right to development, entails an additional obligation for governments not only to involve peoples and individuals in the process of development, but also to ensure that the population as a whole, as well as specific groups within society, benefit from the resulting development. The first obligation is firmly established in international law, *inter alia*, in Security Council resolutions relating to particular conflicts, while the second obligation finds some resonance in relevant Security Council resolutions.

In addition to human rights law, international environmental law has developed principles that have an impact on the governance of natural resources within States. These principles were examined in Chapter 4 of this book. This chapter demonstrated that international environmental law formulates duties of care for the environment which States must respect when they exploit their natural resources. Chapter 4 discussed the following principles: the principle of sustainable use, the principle of inter-generational equity, the principle of prevention and the precautionary principle.

The principle of sustainable use and the principle of inter-generational equity qualify the right of States to exploit their natural resources in order to safeguard a State's natural resource capital for future development. In

addition, the principle of prevention formulates an obligation for States to take measures to prevent damage to the environment of other States. Furthermore, States must act with caution to prevent damage to the environment. Although the precautionary principle is not generally accepted, it entails an obligation to conduct an Environmental Impact Assessment for resource projects that are likely to cause significant damage to the environment. Today this obligation represents customary international law. All these principles qualify the right of States to exploit their natural resources.

In addition, Chapter 4 examined the concept of common regimes which have been set up to protect a specific interest of a broader community of States. Relevant common regimes include those for the protection of natural resources that have been designated "world heritage" or "wetlands of special importance", as well as those for the protection of endangered species. These common regimes share similar characteristics: 1) they were set up to protect natural resources that represent a special interest to the international community as a whole; 2) they are situated within the territory of a State. Common regimes that were set up to address a "common concern" of the international community share these characteristics. Finally, common regimes that were set up to protect natural resources shared by two or more States primarily serve to preserve the interests of those States that have a share in the natural resources. However, in all cases these regimes protect natural resources because they are important to a broader community of States. It is for this reason that these regimes can be seen as qualifying the right of States to freely dispose of these natural resources.

In conclusion, it can be argued that the legal regime for the governance of natural resources within States is based on the right for States and peoples to freely dispose of their natural resources. This right is normally exercised by the government on behalf of the State and its people. However, the right of a government to dispose of the State's natural resources is qualified by several obligations arising from international human rights and environmental law. These obligations are aimed at ensuring that the government effectively exercises the right of the State to freely dispose of its natural resources for the purpose of promoting sustainable development, in the sense of long-term and inclusive development. It is argued that respect for this framework is paramount, both for the prevention of armed conflicts and for post-conflict reconstruction. Part II of this book examines the applicability of this legal framework in situations of armed conflict.

Part II

The governance of natural wealth and resources in situations of armed conflict

Introductory remarks to Part II

The current part of this book discusses the legal framework for the governance of natural resources in situations of armed conflict, which pose major challenges to the governance of natural resources within States. In many of the conflicts referred to in this book, parts of State territory were brought under the control of armed groups or foreign troops, making it impossible for the government to exercise control over the natural resources situated within these territories. The occupation of Eastern Congo by Uganda and Rwanda is one example of this. The situation in Côte d'Ivore between 2002 and 2007, where the northern part of Côte d'Ivoire was under the control of the rebel forces that made up the *Forces Nouvelles* is another example.

The extent to which contemporary international law is able to address these challenges is examined in this part of the book. To what extent does international law formulate obligations for non-state armed groups and foreign States regarding the use of their adversary's natural resources? In addition, to what extent does international law formulate obligations for States in relation to the exploitation of their own natural resources in situations of armed conflict?

The previous part of this book argued that it is the government of a State that should exploit the State's natural resources on behalf of the State and its people. However, it also demonstrated that the government cannot in all situations be considered to constitute the legitimate representative of the people of the State. Specific problems may arise in internal armed conflicts, where the government is a party to the armed conflict as well. As a party to an armed conflict, a government can have interests that do not coincide with the interests of the people living in the State.

All these situations – occupation by foreign States, territories under the control of armed groups and the exercise of permanent sovereignty over natural resources by governments that are parties to an armed conflict – pose challenges for the premises on which the legal framework for the governance of natural resources are based, in particular the basic premise that natural resources must be exploited for national development and the well-being of the people.

The current legal framework governing the exploitation of natural resources in situations of armed conflict is made up of rules from various fields of

international law. Chapter 5 discusses the effects of armed conflict on the general legal framework for the governance of natural resources as discussed in Part I of this book. The legal framework as set out in Part I of this book defines the rights and obligations of governments with regard to the management of the State's natural resources, as well as the effects of particular exploitation activities on the environment of other States. For the purposes of this book, it is especially relevant to examine to what extent this legal framework continues to apply in situations of armed conflict for: 1) the actions of governments involved in internal armed conflicts and; 2) the actions of States intervening in an armed conflict on the territory of another State.

Chapter 6 discusses the rules of the law of armed conflict, or international humanitarian law. This field of international law sets out the rights and obligations of parties to an armed conflict. Although its principal focus is on regulating military operations and their effects on vulnerable groups, international humanitarian law does contain some rules that are relevant for the exploitation of natural resources by parties to an armed conflict. In the first place, it contains a well-developed body of rules to regulate the powers of occupants in occupied territory. Moreover, international humanitarian law is the only body of international law that applies directly to non-state armed groups.

5 The role of international human rights and environmental law in situations of armed conflict

5.1 INTRODUCTORY REMARKS

Pursuant to the principle of permanent sovereignty over natural resources, States and peoples have the right to exploit their natural resources within the limits set by international law, including limits set by international human rights and environmental law. International human rights law formulates as a minimum obligation that "[i]n no case may a people be deprived of its own means of existence".[1] In addition, both international human rights and environmental law formulate rights relating to public participation in decision making. Furthermore, international environmental law formulates several obligations of care with regard to the use of natural resources. These include an obligation to conserve and sustainably use particular natural resources that are considered important to several States or to the international community as a whole, including biological diversity, international watercourses, wetlands of international importance, threatened species and natural heritage.[2]

These obligations are not only relevant for States exploiting their own natural resources, but also for occupants. Although the rights and obligations of occupants are primarily regulated through international humanitarian law, it can be argued that international human rights and environmental law constitute additional sources of obligations for them because of the special responsibility of occupants as *de facto* authorities in occupied territory. This is also explicitly provided in Article 43 of the 1907 Hague Conventions, which stipulates that occupants must respect the laws in force in occupied territory unless they are "absolutely prevented" from doing so.

However, it is generally acknowledged that the outbreak of an armed conflict may alter the extent to which obligations under international law have to be fulfilled. The principal question posed in this chapter is therefore: to what

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1 See the identical Articles 1(2) of the ICESCR and the ICCPR, discussed in Chapter 1 of this study.

2 Relevant obligations can be inferred from the following treaties: the 1992 Convention on Biological Diversity, the 1997 UN Convention on the Law of the Non-Navigational Uses of International Watercourses, the 1971 Convention on Wetlands of International Importance Especially as Waterfowl Habitat, the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora, the 1979 Convention on the Conservation of Migratory Species of Wild Animals and the 1972 Convention for the Protection of the World Cultural and Natural Heritage. Also see Chapter 4 of this study.

extent do norms of international human rights and environmental law continue to apply during armed conflict and what are the implications for the legal framework regarding the exploitation of natural resources in situations of armed conflict?

The effects of armed conflict on treaties constitute a longstanding issue, which has not yet been fully resolved. The *Institut de Droit International* (IDI) issued a first set of draft articles dealing with the matter as early as 1912, followed by a second set in 1985.[3] Despite the early work of the IDI in this respect, the 1969 Vienna Convention on the Law of Treaties dodges the issue. Article 73 of the Vienna Convention stipulates that "[t]he provisions of the present Convention shall not prejudge any question that may arise in regard to a treaty […] from the outbreak of hostilities between States".

During the drafting process of the Vienna Convention, the International Law Commission (ILC) took – in the words of Anthony Aust – an "ostrich-like" position by arguing that the outbreak of hostilities between States should be considered as an "entirely abnormal condition", which should not be regulated in a treaty dealing with "the general rules of international law applicable in the normal relations between states".[4] Indeed, the reports of the Special Rapporteurs on the law of treaties Gerald Fitzmaurice and Humphrey Waldock both repeatedly emphasise that the effect of armed conflict on treaties raises special issues which should be addressed in a separate study.[5]

In 2004, the ILC finally decided to include the topic in its long-term programme of work, a decision that was endorsed by the UN General Assembly.[6] It led to the drafting of eighteen articles on the effects of armed conflict on treaties. These draft articles were adopted at the sixty-third session of the International Law Commission in 2011.[7] The UN General Assembly subsequently took note of the draft articles and decided to consider the form to be given to the articles at its session in 2014.[8]

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3 See *Règlement Concernant les Effets de la Guerre Sur les Traités*, Christiania (1912); and *The Effects of Armed Conflicts on Treaties*, Helsinki (1985).

4 A. Aust, *Modern Treaty Law and Practice*, Second edition, Cambridge: Cambridge University Press (2007), p. 308.

5 See the Second Report on the Law of Treaties of the Special Rapporteur, Sir Humphrey Waldock, *UN Doc. A/CN.4/156* and Add.1-3, Yearbook of the International Law Commission 1957, Vol. II, p. 79; and the Second Report on the Law of Treaties of the Special Rapporteur, Sir Gerald Fitzmaurice, *UN Doc. A/CN.4/107*, Yearbook of the International Law Commission 1957 Vol. II, p. 30.

6 See UN General Assembly Resolution 59/41 of 2 December 2004 on the Report of the International Law Commission on the work of its fifty-sixth session, para. 5.

7 Report of the International Law Commission on the work of its sixty-third session, *UN Doc. A/66/10* (2011), paras. 89-101.

8 See UN General Assembly Resolution 66/99 of 9 December 2011, paras. 3 and 4. The draft articles are included in the provisional agenda of the General Assembly's sixty-ninth session, to be held in 2014.

The draft ILC articles on the effects of armed conflict on treaties are clearly based on earlier work of the ILC, especially on its work in relation to the law on treaties and the law on state responsibility. The draft articles mirror several of the provisions of the Vienna Convention on the Law of Treaties, as well as the ILC Articles on the Responsibility of States for Internationally Wrongful Conduct, also known as the ILC Articles on State Responsibility. The close connection established by the ILC between its new draft articles on the effects of armed conflict on treaties and its earlier work considerably strengthens the authority of the draft articles and might prove conducive to their acceptance by States.

One innovative feature of the ILC draft articles is that they formulate the basic principle that the outbreak of an armed conflict does not *ipso facto* suspend or terminate the operation of treaties in force either between the parties to an armed conflict themselves or between parties to the conflict and third States. More specifically, the treaty relations between a belligerent State on the one hand, and third states on the other, continue to be governed by the law of peace, supplemented by the law of neutrality in international armed conflict.[9] Thus as a matter of principle, States involved in an armed conflict – whether international or internal[10]– remain under a duty to abide by their

9 See, *inter alia,* M. Bothe; C. Bruch; J. Diamond; and D. Jensen, 'International Law Protecting the Environment During Armed Conflict: Gaps and Opportunities', *International Review of the Red Cross,* Vol. 92, No. 879 (2010), p. 581; E.V. Koppe, *The Use of Nuclear Weapons and the Protection of the Environment During International Armed Conflict*, Oxford: Hart Publishing, p. 336. Specifically on the law of neutrality, which is based on a duty of non-participation and impartiality for the neutral State as well as a right not to be adversely affected by the armed conflict, see M. Bothe, 'Neutrality, Concept and General Rules', in R. Wolfrum (ed.), *Encyclopedia of Public International Law*, Max Planck Institute for Comparative Public Law and International Law, Oxford: Oxford University Press (2012), Vol. VII, pp. 617-634; P. Hostettler, O. Danai, 'Neutrality in Land Warfare', in R. Wolfrum (ed.), *Encyclopedia of Public International Law*, Max Planck Institute for Comparative Public Law and International Law, Oxford: Oxford University Press (2012), Vol. VII, pp. 638-643, para. 1; L. Oppenheim, *International Law: A Treatise*, Vol. II, *Disputes, War and Neutrality*, seventh edition, edited By H. Lauterpacht, London/New York/Toronto: Longmans, Green and Co (1952); and E. Chadwick, *Traditional Neutrality Revisited: Law, Theory and Case Studies*, The Hague: Kluwer Law International (2002). Of course, the general principle of the continued applicability of treaty relations between a State involved in armed conflict and third States does not imply that these treaty relations remain unaffected in all circumstances. The following section discusses the suspension of treaties during armed conflict as well as circumstances precluding the wrongfulness of a State's acts.

10 A remarkable novelty of the ILC draft articles on the effects of armed conflict on treaties – as compared to those of IDI – is that these not only cover international armed conflict, but also internal armed conflicts in which government authorities are involved. Compare Article 1 of the Helsinki Resolution of the *Institut de Droit International* with Article 2 of the draft articles of the International Law Commission, *UN Doc. A/CN.4/L.777* of 11 May 2011 on the Effects of Armed Conflicts on Treaties: Titles and Texts of the Draft Articles on the Effects of Armed Conflicts on Treaties Adopted by the Drafting Committee on Second Reading. It should be noted that the ILC draft articles exclude armed conflicts between non-state armed groups without the involvement of government forces. This restriction

treaty obligations with regard to third States. Moreover, the articles formulate the principle that even between belligerent States *inter se*, whose relations are of course primarily regulated by international humanitarian law, the operation of treaties is considered not to be *ipso facto* terminated or suspended upon the outbreak of armed conflict.[11]

This chapter examines the implications of the basic principle formulated by the ILC for the legal framework governing the management and protection of natural resources during armed conflict. The ILC draft articles on the effects of armed conflict on treaties serve as a guideline throughout this chapter. There are two specific reasons for taking the ILC articles as a point of reference. In the first place, the ILC is a committee set up by the UN General Assembly pursuant to Article 13 of the UN Charter with the specific mandate to promote "the progressive development of international law and its codification".[12] In accordance with its mandate, the ILC has been engaged in the preparation of a number of "draft articles", some of which have subsequently been adopted by States in the form of treaties. The 1969 Vienna Convention on the Law of Treaties is a relevant example. Others, such as the ILC articles on State responsibility, are directly relied on by States and international courts, despite the fact that the articles are not contained in a legally binding document.

The second reason for taking the articles on the effects of armed conflict as a point of reference relates to the working method of the ILC, which is characterised by a constant dialogue with governments throughout the drafting process and which includes an extensive consideration of State practice. The drafting process of ILC articles – and in particular the views expressed by States with regard to the draft articles – therefore offers important insights into the process of customary international law making.

Section 2 examines the outbreak of armed conflict as grounds for the termination or suspension of treaties. Section 3 then takes a closer look at the general rules on the termination and suspension of treaties, codified in the Vienna Convention on the Law of Treaties. Section 4 examines circumstances precluding wrongfulness under the law of State responsibility for the non-

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relates to the scope of the draft articles as specified in draft Article 3, *i.e.,* that the articles apply only to situations in which at least one State party to a treaty is also a party to the conflict. See draft Article 3 and the first report on the effects of armed conflict on treaties prepared by Special Rapporteur Mr. Lucius Caflisch, *UN Doc. A/CN.4/627* of 22 March 2010, para. 21.

11 See, *e.g.,* Lassa Oppenheim, who had already declared in 1912 that "the opinion is pretty general that war by no means annuls every treaty". See L. Oppenheim, *International Law: A Treatise*, Vol. II, *War and Neutrality*, second edition, New York/Bombay/Calcutta: Longmans, Green and Co. (1912), p. 129. Also see C. Greenwood, 'Scope of Application of Humanitarian Law', in D. Fleck, (ed.), *The Handbook of International Humanitarian Law*, Second Edition, Oxford: Oxford University Press (2008), p. 73; and A. Aust, *Modern Treaty Law and Practice*, Second edition, Cambridge: Cambridge University Press (2007), p. 310.

12 Statute of the International Law Commission, UN General Assembly Resolution 174 (II) of 21 November 1947, last amended by resolution 36/39 of 18 November 1981, Article 1.

performance of treaty obligations. Section 5 assesses the effects of armed conflict on obligations under customary international law. Finally, section 6 evaluates the role of international human rights and environmental law for the legal regime regarding the exploitation of natural resources in situations of armed conflict.

5.2 THE OUTBREAK OF ARMED CONFLICT AS GROUNDS FOR THE TERMINATION OR SUSPENSION OF TREATIES

This section assesses the outbreak of armed conflict as autonomous grounds for the termination or suspension of the operation of treaties. It first assesses the general rules formulated in the ILC draft articles and then examines the effects of armed conflict on human rights and environmental treaties specifically, looking both at the rules formulated in the ILC draft articles and at relevant case law.

5.2.1 General principles concerning the effects of armed conflict on treaties

In order to assess the precise effects of armed conflict on the applicability of individual treaties, the ILC draft articles formulate guidelines on the susceptibility of treaties to suspension, withdrawal or termination as a consequence of the outbreak of an armed conflict.[13] According to Article 4 of the ILC draft Articles, reference should first be made to the provisions of the relevant treaty. It states that "where a treaty itself contains provisions on its operation in situations of armed conflict, those provisions shall apply". In this way, the ILC draft Articles follow the system set out in the 1969 Vienna Convention on the Law of Treaties, which determines that the termination, withdrawal from or suspension of the operation of a treaty may take place "in conformity with the provisions of the treaty".[14]

Secondly, if the treaty does not contain an express provision on its operation, Article 5 of the ILC draft Articles prescribes that recourse must be made to the rules of international law on treaty interpretation in order to determine whether the treaty is susceptible to termination, withdrawal or suspension

13 This may be considered one of the most innovative features of the ILC draft Articles on the Effects of Armed Conflict on Treaties, since it breaks away from the traditional approach consisting of a negative assumption that treaty relations will be discontinued during armed conflict.

14 See Article 54 of the 1969 Vienna Convention on the Law of Treaties (23 May 1969, *1155 U.N.T.S. 331*) on termination and withdrawal and Article 57 on suspension.

in the event of an armed conflict.[15] Thus the text of the provisions should be seen in context and in the light of the object and purpose of the treaty.[16]

If the treaty itself does not provide any indication of its susceptibility to termination, withdrawal or suspension in the event of an armed conflict, recourse should be made to Article 6 of the draft Articles. This provision determines that regard shall be had to external factors indicating the susceptibility of a treaty to termination, withdrawal or suspension in the event of an armed conflict, including the nature of the treaty – in particular its subject matter, its object and purpose, its content and the number of parties to the treaty – as well as the characteristics of the armed conflict, such as its territorial extent, its scale and intensity, its duration, and, in the case of a non-international armed conflict, the degree of outside involvement.[17]

This provision should be read together with Article 7, and the annex containing an indicative list of treaties "the subject matter of which involves an implication that they continue in operation, in whole or in part, during armed conflict". These treaties include international human rights and environmental treaties, but also treaties which may cover these subject-matters, namely

15 This refers to the customary rules on treaty interpretation. Although these rules have been codified in Articles 31 and 32 of the Vienna Convention on the Law of Treaties, the ILC preferred to include a general reference to the customary rules in the draft articles rather than a specific reference to the Vienna Convention. The reason for including such a general reference is twofold. First of all, it is intended to ensure that the provision also addresses those States that are not a party to the Vienna Convention. Secondly, it is meant as a concession to the committee members favouring a subjective approach to the question of continued applicability of treaties, focusing on the intention of the parties to the treaty rather than on the – objective – question whether the treaty is compatible with the situation of armed conflict. See the Effects of Armed Conflicts on Treaties, Statement of the Chairman of the Drafting Committee of 17 May 2011, pp. 9-10. For the customary international law status of these provisions, see, *inter alia,* the judgment of the International Court of Justice in *Oil Platforms* (Islamic Republic of Iran v. United States of America), Judgment of 6 November 2003, *I.C.J. Reports 2003*, p. 161, para. 41, in which the Court refers to "the general rules of treaty interpretation, as reflected in the 1969 Vienna Convention on the Law of Treaties". For references to other ICJ cases confirming the customary international law status of these provisions, see M.E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties*, Leiden/Boston: Martinus Nijhoff Publishers (2009), p. 440, note 121.

16 Compare Article 31 of the Vienna Convention on the Law of Treaties. For a discussion of the rules on interpretation, see *inter alia* R.K. Gardiner, *Treaty Interpretation*, Oxford: Oxford University Press (2008); and U. Linderfalk, *On the Interpretation of Treaties: The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties*, Law and Philosophy Library, Vol. 83, Dordrecht: Springer (2007).

17 The Commentary to the draft articles indicates that recourse to Article 6 may be made only when interpretation under Article 5 has not provided a conclusive answer. See the Statement of the Chairman of the Drafting Committee on the Effects of Armed Conflict on Treaties of 17 May 2011, p. 11. The present author expresses serious doubts with regard to this approach. Several of the factors mentioned in Article 6 are already part of the interpretation exercise under Articles 31 and 32 of the Vienna Convention to which Article 5 of the draft articles refers, including the subject matter of the treaty, its object and purpose and its content.

treaties declaring, creating or regulating a permanent regime or status and multilateral law-making treaties.[18] It is ultimately the subject-matter of the treaty which determines to what extent a treaty continues to apply during armed conflict. Special Rapporteur Lucius Caflisch indicates that "the survival of a treaty belonging to a category included in the list may be limited to only some of its provisions".[19] This implies that parties to an armed conflict must carefully consider to what extent they must continue to respect their obligations under a particular treaty.

Although the list of treaties included in Article 7 is merely indicative and has also met with some criticism,[20] the inclusion in the list of international human rights treaties and environmental treaties, as well as categories which may cover these subject-matters, may be interpreted as a strong presumption in favour of the continued applicability of these types of treaties, in whole or in part, during an armed conflict. The following subsections examine the question of the continued applicability of these types of treaties in more detail.

5.2.2 Human rights instruments

This section discusses two issues. The first concerns the effects of armed conflict on human rights instruments in general, with a particular emphasis on the effects of armed conflict on the rights protected under the ICESCR and the ICCPR. The second part discusses the implications of this general framework for the right of a people not to be deprived of its means of subsistence, while

18 In this regard, see the comments made by Switzerland, arguing that international environmental treaties may be said to fall within the category of multilateral law-making treaties. See Effects of Armed Conflict on Treaties, Comments and information received from Governments, *UN Doc. A/CN.4/622*, 15 March 2010, comments concerning draft Article 5 and its annex. For a study of the effects of armed conflict on international environmental agreements in particular, see S. Vöneky, 'A New Shield for the Environment: Peacetime Treaties as Legal Restraints of Wartime Damage', *Review of European Community & International Environmental Law* 9 (1) 2000, pp. 20–32.

19 International Law Commission, First report on the effects of armed conflicts on treaties, by Mr. Lucius Caflisch, Special Rapporteur, *UN Doc. A/CN.4/627* of 22 March 2010, para. 69.

20 For comments by governments in respect of the list, see Effects of Armed Conflict on Treaties, Comments and information received from Governments, *UN Doc. A/CN.4/622*, 15 March 2010, comments concerning draft Article 5 and its annex; and *UN Doc. A/C.6/60/SR.20* of 29 November 2005, para. 1 for critical remarks made by the United Kingdom in respect of the inclusion of international environmental treaties. See also the commentary of the United States in the Sixth Committee of the General Assembly: "Such a categorization of treaties was problematic, since treaties did not automatically fall into one of several categories. […] It would be more useful, for the guidance of States, to enumerate the factors that might lead to the conclusion that a treaty or some of its provisions should continue or should be suspended or terminated in the event of armed conflict". See *UN Doc. A/C.6/60/SR.2* of 29 November 2005, para. 34.

the third part focuses on rights relating to public participation in decision-making.

General remarks concerning the effects of armed conflict on human rights instruments
The ILC draft articles on the effects of armed conflict suggest that human rights treaties continue to apply during armed conflict. This is supported first of all in the preamble of Additional Protocol II, which recalls that "international instruments relating to human rights offer a basic protection to the human person". The legal effect of armed conflict on the operation of international human rights treaties has also been dealt with extensively in the case law of international tribunals, in particular in the case law of the International Court of Justice.

With regard to the operation of the International Covenant on Civil and Political Rights (ICCPR), the ICJ made a distinction between the derogable and non-derogable rights listed in the Convention.[21] In its *Nuclear Weapons Advisory Opinion*, the Court observed that the protection of the ICCPR "does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency".[22]

In the *Nuclear Weapons Advisory Opinion*, the Court also commented on the relationship between international human rights law and international humanitarian law. In this respect it should be remembered that both international humanitarian law and international human rights law provide protection to human beings. However, they do so in very different ways. The primary aim of international humanitarian law is to regulate the horizontal relationship between parties to an armed conflict, and in doing so, to prevent unnecessary suffering for those not directly involved in the armed conflict.

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21 Article 4 (1) of the ICCPR permits States to derogate from their obligations under the Covenant "[i]n time of public emergency" – which may include an armed conflict. See General Comment No. 29 of the Human Rights Committee on Art. 4 (Derogations during a State of Emergency), UN Doc. *CCPR/C/21/Rev.1/Add.11*, 31 August 2001. It must be noted that derogation and suspension, strictly speaking, have different legal effects. Where suspension temporarily sets aside the legal obligation, derogation does not affect the binding nature of the legal obligation as such. In the former case, a State is completely exempted from compliance with the legal obligation, while in the latter case it will have to justify non-compliance for each individual case. However, it may be argued that when a treaty provides for derogation from its provisions in situations of armed conflict, this must be interpreted as a strong indication against the susceptibility of the treaty to suspension in these particular circumstances. This conclusion is supported by the ILC in its commentary to the draft articles, which state that " the competence to derogate "in time of war or other public emergency threatening the life of the nation" certainly provides evidence that an armed conflict as such may not result in suspension or termination". See Draft articles on the effects of armed conflicts on treaties, with commentaries, *Yearbook of the International Law Commission (2011)*, Vol. II, Part Two, para. 50. Therefore, this section focuses on derogation rather than suspension of human rights treaties.

22 International Court of Justice, Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion of 8 July 1996, *I.C.J. Reports 1996*, para. 25.

On the other hand, international human rights law regulates the vertical relationship between governmental authorities and the persons falling within their jurisdiction.

In this particular case, the Court was confronted with the application of a right from which no derogation is permitted during armed conflict under Article 4 of the ICCPR, *i.e.*, the right to life. The Court determined that:

> "the right not arbitrarily to be deprived of one's life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis,* namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself".[23]

It can be concluded from this case that – whenever obligations under human rights law are in conflict with obligations under international humanitarian law in situations of armed conflict – the relevant obligations under human rights law must be interpreted in the light of concurring rights or obligations under international humanitarian law.

In its *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the Court based its views on its previous opinion in *Nuclear Weapons* and considered that there are three possible scenarios with respect to the relations between international human rights law and international humanitarian law: international humanitarian law is exclusively applicable, international human rights law is exclusively applicable, or both these branches of international law are concurrently applicable.[24] The Court further extended the protection of human rights instruments, including

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23 *Ibid.*

24 International Court of Justice, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion of 9 July 2004, *I.C.J. Reports 2004*, p. 136, para. 106. Also see E.V. Koppe, *The Use of Nuclear Weapons and the Protection of the Environment During International Armed Conflict*, Studies in International Law, Vol. 18, Oxford, Hart (2008), p. 347, who distinguishes a fourth situation, namely a situation in which neither international human rights law nor international humanitarian law would be applicable. The present author doubts whether such a situation would be possible, at least with regard to the rights protected under the ICCPR, because the possibility to derogate from particular human rights in situations of public emergency under this convention – including situations of internal disturbances not amounting to armed conflict – does not render the rights as such completely inoperative. After all, Article 4 (1) determines that the provisions may only be derogated from "to the extent strictly required by the exigencies of the situation". In this respect also see: Minimum humanitarian standards, Analytical report of the Secretary-General submitted pursuant to Commission on Human Rights resolution 1997/21, *UN Doc. E/CN.4/1998/87*, 5 January 1998, para. 54.

the ICCPR and the International Covenant on Economic, Social and Cultural Rights (ICESCR), to situations of occupation.[25]

The Court confirmed its earlier case law in its judgment in the *Case concerning Armed Activities on the Territory of the Congo*, when it concluded that "both branches of international law, namely international human rights law and international humanitarian law, would have to be taken into consideration" in situations of armed conflict and that "international human rights instruments are applicable 'in respect of acts done by a State in the exercise of its jurisdiction outside its own territory", particularly in occupied territories".[26]

In addition to the case law of the International Court of Justice, several judgments of regional human rights courts have dealt with the application of human rights to conflict situations.[27] First, in its order for provisional measures against Libya issued during the internal conflict that broke out in February 2011, the newly set-up African Court on Human and Peoples' Rights ordered the Gaddafi regime to "immediately refrain from any action that would result in loss of life or violation of physical integrity of persons, which could be a breach of the provisions of the Charter or of other international human rights instruments to which it is a party".[28] Similarly, the Inter-American Court of Human Rights consistently applies the Inter-American Convention on Human Rights in situations of internal armed conflict.[29] Finally, the European Court of Human Rights has also applied the rights protected under the European Convention on Human Rights in conflict situations, in particular in situations of internal armed conflict and occupation.[30]

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25 International Court of Justice, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion of 9 July 2004, *I.C.J. Reports 2004*, p. 136, paras. 111-112.

26 International Court of Justice, Case concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment of 19 December 2005, *I.C.J. Reports 2005*, p. 168, para. 216. It is interesting to note that, by applying the ICCPR to situations of occupation, the International Court of Justice explicitly departs from the original intentions of the parties to the ICCPR. See on this M.J. Dennis, 'Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation', *American Journal of International Law,* Vol. 99, No. 1, pp. 119-141.

27 Where the current section deals with the application of human rights law to situations of armed conflicts by human rights bodies, see C. Byron, 'A Blurring of the Boundaries: The Application of International Humanitarian Law by Human Rights Bodies', *Virginia Journal of International Law,* Vol. 47(4) (2006-2007), pp. 839-896 for an analysis of the application of international humanitarian law by human rights bodies.

28 Commission on Human and Peoples' Rights v. Great Socialist People's Libyan Arab Jamahiria, Application No. 004/2011, Order for provisional measures, 25 March 2011.

29 See the judgments of the Inter-American Court of Human Rights in the Las Palmeras Case, Judgment of 4 February 2000 (preliminary objections), para. 32 and the Case of Bámaca-Velasquez v. Guatemala, Judgment of 25 November 2000 (merits), para. 207.

30 For occupation, see, *e.g.,* the judgments of the European Court for Human Rights in Loizidou v. Turkey (preliminary objections), Application No. 15318/89, Judgment of 23 March 1995 and in Al-Skeini and Others v. the UK, Application No. 55721/07, Judgment of 7 July 2011.

Special reference should be made in this respect to the Chechnya cases before the European Court of Human Rights. Several cases have been filed before the Court against Russia for violations of the European Convention on Human Rights as a result of its military operations in Chechnya, including violations of the right to life.[31] The situation in Chechnya clearly suggests the application of both the common Articles 3 of the 1949 Geneva Conventions and the provisions of the 1977 Additional Protocol II. In other words, the situation can be characterised as an internal armed conflict to which the less stringent rules of international humanitarian law apply when it comes to the protection of human lives. Nevertheless, the European Court directly applied human rights standards to assess the legality of the conduct of the Russian security forces. In this respect, one of the important considerations of the Court was that Russia had not declared a state of "war or other public emergency", as required under the European Convention for the Protection of Human Rights to derogate from the Convention's provisions.[32]

It may therefore be concluded that human rights treaties continue to apply during armed conflict. This is particularly the case for situations of internal armed conflict and for situations of occupation. In situations of occupation, the case law of the ICJ shows that in occupied territory an occupant must respect its own obligations arising from treaties to which it is a party, at least those with extraterritorial effects. In addition, international humanitarian law – in particular, Article 43 of the 1907 Hague Regulations – provides that an occupant must respect the laws in force in occupied territory. As argued above, this may include relevant treaties to which the occupied State is a party.

Although the continued applicability of human rights treaties certainly covers the non-derogable rights protected under the ICCPR, a similar conclusion can be drawn with regard to the derogable rights protected under the ICCPR and, to a lesser extent, for economic, social and cultural rights protected under the ICESCR. As regards derogable rights under the ICCPR, it should be noted that derogation is permitted only under exceptional circumstances and to the extent necessary in view of the situation, which implies that derogation must

31 See, *e.g.*, the following cases before the European Court of Human Rights: Khashiyev and Akayeva *v.* Russia, Applications nos. 57942/00 and 57945/00, Judgment of 24 February 2005; Isayeva *v.* Russia, Application no. 57950/00, Judgment of 24 February 2005; and Estamirov and Others *v.* Russia, Application no. 60272/00, Judgment of 12 October 2006.

32 See *e.g.* European Court of Human Rights, Isayeva *v.* Russia, Application no. 57950/00, Judgment of 24 February 2005, para. 191: "The Court considers that using this kind of weapon in a populated area, outside wartime and without prior evacuation of the civilians, is impossible to reconcile with the degree of caution expected from a law-enforcement body in a democratic society. No martial law and no state of emergency has been declared in Chechnya, and no derogation has been made under Article 15 of the Convention (see § 133). The operation in question therefore has to be judged against a normal legal background".

be justified in each individual case.[33] In addition, as the Chechnya cases before the European Court for Human Rights show, a State may only derogate from its obligations under human rights treaties when it explicitly invokes this right. As regards rights protected under the ICESCR, the *Israeli Wall Opinion* confirms their applicability to situations of occupation, depending on the nature and duration of the occupation. From the *Israeli Wall Opinion* it can be inferred that a State exercising jurisdiction over an occupied territory over a longer period of time is considered bound by the provisions of the ICESCR.[34]

It can be concluded from the case law examined in this section that international law contains two basic principles for determining the applicable law in situations where both international humanitarian law and international human rights law contain relevant rules. First, it is necessary to determine whether there is any conflict between the rules of international humanitarian and human rights law. A conflict occurs when the rules from the two fields of international law point in different directions. This was the case in the *Nuclear Weapons Advisory Opinion*, where the right to life protected under the ICCPR clashed with the rules regarding the use of weapons under international humanitarian law. In these situations, the *lex specialis* principle must be applied, implying that the relevant rules of international humanitarian law prevail over the rules of international human rights law. However, in many cases, rules of international humanitarian and human rights law that apply to similar situations complement each other. In these cases, the principle of harmonious interpretation must be applied, implying that the rules from the two fields

33 Article 4 (1) of the ICCPR permits States to take measures derogating from their obligations under the Covenant in case of a public emergency which "threatens the life of the nation", but these measures may not be inconsistent with their other obligations under international law – including under international humanitarian law – and may only be taken "to the extent strictly required by the exigencies of the situation". See General Comment No. 31 of the Human Rights Committee on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc. *CCPR/C/21/Rev.1/Add. 13*, 26 May 2004, para. 11 for an express confirmation that the Covenant applies also in situations of armed conflict. Also see General Comment No. 29 of the Human Rights Committee on Art. 4 (Derogations during a State of Emergency), UN Doc. *CCPR/C/21/Rev.1/Add.11*, 31 August 2001, para. 3, which stipulates that "[t]he Covenant requires that even during an armed conflict measures derogating from the Covenant are allowed only if and to the extent that the situation constitutes a threat to the life of the nation". See also E.V. Koppe, *The Use of Nuclear Weapons and the Protection of the Environment During International Armed Conflict*, Studies in International Law, Vol. 18, Oxford: Hart (2008), p. 347.

34 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, *I.C.J. Reports 2004*, Advisory Opinion of 9 July 2004, p. 136, para. 112. For more details, see S. Vité, 'The Interrelation of the Law of Occupation and Economic, Social and Cultural Rights', *International Review of the Red Cross,* Vol. 90, No. 871 (2008), pp. 629-651.

of international law should be interpreted in such a way as "to give rise to a single set of compatible obligations".[35]

Implications for the prohibition against depriving a people of its means of subsistence
As regards the implications of these general rules set out in the case law of international tribunals for the right of peoples not to be deprived of their means of subsistence, as protected under Article 1(2) of the ICESCR and the ICCPR, it should first of all be noted that Article 1 of the ICCPR is not listed in Article 4 among the rights from which no derogation is permitted. Nevertheless, at the same time, the prohibition against depriving peoples of their means of subsistence is framed in absolute terms. The identical Articles 1(2) of the ICESCR and the ICCPR provide that *in no case* may a people be deprived of its means of subsistence. This may be regarded as a strong presumption in favour of its continued applicability during armed conflict.

This presumption is further strengthened by Article 25 of the ICESCR and Article 47 of the ICCPR, which expressly provide that "[n]othing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources". It may therefore be concluded that Article 1 has a special status compared to other rights protected under the Covenants.

The special status of the identical Articles 1 of the ICESCR and the ICCPR has been confirmed on several occasions. For example, in its General Comment No. 24 regarding reservations, the Human Rights Committee, stated that a "reservation to article 1 denying peoples the right to determine their own political status and to pursue their economic, social and cultural development, would be incompatible with the object and purpose of the Covenant".[36] Furthermore, in its commentary on the draft articles on State responsibility the ILC argued that, in relation to the permissibility of countermeasures, the prohibition against depriving peoples of their means of subsistence constitutes a fundamental human right which may not be affected by – otherwise lawful – countermeasures.[37]

The question arises what the special status of Article 1(2) of the 1966 Covenants implies for the application of the provision in situations of armed

35 International Law Commission, Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, Yearbook of the International Law Commission, 2006, Vol. II, Part Two, p. 408.

36 Human Rights Committee, General Comment No. 24 on Issues Relating to Reservations Made Upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant, 4 November 1994, *UN Doc. CCPR/C/21/Rev.1/Add.6 (1994)*, para. 9.

37 Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, UN Doc. A/56/10, *Yearbook of the International Law Commission* 2001, Vol. II, Part Two, p. 132, para. 7.

conflict. Current case law of the International Court of Justice, and in particular the *Nuclear Weapons Advisory Opinion*, indicates that in situations of armed conflict, human rights law must be interpreted with reference to relevant rules of international humanitarian law. However, as explained in the previous section, this is only the case when there is a conflict between the relevant rules of these fields of law, as in the *Nuclear Weapons Advisory Opinion*, where the prohibition against arbitrarily depriving someone of his life under international human rights law was thought to be at odds with the right under international humanitarian law to use weapons that cause civilian casualties. The question is therefore whether there is a conflict between the prohibition against depriving peoples of their means of subsistence and a relevant rule of international humanitarian law. It is only then that the *lex specialis* principle applies.

International humanitarian law does not contain provisions that expressly allow parties to an armed conflict to deprive the civilian population of its means of subsistence. Rather, it contains several rules that are aimed at protecting the civilian population against such practices. As the very least, parties to an armed conflict may not attack, destroy, remove or render useless objects indispensable to the survival of the civilian population. In addition, international humanitarian law contains prohibitions against pillage and the seizure of property outside situations of military necessity that go beyond the prohibition to remove objects indispensable to the civilian population.[38]

It can therefore be argued that the prohibition against depriving peoples of their means of subsistence incorporated in Article 1(2) of the ICESCR and the ICCPR remains fully applicable in situations of armed conflict. The prohibition against attacking, destroying, removing or rendering useless objects indispensable to the survival of the civilian population must be regarded as a minimum guarantee, while the prohibitions against pillage and against seizing property outside situations of military necessity can be regarded as providing complementary protection.

Implications for rights relating to public participation in decision making

Chapter 3 discussed the right to internal self-determination and argued that this right entails a right for the population of a State and for specific groups within society to participate in decision making regarding exploitation projects. For indigenous peoples this right is inextricably linked to their right to enjoy their culture under Article 27 of the ICCPR. For individual members of the population, it can be argued that their right to be involved in decision making is expressed in the right to participate in the conduct of public affairs under Article 25 of the ICCPR.

As far as Article 27 of the ICCPR is concerned, the Human Rights Committee explicitly stated that "a State may not reserve the right to […] deny to minor-

38 These prohibitions are discussed in more detail in the following chapter.

ities the right to enjoy their own culture, profess their own religion, or use their own language".[39] The Committee also noted that Article 27 of the ICCPR is a right "of profound importance".[40] However, the Committee's Comment relates to the subject of treaty reservations, rather than the issue of the suspension of treaties as a result of armed conflict. Moreover, the Comment relates to the right of minorities to enjoy their culture in general and not to the right to public participation arising from this.

Furthermore, none of the provisions cited above provides for a direct right to public participation. Pursuant to Article 1 of the ICCPR, States are required to establish procedures that allow the exercise of the right to internal self-determination in practice, but this obligation does not automatically afford citizens a direct right to participate in decision making. That right cannot be automatically inferred from Article 25 of the ICCPR either, as that provision deals only with the right to participate in the conduct of public affairs in a general way.

Generally speaking, it may be argued that the right of a State to derogate from relevant provisions of the human rights covenants providing indirectly for public participation in decision making, in particular, Articles 1, 25 and 27 of the ICCPR, is only permitted to the extent necessary in view of the situation. The right of a government to limit the exercise of specific rights in situations of armed conflict does not relieve a government of its obligations under human rights law in general. Therefore, arguably a State must respect its obligation to consult local communities regarding projects that directly affect them, but only insofar as this obligation is compatible with the situation of armed conflict.

5.2.3 International environmental treaties

The ILC draft articles on the effects of armed conflict on treaties not only formulate a presumption of continued applicability for international human rights instruments, but also for international environmental treaties. The decision of the ILC to include environmental treaties in the indicative list annexed to Article 7 is quite remarkable, as there is hardly any conclusive case law or practice to base this presumption on. The ICJ's *Nuclear Weapons Advisory Opinion* is an exception in this respect. In this opinion, the Court briefly touched upon the legal effects of armed conflict on international environmental treaties.

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39 Human Rights Committee, General Comment No. 24: Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under Article 41 of the Covenant, 4 November 1994, *CCPR/C/21/Rev.1/Add.6*, para. 8.

40 *Ibid*., para. 10.

The Court took a cautious view and only addressed the actual question put to it, namely whether the obligations stemming from environmental treaties would preclude the threat or use of nuclear weapons in legitimate self-defence.[41] It argued "that the issue is not whether the treaties relating to the protection of the environment are or are not applicable during an armed conflict, but rather whether the obligations stemming from these treaties were intended to be obligations of total restraint during military conflict".[42]

The Court also stated that it did "not consider that the treaties in question could have intended to deprive a State of the exercise of its right of self-defence under international law because of its obligations to protect the environment", but that nevertheless, "States must take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives". It went on to consider that "respect for the environment is one of the elements that go to assessing whether an action is in conformity with the principles of necessity and proportionality". Therefore this Opinion implies that environmental standards must be taken into account in the interpretation of the international humanitarian law principles of necessity and proportionality.

A similar approach was adopted by an ICTY Committee established to review the NATO bombing campaign against the Federal Republic of Yugoslavia.[43] This Committee used the international humanitarian law principles of necessity and proportionality in order to assess the legitimacy of the environmental damage inflicted by the NATO bombing campaign in former Yugoslavia.[44] It concluded that the principle of proportionality requires a balancing exercise between the military advantage obtained by an attack on the one hand, and damage to the environment on the other. The Committee stated in this respect that "in order to satisfy the requirement of proportionality, attacks against military targets which are known or can reasonably be assumed to cause grave environmental harm may need to confer

41 The original request for an Advisory Opinion asked the Court to render its opinion on the following question: "Is the threat or use of nuclear weapons in any circumstance permitted under international law?" See UN General Assembly Resolution 49/75 of 15 December 1994. In this respect, also see the written statement of the United Kingdom to the request for an advisory opinion, which contains a clear exposé of the issues to be considered by the International Court of Justice.

42 Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion of 8 July 1996, *I.C.J. Reports 1996*, para. 30.

43 Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, published on 14 June 2000, available through <http://www.icty.org> (last consulted on 23 November 2012).

44 The Committee considered in this regard that the environmental effects of the NATO bombing campaign "are best considered from the underlying principles of the law of armed conflict such as necessity and proportionality". *Ibid*., para. 15. For a critical assessment of the report on this point, see M. Bothe, 'The Protection of the Civilian Population and NATO Bombing on Yugoslavia: Comments on a Report to the Prosecutor of the ICTY', *European Journal of International Law,* Vol. 12, No. 3 (2001), pp. 531-535.

a very substantial military advantage in order to be considered legitimate".[45] From the perspective of environmental protection, this interpretation of the principle of proportionality at first seems highly unsatisfactory. It implies that, when the stakes are sufficiently high, causing grave harm to the environment can be considered legitimate, as long as this harm does not reach the threshold of "widespread, long-term and severe" damage to the environment. However, at the same time it also implies that the threshold for environmental damage is considerably lower when such a "very substantial military advantage" cannot be anticipated.

Both the *Nuclear Weapons Advisory Opinion*, as well as the report of the ICTY Committee, focus on environmental damage resulting from military attacks. The *Nuclear Weapons Advisory Opinion* addressed the question of permissible environmental damage only against the background of the right to self-defence, which is too narrow a context to deal with this question. Neither the ICJ nor the ICTY Committee addressed the broader question of the continued applicability of international environmental law as such in situations of armed conflict.

This question is highly relevant for the purposes of the present book, as international environmental treaties formulate obligations of care that may qualify the right of States to exploit natural resources in situations of armed conflict. In addition, combined environmental and trade treaties, like CITES, can be instrumental in curbing the trade in conflict resources. In the light of the general presumption of the ILC in favour of the continued applicability of international environmental law in situations of armed conflict and in the absence of specific guidelines arising from the case law of the ICJ or any other authority, the best way to proceed is to take a closer look at the relevant treaties themselves.

Looking at international environmental treaties, it becomes apparent first of all that these treaties rarely contain express provisions on their applicability in situations of armed conflict.[46] CITES, for example, is completely silent on the matter. However, there are a few treaties that do contain provisions which implicitly provide for their applicability – or inapplicability – in situations of armed conflict. The UN Convention on the Law of the Non-Navigational Uses of International Watercourses, which contains a *renvoi* to the relevant rules of international humanitarian law, is an example of this.[47] Article 29 of this Convention provides that "international watercourses and related installations, facilities and other works shall enjoy the protection accorded by

45 *Ibid.*, para. 22.

46 A study by UNEP indicates that around 20 per cent of international environmental treaties provide for their discontinuance during armed conflict, while the remaining 80 per cent either does not provide any answer or is inconclusive on its operation during armed conflict. See UNEP, 'Protecting the Environment During Armed Conflict: An Inventory and Analysis of International Law', Nairobi (2009).

47 UN Convention on the Law of the Non-Navigational Uses of International Watercourses, 21 May 1997, *36 ILM 700 (1997).*

the principles and rules of international law applicable in international and non-international armed conflict and shall not be used in violation of those principles and rules".

This provision can be interpreted in two ways. The first interpretation regards this provision as a confirmation of the complementary protection afforded by international humanitarian law to international waterways in situations of armed conflict. It should be noted that international waterways can have strategic relevance to parties to an armed conflict, *e.g.*, as supply lines or transportation routes. In contrast, the second interpretation regards this provision as a confirmation of the inapplicability of the convention in situations of armed conflict in favour of the application of the relevant rules of international humanitarian law.

The Commentary of the ILC, which was responsible for drafting the convention, shows a preference for the first interpretation. The Commentary indicates in this respect that Article 29 "simply serves as a reminder that the principles and rules of international law applicable in international and internal armed conflict contain important provisions concerning international watercourses and related works", but that "[o]f course, the present articles themselves remain in effect even in time of armed conflict".[48]

When there is no conflict between the relevant rules of international humanitarian law and the Watercourses Convention,[49] there is no reason to assume that the latter ceases to apply. The Watercourses Convention contains several obligations that are relevant for the protection of watercourses in situations of peace as well as in situations of armed conflict. For example, Article 5 of the Convention, formulates an obligation for watercourse States to utilise an international watercourse in their territories "in an equitable and reasonable manner". Furthermore, Article 7 stipulates 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". These obligations qualify the right of States parties to the Watercourses Convention to exploit the natural resources of international watercourses, including alluvial diamonds.

The UNESCO World Heritage Convention is another example. It includes a provision on safeguarding of world heritage threatened by armed conflict. Article 11(4) of the UNESCO World Heritage Convention provides for the

48 International Law Commission, Draft Articles on the Law of the Non-navigational Uses of International Watercourses and Commentaries thereto, *Yearbook of the International Law Commission 1994*, Vol. II, Part Two, p. 131, paras. 1 and 3.

49 A conflict may occur if an international watercourse is used by one of the parties to an armed conflict in a way as to make an effective contribution to an armed conflict, for example, when an international watercourse is used to transport weapons. In these cases, the watercourse can become a military objective, which means that it can be subject to a military attack. See Chapter 6 of this study for the definition of a military objective and the relevant rules that apply to these objectives.

possibility of placing natural heritage threatened by "the outbreak or the threat of an armed conflict" on a list of "World Heritage in Danger".[50] In this way, the convention implicitly provides for its continued application in conflict situations. Several World Heritage sites in the DR Congo and Côte d'Ivoire have been placed on the list because of threats associated with the conflicts raging in those States.

The continued applicability of this convention in situations of armed conflict also directly affects the obligations of States involved in an international armed conflict. Article 6(3) of the UNESCO World Heritage Convention formulates a prohibition for States against taking "any deliberate measures which might damage directly or indirectly" natural heritage "situated on the territory of other States Parties to this Convention". In the first place, this means that States may not deliberately launch an attack which could cause damage to World Heritage sites. However, it also implies that States may not exploit natural resources situated in world heritage parks, if such exploitation would cause damage to the natural heritage. This implies, for example, that Uganda and Rwanda may have acted in violation of the convention when they undertook the exploitation of natural resources within and around UNESCO World Heritage sites in the DR Congo, including ivory poaching, logging and mining. These activities have posed a significant threat to the integrity of these biodiversity reserves.[51]

In addition to provisions that indicate the continued applicability of environmental treaties, there may be conflict clauses in these treaties which indicate their operation during armed conflict. Article 22 (1) of the Biodiversity Convention, for example, determines that the provisions of the convention

> "shall not affect the rights and obligations of any Contracting Party deriving from any existing international agreement, except where the exercise of those rights and obligations would cause a serious damage or threat to biological diversity".

It is relevant to note that the 1907 Hague Regulations, the 1949 Geneva Conventions and the 1977 Additional Protocols contain several rights for parties to an armed conflict which could be in conflict with their obligations under the Biodiversity Convention. Examples include the right of parties to an armed conflict to destroy property of the hostile party in cases of military necessity; as well as the right of parties to launch an attack against parts of the environment that constitute military objectives. Article 22 of the Biodiversity Conven-

50 UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage, 16 November 1972, *1037 UNTS 151*.

51 Interim report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo, *UN Doc. S/2002/565*, paras. 50 and 52.

tion makes it clear that the exercise of these rights may not cause a serious damage or threat to biological diversity.[52]

It can be concluded that international environmental conventions generally remain applicable in situations of armed conflict, unless the relevant convention provides otherwise. However, it should be noted that the obligations of the parties to these conventions can change as a result of an armed conflict. Many international environmental conventions contain clauses which are more lenient to States with regard to the implementation of their obligations in view of special circumstances. Article 6 of the 1992 Biodiversity Convention, for example, provides that parties have to implement the general measures for conservation and sustainable use "in accordance with [their] particular conditions and capabilities". Of course, such clauses could be invoked by parties to the convention in situations of armed conflict as a reason not to implement part of their obligations under the convention.

5.2.4 Conclusions on the outbreak of armed conflict as a ground for the termination or suspension of treaties

This section has shown that the outbreak of an armed conflict does not automatically suspend the obligations for States under relevant international human rights and environmental treaties. However, this does not imply that these two fields of law apply fully in situations of armed conflict. In some cases international human rights law expressly grants States the right to derogate from their obligations under relevant conventions. The ICCPR contains an express provision allowing for the derogation of rights under the convention in cases of national emergency, including armed conflicts. For the purposes of this book, the right of States to derogate from their obligations under the ICCPR includes a right to derogate to a certain extent from provisions that indirectly provide for public participation by the population of a State.

Furthermore, some of the obligations of States under international human rights treaties may be at odds with rights formulated by international humanitarian law for parties to an armed conflict. This can be illustrated with reference to the ICJ's *Nuclear Weapons Advisory Opinion*, where the International Court of Justice had to consider whether the use of nuclear weapons in situations of armed conflict would constitute a violation of the right to life under international human rights law. In cases where a particular right under international humanitarian law (*i.e.*, the right to cause casualties in situations of armed conflict) is at odds with an obligation under international human

52 What constitutes "serious damage or threat" can be discerned from the ILC commentary to the Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, discussed in Chapter 4 of this book. Damage to the environment can be considered "serious" when it is substantial in the sense of encompassing "significant" damage.

rights law (*i.e.,* the prohibition against arbitrarily depriving someone of his life), the rules of human rights law must be applied in the light of the relevant provisions of international humanitarian law. No such express conflict was established in relation to the rights that are relevant to this book. In fact, it appears that the relevant prohibitions under international human rights law and international humanitarian law are complementary.

Whether particular obligations of international environmental law continue to apply must be established first of all with reference to the treaties themselves. It is relevant to note that some of the environmental conventions that contain relevant obligations for States with respect to the exploitation of natural resources contain provisions indicating their continued applicability in situations of armed conflict. The most relevant examples are the 1972 UNESCO World Heritage Convention and the 1992 Convention on Biological Diversity. Both conventions contain provisions that in practice qualify the right of States to exploit natural resources in situations of armed conflict, most notably by prohibiting certain forms of environmental damage. These apply in all circumstances.

Therefore it can be concluded that the outbreak of an armed conflict has some effect on the applicability of international human rights law and international environmental law, but that most obligations continue to apply to some extent. The following section discusses other grounds for the termination or suspension of treaties under general international law and assesses their relevance for the applicability of international human rights and environmental law in situations of armed conflict.

5.3 Termination or suspension of treaties under the 1969 Vienna Convention on the Law of Treaties

Article 18 of the draft ILC articles on the effects of armed conflict on treaties provides that the draft articles "are without prejudice to the termination, withdrawal or suspension of treaties as a consequence of, inter alia: (a) a material breach; (b) supervening impossibility of performance; or (c) a fundamental change of circumstances". The current section addresses all these grounds for the termination, withdrawal or suspension of a treaty which are codified in the 1969 Vienna Convention on the Law of Treaties.

5.3.1 Material breach

A material breach by a party to a treaty entitles the other parties to terminate or suspend the operation of the treaty. Article 60 of the 1969 Vienna Convention on the Law of Treaties defines a material breach as either "a repudiation of the treaty not sanctioned by the present Convention", meaning *a contrario*

that repudiations that are sanctioned by the Vienna Convention do not constitute material breaches for the purposes of Article 60,[53] or – and this is more relevant to the present book – "the violation of a provision essential to the accomplishment of the object and purpose of the treaty". A provision is considered "essential' if it is "considered by a party to be essential to the effective execution of the treaty".[54] This includes provisions that touch directly on the central purposes of the treaty, as well as provisions of an ancillary character.

Article 60 of the 1969 Vienna Convention clearly delineates the circumstances in which parties may invoke material breach as a reason to terminate a treaty or suspend its operation. In the case of multilateral treaties, which are most relevant to the current study, Article 60(2)(a) provides that a treaty may be suspended or terminated by all the parties to the treaty by unanimous agreement, either between themselves and the defaulting State only, or between all the parties. This possibility is of limited relevance for the current study, as it is not directly related to the circumstances regarding the outbreak of an armed conflict.

In addition, Article 60(2)(b) and (c) recognise two circumstances for unilateral responses, which are limited to suspension. A right to suspend the operation of a treaty in case of material breach accrues first to specially affected parties under section 2(b). The pollution of a State's territory as a result of the violation of an obligation under a multilateral environmental treaty is a relevant example of this.[55]

Secondly, according to Article 60(2)(c) of the Vienna Convention, such a right accrues to other parties "if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty". The drafting history of Article 60 shows that this provision specifically referred to so-called "integral agreements", i.e., treaties which require the

53 Bruno Simma and Christian Tams state in this respect that "[t]he reference to repudiation 'sanctioned by the present Convention' makes clear that claims of invalidity of treaties pursuant to Articles 46 to 53 of the Convention, or for the suspension and/or termination of treaties pursuant to Articles 54 to 64, do not constitute material breaches. In addition, it follows from Article 73 of the Convention that repudiations justified under the law of State responsibility or the United Nations Charter cannot bring Article 60 into operation either". See B. Simma & C.J. Tams, 'Article 60: Termination or Suspension of the Operation of a Treaty as a Consequence of its Breach', in O. Corten & P. Klein (eds.), *The Vienna Convention on the Law of Treaties: A Commentary*, Oxford: Oxford University Press, Vol. II, p. 1358.

54 International Law Commission, Reports of the International Law Commission on the second part of its seventeenth session and on its eighteenth session, *UN Doc. A/6309/Rev.l*, in Yearbook of the International Law Commission (1966), Vol. II, p. 255.

55 See B. Simma & C.J. Tams, 'Article 60: Termination or Suspension of the Operation of a Treaty as a Consequence of its Breach', in O. Corten & P. Klein (eds.), *The Vienna Convention on the Law of Treaties: A Commentary*, Oxford: Oxford University Press, Vol. II, pp. 1364-1365 for this and other examples.

interdependent performance of obligations by all parties for the achievement of its objective.[56] Typical examples include disarmament treaties.

For the purposes of the present study, the question arises whether Article 60 allows a party to suspend the operation of the treaty in the case of a breach of *erga omnes* obligations. As argued above, several environmental conventions contain *erga omnes partes* obligations. In this respect, Bruno Simma and Christian Tams argue that, for the purposes of Article 60(2)(b), the fact that all States can be held to have a legal interest in the observation of the treaty does not make these States specially affected in the case of a breach of the treaty.[57] Therefore it can be argued that this provision cannot be invoked by a State as a ground to suspend the operation of environmental treaties.

Article 60(2)(c) raises another question. Can a breach of an *erga omnes* obligation have the effect of "radically changing the position of all other parties with respect to the performance of their obligations under the treaty"? This question could be rephrased to ask whether those environmental treaties that protect common goods can be considered to constitute integral treaties. In general this is not the case, as obligations under international environmental law are usually not interdependent in the sense that the parties have made their performance of the treaty dependent on the performance by other parties, as is the case with regard to disarmament treaties. Therefore it can be argued that Article 60(2)(c) does not provide grounds for the suspension of the operation of such treaties either.

There may, however, be exceptions to this rule, in particular when parties have agreed to achieve particular targets, as in the case of the 1997 Kyoto Protocol to the 1992 UN Framework Convention on Climate Change. This instrument could be considered an integral treaty in the sense of Article 60(2)(c) of the Vienna Convention. However, it should be noted that a material breach of a specialised instrument such as the Kyoto Protocol would not affect the general obligations of States under the Climate Convention itself.

The final issue relates to the suspension of humanitarian treaties. Article 60(5) of the 1969 Vienna Convention provides that a treaty cannot be suspended in the case of a material breach of "provisions relating to the protection of the human person contained in treaties of a humanitarian character". The term "treaties of a humanitarian character" refers primarily to international humanitarian law treaties. However, arguably, it refers to human rights treaties

56 *Ibid.*, p. 1365. Simma and Tams define integral treaties as treaties "the objective of which can only be achieved through the interdependent performance of obligations by all parties".

57 *Ibid.*, p. 1366.

as well.[58] This implies that human rights treaties cannot be suspended in response to a material breach by another party.

In conclusion, it may be argued that Article 60 of the 1969 Vienna Convention formulates the general rule that a treaty may be suspended – and in some cases terminated – in response to a material breach by one of the parties. However, the provision sets out clear and strict rules for the legality of such responses. Most importantly, suspension is mainly open to parties that are specially affected by the breach. For the purposes of the present book, the provision is therefore primarily relevant in situations of international armed conflict. It affords a belligerent State a right to suspend the operation of a treaty in the case of a material breach committed by another State, provided that the former State suffers damage from the breach of obligations. For the purposes of this book, such damage will usually concern extraterritorial damage to the environment.

5.3.2 Supervening impossibility of performance

According to Article 61 of the 1969 Vienna Convention, supervening impossibility of performance can be invoked as a reason to terminate, withdraw from or suspend the operation of a treaty if the performance of the treaty has become impossible due to the temporary or permanent disappearance or destruction of an object indispensable for the execution of the treaty.[59]

Thus the impossibility of performance must be directly linked to the disappearance or destruction of an object which was essential for the performance of the treaty.[60] Relevant examples for the purposes of the current book include the destruction of a particular site protected under the Ramsar or the World Heritage Convention or the extinction of a species protected by a wildlife treaty. Therefore the mere loss of control by a State over territory in which the site or species is situated does not meet the requirements of the Vienna Convention.

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58 See the drafting history of Article 60 (5) of the Vienna Convention. United Nations Conference on the Law of Treaties, Official Records, *UN Doc. A/CONF.39/11*, p. 354, para. 12. The Swiss delegate proposing the insertion of Article 60(5) did not only mention the Geneva Conventions, but also "conventions of equal importance concerning the status of refugees, the prevention of slavery, the prohibition of genocide and the protection of human rights in general".

59 In the case of the temporary disappearance of an object indispensable for the operation of a treaty, a party may only suspend the operation of the treaty.

60 See P. Bodeau-Livinec & J. Morgan-Foster, 'Article 61: Supervening Impossibility of Performance', in O. Corten & P. Klein (eds.), *The Vienna Convention on the Law of Treaties: A Commentary*, Oxford: Oxford University Press, Vol. II, p. 1383.

One question that arises is whether the impossibility can be of a juridical nature as well. This possibility was originally rejected by the ILC. According to Fitzmaurice, admitting a juridical impossibility would have the result

> "that a country could always obtain release from its treaty obligation by entering into other incompatible obligations. In such cases there is not impossibility in the sense that the treaty cannot be executed, but merely in the sense that it cannot be executed without involving a breach of another treaty".[61]

In other words, a State may not invoke supervening impossibility of performance as a ground to suspend its obligations under one treaty, for example, a human rights or environmental treaty, because of a perceived conflict with its obligations under another treaty, for example, an international humanitarian law treaty.

However, it is possible to envisage situations in which the juridical impossibility is not linked to a conflict of norms, but to the actual disappearance of a juridical object indispensable to the execution of the treaty. The termination of a legal regime or a radical change in the situation on which the performance of the treaty was based would be an example of this.

This issue was raised by Hungary before the International Court of Justice in the case concerning the *Gabčíkovo-Nagymaros Project*. Hungary argued that "the essential object of the Treaty […] had permanently disappeared and that the Treaty had thus become impossible to perform".[62] Although the Court rejected Hungary's argument in this particular case, it did not as such refute the possibility that the disappearance of a juridical object could fall within the scope of Article 61 of the Vienna Convention.

According to Pierre Bodeau-Livinec and Jordan Morgan-Foster: "What matters is that the impossibility of performance is material, due to the absence of a necessary element for the implementation of the treaty".[63] Within these strict confines, it does not matter whether the object that disappeared was of a physical or juridical nature.

Furthermore, according to Article 61 (2), a State may not invoke the ground if the impossibility results from its own behaviour, because the impossibility is the result either of a breach by that State of its obligations under the relevant treaty or of its other international law obligations. In the case concerning the *Gabčíkovo-Nagymaros Project*, the International Court of Justice expressly relied

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61 Second Report on the Law of Treaties of the Special Rapporteur, Sir Gerald Fitzmaurice, *UN Doc. A/CN.4/107*, *Yearbook of the International Law Commission* 1957, Vol. II, p. 50.

62 International Court of Justice, Case concerning the Gabčíkovo-Nagymaros Project (Hungary v. Slovakia), Judgment of 25 September 1997, *I.C.J. Reports* 1997, p. 7, para.103.

63 P. Bodeau-Livinec & J. Morgan-Foster, 'Article 61: Supervening Impossibility of Performance', in O. Corten & P. Klein (eds.), *The Vienna Convention on the Law of Treaties: A Commentary*, Oxford: Oxford University Press, Vol. II, p. 1391.

on this provision in response to Hungary's claim that the essential object of the treaty between itself and Slovakia had permanently disappeared.[64]

For the purposes of the present book, this limitation implies, *inter alia,* that an aggressor State cannot invoke supervening impossibility of performance as a ground for suspending its obligations under treaties to which it is a party.[65] It also implies that a State that destroys World Heritage sites within its own territory because these protected sites are used by non-state armed groups as a shelter, for example, cannot invoke the justification to terminate or suspend the operation of the UNESCO World Heritage Convention.

Therefore it is clear that Article 61 of the Vienna Convention only in very exceptional circumstances allows States to invoke supervening impossibility of performance as a justification for the termination, withdrawal or suspension of treaty obligations. Indeed, it is hard to imagine situations relevant to this book that would meet the requirements set by this provision.

5.3.3 Fundamental change of circumstances

According to Article 62 of the Vienna Convention, the principle of *rebus sic stantibus* or fundamental change of circumstances can be invoked when the circumstances existing at the time that the treaty was concluded constituted an essential basis for the consent of the parties to be bound by the treaty *and* if the effect of the change were radically to transform the extent of obligations still to be performed under the treaty.[66] Furthermore, the fundamental change may not relate to circumstances which the parties to the treaty must have been able to foresee.

According to the ILC, the provision serves as a "safety valve" for "cases in which, failing any agreement, one party may be left powerless under the treaty to obtain any legal relief from outmoded and burdensome provisions".[67]

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64 A claim which was refuted all together by the ICJ. See the International Court of Justice, Case concerning the Gabčíkovo-Nagymaros Project (Hungary v. Slovakia), Judgment of 25 September 1997, *I.C.J. Reports,* 1997, p. 7, para. 103.

65 Compare in this regard Article 15 of the ILC draft Articles on the Effects of Armed Conflict to Treaties, UN Doc. A/CN.4/L.777, 11 May 2011, which prohibits an aggressor State from terminating or withdrawing from a treaty or suspending its operation as a consequence of an armed conflict that results from the act of aggression if the effect would be to the benefit of that State.

66 For an explanation of these conditions, see the Second Report on the Law of Treaties of the Special Rapporteur, Sir Gerald Fitzmaurice, *UN Doc. A/CN.4/107*, Yearbook of the International Law Commission 1957, Vol. II, pp. 32-33.

67 International Law Commission, *Document A/6309/Rev. l:* Reports of the International Law Commission on the second part of its seventeenth session and on its eighteenth session, *Yearbook of the International Law Commission (1966)*, Vol. II, p. 258. See also the Second Report on the Law of Treaties of the Special Rapporteur, Sir Gerald Fitzmaurice, *UN Doc. A/CN.4/*

This was also recognised by the International Court of Justice in the case concerning the *Gabčíkovo-Nagymaros Project*, in which the Court reasoned that "the stability of treaty relations requires that the plea of fundamental change of circumstances be applied only in exceptional cases".[68] Thus a plea of fundamental change of circumstances can only be considered as a last resort.

The exceptional nature of a justification for the termination, withdrawal from or suspension of the operation of a treaty is reflected in the conditions set by Article 62 of the Vienna Convention. The conditions are cumulative and must be interpreted narrowly. First, the change of circumstances must be objective. It must refer to "external elements independent of the will of the parties".[69] Furthermore, the change must be *fundamental* in the sense of affecting circumstances which constituted the essential basis of the consent of the parties to be bound by the treaty and in the sense of radically transforming the extent of obligations still to be performed under the treaty.

Therefore, in the first place, the change must alter the core of the agreement between the parties. Secondly, the change must radically transform the obligations under the treaty, meaning that "[t]he change must have increased the burden of the obligations to be executed to the extent of rendering the performance something essentially different from that originally undertaken".[70]

The last condition for invoking the plea of fundamental change of circumstances is that the change may not relate to circumstances that the parties to the treaty should have been able to foresee. The outbreak of an armed conflict is generally considered to constitute a circumstance that the parties were not able to foresee when they concluded a treaty, which makes the provision relevant to this book. Finally, Article 62 contains a provision similar to Article 61, providing that a party invoking the ground cannot take advantage of its own breach of an obligation.[71]

For the purposes of the current book, the question whether the existence of a peaceful situation in a State "constituted an essential basis of the consent of the parties to be bound by the treaty" *and* whether the effect of the outbreak of armed conflict radically transforms "the extent of obligations still to be performed under the treaty" are both crucial. In these circumstances, the question whether the outbreak of an armed conflict radically alters the relation-

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107, *Yearbook of the International Law Commission (1957)*, Vol. II, p. 32, which already recognized the residual nature of the justification.

68 International Court of Justice, Gabčíkovo-Nagymaros Project (Hungary v. Slovakia), Judgment of 25 September 1997, *I.C.J. Reports* 1997, p. 7, para. 104.

69 M.N. Shaw & C. Fournet, 'Article 62: Fundamental Change of Circumstances', in O. Corten & P. Klein (eds.), *The Vienna Convention on the Law of Treaties: A Commentary*, Oxford: Oxford University Press, Vol. II, p. 1424.

70 International Court of Justice, Fisheries Jurisdiction case (Federal Republic of Germany v. Iceland), Judgment of 2 February 1973, *I.C.J. Reports 1973*, para. 43.

71 Statement in Vienna by the Dutch delegation, reported in M.E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties*, Leiden/Boston: Martinus Nijhoff Publishers (2009), p. 776.

ships between the parties to the treaty is a decisive element.[72] This is not automatically the case. While the outbreak of an armed conflict can certainly affect the capacity of the State to respect its obligations under international and human rights obligations, it does not necessarily affect the relationship between the belligerent State and other States to the treaty. Therefore this ground for the suspension of a treaty is primarily relevant in the relationship between belligerents *inter se*.

5.3.4 Conclusions on the relevance of other grounds for the termination or suspension of treaties in situations of armed conflict

The previous section demonstrated that the outbreak of an armed conflict does not automatically suspend the operation of international human rights or environmental treaties, except where relevant treaties provide otherwise. States wishing to suspend the operation of their obligations under international human rights or environmental law therefore have to resort to the general grounds for the termination or suspension of treaties, codified in the 1969 Vienna Convention on the Law of Treaties.

This section has shown that the primary objective of the system established by the 1969 Vienna Convention for the termination and suspension of treaties is to maintain stability in treaty relations. Therefore States can invoke the grounds for the termination or suspension of treaties only in exceptional circumstances. For the purposes of this book, there are some situations that would allow States to suspend their obligations under relevant treaties.

First, States can suspend their treaty obligations in response to a material breach by another State. However, this possibility exists only for a material breach that directly affects the State concerned. A material breach of a treaty that protects a natural resource shared by two or more States is an example of this. Secondly, supervening impossibility of performance can be invoked if the object of protection of a treaty has disappeared. The destruction of a wetland protected under the Ramsar Convention or a natural heritage site protected under the UNESCO World Heritage Convention are relevant examples. Finally, a fundamental change of circumstances can be invoked if the outbreak of an armed conflict radically alters the relationships between the parties to a treaty and their mutual obligations. A treaty regulating the common use of a shared natural resource, concluded between States that have subsequently engaged in an armed conflict with each other, is an example of this.

It can therefore be concluded that in most cases States remain bound by their obligations under relevant treaties. The main exceptions are international

72 See M.N. Shaw & C. Fournet, 'Article 62: Fundamental Change of Circumstances', in O. Corten & P. Klein (eds.), *The Vienna Convention on the Law of Treaties: A Commentary*, Oxford: Oxford University Press, Vol. II, p. 1430.

environmental treaties and concern the relationship between belligerent States *inter se*. States must continue to respect their obligations to neutral States. In addition, internal armed conflicts do not generally entail a right for States to suspend their obligations under international environmental or human rights treaties.

5.4 Circumstances precluding wrongfulness

If a treaty cannot be terminated or suspended on the basis of one of the grounds discussed in the previous section, a State involved in an armed conflict may wish to preclude the wrongfulness of its conduct by invoking one of the circumstances discussed in this section. This argument lasts only as long as the circumstances persist. In the *Gabčíkovo-Nagymaros Project* case, the International Court of Justice emphasised that a State must resume its international obligations as soon as the situation changes.[73]

Circumstances precluding wrongfulness are based on the domain of State responsibility. Their function is not to affect treaty obligations as such, but rather to remove the responsibility of a State for the breach of an obligation. In its commentary to the Articles on State Responsibility, the International Law Commission emphasised that circumstances precluding wrongfulness "act as a shield rather than a sword".[74]

The Articles on State Responsibility list six circumstances precluding the wrongfulness of an act that would otherwise constitute a breach of the international obligations of the State concerned. These are consent (Article 20), self-defence (Article 21), countermeasures (Article 22), *force majeure* (Article 23), distress (Article 24) and necessity (Article 25). The situations of *force majeure* and necessity are the most relevant for this book.[75]

5.4.1 Force majeure

A situation of *force majeure* is defined in Article 23 of the ILC Articles on State Responsibility as "the occurrence of an irresistible force or of an unforeseen event, beyond the control of the State, making it materially impossible in the circumstances to perform the obligation". Therefore there are three criteria

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73 International Court of Justice, Gabčíkovo-Nagymaros Project (Hungary v. Slovakia), Judgment, *I.C.J. Reports 1997*, p. 7, para. 101.

74 Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, *Yearbook of the International Law Commission* 2001, Vol. II, Part Two, p. 71.

75 Self-defence, as relevant as it is in general to a situation of armed conflict, is left out of consideration. It seems too far-fetched to argue that the exploitation of the natural resources of another State constitutes a lawful measure of self-defence, as required by Article 21 of the Articles on State Responsibility.

that have to be met. First, the situation concerned must be brought about by an irresistible force or an unforeseen event. The outbreak of an armed conflict could qualify as such an "unforeseen event" if it was not easily foreseeable.[76] Secondly, the unforeseen event must be beyond the control of the State concerned. This criterion is not elaborated in any further detail, but it implies that the State must be in a position in which it has no reasonable means at its disposal to alter the situation. Finally, there must be a direct link between the unforeseen event and the material impossibility of performance. The ILC Commentary explicitly mentions the loss of control over a portion of the State's territory as a result of an insurrection as an example of a material impossibility.[77]

For the purposes of the present study, *force majeure* could therefore be invoked by a State for breaches of its obligations under international human rights and environmental conventions in territories under the control of armed groups. While these situations do not justify the suspension of a treaty based on supervening impossibility of performance, the State can preclude the wrongfulness of its acts by invoking *force majeure*. Of course, as soon as the State regains control over its territory, it must resume its obligations under the relevant conventions.

There is, however, one important additional condition that must be fulfilled for a State to be able to successfully appeal to *force majeure*. Article 61 (2) of the ILC Articles excludes a plea of *force majeure* if the situation of *force majeure* is due, either solely or in combination with other factors, to the conduct of the State invoking it, or if the State has assumed the risk of that situation occurring. A considerable degree of responsibility is therefore required before a State can be assumed to have brought about the situation of *force majeure*. According to the ILC Commentary, the State must either have played a substantial role in bringing about the situation of *force majeure* or it must have explicitly accepted responsibility for the occurrence of a particular risk.[78]

For the purposes of the present study, this would imply, for example, that a government that does not actively attempt to stop the violations of international human rights and environmental treaties in territories under the control of armed groups could be barred from invoking a plea of *force majeure*. Côte d'Ivoire provides a relevant example in this respect. In 2003, a government of national unity was installed in the country as part of the peace process which included the government in control of the south of the country, and the rebel group *Forces Nouvelles* in control of the north of the country. However, the subsequent report of the Panel of Experts on Côte d'Ivoire concluded that the government of national unity's efforts to redeploy local government ad-

76 Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, *Yearbook of the International Law Commission* 2001, Vol. II, Part Two, p. 76.

77 *Ibid*.

78 *Ibid*., p. 78.

ministration in the north of the country were inadequate, as a result of which local warlords were able to remain in control over this part of the territory.[79] This example illustrates that a government can indirectly be responsible for the occurrence of a situation of *force majeure* because of its lax attitude.

5.4.2 Necessity

Necessity arises only in exceptional circumstances where there is an irreconcilable conflict between an essential interest, either of the State invoking necessity or of the international community on the one hand, and a legal obligation on the other.[80]

According to Article 25 of the ILC Articles on State Responsibility, a plea of necessity must meet the following cumulative requirements. First, the breach of an international obligation must be "the only way for the State to safeguard an essential interest against a grave and imminent peril'. The question of what constitutes an "essential interest" of a State must be determined on a case-by-case basis.[81] Obviously the national security of a State would certainly constitute such an interest. For the purposes of the present study, it is interesting to note that the preservation of the environment has expressly been recognized as an essential interest within the scope of this provision.[82]

In addition, the essential interest of the State must be protected against a "grave and imminent peril'. In the *Gabčíkovo-Nagymaros Project* case, the International Court of Justice stated that the terms "grave and imminent peril' imply that a state of necessity cannot exist without a peril "duly established at the relevant point in time", although a degree of uncertainty about the future is permitted as long as the peril

> "appearing in the long term might be held to be "imminent" as soon as it is established, at the relevant point in time, that the realization of that peril, however far off it might be, is not thereby any less certain and inevitable".[83]

Moreover, the wrongful conduct must be the "only way" open to the State to protect its essential interest. Therefore necessity may not be invoked to

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79 See in particular: Final report of the Group of Experts submitted in accordance with paragraph 11 of Security Council Resolution 1842 (2008) of 9 October 2009, *UN Doc. S/2009/521*, paras. 30-41.

80 Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, *Yearbook of the International Law Commission* 2001, Vol. II, Part Two, p. 80.

81 *Ibid*., p. 83.

82 International Court of Justice, Gabčíkovo-Nagymaros Project (Hungary v. Slovakia), Judgment of 25 September 1997, *I.C.J. Reports 1997*, p. 7, para. 53.

83 *Ibid*., para. 54.

excuse behaviour for which reasonable, and more proportionate, alternatives were available.

In addition to these requirements, Article 25 of the ILC Articles provides that a State invoking necessity may not "seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole". Thus a State may not invoke necessity to justify a breach of obligations relating to the essential interests of other States or of the international community as a whole. Finally, according to Article 25, no appeal can be made to necessity if "the international obligation in question excludes the possibility of invoking necessity" – which is, for example, the case for certain provisions under international humanitarian law – or if "the State has contributed to the situation of necessity".

These requirements entail two important consequences for the purposes of the present study. First, a State that breaches an international obligation in order to protect the environment against a grave and imminent danger could in principle invoke the plea of necessity. This is because the preservation of the environment has expressly been recognised to constitute an "essential interest". In contrast, States cannot invoke necessity to justify particular actions that harm the environment for reasons of national security, because such actions would touch upon the essential interests of other States. This is particularly the case when their actions are directed against an object that is subject to a common regime, such as the regimes protecting natural heritage, endangered species or biological diversity.

Therefore it can be concluded that necessity cannot be invoked by States to justify breaches of international environmental agreements which affect the essential interests of the international community, such as the Biodiversity Convention. Nor can it be invoked by States that have contributed to the occurrence of an armed conflict.[84] Furthermore, it is interesting to note that a plea of necessity could in theory be invoked by another State as a justification for taking action to safeguard a natural heritage site against its destruction by the parties to the armed conflict. However, whether such action would include entering the territory of a State involved in an armed conflict without its permission is doubtful, as the State that undertook such an operation would have to demonstrate that there was no other reasonable alternative to prevent the destruction of the natural heritage site.

84 Compare Koppe, who asserts for the situation of international armed conflict that "[o]nly states using force in self-defense comply with the requirement that the non-performance of their obligations under conventional and customary international law is not the result of their own behavior". See E.V. Koppe, *The Use of Nuclear Weapons and the Protection of the Environment During International Armed Conflict*, Studies in International Law, Vol. 18, Oxford: Hart (2008), p. 364.

5.5 CUSTOMARY INTERNATIONAL LAW

The previous sections discussed the continued applicability of treaty law in situations of armed conflict. However, this book has also identified some principles that apply independently from treaties. Relevant principles of customary international law include the principle of permanent sovereignty over natural resources, the principle of sustainable use of natural resources and the principle of prevention of environmental damage. Arguably, these principles could continue to apply irrespective of the applicability of the treaty in which they are incorporated.[85]

5.5.1 The principle of permanent sovereignty over natural resources

The principle of permanent sovereignty is relevant to the situation of armed conflict in several ways. First, it entails an obligation for third States to respect a State's sovereignty over natural resources. This obligation imposes clear limits on what a State involved in an international armed conflict is permitted to do with the natural resources of its adversary. Secondly, the principle of permanent sovereignty entails obligations for the national government with regard to the exploitation of natural resources. One condition inherent in the principle of permanent sovereignty is the obligation to exercise sovereignty over natural resources for national development and the well-being of the people of the State. It is this condition that is of particular relevance for the current book.

The principle of permanent sovereignty over natural resources has been applied to situations of armed conflict on several occasions. First, it was referred to in several UN Security Council resolutions relating to the armed conflict in the DR Congo.[86] Furthermore, in a more general vein, the sovereign right of states to exploit their own natural resources was reaffirmed in a presidential statement of the Security Council concerning the maintenance of international peace and security.[87]

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85 Compare Article 10 (Obligations imposed by international law independently of a treaty) of the ILC draft articles on the effects of armed conflict on treaties and Article 43 of the Vienna Convention on the Law of Treaties.

86 See, *e.g.*, UN Security Council Resolutions 1291 (2000), 1304 (2000), 1332 (2000), 1341 (2001), 1355 (2001), 1493 (2003), and 1533 (2004).

87 Statement by the President of the Security Council made in connection with the Council's consideration of the item entitled Maintenance of International Peace and Security, *UN Doc. S/PRST/2007/22*, 25 June 2007. See in this regard also 'The Plundering of Natural Resources and Destruction of the Environment in Times of Armed Conflict', in W.J.M. van Genugten, M.P. Scharf, and S.E. Radin (ed.), *Criminal Jurisdiction 100 Years after the 1907 Hague Peace Conference*, Proceedings of the 2007 Hague Joint Conference on Contemporary Issues of International Law, p. 242 (2009).

In addition, in its resolutions concerning the Israeli occupation of Palestinian territory, the UN General Assembly expressly declared the principle of permanent sovereignty over natural resources to be applicable to the natural resources of territories under occupation. Resolution 66/225 of 29 March 2012, in which the UN General Assembly reaffirms "the principle of the permanent sovereignty of peoples under foreign occupation over their natural resources"[88] is one example.

Similarly, in a report on the implications of the United Nations resolutions on permanent sovereignty over natural resources on the occupied Palestinian and other Arab territories and on the obligations of Israel concerning its conduct in these territories under international law, the UN Secretary-General stated that the principle of permanent sovereignty over natural resources and the law of belligerent occupation "strengthen and reinforce each other".[89]

The decision of the International Court of Justice in the Congo-Uganda case does not appear to be in line with this. In that case, the DR Congo had invoked the principle of permanent sovereignty as a principle relevant to the situation of the illegal exploitation, looting and plundering of natural resources by members of the Ugandan army. After the Court determined that the principle of permanent sovereignty was part of customary international law, it noted that there was nothing in the UNGA resolutions defining the principle of permanent sovereignty to suggest "that they are applicable to the specific situation of looting, pillage and exploitation of certain natural resources by members of the army of a State militarily intervening in another State [...] The Court does not believe that this principle is applicable to this type of situation."[90]

The precise meaning of the Court's judgment in this respect remains unclear. Does the Court say that the principle of permanent sovereignty is not applicable at all to the situation of armed conflict or is its inapplicability confined to the specific situation at hand?[91] In this respect, it should be noted that in general the Court does not exclude the applicability of the principle of permanent sovereignty to the situation of armed conflict. Instead, it refers to "this" type of situation. The decision could therefore be determined by the specific circumstances of the case –i.e., that the looting, pillage, and exploitation

88 UN General Assembly Resolution 66/225 on 'Permanent sovereignty of the Palestinian people in the Occupied Palestinian Territory, including East Jerusalem, and of the Arab population in the occupied Syrian Golan over their natural resources,' adopted on 29 March 2012.

89 UN Secretary-General, Report on the implications, under international law, of the United Nations resolutions on permanent sovereignty over natural resources, on the occupied Palestinian and other Arab territories and on the obligations of Israel concerning its conduct in these territories, *UN Doc. A/38/265*, 21 June 1983, para. 47.

90 *Congo-Uganda* case, *supra,* note 11 at para. 244.

91 Compare N.J. Schrijver, 'Natural Resources, Permanent Sovereignty over', in R. Wolfrum (ed.), Encyclopedia of Public International Law, Max Planck Institute for Comparative Public Law and International Law, Oxford: Oxford University Press (2012), para. 18.

were committed by individual members of the Ugandan army in the absence of sufficient evidence of a systematic policy of the Ugandan government aimed at the plunder of the natural resources of the DRC.[92]

Moreover, the Court's decision does not appear to affect the rights and obligations inherent in the principle of permanent sovereignty. This conclusion follows, first of all, from the decision itself. When it comes to determining Uganda's international responsibility, the Court explicitly refers to Article 21 of the 1981 African Charter of Human and Peoples' Rights, which formulates the right of all peoples to freely dispose of their natural resources and, in case of spoliation, formulates a right for a dispossessed people to the lawful recovery of its property, as well as to adequate compensation.[93]

In other words, the Court seems to acknowledge that the right of peoples to freely dispose of their natural resources does impose specific obligations on Uganda as an occupying power, if not on the basis of custom, then at least on the basis of treaty law. Furthermore, in his declaration, Judge Koroma stated that the rights and interests arising from the 1962 Declaration on Permanent Sovereignty over Natural Resources "remain in effect at all times, including *during armed conflict and during occupation*."[94]

Therefore it can be argued that the principle of permanent sovereignty over natural resources continues to apply in times of armed conflict, both in relation to third States and in relation to a State's own natural resources. Of course, the obligation to exploit natural resources for the well-being of the people does not prohibit a government from using the proceeds of resource exploitation for military expenditure. Fighting rebel groups that undermine State authority can perfectly well be "for the well-being of the people". Nevertheless, the obligation for a government to act for the well-being of the people arguably does entail a general obligation for the government to account for its decisions in this respect.

5.5.2 The environmental principles of sustainable use and prevention of environmental damage

Other principles that are of particular relevance for the exploitation of natural resources in situations of armed conflict are the principles of sustainable use and prevention of environmental damage. Arguably these principles apply both to the exploitation by a State of its own natural resources and in relation to the natural resources of a third State. Despite their relevance for situations of armed conflict, there have not been many references to these principles in

92 Compare *Ibid.* and P.N. Okowa, 'Natural Resources in Situations of Armed Conflict: Is there a Coherent Framework for Protection?' *International Community Law Review* 9 (2007), p. 2.

93 *Congo-Uganda* case, *supra,* note 11 at para. 245.

94 *Ibid*., (declaration of Judge Koroma) [emphasis in original].

the practice of UN bodies in relation to specific armed conflicts. The UN Security Council has referred to the concept of sustainability only in a few of its resolutions, mainly with indirect references.[95] Nevertheless, the systematic exploitation of natural resources "with little regard to sustainable […] practices", as happened in Liberia under Charles Taylor, is arguably not permitted except in situations of military necessity.[96]

The obligation to prevent damage to the environment of other States has been explicitly applied to situations where a State exercises *de facto* control in another State. Arguably this principle therefore applies in situations of occupation.[97] Moreover, there is no reason why it would cease to apply in the relationship between a belligerent State and third States. In this respect, it should be noted that the law of neutrality even assures the territorial inviolability of neutral States.[98]

One important implication of the obligation to prevent damage to the environment of other States concerns the related obligation to conduct an Environmental Impact Assessment, an obligation which, according to the International Court of Justice in the *Pulp Mills* case, constitutes a "requirement under general international law […] where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context".[99] Arguably the obligation to conduct an EIA not only applies when there is a risk of damage to the environment of other States, but also when there is a risk of damage to natural resources or parts of the environment that are important to the larger community of States, even if these natural resources are found entirely within the territory of a single State. Reference can be made to natural resources that are subject to common regimes, such as biological diversity and particular ecosystems and species.

The obligation to conduct an EIA requires States to conduct an assessment of the risks of the project for the environment both before the start of the project and during its exploitation. A situation of armed conflict does not relieve States of this responsibility, especially not for the exploitation projects that are to be conducted in parts of the State territory where no fighting occurs. Moreover, an EIA is a flexible instrument that can be adapted to all circum-

95 These resolutions relate to armed conflicts in Cambodia and Liberia respectively. For more details, see Chapter 7 of this study.

96 Report of the Panel of Experts on Liberia established pursuant to Security Council Resolution 1343 (2001), paragraph 19, concerning Liberia, *UN Doc. S/2001/1015* of 26 October 2001, para. 33.

97 See the commentary of the ILC on its Draft articles on Prevention of Transboundary Harm from Hazardous Activities, *Yearbook of the International Law Commission*, Vol. II, Part Two (2001), p. 151, para. 12, as discussed in Chapter 4 of this study.

98 E.V. Koppe, *The Use of Nuclear Weapons and the Protection of the Environment During International Armed Conflict*, Studies in International Law, Vol. 18, Oxford: Hart (2008), p. 361.

99 International Court of Justice, Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay), *I.C.J. Reports, 2010*, para. 204.

stances. Therefore, the extent to which States have to assess the risks arising from a project will depend on the factual circumstances.

5.6 THE ROLE OF INTERNATIONAL HUMAN RIGHTS AND ENVIRONMENTAL LAW IN SITUATIONS OF ARMED CONFLICT

This chapter has examined whether and to what extent States remain bound by international human rights and environmental law when conducting exploitation activities in situations of armed conflict. It argued that the exploitation of natural resources by States as a commercial activity continues to be regulated by the legal framework that applies to the management of natural resources in situations of peace. This implies that States remain bound by their obligations under international human rights and environmental law in situations of armed conflict. There are two exceptions to this basic assumption.

First, as the case law of the International Court of Justice shows, situations of armed conflict are primarily governed by the rules of international humanitarian law. In cases where the relevant rules of international human rights and environmental law clash with this field of international law, there is a presumption that the rules of international humanitarian law prevail. However, in cases where there is no apparent clash between the relevant rules from the different fields of international law, the relevant rules complement each other. As the following chapter will show, international humanitarian law contains only few specialised rules that apply to the management of natural resources. In addition, these rules do not directly conflict with relevant rules of international human rights and environmental law.

The existence of an armed conflict may alter the extent of the obligations to be fulfilled by States under international human rights and environmental law. There are factors that are inherent in international human rights and environmental treaties which have an impact on the performance of their obligations during an armed conflict. For obligations under international human rights law, the principal issue affecting the operation of human rights instruments during an armed conflict concerns the possibility of derogating from the provisions of the treaties. This applies particularly to the ICCPR, which contains an express provision on derogation.

Derogation permits States to deviate from their obligations under human rights treaties in situations of public emergency, including armed conflicts. Derogation is permitted in exceptional circumstances only after a situation of public emergency has been announced. Moreover, derogation does not annul the obligation itself. States have to justify not respecting their obligations in each individual case.

This chapter has argued that the possibility of derogating from particular human rights may have an impact on the rights of individuals and minorities to participate in decision making, but it does not affect the basic prohibition

against depriving a people of their means of subsistence, incorporated in the identical Articles 1(2) of the ICCPR and the ICESCR. This prohibition is framed in absolute terms, which implies that derogation from the prohibition is not permitted under any circumstance.

As far as environmental obligations are concerned, it should be noted that many provisions in environmental treaties are lenient with regard to the implementation of the substantive obligations by States. This leniency can be seen at two levels. First, environmental obligations are generally not executed automatically. The implementation of environmental obligations often requires the formulation of plans and policies at the national level. Examples include the provisions of the Biodiversity Convention relating to the *in situ* (Article 8) and *ex situ* (Article 9) conservation of biological diversity, the provisions in the UNESCO World Heritage Convention on the protection, conservation and preservation of world heritage (in particular, Article 5) and the provisions in the Ramsar Convention on Wetlands on the listing and conservation of wetlands (i.e., Articles 2 and 4).

Secondly, the implementation of obligations under international environmental treaties is often conditional on the respective capabilities of States. Examples include obligations incorporated in the Convention on the Conservation of Migratory Species of Wild Animals, the Biodiversity Convention and the Climate Change Convention, which require implementation only as far as this is possible and appropriate.[100] This implies that States could deviate from these obligations in situations of armed conflict, if their implementation were not possible or appropriate.

However, as a minimum, it can be argued that States cannot act contrary to their core obligations under international environmental treaties. This results from their general obligation to act in good faith with regard to the implementation of their treaty obligations. This not only applies for exploitation activities in inter-state armed conflicts, but also for the exploitation of public natural resources in intra-state conflicts. In both cases, the *rationale* for the continued applicability of international environmental law is based on the need to protect the interests of third States. As argued above, many obligations under international environmental law serve to protect the interests of a larger community of States. The occurrence of an armed conflict does not diminish these obligations.

This chapter also examined the possibilities for States to terminate or suspend the operation of treaties in situations of armed conflict. More in

100 See, for example. Article III (4) of the Convention on the Conservation of Migratory Species of Wild Animals, which determined that Parties "shall endeavour […] where feasible and appropriate; […] as appropriate…; and to the extent feasible and appropriate…". Similarly, Articles 8 to 11 of the Biodiversity Convention formulate obligations for parties to be implemented "as far as possible and appropriate". Similarly, the principle of common but differentiated responsibilities, expressed in the Climate Change Convention, implies a degree of leniency as well.

particular, it examined three possibilities for suspension: the suspension of a treaty in the case of a material breach of that treaty by another party to the treaty; supervening impossibility of performance; and fundamental change in circumstances. Arguably States can only suspend their treaty obligations in exceptional circumstances. Therefore in most cases States remain bound by their obligations under relevant treaties. The exceptions mainly affect international environmental treaties and concern the relationship between belligerent States *inter se*.

In addition, this chapter examined circumstances precluding the wrongfulness of otherwise illegal conduct. More in particular, it examined *force majeure* and necessity as circumstances that would preclude the wrongfulness of acts of States contrary to their treaty obligations under international human rights and environmental treaties. Most relevant to the current study is the conclusion that a State can invoke *force majeure* for breaches of its obligations under international human rights and environmental conventions in territories under the control of armed groups, but only to the extent that it was factually impossible for the State to prevent the violation of the relevant obligations.

Furthermore, States continue to be bound by their obligations under customary international law in situations of armed conflict. The most relevant example of a customary international law obligation concerns the principle of permanent sovereignty and the inherent condition that a government must exercise permanent sovereignty for national development and the well-being of the population. As a minimum, this implies that a government remains accountable for its use of the proceeds of natural resources exploitation. Another example concerns the obligation to conserve and sustainably use natural resources, as incorporated, *inter alia,* in the Ramsar Convention on the Protection of Wetlands, the UNESCO World Heritage Convention and CITES. Arguably, this principle qualifies the right of States to exploit their natural resources, even in situations of armed conflict.

Another customary international law obligation which continues to apply for States involved in an armed conflict is the obligation to prevent damage to the environment of other States resulting from exploitation activities, including an obligation to conduct an environmental impact assessment when an activity could entail risks for the environment. These obligations continue to be relevant in situations of armed conflict.

In conclusion, it can be argued that international human rights and environmental law provide a basic framework qualifying the right of governments to freely dispose of the State's natural resources in situations of armed conflict. The extent to which these fields of international law can in fact regulate the commercial exploitation of natural resources by governments in situations of armed conflict in a meaningful way depends on a number of factors. This chapter has discussed several of these factors. In a more general vein, it can be argued that the extent to which international human rights and environmental law continue to effectively regulate the management of natural

resources by governments depends on the gravity of the conflict situation, including the measure of control exercised by a government over the State's territory.

6 Protection of natural resources and the environment under international humanitarian law

6.1 Introductory Remarks

The law of armed conflict – or international humanitarian law (IHL) – regulates the conduct of parties to an armed conflict. It limits the methods and means that parties to an armed conflict may use to weaken the adversary and it provides rules that aim to limit the effects of warfare on vulnerable groups, in particular the civilian population as well as persons that no longer take part in hostilities. In other words, IHL primarily regulates the use of violence by parties to an armed conflict.[1] This specific focus of IHL is decisive for the way in which this field of international law addresses activities relating to the exploitation of natural resources by parties to an armed conflict. It also immediately reveals the limits of IHL in this respect.

The exploitation of natural resources by parties to an armed conflict is not an act of war in itself, but rather, an activity that sustains conflict. Natural resources provide parties to an armed conflict with the means to finance their armed struggle. Therefore IHL appears to be ill suited to regulate the exploitation of natural resources by parties to an armed conflict, in contrast with occupation law, which has a different aim, namely to define the rights and obligations for occupants as *de facto* State authorities. This field of IHL does include rules defining the rights of an occupant with regard to the natural resources situated in occupied territory.

The limits of IHL for the scope of this book are also evident from its environmental provisions. The few international humanitarian law provisions which were specifically designed to protect the environment during armed conflict focus on the effects of military operations on the environment.[2] Their

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1 See the following definition provided by the International Committee of the Red Cross (ICRC), which defines IHL as "the branch of international law limiting the use of violence in armed conflicts by: a) sparing those who do not or no longer directly participate in hostilities; b) restricting it to the amount necessary to achieve the aim of the conflict, which – independently of the causes fought for – can only be to weaken the military potential of the enemy". See M. Sassòli; A.A. Bouvier & A. Quintin, *How Does Law Protect in War? Cases, Documents and Teaching Materials on Contemporary Practice in International Humanitarian Law*, Third Edition, Volume I, Geneva: ICRC (2011), p. 1.

2 Articles 35 (3) and 55, Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, *1125 UNTS 3*. Besides these provisions, mention must be made of the Convention

purpose is to prevent "widespread, long-term and severe" damage to the environment resulting from acts of warfare.[3] They were not designed to protect the environment against other threats resulting from the conduct of parties to an armed conflict, such as environmental damage resulting from the exploitation of natural resources by parties to an armed conflict. Furthermore, it should be noted that these provisions were adopted in 1977, when modern international environmental law was at an early stage of development.

Despite all these apparent limitations, IHL is important for the protection of natural resources and the environment during armed conflict. First, it is the only field of international law that contains directly binding obligations for non-state armed groups. In addition, it is the primary field of international law that is applicable to States which occupy or intervene militarily in other States.

Therefore the current chapter examines the few provisions of IHL which are relevant for the protection of natural resources and the environment during armed conflict. These are Article 23 (g) of the 1907 Hague Regulations, containing a prohibition against destroying or seizing the property of the enemy, Article 28 of the 1907 Hague Regulations, Article 33 (2) of the 1949 Geneva Convention IV and Article 4 (2) (g) of the 1977 Additional Protocol II to the Geneva Conventions on the prohibition against pillage, Article 55 of the 1907 Hague Regulations defining the right of usufruct of an occupant, Article 54 of the 1977 Additional Protocol I and Article 14 of the 1977 Additional Protocol II on the protection of objects indispensable to the survival of the civilian

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on the prohibition of military or any other hostile use of environmental modification techniques (ENMOD), concluded on 10 December 1976 in New York (entry into force: 5 October 1978), *1108 UNTS 151*. This convention aims to prevent the environment being used as a weapon.

3 For proposals regarding current Article 55 of Additional Protocol I, see *CDDH/III/60* of 19 March 1974 (Proposal by Australia to insert a new provision Article 49 bis in Additional Protocol I) and *CDDH/III/64* of 19 March 1974 (Proposal by Czechoslovakia, the German Democratic Republic and Hungary to add a new paragraph to Article 48 of Additional Protocol I). For proposals with regard to current Article 35 (3) of Additional Protocol I, see *CDDH/III/108* of 11 September 1974 (Amendment by the German Democratic Republic to Article 33 of Protocol I); *CDDH/III/222* of 24 February 1975 (Amendment by the Arab Republic of Egypt, Australia, Czechoslovakia, Finland, German Democratic Republic, Hungary, Ireland, Norway, Sudan, Yugoslavia to Article 33 of Additional Protocol I) and *CDDH/III/238* and Add. 1 of 25 February 1975 (Amendment by the Democratic Republic of Vietnam and Uganda to Article 33 of Additional Protocol I). *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*, Geneva (1974-77), Vol. III, p. 220, 155-157. For a proposal regarding the insertion of a new paragraph to current Article 14 of Additional Protocol II, see *CDDH/III/55* of 19 March 1974 (proposal by Australia to insert a new provision Article 28 bis in Additional Protocol II). *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*, Geneva (1974-77), Vol. IV, Amendments, p. 91.

population, and finally, Articles 35(3) and 55 of the 1997 Additional Protocol I on the protection of the natural environment.

The current chapter aims to determine to what extent international humanitarian law contains rules that prohibit the illicit exploitation, looting and plundering of natural resources by parties to an armed conflict and address the related environmental damage. Of course, as explained above, IHL was not specifically designed to address instances of natural resources exploitation by parties to an armed conflict. As a specialised branch of international law, IHL is however part of the broader system of international law. This implies that it must be interpreted and applied in the light of the relevant rules of general international law and other specialised branches of international law. International environmental and human rights law in particular can be instrumental in filling the gaps in IHL. This applies particularly for international environmental law, as the standards set by this field of law are more specific and more recent than those set by international humanitarian law.

Before embarking on an in-depth analysis of substantive international humanitarian law, section 2 analyses the classical dichotomy made in international humanitarian law between international and non-international armed conflicts from the perspective of resource-related armed conflicts. Section 3 then discusses the relevant rules of IHL, while section 4 takes a closer look at the Martens clause as a means of integrating rules from international human rights and environmental law in the law of armed conflict. Finally, section 5 assesses the protection provided by IHL to natural resources and the environment.

6.2 QUALIFICATION OF THE LEGAL SITUATION

International humanitarian law makes a fundamental distinction between international and non-international armed conflicts. The classification of a conflict as international or non-international determines which law is applicable to the conflict. Article 2 common to the 1949 Geneva Conventions defines "international armed conflict" as a situation of "declared war or […] any other armed conflict which may arise between two or more of the High Contracting Parties" or a situation of "total or partial occupation of a territory". Article 3 common to the 1949 Geneva Conventions defines "non-international armed conflict" as an armed conflict "occurring in the territory of one of the High Contracting Parties".

Most of the armed conflicts discussed in this chapter are internal in nature. However, some are internationalised through the intervention of foreign States. This intervention is sometimes direct, in the sense that the foreign State sends its army into the territory of another State. This is what Uganda and Rwanda did during the 1990s, when they entered the territory of the DR Congo and even occupied parts of the DR Congo's territory. However, the intervention

can also be indirect, in the sense that a foreign State provides support to armed groups engaged in an internal armed conflict. Again, Rwanda serves as an example. A recent report by the Group of Experts on the DR Congo revealed Rwanda's support for armed groups operating in the DR Congo.[4] Liberia's support for the RUF between 1998 and 2002 is another example of a State providing indirect support to armed groups.

The extent to which foreign States are involved in an internal armed conflict determines whether it is qualified as an international or internal conflict. The current section examines this distinction between internal and international armed conflicts. It looks in particular at the following questions. What constitutes an internal armed conflict? When can such an armed conflict be deemed to become internationalised? What are the legal implications of the distinction between internal and international armed conflicts?

6.2.1 Internal armed conflict

For a long time, internal armed conflicts were not subject to international regulation. These conflicts were considered to fall within the *domaine réservé* of the State concerned.[5] The treatment of insurgents was left to the discretion of the incumbent government, which could freely choose whether or not to

4 Group of Experts on the DR Congo, Addendum to the Interim report of the Group of Experts on the DRC submitted in accordance with paragraph 4 of Security Council Resolution 2021 (2011), *UN Doc. S/2012/348/Add.1* of 27 June 2012.

5 See J. Pictet and O.M. Uhler, *The Geneva Conventions of 12 August 1949: Commentary, Part 4 on the Geneva Convention relative to the protection of civilian persons in time of war*, Geneva: International Committee of the Red Cross (1958), pp. 26-30. There is one early instrument that regulates internal armed conflict, but this is a State's military manual rather than a legal instrument. The *Instructions for the Government of Armies of the United States in the Field (General Orders No. 100)* of 24 April 1863, also known as the 'Lieber Code', contains a section X on 'insurrection, civil war and rebellion'. For reasons of "humanity" rather than out of a sense of legal obligation, this section proposed to apply the rules of international armed conflict to the situation of internal armed conflict. This is reflected in Article 52, one of the key provisions of Section X, which provides as follows: "When humanity induces the adoption of the rules of regular war to ward rebels, whether the adoption is partial or entire, it does in no way whatever imply a partial or complete acknowledgement of their government, if they have set up one, or of them, as an independent and sovereign power. Neutrals have no right to make the adoption of the rules of war by the assailed government toward rebels the ground of their own acknowledgment of the revolted people as an independent power". On this subject, see L. Perna, *The formation of the Treaty Law of Non-International Armed Conflict*, International Humanitarian Law Series, Vol. 14, Leiden/Boston: Martinus Nijhoff Publishers (2006), pp. 31-33 and L. Moir, *The Law of Internal Armed Conflict*, Cambridge: Cambridge University Press (2002), p. 19. The Lieber Code is available through the International Humanitarian Law Database of the ICRC. See <http://www.icrc.org/ihl>.

grant its opponent rights by conferring belligerent status on him.[6] Third States were prohibited altogether from interfering in these "internal affairs", which were subject to domestic regulation.[7]

This gradually changed during the course of the nineteenth century, when the duty of non-interference started to give way to the doctrine of recognition of belligerency. If the hostilities in the armed conflict had attained a certain level, close to that of an international armed conflict, third States declared recognition of belligerency to both parties, thus bringing into effect the corpus of international humanitarian law.[8] Recognition of belligerency required careful consideration, as the legal conditions were stringent and the legal consequences of premature or unfounded recognition could be severe.[9]

This is the background against which the delegations at the 1949 Geneva Diplomatic Conference negotiated a special provision applicable to internal armed conflicts which was to be inserted in all four Conventions. Article 3 common to the 1949 Geneva Conventions offered protection to all persons taking no active part in hostilities – including members of armed groups, whether they were recognised by their government or not.

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6 On the subject of recognition of belligerency, see H. Lauterpacht, *Recognition in International Law*, Cambridge: Cambridge University Press (1947), pp. 175-200; E.H. Riedel, 'Recognition of Belligerency', R. Bernhardt, *Encyclopedia of Public International Law*, Vol. IV, Max Planck Institute for Comparative Public Law and International Law, Amsterdam: Elsevier (2000), pp. 47-50; L. Perna, *The Formation of the Treaty Law of Non-International Armed Conflict*, International Humanitarian Law Series, Vol. 14, Leiden/Boston: Martinus Nijhoff Publishers (2006), pp. 29-30; and L. Moir, The Law of Internal Armed Conflict, Cambridge: Cambridge University Press (2002), pp. 4-11. In most cases, the incumbent government was not willing to grant its opponents belligerent status, because it would give them extensive rights. See L. Perna, *The Formation of the Treaty Law of Non-International Armed Conflict*, International Humanitarian Law Series, Vol. 14, Leiden/Boston: Martinus Nijhoff Publishers (2006), p. 30.

7 Lauterpacht points to a resolution of the Institute of International Law, adopted in 1900, which clearly states that "every third Power, at peace with an independent nation, is bound not to interfere with the measures which this nation takes for the re-establishing of internal peace". See *Resolutions of the Institute*, Carnegie Endowment (1916), p. 156, quoted in H. Lauterpacht, *Recognition in International Law*, Cambridge: Cambridge University Press (1947), p. 230.

8 See H. Lauterpacht, *Recognition in International Law*, Cambridge: Cambridge University Press (1947), p. 175-176 and E.H. Riedel, 'Recognition of Belligerency', R. Bernhardt, *Encyclopedia of Public International Law*, Vol. IV, Max Planck Institute for Comparative Public Law and International Law, Amsterdam: Elsevier (2000), p. 47. Lauterpacht mentions the following conditions (p. 176): "First, there must exist within the State an armed conflict of a general (as distinguished from a purely local) character; secondly, the insurgents must occupy and administer a substantial portion of national territory; thirdly, they must conduct the hostilities in accordance with the rules of war and through organized armed forces acting under a responsible authority; fourthly, there must exist circumstances which make it necessary for outside States to define their attitude by means of recognition of belligerency".

9 Premature or unfounded recognition constituted and internationally wrongful act against the incumbent government. See H. Lauterpacht, *Recognition in International Law*, Cambridge: Cambridge University Press (1947), p. 176.

Article 3 common to the 1949 Geneva Conventions defines internal armed conflicts as armed conflicts "occurring in the territory of one of the High Contracting Parties". There was considerable discussion about this definition during the drafting of common Article 3.[10] According to the Commentary on the Geneva Conventions, some States feared that the term "conflict not of an international character" might be interpreted as covering any act committed by force of arms, including minor insurgencies or even plain banditry.[11] Therefore several delegations proposed inserting amendments containing conditions for the applicability of the Conventions. These amendments were concerned with various aspects, including recognition of belligerency, the form of organization of armed groups and even the recognition by the Security Council that the dispute constituted a threat to international peace, a breach of the peace or act of aggression.[12] Ultimately, none of these amendments were included in the Conventions, leaving a large measure of flexibility for the provision to apply.

Thus what constitutes an internal armed conflict for the purposes of Article 3 is left wide open. However, as was clear from the start, a certain threshold must be met for Article 3 to apply. In this respect the Commentary on the Geneva Conventions states that "it must be recognized that the conflicts referred to in Article 3 are armed conflicts, with armed forces on either side engaged in hostilities […] In many cases, each of the Parties is in possession of a portion of the national territory, and there is often some sort of front".[13] The ICRC description indicates that there are specific requirements relating to the organization of the parties to the conflict and the intensity of the violence. Both requirements were identified and elaborated upon in subsequent case law of international criminal tribunals, in particular in the case law of the International Criminal Tribunal for the former Yugoslavia (ICTY).

In this respect the ICTY's *Tadić case*, which defined a non-international armed conflict as "*protracted* armed violence between governmental authorities and *organized* armed groups or between such groups within a State" was a landmark case.[14] This definition was subsequently inserted in Article 8 of the ICC

10 For a full account of the drafting history of Article 3, see A. Cullen, *The Concept of Non-International Armed Conflict in International Humanitarian Law*, Cambridge: Cambridge University Press (2010), pp. 27-51.

11 See J. Pictet and O.M. Uhler, *The Geneva Conventions of 12 August 1949: Commentary, Part 4 on the Geneva Convention relative to the protection of civilian persons in time of war*, Geneva: International Committee of the Red Cross (1958), p. 35.

12 *Ibid.*, pp. 35-36.

13 *Ibid.*, p. 36.

14 International Criminal Tribunal for the former Yugoslavia, *The Prosecutor v. Dusko Tadić*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Case No. IT-94-1-A, Appeals Chamber Decision of 2 October 1995, para. 70. Emphasis added.

Statute, dealing with war crimes.[15] The term "protracted armed violence" has become the standard for assessing the intensity of the violence. In order to distinguish armed conflict from internal disturbances, the violence must be carried out over a longer period of time. The violence must exceed sporadic acts of violence, but it does not have to involve sustained military operations.[16] As regards the degree of organization of armed groups, reference can be made to indicators such as the command structure and the operational effectiveness of the group.[17]

All the conflicts discussed in the current book satisfy these requirements. In many resource-related armed conflicts, non-state armed groups even control a portion of State territory, in particular those regions where natural resources are located. Examples include the conflict in Côte d'Ivoire between 2002 and 2007, where the *Forces Nouvelles de Côte d'Ivoire* occupied most of the northern part of the country. The Revolutionary United Front (RUF) in Sierra Leone also exercised control over a region of Sierra Leone bordering Liberia, where most of the diamonds are located.

This means that these conflicts are governed by the rules stipulated in Article 3 common to the 1949 Geneva Conventions. This provision contains a set of fundamental rules for parties to an internal armed conflict regarding the humane treatment of persons taking no active part in hostilities. In the words of the International Court of Justice, these rules reflect "elementary considerations of humanity", which can be interpreted as a recognition of their customary international law status.[18] The rules formulated in Article 3 of the Geneva Conventions apply automatically and without any requirement of reciprocity.[19] Other provisions of the Geneva Conventions apply only to non-

15 Article 8(2)(f) of the ICC Statute defines internal armed conflicts as "armed conflicts that take place in the territory of a State when there is protracted armed conflict between governmental authorities and organized armed groups or between such groups". In the case against Thomas Lubanga, the ICC Trial Chamber clarified the concept of 'non-international armed conflict' for the purposes of the ICC Statute. See International Criminal Court, The Prosecutor v. Thomas Lubanga Dyilo, Trial Chamber I, Judgment pursuant to Article 74 of the Statute, 14 March 2012, *ICC-01/04-01/06-2842*, paras. 534-538.

16 For a full discussion of relevant case law and literature, see A. Cullen, *The Concept of Non-International Armed Conflict in International Humanitarian Law*, Cambridge: Cambridge University Press (2010), pp. 122-133.

17 *Ibid*.

18 Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America), judgment of 27 June 1986, *I.C.J. Reports* 1986, para. 218.

19 In general, see E.H. Riedel, 'Recognition of Belligerency', R. Bernhardt, *Encyclopedia of Public International Law*, Max Planck Institute for Comparative Public Law and International Law, Amsterdam: Elsevier (2000), Vol. IV p. 47-50. See also J. Pictet and O.M. Uhler, *The Geneva Conventions of 12 August 1949: Commentary, Part 4 on the Geneva Convention relative to the protection of civilian persons in time of war*, Geneva: International Committee of the Red Cross (1958), p. 35.

international armed conflicts with the express consent of all parties to the armed conflict.[20]

In order to increase the humanitarian protection offered by the common Article 3 of the 1994 Geneva Conventions, a second Protocol to the Geneva Conventions was adopted in 1977 after extensive negotiations. Today, Additional Protocol II has been ratified by the majority of States, including nearly all States which have been involved in resource-related armed conflicts in the last decades.[21] Based on the rules provided by common Article 3, the more detailed provisions of Additional Protocol II on the treatment of prisoners and civilians significantly raise the level of protection for these categories of persons.

At the same time, Additional Protocol II sets a much higher threshold for application than the common Articles 3. While Article 3 common to the 1949 Geneva Conventions is generally assumed to apply to all internal conflicts, whether the State army is involved or not, Additional Protocol II applies only to situations of armed conflict between governments on the one hand, and non-state armed groups on the other. In addition, the conflict must take place within the territory of the government concerned. Finally, armed groups must be "under responsible command" and "exercise such control over a part of its territory as to enable them to carry out sustained and concerted military operations".[22]

This degree of organization of armed groups that is required can pose difficulties in practice. Even if an armed group exercises control over part of the State territory, it may not have an adequate command structure or be unable to carry out "sustained and concerted" military operations.[23] In the DR Congo in particular, many different armed groups are active. Some of these are highly organised, but many do not satisfy the criteria set by Additional

20 The common Article 3 to the Geneva Conventions urges parties to conclude "special agreements" by means of which they bring into operation "all or part of the other provisions of the Geneva Conventions".

21 As of November 2012, Protocol II has been ratified by 166 States. For an overview of the State parties to Protocol II, see <http://www.icrc.org/ihl.nsf/CONVPRES?OpenView> (consulted on 8 November 2012). It must be noted that the United States has not ratified the Protocol, but it did sign it. For its negotiating history, see D. Momtaz, 'Le droit international humanitaire applicable aux conflits armés non internationaux', in *Recueil des cours*, Vol. 292 (2001), pp. 30-33. Momtaz argues that the reason for many states to have ratified the Protocol in recent years is due to the formation of new customary rules which have made the provisions of Protocol II rather obsolete. At the same time, it could be argued that the formation of customary rules similar to the rules incorporated in the Protocol may also confirm the Protocols' legal significance. Its provisions may then to a certain extent be considered an expression of customary law.

22 Article 1, Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), 8 June 1977, *1125 UNTS 609*.

23 Also see D. Momtaz, 'Le Droit International Humanitaire Applicable aux Conflits Armés Non Internationaux', *Recueil des Cours,* Vol. 292 (2001), pp. 49-51.

Protocol II. This leads to confusing situations, where different rules apply in the relationship between the State and different armed groups. The situation becomes even more complex when foreign States are involved. This situation is examined below.

6.2.2 International armed conflict

Article 2 common to the 1949 Geneva Conventions defines "international armed conflict" as a situation of "declared war or […] any other armed conflict which may arise between two or more of the High Contracting Parties" or a situation of "total or partial occupation of a territory". A large body of international humanitarian law applies to these situations, including the 1907 Hague Conventions, the 1949 Geneva Conventions, the 1977 Additional Protocol I to the 1949 Geneva Conventions, as well as a large number of specialised conventions. Some of the rules contained in these instruments apply to international armed conflicts in general, while other rules are specific to the situation of invasion or occupation respectively.

The definition of international armed conflict as set out in Article 2 of the 1949 Geneva Conventions is quite straightforward. An armed conflict is international when two or more States are fighting each other and/or when a State occupies (part of) the territory of another State. However, for the purposes of the present book the definition is not so clear. In the late 1990s, for example, Uganda and Rwanda were invited by the Congolese government to enter its territory in order to fight irregular Ugandan and Rwandese armed groups operating from Congolese territory. However, these States decided to stay in the DR Congo after the government had requested them to leave, and even occupied parts of Congolese territory.

How should this situation be characterised? There are no particular problems as regards the term "occupation". Occupation is a factual situation which is determined on the basis of the transfer of *de facto* State authority.[24] As soon as a State exercises *de facto* authority in a particular region, the law on occupation applies. However, in other parts of Congolese territory, the classical definition does pose some difficulties. Uganda and Rwanda were not actually fighting the Congolese government, but were actually fighting armed groups launching attacks on these countries from Congolese territory. Does this mean that the law on international armed conflict does not apply?

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24 Article 43 of the 1907 Hague Regulations, annexed to Convention (IV) respecting the Laws and Customs of War on Land, 18 October 1907, determines in this regard: "[t]he authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country".

The International Court of Justice had the opportunity to pronounce on this issue in the case concerning *Armed Activities in the Territory of the Congo* (hereafter: the Congo-Uganda case), at least in relation to Uganda.[25] In that case, the Court considered whether Uganda was responsible for acts committed by its troops during its military intervention in the DRC. In this respect the Court concluded that "a party to an armed conflict shall be responsible for all acts by persons forming part of its armed forces".[26] Therefore it found that Uganda was "internationally responsible for violations of international human rights law and international humanitarian law committed by the UPDF and by its members in the territory of the DRC".[27] Provisions of IHL mentioned by the Court were all part of the body of law regulating international armed conflict. This case implies that a State intervening in a foreign State is bound by the law regulating international armed conflict, even if the foreign State is not its opponent as such.

An internal armed conflict can also be internationalised as a result of a State providing support to armed groups, either directly, by means of armed intervention on behalf of a non-state armed group, or indirectly, in the form of financial and strategic military support for operations of armed groups.[28] In the case of indirect intervention, a conflict can be qualified as international if it is determined that the armed group is acting on behalf of the foreign State.

There are two different criteria to establish whether an armed group is acting on behalf of a foreign State. To determine the criminal responsibility of individuals, the International Criminal Tribunal for the former Yugoslavia introduced the "overall control' test. In the 1999 *Tadić Case* the ICTY determined that an armed group can be considered to act on behalf of a State when that State exercises general strategic control over the operations of the armed group.[29] This is the case when the foreign State "*has a role in organizing, co-ordinating or planning the military actions* of the military group, in addition to

25 It must be noted that a similar case instituted by the DR Congo against Rwanda was dismissed on the basis of jurisdiction. See International Court of Justice, Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo *v.* Rwanda), Judgment of 3 February 2006, *I.C.J. Reports 2006*, p. 6.

26 International Court of Justice, Case Concerning Armed Activities in the Territory of the Congo (Democratic Republic of the Congo *v.* Uganda), Judgment of 19 December 2005, *I.C.J. Reports 2005*, para. 214.

27 *Ibid.*, para. 220.

28 See D. Fleck (ed.), *The Handbook of International Humanitarian Law*, Second Edition, Oxford: Oxford University Press (2008), p. 606; and J. Stewart, 'Towards a Single Definition of Armed Conflict in International Humanitarian Law: A Critique of Internationalized Armed Conflict', *International Review of the Red Cross*, Vol. 85, No 850 (2003), p. 315. See *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment of 26 February 2007, paras. 402-406.

29 International Criminal Tribunal for the former Yugoslavia, The Prosecutor v. Dusko Tadić, *Case No. IT-94-1-AR72*, Appeals Chamber Judgment of 15 July 1999, para. 131.

financing, training and equipping or providing operational support to that group".[30]

By introducing this test, the ICTY departed from the more stringent "effective control' test introduced by the International Court of Justice in the 1986 *Nicaragua Case*. This test was established to determine the responsibility of a State for the actions of an armed group; in other words, to determine whether an armed group was acting as a *de facto* State organ. According to the "effective control' test, a State is responsible only for those violations of international law committed by an armed group in the course of military operations over which the State exercised effective control.[31]

In the 2007 *Genocide Case* the International Court of Justice pronounced on the relationship between the two tests. The Court considered that the effective control test must be applied in order to attribute responsibility to a State for actions committed by an armed group. However, to determine "whether or not an armed conflict is international', the ICJ stated that the overall control test "may well be applicable and suitable".[32] According to the Court, each test has its own purpose. In this respect it considered that:

> "the degree and nature of a State's involvement in an armed conflict on another State's territory which is required for the conflict to be characterized as international, can very well, and without logical inconsistency, differ from the degree and nature of involvement required to give rise to that State's responsibility for a specific act committed in the course of the conflict".[33]

Thus a conflict can be characterised as being international if it is established that a State is exercising overall control over the operations of an armed group, which means that the State has a role in organizing, co-ordinating or planning the military actions.

However, the following question arises regarding the implications for the law that is applicable in a conflict between a government and an armed group that is supported by a third State. In the *Military and Paramilitary Activities in and against Nicaragua* case, the International Court of Justice made a clear distinction between two conflict situations:

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30 *Ibid*., para. 137. Emphasis in original. These criteria have been confirmed in other cases before the ICTY as well. See *e.g.* International Criminal Tribunal for the former Yugoslavia, The Prosecutor v. Dario Kordić and Mario Čerkez, *Case No. IT-95-14/2-A*, Appeals Chamber Judgment of 17 December 2004, paras. 306-308.

31 International Court of Justice, Military and Paramilitary Activities in and against Nicaragua (Nicaragua *v.* United states), Judgment of 27 June 1986, *I.C.J. Reports 1986*, para. 115.

32 International Court of Justice, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro), Judgment of 26 February 2007, *I.C.J. Reports 2007*, paras. 402-406.

33 *Ibid*., para. 405.

> "The conflict between the Contras' forces and those of the Government of Nicaragua is an armed conflict which is "not of an international character". The acts of the Contras towards the Nicaraguan Government are therefore governed by the law applicable to conflicts of that character; whereas the actions of the United States in and against Nicaragua fall under the legal rules relating to international conflicts".[34]

Thus the case implies that indirect third State intervention does not alter the classification of the conflict between the State and the opposing armed group. Arguably, this definition cannot be distinguished from the earlier conclusion reached by the Court that the United States did not exercise effective control over the Contras. If the Court had reached a different conclusion on the issue of control, it might well have reached a different conclusion regarding the classification of the armed conflict.

Case law does not fully clarify the implications of indirect State intervention on the law applicable to the relationship between a State and a rebel group. The Special Court for Sierra Leone, for example, did not deal in any of its cases with the question whether the support from the Liberian President Charles Taylor internationalised the armed conflict in Sierra Leone, although there was sufficient evidence of Taylor's financial and strategic involvement in the operations of the RUF. In these cases it was not necessary to deal with the question of the internationalisation of the armed conflict, because the Statute of the SCSL does not distinguish between crimes committed in the course of an international or an internal armed conflict.

The ICC has dealt with the issue in a few cases, especially in the case against Thomas Lubanga, the leader of a Congolese rebel group that received support from Uganda. In an early decision, the ICC Pre-trial Chamber discussed the issue extensively. The Chamber applied the overall control test of the ICTY to the situation. It also relied on the judgment of the ICJ in the Congo-Uganda case to establish that Uganda had effectively intervened in the armed conflict in the DR Congo, turning it into an international armed conflict. The Pre-trial Chamber decided to apply Article 8(2)(b) of the ICC Statute on war crimes committed in the context of an international armed conflict, to Lubanga's acts committed between July 2002 and June 2003, when Uganda occupied parts of Congolese territory.[35]

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34 International Court of Justice, Military and Paramilitary Activities in and against Nicaragua (Nicaragua *v.* United States of America), Merits, Judgment, *I.C.J. Reports,* 1986, para. 219.

35 See International Criminal Court, The Prosecutor v. Thomas Lubanga Dyilo, Pre-Trial Chamber I, Decision of on the confirmation of charges, 29 January 2007, *ICC-01/04-01/06-803-tEN*, paras. 205-226. The Pre-trial Chamber made a similar determination in the cases against Katanga and Chui, more than a year later. See International Criminal Court, Prosecutor v. Germain Katanga and Mathieu Ngudjolo Chui, Pre-Trial Chamber I, Decision on the Confirmation of Charges, 30 September 2008, *Case No. ICC- 01/04-01/07-717*. Also see R. Heinsch, *Yearbook of International Law and Jurisprudence*, Volume I, Oxford: Oxford University Press (2009), pp. 394-403.

However, the Trial Chamber reversed the earlier judgment of the Pre-trial Chamber. Although it stated that the "overall control' test was decisive for establishing whether armed groups were acting under the control of a foreign State, the Trial Chamber decided that it had not been demonstrated that either Rwanda or Uganda exercised sufficient control over the Congolese rebel groups to turn the conflict into an international armed conflict.[36] Arguably the decision of the Trial Chamber can be interpreted as providing support for the thesis that indirect third State intervention changes the relationship between the government and an armed group. In these situations, the law applicable to international rather than internal armed conflicts applies. However, the decision also demonstrates that the evidentiary standards are high.

The last way in which an internal armed conflict can be internationalised is when third States grant recognition to an armed group as a formal belligerent. The theory of recognition of belligerency has become outdated as a result of the adoption of rules regulating the situation of internal armed conflict. Since the adoption of the 1949 Geneva Conventions, internal armed conflicts are no longer considered to be a matter of domestic concern, but are properly regulated under international law. However, even today, recognition of belligerency is more than a theoretical option. Chapter 2 argued that the recognition of the opposition forces as the official representative of the people by a large number of States, both in the recent armed conflict in Libya in 2011 and in the ongoing armed conflict in Syria, can be considered as acts of recognition of belligerency by these States. These examples show that recognition of belligerency is still one of the principal ways in which an internal armed conflict can be internationalised.

6.2.3 The relevance of the distinction between international and internal armed conflicts

The relevance of the distinction between international and internal armed conflict has declined in recent years. Three developments have been instrumental in bridging the gaps between the rules applicable to international and internal armed conflicts. The first development concerns the harmonisation of the treaty rules relevant to both types of armed conflict, especially those relating to the use of weapons in international and internal armed conflicts. Since the 1990s several conventions prohibiting the use of certain weapons have either been amended to encompass the situation of non-international conflict or have been amended with an express provision to this effect. Relevant examples include the 1993 Chemical Weapons Convention and the 1997 Anti-

36 International Criminal Court, The Prosecutor v. Thomas Lubanga Dyilo, Trial Chamber I, Judgment pursuant to Article 74 of the Statute, 14 March 2012, *ICC-01/04-01/06-2842*, paras. 541-542 (on the law) and 552-567 (on the facts).

Personnel Mines Convention, which prohibit "in any circumstances" the development, production, stockpiling, transfer and use of chemical weapons or of anti-personnel mines respectively.[37] Both types of weapons are particularly harmful to the environment and seriously hamper post-conflict reconstruction.

Furthermore, in 2001, the scope of application of the 1980 Convention on Certain Conventional Weapons and its five protocols was extended to the situation of non-international armed conflict.[38] The 1996 Amended Protocol II on Mines, Booby-Traps and Other Devices and the 1980 Protocol III on Incendiary Weapons are particularly relevant for the protection of the environment during armed conflict.[39] Protocol III on Incendiary Weapons, for example, includes an express prohibition against making "forests or other kinds of plant cover the object of attack by incendiary weapons".[40]

More relevant to the current study, however, is the second development, viz. the crystallisation of relevant treaty rules into customary international law. There has been increasing recognition in recent years that particular rules applicable to international armed conflicts have also become applicable to internal armed conflicts. An important study by the ICRC on customary international humanitarian law demonstrated that many rules regulating international armed conflict are applied to internal armed conflicts as well.[41] Although the ICRC study is contentious in some respects and therefore cannot be relied upon directly, it provides a wealth of information regarding the application of IHL in practice.[42]

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37 Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, 13 January 1993, *1974 UNTS 45*, Article 1; Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (Ottawa Convention), 18 September 1997, *2056 UNTS 241*, Article 1.

38 Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, 10 October 1980, *19 ILM 1823* (1980).

39 Protocol II to the 1980 Conventional Weapons Convention on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996, 3 May 1996, *35 ILM 1209 (1996)*; Protocol III to the 1980 Convention on Conventional Weapons on Prohibitions or Restrictions on the Use of Incendiary Weapons, 10 April 1981, *1342 U.N.T.S. 171*.

40 Article 2(4) of Protocol III.

41 See J.M. Henckaerts & L. Doswald-Beck (eds.), *Customary International Humanitarian Law*, International Committee of the Red Cross, Cambridge: Cambridge University Press (2005), Vols. I & II.

42 Criticism on the methodology has been voiced notably by the United States. See Joint letter from John Bellinger and William Haynes to Jakob Kellenberger on Customary International Law Study, *46 ILM 514 (2007)*. For critical assessments of the study, see M. Bothe, 'Customary International Humanitarian Law: Some Reflections on the ICRC Study', *Yearbook of International Humanitarian Law,* Vol. 8 (2005), pp. 143-178; E. Newalsing, 'Customary International Humanitarian Law', *Leiden Journal of International Law,* Vol.21(1) (2008), pp. 255-279.

In this respect the case law of international criminal tribunals is especially relevant. This case law has applied and interpreted rules of IHL in the context of particular conflict situations. While the post-war criminal tribunals dealt exclusively with international armed conflict, many of the present day international criminal tribunals deal with internal armed conflicts as well. Examples include the International Tribunal for the Former Yugoslavia (ICTY), the Special Court for Sierra Leone (SCSL) and, of course, the International Criminal Court (ICC).

The interpretation of rules of IHL by these international criminal tribunals is closely linked to the third development that has been instrumental in bridging the gaps between the law applicable to international and internal armed conflicts. This development is related to the evolution of international criminal law as a distinct branch of international law. Not all of the war crimes listed in Statutes of international criminal tribunals that apply to situations of internal armed conflict are directly based on express provisions in international humanitarian law conventions.

One example concerns the war crime of destroying or seizing the property of an adversary, unless such destruction or seizure be imperatively demanded by the necessities of the conflict, as codified in Article 8(2)(e)(xii) of the Rome Statute of the International Criminal Court (ICC Statute).[43] This war crime, which applies to internal armed conflicts, follows from Article 23(g) of the 1907 Hague Regulations, applicable only to international armed conflicts. There is no IHL equivalent for this war crime related to internal armed conflicts. In this way, international criminal law can be said to progressively develop international humanitarian law as well.

6.3 INTERNATIONAL HUMANITARIAN LAW PROTECTION OF NATURAL RESOURCES AND THE ENVIRONMENT

This section assesses the protection afforded by international humanitarian law to natural resources and to the environment against (the effects of) the exploitation and plundering of natural resources. Protection is provided primarily by provisions on the protection of property and civilian objects.

This section starts with the provisions on the protection of property and in particular with the prohibition against pillage, which is the most cited provision in relation to the plundering of natural resources by parties to an armed conflict. It argues that the prohibition against pillage is primarily applicable to the plundering of natural resources for the purposes of self-enrichment. It then turns to the prohibition against destroying or seizing property to see if this provision can fill the gap left open by the prohibition

43 Rome Statute of the International Criminal Court, adopted on 17 July 1998 (entry into force: 1 July 2002), *2187 UNTS 90*.

against pillage. Furthermore, this section discusses the right of an occupant to exploit natural resources on the basis of *usufruct*.

The section goes on to discuss two provisions which provide protection to civilian objects. It looks at the extent to which the prohibition against attacking, destroying, removing or rendering useless objects indispensable to the survival of the civilian population provides residual protection to natural resources because of their significance to the civilian population. Secondly, it examines to what extent the duty of care with regard to protecting the natural environment includes environmental damage caused by the exploitation of natural resources by parties to an armed conflict.

It should be noted that the rules of international humanitarian law which have a bearing on the exploitation of natural resources are deficient in several respects. The most important deficiency is their lack of precision. They are not specifically designed to address instances of natural resource exploitation by parties to an armed conflict. This is partly due to the fact that most of the rules of the law of armed conflict predate important developments in international environmental law which qualified the right of States to exploit natural resources. It is therefore important to interpret the relevant rules of international humanitarian law in the broader context of public international law and, more specifically, to take more recent developments in international law into account in the interpretation of the provisions.

Therefore the current section interprets the provisions of international humanitarian law in the light of relevant provisions of international human rights and environmental law. The means of interpretation used in this section include a dynamic-evolutionary method to interpret treaty terms, as well as the systemic method of interpretation to interpret the substantive rules contained in the provisions, as described in the introduction to this book.

6.3.1 The protection of property

International humanitarian law conventions contain several provisions aimed at protecting property against unjustified destruction or appropriation by parties to an armed conflict. In international law property can be broadly defined to include movable and immovable, as well as public and private property.[44] In addition, the case law of the Nuremberg Tribunal established that property includes both physical and intangible property.[45] The term 'property' is therefore sufficiently broad to capture all types of natural

44 See Y. Sandoz, C. Swinarski and B. Zimmermann (ed.), *Commentary on the additional protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Dordrecht: Nijhoff Publishers (1987), p. 1376.

45 See the *I.G. Farben* case, *Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10*, vol. VIII (1952), p. 1134.

resources, whether state owned or privately held, extracted natural resources or natural resources which have not yet been removed, as well as rights relating to the exploitation of natural resources, such as concessions.

The term 'property' is presumed to cover natural resources. Despite the lack of a formal definition, the conventions provide sufficient indications to support this. Article 55 of the 1907 Hague Regulations, for example, expressly defines forests as properties. Moreover, the relevant provisions have all been considered to be applicable to the protection of the environment.[46] *Mutatis mutandis* they must also cover materials which are part of that environment.

The current book proposes making a further distinction between natural resources *in situ* and *ex situ*.[47] As long as the natural resources are not extracted (*in situ*), they are part of the environment and therefore qualify as immovable property. However, as soon as they have been extracted (*ex situ*), natural resources become tangible objects and therefore fall into the category of movable property. This means that the exploitation of natural resources is governed by the rules concerning immovable property, while the rules on movable property regulate the (il)legality of the appropriation of natural resources which have already been extracted.

Prohibition against pillage

The prohibition against pillage is codified in Articles 28 and 47 of the 1907 Hague Regulations, Article 33 (2) of 1949 Geneva Convention IV and Article 4 (2) (g) of 1977 Additional Protocol II. Some of these provisions are aimed at providing protection for particular persons, especially civilians and persons who no longer take part in hostilities, while others have a more general scope.[48] In addition, the prohibition has been recognised as having customary

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46 See the Report of the Secretary-General on the protection of the environment in times of armed conflict, *UN General Assembly Document A/48/269* of 29 July 1993, pp. 5-6; and the Memorandum on International Law Providing Protection of the Environment in Times of Armed Conflict, Annex to a Letter dated 28 September 1992 from the permanent missions of the Hasjemite Kingdom of Jordan and of the United States of America addressed to the Chairman of the Sixth Committee of the General Assembly, *UN Doc. A/C.6/47/3* of 28 September 1992.

47 See the 1956 judgment from the Court of Appeal of Singapore in the Singapore Oil Stocks Case, regarding the exploitation of oil in the Netherlands Indies by the Japanese occupant during the Second World War. In this case, the Court determined that crude oil in the ground constituted immovable property. N.V. De Bataafsche Petrolium Maatschappij & Ors. *v.* The War Damage Commission, Court of Appeal, Singapore, April 13, 1956, reprinted in the *American Journal of International Law*, Vol. 51 (1957), p, 809. For more details, see I. Scobbie, 'Natural Resources and Belligerent Occupation: Mutation Through Permanent Sovereignty', S. Bowen (ed.), *Human Rights, Self-Determination and Political Change in the Occupied Palestinian Territories*, The Hague: Martinus Nijhoff Publishers, International Studies in Human Rights (1997), pp. 235-237.

48 General protection is provided through Article 28 of the Hague Regulations, applicable to international armed conflicts, which provides that "the pillage of a town or place, even when taken by assault, is prohibited" and Article 47 of the Hague Regulations, applicable

international law status, both for international and non-international armed conflicts.[49]

Traditionally the prohibition against pillage was applied to acts of theft during armed conflict, either by individual soldiers or in the form of organized plundering.[50] The main purpose of the drafters of the 1907 Hague Regulations was to ban the practice of rewarding troops for their services by authorising them to loot villages and towns. The Nuremberg Tribunal cast the net much wider. The Tribunal applied the war crime of plunder to all forms of appropriation of public or private property – whether this concerns physical property or rights attached to property[51] – without the consent of the owner, in the context of an armed conflict. The prohibition against pillage is also the most cited provision in relation to the illegal exploitation, looting and plundering of natural resources by foreign troops and armed groups.[52]

The prohibition against pillage is one of the few provisions of IHL that prohibits the appropriation of a State's natural resources by parties acting without the consent of the State. However, despite the broad scope of the prohibition, it is important to remember its original purpose, which was to

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to occupation, which provides that "pillage is formally forbidden". Specific protection is provided to civilian persons through Article 33 (2) of Geneva Convention IV, applicable to international armed conflicts, and to civilians as well as persons who do not actively take part in hostilities through Article 4 (2) (g) of Additional Protocol II, applicable to non-international armed conflicts.

49 For international armed conflict, the customary nature of the prohibition stems primarily from its inclusion in the 1907 Hague Regulations, which have been affirmed to constitute customary law. The customary status of the Regulations has been affirmed by the International Court of Justice in its *Advisory Opinion on the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, *I.C.J. Reports 2004*, p. 172, para. 89, where the Court considered "that the provisions of the Hague Regulations have become part of customary law". For non-international armed conflict, both the Appeals Chamber of the ICTY and the SCSL have expressly held this prohibition to be part of customary law applicable to non-international armed conflict. ICTY, *Hadzihasanovic, Alagic and Kubura* (IT-01-47), Decision on Joint Defence Interlocutory Appeal of Trial Chamber Decision on Rule 98bis Motions for Acquittal, para. 37; SCSL, *The Prosecutor vs. Moinina Fofana and Allieu Kondewa*, Appeal Chamber Judgment of 28 May 2008, para. 390.

50 See Y. Sandoz, C. Swinarski and B. Zimmermann (ed.), *Commentary on the additional protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Dordrecht: Nijhoff Publishers (1987), p. 1376; and G. Carducci, 'Pillage', in R.Wolfrum, Encyclopedia of Public International Law, Max Planck Institute for Comparative Public Law and International Law, Oxford: Oxford University Press (2012), Vol. VIII, pp. 299-304.

51 See the *I.G. Farben* case, *Trials of War Criminals before the Nuremberg Military Tribunals under Control Council Law No. 10*, Vol. VIII (1952), p. 1134.

52 See, *e.g.*, J.G. Stewart, *Corporate War Crimes: Prosecuting the Pillage of Natural Resources*, New York: Open Society Justice Initiative Publication (2011); M.A. Lundberg, 'The Plunder of Natural Resources During War: A War Crime (?)' 39 *Georgetown Journal of International Law* Vol. 39, Issue 3 (2008, pp. 495-526; and L.J. van den Herik & D.A. Dam-de Jong, 'Revitalizing the Antique War Crime of Pillage: The Potential and Pitfalls of Using International Criminal Law to Address Illegal Resource Exploitation during Armed Conflict', *Criminal Law Forum*, Vol. 22(3) (2011), pp. 237-273.

prohibit theft. The prohibition therefore contains an important restriction: it applies only to the appropriation of property for personal gain. This restriction is based on the system of international humanitarian law itself, which makes a distinction between "pillage" on the one hand, and "seizure" and "requisition" on the other. While pillage is prohibited in absolute terms, the seizure or requisition of property is permitted under particular circumstances. The ICRC Commentary to Article 33 of Geneva Convention IV explicitly states that the prohibition against pillage "leaves intact the right of requisition or seizure".[53]

This distinction is retained in international criminal law as well. The ICC Statute lists pillage on the one hand, and the destruction or seizure of the property of the hostile party outside a situation of military necessity on the other, as two separate war crimes.[54] Furthermore, the *Elements of Crime* defining the crimes listed in the ICC Statute restrict pillage to appropriation for private or personal use.[55] This interpretation of pillage is confirmed in the case law of the Special Court for Sierra Leone. According to the Appeals Chamber of the SCSL, 'pillage' refers to the appropriation of property for private purposes.[56] It is also in this context that the prohibition against pillage was considered by the International Court of Justice in the case of the DR Congo against Uganda. In that case, the DR Congo claimed that members of the Ugandan army had systematically exploited the DRC's natural resources for their personal benefit.[57] The International Court of Justice concluded that "whenever members of the UPDF were involved in the looting, plundering and exploitation of natural resources in the territory of the DRC", they acted in violation of the prohibition against pillage.[58]

There is no specific case law from modern international criminal tribunals which has determined that the war crime of pillage applies to the exploitation

53 J. Pictet and O.M. Uhler, *The Geneva Conventions of 12 August 1949: Commentary, Part 4 on the Geneva Convention relative to the protection of civilian persons in time of war*, Geneva: International Committee of the Red Cross (1958), p. 227.

54 See Article 8(2)(b)(xiii) and (xvi) and Article 8(2)(e)(v) and (xii) of the ICC Statute.

55 Elements of Crimes, *Official Journal of the International Criminal Court*, available at <www.icc-cpi.int/library/about/officialjournal/Element_of_Crimes_English.pdf> (last consulted on 1 August 2012). *Also see* K. Dörmann, *Elements of War Crimes under the Rome Statute of the International Criminal Court: Sources and Commentary*, International Committee of the Red Cross (Cambridge University Press, Cambridge 2002).

56 Special Court for Sierra Leone, *The Prosecutor vs. Moinina Fofana and Allieu Kondewa*, Appeals Chamber Judgment of 28 May 2008, para. 392, note 770. The Appeals Chamber departed from the decision of the Trial Chamber on this point, which held that "the inclusion of the requirement that the appropriation be for private or personal use is an unwarranted restriction on the application of the offence of pillage". Special Court for Sierra Leone, *The Prosecutor vs. Moinina Fofana and Allieu Kondewa*, Trials Chamber Judgment of 2 August 2007, para. 160.

57 *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, I.C.J., 19 December 2005, Judgment, *I.C.J. Reports* 2005, paras. 222-229.

58 *Ibid.*, para. 245.

of natural resources. Up to now, none of these tribunals has applied the provision to instances of natural resource exploitation. Despite the fact that the war crime could cover them, instances of pillage before modern international criminal tribunals have been limited to the appropriation of personal belongings of civilians, mainly in relation to the raiding of villages.[59] Even in the cases against Charles Taylor and the leaders of the RUF and the AFRC before the Special Court for Sierra Leone, where there was a close connection between the exploitation of natural resources and the committing of other crimes, the pillage of natural resources was not one of the charges.[60]

In the absence of modern case law from international criminal tribunals which may provide more specific guidance for the interpretation of pillage in relation to natural resources, it may be concluded from the judgment of the International Court of Justice in the *Congo-Uganda case* that the prohibition against pillage applies first and foremost to the exploitation of natural resources by members of rebel groups or foreign armies for the purpose of self-enrichment. Arguably, it applies equally to the misappropriation of natural resources or their proceeds by public officials of the domestic State, including members of the government or the State's armed forces, in view of the fact that natural resources belong to the State and not to its representatives. Furthermore, pillage may be interpreted broadly to include all appropriation of property that does not – directly or indirectly – serve a military purpose. As the case law of the Nuremberg Tribunal showed, appropriation of property by a foreign army to benefit the economy of the foreign State therefore also constitutes pillage. However, it seems less appropriate to apply the prohibition against pillage to the exploitation of natural resources for military purposes, including the funding of an armed conflict. In the light of the system of international humanitarian law as a whole, these instances are covered by the prohibition against seizing the property of the adversary, which is discussed in the following section.

Prohibition against destroying or seizing the property of a hostile party

Article 23 (g) of the 1907 Hague Regulations formulates a prohibition against destroying or seizing "enemy property" in situations of international armed conflict "unless imperatively demanded by the necessities of war". In addition, Article 53 of Geneva Convention IV contains an express prohibition for occupants against destroying "real or personal property belonging individually

59 For examples of relevant practice by international criminal tribunals, *see* the *ICRC Customary International Humanitarian Law Database*, Rule 52, available through www.icrc.org/customary-ihl/eng/docs/home (last consulted on 9 June 2013).

60 For a detailed discussion of the crime of pillage and its applicability to the exploitation of natural resources, *see* L.J. van den Herik and D.A. Dam-de Jong, 'Revitalizing the Antique War Crime of Pillage: The Potential and Pitfalls of Using International Criminal Law to Address Illegal Resource Exploitation During Armed Conflict', *Criminal Law Forum,* Vol. 22(3) (2011), pp. 237-273.

or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations […], except where such destruction is rendered absolutely necessary by military operations".[61]

Although there is no express provision for internal armed conflicts, the applicability of the prohibition against destroying or seizing the property of a hostile party in internal armed conflicts can be deduced from international criminal law, and more specifically from Article 8(2) (e)(xii) of the ICC Statute, which criminalises the destruction and seizure of the property of an "adversary", unless such destruction or seizure be imperatively required by the necessities of the conflict. Both the ICTY and the SCSL also expressly determined that the prohibition against destroying the property of a hostile party is part of customary international law applicable to both international and non-international armed conflict.[62] By analogy, the customary international law status of the prohibition could also extend to the appropriation of property. Furthermore, as the customary international law prohibition addresses parties to an armed conflict in general, it can be interpreted to be binding on non-state armed groups.[63]

These provisions, as well as the system of international humanitarian law as a whole, imply that the prohibition against seizing or destroying the property of a hostile party is aimed at prohibiting the destruction or seizure of property only outside situations of military necessity. *Mutatis mutandis*, the prohibition formulates an indirect right for belligerents to destroy or seize the property of the hostile party when it is imperative from a military perspective.

It is important to note beforehand that the right for belligerents to destroy or seize particular property in cases of imperative military necessity does not depend upon the characteristics of the property itself. Whereas international humanitarian law generally distinguishes between civilian objects and military objectives, determining that civilian objects may not be the subject of attack, this distinction does not affect the application of the current provisions.

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61 One of the main differences between the two provisions is their formal scope of application. Whereas Article 23 (g) of the Hague Regulations applies to international armed conflict in general, including the situation of occupation, Article 53 of Geneva Convention IV applies exclusively to the situation of occupation. Thus the prohibition contained in Article 23 (g) extends to all phases of an armed conflict, while Article 53 of Geneva Convention IV does not bind a party to an armed conflict until he actually takes over the authority in (part of) its enemy's territory. After all, Article 42 of the Hague Regulations determines that "territory is considered occupied when it is actually placed under the authority of the hostile army".

62 International Criminal Tribunal for the Former Yugoslavia, *Kordić and Čerkez* case, Judgment of 26 February 2001, para. 205; Special Court for Sierra Leone, *The Prosecutor vs. Moinina Fofana and Allieu Kondewa*, Appeals Chamber Judgment of 28 May 2008, para. 390.

63 On the binding nature of customary international law in relation to non-state armed groups, see Chapter 1 of this study.

The question whether an object is civilian or military depends on the nature, location, purpose or use of the object. If the object does not make an effective contribution to military action by any of these factors, it may normally not be the subject of attack.[64] However, for the application of the current provisions, it does not matter whether or not the objects make an effective contribution to military action. The decisive criterion is the existence of a situation of imperative military necessity. In these circumstances, belligerents may seize or destroy the property of the hostile party, whether this property is a military objective or a civilian object. In this sense, it must be regarded as an exception to the general rule prohibiting the attack of civilian objects.

Given the exceptional nature of the right that ensues from the prohibition to seize or destroy the property of a hostile party, it is of great importance to carefully delineate the objects covered by the provisions and the circumstances that allow for the exception to be invoked. The first question that arises concerns the interpretation of the terms "enemy property" in international armed conflicts and "property of an adversary" in internal armed conflicts. Although both terms cover all types of property – whether movable or immovable, public or private[65] –there are important differences as regards the scope of the two terms. In international armed conflicts, all property situated within the territory of the "enemy" State is considered to be "enemy property" for the purposes of international humanitarian law. In other words, in international armed conflicts, belligerents are prohibited from seizing or destroying any property found within the territory of their adversary, including both publicly and privately owned property, unless the seizure or destruction is strictly necessary from a military perspective.

In internal armed conflicts, the situation is more complex, as ownership of the property must be determined by national law.[66] Where international law attributes ownership of natural resources to the State on the basis of the principle of permanent sovereignty over natural resources, it is for the State to decide on issues of ownership within the national context. In relation to

64 See section 6.3.2 of this chapter.

65 See Article 53 of Geneva Convention IV, which expressly prohibits the destruction of "real" and "personal" property. Also see the judgment of the Nuremberg Military Tribunal in the *Hostage case*, which determined that Article 23 (g) of the Hague Regulations applied to such diverse objects as "railways, lines of communication, or any other property that might be utilized by the enemy" as well as "private homes and churches". *Trials of War Criminals before the Nuremberg Military Tribunals Under Control Council Law No. 10*, Nuremberg, October 1946-April 1949, Vol. XI, Washington: Government Printing Office (1959), p. 1254.

66 According to Zimmerman, in the context of Article 8(2)(e)(xii) of the ICC Statute, the term "adversary" refers to "any person, who is considered to belong to another party to the conflict, such as the government, insurgents or, as article 8 para. 2(f) of the Statute demonstrates, belongs to an opposing organized armed group". A. Zimmerman, 'article 8 - para. 2 (e)', in O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (1999), margin no. 326-327, p. 284.

natural resources, many national constitutions vest the ownership of natural resources in the State, which is formally represented by the government. This means that in internal armed conflicts the prohibition against destroying or seizing the property of an adversary primarily covers natural resources that belong to the State or to private persons affiliated to the State. In other words, the prohibition against seizing or destroying natural resources, except in cases of imperative military necessity, will therefore primarily apply to non-state armed groups, provided that they are actually fighting the government.[67] Conversely, it also means that these armed groups can justify the seizure or destruction of natural resources in cases of imperative military necessity.

The second question that must be addressed concerns the interpretation of "imperative military necessity". The concept of military necessity can be traced back to the American Lieber Code of 1863, which defined military necessity as "those measures which are indispensable for securing the ends of the war, and which are lawful according to the modern law and usages of war".[68] In other words, military necessity excuses actions that are otherwise prohibited if the relevant provision provides for such an excuse and if the actions would help the belligerent party to gain a military advantage.[69]

Although the concept of military necessity was inserted in all subsequent legal instruments regulating the conduct of hostilities, the definition was not retained. This makes it difficult to determine the precise contents and limits of the exception contained in the prohibition against seizing or destroying the property of the hostile party. Some guidance on the interpretation of military necessity can be found in the case law of the Nuremberg Tribunals. The exception of military necessity to excuse particular behaviour was invoked in several proceedings before the Nuremberg Tribunals. The tribunals also dealt with the interpretation of the phrase "imperative military necessity" as part of the prohibition against destroying or seizing the property of a hostile party.

Reference can be made in particular to the *Hostage case*, which dealt, *inter alia*, with charges against high-ranking officers in the German army for wanton destruction of cities, towns and villages, as well as other acts of devastation.

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67 Since natural resources generally do not belong to armed groups, a right to seize or destroy natural resources in cases of military necessity does not apply to conflicts between armed groups. *Mutatis mutandis*, the prohibition to seize or destroy the natural resources of the adversary does not apply to these situations either.

68 Instructions for the Government of Armies of the United States in the Field (Lieber Code), 24 April 1863. Available through <http://www.icrc.org/ihl.nsf>.

69 Of course, implicit in the notion of military necessity is further that property of the hostile party can be seized or destroyed solely for military purposes. See Y. Dinstein, 'Military Necessity', in R.Wolfrum, *Encyclopedia of Public International Law*, Max Planck Institute for Comparative Public Law and International Law, Oxford: Oxford University Press (2012), Vol. VII, p. 201-207, paras. 25-26. This requirement that the property is appropriated for military purposes is also what distinguishes the qualified prohibition to seize the property of a hostile party from the absolute prohibition of pillage.

In this case the Military Tribunal considered that "[m]ilitary necessity permits a belligerent, subject to the laws of war, to apply any amount and kind of force to compel the complete submission of the enemy with the least possible expenditure of time, life and money. In general, it sanctions measures by an occupant necessary to protect the safety of his forces and to facilitate the success of his operations".[70] It also considered that the Hague Regulations require the military necessity to be "urgent" and that there must be a "reasonable connection between the destruction of property and the overcoming of the enemy forces".[71]

Two principal requirements can be derived from this case law. First, the seizure or destruction of property must make an effective contribution to military action.[72] Secondly, whether the seizure or destruction of property is permitted in particular circumstances depends on the urgency of the situation. The requirement of "urgency" concerns both the time element and the existence of alternatives to attain the objective. As regards the time element, reference can be made to the *Caroline* criteria generally used to assess the need for an act of self-defence. According to the *Caroline* criteria, military action can be justified if the necessity is "instant, overwhelming, leaving no choice of means and no moment for deliberation".[73] As regards proportionality, "urgency" means, at the very least, that the belligerent did not have any less injurious alternatives at his disposal to achieve the objective.[74] According to Otto Triffterer, military necessity even implies that "there are no other means to secure military safety".[75]

For the purposes of the present study, the excuse of imperative military necessity is of limited relevance to armed groups seeking to justify the appropriation or destruction of natural resources. The contribution of natural resources to an armed conflict is in most cases indirect, in the sense that they cannot be directly used in military operations or to guarantee the safety or

70 The Tribunal also recognised that destruction as an end in itself is a violation of international law. *Hostage case*, Judgment of 19 February 1948, Trials of War Criminals before the Nuremberg Military Tribunals Under Control Council Law No. 10, Nuremberg, October 1946-April 1949, Vol. XI, Washington: Government Printing Office (1959), pp. 1253-1254.

71 *Ibid*. Also see O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article* (1999), margin no. 105, p. 232.

72 See International Criminal Tribunal for the Former Yugoslavia, Strugar Case, *Case No. IT-01-42*, Trial Judgment of 31 January 2005, para. 295. The Chamber defined "military necessity" with reference to the definition of military objects in Article 52 of Additional Protocol I to the Geneva Conventions, discussed in the following section.

73 Correspondence between Great Britain and the United States, respecting the Arrest and Imprisonment of Mr. McLeod, for the Destruction of the Steamboat Caroline, March, April 1841.

74 See G. Werle & F. Jessberger, *Principles of International Criminal Law*, The Hague: T.M.C. Asser Press (2005), p. 340, margin no. 1003, who argue that military necessity implies that destruction is not permitted if alternative means to achieve the military goal are open.

75 O. Triffterer (ed.), *Commentary on the Rome Statute of the International Criminal Court: Observers' Notes, Article by Article*, Baden-Baden : Nomos (1999), p. 232, margin nos. 154 and 155.

survival of members of an armed group. Rather, they provide the means to finance military operations and to provide food and shelter. Therefore their destruction or appropriation may secure a military advantage, but does not satisfy the requirement of urgency. The *Krupp case* before Nuremberg Military Tribunal III confirms this interpretation. In that case, the Tribunal quoted and approved the following passage from *Garner's International Law and the World War*:

> "...it is quite clear from the language and context of Article 23(g) as well as the discussions on it in the Conference that *it was never intended to authorize a military occupant to despoil on an extensive scale the industrial establishments of occupied territory or to transfer their machinery to his home country for use in his home industries. What was intended merely was to authorize the seizure or destruction of private property only in exceptional cases when it was an imperative necessity for the conduct of military operations* in the territory under occupation. This view is further strengthened by Article 46 which requires belligerents to respect enemy private property and which forbids confiscation, and by Article 47 which prohibits pillage".[76]

In conclusion, the excuse of imperative military necessity is primarily relevant in emergency situations, where there is a reasonable connection between the appropriation or destruction of natural resources and a military purpose. This means that it may be a justification for the appropriation of natural resources that can be directly used to satisfy the basic needs of members of armed groups, such as the poaching of wild animals or the cutting of trees in a State forest for firewood. However, the excuse of imperative military necessity is too narrowly formulated to justify the systematic exploitation of natural resources for the purpose of financing military operations.

Administration of public property in territories under occupation

The most detailed regime for the protection of property is set out for territories under foreign occupation. One of the basic tenets of occupation law is that private property must be respected.[77] An occupant may only appropriate

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76 Trials of War Criminals before the Nuremberg Tribunals under Control Council Law No. 10, Vol. IX, the *Krupp* case, Washington: Government Printing Office (1950), pp. 1344-1345. Author's emphasis added.

77 M. Bothe, 'Occupation, Belligerent', R. Bernhardt, *Encyclopedia of Public International Law*, Vol. III, Max Planck Institute for Comparative Public Law and International Law, Amsterdam: Elsevier (2000), p. 766. Article 46 (2) of the 1907 Hague Regulations prohibits the confiscation of such property and Article 47 prohibits pillage of property in general. The Hague Regulations contain only two exceptions to the principle of the inviolability of private property. First, Article 52 of the Hague Regulations permits the occupant to requisition private property against financial compensation in order to satisfy "the needs of the army of occupation", provided such requisitions "shall be in proportion to the resources of the country, and of such a nature as not to involve the inhabitants in the obligation of taking part in military operations against their own country". The second exception concerns property which may be qualified as "munitions of war" under Article 53 (2) of the Hague

private property in exceptional circumstances, and providing financial compensation. In contrast, as the principal governmental authority in territory under occupation,[78] an occupant may to a certain extent dispose of public property. First, Article 53 of the 1907 Hague Regulations authorises the occupant to take possession of particular objects, such as State-owned cash, funds and realisable securities as well as all public movable property "which may be used for military operations" and munitions of war.[79] Secondly, Article 55 of the 1907 Hague Regulations grants the occupant a right of usufruct over immovable public property.

The latter provision is key to the occupant's right to exploit natural resources. It reads in full:

> "The occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct".

The right of *usufruct*, as set out in Article 55 of the 1907 Hague Regulations, grants the occupant the right to administer the immovable properties of the occupied State, including state-owned forests and mines, and to enjoy their proceeds as long as he "safeguards the capital of these properties".

Thus it is clear that the concept of usufruct imposes limits on the right of an occupant to use the property of the territory under occupation. As Lassa Oppenheim noted as early as 1952, the occupant is "prohibited from exercising its right [of usufruct] in a wasteful or negligent way so as to decrease the value of the stock and plant. Thus, for instance, he must not cut down a whole forest,

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Regulations – which applies equally to public property. These properties may be seized without offering immediate compensation, provided the objects are restored and compensation is fixed after the war.

78 This authority is based on *de facto* rather than *de jure* power. See Y. Dinstein, *The International Law of Belligerent Occupation*, Cambridge: Cambridge University Press (2009), p. 49; and M. Bothe, 'Occupation, Belligerent', R. Bernhardt, *Encyclopedia of Public International Law*, Vol. III, Max Planck Institute for Comparative Public Law and International Law, Amsterdam: Elsevier (2000), p. 764. Furthermore, according to Bothe, "international law does not grant rights to the occupying power, but limits the occupant's exercise of its *de facto* powers" (p. 764). Also see E. Benvenisti, *The International Law of Occupation*, Princeton and Oxford: Princeton University Press (2004), pp. 5-6. Benvenisti compares the occupant's status to that of a trustee. According to Benvenisti, the occupant administers the territory on behalf of the sovereign.

79 Article 53 of the Hague Regulations reads in full: "An army of occupation can only take possession of cash, funds, and realizable securities which are strictly the property of the State, depots of arms, means of transport, stores and supplies, and, generally, all movable property belonging to the State which may be used for military operations.
All appliances, whether on land, at sea, or in the air, adapted for the transmission of news, or for the transport of persons or things, exclusive of cases governed by naval law, depots of arms, and, generally, all kinds of munitions of war, may be seized, even if they belong to private individuals, but must be restored and compensation fixed when peace is made".

unless the necessities of war compel him".[80] This is still the prevailing view in academic literature today.[81]

Arguably, the requirement that an occupant must safeguard the capital of the properties it administers should be interpreted in the light of the relevant obligations of the occupant under customary international law, including customary international law obligations arising from other fields of international law. This would require an occupant to use the natural resources in a sustainable way and to exploit them with respect for the principle of permanent sovereignty over natural resources and the right to self-determination of the people under occupation, meaning that an occupant must exploit the natural resources in occupied territory for the benefit of the occupied territory and its population.[82]

Furthermore, the principle of sustainable use is today one of the basic tenets underlying the obligation of an occupant to safeguard the capital of the State's natural resources. The principle creates a balance between the right of an occupant to use the natural resources in occupied territory to cover the costs of the occupation and the obligation to safeguard these resources for the benefit of future generations.

One long-standing issue in international law concerns the right of an occupant to exploit non-renewable natural resources. This issue received much scholarly attention, especially in relation to Israel's right to exploit oil resources in the occupied Sinaï Peninsula in the 1970s.[83] Nico Schrijver remarks that "while usufruct of renewable resources may give no rise to particular problems, its application to non-renewable resources such as minerals is controversial'.[84]

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80 L. Oppenheim, *International Law: A Treatise,* Vol. II Disputes, War and Neutrality, Seventh Edition, Edited by H. Lauterpacht, London/New York/Toronto: Longmans, Green and Co (1952), p. 398. Obviously the obligation to safeguard the capital of the properties in occupied territory does not impede the right of an occupant to destroy property in occupied territory in cases of military necessity as incorporated in Article 23 (g) of the Hague Regulations and Article 53 of Geneva Convention IV.

81 See, *e.g.,* Y. Arai-Takahashi, *The Law of Occupation: Continuity and Change of International Humanitarian Law, and its Interaction with Human Rights Law*, The Hague: Martinus Nijhoff Publishers (2009), pp. 209-215; Y. Dinstein, *The International Law of Belligerent Occupation*, Cambridge: Cambridge University Press (2009), p. 214.

82 For the impact of the principle of permanent sovereignty on the interpretation of the right of usufruct, see Y. Arai-Takahashi, *The Law of Occupation: Continuity and Change of International Humanitarian Law, and its Interaction with Human Rights Law*, The Hague: Martinus Nijhoff Publishers (2009), pp. 215-216.

83 See in particular B. Sloan, 'Study on the Implications, under International Law, of the United Nations Resolutions on Permanent Sovereignty over Natural Resources, on the Occupied Palestinian and other Arab Territories and on the Obligations of Israel Concerning its Conduct in these Territories, *UN Doc. A/38/85*, 21 June 1983; and US Department of State, 'Memorandum of Law on Israel's Right to Develop New Oil Fields in Sinai and the Gulf of Suez', *17 ILM 2* (1978), pp. 432-444.

84 N.J. Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties*, Cambridge: Cambridge University Press (1997), p. 268.

Indeed, the opinions differ considerably in this respect. An examination of the scholarly debate reveals that the obligation to safeguard the capital of non-renewable natural resources may either be interpreted narrowly to prohibit the exploitation of non-renewable natural resources altogether, based on the idea that exploitation would *ipso facto* reduce their capital, or it may be interpreted broadly to prohibit only excessive exploitation.[85] Based on the principle of sustainable use, this book argues that contemporary international law allows an occupant to exploit the natural resources of occupied territory, including its non-renewable natural resources, insofar as this would not harm the options of future generations to exploit the natural resources for their development.

On the other hand, the principle of permanent sovereignty serves to underline the obligation of occupants to administer the natural resources in occupied territory for the benefit of the people.[86] This implies that the right of usufruct precludes exploitation of the natural resources of a country by an occupant for its own benefit, a prohibition that is also confirmed in the relevant case law of the Nuremberg tribunals.[87] The International Military Tribunal at Nuremberg considered that "the economy of an occupied country can only be required to bear the expense(s) of the occupation, and these should not be greater than the economy of the country can reasonably be expected to bear".[88] This judgment should be read in conjunction with the *Krupp case*, decided by a lower military tribunal at Nuremberg. This tribunal considered that an occupied country's economic assets could never be used for military

85 See N.J. Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties*, Cambridge: Cambridge University Press (1997), pp. 268-269; B. Sloan, 'Study on the Implications, under International Law, of the United Nations Resolutions on Permanent Sovereignty over Natural Resources, on the Occupied Palestinian and other Arab Territories and on the Obligations of Israel Concerning its Conduct in these Territories, *UN Doc. A/38/85*, 21 June 1983, in particular pp. 15 and 16; A. Cassese, 'Powers and Duties of an Occupant in Relation to Land and Natural Resources', in E. Playfair (ed.), *International law and the Administration of Occupied Territories: Two Decades of Israeli Occupation of the West Bank and Gaza Strip*, proceedings of a conference organized by al-Haq in Jerusalem in January 1988 (1992), pp. 419-442; E. Benvenisti, *The International Law of Occupation*, second edition, Oxford: Oxford University Press (2013), pp. 81-82.

86 See Y. Arai-Takahashi, *The Law of Occupation: Continuity and Change of International Humanitarian Law, and its Interaction with Human Rights Law*, The Hague: Martinus Nijhoff Publishers (2009), pp. 215-216.

87 See e.g. A. Cassese, 'Powers and Duties of an Occupant in Relation to Land and Natural Resources', in E. Playfair (ed.), *International law and the Administration of Occupied Territories: Two Decades of Israeli Occupation of the West Bank and Gaza Strip*, proceedings of a conference organized by al-Haq in Jerusalem in January 1988 (1992), p. 426, who argues that the principle of permanent sovereignty over natural resources, in the context of belligerent occupation, "tends to support a restrictive interpretation of the occupant's powers to exploit and dispose of immovable property. Even if the occupant has reservations about the 'statehood' of its enemy, this principle should serve to restrain the occupant from exploiting resources in contravention of the rights of an alien people in occupied territory".

88 *Trial of the Major War Criminals before the International Military Tribunal*, Nuremberg, 14 November 1945 – 1 October 1946, Official Documents, Vol. I, Nuremberg (1947), p. 239.

operations against the occupied territory.[89] The International Military Tribunal at Nuremberg also considered that excessive exploitation of natural resources could even amount to plunder. According to the Tribunal, Germany had exploited the occupied territories for the German war effort "in the most ruthless way, without consideration of the local economy, and in consequence of a deliberate design and policy". The Tribunal held that this amounted in reality to "a systematic 'plunder of public and private property'".[90]

A modern interpretation of these judgments suggests that an occupant is permitted to use the proceeds from exploiting resources for the purposes of maintaining a civilian administration in occupied territory, but not to cover the costs associated with military operations. This can be illustrated with reference to the Development Fund for Iraq, set up and administered by the US-UK occupying authority in Iraq in 2003 with the specific purpose of meeting "the humanitarian needs of the Iraqi people, for the economic reconstruction and repair of Iraq's infrastructure, for the continued disarmament of Iraq, and for the costs of Iraqi civilian administration, and for other purposes benefiting the people of Iraq".[91] The Development Fund was primarily funded with the proceeds from the sale of Iraqi oil.[92] Although it may be questioned whether all the stated purposes of the fund are in conformity with the limited powers conferred upon an occupant by the international law on occupation,[93]

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89 Trials of War Criminals before the Nuremberg Tribunals under Control Council Law No. 10, Vol. IX, the *Krupp* case, Washington: Government Printing Office (1950), p. 1341. The tribunal held in relevant part: "Just as the inhabitants of the occupied territory must not be forced to help the enemy in waging the war against their own country or their own country's allies, so must the economic assets of the occupied territory not be used in such a manner".

90 *Ibid*. Today, as a consequence of the narrow definition of pillage in the ICC *Elements of Crime*, the conduct of Germany would be more likely to fall under the war crime of destruction or seizure of the property of a hostile party, a crime which was not included in the Statute of the Nuremberg Tribunal.

91 UN Security Council Resolution 1483 (2003), especially paragraph 14.

92 UN Security Council Resolution 1483 (2003) determined that "all proceeds from [export sales of petroleum, petroleum products, and natural gas from Iraq] shall be deposited into the Development Fund for Iraq until such time as an internationally recognized, representative government of Iraq is properly constituted".

93 Article 43 of the 1907 Hague Regulations, which sets out the general obligations of an occupant, prescribes an occupant to "take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country". Whether the measures regarding Iraq are in conformity with the law of occupation, depends on the interpretation of Article 43. Does it imply an obligation for the occupant to preserve as much as possible the *status quo ante bellum* or does the obligation to "ensure… public order and safety" also bring about positive obligations for occupants to enact legislation and to set up economic and social policies? See on this issue. *e.g.,* E. Benvenisti, *The International Law of Occupation,* Oxford: Oxford University Press (2013); and A. Roberts, Transformative Military Occupation: Applying the Laws of War and Human Rights, *American Journal of International Law,* Vol. 100 (2006), p. 580-622. On the occupation of Iraq and the relationship between international occupation law and UN Security Council Resolutions, see D.J. Scheffer, 'Beyond Occupation Law',

it is relevant to note that the Development Fund underlines the basic idea that the natural resources in occupied territory must be exploited for the benefit of the people of the occupied territory.

Thus Article 55 of the 1907 Hague Regulations formulates a right for occupants to exploit the natural resources within occupied territory, but only for the benefit of the population. The proceeds from the exploitation of natural resources may therefore be used to cover costs related to civilian administration, but not to cover costs associated with the occupation itself. An occupant cannot escape this restriction by claiming that particular natural resources are "munitions of war" under Article 53 of the Hague Regulations, which would mean that they could be seized by the occupant at all times. In this respect, Elihu Lauterpacht remarks that

> "belligerent occupation is essentially a temporary affair. For that reason, an Occupant is not entitled to diminish or retard the prospects of the economic recovery of the territory by draining it of its resources of minerals and raw materials on the pretext that they constitute *munitions de guerre*. It is this factor which underlies, for example, the limitation of powers of an Occupant in respect of public immovable property to the rights of an usufructuary and no more".[94]

It is generally accepted that the term "munitions de guerre" has a narrow scope and only includes objects which can be of direct military use, in the sense that they can be used for military operations.[95] Precious minerals, such as diamonds, cobalt or tin, are therefore excluded from the definition. After all, these minerals do not have any direct military use, as opposed to oil, which can serve as fuel for military vehicles. In this respect, reference can be made to the distinction made in the often-cited 1956 Singapore Oil Stocks Case between natural resources *in situ* (immovable property) and *ex situ* (movable property).[96] This case implies that only extracted oil – as a movable property – can qualify as *munitions de guerre*. Furthermore, only processed oil can actually be directly used for military purposes and thus qualifies as *munitions de guerre*.

American Journal of International Law. Vol. 97 (2003), p. 842-860; and M. Zwanenburg, 'Existentialism in Iraq: Security Council Resolution 1483 and the Law of Occupation', *International Review of the Red Cross,* Vol. 86 (2004), p. 745-768. On the management of Iraqi natural resources, in particular oil and water, see E. Benvenisti, *The International Law of Occupation,* Oxford: Oxford University Press (2013), pp. 264-266.

94 E. Lauterpacht, 'The Hague Regulations and the Seizure of *Munitions de Guerre*', 32 *British Yearbook of International Law* 218 (1955-1956), p. 240.

95 See *e.g.* E. Lauterpacht, 'The Hague Regulations and the Seizure of Munitions de Guerre', 32 British Yearbook of International Law 218 (1955-1956), pp. 219-243; Y. Dinstein, *The International Law of Belligerent Occupation*, Cambridge: Cambridge University Press (2009), p. 233.

96 Singapore Court of Appeal, N.V. De Bataafsche Petrolium Maatschappij & Ors. v. The War Damage Commission, Judgment of 13 April 1956, reprinted in the *American Journal of International Law*, Vol. 51 (1957), p. 809.

It is also important to note, as indicated in Chapter 5, that occupants have a general obligation to respect the laws in force of the occupied State "unless absolutely prevented".[97] Arguably, this also implies an obligation to respect the treaties to which the occupied State is a party, including relevant environmental and human rights treaties.[98] For example, this implies that an occupant must respect the rights of indigenous peoples over their lands and the resources situated in their lands, ensuing from Article 27 of the ICCPR, provided that the occupied State is a party to this treaty.

Finally, an occupant is not only responsible for its own conduct in occupied territory, but also for the conduct of other actors operating in the territory, including non-state armed groups. Its role as the principal governmental authority in occupied territory entails an obligation for the occupant to prevent other actors operating in the territory from violating international humanitarian law. In the *Congo-Uganda Case*, the ICJ determined that, as Uganda was an occupying power in part of the territory of the DR Congo at the relevant time,

> "Uganda's responsibility is engaged both for any acts of its military that violated its international obligations and for any lack of vigilance in preventing violations of human rights and international humanitarian law by other actors present in the occupied territory, including rebel groups acting on their own account".[99]

According to the Court, Uganda was under an obligation to "take appropriate measures to prevent the looting, plundering and exploitation of natural resources in the occupied territory to cover private persons in the district". Thus the "duty of vigilance" of an occupant seems to entail an obligation to prevent other actors from exploiting, looting or plundering natural resources in occupied territory.

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97 Article 43 of the 1907 Hague Regulations reads in full: "The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country".

98 Some support for this proposition can be found in T. Meron, 'Applicability of Multilateral Conventions to Occupied Territories', *American Journal of International Law* Vol. 72 (1978), pp. 550-551. He argues that an occupant must respect a Convention ratified by the sovereign authorities of the occupied territory if the authorities have adopted the necessary implementing legislation. If they have not done so, Meron argues that the "ratification should be regarded as determining that the convention is suitable for the local social and economic conditions". However, in these circumstances, he does not consider the occupant bound to apply the Convention. Actually, this position is not very helpful, since it can be argued that a treaty that is implemented through national legislation has automatically become part of "the laws in force". In these circumstances, it is not the treaty that has to be respected by the occupant, but rather the domestic legislation.

99 Armed activities on the territory of the Congo (Democratic Republic of the Congo *v.* Uganda), Judgment of 19 December 2005, *I.C.J. Reports 2005*, para. 179.

6.3.2 The protection of civilian objects

Parts IV of Additional Protocols I and II deal with the protection of the civilian population. Both protocols contain provisions that provide protection for objects that are important for the civilian population. In international armed conflicts, a general provision provides protection for civilian objects. Article 52 of Additional Protocol I provides that hostilities may only be directed at military objectives. It defines civilian objects as "all objects which are not military objectives". According to paragraph 2 of the same provision, "military objectives" are "those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture or neutralization, in the circumstances ruling at the time, offers a definite military advantage".

Thus Article 52 of Additional Protocol I sets a dual standard for determining whether objects are military objectives. They must "make an effective contribution to military action" in relation to one of the factors mentioned in the provision,[100] and in addition, their "destruction, capture or neutralization" must offer "a definite military advantage".[101] If these conditions are satisfied, civilian objects are no longer protected and become military objectives.

It is not difficult to imagine instances where natural resources constitute military objectives rather than civil objects. This is the case particularly when natural resources are exploited by parties to an armed conflict in order to finance their armed struggle. In these cases, natural resources make an effective contribution to military action, both in terms of their use and purpose. In addition, destroying or capturing those natural resources offers a definite military advantage, because such action cuts off the financial means of the hostile party. Thus for the purposes of the current study, the general protection provided by Article 52 of Additional Protocol I to civilian objects is of little relevance.

In addition to the general protection afforded to civilian objects, Additional Protocol I and II also identify particular objects for which special protection is provided, regardless of whether such objects constitute civilian objects or military objectives. Objects that are deemed indispensable for the survival of

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100 According to the Commentary on the Additional Protocols, objects which by their nature make an effective contribution to military action comprise all objects directly used by armed forces, such as weapons, means of transport or buildings used by the armed forces. Objects which by their location make an effective contribution to military action include strategic objects like bridges. Furthermore, according to the commentary, "purpose" refers to "the intended future use of an object", while "use" refers to "its present function". Y. Sandoz, C. Swinarski and B. Zimmermann (ed.), *Commentary on the additional protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Dordrecht: Nijhoff Publishers (1987), Art. 52, p. 636.

101 See Y. Sandoz, C. Swinarski and B. Zimmermann (ed.), *Commentary on the additional protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Dordrecht: Nijhoff Publishers (1987), Art. 52, p. 636.

the civilian population, are protected under Article 54 of Additional Protocol I and Article 14 of Additional Protocol II, while the natural environment is protected under Article 55 of Additional Protocol I. These provisions are more relevant for the protection of natural resources and the environment than those providing general protection to civilian objects, since they also apply to natural resources or parts of the environment that are considered to be military objectives.

Prohibition against attacking, destroying, removing or rendering useless objects indispensable to the survival of the civilian population

Article 54 (2) of Additional Protocol I and Article 14 of Additional Protocol II contains a prohibition which states that parties to an armed conflict may not "attack, destroy, remove or render useless objects indispensable to the survival of the civilian population". The provisions are aimed at providing a safety net for the population of a State involved in an armed conflict, ensuring their right to retain access to the basic needs for survival.

The argument for providing protection for objects which are indispensable to the civilian population is therefore to ensure the survival of the population. According to Article 54(2) of Additional Protocol I, parties to an armed conflict may not attack, destroy, remove or render useless such objects "for the specific purpose of denying them for their sustenance value to the civilian population or to the adverse Party". The provisions are therefore primarily aimed at prohibiting practices such as targeting water supply systems and destroying crops, as the rebel group RUF reportedly did during the conflict in Sierra Leone.[102]

In order to establish whether and to what extent the provisions qualify the right of parties to an armed conflict to exploit natural resources, it is necessary to consider three different issues. The first concerns the limitations related to the objective of the provisions, the second concerns the type of objects that are protected, and the third concerns the exceptions formulated in the provisions.

Both provisions formulate a prohibition against attacking, destroying, removing or rendering useless objects that are indispensable for the *survival* of the population. More specifically, Article 14 of Additional Protocol II makes the protection of such objects subordinate to the all-encompassing prohibition against starving the population as a method of combat.[103] The prohibition

102 UNEP, *Sierra Leone, Environment, Conflict and Peacebuilding Assessment, Technical Report*, February 2010, p. 45.

103 The original draft provision did not subordinate the protection of objects indispensable to the survival of the civilian population to the prohibition to use starvation of the population as a method of combat. It simply prohibited parties to attack or destroy those objects with the intention "to starve out civilians, to cause them to move away or for any other reason". *Official Records of the Diplomatic Conference on the Reaffirmation and Development of*

is formulated more loosely for international armed conflict. Article 54 (2) of Additional Protocol I provides that such objects may not be attacked, destroyed, removed or rendered useless "for the specific purpose of denying them *for their sustenance value* to the civilian population […] *whatever the motive*".[104] In both cases, the provisions imply a certain degree of immediacy, in the sense that the survival of the civilian population must be at stake. Furthermore, it therefore has to be established that parties to an armed conflict have the intention of starving the population (internal armed conflict) or denying the population certain objects for their sustenance value (international armed conflict).

It is not clear to what extent these requirements qualify the prohibition. If a specific intent is required, it must be assumed that the prohibition does not cover the appropriation of natural resources for the purpose of financing an armed conflict or for personal gain, as in these cases the removal of natural resources is not carried out with the specific intent to deprive the population of their means of subsistence. A similar conclusion can be drawn with regard to damage to the environment caused by such activities, if such damage has the effect of destroying objects indispensable to the civilian population. If, however, it is accepted that reckless disregard by a party for an armed conflict for the consequences of its actions can be considered to reflect intent, the provisions may cover the removal of natural resources for economic purposes, as well as environmental damage caused by such activities. From the perspective of protecting the civilian population, a broad interpretation of 'intent' is therefore to be preferred.

Although State practice is not uniform, the customary international humanitarian law study conducted by the International Committee of the Red Cross (ICRC) shows that the majority of military manuals do not state that the prohibition requires a specific intent to starve the civilian population or prevent it from being supplied.[105] Although the extent to which military manuals accurately reflect State practice is still open to debate, these manuals do provide indications arguing in favour of a broad rather than a stringent interpretation of the provisions.

The second issue concerns the types of objects that are covered by the provisions. The ICRC Commentary indicates that the provisions apply to objects that are "of basic importance for the population from the point of view of

International Humanitarian Law Applicable in Armed Conflicts, Geneva (1974-77), Vol. I, Part three, p. 16 and 40.

104 Author's emphasis added.

105 See J-M. Henckaerts. & L. Doswald-Beck (ed.), Customary International Humanitarian Law, International Committee of the Red Cross, Cambridge: Cambridge University Press (2005), Vol. I, p. 190.

providing the means of existence".[106] The notion of "basic importance" is not defined in any further detail. The provisions refer to objects like foodstuffs, agricultural areas for the production of foodstuffs, crops and drinking water installations, but this list is by no means exhaustive. The Diplomatic Conference that adopted the Additional Protocols did not want to narrow down the categories of objects to which the provisions should apply, as "an exhaustive list might well have resulted in omissions or in making a somewhat arbitrary choice of objects".[107]

It is evident from the express reference in the provisions to objects such as foodstuffs and drinking water installations that particular natural resources, such as lakes and rivers, which provide for drinking water and fish, should fall within the ambit of the provisions.[108] Arguably, forests, which provide food, timber, firewood, and medicinal plants, may also constitute indispensable "objects" in the sense of the provisions.[109]

One interesting question in this respect is whether the prohibition also covers economically valuable natural resources that cannot be directly consumed, such as diamonds or coltan. Can such natural resources be considered "indispensable to the survival of the population"? Although this may initially seem far-fetched, it must be remembered that many civilians in conflict regions are highly dependent on particular natural resources to generate a basic income. In fact, it seems that the dependency of the local population on artisanal mining in the DR Congo was one of the principal reasons for the

106 See Y. Sandoz, C. Swinarski and B. Zimmermann (ed.), *Commentary on the additional protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Dordrecht: Nijhoff Publishers (1987), Art. 14, p. 1458.

107 *Ibid*, Art. 14, p. 1458. It is interesting to note that the original draft provision proposed by the ICRC contained an exhaustive list of objects, consisting of "food stuffs and food-producing areas, crops, livestock, drinking water supplies and irrigation works". *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*, Geneva (1974-77), Vol. I, Part three, pp. 16 and 40.

108 Compare K. Mollard-Bannelier, *La Protection de l'Environnement en Temps de Conflit Armé*, Publication de la Revue Générale de Droit International Public, Nouvelle Série No. 53, Paris : Editions A. Pedone (2001), p. 189. Mollard-Bannelier argues that certain natural resources could clearly be considered to constitute indispensable objects, but she does not provide examples.

109 The Democratic Republic of Vietnam explicitly mentioned the destruction of forests "for the purpose of starving the civilian population and forcing them to become refugees". *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*, Geneva (1974-77), Vol. XIV, CDDH/III/SR.17, p. 143. Furthermore, the Additional Protocols themselves consider objects such as medicines and means of shelter essential to the survival of the civilian population. In this regard, Article 18 (2) of Additional Protocol II mentions medical supplies, while Article 69 (1) of Additional Protocol I also points to clothing, bedding, means of shelter and other supplies. See J-M. Henckaerts. & L. Doswald-Beck (ed.), Customary International Humanitarian Law, International Committee of the Red Cross, Cambridge: Cambridge University Press (2005), Vol. I, p. 193.

Security Council to abstain from imposing commodity sanctions to curb the trade in natural resources originating from the DR Congo.[110]

It should also be noted that the provisions themselves leave ample discretion for the parties to an armed conflict to interpret the objects they consider "indispensable for the survival of the population" in their own way. During the negotiations on the draft text of Article 54 of Additional Protocol I, Egypt and several other oil producing States proposed including fuel reservoirs and refineries in the text of the provision "since fuel concerned the whole international community, which depended on oil in all spheres".[111] Therefore it can be argued that the phrase "objects indispensable to the survival of the civilian population" in Article 54(2) of Additional Protocol I and in Article 14 of Additional Protocol II should be broadly interpreted to cover natural resources that provide a basic income for the local population.

This broad interpretation also follows from the interpretation of Article 54(2) of Additional Protocol I and Article 14 of Additional Protocol II in the light of the identical Articles 1(2) of the ICESCR and the ICCPR. This provision is of particular relevance because it determines that "*in no case*, may a people be deprived of its own means of subsistence".[112] An interpretation of Article 54(2) of Additional Protocol I and Article 14 of Additional Protocol II in the light of Article 1(2) of the ICESCR and the ICCPR would extend the protection provided by the provision to all objects which provide the population with the means of subsistence, including particular natural resources that generate a basic income for the local population. Following this interpretation, parties to an armed conflict may, under certain circumstances, be prohibited from cutting off the civilian population from the mining sites or forests under their control.

The last relevant issue concerns the exceptions formulated in Article 54 of Additional Protocol I. The first exception is formulated in Article 54 (3) of

110 A report prepared by the Secretary-General had warned against the negative impacts of such sanctions on the local population. *See* the *Report of the Secretary-General pursuant to paragraph 8 of resolution 1698 (2006) concerning the Democratic Republic of the Congo*, UN Doc. S/2007/68 of 8 February 2007, paras. 62-63.

111 Egypt and several other oil producing States proposed to include fuel reservoirs and refineries in Article 54 of Protocol I "since fuel concerned the whole international community, which depended on oil in all spheres". *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*, Geneva (1974-77), Vol. III, CDDH/III/63, p. 218 and Vol. XIV, CDDH/III/SR.16, p. 139. Also see K. Mollard-Bannelier, *La Protection de l'Environnement en Temps de Conflit Armé*, Publication de la Revue Générale de Droit International Public, Nouvelle Série No 53, Paris: Editions A. Pedone (2001), pp. 188-189. The interpretation of what constitute "indispensable" objects is largely left to the discretion of the parties to an armed conflict. Besides the major advantage of flexibility, this system has some important drawbacks. Mollard-Bannelier argues that it creates a legal uncertainty for parties to an armed conflict regarding the application of the provision. One could also argue that it gives parties to an armed conflict a loophole with regard to the obligations incumbent on them.

112 Author's emphasis added.

Additional Protocol I and is also implicit in Article 14 of Additional Protocol II. This provision determines that the prohibition does not apply to objects which are used "as sustenance solely for the members of its armed forces" or "in direct support of military action". The latter phrase is particularly relevant for the subject of this book. The ICRC Commentary to the Additional Protocols points to the following examples: a food producing area which the enemy uses as it advances through it, or a food storage barn used by the enemy for cover or as an arms depot.[113] Objects used in these ways lose their immunity unless actions against these objects could "leave the civilian population with such inadequate food or water as to cause its starvation or force its movement". This implies that Article 54 of Additional Protocol I does not prohibit parties to an international armed conflict from destroying areas where natural resources are exploited by the hostile party, unless this could lead to the starvation or forced removal of the population. Of course, it should be noted that such a right should be interpreted consistently with Article 23(g) of the 1907 Hague Regulations, which allows parties to an armed conflict to destroy property of a hostile party only in situations of imperative military necessity.[114]

The second exception concerns the defence of national territory against invasion by a foreign State. In these circumstances, Article 54 (5) of Additional Protocol I allows a party to an armed conflict to derogate from the prohibitions of paragraph 2 on its own territory if "imperative military necessity" so requires. *De facto*, this permits a party to an armed conflict to resort to a "scorched earth" policy.[115] However, the exception is formulated in such a restrictive way as to apply only in exceptional circumstances. It only covers the situation of *defence* of national territory which is under the *control* of the party to the armed conflict against *invasion*.[116] Furthermore, such action may under no circumstances result in the starvation of the population.[117] For the

113 Y. Sandoz, C. Swinarski and B. Zimmermann (ed.), *Commentary on the additional protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Dordrecht: Nijhoff Publishers (1987), Art. 54, p. 657. These exceptions were inserted at the proposal of the United States, which wanted to prevent "combatants to seek protection under provisions intended solely for the protection and benefit of the civilian population". *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*, Geneva (1974-77), Vol. XIV, CDDH/III/SR.16, p. 138.

114 As discussed in section 6.3.1, Article 23(g) of the Hague Regulations contains a prohibition to destroy the property of a hostile party, except in cases of imperative military necessity.

115 Y. Sandoz, C. Swinarski and B. Zimmermann (ed.), *Commentary on the additional protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Dordrecht: Nijhoff Publishers (1987), Art. 54, p. 659. For an analysis of military necessity, see section 2.3.2 of this study.

116 Emphasis added.

117 The prohibition of starvation is formulated in Article 54(1) of Additional Protocol I, while this provision derogates from Article 54(2). Also see K. Mollard-Bannelier, *La Protection de l'Environnement en Temps de Conflit Armé*, Publication de la Revue Générale de Droit International Public, Nouvelle Série No. 53, Paris: Editions A. Pedone (2001), p. 190.

purposes of the present study, it is hard to imagine a situation where a State would destroy its own natural resources to defend itself against an invasion by a third State.

Prohibition to cause widespread, long-term and severe damage to the environment
Articles 35 (3) and 55 of Additional Protocol I formulate a prohibition against causing widespread, long-term and severe damage to the environment.[118] Article 35 (3) of Additional Protocol I provides that "it is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment", while Article 55 provides that "care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage". In addition, Article 55 specifies that "this protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population". It also prohibits attacks against the environment in the form of reprisals.

The prohibition against causing widespread, long-term and severe damage to the environment applies exclusively to the situation of international armed conflict. A proposal from Australia to introduce a similar provision to Articles 35 (3) and 55 of Additional Protocol I in Additional Protocol II relating to internal armed conflicts met with resistance from several delegations.[119] For example, Canada considered the provision superfluous, as it considered that both the government and rebels would have a good reason not to risk alienating the population by causing ecological damage.[120]

Furthermore, it is doubtful whether the prohibition can be considered to apply to internal armed conflicts as a matter of customary international law, as argued by the ICRC in its customary international humanitarian law study.[121] The prohibition is referred to in only two other international human-

118 Only Article 55 on the protection of the natural environment is actually part of Chapter III on the protection of civilian objects. Article 35, on the other hand, lays down the basic rules of armed conflict and is part of Section I of Part III on the "Methods and means of warfare". However, despite these different perspectives, the two provisions both incorporate the prohibition to cause widespread, long-term and severe damage to the environment. Therefore this study deals with both provisions.

119 The amendment provided: "It is forbidden to despoil the natural environment as a technique of warfare". *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*, Geneva (1974-77), Vol. IV, Amendments, p. 91, Doc. CDDH/III/55, 19 March 1974.

120 For this and other comments, see *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*, Geneva (1974-77), Vol. XIV, CDDH/III/SR.12, pp. 176-179 and CDDH/III/SR.18, p. 153.

121 See J-M. Henckaerts. & L. Doswald-Beck (ed.), Customary International Humanitarian Law, International Committee of the Red Cross, Cambridge: Cambridge University Press (2005), Vol. I, pp. 151-155. The ICRC customary law study argues that, for international armed conflicts, the prohibition has attained customary law status and posits that a similar

itarian law conventions, of which only one applies to the situation of internal armed conflict.[122] In addition, in its 1996 *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, the International Court of Justice expressly stated that Articles 35 (3) and 55 were "powerful constraints for all the States *having subscribed to these provisions*".[123] This is indicative of the Court's belief that neither of the provisions has attained customary international law status, not even for international armed conflicts. At most, there are indications that the prohibition expresses an emerging custom.[124]

Thus Articles 35 (3) and 55 of Additional Protocol I are the only provisions which formulate the prohibition against causing widespread, long-term and severe damage to the environment. They do so in different ways. While Article 35 (3) sets limits on the means and methods of warfare, Article 55 provides protection to the environment because of its importance to human beings.[125]

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conclusion can be drawn for internal armed conflicts. It should, however, be noted that for a rule to become part of customary international law, there should be, in the words of Article 38 of the Statute of the International Court of Justice, "a general practice accepted as law". The ICRC study argues that the prohibition has been inserted in many military manuals of States, but, as argued before, insertion in a military manual does not prove that States consider themselves legally bound by the prohibition. On the contrary, the United States, for example, has inserted the prohibition in its military manual, but it has also explicitly stated that it does not consider the prohibition to be part of customary international law.

122 See the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons Which May be Deemed to be Excessively Injurious or to Have Indiscriminate Effects, adopted in Geneva on 10 October 1980, *1342 UNTS 163*, as amended in 2001, which recalls in its preamble "that it is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment". See also, for the situation of international armed conflict only, the Convention on the prohibition of military or any other hostile use of environmental modification techniques (ENMOD), concluded on 10 December 1976 in New York (entry into force: 5 October 1978), *1108 UNTS 151*. Article 1 of this convention determines that "each State Party to this Convention undertakes not to engage in military or any other hostile use of environmental modification techniques having *widespread, long-lasting or severe effects* as the means of destruction, damage or injury to any other State Party". Author's emphasis added.

123 International Court of Justice, *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, 8 July 1996, para. 30, *I.C.J. Reports 1996*. Author's emphasis added.

124 E.V. Koppe, *The Use of Nuclear Weapons and the Protection of the Environment During International Armed Conflict*, Oxford: Hart Publishing, p. 235. For an extensive analysis regarding the status of the prohibition, see pp. 177-197.

125 It must be noted that this does not imply that the environment is protected only in so far as damage would prejudice the health or survival of the population, as argued by some authors. See, *e.g.*, W.D. Verwey, 'Protection of the Environment in Times of Armed Conflict: In Search of a New Legal Perspective', *Leiden Journal of International Law*, Vol. 8, No. 1 (1995), p. 13, who argues that the reference to the health or survival of the population in the second part of Article 55 must be read as a limitation to the protection afforded to the environment under this provision. However, the official records of the diplomatic conference that adopted the provisions note that "the first sentence enjoining the taking of care lays down a general norm, which is then particularized in the second sentence. Care must be taken to protect

Most importantly, Article 55 formulates a general duty of care for the environment.[126] In this sense, Article 55 is broader in scope than Article 35 (3) of Additional Protocol I, because it encompasses all activities that cause "widespread, long-term and severe damage" to the environment, not only damage caused by the means and methods of warfare. Furthermore, it includes a positive obligation to protect the environment.[127] This makes this provision more relevant for the purposes of the current study.

One important question that arises with respect to Article 55 of Additional Protocol I is what this "duty of care" for the environment actually implies. In this respect, Karen Hulme argues that the duty of care first and foremost serves as "a lasting reminder of th[e] recognition that humankind must continue to protect the environment in armed conflict".[128] From this perspective, the duty of care formulated in Article 55 of Additional Protocol I should be achieved on the basis of the general standards of care formulated in international environmental law. The principles of prevention and precaution are most relevant in this regard. Both require States to exercise due diligence in the activities they undertake.[129] As indicated in Chapter 4 of this book, "due

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the natural environment against the sort of harm specified even if the health or survival of the population is not prejudiced". See the *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*, Geneva (1974-77), Vol. XV, Report to the Third Committee on the Work of the Working Group, Committee 3, April 1975, CDDH/III/275, p. 4. Also see E.V. Koppe, *The Use of Nuclear Weapons and the Protection of the Environment During International Armed Conflict*, Oxford: Hart Publishing (2008), p. 148, who argues that the prohibition formulated in the second sentence of Article 55 (1) "is illustrative and exemplary for the duty of care of Article 55 (1), first sentence"; Y. Sandoz, C. Swinarski and B. Zimmermann (ed.), *Commentary on the additional protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Dordrecht: Nijhoff Publishers (1987), Art. 55, p. 663, who note that "the expression "care shall be taken" is not used in Article 35 paragraph 3, which is therefore more stringent"; and Y. Dinstein, 'Protection of the Environment in International Armed Conflict', Max Planck Yearbook of United Nations Law, Vol. 5 (2001), pp. 531-532, who argues that the first phrase of Article 55 is not reduced to cases in which damage to the natural environment prejudices human health or survival. In his opinion, "the injury to human beings should be regarded not as a condition for the application of the injunction against causing environmental damage, but as the paramount category included within the bounds of a larger injunction".

126 See K. Hulme, 'Taking Care to Protect the Environment Against Damage: a Meaningless Obligation?' *International Review of the Red Cross,* Vol. 92, No. 879 (2010), pp. 675-691. Also see E.V. Koppe, *The Use of Nuclear Weapons and the Protection of the Environment During International Armed Conflict*, Oxford: Hart Publishing (2008), p. 148; and Y. Dinstein, 'Protection of the Environment in International Armed Conflict', *Max Planck Yearbook of United Nations Law*, Vol. 5 (2001), p. 530.

127 K. Hulme, *War Torn Environment: Interpreting the Legal Threshold*, Leiden: Nijhoff, International Humanitarian Law Series (2004), p. 73.

128 See K. Hulme, 'Taking Care to Protect the Environment Against Damage: a Meaningless Obligation?' *International Review of the Red Cross,* Vol. 92, No. 879 (2010), p. 677.

129 See K. Hulme, *War Torn Environment: Interpreting the Legal Threshold*, Leiden: Nijhoff, International Humanitarian Law Series (2004), pp. 80-88.

diligence" implies that States are to "use all the means at [their] disposal' or "to take all appropriate measures" in order to prevent damage.[130] Of course, what is considered "appropriate" in situations of armed conflict can differ significantly from what is expected in situations of peace.

The next question is whether this provision applies to the exploitation of natural resources by parties to an armed conflict, and if so, what this entails. First, it is relevant to note that Article 55 provides that "care shall be taken *in warfare*…".[131] The exploitation of natural resources by parties to an armed conflict for financial purposes cannot in itself be considered to constitute an act of warfare. However, the exploitation of the natural resources that belong to the hostile party could be regarded as a form of economic warfare aimed at strengthening its own military capacity, while weakening the capacity of the enemy with economic measures.[132] Thus Article 55 arguably covers instances of resource exploitation. This means that a party to an armed conflict that engages in the exploitation of the natural resources of the enemy must take appropriate measures to prevent "long-term, widespread and severe" damage to the environment.

The last relevant question concerns the kind of standard implied by the terms "long-term, widespread and severe". At the very least, the cumulative criteria rule out the possibility that the prohibition applies to incidental damage resulting from conventional military operations.[133] However, there is no general understanding regarding the threshold that does apply. Neither the provision itself nor the *travaux préparatoires* give any further indication of how the criteria are interpreted. The *travaux* merely indicate that the term "long-term" refers to damage lasting several decades.[134]

Only ENMOD provides some indications, although the *travaux* do indicate that the threshold for damage envisaged for Protocol I was to be higher than

130 Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay), *I.C.J. Reports 2010*, para. 101; and Article 3 of the *ILC Draft articles on Prevention of Transboundary Harm from Hazardous Activities*. See also Article 194(2) of the United Nations Convention on the Law of the Sea, 10 December 1982, *1833 UNTS 3*, which indicates an obligation for States to "take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment".

131 Author's emphasis added.

132 On the notion of economic warfare, see V. Lowe and A. Tzanakopoulos, 'Economic Warfare', in R. Wolfrum (ed.), *Encyclopedia of Public International Law*, Max Planck Institute for Comparative Public Law and International Law, Oxford, Oxford University Press (2012).

133 *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*, Geneva (1974-77), Vol. XV, CDDH/215/Rev.1, para. 27, pp. 268-269. It should be noted that Articles 35 (3) and 55 of Additional Protocol I both embody to a certain extent the precautionary principle, by allowing a degree of latitude as to the actual occurrence of damage. See Chapter 4 of this study for a more comprehensive discussion on this principle.

134 *Ibid.*

that for ENMOD.[135] The *Understandings* which States adopted regarding certain provisions of the ENMOD Convention defined "widespread" as "encompassing an area on the scale of several hundred square kilometres" and "severe" to involve 'serious or significant disruption or harm to human life, natural and economic resources or other assets".[136]

Thus if these definitions can be considered to provide a minimum threshold for the prohibition contained in Additional Protocol I, as a minimum the prohibition seems to require damage that covers a considerable area, encompasses serious damage and lasts for several decades.[137] These requirements limit the scope of application of the prohibition against causing widespread, long-term and severe damage to the more extreme cases of environmental damage. Therefore Phoebe Okowa, amongst others, argues that "the so-called natural resource/ environmental protection provisions in AP I, in particular Articles 35 (3) and 55, are set at such a high threshold with a wide margin of discretion during military operations, making them of marginal relevance as effective constraints in most conflicts".[138]

On the other hand, they do not rule out that certain damage caused by natural resource exploitation, such as large-scale deforestation and loss of biodiversity caused by timber extraction or the poisoning of groundwater in a region caused by the extraction of minerals, may be included in the scope of this prohibition. This applies particularly if the damage threshold is interpreted in a dynamic and evolutionary way. Arguably, a correct interpretation of the provision and its damage threshold would take into account modern views on environmental protection, calling for the adoption of an ecosystem approach. The starting point for this is that damage to components of an ecosystem can disrupt the balance of the ecosystem as a whole. From this perspective, environmental damage can be considered to be widespread, long-term and severe if it seriously upsets the balance of an ecosystem that

135 *Official Records of the Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts*, Geneva (1974-77), Vol. VI, CDDH/SR.39, Annex, pp. 113-118. Also see K. Hulme, *War Torn Environment: Interpreting the Legal Threshold*, Leiden: Nijhoff, International Humanitarian Law Series (2004), pp. 89-91.

136 Report of the Conference of the Committee on Disarmament, Volume I, General Assembly Official records, Thirty-first session, Supplement No. 27, Doc. *A/31/27*, New York, United Nations, 1976, pp. 91-92.

137 The terms have also been incorporated in Article 20 (g) of the 1996 *Draft Code of Crimes against the Peace and Security of Mankind* of the International Law Commission and in Articles 8 (2) (b) (iv) of the *ICC Statute*. Unfortunately, the preparatory works of these instruments fail to clarify the meaning of the threshold. It should further be noted that the protocol does not define the meaning of the term 'damage'. It is therefore not clear what constitutes 'damage' for the purposes of the protocol and whether 'damage' includes alterations to the environment. For a thorough analysis of the damage criteria, see K. Hulme, *War Torn Environment: Interpreting the Legal Threshold*, Leiden: Nijhoff, International Humanitarian Law Series (2004), pp. 17-40.

138 P.N. Okowa, 'Natural Resources in Situations of Armed Conflict: Is there a Coherent Framework for Protection?' *International Community Law Review* 9 (2007), p. 250.

encompasses a considerable area in such a way that the damage lasts for several decades.

Of course, this still is a fairly high threshold. Therefore Article 55 of Additional Protocol I cannot be expected to provide meaningful protection to the environment against damage resulting from the commercial exploitation of natural resources in situations of armed conflict. Moreover, since the provision does not apply to internal armed conflicts, its use is relatively limited. In view of these limitations, the provision can be considered of relatively little use for the purposes of this study.

6.4 THE MARTENS CLAUSE

The previous section showed how standards in international human rights and environmental law impact upon obligations of parties to an armed conflict under international humanitarian law. In addition, reference can be made to another way of incorporating external norms in international humanitarian law treaties, *i.e.,* by way of express provisions in the treaty itself. In this respect the so-called "Martens Clause" is of particular interest. It was named after the Russian delegate at the 1899 Hague Peace Conference who introduced the clause in order to break a deadlock in the negotiations concerning the right of populations in occupied territories to rebel against the occupying forces.[139] Since then it has been inserted in a number of international humanitarian law treaties.

The original clause, as included in the preamble of the 1899 Hague Convention, states as follows:

> "Until a more complete code of the laws of war is issued, the High Contracting Parties think it right to declare that in cases not included in the Regulations adopted by them, populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience".[140]

Over time, the Martens clause has been used to avoid a legal vacuum in the protection of human beings in cases not dealt with in international humanitarian law conventions and to prevent these cases being left – in the words of the 1899 Hague Convention – to "the arbitrary judgment of the military

139 For a thorough analysis of the genesis of the Martens Clause, see A. Cassese, 'The Martens Clause: Half a Loaf or Simply Pie in the Sky?' *European Journal of International Law,* Vol. 11 (2000), pp. 187-216.

140 Convention (II) with Respect to the Laws and Customs of War on Land and its annex: Regulations concerning the Laws and Customs of War on Land. The Hague, 29 July 1899.

commanders".[141] The clause was mainly interpreted in this way by the Nuremberg Military Tribunal III in the *Krupp* case. The Nuremberg Tribunal used the Martens Clause to reject the argument of the defence that certain provisions applicable to occupied territories did not apply in cases of "total war", referring to a conduct of war that leaves no room for considerations of humanity. With regard to the Martens Clause the tribunal stated:

> "It is a general clause, making the usages established among civilized nations, the laws of humanity and the dictates of public conscience into the legal yardstick to be applied if and when the specific provisions of the Conventions […] do not cover specific cases occurring in warfare, or concomitant to warfare".[142]

Although this passage of the judgment does not specifically refer to the protection of human beings, it is clear from the context of the passage that the Nuremberg Tribunal did not intend to apply the Martens clause to all cases occurring in or concomitant to warfare. The Martens clause was invoked directly in relation to the protection of private property.

Providing protection to the civilian population was also the rationale for the International Court of Justice to apply the Martens clause in its *Nuclear Weapons* Advisory Opinion. In this Advisory Opinion, the International Court of Justice referred to the Martens Clause to interpret the humanitarian law principles of distinction and necessity in the light of new technological developments in warfare not dealt with in the relevant conventions. The Court considered that the Martens clause "has proved to be an effective means of addressing the rapid evolution of military technology".[143] In other words, the Court used the Martens Clause to justify a dynamic-evolutionary interpretation of two of the core principles of international humanitarian law.

Furthermore, the Martens clause has been relied on in case law in order to confirm the applicability of customary international law principles alongside treaty law. It is in this sense that the Martens clause was relied on in the *Nicaragua* case. The Court referred to the version of it inserted in the Geneva Conventions, dealing with the legal effects of denunciation of the conventions.[144] In this case, it was principally called upon to confirm that the core

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141 *Ibid*.

142 Trials of War Criminals before the Nuremberg Tribunals under Control Council Law No. 10, Vol. IX, the *Krupp* case, Washington: Government Printing Office (1950), p. 1341.

143 See Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, *I.C.J. Reports* 1996, p. 226, para. 78.

144 See Article 158 of Geneva Convention IV: "The denunciation shall have effect only in respect of the denouncing Power. It shall in no way impair the obligations which the Parties to the conflict shall remain bound to fulfil by virtue of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience".

principles of international humanitarian law can be applied, even when the conventions of which they are part cannot.[145]

However, the primary significance of the Martens clause is not so much its confirmation of the applicability of customary international law in situations of armed conflict in general. Today it is generally accepted that armed conflicts are regulated not only by treaty law, but also by customary international law. Many rules that were codified in the 1907 Hague Regulations and the 1949 Geneva Conventions have been recognised as reflecting customary international law in international case law. In addition, modern criminal tribunals have confirmed the existence of principles of customary international law applicable to situations of international and internal armed conflicts.

The primary significance of the Martens clause is rather its reference to "the laws of humanity" and "the requirements of the public conscience" – or, in their modern formulations, "the principles of humanity" and "the dictates of the public conscience", as foundations of the principles of international law that provide protection to populations and belligerents in cases not covered by treaty law.[146] The question is what is meant by these terms. The wording of the Martens Clause as a whole clearly shows that the principles of humanity and the dictates of public conscience are not to be considered as "new" or additional sources of international law. Rather, their purpose is to help shape the content of the customary international law principles to be applied whenever a particular situation is not covered by the existing treaty rules – either because the treaty rules are imprecise or incomplete or, as in the case of the Geneva Conventions, because a party to an armed conflict has denounced the treaty in question.

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145 International Court of Justice, Case concerning Military and Paramilitary Activities in and against Nicaragua, Judgment of 27 June 1986, *I.C.J. Reports 1986*, p. 14, para. 218.

146 See Article 1 (2) of Additional Protocol I and the preamble of Additional Protocol II. It is further to be noted that Additional Protocol II contains a shortened version of the Martens clause. It simply states that "in cases not covered by the law in force, the human person remains under the protection of the principles of humanity and the dictates of the public conscience". The Commentary to Additional Protocol II indicates that the absence of a reference to custom "should not be interpreted as a rejection on the part of the Conference, as the ICRC had not made a proposal to that effect in its initial draft". See Y. Sandoz, C. Swinarski and B. Zimmermann (ed.), *Commentary on the additional protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949*, Dordrecht: Nijhoff Publishers (1987), p. 1337. The reasons for the absence of such a proposal in the draft Convention are not entirely clear. They could be related to the particular nature of internal armed conflicts as compared to the one-sided focus of the process of international customary norm creation on *State* practice and *State opinio juris* or there could be other reasons. In any case, the absence of a reference to established custom should not be interpreted as a rejection of the applicability of international customary law to internal armed conflicts.

The emphasis placed by the Martens Clause on the moral foundations of legal principles has two significant implications.[147] First, as argued by both Meron and Cassese, the emphasis in the Martens Clause on the moral foundations of legal principles raises the conceptual element of the customary international law process to a higher level, while relaxing the requirements prescribed for state practice.[148] In addition, these authors argue that the reference to the "law" or "principles" of "humanity" denotes a strong presumption in favour of applying international humanitarian law consistently with human rights norms, as well as using human rights law to fill the gaps in international humanitarian law treaties.[149]

It is for these reasons that the Martens clause retains its relevance in modern armed conflicts. The Martens clause recognises the paramount importance of providing protection to human beings in situations of armed conflict, even in cases where the law of armed conflict is silent. Most importantly, it applies to international as well as internal armed conflicts. The body of international humanitarian law is much less developed for internal armed conflicts than for international armed conflicts. Therefore the Martens clause can play an important role in ensuring basic protection to the civilian population in internal armed conflicts in addition to the protection provided by Article 3 of the 1949 Geneva Conventions and, if applicable, the provisions of 1977 Additional Protocol II. At the very least, the Martens clause clearly shows that even though they are not formally bound by international human rights law, armed groups may not abuse gaps in the law of armed conflict in order to commit human rights violations.

The Martens clause could also be relevant for a coherent reading of international humanitarian law. For example, one issue that is not adequately addressed in current international humanitarian law applicable to internal armed conflicts concerns the protection of private property. In the law applicable to international armed conflicts, private property has a special status. This is most apparent in international occupation law, which prohibits the taking of private property altogether. In contrast, in internal armed conflicts, private

147 For a discussion of the moral imperatives of the Martens clause, see also M. Salter, 'Reinterpreting Competing Interpretations of the Scope and Potential of the Martens Clause', *Journal of Conflict & Security Law,* Vol. 17(3) (2012), pp. 433–436.

148 Cassese argues that the Martens Clause "*loosens* the requirements prescribed for *usus*, while at the same time *elevating opinio (iuris* or *necessitates*) to a rank higher than that normally admitted". See A. Cassese, 'The Martens Clause: Half a Loaf or Simply Pie in the Sky?' *European Journal of International Law,* Vol. 11 (2000), p. 214. Meron argues that the Martens Clause "reinforces a trend, […], toward basing the existence of customary law primarily on *opinio juris* (principles of humanity and dictates of public conscience) rather than actual battlefield practice". See T. Meron, 'The Martens Clause, Principles of Humanity, and Dictates of Public Conscience', *American Journal of International Law,* Vol. 94, No. 1, p. 88.

149 Cassese further argues in favour of deducing the principles of humanity from existing international human rights standards. See A. Cassese, 'The Martens Clause: Half a Loaf or Simply Pie in the Sky?' *European Journal of International Law,* Vol. 11 (2000), p. 212.

property is only expressly protected by the prohibition against pillage, which, as argued above, does not apply to the taking of property for military purposes. The prohibition against seizing the property of an adversary, which does apply to the taking of property for military purposes, is however more difficult to apply to the protection of private property in internal armed conflicts because one needs to determine that the owner is somehow affiliated to a party to the armed conflict. A consistent reading of international humanitarian law would result in the assumption that taking private property is not permitted for military purposes either, regardless of any particular affiliation to a party to an armed conflict, except in situations of imperative military necessity. It is in these cases that the Martens clause is useful, in the sense that the dictates of public conscience prescribe that the law applicable to the protection of private property in internal armed conflicts is interpreted consistently with the relevant provisions relating to the protection of private property in international armed conflicts.

In conclusion, the Martens clause provides protection to human beings in situations not dealt with by international humanitarian law treaties. Its purpose is to provide basic protection to civilians and combatants in the conduct of hostilities, where such protection is not provided by relevant international humanitarian law treaties. The question arises whether the Martens clause could be used to fill other gaps in the law of armed conflict.

Certainly some authors propose using the Martens clause as a tool to protect the environment and natural resources. Iain Scobbie, for example, refers to the seemingly broad interpretation given to the Martens clause by the Nuremberg Tribunal in the *Krupp* case, quoted above, in order to support his argument that the Martens clause "is a dynamic mechanism by which general international law is imported into the [Hague] Regulations in matters 'concomitant to warfare'". Therefore, in his opinion "[g]eneral international law regarding natural resources, as it has developed since 1907, must now accordingly form part of the provisions set out in Section III of the Regulations [relating to the law of occupation]".[150] However, as argued above, the relevant passage in the *Krupp* case should not be interpreted as an attempt to broaden the application of the Martens clause. Moreover, such an overly broad interpretation would run counter to a textual interpretation of the Martens clause, as inserted in both prior and subsequent legal instruments.

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150 See, *e.g.*, Iain Scobbie, who argues that general international law regarding natural resources, as it has developed since 1907, must be inserted through the Martens clause into the section of the 1907 Hague Regulations covering occupation. I. Scobbie, 'Natural Resources and Belligerent Occupation: Mutation Through Permanent Sovereignty', in S. Bowen (ed.), *Human Rights, Self-Determination and Political Change in the Occupied Palestinian Territories*, The Hague: Martinus Nijhoff Publishers, International Studies in Human Rights (1997), p. 247. Also see Simonds, S.N., 'Conventional Warfare and Environmental Protection: A Proposal for International Legal Reform', Stanford Journal of International Law Vol. 29 (1992-1993), p. 188.

The Martens clause cannot be seen as a magic wand which can be used to fill all the gaps in international humanitarian law. The principal objective of the clause is to provide protection to human beings during an armed conflict against unnecessary suffering or abuse in cases not dealt with in relevant treaties. This is also clear from the emphasis placed by the clause on the laws of humanity and the dictates of public conscience, both of which have a strong humanitarian connotation. Thus, insofar as general natural resources law provides protection to human beings where international humanitarian law does not, it can be applied by virtue of the Martens clause. However, in general, it should be concluded that the Martens clause is not the appropriate mechanism for the introduction of norms other than those with a humanitarian character in international humanitarian law.

6.5 Preliminary conclusions

International humanitarian law contains a number of obligations for parties to an armed conflict which are applicable to the exploitation and plundering of natural resources in situations of armed conflict. These obligations follow from provisions which afford protection to property and to civilian objects. However, upon closer examination, three problems immediately become apparent. The first concerns the general ability of international humanitarian law to regulate the exploitation of natural resources, which is principally a commercial activity and not an act of warfare. International humanitarian law is not designed to address these types of activities. This is only different for occupation law, which regulates the position of an occupant as a *de facto* authority. Most importantly, the right of an occupant to exploit natural resources is limited to a right of "usufruct" to cover the costs of civilian administration in occupied territory.

The second issue that immediately becomes apparent concerns the enormous range of obligations under international humanitarian law. Although there are actually not many rules that apply to the exploitation of natural resources in situations of armed conflict, different rules apply to different conflict situations. Moreover, some of the rules target only one party to the conflict. This asymmetry of obligations for parties to an armed conflict is most apparent in situations of internal armed conflict. For example, the prohibition against seizing or destroying the property of an "adversary" restricts its application to the exploitation of natural resources by non-state armed groups, while the prohibition has no direct relevance for governments.

The final problem that is apparent is the failure of IHL to provide adequate protection to the environment in situations of armed conflict. The prohibition against causing widespread, long-term and severe damage to the environment applies only to situations of international armed conflict. Moreover, it has such a high threshold that it would only cover the most extreme cases of environmental damage resulting from the exploitation of natural resources. The mass-

ive pollution of a river caused by the use of chemicals or the cutting down of a forest encompassing at least several hundred square kilometres are examples of this. More general provisions regarding the protection of property or of objects that are indispensable to the civilian population could fill some of the gaps, but these provisions do not primarily serve environmental purposes.

Some possibilities for the reform of international humanitarian law have been proposed in order to provide better protection to the environment. Michael Bothe et al., for example, propose the creation of protected zones and non-defended localities under Articles 59 and 60 of Additional Protocol I in order to provide protection to the environment in situations of armed conflict.[151] Such protected zones may not be the subject of attack. However, this does not seem to be a viable option in areas of high economic importance, which form the subject matter of this book.

Other options include the adoption of a new legal instrument to protect the environment during armed conflict. Reference can be made to specific calls for the adoption of a fifth Geneva Convention on the protection of the environment or of a "green" Additional Protocol.[152] Although these proposals focus mainly on the effects of warfare on the environment, their scope could be broadened to encompass environmental damage caused by parties to an armed conflict by other activities as well. In this sense it could be construed as a legally binding code of conduct for parties to an armed conflict with regard to the environment.

However, it remains to be seen whether the adoption of a new legal instrument to protect the environment in situations of armed conflict is a viable option. Discussions on this subject date back to 1991, when a round table debate was organized by the London School of Economics. Since then, the subject has remained on the agenda, but the debate has been confined to academic and civil society circles.

Apart from these policy considerations, a more fundamental objection can be made to this sort of legislative effort in relation to the subject matter of this book. A Convention focusing on the protection of the environment in situations of armed conflict could be very useful in providing better protection to the environment in these situations. From this perspective, the initiative is to be applauded. However, it does not solve the other problems identified in this chapter, in particular the lack of clarity with regard to the existing rules for the exploitation of natural resources by parties to an armed conflict. A convention focusing on the protection of the environment is not an appropriate instrument to address issues related to an essentially economic activity. Fur-

151 M. Bothe; C. Bruch; J. Diamond; and D. Jensen, 'International law protecting the environment during armed conflict: gaps and opportunities', *International Review of the Red Cross,* Vol. 92, No. 879 (2010), p. 577.

152 G. Plant, *Environmental Protection and the Law of War: A 'Fifth Geneva' Convention on the Protection of the Environment in Time of Armed Conflict*, London: Belhaven Press (1992).

thermore, what is needed is not so much a codification of relevant rules belonging to the field of international humanitarian law relating to the exploitation of natural resources, but rather a reassessment of the existing rules from all relevant fields of international law. This issue is explored in greater detail in the final conclusions to this part of the book.

Finally, it can be argued that international humanitarian law contributes to the protection of natural resources in two important ways. First, it contains an elaborate regime for the situation of occupation which explicitly deals with the exploitation of natural resources in occupied territories. Secondly, it is the only field of international law that contains binding obligations for non-state armed groups, including rules that are relevant for the exploitation of natural resources. According to these rules, armed groups are not allowed to exploit natural resources, except in cases of imperative military necessity. However, in reality it is difficult to imagine situations where the exploitation of natural resources could ever satisfy the criteria of imperative military necessity, in particular the "urgency" requirement. Although these restrictions are understandable from the point of view of the States that have negotiated the relevant treaties which embody these rules, the question arises whether these restrictions are effective. If there is a quasi- prohibition against armed groups exploiting natural resources in order to finance their armed struggle, why should they then bother to abide by the law at all? From the point of view of environmental protection, it may therefore be more useful to provide those armed groups that satisfy the criteria of Additional Protocol II with a qualified right to exploit natural resources in territories under their control. This point is taken up in greater detail in the concluding remarks to this part of the book.

Concluding remarks to Part II

This part of the book examined the legal framework governing the exploitation of natural resources in situations of armed conflict. Chapter 5 showed that the foundations of the general legal framework for the governance of natural resources are only partially affected in situations of armed conflict. The ILC draft articles on the effects of armed conflict on treaties show a strong presumption in favour of the continued applicability of both international human rights and environmental treaties. Furthermore, the rules for the suspension of treaties, as well as the circumstances precluding wrongfulness, are sufficiently stringent to preclude any easy ways out. However, there are other factors that affect the operation of international human rights and environmental treaties in situations of armed conflict. First, human rights treaties provide for the possibility of derogating from obligations in situations of public emergency. This means that domestic governments can, for example, derogate from provisions on public participation in these treaties. Secondly, international environmental treaties often contain clauses that are lenient with regard to States implementing their obligations. Such clauses call on States to implement their obligations as far as this is appropriate or depending on their capabilities.

As a minimum requirement, States remain bound by their core obligations under these treaties. These include a prohibition against depriving a people of its means of subsistence under the 1966 Human Rights Covenants, as well as a prohibition against inflicting harm on particular natural resources that are protected under relevant environmental conventions, including the 1972 UNESCO World Heritage Convention and the 1992 Convention on Biological Diversity. Furthermore, States remain bound by their obligations under customary international law. These include the principle of permanent sovereignty and the inherent condition that a government must exercise permanent sovereignty for national development and the well-being of the population, as well as the principle of sustainable use, which qualifies the right of States to exploit their natural resources, even in situations of armed conflict.

One major deficiency of international human rights and environmental law is that these fields of international law do not contain direct obligations for armed groups. Furthermore, their obligations are only partially relevant for the conduct of foreign States in situations of armed conflict. Therefore Chapter 6 has addressed the role of international humanitarian law in providing relevant rules. It demonstrated that on the whole, international humanitarian law does not directly address issues related to the exploitation of natural

resources by parties to an armed conflict. This is different only for the situation of occupation, which does contain express rules for occupants relating to the exploitation of natural resources. The key provision in this respect is Article 55 of the 1907 Hague Regulations, which provides occupants with a right to usufruct on the natural resources situated in occupied territory. According to the right of usufruct, occupants are allowed to exploit natural resources in occupied territory for two purposes: 1) to cover the costs of civilian administration, within reasonable limits and in proportion to the available natural resources; and 2) for other purposes benefitting the population living in occupied territory.

Rules that apply to other States with a military presence on the territory of a foreign State, as well as to armed groups, must be derived from more general provisions relating to the protection of property and civilian objects. Protection of natural resources is provided first of all by the prohibition against pillage, which prohibits the taking of property for personal gain. Furthermore, parties to an armed conflict are prohibited from taking or destroying property that belongs to a hostile party for military purposes, except in situations of "imperative military necessity". Although the categories of situations to which the exception of "imperative military necessity" applies are not expressly listed, an exception can be made only if the following conditions are met: 1) there must be a reasonable connection between the taking or destruction of property and the accomplishment of a military advantage; and 2) there must be a degree of urgency. It is particularly this degree of urgency that is absent in the majority of cases involving the exploitation of natural resources by parties to an armed conflict.

In internal armed conflicts, the international humanitarian law prohibitions mainly focus on armed groups. However, this asymmetry of obligations for armed groups and the government is not a problem when considered in a broader context, and in particular in the light of the view that governments remain bound by the general framework for the exploitation of natural resources. The virtual absence of provisions protecting the environment in international humanitarian law is more problematic.

There are only two provisions that expressly prohibit parties to an armed conflict from causing damage to the environment. They prohibit parties to an armed conflict from causing long-term, widespread and severe damage to the environment. It has been argued that these provisions suffer from two major deficiencies. The first is that they apply only to international armed conflict. The second is that they set a cumulative threshold for environmental damage, which means that the provisions apply only to environmental damage that is widespread, long-term *and* severe. This is a very high threshold, even when it is interpreted in the light of modern developments in international environmental law.

Other provisions that are relevant for the protection of the environment include the above-mentioned prohibition against taking or destroying the

property of a hostile party, except in cases of imperative military necessity, and the prohibition against destroying or rendering useless objects that are considered indispensable to the civilian population. Chapter 6 has demonstrated that the protection provided to the environment by these provisions is far less than what is necessary to prevent environmental degradation.

Two main conclusions can be drawn from these findings to address the challenges involved in resource-related armed conflicts. First, it is necessary to develop clear rules for the commercial exploitation of natural resources in situations of armed conflict. Secondly, there is a need for adequate rules for the protection of the environment in situations of armed conflict, particularly internal armed conflicts. These rules can mainly be based on existing international law, but new rules also need to be developed.

The task of evaluating the existing rules and developing new rules can best be assigned to the International Law Commission (ILC). Despite the lengthy procedures involved in drafting its articles, it is the only international body that combines expertise in all the relevant fields of international law with an official mandate to progressively develop and codify international law. The ILC could undertake this work as part of its study on the 'Protection of the Environment in Relation to Armed Conflicts', a topic which it recently included in its programme of work.[153] Special Rapporteur Marie Jacobsson proposed to include in this study an analysis of the existing rules applicable in situations of armed conflict, with a particular emphasis on internal armed conflicts.[154] As regards the development of new rules, the Special Rapporteur indicated that "it was suggested that it was not the task of the Commission to modify … existing legal regimes [regulating the law of armed conflict]".[155] It is argued however that the task of the ILC includes to progressively develop international law. Therefore, the ILC should not limit its work to an analysis of the existing rules, but should also progressively develop those rules.

This book suggests that the mandate of the ILC should first of all include the clarification of the implications of the existing rules of international humanitarian, environmental and human rights law for the commercial exploitation of natural resources during armed conflict, an issue that has not been systematically addressed in existing legal instruments. The ILC should address several questions, including the meaning of "imperative military necessity" in relation to the prohibition against appropriating or destroying the property of a hostile party under international humanitarian law. What does this exception entail? Does it include the exploitation of natural resources to provide for the basic needs of hostile parties? Arguably, it does not. It is only when natural

153 See International Law Commission, Report on the work of its sixty-fifth session (2013), *UN Doc. A/68/10*, Chapter IX.

154 *Ibid*., para. 136 and 141.

155 *Ibid*., para. 136.

resources can be directly consumed, such as firewood, that the condition of urgency is satisfied.

Furthermore, the ILC should assess the existing rules in their totality, *i.e.*, it should take the existing rules from international humanitarian, human rights and environmental law together. All too often the rules of international humanitarian law are looked at in isolation when assessing activities that take place in situations of armed conflict. However, rules from international human rights and environmental law are equally important, especially when assessing the rights and obligations of domestic governments in relation to the exploitation of natural resources. Chapters 5 and 6 have shown that international humanitarian law primarily creates obligations for non-state armed groups and foreign States, while international human rights and environmental law create obligations for domestic governments and, to a lesser extent, for foreign States as well. For the sake of clarity and comprehensiveness, it is therefore essential to list all the relevant rules, not only those of international humanitarian law.

In addition, the ILC should clarify the position of armed groups in relation to the exploitation of natural resources in situations of armed conflict. The relevant provisions of international humanitarian law applicable to internal armed conflicts formulate an absolute prohibition for armed groups against exploiting natural resources. However, as soon as a conflict is internationalised, armed groups which are recognised as belligerents by third States or acting under the control of a foreign State, become subject to the law applicable to international armed conflict. For those armed groups that control portions of a State's territory, this means that they are granted a limited right to exploit natural resources under international occupation law. From an environmental and human rights perspective, a case could be made for the elimination of this distinction for armed groups that satisfy the criteria of Additional Protocol II. These armed groups should be accorded a right similar to that of occupants, whether or not the armed conflict is internationalised. It is then at the discretion of the UN Security Council to decide whether exploitation activities pose a risk to international peace and security in specific instances and therefore must be prevented altogether.

This position is reflected to some extent in the Kimberley Process Certification Scheme for the Certification of Rough Diamonds, discussed in Chapter 8. This Scheme defines "conflict diamonds" as "rough diamonds used by rebel movements or their allies to finance conflict aimed at undermining legitimate governments, as described in relevant United Nations Security Council resolutions…".[156] This definition implies that the determination of what constitutes "conflict diamonds" is left to the discretion of the UN Security Council.

156 Kimberley Process Certification Scheme, Section I.

Furthermore, the major advantage of taking occupation law as a point of reference for rules regulating the behaviour of armed groups in control of portions of the State territory is that this field of law is well developed and is susceptible to interpretation in the light of relevant human rights and environmental norms. Some rights are accorded to armed groups in this way, but at the same time, these armed groups must also meet stringent obligations. Arguably this balancing of rights and obligations is the best way to provide protection to the environment and the civilian population in territories that are controlled by armed groups. Furthermore, granting armed groups some rights may give these groups a positive incentive to respect the corresponding obligations.

Finally, the ILC should evaluate the existing rules for the protection of the environment in internal armed conflict and formulate proposals to improve these rules. One of the major gaps in the existing rules relate to the absence of binding rules for armed groups in relation to environmental protection. Arguably, governments remain bound by international environmental law, but armed groups are not. Therefore, the ILC should examine the extent to which existing rules of international humanitarian law protect the environment and develop new rules in relation to environmental damage caused by acts of warfare. It is argued that the prohibition against destroying the property of an adversary provides basic protection to the environment, but this protection needs to be improved. The proposals for the adoption of a fifth Geneva Convention on the protection of the environment or of a "green" Additional Protocol could be taken as a starting point for the ILC in this respect.

Most relevant for the purposes of the present study, the ILC should define the implications of existing rules for preventing more serious environmental damage caused by the exploitation of natural resources by parties to an armed conflict, including the provisions of the 1977 Additional Protocols relating to the protection of objects indispensable to the civilian population. For example, do these rules cover situations such as the poisoning of groundwater as a result of irresponsible dumping of chemical substances used in the mining sector? Arguably, they do cover such situations if the poisoning of groundwater results in the starvation or forced movement of people. It is essential that the ILC sheds some light on these issues and develops the law in this field.

Part III

The governance of natural resources as part of conflict resolution and post-conflict peacebuilding efforts

Introductory remarks to Part III

This part discusses two distinct but interrelated issues. The first concerns the approaches to stopping the trade in natural resources that is used to finance armed conflicts. Addressing this issue is a prerequisite for resolving those armed conflicts. The second concerns the governance of natural resources in countries that are recovering from resource-related armed conflicts. While economic reconstruction must be an inherent part of any peacebuilding strategy, specific challenges must be addressed when natural resources play a role in armed conflicts, to either finance or sustain them. In these situations, it is often necessary to implement institutional changes regarding the governance of natural resources in order to prevent a relapse into armed conflict.

Notwithstanding the paramount importance of addressing natural resources governance as part of peacebuilding efforts, this issue has not been included in the official mandate of the UN Peacebuilding Commission, an intergovernmental advisory body established in 2005 by the UN Security Council, together with the UN General Assembly. The principal objective of the UN Peacebuilding Commission is "to address the special needs of countries emerging from conflict towards recovery, reintegration and reconstruction and to assist them in laying the foundation for sustainable development".[1] As part of its general mandate, the UN Peacebuilding Commission has recently started to consider issues related to natural resources management, both in a general sense and

1 UN Security Council Resolution 1645 (2005), preambular paragraph 6; UN General Assembly Resolution 60/180 (2005), sixth preambular paragraph. For this purpose, the UN Peacebuilding Commission has received three main tasks: 1) to bring together all relevant actors to marshal resources and to advise on and propose integrated strategies for post conflict peacebuilding and recovery; 2) to focus attention on the reconstruction and institution-building efforts necessary for recovery from conflict and to support the development of integrated strategies in order to lay the foundation for sustainable development; and 3) to provide recommendations and information to improve the coordination of all relevant actors within and outside the United Nations, to develop best practices, to help to ensure predictable financing for early recovery activities and to extend the period of attention given by the international community to postconflict recovery.

in its country specific configurations.[2] However, the practice of the UN Peacebuilding Commission is still limited, preventing a systematic analysis of its work in this field. Furthermore, the UN Peacebuilding Commission becomes involved in a relatively late stage, when the situation in a former conflict country has, to a certain extent, stabilised. It is submitted that, in order to enhance the success of the peace process in countries emerging from armed conflict, changes in the governance of natural resources must be initiated already in the phases of conflict resolution and immediate post-conflict reconstruction, which is the principal focus of this part of the study.

Recent attempts to address the governance of natural resources, and, as a prerequisite, the trade in natural resources that finance armed conflicts as part of conflict resolution and immediate post-conflict reconstruction efforts have evolved around two distinctive but interrelated approaches, namely sanctions by the Security Council under Chapter VII of the United Nations Charter on the one hand, and voluntary agreements between States and other entities related to the management of natural resources in States experiencing an armed conflict, on the other.

The United Nations Charter has assigned the Security Council the primary responsibility for maintaining international peace and security.[3] It has given the Security Council a wide range of powers to perform its functions effectively. In this respect the principal powers of the Security Council relate to its role in the pacific settlement of disputes under Chapter VI of the UN Charter and its authority to adopt coercive measures in response to threats to the peace, breaches of the peace, and acts of aggression under Chapter VII of the UN Charter. Together these chapters assign the Security Council a variety of options to effectively address specific situations which constitute a threat to international peace and security.

In practice, resource-related economic measures under Article 41 of the UN Charter have been the principal means used by the Security Council to

2 The need for the UN Peacebuilding Commission to address these issues was emphasised in a 2009 UNEP report, entitled 'From Conflict to Peacebuilding: The Role of Natural Resources and the Environment'. The UNEP Report further contains a number of recommendations for the Peacebuilding Commission on the integration of natural resources management and environmental protection into its peacebuilding strategies. In response to the UNEP report, the UN Peacebuilding's Working Group on Lessons Learned has issued a background paper in July 2011 on 'Economic Revitalization and Youth Employment for Peacebuilding', identifying natural resources management as one of the priority areas for the Peacebuilding Commission to focus on in the near future. This background paper expanded on preliminary work undertaken by this Working Group in cooperation with UNEP on 'Environment, Conflict and Peacebuilding'. Nonetheless, the proposals of the Working Group have not yet been adopted as part of the overall strategy of the Peacebuilding Commission.

3 The legal basis for this function of the Security Council may be found in Article 24 of the UN Charter.

address the links between natural resources and armed conflict.[4] Before the end of the Cold War, the Council only used its powers under Chapter VII once to impose resource-related coercive measures aimed at ending a conflict, namely in the case of natural resources originating in Southern Rhodesia.[5] Since 1990 the Council has increasingly used its powers for this purpose. Examples include diamond sanctions in the cases of Angola, Sierra Leone, Liberia and Côte d'Ivoire, petroleum sanctions in the case of Iraq and timber sanctions in the case of Liberia.[6] This practice of the Security Council reveals the recent trend towards "smart" or "targeted" rather than comprehensive sanctions.[7]

In addition, voluntary agreements between States and other entities related to the management of natural resources in fragile States have become more important in the last decade, both as an alternative and complementary to Security Council sanctions. The objective of some of these voluntary agreements is to address the trade in so-called "conflict resources", while others address management-related issues. Examples of the former include certification mechanisms, such as the Kimberley Scheme for the Certification of Rough Diamonds. Examples of the latter include voluntary processes aimed at combatting corruption in government administration, such as the Extractive Industry Transparency Initiative.

These voluntary agreements are part of a broader movement away from formal treaty-making procedures to informal processes that create "commitments" rather than legal obligations for States. These processes are even encouraged by formal institutions. The 2002 Johannesburg Summit on Sustainable Development, for example, introduced the idea of partnerships between States and private entities for sustainable development. The United Nations Conference on Sustainable Development held in Rio de Janeiro in 2012 further consolidated this practice of public-private partnerships with the organization of a "Partnerships Forum" and encouraged the establishment

4 See P. Le Billon, 'Natural Resources, Armed Conflicts, and the UN Security Council', Liu Institute for Global Issues, Briefing Paper No. 07-001, 30 May 2007, p. 2. Other tools include peacekeeping missions. The Security Council has, so far, only in two instances expressly included issues related to natural resources management in the mandate of a peacekeeping mission. These are the UN Mission in Liberia (UNMIL) and the UN Organization Stabilization Mission in the Democratic Republic of the Congo (MONUSCO). For more details on these and other peacekeeping missions, see a recent report issued by UNEP, 'Greening the Blue Helmets: Environment, Natural Resources and UN Peacekeeping Operations' (2012).

5 See UN Security Council Resolution 232 (1966) concerning an import ban on certain natural resources, including iron ore and copper and Resolution 253 (1968) concerning an import ban on all commodities and products.

6 See, *e.g.*, UN Security Council Resolution 1173 (1998) concerning an import ban on diamonds originating in Angola; Resolution 1306 (2000) concerning an import ban on diamonds originating in Sierra Leone and Resolution 1521 (2003) concerning an import ban on diamonds and timber products from Liberia.

7 D. Cortright & G.A. Lopez (ed.), *Smart Sanctions: Targeting Economic Statecraft*, Lanham: Rowman & Littlefield (2002).

of new partnerships.[8] In other areas, informal processes are also becoming more important, for example, global standards for the registration of drugs aree developed through the International Conference on Harmonisation of Technical Requirements for Registration of Pharmaceuticals for Human Use (ICH), an informal organization that brings together regulatory authorities and the pharmaceutical industry.

The phenomenon of informal agreements can partly be explained by a genuine desire of States to actively involve other stakeholders, principally civil society and the private sector, in efforts to address issues of general concern. However, the question arises whether these initiatives are in fact as effective as formal treaty processes in addressing issues of general concern. Since voluntary initiatives increasingly replace formal treaty-making processes, it is important to determine whether these voluntary initiatives actually provide a credible alternative to treaties.

Chapter 7 examines sanctions regimes adopted by the Security Council to stop natural resources from financing or fuelling armed conflicts. The chapter discusses the contribution of these sanctions to conflict resolution and, ultimately, post-conflict peacebuilding. Chapter 8 examines three categories of informal instruments. These are certification mechanisms, anti-corruption initiatives and corporate responsibility tools. Each category is discussed from the perspective of one instrument which is of particular interest for the purposes of this study.

One question that is central to both chapters concerns the ways in which these mechanisms contribute to providing structural solutions for preventing future conflicts involving natural resources in States that have experienced armed conflicts. Throughout this book it has been argued that the issue of resource governance is of central importance to prevent conflicts involving natural resources. In other words, the question is how and to what extent these mechanisms contribute to promoting adequate resource governance in countries that have experienced armed conflict. And what does 'adequate' resource governance mean within this context?

Of course, the current book can only give a glimpse into the enormous range of initiatives that – directly or indirectly – contribute to breaking the link between natural resources and armed conflict. The purpose of this book is not to give an exhaustive summary of all the initiatives, but rather to provide insight into the contribution of those approaches that have been at the forefront of efforts to break the link between natural resources and armed conflict.

8 See UN General Assembly Resolution 66/288, 'The Future We Want', of 11 September 2012, paras. 46, 64, 71, 76, 202 and 269-275.

7 UN Security Council Sanctions Regimes

7.1 INTRODUCTORY REMARKS

Sanctions constitute one of the principal tools of the Security Council to address the links between natural resources and armed conflict. Pursuant to Article 25 of the UN Charter, UN member States are obliged to implement measures taken by the Security Council under Article 41 of the UN Charter. This makes sanctions *prima facie* a particularly effective tool to address instances in which natural resources finance, or even fuel armed conflicts.

Sanctions can involve a variety of measures, ranging from import and export embargoes and the freezing of assets, to travel bans and reducing diplomatic relations. While older sanctions regimes were mainly comprehensive, covering all sorts of measures, most of the modern sanctions regimes apply so-called "smart" sanctions. These consist of specific measures, taking account of the potential impact of sanctions on vulnerable groups.[9]

Smart sanctions comprise "targeted sanctions" designed to target specific persons or organizations, and "selective sanctions" which impose restrictions on the trade in specific products.[10] Obviously this implies that commodity sanctions exclusively against particular organizations are both selective *and* targeted. However, for the purposes of clarity, this chapter refers to commodity sanctions as selective sanctions, while reserving the term "targeted" for measures that involve designating particular individuals or organizations on a sanctions list.

The Security Council has imposed several sanctions regimes to address the contribution of natural resources to armed conflict, including both selective and targeted sanctions. Examples of selective sanctions imposed by the Security Council include diamond sanctions in the cases of Angola, Sierra Leone, Liberia and Côte d'Ivoire and timber sanctions in the cases of Cambodia and Liberia. Examples of targeted sanctions imposed in relation to natural resources include

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9 D. Cortright & G.A. Lopez (ed.), *Smart Sanctions: Targeting Economic Statecraft*, Lanham: Rowman & Littlefield (2002), p. 2.

10 For the distinction between 'targeted' and 'selective' sanctions, see, *e.g.*, D. Cortright & G.A. Lopez (ed.), *Smart Sanctions: Targeting Economic Statecraft*, Lanham: Rowman & Littlefield (2002), p. 172, defining selective sanctions as less-than-comprehensive measures involving restrictions on particular products or financial flows, while targeted sanctions are described as a subset of selective sanctions, specifically aiming for more narrow and precise effects, usually directed at a particular segment of the population in the targeted State.

travel bans and asset freezes in the cases of the DR Congo and Libya. In addition, in the case of the DR Congo, the Security Council developed an innovative approach, consisting of the direct targeting of companies which do not respect due diligence requirements.

In the Presidential Statement of 25 June 2007, the President of the Security Council clarified the objectives of the sanctions regimes adopted by the Security Council in order to address the link between natural resources and armed conflict:

> "[t]he Security Council, through its resolutions, has taken measures on [the issue of natural resources contributing to armed conflict], more specifically to prevent illegal exploitation of natural resources, especially diamonds and timber, from fuelling armed conflicts and to encourage transparent and lawful management of natural resources, including the clarification of the responsibility of management of natural resources".[11]

This chapter aims to explore to what extent the Security Council resolutions have actually gone beyond merely sanctioning the illegal trafficking of natural resources and have addressed issues relating to the governance of natural resources. In particular, the question arises whether these resolutions have set standards for the management of natural resources. If so, is the Security Council the appropriate body to do so or is the Council exceeding its authority here?

In order to answer these questions, this chapter traces the evolution in the Security Council's approach to addressing the role of natural resources in financing armed conflicts. It analyses several sanctions regimes established by the Security Council to address specific conflicts financed by natural resources from the 1960s to the present. The chapter examines the overall structure and objectives of the sanctions regimes, as well as the targets and addressees of the sanctions obligations. In this way, it aims to clarify the Security Council's approach to tackling the trade in natural resources that finance armed conflict.

Section 2 defines the role of sanctions in the particular context of resource-related armed conflicts. Section 3 then takes a closer look at two older sanctions regimes which paved the way for the new generation of smart sanctions. These are the 232 Southern Rhodesia Sanctions Regime and the 661 Iraq Sanctions Regime. Section 4 examines selective commodity sanctions imposed by the Security Council in relation to resource-related armed conflicts. These are the 792 Cambodia Sanctions Regime, the 864 UNITA Sanctions Regime, the 1132 Sierra Leone Sanctions Regime, the 1343 and 1521 Liberia Sanctions Regimes, and the 1572 Côte d'Ivoire Sanctions Regime. Section 5 takes a closer look at

11 Statement by the President of the Security Council of 25 June 2007, *UN Doc. S/PRST/2007/22*, para. 6.

the Security Council's use of targeted sanctions in order to put an end to resource driven conflicts. This section discusses the 1493 DR Congo Sanctions Regime and the 1970 Libya Sanctions Regime. Finally, section 6 discusses the evolution in the Security Council's approach to sanctions in the context of resource-related armed conflicts. It also examines the implications of the approach developed by the Security Council for its contribution to promoting sustainable resource governance in specific conflict situations.

7.2 General remarks concerning sanctions

Georges Abi-Saab provided a generally accepted definition of sanctions as "coercive measures taken against a target State or entity in application of a decision by a socially competent organ".[12] Most of the elements of this definition accurately reflect the sanctions regimes discussed in this chapter, which target States, individuals or non-state entities, such as non-state armed groups and corporations. They are imposed by the Security Council, on the basis of the role assigned it by Article 24 of the UN Charter. In addition, most of the sanctions regimes examined in this chapter are imposed pursuant to decisions of the Security Council taken under Chapter VII of the UN Charter.

On the basis of Chapter VII of the UN Charter, the Security Council may adopt measures pursuant to Article 41 of the UN Charter once it has determined the existence of a threat to the peace, a breach of the peace or an act of aggression under Article 39 of the UN Charter. Furthermore, it may do so only in order to "maintain or restore international peace and security". These requirements have two important implications for the Security Council's ability to act.

First of all, Article 39 defines the purposes and legal basis for Security Council action. As Hans Kelsen had noted already in 1950: "[t]he purpose of the enforcement action under Article 39 is not: to maintain or restore the law, but to maintain, or restore peace, which is not necessarily identical with the law".[13] In other words, the authority of the Security Council to take measures under Chapter VII of the UN Charter is not dependent on determining that

12 G. Abi-Saab, 'The Concept of Sanction in International Law', in V. Gowland-Debbas (ed.), *United Nations Sanctions and International Law*, The Hague/London/Boston: Kluwer Law International (2001), p. 39.

13 H. Kelsen, *The Law of the United Nations: A Critical Analysis of Its Fundamental Problems*, London: Stevens and Sons (1950), p. 294. Also see J. Crawford, 'The Relationship Between Sanctions and Countermeasures', in V. Gowland-Debbas (ed.), *United Nations Sanctions and International Law*, Graduate Institute of International Studies Geneva, The Hague/London/Boston: Kluwer Law International (2001), pp. 58-59; and L.J. van den Herik, 'Individualizing Enforcement in International Law: Progress or Peril?' inaugural lecture Leiden University, 29 June 2012.

there has been a violation of international law, but rather that a particular situation constitutes a threat to international peace and security.

This means that the Security Council can address situations that are perfectly legal – such as the exploitation of natural resources by a State and to use the proceeds to finance an armed conflict – but which pose a threat to international peace and security anyway. For the purposes of the present study, this means that the Security Council may qualify the right of a State to exercise permanent sovereignty over its natural resources if necessary to maintain or restore international peace and security. An internal uprising against the government of a State is another relevant example. International law does not formally oppose waging a civil war. However, such a situation may constitute a threat to peace and security, and the Council can act against that. For example, by imposing sanctions against natural resources used by the rebel forces to finance their armed struggle.

The second implication of Article 39 of the UN Charter regarding the Security Council's ability to act is that it limits the powers of the Security Council. Article 39 provides that the Security Council can only take measures pursuant to Articles 41 and 42 of the UN Charter "in order to maintain or restore international peace and security". For internal armed conflicts, this means that the Security Council can, in principle, impose sanctions only if these armed conflicts pose a threat to *international* peace and security. In practice, the Security Council has adopted a flexible approach in this respect. It has imposed sanctions to address threats arising from internal situations with a potential cross-border impact, as well as to address threats ensuing from purely 'internal' situations, such as the large-scale violation of human rights by governments.[14]

Furthermore, Security Council measures do not necessarily have to target States.[15] The behaviour of non-state entities, such as armed groups, can also trigger Security Council action. Many of the sanctions regimes discussed in this chapter target non-state armed groups. Examples include the sanctions regime imposed against the National Union for the Total Independence of

14 This is linked to the doctrine of the responsibility to protect, as recognized in paragraphs 138 and 139 of the 2005 World Summit Outcome Document, which formulates a responsibility for States to protect its populations from genocide, war crimes, ethnic cleansing and crimes against humanity as well as a responsibility for the international community to intervene when a State does not respect his responsibilities. See World Summit Outcome Document, *UN Doc. A/60/L.1* of 15 September 2005.

15 See A. Pellet & A. Miron, 'Sanctions', in *Max Planck Encyclopedia of Public International Law*, para. 22, available through www.mpepil.com, (consulted on 3 May 2012) who argue that "the elasticity of the notion of a threat to, or breach of, the peace was accompanied by an enlargement of the category of targeted entities; as a consequence, it is no longer necessary that a violation of international law amounting to a threat to the peace be attributable to a State in order to justify the imposition of sanctions. Individuals or groups can violate international law and be subject to sanctions".

Angola (UNITA) in Angola and against the Revolutionary United Front (RUF) and other rebel groups in Sierra Leone.

This targeting of entities other than States also has implications for the definition of sanctions itself. It highlights an important problem inherent in Abi-Saab's definition, at least for the purposes of the current study. This problem arises from the interpretation of the term "coercive". According to Abi-Saab, "coercive" implies that measures are "taken against the will of the target State at least without its consent" and "to the detriment of the target State".[16] However, this view of sanctions, based on the idea that sanctions are measures that intend to cause harm to a particular State, does not correspond very well with the *rationale* behind many of the sanctions regimes discussed in the present chapter.

Many of the sanctions regimes discussed in this chapter are in fact imposed to assist governments in regaining control over the State's natural resources. Examples include the diamond sanctions imposed against UNITA in Angola and against the RUF and other rebel groups in Sierra Leone. In some cases, sanctions have even been imposed at the request of the government of a target State. The diamond sanctions imposed in relation to the conflicts in Angola, Sierra Leone and Côte d'Ivoire are examples of this.[17] Another example concerns the endorsement by the Security Council of a national ban on timber in Cambodia, imposed to cut off the Khmer Rouge from timber revenues.

Instead of defining sanctions as "coercive measures" like Abi-Saab, sanctions can therefore be regarded in a less intrusive way in this context as economic or diplomatic measures aimed at constraining the actors against which they are imposed, whether these actors are States or non-state actors. More in general, the sanctions imposed by the Security Council in this context could be described as measures aimed at assisting a particular State to address a threat to the peace coming from within its borders.

Some final remarks can be made with regard to the operation of sanctions regimes, in particular with respect to the role of Expert Panels and Sanctions Committees. Most contemporary sanctions regimes discussed in this chapter make use of "smart sanctions" which are tailored to address a specific situation. To make an informed decision about the type of measures to impose, the Security Council has increasingly relied on Expert Panels to provide the information necessary to tailor its sanctions. These Expert Panels are established on the basis of Article 29 of the UN Charter, which permits the Security Council to establish subsidiary bodies to assist it in the performance of its functions.[18]

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16 *Ibid*.

17 These examples are discussed in more detail in section 4 below.

18 For an overview of committees established pursuant to this provision, see J.M. Farrall, *United Nations Sanctions and the Rule of Law*, Cambridge: Cambridge University Press (2007), pp. 146-181.

Panel reports have extensively documented the role played by natural resources in the conflicts discussed in this chapter. In addition, their findings on sanctions busting in particular conflicts, such as those in Angola, Sierra Leone and the DR Congo, have been instrumental in the Security Council's embracing new approaches to tackle the trade in "conflict resources". These include the Kimberley Process for the Certification of Rough Diamonds and the due diligence requirements formulated by the Group of Experts on the DR Congo, discussed later in this chapter.

In addition to Panels of Experts, the Security Council has established Sanctions Committees, mandated with the monitoring and implementation of sanctions regimes. The composition of the Sanctions Committees is similar to that of the Security Council itself. These committees play an important role in the application of sanctions. They are often entrusted with the task of designating persons or entities to apply targeted sanctions. Furthermore, they provide the Security Council with information on the implementation of the sanctions regime by States. Their regular reports to the Security Council, supplemented with the reports of the Panels of Experts, are vital to the proper functioning of sanctions regimes.

7.3 Early examples of resource-related sanctions regimes

The current section discusses two early sanctions regimes imposed by the Security Council which rely principally on comprehensive sanctions, and which involve natural resources.[19] In the case of Southern Rhodesia, selective sanctions against natural resources were imposed as a first measure, before making the sanctions regime comprehensive. In the case of Iraq, the sanctions regime provided for a conditional exemption from the comprehensive regime for the export of limited quantities of oil.

7.3.1 The 232 Southern Rhodesia Sanctions Regime

Structure and objectives of the sanctions regime

The sanctions regime issued against Southern Rhodesia in 1966 was the first ever imposed by the Security Council.[20] Its aim was to put an end to the white

19 The link with natural resources is what distinguishes these sanctions regimes from other regimes with contain import prohibitions, such as the sanctions regime imposed against the Federal Republic of Yugoslavia (Serbia and Montenegro) through UN Security Council Resolution 757 (1992).

20 For more details regarding this sanctions regime, see P.J. Kuyper, *The Implementation of International Sanctions: The Netherlands and Rhodesia*, Alphen aan den Rijn: Sijthoff & Noordhoff (1978) and J.M. Farrall, *United Nations Sanctions and the Rule of Law*, Cambridge: Cambridge University Press (2007), pp. 247-253.

minority regime established in Southern Rhodesia in 1965 and to enable the population of Southern Rhodesia to exercise their right to self-determination. The first resolution adopted by the Security Council with regard to the situation in Southern Rhodesia called upon all States to break all economic relations with Southern Rhodesia, but the associated measures did not comprise any import prohibitions and were not taken pursuant to Chapter VII of the UN Charter.[21]

It was only a year later, with the adoption of Resolution 232 (1966), that the Security Council imposed mandatory sanctions based on Article 41 of the UN Charter against the illegal authorities in Southern Rhodesia. These sanctions included an import embargo for UN member States on a range of commodities, including several minerals, sugar, tobacco, meat and other animal products, targeting not only the direct import of these commodities, but also all activities undertaken by UN member States within their territory or by their nationals that would promote the export of the banned commodities from Southern Rhodesia.[22] The import embargo was accompanied by export embargos for UN member States with regard to the supply of oil or oil products, arms and military and transport material to Southern Rhodesia.[23]

Resolution 253 (1968) subsequently transformed the selective regime set up by Resolution 232 into a comprehensive regime, extending sanctions to all products and commodities originating from or destined to Southern Rhodesia, with the exception of some products that were very important for the local population,[24] such as medical supplies, educational materials and, under certain conditions, foodstuffs.[25]

The same resolution established a committee to monitor the implementation of the sanctions regime, also known as the "Watchdog Committee".[26] The mandate of this committee, which was to examine reports and seek information from States and specialised agencies regarding the implementation of Resolution 253 (1968), was rather modest compared to modern sanctions com-

21 See UN Security Council Resolution 217 (1965), especially paragraph 8 and J.M. Farrall, *United Nations Sanctions and the Rule of Law*, Cambridge: Cambridge University Press (2007), p. 248, who labels these sanctions as voluntary in nature. Earlier, the UN General Assembly had already called upon all States to refrain from rendering assistance to the white minority regime and had, subsequently, condemned the unilateral declaration of independence made by the racialist minority regime. See UN General Assembly Resolutions 2022 (XX) of 5 November 1965 and 2024 (XX) on the Question of Southern Rhodesia of 11 November 1965.

22 See UN Security Council Resolution 232 (1966), especially paragraph 2 (a) and (b).

23 *Ibid*., especially paragraph 2 (d), (e) and (f).

24 See UN Security Council Resolution 253 (1968), especially paragraph 3.

25 *Ibid*., especially paragraph 3 (d).

26 *Ibid*., especially paragraph 20. See on this committee, P.J. Kuyper, 'The Limits of Supervision: the Security Council Watchdog Committee on Rhodesian Sanctions', *Netherlands International Law Review,* Vol. 25 (1978), pp. 159-194.

mittees.[27] Nevertheless, the establishment of the Committee provided the Security Council with the opportunity to experiment with the implementation of sanctions by subsidiary bodies.

In subsequent years the Security Council adopted several resolutions building on the sanctions regime established in Resolutions 232 and 253. Unfortunately the sanctions were not particularly effective. Many countries, including Portugal and South Africa, continued to trade with the illegal white minority regime.[28] In 1979, the sanctions were finally lifted after a political solution to the situation had been reached and when Zimbabwe emerged as a newly independent State.[29]

Targets and addressees of the sanctions obligations

The sanctions regime against Southern Rhodesia targeted in particular the *de facto* government in that country, i.e., the illegitimate white minority regime. It was aimed at strengthening the efforts of the United Kingdom to end the illegal situation in its former colony in order to realise the right of the black majority in the country to self-determination pursuant to the UN Charter and the UN General Assembly's Decolonisation Declaration. In this way, the sanctions regime indirectly provided support not only to the United Kingdom, but also to armed groups within the country opposing the political authorities.

The obligation to implement the sanctions was imposed on all States. In the first place, it was imposed on UN member States by Article 25 of the UN Charter. However, the resolutions also urged non-UN member States to implement the measures with a general appeal to the principles stated in Article 2 of the UN Charter.[30]

Appraisal of the sanctions regime

The sanctions regime imposed against Southern Rhodesia was the first time the Security Council adopted sanctions in order to apply economic pressure on an entity as a response to a threat to the peace. It did so in the first instance by imposing selective commodity sanctions. In this respect, it can be seen as a predecessor of later sanctions regimes, targeting particular commodities in order to restore international peace and security.

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27 *Ibid.*; and E. de Wet, A. Nollkaemper and P. Dijkstra (eds.), *Review of The Security Council by Member States*, Utrecht: Intersentia (2003), pp. 50-51.

28 See N.J. Schrijver, 'The Use of Economic Sanctions by the UN Security Council: An International Law Perspective', in Post, H.G.H. (ed.), *International Economic Law and Armed Conflict*, The Hague: Martinus Nijhoff Publishers (1994), p. 130.

29 See UN Security Council Resolution 460 (1979).

30 See UN Security Council Resolution 232 (1966), especially paragraph 7 and Resolution 253 (1968), especially paragraph 14. It must be remembered that Article 2(6) of the UN Charter states that the United Nations "shall ensure that states which are not Members of the United Nations act in accordance with [the] Principles [set out in Article 2 of the UN Charter] so far as may be necessary for the maintenance of international peace and security".

However, there are also important differences with later sanctions regimes. While the sanctions regime started with the imposition of selective sanctions, it soon became comprehensive. Furthermore, even the selective sanctions imposed by the Security Council in relation to Southern Rhodesia were rather blunt compared to later sanctions regimes. The Security Council simply targeted all primary export products from the Southern Rhodesian State, without examining their precise contribution to keeping the illegal minority regime in power.

Therefore the aim of the sanctions was simply to put pressure on the Rhodesian authorities by targeting all their sources of income. It did not take into account the impact of the commodity sanctions on the civilian population. The humanitarian exemptions introduced by the Security Council were not related to the commodity sanctions, as these were introduced only after the sanctions regime had become comprehensive.[31]

The sanctions regime imposed against Southern Rhodesia can therefore be considered as the first experiment of the Security Council with the instrument of economic sanctions. Arguably, the poor compliance of States with observing the sanctions constituted an important lesson for the Security Council. It laid the foundations for a more active role of the Security Council in the enforcement of sanctions applied subsequently in the sanctions regime imposed against Iraq in 1990.

7.3.2 The 661 Iraq Sanctions Regime

Structure and objectives of the sanctions regime

The sanctions regime against Iraq was imposed in 1990 after Iraq's unlawful invasion and occupation of neighbouring Kuwait.[32] Its original purpose was to put pressure on Iraq to withdraw from Kuwait and to restore Kuwait's sovereignty, independence and territorial integrity.[33] The measures imposed by the Security Council included a comprehensive import and export embargo, as well as an assets freeze.[34] Humanitarian exemptions were provided for medicines and health supplies, as well as essential foodstuffs strictly meant

31 See UN Security Council Resolution 253 (1968), especially paragraph 3(d).

32 For more details regarding this sanctions regime, see K. M. Manusama, *The United Nations Security Council in the post-cold war era : applying the principle of legality*, Leiden: Nijhoff (2006), pp. 138-149; J.M. Farrall, *United Nations Sanctions and the Rule of Law*, Cambridge: Cambridge University Press (2007), p. 261-281 and D. Cortright, G.A. Lopez and L. Gerber-Stellingwerf, 'Sanctions', in T.G. Weiss & S. Daws, *The Oxford Handbook on the United Nations*, Oxford,: Oxford University Press (2007), pp. 350-352. See also the report of the Dutch Commission of Inquiry upon Iraq, *Rapport Commissie van onderzoek besluitvorming Irak* (Commissie Davids), Amsterdam: Boom Publishers, p. 229-236.

33 See UN Security Council Resolution 661 (1990), second paragraph of the preamble.

34 *Ibid*., especially paragraph 3.

for the civilian population.[35] A Sanctions Committee was established to monitor the implementation of the sanctions.[36]

After Operation Desert Storm, the sanctions regime against Iraq was maintained but its purposes were modified to accommodate the new situation. The new objectives included the disarmament of Iraq and the creation of a fund to pay reparation for damage inflicted by Iraq during the Gulf War.[37] In addition, the exemptions from the export embargo were broadened to cover all foodstuffs submitted to a special committee under a "no objections procedure".[38] Furthermore, Resolution 687 (1991) provided specifically for the possibility of lifting the import embargo when Iraq fully complied with the requirements set out in the resolution.[39]

A further relaxation of the sanctions regime was realised with the adoption of the so-called Oil-for-Food programme, which allowed Iraq to export controlled quantities of oil in order to provide the population with the basic means of subsistence.[40] States wishing to import oil from Iraq were to ask the 661 Sanctions Committee to approve each individual purchase,[41] and payment was to be made to an escrow account established by the Secretary-General exclusively to meet the purposes of Resolution 986 (1995).[42]

The responsibility for the distribution of humanitarian goods to the civilian population was left with the government of Iraq, provided that Iraq effectively guaranteed an equitable distribution of goods to every sector of the Iraqi population throughout the country.[43] However, an exception was made for three provinces in northern Iraq, where the UN would resume responsibility for the distribution of humanitarian goods.[44]

The Oil-for-Food programme was revised once more in Resolution 1409 (2002), which introduced a Goods Review List. The new scheme allowed all

35 *Ibid.*, especially paragraph 3 (c).
36 *Ibid.*, especially paragraph 6.
37 See UN Security Council Resolution 686 and 687 (1991). Reference is made in particular to Iraq's liability for environmental damage and the depletion of natural resources as a result of the setting on fire of Kuwaiti oil wells by Iraq during the conflict. See UN Security Council Resolution 687 (1991), especially paragraph 16.
38 See UN Security Council Resolution 687 (1991), especially paragraph 20. The committee is further referred to as "the 661 sanctions committee".
39 These requirements include the destruction, removal or rendering harmless of chemical and biological weapons as well as a prohibition to acquire or develop nuclear weapons. See UN Security Council Resolution 687 (1991), especially paragraphs 7-14 and 22.
40 This was a concession to the government of Iraq, which had not accepted the original proposal for an Oil-for-Food-Programme as envisaged by the Security Council. The original proposal, set out in UN Security Council Resolutions 706 (1991) and 712 (1991), granted full control over the sale of Iraqi oil to the United Nations.
41 See UN Security Council Resolution 986 (1995), especially paragraph 1(a).
42 *Ibid.*, especially paragraphs 1 (b), 7 and 8.
43 *Ibid.*, preamble and especially paragraph 8 (a) (ii).
44 *Ibid.*, especially paragraph 8 (b).

goods to be exported to Iraq, except those listed in the Goods Review List.[45] The programme and the sanctions regime ended shortly after the fall of the Hussein regime in 2003.[46]

Targets and addressees of the sanctions obligations

The sanctions regime against Iraq targeted the government of Iraq. Although it originally also comprised products from Kuwait, it was adjusted as soon as Kuwait was liberated from Iraqi occupation in early 1991. Furthermore, like the regime against Southern Rhodesia, all States, including non-member States of the United Nations, were requested to implement the regime.[47]

However, the most notable feature of the sanctions regime was the role of international organizations in the implementation of the sanctions. Even at an early stage, international organizations were expressly called upon to implement the arms embargo.[48] The role of United Nations organs – in particular of the Sanctions Committee and the Secretary-General – is the most significant with regard to implementing the commodity-related sanctions. The responsibilities of the Sanctions Committee established pursuant to Resolution 661 (1990) to monitor the implementation of the sanctions included monitoring the export of oil from Iraq.[49] The Secretary-General was also requested to open an escrow account for the administration of the oil revenues and to appoint independent and certified public accountants to audit the account.[50]

The account was to be used by the United Nations for several purposes, inter alia, for the provision of humanitarian relief to the Iraqi population, and to ensure reparation for the damage caused by Iraq to Kuwait during the first Gulf War. In this respect it is interesting to note that in addition to damage caused to Kuwaiti assets, Iraq was also held liable for the depletion of natural resources and environmental damage resulting from its unlawful invasion and occupation of Kuwait. For this reason, a special compensation fund was established, supervised by the United Nations Compensation Commission.[51]

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45 See UN Security Council Resolutions 1409 (2002) and 1382 (2001). For the Goods Review List, see *UN Doc. S/2002/515*.

46 See UN Security Council Resolution 1483 (2003), especially paragraphs 10 and 16.

47 See UN Security Council Resolution 661 (1990), para. 5.

48 See *e.g.* UN Security Council Resolution 687 (1991), especially paragraph 25.

49 See UN Security Council Resolutions 986 (1995), especially paragraph 6.

50 *Ibid.*, especially paragraph 7. For more details on the administration of the escrow account, see Memorandum of understanding between the Secretariat of the United Nations and the Government of Iraq on the implementation of Security Council Resolution 986 (1995), *UN Doc. S/1996/356* of 20 May 1996.

51 For more details, see O. Elias, 'Sustainable Development, War Reparations and Environmental Damage', in M. Fitzmaurice and M. Szuniewicz, *Exploitation of Natural Resources in the 21st Century*, The Hague: Kluwer Law International (2003), pp. 67-90 and N.J. Schrijver, *Development without Destruction: The UN and Global Resource Management*, United Nations Intellectual History Project Series, Bloomington and Indianapolis, Indiana University Press (2010), pp. 179-180.

Appraisal of the sanctions regime

The sanctions regime in Iraq is an example of a comprehensive sanctions regime. However, as in the case of Southern Rhodesia, specific exemptions to the sanctions regime were provided for humanitarian purposes. Interestingly, these exemptions related to the export of oil, a conflict-sustaining commodity. This was done through the Oil-for-Food programme, which was aimed at mitigating the negative effects of the sanctions on the Iraqi population and ensuring that the Iraqi population had the basic means of subsistence at its disposal.

One interesting aspect of the sanctions regime against Iraq as it evolved is that it upheld the sovereignty and territorial integrity of Iraq, as well as the principle of permanent sovereignty over natural resources.[52] The Oil-for-Food programme permitted the Iraqi government to export small quantities of oil in order to provide the Iraqi population with the basic means of subsistence. This was not a deliberate choice, but one dictated by political reality. Saddam Hussein refused to accept the scheme unless he retained a minimum of control over the oil resources.

Another interesting aspect of the sanctions regime against Iraq is that it was the first to envisage an active role for the United Nations in the management of natural resources as part of conflict resolution. Although watered down to accommodate the wishes of Saddam Hussein, the sanctions regime still assigned a significant role to the UN. The UN assumed full responsibility for the administration of the revenues obtained from the export of oil from Iraq. A special fund was created for this purpose, which was maintained even after the sanctions regime was lifted as a result of the removal of the Saddam Hussein regime. It was then renamed "Development Fund for Iraq" and its administration was placed in the hands of the Central Bank of Iraq, monitored by representatives of the UN, the IMF, the Arab Fund for Social and Economic Development and the World Bank.[53]

Arguably, the sanctions regime proved to be instrumental in removing the threat posed by Iraqi weapons of mass destruction.[54] The best proof of this was delivered in 2003 after the US-led invasion of Iraq. Despite the suspicions that Iraq had a vast arsenal of weapons, no such weapons were actually found. However, it remains unclear in what way the sanctions contributed to this result. Were the sanctions successful because they curtailed Saddam Hussein's ability to stockpile weapons of mass destruction or were they successful in compelling Iraq to comply with the conditions set out in Resolution

52 See, *e.g.*, UN Security Council Resolutions 986 (1995), fifth preambular paragraph, which makes a general reference to the sovereignty and territorial integrity of Iraq.

53 See UN Security Council Resolution 1483 (2003), especially paragraph 12.

54 See G. Cortright; G.A. Lopez & L. Gerber-Stellingwerf, 'Sanctions', in T.G. Weiss & S. Daws, *The Oxford Handbook on the United Nations*, Oxford: Oxford University Press (2007), p. 351. For a different view, see the Report of the Dutch Committee of Inquiry on Iraq (Commissie Davids). This report signals the problem of sanctions busting by States.

687 (1991) for the removal of the sanctions, which included the destruction of the existing arsenal of weapons of mass destruction?

The administration of the Oil-for-Food programme by the UN proved problematic. An Independent Inquiry Committee, established to assess the performance of the UN in this respect, issued a very critical report in 2005 regarding the UN's management of Iraqi oil. The Inquiry Committee found gross irregularities in the administration of the oil proceeds. In addition, it concluded that the operational structure of the programme had several deficiencies, including a lack of clarity about the distribution of responsibilities for the implementation of the programme.[55] Other reports highlighted the manipulation of the Oil-for-Food programme by Saddam Hussein and the impact of the programme on the Iraqi population. All in all, the reports did not paint a rosy picture of the Oil-for-Food programme.[56]

Despite its many deficiencies, the Oil-for-Food programme served as an example for subsequent sanctions regimes. It was a precedent for the more active involvement of the United Nations, and especially of the Security Council, in the management of natural resources in the context of conflict resolution.

7.3.3 Comparing the sanctions regimes

The sanctions regime against Iraq, like the regime against Southern Rhodesia, targeted the behaviour of a State rather than non-state actors. However, the objective of the sanctions regime against Iraq differed significantly from that of the sanctions regime imposed against Southern Rhodesia. While the latter was aimed at resolving an essentially internal situation, *i.e.*, to bring the rebellion in Southern Rhodesia to an end,[57] the former was aimed first and foremost at reducing the threat of Iraq for other States.[58]

Another major difference concerns the operation of the sanctions regimes, in particular with respect to the role of commodities. In the case of Southern Rhodesia, the sanctions regime originally targeted selective commodities that supported the Rhodesian economy, but the measures themselves were all

55 See Independent Inquiry Committee into the United Nations Oil-for-Food Programme, The Management of the United Nations Oil-for-Food Programme, Report of the Committee, Vol. I (2005), in particular, pp. 60-62.

56 All reports are available through http://www.iic-offp.org/documents.htm (last consulted on 17 December 2012).

57 See UN Security Council Resolution 232 (1966), second paragraph of the preamble.

58 See UN Security Council Resolution 661 (1990), second paragraph of the preamble and Resolution 687 (1991), paragraph 24 of the preamble. However, it must be noted that Resolution 687 also mentions Iraq's threat to use chemical weapons amongst the reasons for imposing sanctions. This must be read against the background of Saddam Hussein's earlier attacks against the Kurdish population in the North.

inclusive. No exemptions were provided for humanitarian purposes. It was only after the regime became comprehensive that exemptions were provided, but these exemptions concerned the import into Rhodesia of humanitarian goods – including educational materials – and were unrelated to the targeted commodities. In contrast, the sanctions regime was comprehensive from the beginning in Iraq, but it did provide specific exemptions for humanitarian purposes for the export of oil, a conflict-sustaining commodity.

In other words, the sanctions regime in Iraq established a direct link between the sanctions themselves and exemptions to the regime. As shown in this chapter, this direct link between sanctions and exemptions became a characteristic of the approach developed by the Security Council in subsequent sanctions regimes. However, the sanctions regime imposed against Iraq also taught the Security Council some important lessons. The comprehensive regime might have been effective, but it also led to a humanitarian crisis in Iraq. For these reasons, the Security Council further refined its methods as part of its policy of "smart sanctions".[59]

7.4 SELECTIVE COMMODITY SANCTIONS

This section discusses sanctions regimes that have been imposed for specific natural resources which were believed to contribute directly to sustaining armed conflicts. Some of the decisions to impose sanctions against particular commodities were based on reports by investigative bodies, such as Panels of Experts and Monitoring Mechanisms established by the Security Council. However, public concern raised by campaigns by NGOs such as Global Witness and Partnership Africa Canada has also played a significant role in convincing the Security Council to take action in particular cases, notably in Angola and Sierra Leone. Finally, it is striking that in most situations, the Council's action was triggered by the national State itself requesting the Security Council to take measures targeting particular commodities.

59 Mention must be made in this respect to the Interlaken, Bonn and Stockholm processes which delivered the necessary input for the Security Council's policy reforms. On these processes, see the Watson's Institute background paper on targeted sanctions, available through <http://www.watsoninstitute.org/pub/Background_Paper_Targeted_Sanctions.pdf> (last consulted on 22 March 2013) as well as the white paper prepared by this same institute, entitled 'Strengthening Targeted Sanctions Through Fair and Clear Procedures', 30 March 2006, available through <http://watsoninstitute.org/pub/Strengthening_Targeted_Sanctions.pdf> (last consulted on 22 March 2013).

7.4.1 The 792 Cambodia Sanctions Regime

Structure and objectives of the sanctions regime

The sanctions regime imposed in relation to the conflict in Cambodia differs significantly from all other sanctions regimes discussed in this chapter. The most important difference is to be found in its legal basis. The sanctions regime imposed in relation to the conflict in Cambodia was not imposed by the Security Council itself. Rather, the Security Council expressed support for sanctions imposed by the national authorities of Cambodia. This explains also why the Security Council did not invoke Chapter VII of the UN Charter, which provides the legal basis for imposing sanctions.[60] Furthermore, the Security Council refrains from using hortatory language in relation to the measures regarding natural resources, which suggests that these measures are not legally binding on States. These choices are explained by the political background of the conflict.

The internal armed conflict in Cambodia started in the late 1960s. In 1975, the Khmer Rouge took over control and renamed the country "Democratic Kampuchea". The Khmer Rouge established a regime of terror and committed many international crimes.[61] In response to the brutalities committed by the Khmer Rouge regime against the Cambodian population, Vietnamese troops invaded the country in 1978 to assist Cambodian opposition forces to remove the brutal Khmer Rouge regime from power. In 1979, the opposition forces installed a new government and renamed the country "People's Republic of Kampuchea", while the ousted Khmer Rouge regime – together with two other resistance groups – formed the Coalition Government of Democratic Kampuchea.[62]

Vietnam's intervention in Cambodia created a difficult situation for the UN and the General Assembly was deeply divided on the issue. It finally adopted a resolution greatly regretting the Vietnamese armed intervention

60 It must be noted that the Security Council can only impose sanctions pursuant to Article 41 of the UN Charter, which is part of Chapter VII of the UN Charter. Obviously, the Security Council need not expressly invoke Chapter VII when it imposes sanctions. Moreover, the Security Council can also take binding decisions other than sanctions, either pursuant to Chapter VI or to Chapter VII of the UN Charter. As explained in Chapter 1, section 1.6.4, whether or not measures imposed by the Security Council are legally binding or not has to be determined through a careful analysis of the text of the resolution, its objectives and the context of its adoption.

61 These international crimes, including genocide and crimes against humanity, are currently being investigated by a hybrid criminal tribunal, set up by the UN and the Cambodian government. This tribunal is officially called the Extraordinary Chambers in the Courts of Cambodia for the Prosecution of Crimes Committed during the Period of Democratic Kampuchea.

62 For more details on the situation in Cambodia, see M. Vickery, *Cambodia 1975-82*, Boston, South End Press (1984).

and called for the immediate withdrawal of all foreign forces from Cambodia.[63] However, this resolution was adopted with 91 in favour, while 50 States voted against or abstained.[64] Meanwhile, the UN Security Council was paralysed due to serious tensions between China and the Soviet Union, both supporting their respective allies.[65] China, supported by the West, submitted two draft resolutions addressing the situation in Cambodia, calling on all parties to cease combat and to withdraw all foreign forces from Cambodia. Neither was put to the vote.[66]

This deadlock lasted until the end of the Cold War in 1989, when the five permanent members of the Security Council, together with all the Cambodian factions and the Association of Southeast Asian Nations, participated in a peace conference in Paris in order to resolve the Cambodian conflict.[67] This was the first of several meetings aimed at reaching a political settlement. In an unprecedented move, the five permanent members of the Security Council issued a statement in 1990 introducing the framework for the Cambodian peace process.[68] The framework consisted of five key elements necessary for the restoration of peace in Cambodia. These included transitional arrangements for the administration of Cambodia during the pre-election period, military arrangements during the transitional period, the preparation of elections under the auspices of the United Nations, and special measures to assure the protection of human rights.[69]

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63 UN General Assembly Resolution 34/22 of 14 November 1979, paragraph 2 of the preamble and especially paragraph 7.

64 See E. Benvenisti, *The International Law of Occupation*, Oxford: Oxford University Press (2013), pp. 185-187. In addition, R. Falk, 'The Complexities of Humanitarian Intervention: A New World Order Challenge', *Michigan Journal of International Law,* Vol. 17 (1995-1996), pp. 504-505.

65 China supported the Coalition Government, while the Soviet Union supported the new government. Tensions ran extremely high when China invaded Vietnam on 17 February 1979 as a countermeasure to Vietnam's foreign politics, including its invasion of Cambodia. Chinese troops withdrew a month later. For more details on this conflict and on the difficult relationship between China and Vietnam during these years, see K.C. Chen, *China's War With Vietnam, 1979: Issues, Decisions, and Implications*, Stanford University, Hoover Institution Publication 357 (1987).

66 See *Repertoire of the Practice of the Security Council 1975-1980*, Chapter XI, p. 396.

67 See L. Keller, 'Cambodia Conflicts (Kampuchea)', *Max Planck Encyclopedia of Public International Law*, Max Planck Institute for Comparative Public Law and International Law, Heidelberg and Oxford University Press (2012), para. 12.

68 Letter dated 30 August 1990 from the Permanent Representatives of China, France, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland and the United States of America to the United Nations Addressed to the Secretary-General, *UN Doc. A/45/472 and S/21689*, 31 August 1990. For more details on the Paris Agreements, see S.R. Ratner, 'The Cambodia Settlement Agreements', *American Journal of International Law,* Vol. 87, No. 1 (Jan., 1993), pp. 1-41.

69 For more details, see the Letter dated 30 August 1990 from the Permanent Representatives of China, France, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland and the United States of America to the United Nations

The framework document also outlined two important institutional arrangements. The first was the establishment of a Supreme National Council of Cambodia (SNC), consisting of all the Cambodian factions, as the legitimate representative of Cambodia.[70] The second was the proposal to increase the role of the United Nations in the peace process with the establishment of a United Nations Transitional Authority in Cambodia (UNTAC), comprising a military and civilian component.[71] After being accepted by the Cambodian factions, the Security Council adopted Resolution 668 (1990) in which it endorsed the framework and welcomed the commitment of the Cambodian parties to work together with the participants of the Paris conference to elaborate the framework for a comprehensive political settlement.[72] This led to the signing of the Paris Peace Agreements in 1991.

Despite the progress made in many fields, the peace process proved cumbersome. One of the major factions, the Khmer Rouge, withdrew from the peace process and continued fighting. It financed its activities by issuing timber concessions to Thai logging companies and by smuggling gems.[73] The Security Council repeatedly stressed the need for all the factions to comply with the peace agreements, but it did not take any further action.[74]

It was only after the SNC adopted a moratorium on the export of logs from Cambodia to put pressure on the Khmer Rouge that the Security Council took further action, although, as stated above, without invoking Chapter VII of the UN Charter. In Resolution 792 (1992), the Security Council expressed support for the moratorium. It also requested other States to respect the moratorium by not importing logs from Cambodia and requested UNTAC to take appropriate

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Addressed to the Secretary-General, *UN Doc. A/45/472 and S/21689*, 31 August 1990.

70 See the Letter dated 30 August 1990 from the Permanent Representatives of China, France, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland and the United States of America to the United Nations Addressed to the Secretary-General, *UN Doc. A/45/472 and S/21689*, 31 August 1990, Section 1 on transitional arrangements regarding the administration of Cambodia during the pre-election period.

71 See the Letter dated 30 August 1990 from the Permanent Representatives of China, France, the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland and the United States of America to the United Nations Addressed to the Secretary-General, *UN Doc. A/45/472 and S/21689*, 31 August 1990, Section 2 on military arrangements during the transitional period. For more details on UNTAC's mandate and its role in the peace process, see, *e.g.,* S.R. Ratner, 'The Cambodia Settlement Agreements', *American Journal of International Law* Vol. 87, No. 1 (Jan., 1993), pp. 1-41; C. Stahn, *The Law and Practice of International Territorial Administration: Versailles to Iraq and Beyond*, Cambridge Studies in International and Comparative Law, Cambridge [etc.]: Cambridge University Press (2008), pp. 269-279; and J. Dobbins et al, *The UN's Role in Nation-Building : From the Congo to Iraq*, Santa Monica, California [etc.] : RAND Corporation (2005), pp. 69-91.

72 UN Security Council Resolution 668 (1990), especially paragraphs 1 and 3.

73 See P. Le Billon & S. Springer, 'Between War and Peace: Violence and Accommodation in the Cambodian Logging Sector', in W. de Jong, D. Donovan, and K. Abe (eds.), *Extreme Conflict and Tropical Forests*, New York: Springer (2007), p. 24.

74 See *e.g.* UN Security Council Resolution 766 (1992), especially paragraph 2; Resolution 783 (1992), paras. 5 and 6.

measures to ensure the implementation of the moratorium.[75] In addition, the Council requested the SNC to adopt a similar moratorium on the export of minerals and gems – another important source of income for the Khmer rouge rebels – "in order to protect Cambodia's natural resources".[76]

Despite the non-mandatory nature of these measures, a number of countries followed suit by imposing import embargos on logs from Cambodia. In addition, UNTAC took several measures to implement the moratorium, including the deployment of border control teams to monitor violations of the moratorium on the export of logs by land or sea and by raising the number of its checkpoints along the Cambodia-Thailand border.[77] Subsequently the SNC adopted a moratorium on minerals and gems, as requested by the Security Council.

The Security Council commended the decision of the SNC to adopt the moratorium on minerals and gems in its Resolution 810 (1993). It also commended the SNC on its decision to consider limits to the export of sawn timber from Cambodia in order to protect its natural resources.[78] Furthermore, it expressed support for steps taken by the Technical Advisory Committee on Management and Sustainable Exploitation of Natural Resources established by UNTAC to implement these measures.[79]

These were the last references made by the Security Council to natural resources. Subsequent resolutions relating to Cambodia focused on the elections that were organized. After the establishment of a democratically elected government in Cambodia, the Security Council ended the peacekeeping mission with Resolution 880 (1993).

Targets and addressees of the sanctions

The commodity measures clearly targeted the Khmer Rouge because of its failure to cooperate in the peace process. However, in practice the scope of the sanctions was broader. The measures did not distinguish between natural resources traded by the Khmer Rouge and natural resources traded by the government. Instead, the measures banned all round logs, minerals and gems originating from Cambodia. In this respect, they were rather blunt. In subsequent sanctions regimes, including those for Angola, Sierra Leone and Liberia, the Security Council refined its commodity measures in more detail.

The commodity measures were addressed to States. They were to respect the moratorium imposed by the SNC. In addition, the Security Council assigned

75 UN Security Council 792 (1992), especially paragraph 13.
76 *Ibid.*, especially paragraph 14.
77 *Yearbook of the United Nations* 1993, p. 363.
78 UN Security Council Resolution 810 (1993), especially paragraph 16 read in conjunction with the sixth paragraph of the preamble.
79 UN Security Council Resolution 810 (1993), especially paragraph 16. For more details on this Advisory Committee, see J. Dobbins et al., *The UN's Role in Nation-Building: From the Congo to Iraq*, Santa Monica, California [etc.]: RAND Corporation (2005), p. 87.

an important role to UNTAC, the peacekeeping mission operating in Cambodia, to take appropriate measures to secure the implementation of the moratorium.[80] This is the first time that a peacekeeping mission received an express mandate to assist in implementing measures related to natural resources.[81]

Appraisal of the sanctions regime

The Security Council resolutions related to the Cambodian conflict were remarkable in several respects. For the first time the Security Council focused directly on those commodities that were primarily associated with the funding of an armed conflict. Secondly, the resolutions related to Cambodia were the first to target a non-state armed group rather than a State.

Another remarkable aspect concerns the references in the Security Council's resolutions to the protection of Cambodia's natural resources as a reason for the measures.[82] This is the only occasion on which the Security Council has based the adoption of commodity measures on the need to protect natural resources for their intrinsic value.

Furthermore, none of the resolutions adopted by the Security Council to address the situation in Cambodia invoked Chapter VII of the UN Charter. This was not only the case for the resolutions containing commodity measures, but for all the resolutions adopted to further the Paris Peace Agreements. It seems that the legal basis for the measures of the Security Council in relation to Cambodia, which includes binding as well as non-binding measures, was Chapter VI of the UN Charter rather than Chapter VII. The Security Council was enacting its role as facilitator and adjudicator in the pacific settlement of disputes, rather than its role as guardian of collective security.

These facilitating and adjudicating roles characterised the approach of the Security Council throughout the resolution of the Cambodian conflict. During the entire peace process, the Security Council struck a careful balance between collective UN action in the form of a peace support mission and local ownership of the peace process through the establishment of the Supreme National Council of Cambodia. This is reflected in the mandate of UNTAC, which was based on the SNC delegating the UN "all powers necessary to ensure the implementation" of the peace agreement.[83] In other words, the mandate of UNTAC was not based on the exercise of mandatory powers under the UN Charter but on State consent.

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80 UN Security Council 792 (1992), especially paragraph 13.

81 For an excellent overview of peacekeeping missions with a mandate including natural resources, see UNEP, 'Greening the Blue Helmets Environment, Natural Resources and UN Peacekeeping Operations', Part II (2012).

82 UN Security Council 792 (1992), especially paragraph 14; UN Security Council Resolution 810 (1993), especially paragraph 16 read in conjunction with the sixth paragraph of the preamble.

83 Article 6 of the Paris Peace Agreement.

The commodity measures should also be considered in this context. Rather than imposing sanctions itself, the Security Council supported measures taken at the national level; the measures were not imposed from the "outside" but from the "inside". The reason for the Security Council to proceed in this way must be attributed to a large extent to ideological differences between the permanent members regarding the Cambodian conflict. These ideological differences prevented the Security Council from taking firmer action. China, for example, abstained from voting in favour of Resolution 792 (1992) because it feared that the commodity measures laid down in the resolution would destroy the already very fragile peace process by alienating the Khmer Rouge faction from it.[84] These considerations explained the Council's decision not to impose mandatory commodity sanctions in relation to Cambodia.

However, this decision could also explain why the logging embargo was not particularly effective. The non-mandatory nature of the commodity measures did not sufficiently convince neighbouring countries, particularly Thailand, to follow suit. It was until 1995 that Thailand finally closed its borders to logs originating from Cambodia. Once it did, the effects on the military capacity of the Khmer Rouge became immediately clear. The logging embargo considerably weakened them. However, it still took years before their resistance was finally broken down. Although the logging embargo did significantly reduce the Khmer Rouge's military capability, small groups remained active until the early 2000s.[85]

7.4.2 The 864 UNITA Sanctions Regime

The structure and objectives of the sanctions regime

The sanctions regime imposed in relation to the conflict in Angola was intended to put an end to the civil war between the Angolan government and the National Union for the Total Independence of Angola (UNITA) that had devastated the country since its independence in 1975.[86] During most of the conflict, the country had been trapped by the rivalry between the Cold War powers, with the United States financing UNITA and the Soviet Union backing the Angolan government. After the end of the Cold War, with revenues drying

84 Resolution 792 did not only express support for the moratorium on logs, but also contained a call on States to prevent the supply of petroleum products to Khmer Rouge occupied areas (para. 10). China feared that the adoption of such measures "would further increase differences and sharpen contradictions, and thus could lead to new, complicated problems". See *Yearbook of the United Nations* 1992, p. 259.

85 See P. Le Billon & S. Springer, 'Between War and Peace: Violence and Accommodation in the Cambodian Logging Sector', in W. de Jong, D. Donovan, and K. Abe (eds.), *Extreme Conflict and Tropical Forests*, New York, Springer (2007), pp. 17-36.

86 For more details regarding this sanctions regime, see J.M. Farrall, *United Nations Sanctions and the Rule of Law*, Cambridge: Cambridge University Press (2007), pp. 334-344.

up, the parties found new ways of financing their armed struggle in revenues generated from the extraction of natural resources such as oil and diamonds.[87]

Nevertheless, when the Security Council imposed a sanctions regime in 1993 to compel UNITA to cooperate with the implementation of the peace agreements concluded two years earlier with the Angolan government, the sanctions regime did not cover natural resources.[88] Furthermore, when the Security Council imposed additional measures on UNITA in 1997, it did not address the trade in natural resources to fund the armed conflict.[89]

It was not until 1998 that the Security Council decided, as part of a larger package of financial and representative sanctions, to directly target the trade in natural resources. In Resolution 1173 (1998), the Security Council decided to impose an embargo on "all diamonds that are not controlled through the Certificate of Origin regime of the [Angolan government]", as well as a prohibition against selling or supplying mining equipment to persons or entities in "areas of Angola to which State administration has not been extended".[90] The diamond embargo was the first of its kind in the history of the Security Council.

Following reports on States' violations of the sanctions on arms, petroleum and diamonds, particularly by African and Eastern European countries, the Security Council decided to establish a panel of experts, under the chairmanship of Robert Fowler, to look into the matter.[91] This panel of experts investigated the alleged violations of the sanctions regime in great detail, outlining the involvement of several African and European States in busting the arms and petroleum sanctions. In relation to diamonds, the Panel came to the damning conclusion that the "extremely lax controls and regulations governing the Antwerp market facilitate and perhaps even encourage illegal trading activity".[92]

The Panel also issued several recommendations, including some with regard to diamonds. It considered that possibilities should be explored to devise a

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87 See K. Ballentine and J. Sherman (ed.), *The Political Economy of Armed Conflict: Beyond Greed and Grievance*, (2003), Boulder: Lynne Rienner Publishers, pp. 23–24.

88 In Resolution 864 (1993), the Security Council decided under Chapter VII that all States were to prevent the sale or supply to UNITA of weapons and related materiel as well as of petroleum and petroleum products. See UN Security Council Resolution 864 (1993), especially paragraphs 16 and 19.

89 Resolution 1127 (1997) complemented the sanctions regime with travel and aviation sanctions and further provided for additional measures to be taken against UNITA if it failed to implement its obligations under the Lusaka Protocol and relevant Security Council Resolutions.

90 UN Security Council Resolution 1173 (1998), especially para. 12(b) and (c). The diamond embargo was brought in effect through UN Security Council Resolution 1176 (1998).

91 UN Security Council Resolution 1237 (1999), especially paragraph 6. This panel of experts was formally replaced by a monitoring mechanism consisting of a maximum of five experts. See UN Security Council Resolution 1295 (2000).

92 Report of the Panel of Experts on Violations of Security Council Sanctions against UNITA, 10 March 2000, *UN Doc. S/2000/203*, paragraph 87.

system of controls "that would allow for increased transparency and accountability in the control of diamonds from the source of origin to the bourses". In addition, the panel recommended that "the diamond industry develop and implement more effective arrangements to ensure that its members worldwide abide by the relevant sanctions against UNITA".[93]

The Fowler Report was an important trigger for further developments to curtail the trade in "conflict diamonds". First of all, the Report's policy of naming and shaming, viz. the explicit identification of particular States and companies as sanctions busters, was an important motivation for these States and companies to stop trading with UNITA, thus depriving UNITA of its funding.[94] Secondly, it inspired the creation of an international certificate system for rough diamonds, the Kimberley Process for the Certification of Rough Diamonds.[95]

In its Resolution 1295 (2000), the Security Council implicitly endorsed the recommendations of the Panel of Experts. It also emphasised that the implementation of the diamond embargo required "an effective Certificate of Origin regime" and welcomed steps towards devising a more comprehensive system of controls, "including arrangements that would allow for increased transparency and accountability in the control of diamonds from their point of origin to the bourses".[96] In this respect the Council explicitly referred to the first meeting that led to the adoption of the Kimberley Process Certification Scheme in 2002, which was scheduled to be held in May 2000 in Kimberley, South Africa.

In the same resolution the Security Council established a "Monitoring Mechanism" to replace the Panel of Experts. This body published a total of six reports, disclosing in great detail the structures for the mining of and trading in diamonds from UNITA-controlled regions.[97] One of the principal contributions of the reports is that they helped to provide an understanding of the methods used by UNITA to circumvent the Security Council sanctions regarding rough diamonds. Together with the report of the Panel of Experts, the reports of the Monitoring Mechanism contributed greatly to the design of more effective Certificate of Origin regimes.

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93 *Ibid*., paragraphs 113 and 114.

94 See I. Winkelmann, 'Angola', in R. Wolfrum (ed.), *Encyclopedia of Public International Law*, Max Planck Institute for Comparative Public Law and International Law, Oxford: Oxford University Press (2012), Vol. I, pp. 400-408, para. 26.

95 The Kimberley Process is discussed in more detail in the following chapter. It can be noted here that the Kimberley Process is a voluntary certification regime for rough diamonds, developed by States, civil society and the diamond business in order to address the issue of diamonds used by armed groups to fuel conflicts.

96 UN Security Council Resolution 1295 (2000), especially paragraphs 16-19. For the Kimberley Process Certification Scheme, see the following chapter.

97 For the reports of the Monitoring Mechanism, see Documents Relating to the Committee Established Pursuant to Resolution 864 (1993) Concerning the Situation in Angola.

The sanctions regime finally came to an end in December 2002, when UNITA started to cooperate with the implementation of the peace accords.[98] By then the national certificate of origin had been replaced by membership of Angola to the Kimberley Process Certification Scheme. The introduction of this scheme, backed by relevant Security Council resolutions, together with the Fowler's report policy of naming and shaming, can be regarded as important factors that contributed to weakening UNITA, leading to the solution of the conflict.

Targets and addressees of the sanctions obligations

The sanctions regime was adopted at the request of the Angolan government and consisted entirely of measures imposed against UNITA.[99] It was the first sanctions regime to directly target a non-state actor pursuant to Chapter VII of the UN Charter. The reason for imposing sanctions on UNITA was because it was failing to implement the peace accords concluded between UNITA and the Angolan government. After losing the democratic elections held following the peace accords which were concluded in 1991, UNITA continued to fight the government. A second peace agreement concluded in 1994, the Lusaka Protocol, did not change the situation in any way. The sanctions regime was intended to put pressure on UNITA to cooperate in reaching a political settlement to the conflict in Angola, *inter alia*, by curtailing its ability to pursue its objectives by military means.

The Security Council measures adopted in relation to diamonds addressed a variety of actors. Obviously States were the primary addressees responsible for the implementation of the sanctions and also the only entities that were addressed in mandatory terms. According to Resolution 1173 (1998), States were to take "the necessary measures" to prohibit the "direct or indirect import" of Angolan diamonds to their territory.[100]

In order to make the diamond embargo more effective, the Security Council, called upon States in Resolution 1295 (2000), "to cooperate with the diamond industry to develop and implement more effective arrangements" to ensure that members of the diamond industry worldwide abide by the embargo against UNITA. The Security Council also addressed the diamond industry, though mainly to invite the Belgian High Diamond Council to continue its efforts to work with the Sanctions Committee and States in order to "devise practical measures to limit access by UNITA to the legitimate diamond market".[101]

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98 See UN Security Council Resolution 1448 (2002).

99 *Repertoire of the Practice of the Security Council* (1993-1995), Chapter XI, 'Consideration of the provisions of Chapter VII of the Charter, Part III on Article 41, section B, Case 4', available through <http://www.un.org/en/sc/repertoire/>. See also *UN Doc. S/PV.3277* of 15 September 1993 for the speech of the Angolan government representative at the Security Council on the occasion of the adoption of Resolution 864 (1993).

100 UN Security Council Resolution 1173 (1998), especially paragraph 12(b).

101 UN Security Council Resolution 1295 (2000), especially paragraph 17.

Appraisal of the sanctions regime

The sanctions regime adopted in relation to Angola is special for several reasons. It is the first in a series of sanctions regimes addressing the trade in rough diamonds from conflict regions. It is also the first sanctions regime in which the Security Council experimented with commodity sanctions targeting specific entities, in the sense that the commodity sanctions targeted only the trade in diamonds by rebel groups and not by the Angolan authorities. Such a distinction was made possible by the use of a certificate of origin regime to provide exemptions to the sanctions. This is an innovation compared with the sanctions regime adopted in relation to Cambodia, which had also targeted one particular commodity, but the moratorium on round logs had extended to all logs originating from Cambodia, whether exported by the Khmer Rouge or by the Cambodian authorities.

Furthermore, the sanctions regime against UNITA can be seen as a catalyst for the Security Council's structural approaches to curbing the illicit flow in natural resources. The problem of diamond smuggling in contravention of the Angolan sanctions regime motivated the Security Council to look beyond its own powers and search for alternative solutions to address the problem. The Council's endorsement of the proposal to convene a meeting of experts in Kimberley, South Africa to devise "a system of controls […] including arrangements that would allow for increased transparency and accountability in the control of diamonds from their point of origin to the bourses" should be seen in this light.[102] This was a first – cautious – movement towards what later became the Kimberley Process for the Certification of Rough Diamonds.

The last point of interest is that the Council set explicit requirements for a system of controls for rough diamonds. In this respect, the Security Council mentioned the elements of effectiveness, transparency and accountability.[103] The Kimberley meeting in 2000 explicitly referred to these requirements.[104] Moreover, the Angolan sanctions regime set an example for all subsequent sanctions regimes relating to the trade in particular commodities, which all draw on these requirements of effectiveness, transparency and accountability. The following sections show that the Security Council has continued to develop and refine criteria for the management of natural resources from conflict regions.

102 *Ibid*., especially paragraph 18.

103 *Ibid*., especially paragraphs 16 and 18.

104 See Kimberley Process, Third Year Review, November 2006, p. 12, available through http//www.kimberleyprocess.com (last consulted on 20 December 2012).

7.4.3 The 1132 Sierra Leone Sanctions Regime

Structure and objectives of the sanctions regime

The 1132 sanctions regime imposed in relation to the conflict in Sierra Leone aimed to put pressure on the military junta which had taken over power there following a coup d'état in 1997, to restore the democratically elected government.[105] The military junta was composed of two rebel groups, the Armed Forces Revolutionary Council (AFRC) and the Revolutionary United Front (RUF). The AFRC was a rebel group of soldiers of the Sierra Leonean army, set up in 1997 by Johnny Paul Koroma to take over power in Sierra Leone. The RUF was a rebel group sponsored by the Liberian Charles Taylor, which had spread terror throughout Sierra Leone since its establishment in 1991.[106]

The sanctions regime imposed under Resolution 1132 (1997) consisted of a travel ban, an arms embargo and a prohibition against exporting petroleum and petroleum products to Sierra Leone.[107] It did not comprise sanctions related to the import of natural resources from Sierra Leone, despite ample indications that diamonds constituted an important source of income for the rebel groups united in the military junta.[108] It was not until after the military junta had been driven from power by UN peacekeeping forces and the democratically elected government had been reinstated that the Security Council resorted to diamond sanctions, consisting of an import embargo on rough diamonds from Sierra Leone for all States.[109]

The embargo was based on Chapter VII of the UN Charter and was to be supervised by the Sanctions Committee established pursuant to Resolution 1132 (1997).[110] In addition, the Security Council called for an exploratory hearing to assess the role of diamonds in the Sierra Leone conflict and the link between the trade in Sierra Leone diamonds and the trade in arms and related *materiél* in violation of resolution 1171 (1998).[111] The Council also created a Panel of Experts, *inter alia*, to collect information on the link between

105 See UN Security Council Resolution 1132 (1997), paragraph 7 of the preamble and especially paragraph 1.

106 On 18 May 2012, the Trial Chamber of the Special Court for Sierra Leone sentenced Charles Taylor to a prison term of 50 years for its involvement in the armed conflict in Sierra Leone.

107 See UN Security Council Resolution 1132 (1997), especially paragraphs 5 and 6.

108 It was an NGO report, issued in January 2000 by the Canadian NGO Partnership Africa Canada (PAC), entitled *The Heart of the Matter: Sierra Leone, Diamonds, and Human Security*, that spurred the debate on Sierra Leone. A report issued in December 2000 by the Panel of Experts established pursuant to Security Council Resolution 1306 (2000) confirms that, at least from 1995 on, diamonds have been a major source of funding for the RUF. The report also shows that the AFRC, during its short reign, benefitted from the exploitation of natural resources as well. See the Report of the Panel of Experts appointed pursuant to Security Council Resolution 1306 (2000), paragraph 19, in relation to Sierra Leone of 20 December 2000, *UN Doc. S/2000/1195*, paras. 65-111.

109 See UN Security Council Resolution 1306 (2000), especially paragraph 1.

110 *Ibid*., especially paragraph 7.

111 *Ibid*., especially paragraph 12.

the trade in diamonds and the trade in arms, and to report on strengthening the implementation of the sanctions with observations and recommendations.[112] The Panel issued a report later that year, revealing in great detail the ways in which diamonds funded the activities of the RUF.[113]

The sanctions regime comprised all rough diamonds originating in Sierra Leone, but it exempted from the measures those rough diamonds controlled by the government of Sierra Leone with a certificate of origin regime to be set up by the government in cooperation with other States and relevant organizations.[114] As in the case of Angola, the Security Council required that the regime should be "effective".[115]

The diamond embargo was renewed twice before it was lifted in 2003 "in the light of the Government of Sierra Leone's increased efforts to control and manage its diamond industry and ensure proper control over diamond mining areas, and the Government's full participation in the Kimberley Process".[116] The arms embargo and the travel ban were maintained until 2010, when the Security Council finally terminated the sanctions regime, after the government of Sierra Leone had fully re-established its control over the territory, and when all non-governmental forces had been disarmed and demobilized.

Targets and addressees of the sanctions obligations

The sanctions regime generally prohibited the import of all rough diamonds originating from Sierra Leone, with an exception for diamonds of which the origin could be properly established with a Certificate of Origin. As subsequent reports by both the Sanctions Committee and the Panel of Experts showed,[117] the primary targets of the sanctions regime were non-state armed groups fighting against the government of Sierra Leone, in particular the Revolutionary United Front (RUF).[118]

112 *Ibid.*, especially paragraph 19.

113 See the Report of the Panel of Experts appointed pursuant to Security Council Resolution 1306 (2000), paragraph 19, in relation to Sierra Leone of 20 December 2000, *UN Doc. S/2000/1195*, paras. 65-111.

114 See UN Security Council Resolution 1306 (2000), especially paragraphs 2-5.

115 *Ibid.*, especially paragraph 2.

116 See Resolutions 1385 (2001) and 1446 (2002) for the extensions of the diamond sanctions and *UN Doc. SC/7778* of 5 June 2003 for the press statement by the president of the Security Council commenting upon the decision not to renew diamond sanctions against Sierra Leone.

117 See, *e.g.*, Report of the Panel of Experts appointed pursuant to Security Council Resolution 1306 (2000), paragraph 19, in relation to Sierra Leone, *UN Doc. S/2000/1195*, December 2000.

118 UN Security Council Resolution 1306 (2000) refers to a report of the Secretary-General recommending the Security Council to strengthen its sanctions regime by including "measures which would prevent RUF commanders from reaping the benefits of their illegal exploitation of mineral resources, in particular diamonds". Fourth Report of the Secretary General on the United Nations Mission in Sierra Leone, *UN Doc. S/2000/455* of 19 May 2000, para. 94.

The obligation to implement the sanctions was imposed on States. They were to take "the necessary measures to prohibit the direct or indirect import of all rough diamonds from Sierra Leone to their territory".[119] Furthermore, one novel feature of the sanctions regime was that other entities, including in particular the diamond industry, were to play an active role in devising structural approaches to solving the problem of conflict diamonds.

The Security Council therefore requested States, international organizations and other bodies, including representatives from the diamond industry, to provide assistance to the government of Sierra Leone to set up an effective Certification of Origin Regime and invited them to "offer assistance to the Government of Sierra Leone to contribute to the further development of a well-structured and well-regulated diamond industry that provides for the identification of the provenance of rough diamonds".[120]

Appraisal of the sanctions regime

The 1132 Sierra Leone sanctions regime resembles the 864 Angola regime in several respects. First, both sanctions regimes used diamond sanctions to stop the flow of revenues to a non-state armed group. In the case of Angola, the targeted group was UNITA; in the case of Sierra Leone, it was principally the RUF. In addition, both regimes exempted diamonds controlled by a Certificate of Origin Regime. Finally, both regimes welcomed the efforts of the diamond industry to devise practical solutions to the issue of conflict diamonds.

The 1132 Sierra Leone sanctions regime went a step further than the 864 Angola sanctions regime. Resolution 1306 explicitly encouraged the diamond industry "to work with the Government of Sierra Leone and the Committee to develop methods and working practices to facilitate the effective implementation of this resolution".[121] As noted by the United Kingdom upon the adoption of the resolution, this direct appeal to the diamond industry was an unusual feature of Resolution 1306.[122] Arguably, it shows the Security Council's growing awareness of the need to involve the business community in the implementation of sanctions.

In addition, the Security Council took the unprecedented step of calling for an exploratory hearing on the issue of diamonds in Sierra Leone, involving representatives of interested States and regional organizations, the diamond industry and other relevant experts. This was the first time the Security Council organized a hearing for the purpose of gaining a better understanding on an issue related to the perpetuation of an armed conflict. Moreover, the aim was not only to gain a better understanding of the causes of the conflict, but also

119 UN Security Council Resolution 1306 (2000), especially paragraph 1.
120 *Ibid*., especially paragraphs 3 and 11.
121 *Ibid*., especially paragraph 10.
122 See *UN Doc. S/PV.4168 (2000)*, p. 4: "The draft resolution is unusual in its direct appeal to the diamond trade."

to find solutions for the problem of diamonds funding it. The topics discussed at the hearing included the ways and means of developing a sustainable and well-regulated diamond industry in Sierra Leone.[123]

Another exceptional feature of the sanctions regime is that the Security Council established a Panel of Experts only after imposing the diamond sanctions. This implies that the decision of the Security Council to impose the diamond sanctions was based on information from third sources, including NGO reports.[124] The Council also acted on the request of the Sierra Leonean government, which had asked it to impose a trade embargo on Sierra Leonean diamonds as early as 1999.[125]

7.4.4 The 1343 Liberia Sanctions Regime

Structure and objectives of the sanctions regimes

The sanctions regime imposed in relation to Liberia by Resolution 1343 was the second sanctions regime to be imposed against Liberia. It immediately followed and replaced the first sanctions regime established in 1992 with the aim of ending the civil war between the government of Liberia and the National Patriotic Front of Liberia (NPFL), an opposition movement led by Charles Taylor.[126] When Charles Taylor took power in the country, this sanctions regime was terminated and replaced by the new 1343 sanctions regime.[127] While the previous sanctions regime had consisted only of an arms embargo, the new sanctions regime included diamond sanctions.

The aim of the 1343 sanctions regime was to address Liberia's support for the Sierra Leonean Revolutionary United Front (RUF) and other rebel groups operating in the West African region.[128] Therefore in Resolution 1343 (2001),

123 See the summary report along with observations from the Chairman on the exploratory hearing on Sierra Leonean diamonds, held on 31 July and 1 August 2000, Annex to *UN Doc. S/2000/1150* of 4 December 2000.

124 See notably the report released by the Partnership Africa Canada, *The Heart of the Matter: Sierra Leone, Diamonds, and Human Security*, January 2000.

125 See the remarks of the representative of Sierra Leone at the Council debate, which preceded the adoption of Resolution 1306 (2000) as well as the letter sent to the Council by the Sierra Leonean government, both identifying diamonds as a root cause of the conflict in Sierra Leone. See *UN Doc. S/PV.4168* of 5 July 2000 and *UN Doc. S/2000/641* of 28 June 2000.

126 See UN Security Council Resolution 788 (1992). For more details regarding this sanctions regime, see J.M. Farrall, *United Nations Sanctions and the Rule of Law*, Cambridge: Cambridge University Press (2007), pp. 316-319.

127 See UN Security Council Resolution 1343 (2001).

128 See the preceding section of this chapter and the Report of the Panel of Experts appointed pursuant to Security Council Resolution 1306 (2000), paragraph 19, in relation to Sierra Leone, UN Doc. *S/2000/1195* of December 2000. This report concluded that the illicit trade in Sierra Leonean diamonds through Liberia was not possible without the involvement of high Liberian officials. On 18 May 2012, the Trial Chamber of the Special Court for Sierra

the Security Council determined "that the active support provided by the Government of Liberia for armed rebel groups in neighbouring countries, and in particular its support for the RUF in Sierra Leone, constitutes a threat to international peace and security in the region".[129] In pursuance of Chapter VII of the UN Charter, the Security Council demanded that the government of Liberia "cease all direct or indirect import of Sierra Leone rough diamonds which are not controlled through the Certificate of Origin regime of the Government of Sierra Leone" and called upon the government "to establish an effective Certificate of Origin regime for trade in rough diamonds that is transparent and internationally verifiable".[130]

In addition, other States were to "take the necessary measures to prevent the direct or indirect import of all rough diamonds from Liberia, whether or not such diamonds originated in Liberia" and were called upon to "take appropriate measures to ensure that individuals and companies in their jurisdiction […] act in conformity with United Nations embargoes […] and, as appropriate, take the necessary judicial and administrative action to end any illegal activities by those individuals and companies".[131] Furthermore, the Security Council urged diamond-exporting countries in West Africa to adopt Certificate of Origin regimes for the trade in rough diamonds with the assistance of other States and of relevant international organizations and bodies.[132]

The supervision of these sanctions was assigned to a sanctions committee established by the same resolution.[133] In addition, the Security Council requested the Secretary-General to establish a Panel of Experts with the mandate to investigate, *inter alia,* violations of the sanctions and "possible links between the exploitation of natural resources and other forms of economic activity in Liberia, and the fuelling of conflict in Sierra Leone and neighbouring countries".[134]

In 2002, following two reports of the Panel of Experts which both concluded that the exploitation of timber provided the government of Liberia with large amounts of money used to provide support to the (former) RUF and other rebel

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Leone sentenced Charles Taylor to a prison term of 50 years for its involvement in the armed conflict in Sierra Leone.

129 UN Security Council Resolution 1343 (2001), paragraph 9 of the preamble.

130 *Ibid*., especially paragraphs 2 (c) and 15. For more information on the sanctions regime imposed in relation to the conflict in Sierra Leone, see the preceding section of this chapter.

131 *Ibid*.,, especially paragraph 6 and 21.

132 *Ibid*., especially paragraph 16.

133 *Ibid*., especially paragraph 14.

134 *Ibid*., especially paragraph 19.

groups,[135] the Security Council decided to extend the 1343 regime to include timber sanctions.

The first resolution adopted by the Security Council in this respect provided that "the active support provided by the Government of Liberia to armed rebel groups in the region, in particular to former Revolutionary United Front (RUF) combatants who continue to destabilize the region, constitutes a threat to international peace and security in the region".[136] In pursuance of Chapter VII of the UN Charter, the Council called upon the government of Liberia to "take urgent steps, including through the establishment of transparent and internationally verifiable audit regimes, to ensure that revenue derived by the Government of Liberia from the […] Liberian timber industry is used for legitimate social, humanitarian and development purposes".[137]

As this resolution had no effect on the Liberian government's practices, the Security Council adopted a second resolution that included the timber sanctions. Resolution 1478 (2003) considered that the government of Liberia had not demonstrated that the revenue derived from the Liberian timber industry "is used for legitimate social, humanitarian and development purposes, and is not used in violation of Resolution 1408 (2002)".[138] Therefore the Security Council decided in pursuance of Chapter VII that "all States shall take the necessary measures to prevent […] the import into their territories of all round logs and timber products originating in Liberia".[139]

In addition, in response to reports indicating that the sanctions targeting the transit of Sierra Leonean diamonds through Liberia had caused a reverse flow of Liberian rough diamonds being smuggled out of the country and into neighbouring certification schemes,[140] the Security Council reiterated its earlier call for the Liberian government to establish a Certificate of Origin regime for Liberian rough diamonds.[141] The Security Council explicitly called upon the Liberian government to bear in mind "the plans for the international certification scheme under the Kimberley Process" and proposed to exempt from the embargo those rough diamonds controlled by a transparent and internationally verifiable Certificate of Origin regime.[142]

135 Report of the Panel of Experts Pursuant to Security Council Resolution 1343 (2001), Paragraph 19, concerning Liberia, 17 October 2001, *UN Doc. S/2001/1015*, paras. 309-315 and 319-350; Report of the Panel of Experts Appointed Pursuant to Security Council Resolution 1395 (2002), paragraph 4, in relation to Liberia, 11 April 2002, UN Doc. S/2002/470, paras. 138-150.

136 UN Security Council Resolution 1408 (2002), paragraph 11 of the preamble.

137 *Ibid*., especially paragraph 10.

138 UN Security Council Resolution 1478 (2003), especially paragraph 16.

139 *Ibid*., especially paragraph 17 (a).

140 See the Report of the Panel of Experts appointed pursuant to Security Council Resolution 1395 (2002), paragraph 4, in relation to Liberia, UN Doc. *S/2002/470*, para. 136.

141 UN Security Council Resolution 1408 (2002), especially paragraph 7.

142 *Ibid*., especially paragraphs 7 and 8.

In a resolution adopted after the official launch of the Kimberley Process for the Certification of Rough Diamonds, the Security Council reiterated its appeal to the Liberian government to adopt a transparent and internationally verifiable Certificate of Origin Regime and also demanded that the regime be "fully compatible with the Kimberley Process".[143]

The 1343 sanctions regime was terminated later that year in response to political changes in Liberia, in particular the departure of President Taylor and the installation of a new transitional government. Nevertheless, in the light of the fragile situation in the country, the timber and diamond sanctions were brought under a new sanctions regime. As this sanctions regime had a completely different character, it is discussed in the following section.

Targets and addressees of the sanctions obligations

The 1343 sanctions regime was aimed at preventing the Liberian government from financing non-state armed groups, in particular the RUF. The sanctions regime directly addressed the government of Liberia led by Charles Taylor, which was held responsible for financing these rebel factions. Obviously the sanctions regime indirectly targeted the rebel factions sponsored by the Taylor government.

The responsibility for the implementation of the diamond and timber sanctions was placed first and foremost on States. All States were to implement the embargos on rough diamonds and round logs. Furthermore, in order to stop the busting of sanctions on diamonds originating from Liberia when they were smuggled to neighbouring countries, additional appeals were made to diamond-exporting countries in West Africa. These States were requested to adopt Certificate of Origin regimes for the trade in rough diamonds, assisted by other States and relevant international organizations and bodies. Except for providing assistance to States, the resolutions did not impose obligations on international organizations or non-state actors, such as civil society and corporations.

Appraisal of the sanctions regime

The 1343 sanctions regime addressed the role of a State in providing support to non-state armed groups. In this sense, the sanctions regime differs from earlier sanctions regimes imposed against States. The sanctions regimes against Southern Rhodesia and Iraq also targeted States, but primarily as parties to an armed conflict. In the case of Liberia, the link with an armed conflict is indirect. The sanctions regime was aimed at preventing the Liberian State from interfering in other conflicts in the region to which Liberia itself was not a party.

However, subsequent Panel reports concluded that the sanctions barely had any effect on the trade in diamonds and timber. This could partly explain

143 UN Security Council Resolution 1478 (2003), especially paragraph 13.

why the Security Council resorted to other initiatives to strengthen the effectiveness of the sanctions, especially to the Kimberley Process. In fact, it is interesting to note that the Security Council explicitly recognised the Kimberley Process Certification Scheme as the regime of preference for the certification of rough diamonds. This is a new development compared to the sanctions regimes adopted for Angola and Sierra Leone. Furthermore, as in the earlier sanctions regimes, the Security Council linked the adoption of a certification scheme to the lifting of sanctions.

The emphasis placed by the Security Council on the need to ensure that revenue derived by the Government of Liberia from the Liberian timber industry was used for legitimate social, humanitarian and development purposes was another interesting aspect.[144] The Security Council could have confined itself to addressing the link between timber and the fuelling of the armed conflict. However, the Security Council implicitly established a link between the timber sanctions and the obligation of a State to use its natural resources for national development and the well-being of the population, as a corollary to its right to exercise permanent sovereignty over its natural resources, thus going much further than the traditional context of peace and security. This link was confirmed in the subsequent sanctions regime in relation to Liberia, discussed below. Thus the Security Council showed that it is prepared to withhold respect for the principle of permanent sovereignty over natural resources if a State fails to respect the corollary obligation to use the natural resources for national development.

The final interesting aspect is related to the many references made by the Security Council to improvements in governance over natural resources. In relation to diamonds, the Security Council referred to an *effective* Certificate of Origin regime that is *transparent* and *internationally verifiable*. Similarly, in relation to the timber sanctions, the Security Council referred to the establishment of *transparent* and *internationally verifiable* audit regimes. In the latter case, these audit regimes served to introduce more general improvements in governance in the timber sector. In both cases, these improvements in governance were linked to the possibility of lifting sanctions. These references to effective, transparent and internationally verifiable regimes reveal a growing tendency of the Security Council to rely on improvements in governance over natural resources as an effective means to address the link between natural resources and armed conflicts.

144 UN Security Council Resolution 1408 (2002), especially paragraph 10.

7.4.5 The 1521 Liberia Sanctions Regime

Structure and objectives of the sanctions regime

Resolution 1521 (2003) ended the sanctions regime imposed against the government of Liberia for its support to rebel groups in the West African region and imposed a new one aimed at addressing the threat to international peace and security in West Africa posed by the proliferation of illegal arms financed with the illegal exploitation of timber and diamonds.[145] One of the aims of the sanctions regime was to assist the new transitional government of Liberia to regain control over the diamond and timber industries in order to stop these natural resources from fuelling armed conflict in the region.

Resolution 1521 (2003) was adopted under Chapter VII of the UN Charter. It included both diamond and timber sanctions. In relation to diamonds, the Security Council instructed all States "to take the necessary measures to prevent the direct or indirect import of all rough diamonds from Liberia to their territory, whether or not such diamonds originated in Liberia".[146] Furthermore, the resolution called upon the National Transitional Government of Liberia "to establish an effective Certificate of Origin regime for trade in Liberian rough diamonds that is transparent and internationally verifiable" and encouraged the government "to take steps to join the Kimberley Process as soon as possible".[147]

In relation to timber, Resolution 1521 (2003) stipulated that all States were to take the necessary measures "to prevent the import into their territory of all round logs and timber products originating in Liberia".[148] The Security Council also urged the government "to establish its full authority and control over the timber producing areas, and to take all necessary steps to ensure that government revenues from the Liberian timber industry are not used to fuel conflict or otherwise in violation of the Council's resolutions but are used for legitimate purposes for the benefit of the Liberian people, including development".[149] To this end, the Liberian government was encouraged "to establish oversight mechanisms for the timber industry that will promote responsible business practices, and to establish transparent accounting and auditing mechanisms".[150]

The Security Council called upon States, international organizations and other relevant bodies to offer assistance to the Liberian government to achieve the above-mentioned objectives, including assistance with regard to "the promotion of responsible and environmentally sustainable business practices

145 UN Security Council Resolution 1521 (2003), paragraphs 7 and 8 of the preamble.
146 *Ibid*., paragraph 6 of the preamble.
147 *Ibid*., especially paragraphs 7 and 9.
148 *Ibid*., especially paragraph 10.
149 *Ibid*., especially paragraph 11.
150 *Ibid*., especially paragraph 13.

in the timber industry",[151] in order to ensure that the diamond and timber sanctions could eventually be lifted.

In response to the Security Council's call to assist the Liberian government in achieving the objectives set for the timber industry, the United States, together with the World Bank, the International Monetary Fund, the European Commission, the International Union for the Conservation of Nature, the United Nations Food and Agriculture Organisation and several other international and non-governmental organizations set up the Liberia Forest Initiative (LFI). The aim of the LFI was to assist the Liberian government to adopt the necessary reforms in its forestry sector to allow for the sustainable and transparent management of its forest resources for the benefit of the Liberian population.[152]

The LFI programmes focused on every aspect of sustainable forest management, including the three internationally recognised components of sustainable forest management.[153] The economic component of forestry was addressed with a commercial forestry programme, the social component through a communal forestry programme, and the environmental component through a forest conservation programme. The LFI also addressed several interrelated issues, including governance-related issues. Thus the LFI can be considered to have adopted an integrated approach to forest management.

The Security Council expressed its support for the LFI in its subsequent resolutions. In Resolution 1579 (2004), the Security Council noted with some concern that "despite having initiated important reforms", the Liberian government had made only limited progress towards improving its governance of the timber industry.[154] It therefore encouraged the government to "intensify its efforts to meet these conditions, in particular by implementing the Liberia Forest Initiative and the necessary reforms in the Forestry Development Authority".[155]

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151 *Ibid*., especially paragraph 15.

152 For more information on this initiative, see the website of the UN Food and Agriculture Organization, at http://www.fao.org/forestry/lfi/en/ (last consulted on 16 August 2012). Also see S.L. Altman, S.S. Nichols and J.T. Woods, 'Leveraging High-Value Natural Resources to Restore the Rule of Law: The Role of the Liberia Forest Initiative in Liberia's Transition to Stability', in P. Lujala & S.A. Rustad (eds.), *High-Value Natural Resources and Post-Conflict Peacebuilding*, Oxon/New York: Earthscan (2012), pp. 337-365.

153 The Non-Legally Binding Instrument on All Types of Forests, *UN Doc. A/C.2/62/L.5*, of 22 October 2007 defines sustainable forest management in its Article III(4) as "a dynamic and evolving concept, [which] aims to maintain and enhance the economic, social and environmental values of all types of forests, for the benefit of present and future generations".

154 UN Security Council Resolution 1579 (2004), paragraph 11 of the preamble.

155 *Ibid*., especially paragraph 3. For more details on the Liberia Forest Initiative, see S.L. Altman, S.S. Nichols and J.T. Woods, 'Leveraging High-Value Natural Resources to Restore the Rule of Law: The Role of the Liberia Forest Initiative in Liberia's Transition to Stability', in P. Lujala & S.A. Rustad (eds.), *High-Value Natural Resources and Post-Conflict Peacebuilding*, Oxon/New York: Earthscan (2012), pp. 337-365.

The Security Council reiterated its call to the Liberian government to continue the implementation of the LFI and related reforms in subsequent resolutions. It added that these reforms would "ensure transparency, accountability and sustainable forest management".[156] Furthermore, the Security Council encouraged the Liberian government to implement the Governance and Economic Management Assistance Program (GEMAP) as a means to expedite the lifting of the sanctions.[157] This programme was initiated by the same organizations as the LFI in order to enhance transparency and accountability in Liberia's public administration, also in relation to the granting of natural resources concessions.[158] Reported irregularities in the granting of diamond concessions by the Liberian authorities, preventing Liberia's accession to the Kimberley Process,[159] had been a cause of concern and led to the launch of this programme.

The effective implementation of the proposed reforms by the Liberian government finally led to the lifting of the commodity sanctions. The timber sanctions were lifted in 2006 after extensive reforms of the forestry sector, including the adoption of legislation and the establishment of independent audits.[160] The diamond sanctions were lifted almost a year later, upon Liberia's accession to the Kimberley Process Certification Scheme.[161]

Targets and addressees of the sanctions regime

The 1521 sanctions regime principally targeted non-state armed groups threatening the peace process in Liberia and in the wider West African region. However, these armed groups were also represented in the newly established transitional government of Liberia.[162] This led to a rather paradoxical situation. On the one hand, the sanctions regime was set up to assist the new government to gain control over the timber industry and the diamond fields as part of the peace process, while on the other hand, the sanctions aimed to

156 UN Security Council Resolution 1607 (2005), especially paragraph 4; and Resolution 1647 (2004), especially paragraph 3(a).

157 See UN Security Council Resolution 1647 (2005), especially paragraph 4.

158 For more details on the GEMAP programme, see http://www.gemap-liberia.org (last consulted on 17 August 2012).

159 In this respect, see, *e.g.*, the Preliminary Report of the Panel of Experts on Liberia submitted pursuant to resolution 1579 (2004) (On Diamonds) of 17 March 2005, *UN Doc. S/2005/176*, in particular, paras. 17-24; and Report of the Panel of Experts on Liberia submitted pursuant to resolution 1579 (2004) of 13 June 2005, *UN Doc. S/2005/360*, paras. 97-119.

160 See UN Security Council Resolution 1689 (2006), especially paragraph 1.

161 UN Security Council Resolution 1753 (2007), paragraph 2 of the preamble and especially paragraphs 1-3.

162 The National Transitional Government of Liberia consisted of the former Government of Liberia, Liberians United for Reconciliation and Democracy (LURD) and the Movement for Democracy in Liberia (MODEL). See Resolution 1521 (2003), fourth paragraph of the preamble.

prevent members from that government using Liberian natural resources to fund their war effort.[163]

The burden of implementing the diamond and timber sanctions was placed on States. International organizations and other relevant bodies were assigned an additional role. Their role was not so much related to the implementation of the sanctions as it was to assist the government of Liberia to satisfy the criteria for the lifting of sanctions. Their responsibilities included providing assistance to set up a Certificate of Origin regime for diamonds and to promote responsible and environmentally sustainable business practices in the timber industry. For diamonds, this international action was coordinated mainly through the Kimberley Process for the Certification of Rough Diamonds, while for the timber industry action was coordinated mainly through the LFI programme.

Appraisal of the sanctions regime

The commodity sanctions in the 1521 sanctions regime served two distinct but interrelated purposes. The first was to stop timber and diamonds from fuelling armed conflict in Liberia and the West African Region as part of a strategy to resolve the conflict. The second purpose was to prevent natural resources from contributing to a relapse into armed conflict as part of a strategy for post-conflict reconstruction. This second purpose explains why the sanctions regime aimed to achieve real structural reforms of the diamond and timber industries. Beyond the direct contribution of diamonds and timber to the armed conflict, it also sought to address threats to the peace resulting from underlying problems of governance in the Liberian diamond and timber industries.

Thus the Security Council used sanctions as a means of putting pressure on the Liberian government to bring about important structural reforms in Liberia's key economic sectors as part of a comprehensive peacebuilding process. The Security Council's approach was very innovative in this respect, especially in relation to the proposed reforms for the timber sector. The first innovative feature was that it explicitly adopted the basic principle that "government revenues from the Liberian timber industry are [to be] used for legitimate purposes for the benefit of the Liberian people, including development".[164] In this way it implicitly underlined that States must use their sovereignty over their natural resources for the benefit of their people. In this respect the 1521 sanctions regime went one step further than the 1343 regime, which stated in more general terms that timber revenues should be used for legitimate social, humanitarian and development purposes.

163 See the Report of the Panel of Experts appointed pursuant to paragraph 25 of Security Council Resolution 1478 (2003) concerning Liberia, UN Doc. *S/2003/937* of 28 October 2003.

164 UN Security Council Resolution 1521 (2003), especially paragraph 11.

Another innovative feature of the sanctions regime was its explicit recognition of the need to integrate environmental protection in regulatory mechanisms for the timber sector. The Security Council encouraged the Liberian government "to establish oversight mechanisms for the timber industry that will promote responsible business practices" and called upon States, international organizations and other bodies to offer assistance to the Liberian government to achieve this objective, including assistance with regard to "the promotion of responsible and environmentally sustainable business practices in the timber industry".[165]

These are major improvements in comparison with earlier sanctions regimes, which focused principally on stopping the trade in conflict resources. By placing the emphasis on every aspect of the governance of natural resources, the Liberian sanctions regime contributed to peacebuilding efforts in a more structural way, ensuring that Liberian natural resources were managed in a sustainable way for the purposes of development rather than conflict.

The 1521 sanctions regime is one of the few regimes discussed in this chapter that actually succeeded in achieving the necessary changes. The success of the sanctions regime can largely be attributed to the political will of the newly established Liberian President Ellen Johnson Sirleaf. She has been one of the driving forces behind the reform of the Liberian natural resource sectors, as well as of government administration in general.[166] This demonstrates that a commitment to good governance that is rooted in the political system of a country itself is very important in bringing about change.

7.4.6 The 1572 Côte d'Ivoire Sanctions Regime

Structure and objectives of the sanctions regime

The sanctions adopted by the Security Council in relation to Côte d'Ivoire were imposed in order to end hostilities between government forces under the command of elected president Laurent Gbagbo and the opposition forces (the *Forces Nouvelles*).[167] Two peace agreements between the government and the Forces Nouvelles were signed in 2003 (the Linas-Marcoussis Agreement) and 2004 (the Accra III Agreement) respectively, providing, *inter alia,* for the establishment of a government of national reconciliation and a program of disarmament. These peace agreements were supplemented with a third agree-

165 UN Security Council Resolution 1521 (2003), especially paragraphs 13 and 15.

166 See S.L. Altman, S.S. Nichols and J.T. Woods, 'Leveraging High-Value Natural Resources to Restore the Rule of Law: The Role of the Liberia Forest Initiative in Liberia's Transition to Stability', in P. Lujala & S.A. Rustad (eds.), *High-Value Natural Resources and Post-Conflict Peacebuilding*, Oxon/New York: Earthscan (2012), pp. 353-354.

167 For more details regarding this sanctions regime, see J.M. Farrall, *United Nations Sanctions and the Rule of Law*, Cambridge: Cambridge University Press (2007), pp. 439-447.

ment (the Pretoria Agreement) in 2005. The aim of the Security Council sanctions was precisely to secure the implementation of these peace agreements.

The sanctions regime was imposed first with Resolution 1572 (2004). The Security Council, determining that the situation in Côte d'Ivoire continued to pose a threat to international peace and security in the region and acting under Chapter VII of the UN Charter, decided to impose an arms embargo as well as a travel ban and an assets freeze on designated individuals and entities.[168] Furthermore, the Security Council established a Sanctions Committee in order to monitor the sanctions, to be assisted by a Group of Experts.[169] A year later, with Resolution 1643 (2005), the Security Council decided to expand the sanctions regime to include diamond sanctions, targeting the whole diamond industry in Côte d'Ivoire.[170]

The diamond sanctions were taken because of the links between the illicit exploitation of and trade in diamonds on the one hand, and the arms trade and use of mercenaries on the other, "as one of the sources of fuelling and exacerbating conflicts in West Africa".[171] However, interestingly, the reports of the Group of Experts revealed that diamonds were not the only natural resources directly linked to the arms trade and the financing of the conflict in general. The Group of Experts also examined the role of other commodities, with a particular emphasis on cocoa and oil, in relation to the funding of the conflict in Côte d'Ivoire.[172]

The Group reported several ways in which these natural resources were used to violate the arms embargo by both parties to the armed conflict, e.g., by diverting tax revenues to finance extra-budgetary military spending by the government.[173] Despite ample indications that natural resources such as cocoa and oil were prolonging the conflict in Côte d'Ivoire in the same way as

168 UN Security Council Resolution 1572 (2004), especially paragraphs 7, 9 and 11.

169 *Ibid.*, especially paragraph 14 and 17. This group of experts was established through Resolution 1584 (2005), para. 7.

170 UN Security Council Resolution 1643 (2005), especially paragraph 6.

171 UN Security Council Resolution 1643 (2005), paragraph 9 of the preamble.

172 See, *e.g.*,. Midterm report of the Group of Experts submitted in accordance with paragraph 11 of Security Council Resolution 1842 (2008), *UN Doc. S/2009/188*, paras. 59-72; Final report of the Group of Experts on Côte d'Ivoire, prepared in accordance with paragraph 14 of Security Council Resolution 1980 (2011), *UN Doc. S/2012/196*, paras. 113.

173 See e.g. Report of the Group of Experts submitted in accordance with paragraph 7 of resolution 1584 (2005), *UN Doc. S/2005/699*, paras. 22-46; Report of the Group of Experts submitted in accordance with paragraph 9 of resolution 1643 (2005), *UN Doc. S/2006/735*, paras. 113-128; Final Report of the Group of Experts on Côte d'Ivoire, prepared in accordance with paragraph 14 of Security Council Resolution 1980 (2011), *UN Doc. S/2012/196*, paras. 92-110. The Group further identified instances in which natural resources were offered directly in exchange for arms and noted the existence of parallel taxation systems as well as practices of racketeering and looting. For all these instances, see the final report of the Group of Experts on Côte d'Ivoire, prepared in accordance with paragraph 14 of Security Council Resolution 1980 (2011), *UN Doc. S/2012/196*, paras. 92-110.

diamonds,[174] the Security Council did not impose sanctions on these natural resources.

This is characteristic of the Security Council's approach which focuses mainly on curtailing the trade in natural resources by or for the benefit of rebel groups. In general the Council does not look into the ways in which the national authorities use the revenues from natural resources. In itself this is understandable from a legal perspective, especially in the light of the principles of State sovereignty and permanent sovereignty over natural resources, but not in the current case, where the national authorities openly used the proceeds from the cocoa and oil sectors to violate the arms embargo. Therefore there was good cause to address the irregularities in the cocoa and oil sectors, either with an embargo or with formal requests for the reform of those sectors.

The Security Council renewed the diamond sanctions several times before it introduced an exemption to the sanctions regime in Resolution 1893 (2009),[175] though only for diamond samples necessary for scientific research, in order to facilitate the implementation of the Kimberley Process. In Resolution 1893 (2009), the Security Council decided to exclude from the embargo diamond imports "that will be used solely for the purposes of scientific research and analysis to facilitate the development of specific technical information concerning Ivorian diamond production".[176] This research was to be coordinated by the Kimberley Process.[177] In addition, a request to exempt from the embargo a particular import of diamonds was to be submitted to the Committee "jointly by the Kimberley Process and the importing Member State".[178]

In November 2010, elections were finally held in Côte d'Ivoire as part of the implementation of the Ouagadougou peace agreement concluded in March 2007. However, when the defeated President Laurent Gbagbo refused to step down, a crisis broke out. It was only after the crisis ended with the help of UNOCI and ECOWAS troops that Alassane Dramane Ouattara could be installed as the newly elected President of Côte d'Ivoire in April 2011. From then on, the sanctions regime entered a new phase. The measures were no longer

174 See in particular the Report of the Group of Experts submitted in accordance with paragraph 7 of Resolution 1584 (2005), *UN Doc. S/2005/699*, paras. 22-46; the Midterm report of the Group of Experts submitted in accordance with paragraph 11 of Security Council Resolution 1842 (2008) of 8 April 2009, *UN Doc. S/2009/188*, paras. 59-64; Final report of the Group of Experts submitted in accordance with paragraph 11 of Security Council Resolution 1842 (2008) of 9 October 2009, *UN Doc. S/2009/521*, paras. 170-188, which establish direct links between the trade in natural resources by the government and the violation of the arms embargo, e.g., through extra-budgetary military spending.

175 The sanctions were renewed through UN Security Council Resolution 1727 (2006); Resolution 1782 (2007); and Resolution 1842 (2008).

176 UN Security Council Resolution 1893 (2009), especially paragraph 16.

177 *Ibid*., especially paragraph 16.

178 *Ibid*., especially paragraph 17.

intended to contribute to ending the conflict in Côte d'Ivoire, but instead, to support the peace process.[179]

In Resolution 1980 (2011), adopted soon after the installation of President Ouattara, the Security Council emphasised the contribution that the diamond sanctions had made to achieving stability in Côte d'Ivoire and encouraged the Ivorian authorities "to work with the Kimberley Process Certification Scheme to conduct a review and assessment of Côte d'Ivoire's internal controls system for trade in rough diamonds and a comprehensive geologic study of Côte d'Ivoire's potential diamond resources and production capacity, with a view to possibly modifying or lifting [the diamond sanctions]".[180] Resolution 2045 (2012) extended the diamond sanctions even further and urged the Ivorian authorities to "create and implement an action plan to enforce the Kimberley Process rules in Côte d'Ivoire".[181]

In response to a recent report by the Group of Experts indicating that diamond smuggling by military-economic networks in Côte d'Ivoire continues to pose a threat to the stability of the country,[182] the UN Security Council decided to extend the diamond sanctions until 30 April 2014.[183] However, the Council did express its "readiness to review measures in light of progress made towards Kimberley Process implementation", thus making the lifting of the diamond sanctions conditional upon effective implementation of the minimum requirements of the Kimberley Process in Côte d'Ivoire.[184] Furthermore, the Council requested the Kimberley Process and national and international agencies to help the Group of Experts with "its enquiries concerning the individuals and networks involved in the production, trading and illicit export of diamonds from Côte d'Ivoire" and to communicate such matters to the Sanctions Committee.[185]

In addition to the diamond measures, the Resolution also addressed the threats to the peace process resulting from the smuggling and illegal taxation of other natural resources by military networks. Although the Resolution did not impose any concrete measures with respect to these natural resources, it is relevant to note that the Security Council did express its concern about the smuggling of cocoa, cashew nuts, cotton, timber and gold, thus paving the way for the adoption of more concrete measures in the future.[186]

Furthermore, in response to a recommendation by the Group of Experts regarding the problems faced by Côte d'Ivoire with regard to artisanal mining

179 UN Security Council Resolution 1980 (2011), paragraph 4 of the preamble.
180 *Ibid.*, especially paragraph 19.
181 UN Security Council Resolution 2045 (2012), especially paragraphs 6 and 21.
182 Final report of the Group of Experts submitted in accordance with paragraph 16 of Security Council Resolution 2045 (2012), *UN Doc. S/2013/228* of 17 April 2013.
183 UN Security Council Resolution 2101 (2013), especially paragraph 6.
184 *Ibid.*
185 *Ibid.*, especially paragraphs 23 and 24.
186 *Ibid.*, paragraph 14 of the preamble.

in its gold and diamond sectors,[187] the Security Council "encourages the Ivorian authorities to participate in the OECD-hosted implementation programme with regard to the due diligence guidelines for responsible supply chains of minerals from conflict-affected and high-risk areas".[188] This recommendation refers to the OECD Due Diligence Guidance that was developed for companies as a tool to mitigate the risk that their mineral procurement policies could contribute to instability and armed conflict in a country. The Security Council's reference to this programme indicates its commitment to the promotion of more structural solutions for the illegal exploitation of natural resources beyond the financing of conflict.[189]

Targets and addressees of the sanctions obligations

The diamond embargo imposed against Côte d'Ivoire targets all diamonds originating from the country. During the armed conflict, this meant that the embargo *de facto* exclusively targeted the *Forces Nouvelles*, since they were in control of the diamond production. In fact, the embargo issued by the Security Council complemented an already existing national ban on the export of diamonds, issued by the Ivorian government in 2002.[190]

The primary addressees of the sanctions regime are States. However, in relation to the diamonds sanctions the Security Council also assigned a prominent role to the Kimberley Process. In order to prevent the introduction of diamonds from Côte d'Ivoire into the legitimate diamond trade, the Security Council expressly referred to measures taken within the framework of the Kimberley Process Certification Scheme.[191] Although Côte d'Ivoire has been a formal participant in the Kimberley Process since its launch in 2003, the country has never exported diamonds under the scheme.[192]

In addition, the Security Council directly addressed the Kimberley Process. The primary role of the Kimberley Process was to provide the Council with information concerning the production and illicit export of diamonds from Côte d'Ivoire, as well as information about possible violations of the arms and diamond embargoes.[193] In addition, the Kimberley Process was assigned the

187 Final report of the Group of Experts submitted in accordance with paragraph 16 of Security Council Resolution 2045 (2012), *UN Doc. S/2013/228* of 17 April 2013.

188 UN Security Council Resolution 2101 (2013), especially paragraph 25.

189 For more details on the OECD Due Diligence Guidance, see the following section and Chapter 8.

190 Report of the Group of Experts submitted in accordance with paragraph 7 of Resolution 1584 (2005), *UN Doc. S/2005/699*, para. 48.

191 UN Security Council Resolution 1893 (2009), especially paragraph 16; Resolution 1980 (2011), para. 19; and Resolution 2045 (2012), para. 21.

192 Report of the Group of Experts submitted in accordance with paragraph 7 of Resolution 1584 (2005), *UN Doc. S/2005/699*, para. 48.

193 See, *e.g.*, UN Security Council Resolution 1727 (2006), especially paragraphs 10-11; Resolution 1782 (2007), paras. 13-14; Resolution 1842 (2008), paras. 14-15; and Resolution 2045 (2012), para. 20.

task of coordinating research on diamonds exempted from the regime "for the purposes of scientific research and analysis to facilitate the development of specific technical information concerning Ivorian diamond production".[194]

Appraisal of the sanctions regime

The sanctions regime imposed in relation to the conflict in Côte d'Ivoire clearly builds upon earlier sanctions regimes addressing the trade in diamonds. There are some differences, but most of these can be based on the particularities of the situation in Côte d'Ivoire. The first difference relates to the scope of the diamond embargo. While earlier sanctions regimes exempted from the ban diamonds controlled by a certificate of origin regime, the 1572 Côte d'Ivoire sanctions regime covered all diamonds originating from that country. The reason for this difference can be traced back to the internal situation in Côte d'Ivoire. The lack of government control over the diamond mining sites necessitated a comprehensive ban on diamonds.

The second difference relates to the role of the Kimberley Process in the sanctions regime. While earlier sanctions regimes made the modification or lifting of sanctions conditional upon the implementation of an effective certificate of origin regime, the 1572 Côte d'Ivoire sanctions regime required the implementation of the Kimberley Process. Again this difference can be understood in the light of Côte d'Ivoire's membership of the Kimberley Process. Côte d'Ivoire had already joined the Kimberley Process in 2003, but has not yet been able to meet the requirements of the process.

Furthermore, it is important to note that throughout the conflict in Côte d'Ivoire the Security Council never addressed the role of other natural resources besides diamonds in fuelling the conflict, despite ample indications that the government used the proceeds from these natural resources to violate the arms embargo. It is only now, in the phase of post-conflict reconstruction, that the Security Council has started to consider the role of natural resources such as cocoa and gold in perpetuating the violence in Côte d'Ivoire. The attention devoted by the Security Council to the role of key economic sectors in hampering the prospects for sustainable peace is encouraging, as reforms in the governance of these sectors would make a significant contribution to the reconstruction of Côte d'Ivoire.

7.4.7 Comparing the sanctions regimes

The sanctions regimes discussed in the current section all applied sanctions targeting selected commodities which were thought to make a direct contri-

194 UN Security Council Resolution 1893 (2009), especially paragraph 16. See also Resolution 1946 (2010), para. 14, which confirms that the export of Ivorian diamonds for scientific research is to be seen as an exemption to the ban.

bution to the financing of the armed conflicts. In all cases, the ultimate objective of the sanctions was to cut off revenues for armed groups. This was even the case for Liberia, the only sanctions regime targeting a State. The objective of the 1343 Liberia sanctions regime was to stop the Liberian authorities from actively providing financial support to armed groups operating in the region, while the 1521 Liberia sanctions regime was aimed at preventing Liberian natural resources beyond the control of the Liberian authorities from being used to finance these armed groups.

Thus the sanctions regimes discussed in this section show that the Security Council is prepared to address the contribution of natural resources to armed conflict, but only insofar as a link can be established between natural resources and the funding of non-state armed groups. There seems to be a general reluctance on the part of the Security Council to address a government's mismanagement of natural resources revenues in the absence of a link with rebel funding. This explains why the Security Council did resort to the use of sanctions on natural resources exploited by the national authorities in the case of Liberia, while it did not in the case of Côte d'Ivoire. The sanctions regarding Côte d'Ivoire exclusively targeted diamonds, the main source of rebel funding. In contrast, the Security Council did not act against the government, which used revenues from the oil and cocoa industry to fund extra-budgetary military expenditure in contravention of the UN arms embargo. These examples show that the Security Council is prepared to uphold the principle of permanent sovereignty over natural resources in most circumstances, even when a State contravenes Security Council Resolutions.

Most of the sanctions regimes discussed in this section targeted diamonds. With the exception of Côte d'Ivoire, the Security Council in each case provided for the possibility of exempting from the sanctions regime diamonds regulated by a certificate of origin regime. The Security Council also set standards for such a regime, viz. it had to be effective, transparent and accountable. In later sanctions regimes, these requirements were complemented with the requirement that the certificate of origin must be fully compatible with the Kimberley Process.

Two of the sanctions regimes discussed in this section also included timber sanctions. It is interesting to note that these are also the only cases – and during quite different periods of time – that have regard for environmental sustainability. In the case of Cambodia, the protection of Cambodia's natural resources was an underlying reason for the adoption of the measures. In the case of Liberia, the measures aimed to enhance sustainable forest management and to promote responsible and environmentally sustainable business practices in the timber sector.

7.5 From commodity sanctions to targeted sanctions

This section discusses sanctions regimes that have addressed the links between natural resources and armed conflict through sanctions targeting individuals and entities rather than commodities.

7.5.1 The 1493 DR Congo Sanctions Regime

Structure and objectives of the sanctions regime

The 1493 DR Congo sanctions regime was adopted in 2003, when the armed conflict in the DRC had entered the phase of a gradual transition to peace.[195] Joseph Kabila had succeeded his father as president of the DR Congo. Under his leadership, agreements had been signed with Rwanda and Uganda, and international troops from neighbouring countries had started to withdraw from Congolese territory.[196] In addition, Kabila Jr. had signed a peace agreement with different Congolese militias, the Global and All Inclusive Agreement on the Transition in the Democratic Republic of the Congo, and had established a Government of National Unity and Transition. In this context, the adoption of the sanctions regime should therefore be seen as an attempt by the Security Council to support the peace process in the DR Congo.

The sanctions regime consisted of an arms embargo targeting particular armed groups.[197] The Council also condemned the illegal exploitation of the natural resources and other sources of wealth of the Democratic Republic of the Congo and expressed its intention to consider possible ways of ending it.[198] However, it did not adopt specific measures in this regard.

In 2004, the Security Council established a Sanctions Commission to oversee the implementation of the arms embargo, as well as a Group of Experts to assist the Commission.[199] It again condemned the continuing illegal exploitation of natural resources in the Democratic Republic of the Congo. Furthermore, it reaffirmed "the importance of bringing an end to these illegal

195 For an overview of the different phases in the armed conflict in the DR Congo between March 1993 and June 2003, see the *Report of the Mapping Exercise documenting the most serious violations of human rights and international humanitarian law committed within the territory of the Democratic Republic of the Congo between March 1993 and June 2003*, United Nations Human Rights Office of the High Commissioner, August 2010.

196 The Pretoria Accord with Rwanda was signed on 30 July 2002, while the Luanda Agreement with Uganda was signed on 6 September 2002.

197 UN Security Council Resolution 1493 (2003), especially paragraph 20. For an overview of the sanctions regime, see J.M. Farrall, *United Nations Sanctions and the Rule of Law*, Cambridge: Cambridge University Press (2007), pp. 411-418. See also N.J. Schrijver, *Development without Destruction: The UN and Global Resource Management*, United Nations Intellectual History Project Series, Bloomington and Indianapolis, Indiana University Press (2010), pp. 184-186.

198 UN Security Council Resolution 1493 (2003), especially paragraph 28.

199 UN Security Council Resolution 1533 (2004), especially paragraphs 8 and 10.

activities, including by applying the necessary pressure on the armed groups, traffickers and all other actors involved" and urged "all States, and especially those in the region, to take the appropriate steps to end these illegal activities, including through judicial means where possible, and, if necessary, to report to the Council'.[200] However, no mandatory measures were introduced.

A year later Resolution 1596 (2005) renewed and broadened the arms embargo to include all recipients on the territory of the DR Congo.[201] In addition, it contained several auxiliary measures to strengthen the embargo, including measures concerning aviation and border controls, as well as travel and financial sanctions against persons suspected of violating the arms embargo.[202] A subsequent resolution extended the travel and financial sanctions to all political and military leaders of armed groups who were preventing the demobilisation of their members.[203]

Moreover, this resolution contained measures relating to the transit of Congolese natural resources through neighbouring countries. In this respect, the Security Council demanded that neighbouring States as well as the Congolese government "impede any kind of support to the illegal exploitation of Congolese natural resources, particularly by preventing the flow of such resources through their respective territories".[204] The Security Council reaffirmed its demand in Resolution 1698 (2006).[205] However, neither of these resolutions contained any specific measures that States should take in order to implement the obligation, and they did not specify the types of natural resources that were targeted by the resolutions.

Nevertheless, it seems that from that moment on, the Security Council started to address the illegal exploitation of Congolese natural resources in a more coherent manner, looking for more direct ways to stop the exploitation of natural resources from financing armed groups in the DR Congo. The first step can be found in Resolution 1698 (2006), in which the Council expressed its intention to consider possible measures to stem the flow of financing of armed groups and militias operating in the eastern part of the DR Congo, including commodity sanctions.[206]

The Council requested two reports in order to make an informed decision on the type of measures to impose. The Group of Experts was requested to report on feasible and effective measures that the Council could impose, and the Secretary-General was asked to assess the economic, humanitarian and social impacts of such measures on the Congolese population.[207] On the basis

200 *Ibid*., especially paragraphs 6 and 7.
201 UN Security Council Resolution 1596 (2005), especially paragraph 1.
202 *Ibid*., especially paragraphs 6, 10, 13 and 15.
203 UN Security Council Resolution 1649 (2005), especially paragraph 2.
204 *Ibid*., especially paragraph 16.
205 UN Security Council Resolution 1698 (2006), especially paragraph 1.
206 *Ibid*., especially paragraph 9.
207 *Ibid*., especially paragraphs 6 and 8.

of the recommendations contained in these reports, the Security Council decided to address the illegal exploitation of natural resources principally through the existing financial and travel sanctions.[208]

The Security Council specifically decided to extend these sanctions to "individuals or entities supporting the illegal armed groups [operating] in the eastern part of the Democratic Republic of the Congo through the illicit trade of natural resources".[209] In this way it intended to directly target those responsible for the illicit trade in natural resources from the DR Congo.

This decision has had major consequences for companies operating in or sourcing from the DR Congo, because it set in motion a process leading to the adoption of due diligence guidelines for companies. Where Resolution 1857 (2008) encouraged States to take measures "to ensure that importers, processing industries and consumers of Congolese mineral products under their jurisdiction exercise due diligence on their suppliers and on the origin of the minerals they purchase",[210] Resolution 1896 (2009) addressed the minerals industry directly. It recommended that importers and processing industries adopt policies and practices to prevent their businesses from providing indirect support to armed groups.[211] More importantly, the Council mandated the Group of Experts to draw up guidelines for the exercise of due diligence by the importers, processing industries and consumers of mineral products from the DR Congo.[212]

In its final report of 2010 the Group of Experts presented two sets of due diligence guidelines. The first focused exclusively on preventing the purchase of minerals from individuals and entities suspected of providing support to illegal armed groups through the illicit trade in natural resources. The other set also addressed purchases from criminal networks and perpetrators of serious human rights abuses within the Congolese army. Both sets of guidelines followed the same five-step risk-based approach to due diligence. These five steps consisted of strengthening company management systems, identifying

208 The Security Council acted here upon a recommendation of the Group of Experts. See the Report of the Group of experts submitted pursuant to resolution 1654 (2006), *UN Doc. S/2006/525*, para. 159; and the Interim report of the Group of Experts submitted pursuant to resolution 1698 (2006), *UN Doc. S/2007/40*, para. 52. The Group of Expert had also recommended the imposition of selective commodity sanctions, but the report of the Secretary-General dissuaded the Security Council from imposing such sanctions. This report concluded that commodity sanctions would have negative impacts on artisanal miners and on the fragile peace process in the DR Congo. See the Report of the Secretary-General pursuant to paragraph 8 of resolution 1698 (2006) concerning the Democratic Republic of the Congo, *UN Doc. S/2007/68* of 8 February 2007, paras. 62-63.

209 UN Security Council Resolution 1857 (2008), especially paragraph 4(g).

210 *Ibid*., especially paragraph 15.

211 UN Security Council Resolution 1896 (2009), especially paragraph 16, which reads in full: "*Recommends* that importers and processing industries adopt policies and practices, as well as codes of conduct, to prevent indirect support to armed groups in the Democratic Republic of the Congo through the exploitation and trafficking of natural resources".

212 Ibid., especially paragraph 7.

and assessing supply chain risks, designing and implementing strategies to respond to identified risks, conducting independent audits, and publicly disclosing supply chain due diligence and findings.[213]

The guidelines required companies to adopt appropriate procedures to identify the risk of their purchases of minerals providing any sort of support to armed groups, sanctioned individuals or entities, and criminal networks or perpetrators of serious human rights abuses in the eastern part of the DR Congo. If a risk was identified, the guidelines required that companies suspend their contracts with their suppliers until the risk was removed. Furthermore, independent audits had to be performed in order to verify that the due diligence applied by the company was sufficient to identify and prevent the risk of providing support to an individual or entity identified by the Group as contributing to the violence in the eastern part of the DR Congo. Finally, companies had to publish their due diligence policies as part of their annual sustainability or corporate responsibility reports.[214]

These due diligence guidelines received the express support of the Security Council.[215] In this respect it is interesting to note that the Council opted for the second and most far-reaching set of guidelines, thus targeting not only the trade with armed groups, but also the trade with subversive elements within the Congolese army.[216] In addition, the Council made several decisions regarding the implementation of the guidelines. First, it called upon States "to take appropriate steps to raise awareness of the due diligence guidelines" presented by the Group of Experts, "to urge importers, processing industries and consumers of Congolese mineral products to exercise due diligence by applying the aforementioned guidelines, or equivalent guidelines" and to regularly report to the Sanctions Committee on the actions they were taking to implement these recommendations.[217]

More significantly, the Security Council established an express link between compliance with the due diligence guidelines on the one hand, and the imposition of financial and travel sanctions on the other. In this respect it decided that the failure of an individual or entity to exercise due diligence consistent with the steps set out in the resolution could be a reason for them to be placed

213 See the Final report of the Group of Experts prepared pursuant to paragraph 6 of Security Council Resolution 1896 (2009), *UN Doc. S/2010/596*, para. 318. For more details on this five-step approach, see the following chapter of this study.

214 For more details, see the final report of the Group of Experts prepared pursuant to paragraph 6 of Security Council Resolution 1896 (2009), *UN Doc. S/2010/596*, paras. 328-355 for the first set of guidelines and paras. 356-369 for the second set.

215 The Security Council supported "taking forward the Group of Experts' recommendations on guidelines for due diligence for importers, processing industries and consumers of Congolese mineral products". See UN Security Council Resolution 1952 (2010), especially paragraph 7.

216 *Ibid*.

217 *Ibid*., especially paragraphs 8 and 20.

on the sanctions list.[218] This meant that companies operating in or sourcing from the DR Congo were obliged to adhere to the due diligence guidelines.

So far the Sanctions Committee has only placed two companies involved in the trade in minerals on the sanctions list. These are two gold trading companies, located in neighbouring Uganda. It justified placing these companies on the list because they "bought gold through a regular commercial relationship with traders in the DRC tightly linked to militias [which] constitutes 'provision of assistance' to illegal armed groups in breach of the arms embargo of resolutions 1493 (2003) and 1596 (2005)".[219]

The Security Council's subsequent resolutions focused strongly on ways to implement the due diligence guidelines adopted by the Group of Experts. Two particular measures taken by the Security Council deserve special attention. The first concerns the question of traceability of the minerals supply chain, "a key element of any due diligence exercise" according to the Group of Experts.[220] The Council did not take any specific measures in this regard, but rather expressed its support for the efforts of the Congolese government and the wider region "to address the tracing and certification of minerals".[221] Thus it implicitly referred to instruments adopted under the auspices of the International Conference for the Great Lakes Region and showed its willingness to let the affected countries decide for themselves on the design of an instrument addressing the tracing and certification of minerals.

The second measure concerns the decision of the Security Council to include the inspection of mining sites in the mandate of the UN military operation in the DR Congo, MONUSCO.[222] This measure is not directly related to the implementation of the due diligence guidelines, but is part of a broader package of measures involving MONUSCO – and before that, MONUC – aimed at preventing the provision of support to illegal armed groups.[223] Another measure in this package relating to the measures discussed above was the involvement of MONUSCO in a project of the Congolese government to bring

218 *Ibid*., especially paragraph 9.

219 List of Individuals and Entities Subject to the Measures Imposed by Paragraphs 13 and 15 of Security Council Resolution 1596 (2005) as Renewed by Paragraph 3 of Resolution 2021 (2011), last updated on 12 November 2012, available through http://www.un.org/sc/committees/1533/pdf/1533_list.pdf (last consulted on 29 November 2012).

220 See the Interim Report of the Group of Experts prepared in pursuance of paragraph 5 of Security Council Resolution 1952 (2010), *UN Doc. S/2011/345*, para. 77.

221 UN Security Council Resolution 1991 (2011), especially paragraph 17.

222 See UN Security Council Resolution 2021 (2011), especially paragraph 10. The UN operation in the DR Congo was originally called MONUC but was renamed in 2010 to reflect the new situation in the DR Congo's transition to peace. For more information on the mission, see http://www.un.org/en/peacekeeping/missions/monuc/ and http://www.un.org/en/peacekeeping/missions/monusco/ (consulted on 25 May 2012).

223 See, *e.g.*, UN Security Council Resolution 1756 (2007), especially paragraph 2(l) and Resolution 1856 (2008), para. 3(g).

together all State services in a limited number of trading counters in order to improve the traceability of mineral products.[224]

Targets and addressees of the sanctions

The 1493 DR Congo sanctions regime has consistently targeted individuals and entities impeding the peace process in the DR Congo. All the measures taken by the Security Council, including the due diligence guidelines, should be seen in this light. The Security Council gradually increased the number of individuals against whom the sanctions were imposed. The adoption of the due diligence guidelines had two important implications in this respect. It showed that the sanctions targeted not only members of non-state armed groups, but also subversive elements from within the Congolese army. In addition, the Council clearly indicated that "providing support to armed groups" must be broadly interpreted, including providing indirect support to these groups by irresponsible mineral sourcing practices.

The addressees of the sanctions were primarily States, including the Congolese State. They were to implement the arms embargo, as well as the travel and financial sanctions. Indirectly, companies were also addressees of the sanctions. They were to implement the due diligence guidelines, thus preventing armed groups from obtaining the revenues to violate the arms embargo. The final addressee of the sanctions was the United Nations Organization (Stabilization) Mission in the Democratic Republic of the Congo (MONUC/MONUSCO). The relevant tasks include military action aimed at "preventing the provision of support to illegal armed groups, including support derived from illicit economic activities".[225]

Appraisal of the sanctions regime

In order to break the link between the exploitation of natural resources and the ongoing violence in the DR Congo, the Security Council opted for a new approach, compared with earlier sanctions regimes. Instead of imposing commodity sanctions, the Security Council opted for targeted sanctions against individuals and companies in order to address the link between natural resources and armed conflict. In this way, the Security Council broke away from the trend it had set with its earlier sanctions regimes.

Another striking aspect of the sanctions regime is that it paved the way for imposing sanctions on the business community for conducting irresponsible business practices. Companies that did not respect the due diligence guidelines risked being added to the sanctions list. Although this was not the first sanctions regime to directly target companies, it was the first to target companies further up the supply chain as well. Earlier sanctions regimes imposed sanc-

224 UN Security Council Resolution 1925 (2010), especially paragraph 12.

225 UN Security Council Resolution 1756 (2007), especially paragraph 2(l); and Resolution 1856 (2008), para. 3(g).

tions only on companies that were directly implicated in the busting of sanctions. Examples include asset freezes imposed against aviation companies suspected of transporting arms in violation of the arms embargo imposed in relation to Liberia.[226]

In the 1493 DR Congo sanctions regime the Security Council went a step further. It stretched the causal link between the practices of companies and the violation of sanctions by armed groups. This was an interesting development, especially in the light of the earlier sanctions regimes addressing the trade in rough diamonds, which relied on voluntary measures to engage the diamond industry in the proper implementation of sanctions.

In the case of the DR Congo, the Security Council moved away from a voluntary approach to industry self-regulation as articulated in Resolution 1896 (2009) in favour of sanctions to induce the minerals industry to modify their sourcing practices. However, it is too early to tell whether this move away from voluntary measures to sanctions can be regarded as a response to the particular circumstances in the DR Congo, or whether it indicates a change in the approach of the Security Council which extends beyond the specific case of the DR Congo.

Similarly, it is too early to tell whether this new approach adopted by the Council in relation to the DR Congo will actually lead to a change in the behaviour of companies sourcing from the DR Congo. The 2011 Final Report of the Group of Experts reveals a mixed picture. On the one hand, it concluded that the implementation by the Congolese government of the due diligence guidelines has halted nearly all tin, tantalum and tungsten exports from the eastern Democratic Republic of the Congo. On the other hand, it concluded that these minerals were increasingly being smuggled into neighbouring countries, impairing the objective of the due diligence guidelines.[227] Therefore the success of the due diligence guidelines was impaired by the smuggling practices. This indicates that the due diligence guidelines can only be successfully implemented when improvements are carried out in the transparency of the extractive industry in the DR Congo and in neighbouring countries as well. An effective tracing and certification system for minerals is a first requirement in this respect. However, other factors are important as well, especially combating corruption in the minerals sectors.

226 See the List of Individuals and Entities Subject to the Measures Contained in Paragraph 1 of Security Council Resolution 1532 (2004) Concerning Liberia (The Assets Freeze List), last updated on 20 July 2012, available through http://www.un.org/sc/committees/1521/aflist.shtml (last consulted on 23 August 2012).

227 Final Report of the Group of Experts on the DRC submitted in accordance with paragraph 4 of Security Council Resolution 2021 (2011), *UN Doc. S/2012/843*, 15 November 2012, paras. 159-242.

7.5.2 The 1970 Libya Sanctions Regime

Structure and objectives of the sanctions regime

The sanctions regime imposed by the Security Council against Libya in 2011 was not the first sanctions regime imposed against the Libyan authorities. An earlier sanctions regime had addressed the alleged role of the Libyan government in supporting terrorist groups, as part of the response to the Lockerbie incident.[228] However, the 2011 sanctions regime differed from the earlier one in the sense that it was directly related to a situation of armed conflict.

In February 2011, civil protests against the regime of Colonel Muammar Gaddafi resulted in an internal armed conflict between Gadhafi's forces on the one side, and an insurrectional movement labelling itself the National Transitional Council (NTC) on the other.[229] Reports on gross and systematic violations of human rights committed by the Libyan government, including widespread and systematic attacks against the civilian population, prompted the Security Council to take action.

On 26 February 2011, the Security Council adopted Resolution 1970. This Resolution referred the situation in Libya to the ICC and imposed "biting" sanctions against the Gaddafi government as "a clear warning to the Libyan Government that it must stop the killing".[230] These sanctions included an arms embargo, a travel ban and an asset freeze.[231] The asset freeze applied to all persons "involved in or complicit in ordering, controlling, or otherwise directing, the commission of serious human rights abuses" against the Libyan population.[232] The sanctions list annexed to the resolution targeted exclusively members of Colonel Gaddafi's family. The Security Council further appointed a Sanctions Committee to oversee the implementation of the sanctions and to designate other individuals subject to the sanctions.[233]

A few weeks later, Resolution 1973 was adopted in response to Gaddafi's failure to put an end to the violence and to fulfil the legitimate demands of

228 For more details, see J.M. Farrall, *United Nations Sanctions and the Rule of Law*, Cambridge: Cambridge University Press (2007), pp. 297-305.

229 For a timeline of the conflict in Libya, see *the Economist*, 'The Birth of Free Libya', 25 August 2011; and BBC, 'Libya: The Fall of Gaddafi', available through http://www.bbc.co.uk (consulted on 16 July 2012).

230 See the statement of the representative of the United States in the Security Council Meeting that adopted Resolution 1970, *UN Doc S/PV.6491*: "Tonight, acting under Chapter VII, the Security Council has come together to condemn the violence, pursue accountability and adopt biting sanctions targeting Libya's unrepentant leadership. This is a clear warning to the Libyan Government that it must stop the killing. Those who slaughter civilians will be held personally accountable. The international community will not tolerate violence of any sort against the Libyan people by their Government or security forces".

231 See UN Security Council Resolution 1970 (2011), 26 February 2011, paras. 9-14 (arms embargo); 15-16 (travel ban); and 17-21 (asset freeze).

232 *Ibid*., para. 22.

233 *Ibid*., para. 24.

the population. Resolution 1973 established a Panel of Experts to assist the Sanctions Committee and further strengthened the sanctions, including the asset freeze.[234] From that moment on, the asset freeze applied to all assets belonging to the Libyan authorities, including the assets of high government officials and entities under the control of the Libyan authorities.[235]

Most interesting in this respect is the inclusion in the list of the Libyan National Oil Corporation as a "potential source of funding for [Gaddafi's] regime".[236] In addition, the Security Council decided that States must require all individuals and entities under their jurisdiction doing business with Libya to exercise vigilance if they have reasonable grounds to believe that such business could contribute to violence and use of force against civilians.[237] Since the oil business constituted Libya's principal source of income, these measures first and foremost addressed the responsibility of foreign oil companies operating in Libya.[238]

One of the principal questions that arises in relation to these measures concerns their implications for the trade in Libyan oil. The asset freeze targeted only one of the parties to the conflict, *i.e.,* the Libyan authorities. In other words, the assets freeze did not affect the trade in Libyan oil to the benefit of other actors, such as the National Transitional Council. At the same time, the assets freeze against the Libyan authorities was comprehensive: it applied to all assets of the Libyan authorities that were located abroad and it included a prohibition for foreign individuals and entities to make assets available to the Libyan authorities. This prohibition extended to payments made by foreign

234 UN Security Council Resolution 1973 (2011), 17 March 2011, para. 24.

235 The Security Council decides that the asset freeze "shall apply to all funds, other financial assets and economic resources […] which are owned or controlled, directly or indirectly, by the Libyan authorities […] or by individuals or entities acting on their behalf or at their direction, or by entities owned or controlled by them". See UN Security Council Resolution 1973 (2011), 17 March 2011, para. 19.

236 *Ibid.*, Annex II. On 24 June 2011, the Sanctions Committee extended the assets freeze to a subsidiary of the Libyan National Oil Corporation. See in this regard the following press release: 'Security Council Committee Concerning Libya Adds Names of Individuals and Entities to Its Travel Ban and Assets Freeze List', *UN Doc. SC/10302*, 28 June 2011.

237 The resolution stated that "all States shall require their nationals, persons subject to their jurisdiction and firms incorporated in their territory or subject to their jurisdiction to exercise vigilance when doing business with entities incorporated in the Libyan Arab Jamahiriya or subject to its jurisdiction, and any individuals or entities acting on their behalf or at their direction, and entities owned or controlled by them, if the States have information that provides reasonable grounds to believe that such business could contribute to violence and use of force against civilians". See UN Security Council Resolution 1973 (2011), 17 March 2011, para. 21.

238 The Panel of Experts concerning Libya observed that Libya was one of the "less diversified oil-producing economies in the world". It further noted that the oil sector was responsible for 93 per cent of government revenues and 95 per cent of Libya's export earnings. See the Final report of the Panel of Experts established pursuant to Security Council Resolution 1973 (2011) concerning Libya, *UN Doc. S/2012/163*, para. 163.

companies to the Libyan authorities or entities under their control, including payments made to the National Oil Corporation.

The effects of this prohibition should not be underestimated, since the National Oil Corporation was implicated in most oil operations in Libya, mostly through joint ventures with foreign oil companies. In addition, Resolution 1973 (2011) decided that States must require their companies to "exercise vigilance" when doing business in Libya in order to prevent these companies from contributing to "violence and use of force against civilians".[239] This requirement amounts to an obligation of "due care" for companies. Although not watertight, it entails an obligation for companies doing business in Libya to choose their business partners carefully, irrespective of the inclusion of these companies on the sanctions list or not.

The sanctions against the Libyan National Oil Corporation and its subsidiaries were lifted after the National Transitional Council had taken over power in Libya. Resolution 2009, adopted on 16 September 2011, determined that the Libyan National Oil Corporation (LNOC) and Zueitina Oil Company were no longer to be subject to the asset freeze.[240] Sanctions against other entities, including financial institutions, have been lifted subsequently. Some remaining sanctions, notably against Libyan investment companies, are still in place.

Targets and addressees of the sanctions regime

As noted above, the sanctions regime against Libya exclusively targeted the Gadhafi regime. No measures were imposed against the opposition forces. The sanctions regime was to be implemented by all States. Specific obligations relating to the implementation of the asset freeze included the freezing of all assets belonging to the Libyan authorities that were found on their territories and preventing their nationals from making available funds to the Libyan authorities.[241] In addition, States were to require all persons and entities under their jurisdiction to exercise vigilance when doing business with Libyan persons and entities.[242]

Interestingly enough, the resolutions do not directly call upon individuals or companies to exercise vigilance. Instead, the resolutions ask the home States of these companies to enact relevant legislation. This is a departure from other sanctions regimes, discussed in this chapter, which have made direct calls upon individuals and companies to assist in implementing sanctions. Examples include the sanctions regimes imposed against Sierra Leone and Liberia. The sanctions regime against the DR Congo even went a step further through the

239 UN Security Council Resolution 1973 (2011), especially paragraph 21.
240 UN Security Council Resolution 2009, 16 September 2011, para. 14.
241 See UN Security Council Resolution 1973 (2011), especially paragraph 19.
242 *Ibid*., especially paragraph 21.

designation of persons and companies on a sanctions list for not respecting due diligence in the choice of their business partners.

How can this departure from earlier sanctions regimes be explained? A closer look at the objectives and targets of the sanctions regimes may provide a partial answer. Whereas the sanctions regime against Libya was adopted in order to put pressure on the Gaddafi government to end the violence, the sanctions regimes for Sierra Leone, Liberia and the DR Congo were adopted in order to assist these States in addressing a threat to their peace. The due diligence measures in relation to the DR Congo, for example, were adopted at the request of the International Conference for the Great Lakes Region and in support of national legislation. In other words, the sanctions were there to help these States in enforcing national legislation, which was of course not the case in Libya. Nevertheless, the differences in nature between the sanctions regimes only provide a partial explanation. In addition to the adoption of measures addressing the home States of companies doing business with the Gaddafi regime, the Security Council could have addressed companies directly. In this sense, the sanctions regime imposed against Libya can be regarded as a step back in the process of involving individuals and companies in sanctions implementation.

Appraisal of the sanctions regime

In the case of Libya, the Security Council opted for an asset freeze rather than an oil embargo in order to curtail the oil revenues of the Libyan authorities. The reasons for the Security Council to refrain from imposing an oil embargo on Libya may be manifold. Some of these may be politically motivated. It's not a secret that foreign oil companies operating in Libya have conducted a fierce lobby in order to safeguard their business interests. Nevertheless, this would only partially explain the motivation of the Security Council to choose an asset freeze as a lesser means to achieve its objectives.[243]

Another reason may be found in the effects of the sanctions on the Libyan population. In view of the prime significance of oil revenues for the Libyan economy, fully-fledged oil sanctions would have had severe consequences for the Libyan population. A further reason could be related to the objectives of the sanctions regime. The Security Council's main concern was to target the Gaddafi regime in order to stop the violence against the Libyan civilian population. An asset freeze is a more appropriate instrument to target a specific actor than an oil embargo, since such an embargo would have affected both sides to the conflict.

243 This may be exemplified by the position of the European Union as one of the main consumers of Libyan oil. The European Union has extended the asset freeze to include almost the entire Libyan oil industry. See 'Libya: EU imposes additional sanctions following the adoption of UNSCR 1973', Council of the European Union Press Release, 24 March 2011, *Doc. 8110/11 PRESSE 79*.

Even if the Security Council could have solved this problem by exempting oil extracted under authorisation of the NTC from the embargo, it would have encountered both practical and legal problems. The practical problem relates to determining the distinction between "legitimate" and "illegitimate" oil. Certification measures, like those used in the diamond sanctions regimes discussed above, would not have been a viable option in this situation, because these are normally implemented by the government of a State. The legal problem relates to the question of sovereignty. Providing exemptions to an oil embargo for oil traded by an insurrectional movement would have required the Security Council to make a formal statement recognising this movement as the new Libyan government – or at least as the legitimate representative of the Libyan people.[244] The asset freeze avoids these problems while at the same time contributing to the overall objectives of the sanctions regime, i.e., to put an end to the violence in Libya.

A further aspect of interest in relation to the sanctions regime is that the Security Council in both resolutions explicitly expressed its intention to make available at a later stage the frozen assets "to and for the benefit of the people of the Libyan Arab Jamahiriya".[245] This reference arguably constitutes an implicit recognition that the assets belonging to the Libyan authorities belong to and must be used for the benefit of the Libyan people. The reference is reiterated in subsequent resolutions that gradually terminate the asset freeze. In Resolution 2040 (2012), for example, the Security Council decides that the Sanctions Committee must lift the freezing of assets of particular entities "as soon as practical to ensure the assets are made available to and for the benefit of the people of Libya".[246]

It is further interesting to note that the Security Council underscores the importance of making the assets available "in a transparent and responsible manner in conformity with the needs and wishes of the Libyan people".[247] Moreover, the Council requests the International Monetary Fund and the World Bank "to work with the Libyan authorities on an assessment of Libya's public financial management framework, which would recommend steps to be taken by Libya to ensure a system of transparency and accountability with respect to the funds held by Libyan governmental institutions".[248] These statements demonstrate the Security Council's adherence to the principles of transparency and accountability.

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244 For a more detailed analysis of the legal impacts of recognition of the NTC during the Libyan civil war, see Chapter 2 and S. Talmon, 'Recognition of the Libyan National Transitional Council', *ASIL Insights Vol. 15 (16)*, 16 June 2011.

245 UN Security Council Resolution 1970 (2011), especially paragraph 18; and S/RES/1973 (2011), para. 20.

246 See UN Security Resolution 2040 (2012), para. 9. Also see UN Security Council Resolution 2009 (2011), paras. 14-19.

247 See UN Security Council Resolution 2009 (2011), paragraph 14 of the preamble.

248 *Ibid*., especially paragraph 18.

7.5.3 Comparing the sanctions regimes

The sanctions regimes against the DR Congo and Libya use targeted sanctions rather than commodity sanctions to achieve their purposes. In addition, both sanctions regimes cover natural resources. However, the role of natural resources in the sanctions regimes differs significantly. In the case of the DR Congo, individuals and entities are targeted because of their involvement in the illegal trade in natural resources. In the case of Libya, natural resources are targeted because they are owned by individuals placed on the sanctions list.

The regimes also present differences in other respects. One example concerns the targets of the sanctions. In the case of the DR Congo, the sanctions regime targets non-state armed groups and subversive elements of the Congolese army as well as individuals and entities that provide support to these groups. In the case of Libya, the sanctions target the Libyan authorities and those associated with them.

The final difference concerns the role of the private sector in the sanctions regimes. Both regimes target the private sector, but the extent to which and the way in which they do so differs considerably. The 1493 DR Congo sanctions regime targets all companies providing support to armed groups, whether directly or through their mineral procurement policies. If there are grounds for believing that a company is providing support to armed groups and the company has not exercised due diligence, it can be placed on the sanctions list. This implies that the sanctions have a potentially broad reach, targeting companies worldwide that source minerals from the DR Congo. In the case of Libya, the sanctions list includes only those companies that have a direct connection to the Libyan authorities. The guiding principle for placing a company on the list is "ownership" or "control'. The Security Council insists that States require their companies to exercise due care in the choice of their business partners, but the Council does not provide for the possibility of placing these companies on the sanctions list. Thus in this respect the Security Council can be considered to have watered down the 1970 Libya sanctions regime compared to the 1493 DR Congo regime.

7.6 Appraisal of the Security Council's approach to addressing the links between natural resources and armed conflict

This chapter has analysed the sanctions regimes imposed by the Security Council to address the links between natural resources and armed conflict. In most of the cases discussed in this chapter natural resources were at the heart of the conflict. Relevant examples include Angola, Sierra Leone, Liberia and the DR Congo. In other cases, the links between natural resources and

conflict can be considered more remote. The sanctions regime in Southern Rhodesia is an example of a regime targeting natural resources merely because of their general contribution to the Southern Rhodesian economy. The same applies for the situation in Cambodia.

7.6.1 Legal basis

In all cases except Cambodia, the legal basis for imposing sanctions can be found in Chapter VII of the UN Charter. In most cases, the Security Council referred to Chapter VII in a general sense, while in relation to Southern Rhodesia the Council based the sanctions explicitly on Article 41 of the UN Charter. In the case of Cambodia, no reference was made to Chapter VII. Furthermore, the Security Council did not impose sanctions itself, but merely expressed support for a national moratorium. Therefore, the commodity measures imposed in relation to Cambodia do not qualify as sanctions in the sense of Article 41 of the Charter.

In addition, in all cases except Iraq and Cambodia, the Security Council determined the existence of a threat to the peace under Article 39 of the UN Charter before imposing sanctions. In the case of Iraq, the Council referred to "a breach of the peace" because of Iraq's unlawful invasion in Kuwait. In the case of Cambodia, no reference was made to Article 39 of the UN Charter.

7.6.2 Objectives

In its Presidential Statement of 11 February 2011 on the maintenance of international peace and security, the Security Council stated that:

> "The Security Council recalls the role played by the illegal exploitation of natural resources in fuelling some past and current conflicts. In this regard, it recognizes that the United Nations can play a role in helping the States concerned, as appropriate, upon their request and with full respect for their sovereignty over natural resources and under national ownership, to prevent illegal access to those resources and to lay the basis for their legal exploitation with a view to promoting development, in particular through the empowerment of governments in post-conflict situations to better manage their resources".[249]

This Presidential Statement clearly formulates two of the most important objectives of the Security Council sanctions regimes discussed in this chapter. The first is to help States involved in an internal armed conflict to prevent

249 Presidential Statement on Maintenance of international peace and security: the interdependence between security and development, 11 February 2011, *UN Doc. S/PRST/2011/4*.

illegal access by armed groups to the States' natural resources, while the second objective seeks to strengthen the State's governance over natural resources with a view to promoting development.

Curtailing "conflict resources"

The majority of the sanctions regimes discussed in this chapter address the trade in so-called "conflict resources". These are natural resources traded by armed groups in order to finance their armed struggle. Examples of these sanctions regimes include Cambodia, Angola, Sierra Leone, Côte d'Ivoire and the DR Congo. Therefore in many cases sanctions regimes are in fact established to help governments restore the State's sovereignty over its natural resources. The sanctions regimes are often even imposed at the request of the national authorities.

In internal armed conflicts, the Security Council has been hesitant to impose sanctions targeting the national authorities and has done so only in the cases of Southern Rhodesia and Libya. In Southern Rhodesia, sanctions were imposed against a regime that was considered illegal. Similarly, the sanctions imposed in the case of Libya targeted a regime that had lost its legitimacy due to its own actions.

However, in other similar cases, the Security Council refrained from imposing sanctions against the national authorities. In Côte d'Ivoire, it did not take any action against the national authorities during the armed conflict, despite ample evidence of the government violating the arms embargo. Another example concerns the armed conflict in the Darfur region of Sudan between 2003 and 2011, which has not been discussed previously in this chapter.

In the Darfur region, government-supported militias, notably the Janjaweed, were carrying out gross and systematic attacks on the civilian population.[250] In order to put an end to the humanitarian crisis in the Darfur Region, the Security Council imposed an arms embargo against the Janjaweed and provided for the possibility of lifting these sanctions on condition that the government of Sudan fulfilled its commitments to "disarm the Janjaweed militias and apprehend and bring to justice Janjaweed leaders and their associates who have incited and carried out human rights and international humanitarian law violations and other atrocities".[251] In a subsequent resolution, the Security Council expressly contemplated "actions to affect Sudan's petroleum sector" in order to put pressure on the Sudanese government to disarm the militias and stop the atrocities, but the Council never actually imposed such sanc-

250 For more details on the Darfur conflict, see S. Straus, 'Darfur and the Genocide Debate', *Foreign Affairs*, Vol. 84, No. 1 (Jan.-Feb. 2005), pp. 123-133; and A. Abass, 'The United Nations, the African Union and the Darfur Crisis: Of Apology and Utopia', *Netherlands International Law Review* (2007), pp. 415-440.

251 UN Security Council Resolution 1556 (2004).

tions.[252] Instead, it extended the arms embargo to include the Sudanese government.[253]

These examples show that the Security Council is committed to upholding the principle of a State's sovereignty over its natural resources in most circumstances, even in cases where governments use the proceeds from natural resources in ways that threaten international peace and security. However, they also show that political motivations sometimes prevent the Security Council from taking appropriate action. There is no objective reason that explains the difference in the approach used in Libya on the one hand, where the Security Council did impose sanctions against the national oil company, and in Sudan on the other, where the Security Council did not impose such targeted sanctions. In both situations, the government was involved in gross human rights violations. This arbitrary approach undermines the credibility of the Security Council.

Strengthening governance over natural resources

Another relevant issue for the purposes of this chapter is the Security Council's approach to the governance of natural resources. In several cases discussed in this chapter, the Security Council referred to improvements in governance as a reason to exempt natural resources from the sanctions or to lift the sanctions altogether. In the case of diamond sanctions, the Security Council exempted from the sanctions those diamonds that were controlled with an effective, transparent, accountable and internationally verifiable certificate of origin regime. Furthermore, in the case of Liberia, the Security Council made the lifting of the sanctions dependent on the implementation of reform plans for the forestry sector and for public administration in general. Liberia in particular is an example of a sanctions regime where the Security Council used sanctions as a tool to bring about great structural reforms in the governance of natural resources. These reforms also addressed environmental protection as a way of safeguarding the natural resources of Liberia for development.

Another relevant example concerns the DR Congo where the Security Council is engaged in structural reforms of the minerals sector. However, the methods used by the Security Council in relation to the DR Congo differ from the sanctions regimes discussed above. The Council aims to restore the governance of the Congolese State over its mines through a combination of measures, including the introduction of due diligence requirements to companies. Indirectly, the implementation of these due diligence requirements by companies will increase transparency in the Congolese mineral sector.

252 *Ibid*., especially paragraph 14.

253 UN Security Council Resolution 1591 (2005), especially paragraph 7. See also A. Abass, 'The United Nations, the African Union and the Darfur Crisis: Of Apology and Utopia', *Netherlands International Law Review* (2007), p. 429.

The approach of the Security Council in these cases is commendable. Its engagement in structural reforms of natural resources sectors is an essential part of strategies aimed at addressing the links between natural resources and armed conflict. The role of sanctions is important in this respect. They can serve as a catalyst for improvements in the governance of natural resources in States affected by conflicts. The 1521 Liberia sanctions regime serves as an example for future action by the Security Council in this respect. The sanctions against Liberia have prompted important changes in the governance of Liberian resources, mainly by supporting reforms undertaken by other organizations.

7.6.3 Evolution in the approach of the Security Council

The sanctions regimes signal an important evolution in the approach of the Security Council in addressing the links between natural resources and armed conflict. This evolution is linked to the Council's efforts to find ways to address these links effectively, while minimising the negative effects of the sanctions on the civilian population. Thus where the earlier sanctions regimes were mainly comprehensive in nature, the Security Council soon switched to more selective sanctions regimes. These commodity sanctions regimes targeted specific commodities based on their particular contribution to an armed conflict.

The first time the Security Council used such selective commodity sanctions was in the case of Cambodia, where it particularly targeted round logs and gems. In subsequent sanctions regimes, it refined its approach, at least in relation to diamonds. The Council introduced a distinction between diamonds traded by armed groups and by a State's authorities. Diamonds traded by the latter were exempted from the regime. The Security Council introduced an important innovation for this purpose: the Certificate of Origin Regime. This enabled it to directly target those responsible for causing a threat to the peace, while minimising the negative effects of the sanctions on the civilian population.

However, more recent sanctions regimes imposed by the Security Council started to move away from commodity sanctions in favour of sanctions targeting individuals and organizations. In 2008 when the Security Council decided to impose measures to address the illegal exploitation of natural resources in the DR Congo, it opted for an assets freeze and a travel ban targeting individuals and entities supporting illegal armed groups with the illicit trade of natural resources. Similarly, in the case of Libya, the Security Council opted for a freezing of the assets of the national oil company rather than imposing an oil embargo.

One major advantage of targeted sanctions is that individuals and entities responsible for provoking a threat to the peace are targeted directly. This prevents a major problem encountered in the commodity-based sanctions

regimes. In the cases of Liberia and Côte d'Ivoire, for example, the Taylor government and the *Forces Nouvelles* respectively, switched from one natural resource to another in order to escape the sanctions.[254] Sanctions targeting individuals and entities avoid this problem, but also have major disadvantages, such as the risk of the arbitrary application of sanctions. This can be illustrated with reference to the reforms in recent years with regard to appeal procedures regarding the delisting of individuals.[255] Another important disadvantage is the sophisticated level of knowledge required and the administrative burden placed on the Sanctions Committee responsible for the listing and delisting of individuals and entities. In order to apply targeted sanctions effectively, it is necessary to have detailed knowledge of those individuals and entities directly and indirectly involved in the illegal trade of natural resources. From this perspective, commodity sanctions exempting from the embargo those natural resources that are traded with a certificate of origin regime are preferable.[256]

Perhaps the best option for the Security Council would be to apply a combination of the two types of sanctions. Recently, in a resolution relating to the situation in Somalia, the Security Council did resort to imposing both types of sanctions. In Resolution 2036 (2012), the Security Council imposed an embargo on the export of charcoal from Somalia in order to prevent this natural resource from financing armed groups operating in the country.[257] This embargo was intended to strengthen the targeted measures imposed by the Security Council in earlier resolutions, most notably Resolution 1844 (2008).

7.6.4 Sustainability: a missed opportunity

The Security Council has only referred to the protection of natural wealth and resources in a few resolutions. In its resolutions relating to Cambodia, it simply endorsed measures imposed by the national authorities to protect the environment, while in the case of Liberia it referred to the promotion of environmentally sustainable business practices as a reason to lift the timber sanctions. However, in the case of Liberia the Security Council's measures should be

254 See P. Wallensteen, M. Eriksson & D. Strandow, 'Sanctions for Conflict Prevention and Peace Building: Lessons Learned from Côte d'Ivoire and Liberia', Department of Peace and Conflict Research, Uppsala University (2006), p. 31.

255 See, *e.g.*, S. Eckert, T. Biersteker, L.J. van den Herik and A. Cuyvers, 'Due Process and Targeted Sanctions, Update of the Watson Report', Brown University: Watson Institute (2012); and L.J. van den Herik, 'The Security Council's Targeted Sanctions Regimes: In Need of Better Protection of the Individual', *Leiden Journal of International Law*, Vol. 20 (4), pp. 797-807.

256 In the case of the DR Congo, attempts to introduce a regional tracking-and-tracing system for minerals is currently developed under the auspices of the International Conference for the Great Lakes Region.

257 UN Security Council Resolution 2036 (2012), para. 22.

viewed in relation to the Liberian Forest Initiative. In other words, it was not the Security Council that took the initiative to impose measures aimed at environmental protection, but rather the organizations responsible for implementing the LFI.

Thus the Security Council does not actively include environmental protection in its strategies for conflict resolution and post-conflict peacebuilding. A study of relevant reports of UN Panels of Experts does reveal some attention to the issue of environmental protection. For example, some references to this issue can be found in the reports of the Panels of Experts on Liberia and the DR Congo. The main focus of these panels is the issue of (over)exploitation of natural resources and its effect on the environment.

The Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo, for example, designates the "illicit exploitation of wildlife, forest and other resources" in national nature reserves and "intensive and unsustainable mining and logging activities" outside these reserves as the causes of the ecological destruction resulting from the armed conflict.[258] It reports "highly organized and systematic exploitation activities at levels never before seen". According to the Panel, these activities include "poaching for ivory, game meat and rare species, logging, and mining for coltan, gold and diamonds".[259] Similarly, the Panel of Experts on Liberia explicitly refers to the problem of over-exploitation of forest resources by the parties to the armed conflict in Liberia.[260]

In addition, both Panels assess the impact of sanctions on the environment. In this respect the Panel of Experts on Liberia assesses the impact of the timber sanctions imposed by the UN Security Council on the long-term viability of the forest and advises the UN Security Council to declare a moratorium on all commercial activities in the extractive industries.[261] In contrast, the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo assesses the desirability of imposing sanctions on particular commodities and concludes that "an embargo or a moratorium banning the export of raw materials originating in the Democratic Republic of the Congo does not seem to be a viable means of helping to improve the situation of the […] natural environment".[262]

258 Interim report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo, UN Doc. *S/2002/565*, para. 50.

259 *Ibid*., para. 52.

260 Report of the Panel of Experts pursuant to paragraph 25 of Security Council Resolution 1478 (2003) concerning Liberia, UN Doc. *S/2003/779*, para. 14 and paras. 66-69.

261 *Ibid*., para. 17.

262 Final report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo, UN Doc. *S/2002/1146*, para. 155.

In addition to these general references to the environment and to sustainability, the reports of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo also contain indications that parties to an armed conflict must respect the rules of international environmental law. In two of its reports, the Panel of Experts explicitly refers to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) in relation to poaching activities. In its interim report, the panel states that it "has indications that, in most cases, poaching of elephants *in violation of international law* (Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)) was well organized".[263] It goes on to specify that the violations of CITES were committed by the parties themselves: "[e]ither soldiers hunted directly with the consent of the commander or they provided equipment and protection to local villagers to execute the task with the objective of collecting elephant tusks".[264] In its final report, the panel asks Member States to ensure "that their National Bureaus, established under the [Lusaka Agreement on Cooperative Enforcement Operations Directed at Illegal Trade in Wild Fauna and Flora], intensify their investigations into the criminal traffic in endangered species of wild animals and plants as outlined by CITES".[265]

In many cases the Security Council expressly relies on information from reports issued by the Panels of Experts that it established, but it does not show any particular sensitivity with regard to the environmental findings of the Panels of Experts. These findings do not seem to play any role in decisions of the Security Council to either impose or to refrain from imposing sanctions. This is unfortunate, as environmental protection is essential for creating an enduring peace in a country. It is therefore of the utmost importance for the Security Council to start devoting more explicit attention to environmental protection as part of its strategies regarding the economic reconstruction of States that have experienced armed conflict.

7.6.5 The role of the Security Council

With regard to the conflicts discussed in this chapter, the Security Council acts principally in a coordinating capacity. Sanctions serve mainly to prompt reforms that have to be implemented by means of other forms of cooperation. The role of the private sector is of paramount importance in this respect. The

263 Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo, UN Doc. *S/2001/357*, para. 62. Author's emphasis added.

264 *Ibid*.

265 Final report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo, UN Doc. *S/2002/1146*, para. 185.

trade in natural resources that finance armed conflict can only be curbed by engaging the private sector in reforms. The diamond sanctions, as well as the due diligence standards, reveal the Security Council's awareness of the need to engage the private sector in reforms.

The role of governments is of course equally important. Reforms in the natural resources sectors can only be achieved with the full support of the government of a State. Sanctions serve only as a tool to bring about the necessary changes. The Security Council therefore often leaves the initiative to implement changes to the States themselves. Examples include the certificate-of-origin regimes proposed for rough diamonds. The Security Council has left it to the States themselves to choose the appropriate mechanism for this purpose.

In most cases, the Security Council keeps its distance while using sanctions to put pressure on governments to implement the necessary changes. This can even benefit the respective governments when it gives the national authorities the necessary support to push for changes. For example, this was the case in Liberia. The sanctions strengthened the efforts of President Johnson Sirleaf to implement changes in Liberia's administrative system.

The principle of national ownership of strategies for post-conflict peacebuilding is central to the Security Council's efforts in this respect. In a 2009 Presidential Statement on post-conflict peacebuilding, the Security Council explicitly emphasised the importance of this principle for peacebuilding efforts and priorities, while at the same time emphasising "the vital role of the United Nations in supporting national authorities to develop an early strategy, in close consultation with international partners, to address these priorities".[266] The sanctions regimes discussed in this chapter demonstrate the will of the Security Council to respect national ownership as much as possible, even in relation to sanctions regimes.

Finally, it is of paramount importance for the Security Council to continue its efforts to address the role of natural resources in financing armed conflict. In fact, its role should even be strengthened in this respect. The current sanctions regimes focus mainly on preventing the trade in natural resources by armed groups. However, in order to achieve a lasting peace, the underlying governance structures should be addressed as well. The Security Council should use sanctions more often to push for structural changes in the governance of natural resources in countries recovering from armed conflict. These changes should be aimed at introducing transparency, accountability and sustainability in the governance of natural resources as a tool to prevent future conflicts in countries that have suffered from armed conflict. The Security Council has wide discretionary powers to act under Chapter VII of the UN

266 UN Security Council Presidential Statement of 22 July 2009, S/PRST/2009/23. The importance of the principle was confirmed in subsequent presidential statements regarding post-conflict peacebuilding. See S/PRST/2010/7 and S/PRST/2010/20.

Charter, and greater use should be made of these. It is precisely because of its authority to impose mandatory measures that the Security Council is the appropriate body to do so. This approach is in line with the broader acceptance of the Security Council's role beyond immediate crisis management.

Of course, a word of caution is required in this appraisal. Sanctions are an effective tool to address the links between natural resources and armed conflict. In this respect, achieving structural reforms in natural resources sectors can be a legitimate objective of sanctions regimes. However, the role of the Security Council under Chapter VII of the UN Charter is limited to addressing "threats to the peace, breaches of the peace, and acts of aggression" and should therefore not be overestimated. This means that the role that sanctions can play is limited to this context.

8 Addressing resource-related armed conflicts with informal normative processes

8.1 Introductory remarks

The preceding chapter discussed the ways in which sanctions regimes imposed by the Security Council address the links between natural resources and armed conflict. It demonstrated that several of the resolutions adopted by the Security Council encouraged States to participate in voluntary initiatives aimed at improving resource transparency.

Some of these resolutions established a direct link between the participation of States in voluntary initiatives and the implementation of the sanctions regime. Resolution 2045 (2012) related to Côte d'Ivoire is one example. This resolution explicitly offers the government of Côte d'Ivoire the possibility of modifying or lifting sanctions, provided that the Ivorian authorities "create and implement an action plan to enforce the Kimberley Process rules in Côte d'Ivoire" and that they "closely work with the Kimberley Process Certification Scheme to conduct a review and assessment of Côte d'Ivoire's internal controls system for trade in rough diamonds and a comprehensive geologic study of Côte d'Ivoire's potential diamond resources and production capacity".[1] Another example concerns the sanctions regime imposed to address the armed conflict in the DR Congo, where the Security Council expressed its intention to impose sanctions for the non-compliance by corporate entities to the voluntary due diligence guidelines developed by the UN Group of Experts.[2]

The Security Council also expressed its support for these voluntary initiatives in a more general fashion. In its Presidential Statement of 25 June 2007 on Natural Resources and Conflict, it emphasised the important contribution of commodity monitoring and certification schemes, such as the Kimberley Process, in preventing and combating trafficking, illicit trade, and illegal exploitation of natural resources.[3] It also recognised the role of voluntary initiatives aimed at improving revenue transparency such as EITI in ensuring that natural resources stimulate sustainable development.[4] Furthermore, the Security Council referred to the role of voluntary initiatives aiming at en-

1 UN Security Council Resolution 2045 (2012), especially paragraph 6 and 21.
2 See UN Security Council Resolution 1952 (2010), especially paragraph 9.
3 UN Security Council Presidential Statement on Natural Resources and Conflict, *UN Doc. S/PRST/2007/22*, 25 June 2007, paragraph 8.
4 *Ibid*., paragraph 9.

couraging multinational enterprises to adopt responsible business practices, such as the OECD Guidelines for Multinational Enterprises and the UN Global Compact.[5] Lastly, in its Presidential Statement of 15 April 2013 on Peace and Security in Africa, the Security Council recognised "the importance of commodity monitoring and certification schemes, such as the Kimberley Process, and the role of voluntary initiatives aimed at improving revenue transparency, such as the Extractive Industries Transparancy Initiative" as tools for the prevention of conflicts.[6]

The current chapter aims to identify the contribution of these voluntary initiatives to the development of a regulatory framework for the management of natural resources in post-conflict environments. More specifically, the purpose of this chapter is to assess whether and to what extent these voluntary initiatives respond to the call made in the report of the High-level Panel on Threats, Challenges and Change to the United Nations, national authorities, international financial institutions, civil society organizations and the private sector "to develop norms governing the management of natural resources for countries emerging from or at risk of conflict".[7]

This call did not receive express follow-up in subsequent formal documents. Instead, the 2005 World Summit Outcome Document focused exclusively on the process of peacebuilding and its procedural modalities, most notably the establishment of the UN Peacebuilding Commission as the principal institution to coordinate action in this field. From a substantive perspective, the call therefore remains very relevant. This is illustrated by the fact that the UN Peacebuilding Commission itself has recently started to consider issues relating to the management of natural resources in its work programme, showing the continued need for a regulatory framework as called for by the High-level Panel.

For this purpose, the current chapter first examines the substantive contributions made by voluntary initiatives to the governance of natural resources in countries emerging from armed conflict. To what extent do voluntary initiatives create standards for the management of natural resources in post-conflict situations? More in particular, to what extent do such initiatives effectively incorporate elements of sustainable development in their methods of operation, and how do these elements contribute to shaping the governance of natural resources in countries recovering from armed conflict?

Furthermore, given their increasing popularity, this chapter addresses the question whether these informal instruments provide a credible alternative to legally binding instruments. Even though these instruments do not impose

5 *Ibid*., paragraph 10.

6 UN Security Council Presidential Statement on Peace and Security in Africa, *UN Doc. S/PRST/2013/4*, 15 April 2013, paragraph 18.

7 Report of the High-level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility*, United Nations: New York (2004), para. 92.

legally binding obligations on participants, these participants have committed themselves to strive for the achievement of particular objectives. The question is therefore whether these voluntary instruments contain effective mechanisms to monitor and enforce the implementation of the instruments by the participants.

The current chapter discusses three initiatives that are representative of the categories of voluntary initiatives mentioned in the Presidential Statement. The Kimberley Process for the Certification of Rough Diamonds is an example of a commodity monitoring and certification initiative. The Extractive Industries Transparency Initiative is an initiative aimed at improving resource transparency. Finally, the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas is an example of an initiative aimed at improving responsible business conduct.

These initiatives share some common characteristics that make them particularly useful for the purposes of this chapter. First, all three specifically focus on issues related to natural resource governance. This gives them an added value compared to the broad range of other initiatives that address revenue transparency and corporate responsibility in a more general fashion. They include the UN Anti-Corruption Convention and the UN Global Compact. In addition, all three are multi-stakeholder initiatives, which have been developed by representatives of States, civil society and the business community. Thus these initiatives represent a relatively new category of instruments for setting standards, in the sense that they have not been developed by traditional state-centred standard-setting processes. Furthermore, the effective implementation of the initiatives depends not only on States, but also on companies. Finally, the ambition of all three initiatives is to become universal in their application. Therefore they go further than initiatives specific to a particular country or region, such as the Mineral Certification Scheme of the International Conference on the Great Lakes Region.

The following sections discuss the three above-mentioned initiatives. Section 2 discusses the Kimberley Process, section 3 examines the Extractive Industries Transparency Initiative and section 4 looks at the OECD Due Diligence Guidance. Section 5 discusses the substantive contribution of the three initiatives to the development of a regulatory framework for the management of natural resources in conflict-affected States, with a particular emphasis on the role of these initiatives in promoting sustainable resource governance. Finally, section 6 examines the effectiveness of these instruments.

8.2 The Kimberley Process for the Certification of Rough Diamonds

8.2.1 Context

The Kimberley Process Certification Scheme was developed in response to the armed conflicts raging in Angola and Sierra Leone, where diamonds were used to finance the military campaigns of rebel groups opposing the legitimate government.[8] The Security Council had adopted sanctions targeting the export of diamonds originating from these States.[9] However, neither Angola nor Sierra Leone had an effective system in place to track the origin of diamonds mined in these States.[10] Therefore, the sanctions could easily be busted by armed groups smuggling the diamonds into neighbouring countries, from where they were re-exported and sold on the international market.[11]

The origin of the Kimberley Process for the Certification of Rough Diamonds is therefore linked to UN sanctions. It was set up in order to find an effective international solution to the problem of diamond smuggling in contravention of UN sanctions. The aim of the process was quite innovative: to design a universal certification scheme for rough diamonds that would be applied by all States producing and purchasing diamonds. The scheme was to be based on national certification schemes, supplemented with international minimum standards. Because of its universal membership, the scheme would stop so-called "blood diamonds" entering the international diamond market by closing the trade routes for armed groups.

Another innovative feature of the process concerns the diversity of its membership. The Kimberley Process was initiated not only by governments but also by the diamond industry and non-governmental organizations. The involvement of all the interested actors, and especially of the diamond industry, was considered crucial for the success of the scheme. For example, in relation to Angola the report of the Panel of Experts concluded that lax controls

8 For more details on these conflicts, see Chapter 5 of this study.

9 See UN Security Council Resolutions 1173 (1998) and 1295 (2000) concerning the armed conflict in Angola; Resolution 1306 (2000) concerning the armed conflict in Sierra Leone; and Resolution 1343 (2001) concerning Liberia's involvement in the smuggling of diamonds from Sierra Leone. For a more detailed discussion of these resolutions, see Chapter 5 of this study. It should be noted that the first meeting leading to the Kimberley Certification Scheme took place before the Security Council adopted diamond embargoes for Sierra Leone and Liberia.

10 See for example the following reports for an account of the difficulties experienced by the government of Angola in setting up a certification mechanism that would effectively control the trade in Angolan diamonds. Final Report of the Panel of Experts, *UN Doc. S/2000/203*, paras. 94-98; and the 2000 Interim Report of the Monitoring Mechanism, *UN Doc. S/2000/1026*, p. 12.

11 For more information, see the report of the Panel of Experts on Angola (the Fowler report), *UN Doc. S/2000/203*, paras. 75-114; and the report of the Panel of Experts on Sierra Leone, *UN Doc. S/2000/1195*, paras. 65-166.

in diamond- selling centres were one of the factors that made it easy for UNITA to gain access to the international diamond market.[12]

The Kimberley Process Certification Scheme was launched in November 2002, only two and a half years after the first meeting in Kimberley, South Africa. The Scheme was adopted with a ministerial declaration at a conference held in Interlaken.[13] The process is based on voluntary commitments undertaken by participants, *i.e.*, countries producing and trading diamonds. These commitments include the adoption of appropriate national legislation and reporting requirements concerning the volume of their trade in rough diamonds. The implementation of the commitments is monitored by the participating non-governmental organizations.[14] The Kimberley Process is paralleled by a system of self-regulation for the diamond industry under the auspices of the World Diamond Council.[15]

8.2.2 Scope and objectives of the scheme

The Kimberley Process is premised on the idea that "urgent international action is imperative to prevent the problem of conflict diamonds from negatively affecting the trade in legitimate diamonds, which makes a critical contribution to the economies of many of the producing, processing, exporting and importing states, especially developing states".[16] The Kimberley Process Certification Scheme was designed "to exclude conflict diamonds from the legitimate trade".[17] As its objectives show, it is a very practical initiative with the primary aim of protecting the legitimate diamond trade.

In order to gain a proper understanding of the scope of the Kimberley Process, it is essential to take a closer look at its definition of "conflict diamonds". This may help to understand what the scheme covers and, more importantly, what it does not. The Kimberley Process defines conflict diamonds as:

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12 Final Report of the Panel of Experts, *UN Doc. S/2000/203*, paras. 87-93.

13 Interlaken Declaration of 5 November 2002 on the Kimberley Process Certification Scheme for Rough Diamonds.

14 For more details, see J.E. Wetzel, 'Targeted Economic Measures to Curb Armed Conflict? The Kimberley Process on the Trade in 'Conflict Diamonds'', in N. Quénivet & S. Shah-Davis (eds.), *International Law and Armed Conflict: Challenges in the 21st Century*, The Hague: T.M.C. Asser Press (2010), pp. 170-171.

15 The World Diamond Council has been established in 2000 with the purpose of "represent[ing] the diamond industry in the development and implementation of regulatory and voluntary systems to control the trade in diamonds embargoed by the United Nations or covered by the Kimberley Process Certification Scheme". See http://www.worlddiamondcouncil.com/ for more details (consulted on 27 June 2012).

16 Kimberley Process Certification Scheme, fourth paragraph of the preamble.

17 Kimberley Process Certification Scheme, ninth paragraph of the preamble.

> "rough diamonds used by rebel movements or their allies to finance conflict aimed at undermining legitimate governments, as described in relevant United Nations Security Council (UNSC) resolutions insofar as they remain in effect, or in other similar UNSC resolutions which may be adopted in the future, and as understood and recognized in United Nations General Assembly (UNGA) Resolution 55/56, or in other similar UNGA resolutions which may be adopted in future".[18]

The first element that reveals the scope of the Kimberley Process is the reference to "rough diamonds", defined as "diamonds that are unworked or simply sawn, cleaved or bruted".[19] In other words, as soon as diamonds have undergone any form of modification from their natural state, they are no longer covered by the Kimberley Process Certification Scheme. Of course, this considerably narrows the scope of the scheme. In addition, it provides loopholes for bypassing it. In fact, in 2007 the participating NGO Global Witness reported a significant number of suspicious shipments of polished diamonds from countries with no diamond industry.[20] One possible explanation for this is that these shipments were deliberately misclassified.

Secondly, the Kimberley Process covers only diamonds that are used by rebel movements or their allies. Thus the definition covers rebel movements and all those who provide support to these movements, either by trading with them or by other means, including foreign governments, such as the Taylor administration which supported the Revolutionary United Front (RUF) in Sierra Leone, as well as companies.[21] Therefore the definition is broader than an earlier one proposed by the General Assembly in its Resolution 55/56, which focused exclusively on the role of rebel movements themselves.[22]

However, diamonds mined by national authorities are excluded from the definition, even when this is associated with gross human rights violations. This turns out to be a very problematic limitation, threatening the very survival of the Kimberley Process. The 2011 Plenary decision to allow Zimbabwe to resume export of its diamonds,[23] after an earlier decision of the Plenary in 2009 to temporarily block the export of diamonds from Zimbabwe, was a cause

18 Kimberley Process Certification Scheme, Section I.
19 Kimberley Process Certification Scheme, Section I.
20 Global Witness, 'Loopholes in the Kimberley Process', October 2007.
21 See also J.E. Wetzel, 'Targeted Economic Measures to Curb Armed Conflict? The Kimberley Process on the Trade in 'Conflict Diamonds'', in N. Quénivet & S. Shah-Davis (ed.), *International Law and Armed Conflict: Challenges in the 21st Century*, The Hague: T.M.C. Asser Press (2010), pp. 173-174.
22 The General Assembly defined rough diamonds as "diamonds which are used by rebel movements to finance their military activities, including attempts to undermine or overthrow legitimate Governments. UN General Assembly Resolution 55/56 (2000), second paragraph of the preamble.
23 Final Communiqué from the Kimberley Process Plenary Meeting, 3 November 2011, available through http://www.worlddiamondscouncil.org, resources section (consulted on 14 June 2012), para. 19.

of great concern. The reasons for blocking Zimbabwe's diamond exports in 2009 were reports of human rights abuses committed by the Zimbabwean army at particular mining sites, as well as reports of smuggling in contravention of the scheme.[24] The 2011 Plenary decision provoked a great deal of anger, notably among the NGOs involved in the Process. Some of them even walked out of the process.[25]

The last element of the definition is very interesting, as it indirectly touches on the question of the legitimacy of the armed conflict itself. According to the definition, conflict diamonds are diamonds that are used to finance conflicts aimed at undermining *legitimate* governments. The reference to 'legitimate' with respect to governments seems to imply that the definition excludes diamonds that are used by rebel movements to overthrow governments that are not – or are no longer – recognised by the international community. In this respect reference can be made to Chapter 2 of this book, which discussed the position of governments under international law. The reference to legitimate governments in the Kimberley definition of conflict diamonds lends support to the conclusion reached there, in the sense that armed groups that aim to overthrow an illegitimate government are considered to have a right to exploit the State's natural resources.

Furthermore, the definition indicates that it is up to the Security Council to determine whether rough diamonds used by armed groups constitute 'conflict diamonds'. The definition explicitly refers to existing and future Security Council resolutions: "as described in relevant United Nations Security Council resolutions". This reference could be interpreted to mean that the Security Council must determine in advance whether diamonds used by armed groups in particular situations are "conflict diamonds". This implies that the Kimberley scheme only covers diamonds that have explicitly been labelled "conflict diamonds" by the Security Council.

Therefore the definition of conflict diamonds in the context of the Kimberley Process is very specific and very limited. This is understandable, as the original objective of the Kimberley Process was to stop diamonds from financing horrific conflicts such as those in Angola and Sierra Leone, where diamonds were mined by rebel groups like UNITA and the RUF.

However, the Kimberley Process scheme entered into force ten years ago and it is time to rethink its objectives. Is it an initiative that aims at re-establishing sovereignty over natural resources by helping governments to regain control over the State's natural resources? Or is the objective of the process rather human rights-oriented, *i.e.*, is its objective to exclude from the market

24 See the Final report of the Kimberley Process Certification Scheme Review Mission to Zimbabwe from 30 June to 4 July 2009, available through http://graphics8.nytimes.com/packages/pdf/world/ZimFinaldraft020909.pdf (consulted on 9 December 2012).

25 See in this regard *e.g.* the Press release of Global Witness, one of the founding NGOs, on http://www.globalwitness.org (consulted on 14 June 2012).

all diamonds that are associated with violence and human rights abuses in general? In the latter case, the term 'conflict diamonds' urgently needs to be redefined.

The United States, which chaired the Kimberley Process in 2012,[26] was certainly in favour of increasing the scope of the definition. It proposed a new definition of conflict diamonds which would include all diamonds associated with violence and human rights abuses, whether committed by rebel movements or States, in or outside the context of an armed conflict.[27] The advocates of this broader definition not only include civil society groups and State members to the Kimberley Process, but also companies in the diamond industry. The reason for the diamond industry to engage in the Kimberley Process in the first place was the damage to the industry's reputation after reports involving 'blood diamonds' in the late 1990s. Examples like Zimbabwe pose a similar problem for the industry. However, there are also a number of opponents to a new definition, especially – and not surprisingly – in States that produce diamonds. In the light of the controversy surrounding a new definition, the 2012 Plenary meeting, held in December 2012 in Washington, delayed the adoption of a new definition until at least 2013. At the time of publication of this book, no further action has been taken.

8.2.3 Participants and institutional structure

The Kimberley Process has 54 participants, representing 80 States.[28] Although it is not an international organization, State participants are referred to as "members". Producing members account for 99.8 % of the worldwide production in rough diamonds, and the process includes all the major diamond trading countries. Other participants in the process include the World Diamond

26 The Chair of the Kimberley Process rotates on an annual basis. The current Chair is South Africa, while China (the current Vice-Chair) will become the Chair in 2014.

27 In this respect see the Chair Vision Statement of 7 August 2012, available through http://www.kimberleyprocess.com (consulted on 12 August 2012). See also the commentary to the Chair Vision Statement, which sets out in more detail a proposition to change the definition for conflict diamonds so as to apply to "diamond-related conflicts that meet generally agreed-upon standards of armed conflicts, such as a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State. This would also apply to circumstances of systematic violence, such as protracted and violent internal disturbances and tensions, grave acts of violence or acts of a similar nature over an extended period. Such a definition would not apply to individual or isolated cases. Neither would this apply to violence that is unrelated to diamonds". See Chair Vision Statement FAQs, p. 4 (consulted on 12 August 2012).

28 See http://www.kimberleyprocess.com (last consulted on 5 December 2012). The European Union and its member States count for one single participant. In December 2012, Panama, Kazakhstan and Cambodia are admitted as new participants following the admission in August of Cameroon.

Council, representing the diamond industry, and civil society. Global Witness and Partnership Africa-Canada are among the founding NGOs.

The institutional structure of the Kimberley Process is very basic. Its operation largely depends on the contribution of the participants and observers to the Scheme. The Kimberley Process does not have a permanent secretariat at its disposal, although there are plans to establish a so-called administrative support mechanism (ASM).[29] Furthermore, the principal organ of the Kimberley Process is the Plenary, which meets once a year and consists of all the Kimberley Process participants and observers, i.e., the participating States, as well as the diamond industry and civil society. Decisions regarding the functioning of the system are adopted by this organ on the basis of consensus.[30] It may also set up *ad hoc* working groups and subsidiary bodies to refine particular aspects of the system, i.e., to prepare guidelines on internal controls, or to look into specific situations.[31]

The Kimberley Process is supervised by a Chair, a function that rotates amongst the participants on a yearly basis. In addition to directing the working groups and administering the Process, the Chair's functions include the resolution of disputes between participants regarding the implementation of the scheme.[32] This dispute resolution mechanism could constitute an important tool to ensure compliance by members, if used effectively. It is triggered by a form of "whistle blowing". Participants can inform the Chair of concerns regarding compliance with the scheme by other participants. The Chair will then try to find a solution to the problem with a form of mediation. So far, the dispute settlement mechanism has been used once, leading to the suspension of a participant from the process.[33]

29 See the 2010 Administrative Decision on the Establishment of an Ad Hoc Committee for Exploring the Modalities of Enhancing the Efficiency of the Kimberley Process With a View to Provide Administrative Support for its Activities and the 2011 amendment to this decision, available through http://www.kimberleyprocess.com, documents section (consulted on 14 June 2012). In December 2012, the Plenary agreed to accept the offer of the World Diamond Council to supply administrative support to the body for one year, starting January 1, 2013.

30 2003 Rules of Procedure of Meetings of the Plenary, and its Ad Hoc Working Groups and Subsidiary Bodies [hereafter: Rules of Procedure], available through http://www.kimberleyprocess.com (consulted on 14 June 2012), Rule 42.

31 Rules of Procedure, Rule 1 and 19.

32 Kimberley Process Certification Scheme, Section VI.

33 In this respect, see The Kimberley Process Certification Scheme: Third Year Review, p. 6, available through http://www.kimberleyprocess.com, documents section (last consulted on 27 August 2012).

8.2.4 Operation of the scheme

The Kimberley Process Certification Scheme functions on the basis of export and import permits for shipments of rough diamonds. Each shipment of rough diamonds must be accompanied by a duly validated Certificate.[34] This Certificate must meet a number of minimum requirements, including a statement that the rough diamonds in the shipment have been handled in accordance with the provisions of the Kimberley Process Certification Scheme. Furthermore, it must be tamper and forgery-proof, it must identify the issuing authority as well as the exporter and importer, state the carat weight, the number of parcels and the value of the shipment, and it must include a validation of the Certificate by the Exporting Authority.[35] In addition, a confirmation of receipt must be sent to the relevant Exporting Authority, with reference to the Certificate number, the number of parcels, the carat weight and the details of the importer and exporter.[36]

In order to meet these requirements, participants must establish a system of internal controls designed to eliminate conflict diamonds from shipments of rough diamonds imported into or exported from their territory.[37] In this respect, participants must meet a number of minimum requirements. They must designate Importing and Exporting Authorities, ensure that rough diamonds are imported and exported in tamper-proof containers, adopt appropriate legislation to implement and enforce the Certification Scheme, and collect, maintain and exchange official production, import and export data with other participants.[38] Finally, participants should cooperate with each other with the exchange of information and best practices.[39] Over the course of time, these requirements have been further refined with administrative decisions and declarations adopted in the plenary sessions.[40]

In addition to these minimum requirements, the Kimberley Process Certification Scheme provides a number of recommendations for the establishment of a system of internal controls. These include recommendations relating to

34 Kimberley Process Certification Scheme, Section III (a).
35 Kimberley Process Certification Scheme, Annex I A.
36 Kimberley Process Certification Scheme, Section III (b).
37 Kimberley Process Certification Scheme, Section IV (a).
38 Kimberley Process Certification Scheme, Section IV (b)-(f).
39 Kimberley Process Certification Scheme, Section V.
40 See, *e.g.,* the 2005 Moscow Declaration which sets out a number of recommendations concerning internal controls over alluvial diamond mining. Similarly, the 2007 Brussels Declaration contains recommendations on internal controls for participants with rough diamonds trading and manufacturing which directly affect companies. See also the 2009 Administrative Decision on Implementation and Enforcement which builds on Section V of the Kimberley Process Certification Scheme concerning cooperation and transparency, inter alia, to counter fraudulent certificates and suspect shipments. For all these documents, see the documents section of http://www.kimberleyprocess.com (consulted on 13 June 2012).

the transparency of payments for rough diamonds, the licensing of mines and miners, as well as the registration and licensing of diamond buyers, sellers, exporters, agents and courier companies.[41]

The proper functioning of the Kimberley Process is therefore largely dependent on national implementation. Decisions on the operation of the internal controls are left to the national States participating in the scheme. The prosecution of infringements of the scheme is also a domestic issue. The Kimberley Process Third Year Review Report of November 2006 mentions a number of seizures of diamond parcels, as well as the instigation of criminal proceedings by countries, but the report fails to give a real insight into the proper functioning of the Process. The significant number of reported seizures by trading countries such as the European Union, Australia and Canada is a hopeful sign, but does not provide much information on the overall success of the scheme.

Although the scheme relies on national implementation, the Kimberley Process has introduced a system of international monitoring. This system is based primarily on a peer review system and works largely on a voluntary basis. States have to consent to the use of a review mission.[42] Despite the voluntary nature of the monitoring system, the majority of Kimberley members have accepted review missions. In some cases, these have had a considerable impact. In the case of Zimbabwe, for example, a review mission in 2009 provided essential information, resulting in a temporary blocking of Zimbabwean diamonds and the adoption of a working plan by the Zimbabwean government to address the findings of the review team.

Despite the emphasis on national implementation and the voluntary nature of the commitments, States do have to satisfy a number of requirements in order to be eligible to participate in the Kimberley Process. Participation in the process is dependent on the implementation of the minimum requirements set out above. If States do not meet these minimum requirements, they can be suspended from the Process.[43]

In practice there have been some cases of suspension or self-suspension under the Process. In 2004, the Republic of the Congo was suspended because it could not provide sufficient details on its diamond production. It was suspected of being a transit country for smuggling diamonds from the Democratic Republic of the Congo and Angola. The suspension was lifted in 2007,

41 Kimberley Process Certification Scheme, Annex II.

42 See the 2003 Administrative Decision on the Implementation of Peer Review in the KPCS, available through http://www.kimberleyprocess.com, documents section (consulted on 14 June 2012). The peer review system has been revised several times, the last revision dates from 2007, through Administrative Decision 16.

43 Guidelines for the Participation Committee in Recommending Interim Measures as regards Serious Non-compliance with KPCS Minimum Requirements, adopted on 5 November 2008, available through http://www.kimberleyprocess.com (consulted on 13 May 2012).

after the Republic of the Congo had demonstrated that it had introduced reforms in its diamond sector.[44]

Furthermore, Venezuela and Côte d'Ivoire are examples of participants that opted for self-suspension. Côte d'Ivoire opted for suspension as soon as the requirements were introduced in 2003. Today, the country is still not allowed to trade in rough diamonds, but this is largely due to the UN Security Council sanctions imposed in 2005 against diamonds originating from the country. The Kimberley Process and the UN Panel of Experts on Côte d'Ivoire are closely cooperating to reinstate Côte d'Ivoire as an active member of the Kimberley Process. Venezuela announced in 2008 that it would suspend its export of rough diamonds until it had taken the necessary reforms to control its diamond sector. However, Venezuela has not yet rejoined the Kimberley Process.

Since the launch of the Kimberley Process, the number of 'conflict diamonds' traded on the international market has dropped significantly. It is estimated that conflict diamonds represent about one per cent of the international trade in diamonds today, compared to estimates of up to 15% in the 1990s.[45] Nevertheless, it is difficult to measure the precise contribution the Kimberley Process has made to this success. Some of the conflicts that were financed with diamonds, in particular the conflicts in Angola and Sierra Leone which triggered the development of the Kimberley Process in the first place, had already come to an end by the time the Kimberley Process entered into force in early 2003. As a result, the total number of 'conflict diamonds' traded on the international market obviously declined as well.

Thus it is difficult to measure the impact of the Kimberley Process on the elimination of the trade in conflict diamonds. One important function of the Kimberley Process is related to conflict prevention. The improved governance of diamonds, with the introduction of internal controls, the licensing of mines and increased transparency in export data and payments, can fulfil an important role in preventing rebel groups from gaining access to diamond mines. Furthermore, a functioning system of internal controls can be a disincentive for rebel groups to consider diamonds as a source of funding or financial gain. The certificate requirements, as well as the almost universal membership to the scheme, make it more difficult for rebel groups to find buyers for conflict diamonds.[46]

In the case of Sierra Leone, the Kimberley Process has certainly played an important role in capacity building, making the diamond sector in that

44 See J.A. Grant, 'The Kimberley Process at Ten: Reflections on a Decade of Efforts to End the Trade in Conflict Diamonds', in P. Lujala & S.A. Rustad (eds.), *High-Value Natural Resources and Post-Conflict Peacebuilding*, Oxon/New York: Earthscan (2012), p. 165.

45 See http://www.kimberleyprocess.com, 'About' section (last consulted on 6 December 2012).

46 See J.A. Grant, 'The Kimberley Process at Ten: Reflections on a Decade of Efforts to End the Trade in Conflict Diamonds', in P. Lujala & S.A. Rustad (eds.), *High-Value Natural Resources and Post-Conflict Peacebuilding*, Oxon/New York: Earthscan (2012), p. 175.

country more resilient to future attempts by rebel groups to gain control over the sector. Moreover, the proportion of diamonds exported through government channels in that country has increased significantly due to implementation of the Kimberley Process.[47]

8.2.5 International recognition of the Kimberley Process

From the beginning, the Kimberley Process received the support of the principal UN organs. In its resolution 55/56, adopted in December 2000, the UN General Assembly enthusiastically welcomed the Kimberley Process initiative and encouraged the development of an international certification scheme.[48] Moreover, the General Assembly issued a number of recommendations on the design of such a scheme.[49] These included recommendations to base it primarily on national certification schemes to ensure the widest possible participation. They emphasised the need for appropriate arrangements to help to ensure compliance and the need for transparency. Since then, the General Assembly has issued several resolutions endorsing the process and the resulting certification scheme.[50]

From the start of the process, the Security Council also emphasised the importance of States working together with the diamond industry to devise effective arrangements to ensure that members of the diamond industry worldwide abide by the diamond sanctions imposed by it.[51] In this respect the Council welcomed the initiatives that led to the Kimberley Process Certification Scheme.[52] In addition, soon after the official launch of the certification scheme in 2002, the Security Council expressed its strong support for the scheme and urged all member States to actively participate in it.[53] Moreover, as discussed in the preceding chapter, the Security Council embraced the mechanism in several of its subsequent sanctions regimes as the primary way of implementing the sanctions. This gave significant added authority to the Kimberley Process.

In addition, the Kimberley Process has received support from organizations outside the UN. Most notably the recognition by the WTO through its waiver

47 *Ibid*., pp. 166-173.

48 UN General Assembly Resolution 55/56 of 1 December 2000 (date of publication 29 January 2001) on the role of diamonds in fuelling conflict: breaking the link between the illicit transaction of rough diamonds and armed conflict as a contribution to prevention and settlement of conflicts, paragraph 10 of the preamble and especially paragraph 5.

49 Idem, para. 3.

50 See, *inter alia*, UN General Assembly Resolution 56/263 of 13 March 2002; Resolution 57/302 of 15 April 2003; Resolution 58/290 of 14 April 2004 and subsequent resolutions. The most recent resolution is Resolution 66/252 of 25 January 2012.

51 UN Security Council Resolution 1295 (2000), especially paragraph 19.

52 *Ibid*., especially paragraphs 17-18.

53 UN Security Council Resolution 1459 (2003), especially paragraphs 1-3.

procedure. This waiver grants WTO members participating in the Kimberley Process the right to adopt measures to regulate the trade in rough diamonds that deviates from the trading rules of the WTO.[54] In this way, the WTO expresses its support for the Kimberley Process. It should be noted that it is exceptional for the WTO to express support for an initiative that addresses ethical concerns. In most cases where States have invoked ethical concerns as a reason to deviate from the WTO rules, the WTO has adhered to its non-discrimination policy.[55]

8.2.6 Appraisal of the initiative

The Kimberley Process is a voluntary initiative which does not impose legally binding obligations on participating States. However, as stated before, States wishing to participate in the initiative must meet the minimum requirements of the Process. If they do not meet these requirements, they either cannot join or risk suspension from the Process. This is one of the major strengths of the Process, as the participants, including almost all the diamond-producing States, as well as all States hosting major diamond markets, such as Belgium, South Africa and Israel, are barred from trading with non-participants.[56] Therefore expulsion from the process implies exclusion from the international diamond market.

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54 Waiver Concerning Kimberley Process Certification Scheme for Rough Diamonds, Decision of the WTO General Council of 15 May 2003, *Doc. WT/L/518* (27 May 2003). The waiver was extended in 2006 by General Council Decision of 15 Dec. 2006, *Doc. WT/L/676* (19 December 2006) and again in 2012 by General Council Decision of 11 December 2012, *Doc. G/C/W/675/Rev.2*. The waiver expires on 31 December 2018.

55 See P. van den Bossche, N.J. Schrijver and G. Faber, *Unilateral Measures Addressing Non-Trade Concerns, A Study on WTO Consistency, Relevance of other International Agreements, Economic Effectiveness and Impact on Developing Countries of Measures concerning Non-Product-Related Processes and Production Methods*, The Hague: OBT / the Ministry of Foreign Affairs of the Netherlands (2007).

56 This is the characteristic of the scheme that has inspired most debates concerning the compatibility of the scheme with WTO trade law and especially with the principle of non-discrimination. Although in practice this problem is solved through a waiver by the WTO, many authors question the necessity of such a waiver. The main argument of these authors is that the Kimberley Process can be exempted under one of the general exceptions to the principle of non-discrimination under the General Agreement on Tariffs and Trade (GATT). For more details on this discussion, see, *e.g.*, J. Pauwelyn 'WTO Compassion or Superiority Complex? What to Make of the WTO Waiver for "Conflict Diamonds"', *Michigan Journal of International Law*, Vol. 24 (2002-2003), pp. 1177-1207; K.N. Schefer, 'Stopping Trade in Conflict Diamonds : Exploring the Trade and Human Rights Interface with the WTO Waiver for the Kimberley Process', in T. Cottier, J. Pauwelyn and E. Bürgi, *Human Rights and International Trade*, Oxford: Oxford University Press, pp. 391-450; J.E. Wetzel, 'Targeted Economic Measures to Curb Armed Conflict? The Kimberley Process on the Trade in "Conflict Diamonds"', in N. Quénivet & S. Shah-Davis (ed.), *International Law and Armed Conflict: Challenges in the 21st Century*, The Hague: T.M.C. Asser Press (2010), pp. 171-173.

The implementation of the Kimberley Process and its standards is achieved through the adoption of national legislation and procedures. Thus, while the Kimberley Process itself does not impose legally binding obligations on its participants, standards set by the Kimberley Process acquire legal force through implementation in national legislation. Participants expressly commit themselves to implementing Kimberley's minimum requirements regarding internal controls in their national legislation.

Moreover, the international recognition of the scheme, especially the strong support from the Security Council, adds considerable weight to the credibility and effectiveness of the initiative. In its sanctions regimes in relation to Angola, Sierra Leone and Liberia, the Security Council expressly provided for exemptions from the sanctions for rough diamonds traded with an effective certificate of origin regime, and expressed a preference for the Kimberley Process Certification Scheme. In its sanctions regime in relation to Côte d'Ivoire, the Security Council even made the lifting of sanctions conditional on Côte d'Ivoire's participation in the Kimberley Process.

However, from an institutional point of view, the Kimberley Process also has some significant weaknesses. The most important concerns the monitoring mechanism of the scheme. The Kimberley Process relies principally on national monitoring. There is no independent international body responsible for monitoring the implementation of the Kimberley Process requirements by the participants. International monitoring is conducted on the basis of a peer review system and largely on a voluntary basis. This system diminishes the credibility of the Kimberley Process and increases the possibilities for rebel groups to find loopholes to bypass the scheme.

Another weakness of the system is related to the decision-making process. As indicated above, decisions are taken in the Plenary, which is composed of the participants in the Process. This means that the participants have to decide on each other's performance. Decisions are taken on the basis of consensus, which means that States can effectively block controversial decisions. This makes enforcing the requirements much more difficult. The Group of Experts on Côte d'Ivoire mentioned this problem when it concluded that "the Kimberley Process fails to take action when its participants do not, or cannot, adhere to its principles. This problem is not restricted to the region, but applies to Kimberley Process participants more generally".[57]

Thus, on the whole, the Kimberley Process could be seen as an example of a voluntary agreement with compulsory elements, albeit not from a purely legal perspective. In countries that are committed to implementing the scheme, the results have been impressive. Sierra Leone serves as an example in this respect. The country has seen its official diamond exports growing considerably, while a recurrence of the armed conflict has so far been prevented.

57 Midterm Report of the Group of Experts on Côte d'Ivoire pursuant to paragraph 12 of Security Council Resolution 1893 (2009) of 18 March 2010, *UN Doc. S/2010/179*, para. 77.

However, in countries that do not have such a direct interest in implementing the scheme, the results have not always been so positive. Countries like Venezuela and Côte d'Ivoire, which are notorious for large-scale diamond smuggling and circumvention of the Kimberley Process requirements, illustrate the weaknesses of a non-legally binding regulatory regime like the Kimberley Process.

From a legal point of view, the significance of the Kimberley Process could be further improved with reforms in its institutional structure. The monitoring mechanism would benefit from greater impartiality with the introduction of independent audits. The functioning of the enforcement mechanism could be improved with the introduction of a more refined set of sanctions. The only formal sanction that exists at the moment is suspension from the scheme. This is such a robust measure that it is hardly ever applied.

The introduction of more moderate sanctions would give the participants more options to deal with issues of non-compliance, and in practice, such options already exist. The diamond exports of a country can, for example, be blocked without this resulting in the official suspension of the participant. This was the case in Zimbabwe in 2009. The system would benefit from formalising and refining these options.

In spite of its weaknesses, the Kimberley Process has proved to be an invaluable tool in eliminating conflict diamonds. It has provided a universal template for the certification of rough diamonds which can be applied in all countries trading in them. Therefore one important contribution of the Kimberley Process is that it has increased transparency in the diamond industry. Another important contribution of the Kimberley Process is that it has provided a platform for dialogue for States, companies and civil society to draw up plans for the elimination of the trade in conflict diamonds.

It is precisely this latter function that determines the future relevance of the Kimberley Process. In order to continue to be relevant, the participants should carefully reconsider the objectives of the Process. Currently, its principal function is related to conflict resolution, in the sense that it provides a tool to stop armed groups from financing their armed struggle with the trade in rough diamonds. Its function as a tool for conflict prevention is limited to discouraging armed groups from turning to diamonds to finance their armed struggle. Arguably, the participants should continue to develop the role of the Kimberley Process in the prevention of conflicts by adopting a broader definition of conflict diamonds, as proposed by the United States. This definition should include rough diamonds that are associated with violence and human rights abuses, whether they are committed by rebel movements or governments, in or outside the context of an armed conflict. Obviously, this policy change has major implications, not only for the Kimberley Process itself but also for its relationship with other institutions, most notably with the Security Council. The Kimberley Process would become more independent from the Security Council as a result of this change, since it would allow

Kimberley to address situations that do not directly pose a threat to international peace and security. Nonetheless, in order to improve its credibility as a tool to break the link between diamonds and armed violence, it is imperative for Kimberley to embark upon that route.

8.3 Extractive Industry Transparency Initiative

8.3.1 Context

The Extractive Industry Transparency Initiative (EITI) results from an NGO-driven campaign, introduced in 1999 with the aim of increasing transparency in the natural resources sectors of poor States which are rich in resources, by publishing company payments and government revenues. This "Publish What You Pay" campaign inspired the British government to initiate EITI, based on a multi-stakeholder initiative involving governments, the extractive industry and non-governmental organizations.[58] EITI was introduced during the 2002 Johannesburg Summit on Sustainable Development and a pilot phase was launched a year later. In the following years, both the institutional structure and the implementation process were developed in more detail. A Secretariat and a Board were established, and EITI principles, criteria and a validation guide were adopted. EITI has been fully operational since 2009.[59] Moreover, the EITI Standard is updated on a regular basis in order to increase the effectiveness of the initiative. The most recent version of the Standard was adopted in May 2013.

8.3.2 Scope and objectives of the initiative

The objective of EITI is to strengthen governance in resource-rich States by increasing transparency and accountability in the extractive industries. In the first place this involves the oil, gas and mining sectors, but it may also include other natural resources industries. Liberia, for example, has included the forestry and rubber industries in its EITI programme.[60]

The initiative is based on twelve principles which clearly demonstrate a broader commitment to sustainable development.[61] This is especially clear from the first principle, which formulates the premises on which the initiative

58 For more information on the 'Publish What You Pay Campaign', consult http://www.publishwhatyoupay.org (consulted on 18 June 2012).

59 For more details, see the Extractive Industries Transparency Initiative, *The EITI Standard*, EITI International Secretariat (May 2013), available through http://eiti.org (consulted on 20 June 2013).

60 See http://eiti.org/Liberia (consulted on 10 August 2012).

61 These principles can be found in the EITI Standard, p. 9.

is built. This is the belief that "the prudent use of natural resource wealth should be an important engine for sustainable economic growth that contributes to sustainable development and poverty reduction" and that the improper management of natural resource wealth "can create negative economic and social impacts".

The principles reaffirm the sovereignty of States over their natural resources, while emphasising the responsibility of governments to manage natural resources for the benefit of the country's population and in the interests of national development. In this respect, the principles reflect the idea of stewardship for revenue streams and public expenditure.[62] In addition, the principles articulate the relationship between the accountability of governments for the management of natural resources and for sustainable development.[63]

EITI's main tool to increase transparency and accountability for the management of natural resources revenues is the regular publication of reports, including full government disclosure of all extractive industry revenues on the one hand, and of all material payments to governments by extractive companies on the other. These publications must be made available to a wide audience in a publicly accessible, comprehensive and comprehensible manner. Other tools to increase transparency and accountability include external audits and the active engagement of civil society.[64]

Although EITI is not an instrument that is designed specifically to stop natural resources from fuelling armed conflict, the mechanism can be extremely useful in restoring effective government control and improving governance over natural resources in situations of (immediate) post-conflict reconstruction. In this way, EITI can help to prevent resource revenues from provoking a relapse into armed conflict. In fact, its broader ambit does not preclude it from being one of the principal tools to break the link between natural resources and armed conflict. Many countries where major resource-related conflicts have taken place in the last twenty years have joined the Initiative.[65] In addition, a concept note prepared by the United Kingdom for the Security Council's thematic open debate of 19 June 2013 on natural resources and conflict prevention refers to EITI as one out of four risk mitigating initiatives, together with the Kimberley Process, the OECD Due Diligence Guidance and the Ruggie

62 See Principle 2: "We affirm that management of natural resource wealth for the benefit of a country's citizens is in the domain of sovereign governments to be exercised in the interests of their national development" and Principle 8: "We believe in the principle and practice of accountability by government to all citizens for the stewardship of revenue streams and public expenditure".

63 See Principle 4, which states that "a public understanding of government revenues and expenditure over time could help public debate and inform choice of appropriate and realistic options for sustainable development".

64 See the seven EITI Requirements as set out in the EITI Standard 2013, p. 10.

65 EITI compliant countries include Liberia, while candidate countries include the DR Congo, Sierra Leone, Iraq and Côte d'Ivoire. See http://eiti.org/countries for up-to-date information. (consulted on 18 June 2012).

Framework for responsible business practices.[66] During the Open Debate, several delegations confirmed this position.[67] Lastly, EITI is among the principal tools of the International Conference on the Great Lakes Region to curb illegal exploitation of natural resources, as set out in the 2010 Lusaka Declaration.

8.3.3 Participants and institutional structure

EITI has 39 implementing countries, 23 of which are recognised as EITI-compliant countries while 16 have the status of candidate countries.[68] Compliant countries meet all the requirements of the EITI standard, while candidate countries implement the EITI standard but do not yet meet all the requirements. Liberia, Nigeria, Iraq and Côte d'Ivoire are examples of compliant countries, while Afghanistan is a candidate country. In addition to implementing countries, EITI recognises stakeholders. These are "supporting" countries, including the Netherlands and the United States, but also non-governmental organizations, companies and international organizations. Relevant examples of non-governmental organizations include Global Witness, the Open Society Institute, Publish What You Pay and Transparency International. Participating companies include De Beers, BP, Shell and Tata Steel. Finally, international organizations involved in EITI include the African and European Union, the OECD, the IMF and the World Bank Group.

EITI's institutional structure is well developed. EITI is governed by an association, which is registered as a non-profit organization under Norwegian law. Its governance structure is codified in Articles of Association.[69] The EITI Association comprises three permanent institutional bodies. First, the EITI's Members' Meeting, consisting of personal representatives of States, companies and civil society organizations.[70] This is EITI's governing body.[71] The second body is the EITI Board, which is the executive body of the Association. The

66 See Annex to the letter dated 6 June 2013 from the Permanent Representative of the United Kingdom of Great Britain and Northern Ireland to the United Nations addressed to the Secretary-General on 'Conflict prevention and natural resources: how can the effective and transparent management of natural resources in conflict-affected States contribute to international peace and security?', *UN Doc. S/2013/334,* 6 June 2013, paragraph 6.

67 See *e.g.* the United States, which emphasised that "[m]ultiple stakeholder partnerships among Governments, the private sector and civil society, such as the Extractive Industries Transparency Initiative (EITI), are making significant progress in addressing the link between extracted resources and conflict".

68 See http://eiti.org/countries (last consulted: 20 June 2013).

69 See the EITI Standard 2013, pp. 43-52, adopted on 16 February 2009.

70 Articles of Association, Articles 4, 8 and 9. As regards States' representatives, these are mostly civil servants or independent experts. There is no formal State representation in the Members' Meeting.

71 *Ibid*., Article 8.

EITI Board consists of an independent Chair, eight State members, six members from industry and five members from civil society.[72] The members of the Board are elected by the Members' Meeting.[73] The third institutional body is the EITI Secretariat, which supports the EITI Board in running the organization.[74] The Secretariat is funded on a voluntary basis by supporting governments and participating companies.[75]

The well-developed institutional structure of the EITI Association, with organs that can act independently from the Association's members, is one of the principal strengths of the initiative, since it effectively allows EITI to perform its oversight function. It makes EITI less susceptible to inside pressure from member countries.

8.3.4 Operation

States wishing to join EITI have to meet four registration requirements. These include a public announcement of the State's intention to implement EITI and the creation of a multi-stakeholder group at the national level consisting of representatives from the private sector, civil society and relevant government ministries, to prepare and supervise the implementation of the EITI programme.[76] When States have satisfied these requirements, they can apply to the EITI Board for admission as a candidate country. In order to ensure the participation of all the relevant actors in the implementation process, the application cannot take place without the full support of the multi-stakeholder group.

After admission as a candidate country, States have to meet yet another set of minimum requirements before being accepted as a full member or "compliant country".[77] Amongst other things, all the relevant actors must be included in the process of implementation, and all relevant companies and government entities must submit reports which are based on accounts audited to international standards.

Furthermore, governments and companies, including state-owned companies, must comprehensively disclose all material payments and revenues. These are published in an EITI report, drawn up by an independent organization. The report must be "comprehensible, actively promoted, publicly accessible, and contribute to public debate".[78] One important innovation in the 2013 Standard, compared to the 2011 EITI rules, is that the reports must include

72 *Ibid.*, Articles 4 and 10.
73 *Ibid.*, Articles 9 and 10.
74 *Ibid.*, Articles 4 and 16.
75 *Ibid.*, Article 18.
76 EITI Standard 2013, p. 11.
77 *Ibid.*, p. 10.
78 *Ibid.*, pp. 32-33, Requirement 6.

contextual information about the extractive industry in the EITI participant's State.[79] This information must include details about the legal framework and fiscal regime, production data of the extractive industries, government involvement in extractive companies, and the allocation of licences to extractive companies. The inclusion of this requirement in the EITI 2013 Standard is an important step in raising public awareness, as contextual information about the sector enables citizens to see the individual data from a broader perspective. The last requirement of interest is that EITI implementation must be on a "stable, sustainable footing".[80] However, the Standard does not elaborate on this requirement.

Candidate countries must submit their first EITI report within 18 months after their admission. After that, countries must report annually. However, in order to be accepted as an EITI-compliant country, candidate countries must take one final step. Within two and a half years after admission as a candidate, countries must submit a validation report to the EITI Board for approval. This is an external review that assesses a country's compliance with the EITI Principles and Criteria.[81] Again, the process comprises a number of checks and balances: the validator is selected by the EITI Secretariat from a list of accredited organizations pre-approved by the EITI Board, and the national multi-stakeholder group must give its consent to the proposed validator.

The validation process has to be repeated every three years once a country has been accepted as a compliant country. The validation requirements, together with the annual reporting procedure, ensure that States continue to comply with the requirements after their recognition as compliant countries. If the EITI Board considers at any given moment that a country has stopped complying, it can take several measures, ranging from temporary suspension from the process to the delisting of a State. At the moment there are several countries that have been suspended from the process, including the DR Congo, the Central African Republic and Sierra Leone.[82]

The effectiveness of EITI was subject to a review in 2011, undertaken by an independent bureau.[83] However, the review report was based on a very limited case study of three countries, viz. Nigeria, Gabon and Mongolia. Moreover, the report showed mixed results. In all three countries, reforms

79 *Ibid*., pp. 21-25, Requirement 3.

80 *Ibid*., p. 33.

81 For more details on the validation process, see the Validation Guide, included in the EITI Standard 2013, pp. 35-39.

82 Status as of 20 June 2013. The DR Congo is suspended for not reaching compliance in its second validation; the CAR for not being able to implement EITI as a result of the *coup d'état* in March; and Sierra Leone for not satisfying all the reporting requirements in its 2010 Report.

83 Scanteam, Evaluation of the Extractive Industries Transparency Initiative, May 2011, available through http://eiti.org/files/2011-EITI-evaluation-report.pdf (consulted on 7 December 2012).

had been undertaken for the purpose of implementing the EITI Standard. However, there were important differences between the countries, for example, notably with regard to the inclusiveness of the process and the institutional structure put in place to ensure the proper implementation of the process. Moreover, the report showed that the EITI process had hardly had any impact on society, in the sense of creating more accountability in government administration or promoting development. Other case studies on the Nigerian and Liberian EITI programmes have reached similar conclusions.[84]

Joining EITI is regarded as an important step in creating a platform for dialogue and for building trust in government institutions, but it does not directly contribute to creating more accountability in government administration. The 2013 review of the EITI requirements is specifically intended to address these deficiencies, notably with the introduction of the requirement to publish contextual information on the extractive sector and by requiring more detailed information regarding individual payments by companies to governments.

In conclusion, EITI's most important functions so far have been to provide a framework for changes in the administration of natural resources revenues, to create a level playing field for companies in the extractive industries, and to create a platform for dialogue. However, when it comes to bringing about changes in government administration in general, and especially in fostering accountability and sustainable development, it has not yet generated any tangible results. As a tool for conflict prevention and resolution, EITI's role is therefore limited to improving the basic structure for resource governance, while it is not sufficiently equipped to eliminate grievances over resource distribution and to promote sustainable peace.

8.3.5 International recognition of the initiative

Although the launch of EITI had been announced in 2002, it was not until 2009 that it became fully operational. Since then, it has steadily been gaining support. Early support for EITI was voiced by the leaders of the G8, who referred to the importance of the initiative for increasing transparency in the extractive industries in all their declarations since 2007. In their most recent declaration, adopted at the 2013 summit held in Northern Ireland, the G8 expressly encouraged countries to join EITI.[85]

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84 See P.D. Ocheje, 'The Extractive Industries Transparency Initiative (EITI): Voluntary Codes of Conduct, Poverty and Accountability in Africa', *Journal of Sustainable Development in Africa*, Vol. 8 (2006), No. 3 on Nigeria; and E. Rich & N. Warner, 'Addressing the Roots of Liberia's Conflict Through the Extractive Industries Transparency Initiative', in P. Lujala & S.A. Rustad (eds.), *High-Value Natural Resources and Post-Conflict Peacebuilding*, Oxon/New York: Earthscan (2012), pp. 201-209 on Liberia.

85 G8, 2013 Lough Erne G8 Leaders' Communiqué, 18 June 2013, paras. 34-39.

Furthermore, several international organizations participate directly in the initiative, including the African and European Unions, the IMF, the World Bank and the OECD. It is relevant to note that the World Bank administers EITI's so-called Multi-Donor Trust Fund, which provides technical and financial assistance to implementing States.[86] In addition, the OECD has integrated EITI in its own policy tools, such as its Due Diligence Guidance, examined in the following section.[87] The International Conference on the Great Lakes Region also endorsed EITI in its Lusaka Declaration of 15 December 2010 as one of the six tools developed to curb the illegal exploitation of natural resources.[88]

EITI has encouraged the implementation of disclosure requirements for the extractive industries in the national legislations of several States, including those where major extractive companies are located. The United States, for example, has included a section in its Dodd-Frank Wall Street Reform and Consumer Protection Act which requires oil, gas and mining companies listed on Wall Street to include in their annual report information relating to any payment made by the company or any of its subsidiaries to a government for the purpose of the commercial development of oil, natural gas, or minerals.[89] This legislation affects all companies listed on the American stock market, including foreign companies such as BP and Shell.

Similarly, the European Union is currently amending the 2004 Transparency Directive and the 1978 and 1983 Accounting Directives in order to introduce mandatory disclosure requirements in EU legislation. Under the new Directives, both extractive and timber companies must publicly disclose their tax and revenue payments to governments worldwide.[90] The EU legislation goes

86 See the Memorandum of Understanding between the MDTF and the EITI International Secretariat of 20 March 2008, available through http://eiti.org (consulted on 18 June 2012).

87 *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas*, OECD Publishing (2011), p. 24.

88 Declaration of the ICGLR Special Summit to Fight Illegal Exploitation of Natural Resources in the Great Lakes Region, Lusaka, 15 December 2010, especially paragraph 2.

89 Dodd-Frank Wall Street Reform and Consumer Protection Act, *H. R. 4173*, 21 July 2010, Section 1504.

90 Proposal for a Directive of the European Parliament and of the Council amending Directive 2004/109/EC on the harmonisation of transparency requirements in relation to information about issuers whose securities are admitted to trading on a regulated market and Commission Directive 2007/14/EC, 25 October 2011, *COM (2011) 684 final*, Article 6; Proposal for a Directive of the European Parliament and of the Council on the Annual Financial Statements, Consolidated Financial Statements and Related Reports of Certain Types of Undertakings, 25 October 2011, *COM (2011) 684 final*, Article 4.9. Recently, the Legal Affairs Committee of the European Parliament has proposed an amendment to the Directives that would require oil, gas, mining and forestry companies not only to disclose their payments to governments country by country, but also on a project-to-project basis. Furthermore, it has set a relatively low threshold by requiring disclosure of all payments of €80,000 and over. See *The Guardian*, 'EU legislators aim for tougher law on oil, gas and mining payments', 19 September 2012, available through http://www.guardian.co.uk/global-development/2012/sep/19/eu-tougher-transparency-law-extractive (last consulted on 19 December 2012).

beyond section 1504 of the Dodd-Frank Act in two respects. First, unlike the Dodd-Frank Act, the EU legislation applies to timber companies as well. In addition, unlike the Dodd-Frank Act, which applies only to companies listed on the stock market, the EU proposals apply both to companies listed on the European stock markets and to large unlisted companies.[91]

Furthermore, the UN's principal organs have expressed their support for EITI. In a resolution on strengthening transparency in industries, the UN General Assembly emphasised that permanent sovereignty over natural resources must be exercised in the interests of national development and the well-being of the people of the State concerned.[92] It is in this context that the General Assembly encouraged the international community "to strengthen, as appropriate, upon request, the capacity of States endowed with natural resources, especially those emerging from conflict situations" and that it noted "the efforts of countries that are participating in all relevant voluntary initiatives to improve transparency and accountability in industries, including in the Extractive Industries Transparency Initiative in the extractive sector".[93]

Similarly, the Security Council has expressed its support for EITI, both in a general fashion and in the specific case of Liberia.[94] In its Presidential Statement of 25 June 2007, the Security Council recognised the role of voluntary initiatives aimed at improving revenue transparency, such as EITI, in ensuring that natural resources become an engine for sustainable development.[95] In addition, in Resolution 1854 (2008) concerning Liberia the Security Council expressed its support for Liberia's decision to take part in EITI and encouraged "Liberia's continued progress in implementing their EITI work plan to improve revenue transparency".[96]

Nevertheless, it should be noted that the Security Council has never made use of the initiative to support its sanctions regimes, as it did with the Kimberley Process. This is remarkable, as there have been several cases where the Security Council had the occasion to do so. The first example concerns the conflict in Côte d'Ivoire, where revenues from natural resources were used

91 Large companies are those that exceed two of the following three criteria: annual turnover of €40 million; total assets €20 million and employees 250. An important consequence of bringing large unlisted companies under the directive is that state owned companies also fall under the directives.

92 UN General Assembly Resolution 62/274 of 11 September 2008, paragraph 4 of the preamble.

93 UN General Assembly Resolution 62/274 of 11 September 2008, especially paragraph 3 and 4.

94 See the Statement by the President of the Security Council of 25 June 2007, *UN Doc. S/PRST/2007/22*, p. 2; and UN Security Council Resolution 1854 (2008), paragraph 5 of the preamble.

95 UN Security Council Presidential Statement on Natural Resources and Conflict, *UN Doc. S/PRST/2007/22*, 25 June 2007, paragraph 9.

96 UN Security Council Resolution 1854 (2008), paragraph 5 of the preamble.

by both sides to the conflict in order to acquire arms in contravention of the embargo.[97]

The second example concerns the situation in the DR Congo. In its Resolution 2053 (2012), the Security Council encouraged the Congolese Government "to further increase transparency in the administration of contracts for mining rights and the collection and accounting for taxes".[98] These recommendations were made in connection with broader efforts to stop the trade in conflict resources from the DR Congo and to restore governance over the natural resources sectors. However, the Security Council did not refer to EITI as a tool to help the Congolese government to increase the transparency of its administration. Therefore the support for EITI expressed by the Security Council is not unequivocal.

The hesitancy of the Security Council to embrace an initiative like EITI can be linked to the diverging views of members of the UN Security Council with regard to the role of the UN Security Council in preventing armed conflicts. EITI is primarily an initiative aimed at improving the public management of natural resources, and in this way helps to eliminate some of the root courses of armed conflict. An open debate held in the Security Council on the topic of "Conflict prevention and natural resources" on 19 June 2013 revealed that many countries support a stronger role for the Security Council in addressing the root causes of armed conflict. France, for example, emphasised the responsibility of the Security Council "to encourage initiatives that ensure proper, lasting and responsible management" of natural resources. In France's view, the Security Council "must support measures that can establish the basis for lasting peace".[99] France explicitly referred to EITI as one of those measures, which, according to it, "has as a goal to ensure that [natural] resources serve development and not fuel ongoing conflicts".[100]

At the same time, Russia opposed strengthening the role of the UN Security Council. In Russia's view, the Security Council can adopt sanctions "only in the case of specific violators whose actions fuel hotspots of instability. Such measures should be introduced on the basis of the Charter of the United

97 See, *e.g.,* the Midterm report of the Group of Experts submitted in accordance with paragraph 11 of Security Council Resolution 1842 (2008) of 8 April 2009, *UN Doc. S/2009/188*, paras. 61-72; Final report of the Group of Experts submitted in accordance with paragraph 11 of Security Council Resolution 1842 (2008) of 9 October 2009, *UN Doc. S/2009/521*, paras. 171-210; Final report of the Group of Experts submitted in accordance with paragraph 12 of Security Council Resolution 1893 (2009) of 27 April 2011, *UN Doc. S/2011/271*, paras. 118-219. The indications of the Group of Experts were confirmed after the conflict had ended. See Final Report of the Group of Experts on Côte d'Ivoire, prepared in accordance with paragraph 14 of Security Council Resolution 1980 (2011), *UN Doc. S/2012/196*, paras. 92-100.

98 UN Security Council Resolution 2053 (2012), especially paragraph 25.

99 United Nations Security Council, Open debate on conflict prevention and natural resources, *UN Doc. S/PV.6982*, p. 13.

100 *Ibid*.

Nations, be targeted in nature and take account of the negative humanitarian consequences thereof for the population as a whole". Russia also emphasised the danger of "attempts to introduce automaticity in the sanctions mechanisms or to introduce, through the Security Council and not in line with its mandate, quasi-sanction instruments by broadening the practice of the certification of raw materials".[101]

It is this difference of opinion of the permanent members of the UN Security Council with respect to the role of the Security Council in addressing the root causes of armed conflict which to a large extent explains the Council's position with respect to EITI. During the open debate, many delegations emphasised the significance of EITI in preventing armed conflicts involving natural resources. However, the debate also reveals that opinions diverge as to the role of the Security Council in promoting EITI as part of its sanctions mechanisms. This is unfortunate, because instruments like EITI can and do make a valuable contribution to preventing the outbreak of armed conflicts.

8.3.6 Appraisal of the initiative

EITI is an initiative based on voluntary participation and States decide for themselves whether they are willing to participate. However, as soon as a State has decided to implement EITI, it has to satisfy a large number of compulsory requirements, both before joining and after admission. These requirements may not be legally binding, but compliance is essential for participation in the initiative. Furthermore, States that do not – or no longer – satisfy the criteria can lose their membership. One of the major strengths of the initiative lies in its system for the verification of compliance with the EITI requirements. Compliance is verified with an independent third party audit and the process is supervised by the EITI Board.

However, the initiative also has some weaknesses, for example, it relies exclusively on national reporting. EITI therefore relies completely on the national multi-stakeholder groups to provide reliable information concerning both government revenues and company payments. Even the validation process cannot guarantee that the information that is provided is wholly accurate. This weakness could be partly remedied by requiring governments and companies to report directly to EITI.

Furthermore, EITI has so far not been able to improve accountability in government administration. However, the evaluation reports predate the 2013 adaptation of the EITI requirements. Previous EITI Standards did not include any requirements regarding the distribution of revenues from the extractive sectors. The focus of the initiative was one-sided, in the sense that it dealt only with resources revenues and not with issues relating to the expenditure of

101 *Ibid.*, p. 16.

revenues from the extractive sector. This meant that EITI could be instrumental only in showing where the money came from, but not what it was spent on. The 2013 EITI Standard on the other hand, does include requirements related to the distribution of revenues from the extractive industries. Requirement 3.7 in particular determines that the EITI Report "should indicate which extractive industry revenues, whether cash or in-kind, are recorded in the national budget. Where revenues are not recorded in the national budget, the allocation of these revenues must be explained…". Although framed as a recommendation rather than as a mandatory requirement, the inclusion of a reporting requirement for revenue expenditure is encouraging. Broadening the scope of EITI to mandatory public expenditure reporting does not seem to be a viable option, as this would mean that States would have to accept a third party audit on their expenditure. This could be a bridge too far for many countries participating in the initiative.

In conclusion, EITI is the only global initiative that specifically addresses problems related to public administration in the extractive industry. This makes it an important tool for the prevention and resolution of armed conflicts which have grievances over natural resources among their root causes. EITI has successfully highlighted the importance of transparent and accountable public administration in a sector that is of great economic importance to many developing countries, including developing countries emerging from armed conflict. The subsequent adoption of national and regional legislation to address these issues attests to EITI's success in this respect.

At the same time, the adoption of the US Dodd-Frank Act and the revision of the European Transparency Directives, each with its own standards and modes of operation, also present a risk of the duplication of efforts. Therefore, there is a clear need to develop a single global reporting standard for the extractive industries, which was also recognised by the G8 at its 2013 Summit. In their final declaration, the leaders of the G8 committed themselves to "raise global standards for extractives transparency and make progress towards common global reporting standards, both for countries with significant domestic extractive industries and the home countries of large multinational extractives corporations".[102] EITI should play an important role in the implementation of these commitments. As the initiative brings together all the relevant actors and has a well-developed institutional structure, it constitutes a convenient forum for the synchronisation of further international action, both in relation to improving the governance of natural resources in general and, specifically, as part of post-conflict reconstruction efforts. Its primary role in improving resource transparency in conflict-affected States has been expressly acknowledged in specific instruments. Amongst these are the Lusaka Declaration of the International Conference on the Great Lakes Region, referred to

102 G8, 2013 Lough Erne G8 Leaders' Communiqué, 18 June 2013, para. 36.

above, and the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas, examined below.

8.4 OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas

8.4.1 Context

The OECD Due Diligence Guidance is a voluntary code of conduct for companies in the minerals sector that either import from or operate in conflict-affected or otherwise politically unstable regions. The Guidance refers to "high-risk areas", which are characterised by the presence of widespread violence or other risks of harm to people.[103] They include areas of political instability or repression, institutional weakness, insecurity, collapse of civil infrastructure and widespread violence.[104]

In other words, the OECD Due Diligence Guidance applies both to companies operating in States where there is ongoing armed conflict and to companies operating in fragile States. Thus the Guidance is not only a tool to address the responsibility of companies for fuelling conflicts but also to address their responsibility in other situations where gross human rights violations occur.

The Guidance elaborates on earlier OECD initiatives in the context of the OECD Declaration on International Investment and Multilateral Enterprises. These initiatives include in particular the OECD Guidelines for Multinational Enterprises and the OECD Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones.[105] The 2011 revision of the OECD Guidelines for Multinational Enterprises includes general due diligence requirements for all companies adhering to the OECD Guidelines.[106] The OECD Due Diligence Guidance develops these requirements specifically for some of the minerals that have contributed most to contemporary armed conflicts. These are tin, tantalum, tungsten and gold (3TG).

The OECD Due Diligence Guidance was developed to address the responsibility of corporations in respect of the trade in conflict minerals, in particular

103 See the *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas*, OECD Publishing (2013), p. 13.

104 *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas*, OECD Publishing (2013), p. 13.

105 For a discussion of the OECD Guidelines for Multinational Enterprises, see, *e.g.*, J.L. Černič, *Human Rights Law and Business: Corporate Responsibility for Fundamental Human Rights*, Groningen: Europa Law Publishing (2010), p. 184-207. For a discussion of the 2011 update of the guidelines, from the same author, 'The 2011 Update of the OECD Guidelines for Multinational Enterprises', *ASIL Insight*, Vol. 16 (4), February 2012.

106 *Ibid* for a discussion of these requirements.

from the DR Congo. In 2009, the Security Council mandated the Group of Experts on the DR Congo to draw up guidelines for the exercise of due diligence by the importers, processing industries and consumers of mineral products from the DR Congo, taking advantage of work carried out in other forums.[107] In order to implement this resolution, the Group of Experts turned to the OECD, member States of the International Conference on the Great Lakes Region, industry and civil society. This collaboration resulted in two instruments: the OECD Due Diligence Guidance as a general tool for companies in the minerals sector operating in conflict-affected or high-risk regions, as well as a more specific set of guidelines to address the problem of conflict minerals originating from the DR Congo, which was presented to the Security Council by the Group of Experts.

The OECD Council endorsed the Guidance with a recommendation.[108] It recommended that members and non-members adherent to the Declaration on Investment and Multilateral Enterprises "actively promote the observance of the Guidance by companies", that they "take measures to actively support the integration into corporate management systems" of the framework, and that they "ensure the widest possible dissemination of the Guidance and its active use by other stakeholders including professional associations, financial institutions, and civil society organizations".[109] Furthermore, the OECD Council instructed the Investment Committee and the Development Assistance Committee to monitor the implementation of the recommendation.[110]

8.4.2 Scope and objectives of the initiative

The aim of the Guidance is to ensure that companies procuring minerals from conflict-affected and high-risk areas "respect human rights, avoid contributing to conflict and successfully contribute to sustainable, equitable and effective development".[111] The Guidance provides a framework for these companies to help them assess the risk of their activities contributing to armed conflict or human rights abuses. Companies are to observe "due diligence", defined as "an on-going, proactive and reactive process through which companies can

107 UN Security Council Resolution 1896 (2009), especially paragraph 7. The UN Security Council thus implicitly referred to the work undertaken by the OECD, in particular the 2006 Risk Awareness Tool for Multinational Enterprises in Weak Governance Zones; and by the International Conference on the Great Lakes Region, in particular to its 2006 Protocol Against the Illegal Exploitation of Natural Resources and related initiatives.

108 See the Recommendation of the OECD Council on Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas, adopted on 25 May 2011 (amended on 17 July 2012), *Doc. C(2012)93*.

109 *Ibid*., especially paragraphs 1-3.

110 *Ibid*., especially paragraph 5.

111 *Ibid*., especially paragraph 1.

ensure that they respect human rights and do not contribute to conflict".[112] The due diligence framework applies to companies throughout the mineral supply chain, from the phase of the extraction of the minerals to their incorporation in the final consumers' product.[113] The Guidance currently covers tin, tantalum and tungsten, including their ores or mineral derivatives, as well as gold sources.[114]

The framework for due diligence aims to provide practical guidance to companies to help them to assess the risks of their activities contributing to armed conflict or human rights violations and to find adequate responses to eliminate these risks. This raises important questions regarding the nature of the risks the OECD Guidance aims to address. In this regard, the OECD Guidance incorporates a Model Supply Chain Policy which sets out principles and standards for responsible mineral sourcing.[115] Companies adhering to the OECD Guidance must ensure that their own supply chain policy is consistent with the standards set out in this model. A discussion of the principles and standards set out in the Model Supply Chain Policy helps to gain a proper understanding of the OECD's definition of responsible mineral sourcing.

First of all, the Model Supply Chain Policy determines that companies "sourcing from, or operating in conflict-affected and high-risk areas are not to tolerate nor by any means profit from, contribute to, assist with or facilitate the commission by any party" of serious abuses associated with the extraction, transport or trade in minerals. The first paragraph of the Model Supply Chain Policy identifies the following serious abuses: any forms of torture, cruel, inhuman or degrading treatment, any forms of forced or compulsory labour, the worst forms of child labour, other gross human rights violations and abuses such as widespread sexual violence, and war crimes or other serious violations of international humanitarian law, crimes against humanity or genocide.

In other words, the Model Supply Chain Policy requires companies engaged in the minerals sector in fragile States to ensure that neither they nor their business partners are in any way involved in the violation of fundamental human rights or the commission of international crimes. Thus the Model Supply Chain Policy sets a very high standard. It is also interesting to note that the Guidance does not require companies to respect relevant conventions,

112 *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas*, OECD Publishing (2013), p. 13.

113 *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas*, OECD Publishing (2013), p. 14.

114 Recommendation of the OECD Council on Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas, adopted on 25 May 2011 (amended on 17 July 2012), *Doc. C(2012)93*.

115 Model Supply Chain Policy for a Responsible Global Supply Chain of Minerals from Conflict-Affected and High-Risk Areas, *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas*, OECD Publishing (2013), Annex II.

although it specifically refers to particular conventions and also uses legal terminology. It explicitly refers to the ILO Convention on the Worst Forms of Child Labour and uses the ILO's definition of forced and compulsory labour.[116] In addition, it uses such legal terms as 'war crimes' or 'other serious violations of international humanitarian law', 'crimes against humanity' and 'genocide'.

The second form of irresponsible mineral sourcing that the OECD Guidance seeks to prevent is the provision of support to non-state armed groups or public or private security forces that illegally control mining sites. In this respect, the Model Supply Chain Policy requires companies not to tolerate any direct or indirect support to non-state armed groups or to public or private security forces through the extraction, transport, trade, handling or export of minerals. Direct or indirect support is defined broadly to include not only the procurement of minerals themselves, but also any indirect payments to such groups (e.g., by paying them illegal taxes) or providing them with logistical assistance or equipment.

In other words, the OECD Guidance seeks to prevent the involvement of companies in the trade in conflict minerals. It is interesting to note that the Guidance not only targets non-state armed groups, but also other actors such as mercenaries, private security companies and members of the national army involved in illegal mining. In this way, the Guidance aims to cover situations like that in the DR Congo, where criminal bands in the national army are involved in illegal mining.[117]

Finally, the Model Supply Chain Policy requires companies to refrain from engaging in bribery or fraudulent misrepresentation of the origin of minerals. They must support efforts to eliminate money laundering and they must ensure that all taxes, fees and royalties related to mineral extraction, trade and export are paid to the government and disclosed in accordance with the EITI principles.

In this way, the OECD Guidance seeks to prevent illegal taxation in all its forms by non-state armed groups and criminal bands in conflict-affected and high-risk areas. This was a major issue in several of the conflicts discussed in this book. The conflict in Côte d'Ivoire is a good example. The Group of Experts on Côte d'Ivoire uncovered the existence of parallel taxation systems in that country, operated by the opposition forces.[118] A second point of interest is the reliance of the OECD Guidance on EITI as a means to ensure that taxes,

116 ILO Convention No. 182 on the Worst Forms of Child Labour, concluded on 17 June 1999, *2133 UNTS 161*; ILO Convention No. 29 concerning Forced or Compulsory Labour, concluded on 28 June 1930, *39 UNTS 55*.

117 Final Report of the Group of Experts on the Democratic Republic of the Congo prepared pursuant to paragraph 6 of Security Council Resolution 1896 (2009), *UN Doc. S/2010/596* of 29 November 2010, p. 76, pp. 47-76.

118 Final Report of the Group of Experts on Côte d'Ivoire, prepared in accordance with paragraph 14 of Security Council Resolution 1980 (2011), *UN Doc. S/2012/196*, paras. 92-110.

fees and royalties paid to the government are accounted for. This can be seen as a form of direct support for EITI.

It can be concluded from the above that the OECD has opted for a very broad definition of "responsible supply chains of minerals". The responsibility of mineral companies is not limited to their role in fuelling armed conflicts. The OECD Guidance also seeks to address the broader responsibility of mineral companies and their policies on society in conflict-affected and high-risk areas, in particular with the provisions on serious abuses and bribery.

However, at the same time, the OECD Guidance sets a very high standard with regard to abuses in the minerals sector that are not directly related to the issue of providing support to armed groups. In order for the Guidance to become relevant, these abuses must have a serious nature, in the sense of amounting to complicity in the violation of fundamental human rights and international crimes. Therefore, the relevance of the Guidance is limited to addressing only the most serious irregularities in the extractive sector. It is not an instrument that addresses responsible business conduct in the extractive sector in a broad sense.

8.4.3 Participants and institutional structure

The OECD Due Diligence Guidance is part of a broader framework of instruments adopted by the OECD in relation to the (revised) OECD Declaration on International Investment and Multinational Enterprises. All OECD members, as well as nine non-members (Argentina, Brazil, Colombia, Egypt, Latvia, Lithuania, Morocco, Peru and Romania), have signed this declaration. For the purposes of the present study, it is relevant to note that these countries do not include any African States.

The Guidelines for Multinational Enterprises are annexed to the Declaration on International Investment and Multinational Enterprises.[119] They contain recommendations on responsible business conduct for multinational companies. Since 2011, the Guidelines have included detailed recommendations on supply chain due diligence. Under the new Guidelines, companies should "carry out risk-based due diligence […] to identify, prevent and mitigate actual and potential adverse impacts […] and account for how these impacts are addressed".[120] The impacts referred to in the Guidelines include both adverse

119 *OECD Guidelines for Multinational Enterprises*, OECD Publishing, 2011 Edition.

120 *OECD Guidelines for Multinational Enterprises*, OECD Publishing, 2011 Edition, Chapter II, para. A 10.

impacts caused by a company's own activities and adverse impacts caused by their business relations.[121]

In addition to this general due diligence requirement, companies must also carry out human rights due diligence in relation to their own activities and those of their business partners.[122] These requirements were inserted in response to the 'Protect, Respect and Remedy Framework for Business and Human Rights', developed by John Ruggie, the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises.[123] This framework formulates human rights standards for companies. Guiding Principle 17, which sets out a human rights due diligence standard, is particularly relevant in this respect.[124]

It is also relevant to note that States adhering to the Guidelines for Multinational Enterprises must set up so-called National Contact Points (NCPs). The role of the NCPs is to increase the effectiveness of the Guidelines, for example, by resolving issues that arise in relation to the implementation of the Guidelines.[125] These issues can be raised by all the interested parties, inclu-

121 *OECD Guidelines for Multinational Enterprises*, OECD Publishing, 2011 Edition, Chapter II, paras. A 11-12. The OECD official Commentary to these Guidelines define business relationships as including "relationships with business partners, entities in the supply chain and any other non-State or State entities directly linked to its business operations, products or services. *OECD Guidelines for Multinational Enterprises*, OECD Publishing, 2011 Edition, p. 23.

122 *OECD Guidelines for Multinational Enterprises*, OECD Publishing, 2011 Edition, Chapter IV, paras. 2, 3 and 5.

123 This framework has been developed on the initiative of the UN Human Rights Council (then: Commission) in order to improve corporate responsibility for the protection of human rights. It was subsequently endorsed by the Human Rights Council. Also see the Report on the 'Protect, Respect and Remedy Framework for Business and Human Rights' by John Ruggie, the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, *UN Doc. A/HRC/8/5*, 7 April 2008. See also the Report on the Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, *UN Doc. A/HRC/17/31*, 21 March 2011.

124 Guiding Principle 17 states: "In order to identify, prevent, mitigate and account for how they address their adverse human rights impacts, business enterprises should carry out human rights due diligence. The process should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed. Human rights due diligence:
(a) Should cover adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships;
(b) Will vary in complexity with the size of the business enterprise, the risk of severe human rights impacts, and the nature and context of its operations;
(c) Should be ongoing, recognizing that the human rights risks may change over time as the business enterprise's operations and operating context evolve."

125 *OECD Guidelines for Multinational Enterprises*, OECD Publishing, 2011 Edition, p. 68, section I(1).

ding worker organizations and non-governmental organizations.[126] Although the NCPs cannot take binding decisions, the dispute resolution mechanism has proved to be a valuable resource for non-governmental organizations challenging the human rights policies of individual companies.

As the Due Diligence Guidance was a specific result of the general due diligence requirements set out in the Guidelines for Multinational Enterprises, its implementation is subject to the same institutional structure. This means that the dispute resolution mechanism set up under the Guidelines is also able to address alleged violations of the Due Diligence Guidance. This is a promising possibility for challenging the supply chain policies of mineral companies operating in conflict regions. In the 2000 version of the Guidelines, several complaints had already been filed against mineral trading companies operating in the DR Congo.[127] These complaints were triggered by a report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo on business enterprises considered by the Panel to be in violation of the OECD Guidelines for Multinational Enterprises.[128]

Most of these complaints alleged that the company had failed to observe sufficient due diligence in the supply chain. Despite the rudimentary provision of the 2000 version of the Guidelines on supply chain due diligence, stating merely that "[e]nterprises should encourage, where practicable, business partners, including suppliers and sub-contractors, to apply principles of corporate conduct compatible with the Guidelines",[129] some of the cases brought before NCPs have been quite successful.

One of these complaints related to the practices of Afrimex, a British mineral trading company operating in the DR Congo. The complaint brought to the British NCP by Global Witness accused Afrimex of paying taxes to rebel forces in the Democratic Republic of Congo (DRC) and of practising insufficient due diligence in the supply chain, sourcing minerals from mines that use child and forced labour. According to the NCP, Afrimex failed to fulfil the due diligence requirements in two ways. In the first place the NCP concluded that the reliance of Afrimex on statements by its suppliers on the origin of the minerals purchased by Afrimex did not reflect sufficient due diligence.[130]

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126 *OECD Guidelines for Multinational Enterprises*, OECD Publishing, 2011 Edition, p. 72, section C.

127 See e.g. *Global Witness vs. Afrimex* (filed on 20 February 2007); *11.11.11 et al vs. Cogecom* (filed on 24 November 2004); *11.11.11 et al vs. Nami Gems* (filed on 24 November 2004); *RAID vs. Das Air* (filed on 28 June 2004); and *NiZA et al. vs. CPH* (filed on 3 July 2003).

128 Final Report of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo, UN Doc. S/2002/1146, Annex III.

129 *OECD Guidelines for Multinational Enterprises*, OECD Publishing, 2000 Edition, Chapter II, para. II.10.

130 *Final Statement by the UK National Contact Point for the OECD Guidelines for Multinational Enterprises: Afrimex (UK) LTD*, Summary of NCP Decision, 28 August 2008, para. 51.

Secondly, Afrimex practised insufficient due diligence in the supply chain, because it "did not take steps to influence the supply chain and to explore options with its suppliers exploring methods to ascertain how minerals could be sourced from mines that do not use child or forced labour or with better health and safety".[131]

The UK National Contact Point applied the Guidelines in a very forward looking way in the Afrimex case, taking into account new developments in corporate responsibility for human rights abuses emanating from the 'Protect, Respect and Remedy Framework' developed by John Ruggie, Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises. The implementation of this framework in the 2011 version of the Guidelines for Multinational Enterprises will hopefully raise the awareness of both companies and implementing States about the responsibility of companies to carefully assess the risks of their activities contributing to armed conflict or human rights abuses. Furthermore, it is to be expected that when assessing whether companies in the extractive sector have satisfied the due diligence requirements of the 2011 Guidelines, National Contact Points will turn to the Due Diligence Guidance for more specific indications.

8.4.4 Operation

The OECD Due Diligence Guidance was developed to ensure that companies procuring minerals from conflict-affected and high-risk areas "respect human rights, avoid contributing to conflict and successfully contribute to sustainable, equitable and effective development".[132] The Guidance attempts to realise these objectives by introducing transparency and accountability in the minerals supply chain. It does so predominantly by using two main tools. The first involves putting in place mechanisms to ensure that upstream companies obtain information from their suppliers about the origin of the minerals purchased by them and that downstream companies provide such information to their business partners. The second concerns requiring independent audits from companies in order to ensure the credibility of the information relied on by upstream companies, as well as the information provided to them by downstream companies.

The OECD Guidance is based on a five-step approach to due diligence. The basic components of the five-step approach are the establishment of strong company management systems, the identification and assessment of supply

131 *Final Statement by the UK National Contact Point for the OECD Guidelines for Multinational Enterprises: Afrimex (UK) LTD*, Summary of NCP Decision, 28 August 2008, para. 62.

132 Recommendation of the OECD Council on Due Diligence for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas, adopted on 25 May 2011, para. 17.

chain risks, the design and implementation of strategies to respond to identified risks, the performance of independent third-party audits, and annual reporting on supply chain due diligence.

Therefore the approach focuses on the management of risks associated with business transactions in the mineral and gold sectors. The Guidance provides individual companies with the tools to reduce the risks of their business practices contributing to armed conflict and other forms of violence. In order to ensure the proper implementation of the due diligence policies, the approach has also built in some safeguards. These consist of the independent third-party audits and the disclosure requirements, which permit business partners, as well as the general public, to verify the company's mineral policies.

The OECD has also developed two separate supplements which provide specific guidance to companies on how to implement the five steps in their particular sectors, as referred to above. One supplement focuses on supply chain due diligence for companies trading in tin, tantalum and tungsten, while the other focuses on gold. The two supplements make a distinction between so-called "upstream companies", referring to the supply chain from the mine to smelters/refiners, and "downstream companies", referring to the supply chain from smelters/refiners to retailers.[133] Specific recommendations apply to these categories of companies. Neither of the supplements applies to small-scale mining by individuals, informal working groups or communities.

Both supplements require companies to review their sourcing practices in advance in order to determine whether the Guidance applies to them. The supplement on tin, tantalum and tungsten contains a set of "red flags" triggering the due diligence standards and processes contained in the Guidance. Red flags apply to certain locations of mineral origin or transit (minerals originating from or transported via a conflict-affected or high-risk area, minerals that are alleged to originate from a country with very low production levels of the mineral concerned, and minerals that are alleged to originate from a known transit country) and to particular suppliers (suppliers with ties to companies operating in one of the red flag locations, the suppliers or their business partners who are known to have recently sourced minerals from a red flag location). If one of these red flags applies or if a company cannot determine whether this is the case, it should proceed with the implementation of the Guidance.

The supplement on gold does not contain such a red flag system. In order to determine whether they actually or potentially source gold from conflict-affected and high-risk areas, all companies in this sector should immediately start carrying out the first steps of the process. These involve establishing strong management systems and identifying and assessing risks in the supply

133 For these definitions, see the *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas*, OECD Publishing (2013), Supplement on Tin, Tantalum and Tungsten and Supplement on Gold.

chain.[134] One important first step in this respect is the adoption of a supply chain policy, consistent with the Model Supply Chain Policy discussed above. The objective of this policy is to set forth common principles and standards against which the company can assess its own policies, as well as the activities and relationships of its suppliers.[135]

8.4.5 International recognition of the initiative

The OECD Due Diligence Guidance has had extensive back-up from the international community. As mentioned above, both the International Conference on the Great Lakes Region and the UN Group of Experts on the Democratic Republic of Congo were involved in drafting the guidelines. This cooperation resulted in the development of mutually supporting initiatives.

First, the International Conference on the Great Lakes Region endorsed the OECD Due Diligence Guidance in its Lusaka Declaration and directed its Secretariat to integrate the processes and standards of the OECD Guidance in the six tools of the Regional Initiative against the Illegal Exploitation of Natural Resources.[136] Secondly, the Group of Experts on the DR Congo developed a set of due diligence guidelines specifically for minerals originating from the DR Congo, which relies on the OECD Guidance. This was acknowledged by the Group of Experts, which recommended in its final report of 2010 "that relevant individuals and entities refer to the OECD guidance for further details on due diligence requirements".[137]

The Security Council also expressed support for the OECD Guidance, both directly and indirectly, on several occasions. Most importantly, it did so by endorsing the Group of Experts Guidelines for the DR Congo. More specifically, the Security Council mandated the DR Congo Sanctions Committee to take the exercise of due diligence by a company into account when deciding whether to place it on the sanctions list. In this respect, the Security Council specifically referred to the guidelines developed by the Group of Experts or "equivalent guidelines" as a means of appraising the exercise of due diligence by companies.[138] The five-step approach to due diligence examined above

134 *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas*, OECD Publishing (2013), Supplement on Gold.

135 Supplement on Tin, Tantalum and Tungsten, Step 1 (A); Supplement on Gold, Step 1, Section 1 (A).

136 Declaration of the ICGLR Special Summit to Fight Illegal Exploitation of Natural Resources in the Great Lakes Region, Lusaka, 15 December 2010, especially paragraphs 12 and 13. These six tools are a Regional Certification Mechanism; harmonisation of national legislation; a regional database on mineral flows; formalisation of the artisanal mining sector; promotion of EITI; and a whistle blowing mechanism.

137 Final Report of the Group of Experts prepared pursuant to paragraph 6 of Security Council Resolution 1896 (2009), *UN Doc. S/2010/596*, para. 319.

138 UN Security Council Resolution 1952 (2010), especially paragraph 8.

is essential to the Security Council in this respect. Thus, at least in relation to the DR Congo, the Security Council expressed strong support for the approach to due diligence set out in the OECD Guidance. In its Resolution 2101 (2013) in relation to the situation in Côte d'Ivoire, the UN Security Council confirmed its support for the OECD Guidance. In this resolution it expressly encouraged the government of Côte d'Ivoire to participate in the OECD-hosted implementation programme with regard to the due diligence guidelines for responsible supply chains of minerals from conflict-affected and high-risk areas.[139] This reference to the OECD Guidance in relation to Côte d'Ivoire confirms the willingness of the Security Council to promote the implementation of the OECD Guidance in a more general fashion.

Furthermore, the OECD Guidance was put forward as a tool to implement national legislation, such as the obligations imposed by section 1502 of the US Dodd-Frank Wall Street Reform and Consumer Protection Act.[140] Section 1502 of that Act requires companies listed on Wall Street to determine whether their products contain conflict minerals originating in the DR Congo or neighbouring countries, and to report this to the Securities and Exchange Commission (SEC).[141] A proposal for a European counterpart to section 1502 of the Dodd-Frank Act is currently under discussion. In October 2010 the European Parliament requested the European Commission and Council to examine a legislative initiative similar to section 1502 of the US Dodd-Frank Act.[142] However, the European Commission has not yet submitted a proposal to this end. In its Communication of 27 January 2012 to the European Parliament, the Council and the European Economic and Social Committee on Trade, Growth and Development, the Commission stated in more general terms its commitment to "explore ways of improving transparency throughout the supply chain, including aspects of due diligence".[143] However, the Commis-

139 UN Security Council Resolution 2101 (2013), especially paragraph 25.

140 See Joint Letter of the International Conference on the Great Lakes Region, the OECD and the UN Group of Experts on the Democratic Republic of Congo to the U.S. Securities and Exchange Commission, 29 July 2011, available through http://www.oecd.org (consulted on 9 July 2012). The transparency requirements regarding the provenance of minerals sourced in the DR Congo, included in section 1502 of the Dodd-Frank Act, must be distinguished from the transparency requirements regarding the payments of oil, gas and mining companies to governments under section 1504 of the Dodd-Frank Act, discussed above. Although these sections complement each other in some ways, they deal with different issues.

141 Dodd-Frank Wall Street Reform and Consumer Protection Act, *H. R. 4173*, adopted on 21 July 2010, Section 1502.

142 European Parliament Resolution of 7 October 2010 on Failures in Protection of Human Rights and Justice in the Democratic Republic of Congo, *P7_TA(2010)0350*.

143 Communication of the Commission to the European Parliament, the Council and the European Economic and Social Committee on Trade, growth and development: Tailoring trade and investment policy for those countries most in need, 27 January 2012, *COM(2012) 22*, p. 15.

sion did not make any concrete proposals, apart from stating its readiness to promote the OECD Due Diligence Guidance.

8.4.6 Appraisal of the initiative

The OECD Guidance is a voluntary initiative that aims to increase corporate responsibility in the minerals sector, operating on the basis of supply chain due diligence. Assigning responsibility throughout the supply chain is one of the ways of contributing to the effectiveness of the OECD Guidance as a framework for industry self-regulation. By requiring companies throughout the supply chain to conduct due diligence, it gives every company a stake in the due diligence process. Companies cannot hide behind each other or deny knowledge of what is happening further down the supply chain. Every company in the supply chain has a responsibility to check whether its business partners comply with the due diligence requirements in order to be able to fulfil its own obligations.

Another major strength of the Guidance is that it does not stand by itself, but that it can be used to give effect to other initiatives on social corporate responsibility. The OECD Due Diligence Guidance primarily provides mineral companies with a sophisticated set of guidelines which can be used to implement the due diligence requirements formulated in the OECD Guidelines for Multinational Enterprises. Companies can also ask the National Contact Points established pursuant to the OECD Guidelines for assistance with regard to the implementation of the Guidance. In addition, the Guidance can be instrumental in helping companies to implement their due diligence obligations pursuant to other initiatives, in particular the due diligence requirements that were imposed in relation to the DR Congo by the UN Security Council sanctions regime and by the United States Dodd Frank Act. The close coordination between these initiatives has resulted in mutually supportive regimes.

Another advantage of the complementary nature of the OECD Guidance is related to its enforcement. Although companies implement the due diligence requirements on a voluntary basis, there are ways of holding companies to account for their failure to exercise due diligence. The principal option for this is to file a complaint with the National Contact Points established pursuant to the OECD Guidelines. Although the decisions of the NCPs are not legally binding, their role in mediating disputes should not be underestimated. In addition, and exclusively in relation to the DR Congo, companies can be placed on a UN Security Council sanctions list for their failure to exercise due diligence and can be subjected to fines under the United States Dodd-Frank Act. It is to be expected that the European Union will adopt similar legislation in the near future.

The Due Diligence Guidance is a promising tool for increasing the responsibility of companies in the minerals sector and for preventing these companies

from contributing to human rights violations and/or armed conflict. The principal contribution of the Guidance is that it provides companies with a comprehensive due diligence model which they can integrate in their company policies. Furthermore, the Guidance sets standards for the protection of human rights and combating corruption. Although these standards are for the most part based on existing legal instruments, including ILO and OECD Conventions, the Guidance is one of the few instruments that is directly addressed to companies.

In order to increase corporate responsibility in the minerals sector, some issues need further consideration. The Guidance currently covers tin, tantalum and tungsten, including their ores or mineral derivatives, as well as gold sources.[144] Despite the broad reach of the Guidance, there is one striking omission from the list of minerals. The OECD Guidance does not cover diamonds, a mineral that has financed several contemporary armed conflicts. At first sight, it could be argued that this is obvious, as diamonds are already covered by the Kimberley Process. However, a closer look reveals that there is no clear explanation for this omission. Although the core objective of both initiatives is to exclude conflict minerals from the international market, they use different methods to achieve this objective. The Kimberley Process focuses on government-controlled certification, while the OECD Guidance focuses on the role of companies throughout the supply chain. This makes these initiatives mutually compatible. Moreover, the OECD Guidance could strengthen the Kimberley Process. After all, the Guidance covers every phase of the process, from rough minerals to end products, while the Kimberley Process focuses exclusively on rough diamonds. In addition, the Guidance applies not only to countries where there is an ongoing armed conflict, but also to countries where there is widespread violence. In these ways, the OECD Guidance could fill some of the existing gaps in the Kimberley Process. Therefore it is imperative to increase the scope of the Guidance by adding a supplement on diamonds, as suggested by the Kimberley Process Civil Society Coalition.[145] This suggestion has not yet been followed up.

Furthermore, it is necessary to coordinate initiatives such as the OECD Guidance with other corporate responsibility initiatives. In this respect, special mention can be made to the Voluntary Principles on Security and Human Rights, a multi-stakeholder initiative that formulates due diligence requirements for companies in the extractive sector in relation to their security arrangements. These principles overlap with the requirements formulated under the OECD Guidance in relation to security forces.

144 *OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas*, OECD Publishing (2013).

145 Kimberley Process Civil Society Coalition, Communiqué, Brussels, 19 November 2011, para. 3, available through http://www.pacweb.org

It is therefore clear that the OECD Due Diligence Guidance is an important step in addressing the contribution of companies to resource-related armed conflicts. The years to come will show whether the Guidance can succeed in changing corporate behaviour in the extractive sector in conflict regions. A recent pilot project in the Great Lakes region produced some encouraging results, although it also revealed that the success of the OECD Guidance is largely dependent on external factors, two of which are particularly important. First, the final report revealed that the success of the pilot project was in large part due to the adoption of relevant national legislation, as well as to the formulation of requirements by the industry itself.[146] In addition, the effective implementation of due diligence by companies can only be achieved if the origin of the minerals can be traced. The 2012 Final Report of the Group of Experts on the DR Congo showed that smuggling had increased considerably in the past year.[147] This shows that the implementation of corporate responsibility tools is highly dependent on the efficient functioning of a certification mechanism, as well as on law enforcement efforts in the border regions.

8.5 SUBSTANTIVE CONTRIBUTION OF THE INITIATIVES TO IMPROVING RESOURCE GOVERNANCE

This section aims to assess the substantive contribution of the initiatives to the governance of natural resources in conflict-affected States. In this respect it is important to note that the three initiatives have different objectives and methods, but a common aim, i.e., to increase transparency in the management of natural resources. For this purpose, the initiatives set standards with regard to their management, both for States and for companies. The overall objective of the Kimberley Process is to introduce transparency in the trade in rough diamonds in order to eliminate the trade in conflict diamonds by rebel groups. Relevant standards set by the Kimberley Process include the establishment of internal controls, as well as the collection, maintenance and exchange of data relevant to diamond production, import and export. Additional standards relating to the management of rough diamonds include the licensing of mines and tracking cash purchases of rough diamonds through official banking channels. It is relevant to note that the Kimberley Process does not address companies directly.

146 See OECD, 'Upstream Implementation of the OECD Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas', Final Report on one-year pilot implementation of the Supplement on Tin, Tantalum, and Tungsten (2013), p. 9.

147 Final Report of the Group of Experts on the DRC submitted in accordance with paragraph 4 of Security Council Resolution 2021 (2011), *UN Doc. S/2012/843*, 15 November 2012, paras. 159-242.

EITI's contribution to increasing transparency in the management of natural resources consists of setting standards for the public administration of natural resources, which could be part of broader reforms in post-conflict peacebuilding strategies. In order to comply with EITI, States must publish the revenues obtained from contracts with the oil, gas and mining industries, while companies in these sectors must publish their payments to the government. In this way, EITI contributes more directly to improving governance over natural resources. In addition, the 2013 review of the EITI Standard introduced requirements aimed at improving transparency, in particular by formulating requirements relating to the publication of relevant information and to public administration. In this way, EITI has moved closer to achieving its basic objective, i.e., to promote sustainable development in resource-rich States.

Finally, the contribution of the OECD Guidance in increasing transparency in the management of natural resources consists of setting standards for companies that extract, handle or procure minerals from countries that suffer from armed conflict or internal tensions in order to ensure that these companies source their minerals in a responsible manner. Responsible mineral sourcing implies, inter alia, respect for international human rights standards for the prevention of the most serious violations of human rights, as well as standards for the procurement of minerals and transparency in payments.

However, there is one aspect that is neglected in all three initiatives. None of the initiatives includes any direct sustainability requirements in its scheme. This is strange, as both EITI and the OECD Guidance include a reference to sustainable development as part of their objectives.[148] The absence of requirements ensuring that natural resources are sourced in an environmentally sustainable way is regrettable, as environmental protection is essential for the proper management of natural resources and for the prevention of a relapse into armed conflict. In order to contribute more directly to achieving sustainable development, it is necessary for the initiatives to include some minimal requirements for environmental protection in future revisions of their standard-setting documents. The Kimberley Process could include a commitment adopting the ISO standards for environmental protection of diamond mines. The OECD Guidance could include recommendations on the prevention of serious environmental pollution related to the extraction of minerals.

148 EITI is based on the principle that "the prudent use of natural resources should be an important engine for sustainable economic growth that contributes to sustainable development". See EITI Standard 2013, p. 9. The OECD Guidance formulates as its objective that companies procuring minerals from conflict-affected and high-risk areas "respect human rights, avoid contributing to conflict and successfully contribute to sustainable, equitable and effective development". See the Recommendation of the OECD Council on Due Diligence Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas, adopted on 25 May 2011 (amended on 17 July 2012), *Doc. C(2012)93*, para. 1.

8.6 EFFECTIVENESS OF THE INITIATIVES

The initiatives discussed in this chapter can be characterised as voluntary agreements between States and other relevant stakeholders, notably civil society and the business community, aimed at creating standards for the governance of particular natural resources, which are to be implemented by States and/or companies respectively. In other words, the initiatives discussed in this chapter create commitments for the actors involved, but on a voluntary basis only.

It is relevant to note that all the basic documents relating to the three initiatives emphasise the voluntary nature of the commitments, either expressly or in their formulation. The Kimberley Process Certification Scheme *recommends* that participants adopt the scheme. Furthermore, it consistently provides that participants *should* ensure that they meet all the requirements. The EITI Rules formulate minimum requirements for States to be EITI compliant. Finally, the OECD Guidance recommends that OECD members ensure the widest possible dissemination of the Guidance. In addition, the Five Step Framework for Due Diligence contains a number of measures that companies *should* take. Therefore it is clear that none of the initiatives was intended to create legally binding obligations for participants.

Considerable differences can also be seen in the nature of the commitments. For the Kimberley Process and EITI, domestic implementation of the commitments is a prerequisite for participation in the initiatives. States that do not implement the commitments are suspended from the initiatives. However, even between the Kimberley Process and EITI, there are differences as regards the monitoring of compliance with the initiatives. While the Kimberley Process relies principally on a peer review system for the monitoring of compliance with the Kimberley requirements, EITI uses an independent third-party monitoring system. The OECD Guidance operates in a different way. It formulates guidelines to assist companies to implement responsible sourcing practices, while respect for the Guidance must be ensured through the OECD National Contact Points.

Finally, the effectiveness of the initiatives hinges on five factors: 1) a dedication by those concerned to implement the commitments; 2) an inclusive system, in which all the relevant actors participate; 3) an effective monitoring system to ensure compliance; 4) effective national legislation to implement the commitments and 5) external recognition of the initiatives. These factors can be illustrated with reference to the OECD Guidance. Even though it is principally a code of conduct, the OECD Guidance does provide companies with a set of guidelines to comply with OECD requirements, as well as with external requirements, such as the US and Congolese legislation, with respect to conflict minerals originating from the DR Congo, as well as the due diligence requirements set by the UN Security Council with respect to minerals sourced from the DR Congo. As a result, companies operating in the DR Congo have started to implement the guidance.

This example reveals that the effectiveness of voluntary initiatives depends to a large extent on their inclusion in broader initiatives to tackle the problems related to resource-related armed conflicts. It is relevant to note in this respect that the OECD Guidance is the only initiative that is embedded in an international organization, while the Kimberley Process and EITI stand alone. Obviously, it is a great advantage for the OECD Guidance to benefit from the institutional structure of the OECD, but that fact alone does not make it necessarily more effective than the Kimberley Process or EITI, since these initiatives rely on other mechanisms to ensure their effectiveness. Lastly, it must be noted that broad participation, not only of producing States, but also of transit and consuming States, is essential to ensure the effectiveness of the initiatives. When these conditions are satisfied, voluntary initiatives can play an important role in addressing the problems associated with resource-related armed conflicts.

8.7 Concluding remarks

The principal question that must be answered here is how and to what extent the initiatives discussed in this chapter respond to the recommendation of the High-level Panel on Threats, Challenges and Change to the United Nations "to develop norms governing the management of natural resources for countries emerging from or at risk of conflict".[149] It should be noted that all three initiatives address aspects relating to the management of natural resources. Although the initiatives do not develop legal norms, they do develop standards for the management of natural resources for countries emerging from or at risk of conflict. Their main contribution is that they introduce elements of transparency, accountability and corporate responsibility in the management of natural resources in States that have experienced armed conflict. In this respect, the voluntary initiatives do respond to the call made by the High-Level Panel.

It should also be noted that the three initiatives discussed in this chapter are representative of particular categories of mechanisms which are essential components of a regulatory framework for resolving armed conflicts involving natural resources. These are certification mechanisms, anti-corruption mechanisms and corporate responsibility mechanisms. One major contribution of the initiatives discussed in this chapter is that they have resulted in best practices for the development of other regulatory initiatives. For example, reference can be made to the scheme for tracking and tracing minerals that is currently being developed under the auspices of the International Conference for the Great Lakes Region. This scheme is modelled on the Kimberley Process, but also

149 Report of the High-level Panel on Threats, Challenges and Change, *A More Secure World: Our Shared Responsibility*, United Nations: New York (2004), p. 35, para. 92.

takes into account the failures of the Kimberley Process, including its failure to properly address the issuing of false certificates. Furthermore, this scheme recognises the limited use of certification mechanisms such as Kimberley for the elimination of the root causes of armed conflict relating to the governance of natural resources.[150] Furthermore, the best practices resulting from these mechanisms can assist the UN Peacebuilding Commission in devising new strategies for peacebuilding.

However, the existence of all these initiatives does not eliminate the need to develop general standards for the management of natural resources for countries emerging from or at risk of conflict, as called for by the High Level Panel. The focus of such general standards should be on promoting a participatory and sustainable management of natural resources for the purpose of conflict prevention and resolution.

The first part of this book, dealing with the general legal framework for the management of natural resources, revealed several obligations for States with respect to the management of their natural resources. Amongst the principal obligations for States were, first, an obligation to exploit natural resources for the benefit of the population and, for this purpose, to establish constitutional and political processes which allow for public participation in decision making, and, secondly, an obligation to exploit natural resources in a sustainable way. General standards for the management of natural resources for countries emerging from or at risk of conflict should be based on these two obligations, as they constitute the very foundations of contemporary natural resources law.

It is a fact that these obligations are not adequately reflected in the initiatives examined in this chapter. Nevertheless, important lessons can be learned from these initiatives. A general regulatory framework for the management of natural resources in countries emerging from armed conflict should include standards relating to transparency, accountability and corporate responsibility in the management of natural resources. These standards are important prerequisites for conflict resolution and prevention, as they can be instrumental in eliminating the trade in conflict resources and improve the governance of natural resources.

Lastly, the question arises who should develop such general standards. The High-level Panel called on national authorities, international financial institutions, civil society organizations and the private sector to do this. The most likely option would be to set up an *ad hoc* mechanism for this purpose. Participants would have to include the World Bank, regional organizations (including the OECD and the International Conference on the Great Lakes Region), representatives from the extractives industry and NGO's such as Part-

150 For more information on the design of this scheme, see Partnership Africa Canada, Taming the Resource Curse: Implementing the ICGLR Certification Mechanism for Conflict-prone Minerals, March 2011.

nership Africa Canada and Global Witness. Such an effort should be coordinated from within the UN system, preferably by the UN Secretariat, because of its general oversight function and its ability to bring together the key players, including the private sector represented in the UN Global Compact.

Concluding remarks to Part III

This part has discussed the two principal approaches adopted to address the links between natural resources and armed conflict during the phase of conflict resolution. Specific emphasis was given to the ways in which these approaches contribute to improving effective governance over natural resources in States that have experienced armed conflict.

Chapter 7 discussed sanctions regimes imposed by the Security Council in specific conflict situations to resolve armed conflicts involving natural resources. It demonstrated that these sanctions regimes focus mainly on the role of natural resources in financing and perpetuating armed conflicts. The Security Council does not really address the role of natural resources in causing armed conflicts. It also showed that the aim of most sanctions regimes was to assist governments in restoring sovereignty over parts of their territory under the control of armed groups. In general the Security Council is reluctant to impose sanctions against national authorities when their actions pose a threat to international peace and security.

A similar bias can be seen in the voluntary initiatives developed by States and other entities to address the challenges resulting from resource-related armed conflicts. Both the Kimberley Process and the OECD Guidance exclusively target the trade in natural resources by armed groups. The Extractive Industry Transparency Initiative (EITI) can be seen as an exception in this respect because it focuses on enhancing transparency in government revenues from the extractive industries. However, it should be noted that EITI was not developed for the specific purpose of addressing resource-related armed conflicts, but as an instrument for combating corruption in the extractive industries. Its significance for addressing the root causes of resource-related armed conflict is nevertheless clear and its role in preventing these armed conflicts was raised by several participants in the Security Council's Open Debate on Natural Resources and Conflict Prevention of 19 June 2013.

Despite their general emphasis on the role of natural resources in financing armed groups, both approaches – i.e., Security Council sanctions regimes and voluntary initiatives – develop standards for the governance of natural resources as a tool for conflict resolution. Effectiveness, transparency and accountability are common elements of resource governance that can be identified in both approaches.

The focus of both approaches is therefore on promoting responsible or 'good' governance of natural resources as an element of conflict resolution.

These approaches also contribute to preventing a relapse into armed conflict in countries that have experienced armed conflicts involving natural resources. However, in order to achieve lasting peace and promote long-term development, it is also necessary to prevent the over-exploitation of natural resources and ensure that exploitation activities do not place too great a burden on the environment. This is an element that is largely lacking in existing approaches which address the links between natural resources and armed conflict. The existing mechanisms devote little or no attention to issues of sustainability or environmental protection. The Security Council's sanctions regimes in relation to Cambodia and Liberia are exceptions. It is argued here that these exceptions should become the norm.

Furthermore, the existing mechanisms devote much attention to transparency and accountability as means of preventing a relapse into armed conflict. In order to reduce the risks of dormant or renewed grievances flaring up, it is however necessary to involve the population more directly in the process of conflict resolution and post-conflict recovery. This is not adequately reflected in the current initiatives.

In a more general vein, it is necessary to develop more structural solutions to prevent natural resources from financing or fuelling future armed conflicts. Promoting effectiveness, transparency and accountability in the governance of natural resources is important in conflict resolution strategies, but these elements in themselves are not sufficient to promote responsible governance over natural resources for the purposes of conflict resolution and prevention. It is essential to integrate sustainability and public participation requirements more directly in strategies to promote responsible resource governance for the purpose of conflict resolution and post-conflict peacebuilding. Addressing these elements from an early stage increases the chances of creating a lasting peace in countries that are recovering from armed conflicts involving natural resources.

9 Regulating the governance of natural resources for the purposes of conflict prevention, containment and resolution

9.1 INTRODUCTORY REMARKS

This book has demonstrated that resource-related armed conflicts pose considerable challenges to the premises on which the international legal framework for the governance of natural resources is based. It was argued that the general legal framework for the governance of natural resources relies on a stable government that is in full control of the State's natural resources and exploits these for the benefit of all. However, resource-related armed conflicts often show a different reality in which governments are unable to exercise sovereignty over portions of the State territory, foreign States and armed groups plunder the State's natural wealth, and/or governments use the proceeds from natural resource exploitation to fund destructive military campaigns.

The objective of this book was to analyse the role of international law in addressing these challenges. More specifically, it attempted to identify and assess the role of international law in ensuring that natural resources are used to promote development and achieve sustainable peace in countries that have experienced armed conflicts that are either caused, financed or fuelled by natural resources. For this purpose, this book first analysed the general legal framework for the governance of natural resources within States (Chapters 2-4), as well as the effects of armed conflict on this legal regime (Chapter 5). It then examined the additional protection provided to natural resources and the environment under the law of armed conflict (Chapter 6). Finally, it analysed the legal and extra-legal approaches to severing the link between natural resources and armed conflict. More in particular, this book examined the approach of the UN Security Council with regard to resource-related armed conflicts (Chapter 7) and the role of voluntary initiatives that have been developed alongside Security Council action (Chapter 8).

This chapter aims to bring to the fore the most important conclusions that can be drawn from this book. Furthermore, it endeavours to assess the role of international law in the prevention, containment and resolution of resource-related armed conflicts. Sections 2, 3 and 4 briefly discuss the most important conclusions of this book with reference to the three principal research questions formulated in the introduction. These are:

1. *Does current international law provide rules to ensure that natural resources are exploited for the purpose of achieving sustainable development?*

2. *Do these rules continue to apply in situations of armed conflict and does international humanitarian law provide relevant rules?*
3. *Do norms and standards developed by* ad hoc *mechanisms contribute to improving governance over natural resources in States that are recovering from armed conflict?*

Subsequently, section 5 places these questions in a broader context by looking at the role of international law in the prevention, containment and resolution of resource-related armed conflicts.

9.2 THE GENERAL LEGAL FRAMEWORK FOR THE GOVERNANCE OF NATURAL RESOURCES WITHIN STATES

The governance of natural resources within States is based primarily on the principle of permanent sovereignty over natural resources. As discussed in Chapter 2, this principle is rooted both in the principle of State sovereignty and in the right of peoples to self-determination. Originally asserted as a right for former colonial countries to freely dispose of their natural resources as a means to advance their development, permanent sovereignty has evolved into the organizing principle of international law regulating the governance of natural resources, both between and within States. As such, it has come to entail both obligations and rights for States.[1] The obligation for a State to exercise permanent sovereignty for the purposes of national development and the well-being of the people on the one hand, and the obligation to devote due care to the environment on the other are the most relevant obligations for the purposes of this book. They are based on international human rights and environmental law.

Chapter 3 discussed the legal position of peoples in relation to the principle of permanent sovereignty over natural resources. The right of peoples to freely dispose of their natural resources is part of their right to self-determination, as enshrined in the identical Articles 1(2) of the ICESCR and the ICCPR. Peoples are the subjects of the principle of permanent sovereignty over natural resources. However, as argued in Chapter 2, permanent sovereignty is an attribute of State sovereignty as well. In this sense, peoples are also beneficiaries of the principle of permanent sovereignty over natural resources. The 1962 Declaration on Permanent Sovereignty over Natural Resources had already recognised that natural resources must be exploited for the well-being of the people. This condition has been revived in modern legal and political instruments dealing with resource-related armed conflicts.

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1 See in particular, N.J. Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties*, Cambridge: Cambridge University Press (1997).

Chapter 3 also analysed the legal implications of peoples' ownership of natural resources for the governance of natural resources within States. In the context of a sovereign State, it argued that there are two categories of peoples that are eligible to exercise peoples' rights. First, there is the whole population of a State as the successor of the people who have exercised a right to external self-determination. Furthermore, particular groups within a State have been granted a limited right to exercise peoples' rights. These include minorities and indigenous peoples.

The principal argument advanced in this chapter was that for the realisation of the right to internal self-determination and the – emerging – right to development it is essential for governments to put in place procedures that allow for public participation in decision-making with respect to the use of the State's natural resources. Public participation in this sense can be defined broadly to include a right of access to information and justice with regard to all projects that involve the exploitation of the State's natural resources, as well as a right to be consulted with regard to projects that could affect the living environment of local communities.

Although the right for peoples living in an independent State to participate in decision making is not expressly enshrined in current international law, it is implied in the practice of human rights bodies and in resolutions of the UN Security Council. Human rights bodies require States to establish general procedures that allow for the realisation of the right to self-determination in practice. Furthermore, specific case law relating to the right of indigenous peoples to enjoy their culture points to an obligation for governments to consult indigenous peoples when conducting exploitation projects on their lands. Similarly, resolutions of the UN Security Council in general call for effective, transparent and accountable management of natural resources, implying that the government of a State must hold up the management of the State's natural resources against public scrutiny. Therefore international practice shows the emergence of an obligation for States to manage their natural resources in a transparent and accountable way. This entails an obligation for States to involve citizens in decision making with respect to projects relating to the exploitation of the State's natural resources.

Chapter 4 also discussed the environmental obligations of States. International environmental law formulates several standards for States which they must take into account when exploiting their natural resources. These include an obligation to conserve and sustainably use natural wealth and resources, to safeguard natural resources for future generations, to prevent damage to the environment of other States, and to adopt a precautionary approach to the protection of the environment and natural resources. Elements of the environmental principles examined in this chapter can also be found in international humanitarian law. The precautionary principle, for example, recognises that States should take into account the risks to the environment, even when these risks cannot be precisely defined. In this sense, the precautionary prin-

ciple can play a role in battlefield practice, where military commanders must assess the potential damage of their actions on the environment. In addition, the related obligation to conduct an environmental impact assessment for activities that pose a risk to the environment is relevant for States contemplating exploitation projects, whether in situations of peace or in situations of armed conflict.

Chapter 4 also analysed several 'common regimes' aimed at protecting the interests of a larger community of States with regard to a State's natural resources. Relevant common regimes include those aimed at protecting natural resources situated within a State's territory but which represent a special interest to the international community, including "world heritage", "wetlands of special importance" and certain endangered species of flora and fauna, those that are aimed at addressing a common concern of the international community, such as the loss of biological diversity, and those that are aimed at protecting the interests of States that share a natural resource. Common regimes are therefore based on an obligation to individually and collectively protect the natural resources in the interests of all the States concerned. The common interest that these regimes are aimed at protecting entails a presumption that they cannot be unilaterally suspended in situations of armed conflict.

Chapter 4 demonstrated the existence of a general obligation for States to exploit their natural resources in a sustainable way, while preventing damage to the environment of other States. These obligations apply to States both as a matter of treaty law and as customary international law. Furthermore, it is relevant to note that some of the most important treaties that embody these principles are widely accepted. This applies particularly with regard to treaties that establish common regimes. The Convention on Biological Diversity, for example, enjoys universal acceptance with 193 States parties. This Convention is of the utmost importance, because biological resources are estimated to support nearly 40 per cent of the world economy.[2]

Similarly, the World Heritage Convention, with 190 States parties, enjoys near universal acceptance. This Convention is especially important because it protects a number of nature reserves that are particularly rich in biological diversity, including nature reserves in conflict areas. Examples include the Virunga National Park located in the East of the DR Congo and the Comoé National Park located in the Northeast of Côte d'Ivoire.[3]

The last convention of particular relevance to the current book is CITES. With 178 States parties, the convention has been widely ratified. As a combined environmental and trade convention, CITES could play an important role in curbing the trade in particular conflict resources, such as timber and ivory. The significance of CITES in this respect was explicitly recognised by the Panel

2 See http://www.cbd.int/sustainable/ (last consulted on 21 January 2013).
3 See http://whc.unesco.org/en/list/ for the full list of World Heritage sites. (last consulted on 21 January 2013).

of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo. The potential of CITES should therefore be explored to the full.

In conclusion it can be argued that Part I of this book showed that the general legal framework for the governance of natural resources within States contains a number of principles that directly or indirectly aim to ensure that governments exploit natural resources for the purpose of promoting sustainable development. These include in particular the principles of public participation, sustainable use and precaution. Together these principles constitute the basic foundations for a legal framework for the governance of natural resources within States that have experienced armed conflicts.

9.3 THE GOVERNANCE OF NATURAL RESOURCES IN SITUATIONS OF ARMED CONFLICT

The exploitation of natural resources is principally a commercial activity, even if the proceeds of the natural resources are used to sustain an armed conflict. This is one of the primary reasons which explains the fragmentation of the international legal framework for the governance of natural resources in situations of armed conflict. International humanitarian law is normally considered to be the *lex specialis* in situations of armed conflict, but this field of international law is primarily concerned with acts of warfare and their implications for the population of a State. Therefore other fields of international law are equally important for the regulation of natural resources exploitation in situations of armed conflict, at least for States. These are, in particular, international economic, environmental and human rights law.

The international legal framework for the governance of natural resources in situations of armed conflict is therefore composed of rules from different fields of international law. Relevant factors that determine which rules apply in a specific situation are notably the nature of the armed conflict (international or internal) and the actors involved in the exploitation of the natural resources (domestic governments, foreign States or armed groups). Nevertheless, some rules apply to all parties to an armed conflict, irrespective of the nature of the armed conflict or the actors involved.

First, all parties to an armed conflict are bound by the international humanitarian law prohibition of pillage. This prohibition, which applies to cases of the appropriation of natural resources for personal gain, can be construed broadly to cover all instances of natural resources appropriation by parties to an armed conflict that do not serve a military purpose. This means, for example, that an occupant is prohibited from exploiting the natural resources in occupied territory for the benefit of its own economy. It also implies that public officials of the domestic State who misappropriate the proceeds from natural resources exploitation for their personal enrichment violate the prohi-

bition of pillage. Furthermore, the prohibition of pillage is an important tool for addressing instances where armed groups or members of armed forces loot natural resources for their personal gain. However, it does not cover instances of natural resources appropriation for military purposes. These are covered by more specific provisions which do not equally apply to all parties to an armed conflict.

Another obligation that applies to all parties to an armed conflict is the prohibition against removing or destroying objects indispensable to the civilian population, which is linked to the prohibition against starving the civilian population as a method of warfare. It is relevant to note that the drafters of the 1977 Additional Protocols I and II, which include this prohibition, envisaged a large measure of flexibility in the interpretation of the prohibition. The determination of the types of objects that were to be considered indispensable to the civilian population was considered to depend on local circumstances. In many of the countries examined in this book, local communities are highly dependent on natural resources to earn a basic living for themselves and their families. From this perspective, it is therefore logical that the prohibition covers such natural resources as well. This means that the prohibition covers instances where parties to an armed conflict deliberately deprive the local population of the opportunity to earn their living by denying them access to mining sites.

In addition to these general obligations, Chapters 5 and 6 examined specific obligations which apply only to some of the parties to an armed conflict. As regards the rights and obligations of domestic governments in armed conflicts, the applicable legal framework is principally derived from international economic, environmental and human rights law. As the outbreak of an armed conflict does not automatically suspend the existing obligations of States under international law, governments must continue to respect their obligations under international human rights and environmental law.

It should be noted that situations of armed conflict can obviously alter the extent to which States have to fulfil their obligations under relevant treaties. The treaties themselves allow for this. The International Covenant on Civil and Political Rights, for example, contains an express provision on derogation. This provision allows States to derogate from their obligations under the Convention in situations of public emergency, though only to the extent that is necessary in view of the situation. In any case, States can never derogate from the prohibition embodied in Article 1(2) of the Covenant against depriving a people of its means of subsistence. This implies that, as a minimum, States cannot deny the local population access to exploitation sites if these are necessary for their subsistence. This obligation for States under international human rights law therefore complements and strengthens the protection granted to the civilian population under international humanitarian law, notably by the prohibition against removing or destroying objects indispensable to the civilian population.

Furthermore, some international environmental law treaties provide States with a degree of leniency regarding the implementation of specific obligations. The degree to which relevant obligations must be implemented depends on the circumstances. However, even if States are given a measure of flexibility with regard to the implementation of specific obligations, they must continue to respect their core obligations under these treaties. The flexibility provided to States does not annul these obligations, but rather provides States with the possibility of implementing them according to the circumstances. Therefore States must continue to respect their core obligations under relevant international environmental treaties, especially if these treaties protect natural resources that are of importance to the broader international community.

While the rights and obligations of domestic governments with regard to the exploitation of the State's natural resources in situations of armed conflict are primarily regulated by the general legal framework that applies to the exploitation of natural resources, the rights and obligations of other States with regard to these natural resources are primarily determined by international humanitarian law. A distinction should also be made between States that militarily intervene in other States without occupying part of that State's territory, and States that do occupy portions of the State's territory. In some cases, States can assume both roles in the same armed conflict. An example of this can be found in the *Case Concerning Armed Activities on the Territory of the DR Congo*, where the International Court of Justice determined that Uganda was an occupying State in some parts of the DR Congo while it was not in others.

Different rules apply to each of these situations. International humanitarian law contains an almost absolute prohibition with respect to the exploitation of natural resources for foreign States militarily intervening in another State without taking effective control over that State's territory. These States are not allowed to appropriate the natural resources of their adversary, except in cases of imperative military necessity. Chapter 6 argued that this exception must be interpreted restrictively. The appropriation of natural resources is permitted only when the following requirements are fulfilled: 1) the appropriation must secure a military advantage; and 2) the situation must be urgent, in the sense that there is no moment for deliberation and there is no alternative solution available. Instances of systematic resource exploitation by foreign States are therefore not covered by the exception of imperative military necessity.

While foreign States are therefore generally not allowed to exploit natural resources in territory where they are militarily present, the legal framework changes when these States gain effective control over territory. The rights and obligations of occupants with respect to the exploitation of natural resources are primarily regulated on the basis of the concept of *usufruct*. According to the right of *usufruct*, an occupant is allowed to exploit the natural resources in occupied territory for the purpose of administering the territory. Further-

more, the administration of the territory must be for the benefit of the population of the occupied territory. Finally, according to Article 55 of the 1907 Hague Regulations, the exercise of the right of *usufruct* is subject to the condition that occupants safeguard the capital of the properties they administer. A modern interpretation of this requirement points to an obligation for occupants to exploit the natural resources in a sustainable way.

Furthermore, the exploitation activities of armed groups are primarily regulated by international humanitarian law, though the set of rules that applies to these groups depends on their legal status. Generally, the legal position of armed groups is regulated by the legal rules that apply to internal armed conflicts, which determine that armed groups cannot appropriate the State's natural resources, except in cases of imperative military necessity. However, armed groups that act on behalf of a foreign State, or which have been recognised by the international community as belligerents, fall under the rules applicable to international armed conflict. In these circumstances, armed groups that are in control of a portion of the State's territory fall under the rules relating to occupation, which means that the concept of *usufruct* applies to them as well.

Despite the numerous different obligations that apply to different actors in different situations, an important conclusion that can be drawn from this book is that the international legal framework regulating the exploitation of natural resources in situations of armed conflict is difficult to oversee, but not necessarily incomplete. Even where one can observe an asymmetry in international humanitarian law with regard to obligations that apply to armed groups on the one hand, and to the domestic government on the other, it is important to realise that international humanitarian law is only one of several fields of international law that apply to the exploitation of natural resources in conflict situations.

At the same time, it cannot really be argued that the system as it exists today is perfect. The existing legal framework would benefit immensely from clarification, as well as a reinterpretation of existing obligations. There are two issues that deserve particular attention in this respect. These are the protection of the environment on the one hand, and the legal position of armed groups on the other. In relation to the legal position of armed groups, this book strongly advocates applying the concept of *usufruct* from international occupation law to all situations in which armed groups exercise effective control over portions of a State's territory. According a right of usufruct to armed groups that are in control of portions of a State's territory would provide these armed groups with an incentive to respect international humanitarian law. The qualified nature of the concept of *usufruct* strikes a careful balance between the realities of armed conflict and the provisional character of the situation. Moreover, the concept can be interpreted in the light of relevant human rights and environmental norms. This balancing of rights and obligations is the best way to protect the environment and the civilian population in territories that

are controlled by armed groups. Finally, according a right to armed groups that are in effective control over portions of a State's territory provides these armed groups with the opportunity to show that they are willing to assume governmental responsibilities, while it leaves open the possibility of enforcement action in individual cases.

9.4 THE GOVERNANCE OF NATURAL RESOURCES AS PART OF CONFLICT RESOLUTION AND POST-CONFLICT PEACEBUILDING EFFORTS

Several *ad hoc* mechanisms have been developed over the past years to address the challenges resulting from resource-related armed conflicts. Most importantly, the UN Security Council has addressed several of these armed conflicts using its powers under Chapters VI and VII of the UN Charter. Chapter 7 of this book examined the role of sanctions regimes adopted by the Security Council in addressing these conflicts. It demonstrated that the Security Council has used a variety of measures to address resource-related armed conflicts, including selective commodity sanctions, as well as asset freezes and travel bans targeting individuals and organizations involved in the illicit exploitation of natural resources.

The Security Council has also set substantive standards for the governance of natural resources as part of its sanctions regimes. In relation to the diamond sanctions, it demanded a certificate-of-origin regime that was effective, transparent, accountable and internationally verifiable. In relation to timber, it called upon States, international organizations and other bodies to assist the Liberian government, under the presidency of Johnson-Sirleaf, to promote responsible and environmentally sustainable business practices in the timber industry. In addition, in several of its resolutions, it emphasised in a general sense that natural resources must be exploited in order to promote development. In the case of Liberia, it went a step further, and in Resolution 1408 (2002), it called upon the Taylor regime to take urgent steps to ensure that revenue from the timber industry was used for legitimate social, humanitarian and development purposes.

Chapter 7 also demonstrated that the Security Council has continuously tried to improve its methods in order to address specific threats to the peace more effectively. It embraced innovations such as a certificate-of-origin regime to distinguish between diamonds traded by armed groups and by governments, support for specific programs in Liberia to stimulate the necessary post-conflict reforms, and due diligence requirements for companies sourcing from the DR Congo.

However, the readiness of the UN Security Council to adopt measures is often linked to a particular type of threat to peace and security. Most of the sanctions regimes examined in this book were aimed at assisting the government of a State to restore governance over natural resources that had fallen

into the hands of subversive entities. Only in a few cases has the Security Council directly targeted the government of a State, but most of these sanctions regimes did not, strictly speaking, address resource-related armed conflicts. These were the sanctions regimes imposed against Iraq, Southern Rhodesia and Libya. It was only in the case of Liberia under the presidency of Charles Taylor that the Council targeted the government of a State in relation to a resource-related armed conflict. However, even in this case, the purpose of the sanctions regime was to cut off the rebel financing. It can therefore be concluded that the UN Security Council is committed to upholding the principle of permanent sovereignty over natural resources in most circumstances, even when it is clear that a government is violating its commitments under peace agreements.

A recent Open Debate held in the Security Council on 'Natural Resources and Conflict Prevention' showed the diverging opinions within the Council with respect to its role in preventing natural resources from fuelling armed conflict. This debate revealed the divisions between those countries advocating an increased role for the Security Council in preventing conflicts involving natural resources, which would include approaches directly related to improving a State's governance of natural resources, and those countries that insisted on the right of States to exercise permanent sovereignty over their natural resources. This divergence of opinions was an obstacle to adopting a Presidential Statement on the issue of natural resources and conflict prevention.[4]

Voluntary initiatives have been developed by partnerships of States, civil society and companies, parallel to the efforts of the Security Council to address threats to the peace related to the trade in natural resources. Chapter 8 discussed three of these voluntary initiatives that were endorsed by the UN Security Council as a means of addressing problems associated with resource-related armed conflicts. These are the Kimberley Process for the Certification of Rough Diamonds as an example of a certification mechanism that aims to combat the trafficking and trade of natural resources by armed groups, the Extractive Industries Transparency Initiative as an example of a mechanism that aims to improve transparent and accountable governance over natural resources as a tool for conflict resolution and prevention, and the OECD Guidance for Responsible Supply Chains of Minerals from Conflict-Affected and High-Risk Areas as an example of a mechanism that is aimed at improving corporate responsibility with respect to mineral sourcing in conflict-affected States.

The most important contribution of the initiatives to addressing problems associated with resource-related armed conflicts is related to their function of setting standards. All three initiatives set standards aimed at increasing transparency in the management of natural resources. Furthermore, EITI sets

4 United Nations Security Council, Open debate on conflict prevention and natural resources, 19 June 2013, *UN Doc. S/PV.6982*

standards related to accountability in the management of natural resources, while the OECD Guidance sets standards for companies in relation to human rights and public procurement policies. For the purposes of conflict resolution and prevention, environmental protection is equally important, though it is not addressed in any of these initiatives. The initiatives discussed in this book focus exclusively on standards related to restoring or improving the political governance of natural resources. However, in order to ensure that natural resources are used to achieve sustainable development, environmental protection must constitute an integral component of conflict resolution and prevention strategies.

Furthermore, the question arises why the initiatives discussed in Chapter 8 formulate voluntary commitments rather than legally binding obligations. The reason for choosing voluntary rather than legally binding mechanisms cannot be automatically attributed to the participation of entities without treaty-making powers in the initiatives. Although all three initiatives were developed on the basis of multi-stakeholder processes, this multi-stakeholder structure is only marginally reflected in their means of operation. Both the Kimberley Process and EITI formulate requirements only for States, while the role of companies is addressed indirectly. The OECD Guidance does formulate requirements for companies, but its whole institutional focus is on States. The reason for the voluntary nature of the commitments should therefore primarily be sought in other characteristics of the initiatives, notably in their flexibility, which makes it easier to adopt the instruments and to adjust them to achieve better results.

Despite their voluntary nature, the initiatives have yielded some tangible results. The Kimberley Process has significantly reduced the smuggling of diamonds from conflict regions. In addition, a considerable number of States recovering from resource-related armed conflicts have started to implement EITI. Finally, the OECD pilot project in the Great Lakes Region demonstrates a gradual change in attitude in companies with respect to the exercise of due diligence. However, these results cannot be completely attributed to the initiatives themselves. Experience has shown that the effectiveness of voluntary mechanisms depends in particular on five factors: 1) a dedication by those concerned to implement the commitments; 2) an inclusive system, in which all relevant actors participate; 3) an effective monitoring system to ensure compliance; 4) effective national legislation to implement the commitments and 5) external recognition of the initiatives. These factors are considered essential for ensuring the success of voluntary mechanisms.

In conclusion, the UN Security sanctions regimes, as well as the voluntary mechanisms discussed in this book make a significant contribution to addressing the most acute problems related to the role of natural resources in armed conflicts. Nevertheless, it is also necessary to develop more structural solutions to prevent natural resources from financing or fuelling future armed conflicts. Promoting effectiveness, transparency and accountability in the governance

of natural resources are important elements of conflict resolution strategies, though in themselves they are not sufficient to promote responsible governance over natural resources for the purpose of conflict prevention. For this purpose, it is necessary to develop general standards for the management of natural resources in countries recovering from armed conflict. These standards should integrate requirements relating to sustainability and public participation in addition to transparency and accountability in order to increase the opportunities for countries recovering from resource-related armed conflicts to achieve enduring peace.

9.5 The contribution of international law to the prevention, containment and resolution of resource-related armed conflicts

This book has examined the role of international law in addressing the two main challenges associated with resource-related armed conflicts. The first is to stop natural resources from financing or fuelling armed conflicts. This book has shown that the international law that applies to situations of armed conflict prohibits most forms of resource exploitation by parties to an armed conflict. The problems associated with resource-related armed conflict therefore do not stem from an absence of rules. However, there are several factors that prevent international law from effectively regulating the exploitation of natural resources in situations of armed conflict.

The first concerns the lack of clarity that results from the numerous different obligations that exist. There is a clear need to formulate general guidelines that stipulate the rights and obligations of parties to an armed conflict and the most appropriate body to develop these guidelines is the International Law Commission, because of its broad expertise and its mandate to codify and progressively develop international law. As specified in the concluding remarks to Part II of this book, one of the aspects that an ILC study should also address concerns the effects on the environment of the exploitation of natural resources by parties to an armed conflict. As resource exploitation is primarily a commercial activity, the rules of international humanitarian law do not provide adequate protection. Moreover, the existing rules of international environmental law do not address armed groups.

However, a more fundamental question that should also be considered is whether the rules which apply to armed groups are adequate. The equality of parties to an armed conflict is a fundamental principle of the law of armed conflict. This book does not argue in favour of giving armed groups the same rights and obligations with regard to the exploitation of natural resources as governments, nor does it propose assigning all armed groups the right to exploit natural resources. However, it does propose granting those armed groups that are in control of a portion of the State territory a qualified right to exploit natural resources, based on the right of *usufruct* that is central to

international occupation law. The principal reason for granting armed groups that control portions of a State territory this right is it protects the civilian population and the environment more adequately than the current rules do. In the first place, granting armed groups a right of *usufruct* gives them an incentive to respect the rules of international humanitarian law. Secondly, the concept of *usufruct* does not entail a right to use the proceeds from the exploitation of natural resources to buy weapons. It merely grants armed groups a right to set up and maintain a civilian administration for the benefit of the population. Furthermore, granting armed groups such a right does not exclude the possibility for the Security Council to impose sanctions when it considers that a specific situation poses a threat to peace and security.

The second challenge associated with resource-related armed conflicts is to improve the governance over natural resources within States, both in order to resolve existing armed conflicts and to prevent a relapse into armed conflict. The governance of natural resources within States is based on the principle of permanent sovereignty over natural resources. This principle is rooted in the right to self-determination of peoples. Although the principle of permanent sovereignty is considered to be attached to the sovereignty of the State, its roots in the right to self-determination are not without significance. This demonstrates that the State's natural resources should be exploited for the benefit of the people of the State. This is further emphasised by the condition imposed on the principle of permanent sovereignty stipulating that States must be able to exercise the right to freely dispose of their natural resources for national development and the well-being of the people.

This condition is reflected in the modern practice as regards resource-related armed conflicts, in particular in resolutions of the UN Security Council and in regional treaties. Moreover, the governance of natural resources in States suffering from armed conflict is increasingly qualified by requirements linked to the concept of good governance. UN Security Council resolutions require effective, transparent and accountable management of natural resources by States. These elements are also reflected in the political initiatives discussed in Chapter 8. However, current practice does not fully address good governance. In this respect it should be recalled that the present book defined good governance as:

> "the sustainable, transparent and accountable management of natural resources for the purposes of equitable and sustainable development. It entails clear and participatory decision-making procedures at the level of public authorities, transparent and accountable institutions, the primacy of law in the management and distribution of natural resources and their revenues as well as capacity building for elaborating and implementing measures aimed in particular at preventing and combating corruption in the public administration of revenues from natural resources".

The elements of good governance that are mainly neglected in the current initiatives include aspects of public participation and sustainability, factors that are essential for the prevention and resolution of armed conflicts.

In conclusion, it can be argued that international law addresses the challenges associated with resource-related armed conflict fairly well. Although the existing legal framework for the governance of natural resources in situations of armed conflict is fragmented and in some ways inconsistent, there are rules to address instances of the illicit exploitation of natural resources in situations of armed conflict. Furthermore, the current approaches to address the problems associated with resource-related armed conflicts are mostly *ad hoc* and sometimes informal. However, international law does provide some tools to address these problems and the role of the UN Security Council has proved invaluable in this respect. Its sanctions regimes have helped to push for the necessary reforms to assist countries emerging from armed conflict to regain control over their natural resources. The creation of the Kimberley Process, as well as the formulation of due diligence guidelines for companies in the extractive sector, can be directly related to Security Council sanctions regimes. While Security Council measures have so far largely focused on helping governments restore their governance over natural resources that have fallen into the hands of subversive entities, the Security Council should increase its role in the resolution of armed conflicts involving natural resources by focusing more on some of the root causes of armed conflict. In particular, the Security Council should use its powers under the UN Charter more actively than it has done so far, to achieve reforms in the public administration of natural resources in countries recovering from armed conflict.

Finally, it should be emphasised that it is of the utmost importance that natural resource wealth is once again associated with development rather than armed conflict. In order to achieve this, it is essential to assist States that are recovering from armed conflict to (re)build the institutions that are necessary for the proper management of their natural resources. It is only in this way that natural resources can be transformed from engines for conflict into engines for sustainable development.

Samenvatting

INTERNATIONAAL RECHT EN HET BEHEER VAN NATUURLIJKE HULPBRONNEN IN CONFLICT EN POST-CONFLICT SITUATIES

Inleiding

Natuurlijke hulpbronnen, zoals goud, diamanten, olie en hout, zouden een motor moeten zijn voor ontwikkeling van de landen waar zij worden gewonnen. Diverse hedendaagse conflicten schetsen echter een ander beeld, waarin natuurlijke hulpbronnen conflicten in stand houden of zelfs aanwakkeren. Diamanten financierden de conflicten in Angola en Sierra Leone rond de eeuwwisseling, terwijl het huidige conflict in de Democratische Republiek Congo aanhoudt doordat gewapende groeperingen zich in stand houden door de handel in lucratieve mineralen. In veel gevallen blijkt bovendien dat de manier waarop een overheid natuurlijke hulpbronnen beheert, van invloed kan zijn op de uitbraak en beëindiging van een gewapend conflict. Slecht beheer door de overheid ligt in veel gevallen ten grondslag aan een gewapend conflict of staat een structurele oplossing voor een conflict in de weg. In het kader van de preventie en beëindiging van conflicten is het daarom van groot belang om zowel de handel in conflictgoederen te bestrijden, als ook om manieren te zoeken om het beheer van natuurlijke hulpbronnen in een land structureel te verbeteren.

Onderzoeksdoel en probleemstelling

Dit proefschrift onderzoekt gewapende conflicten die gerelateerd zijn aan natuurlijke hulpbronnen. Het doel van het proefschrift is om na te gaan welke bijdrage het internationaal recht kan leveren aan het beëindigen en voorkomen van dit soort conflicten. Daarmee bouwt het onderzoek voort op gezaghebbende studies uit andere wetenschappelijke disciplines, gerelateerd aan theorieën met betrekking tot (wat wordt aangeduid als) de politieke economie van gewapend conflict en de vloek der natuurlijke rijkdommen. Het proefschrift heeft met name een antwoord willen geven op de vraag hoe internationaal recht ertoe kan bijdragen dat rijkdom aan natuurlijke hulpbronnen in een land ten goede kan komen aan duurzame vrede en de ontwikkeling van dat land in plaats van aan gewapend conflict. Daarbij heeft dit proefschrift zowel

aandacht besteed aan regels die moeten voorkomen dat natuurlijke hulpbronnen conflicten financieren als aan regels die tot doel hebben het beheer van natuurlijke hulpbronnen door overheden te reguleren.

Het juridische kader voor het beheer van natuurlijke hulpbronnen in staten

Het eerste deel van het proefschrift is ingegaan op de internationaalrechtelijke regels die betrekking hebben op het beheer van natuurlijke hulpbronnen in algemene zin. Daarbij stond de volgende vraag centraal: bevat het huidige internationaal recht regels die verzekeren dat natuurlijke hulpbronnen worden geëxploiteerd ten behoeve van duurzame ontwikkeling?

Uitgangspunt voor het beheer van natuurlijke hulpbronnen die zich bevinden binnen de territoriale grenzen of onder de jurisdictie van een staat is het recht van die staat om vrijelijk te beschikken over de aanwezige natuurlijke hulpbronnen. Dit recht vormt de kern van het beginsel van permanente soevereiniteit over natuurlijke hulpbronnen, dat op haar beurt is gegrondvest in het beginsel van staatssoevereiniteit en in het recht op zelfbeschikking van volkeren. Het beginsel van permanente soevereiniteit over natuurlijke hulpbronnen is ontstaan uit een claim van voormalig gekoloniseerde volkeren en ontwikkelingslanden, die hun pas hervonden rechten over hun natuurlijke hulpbronnen veilig wilden stellen. Tegenwoordig is het beginsel van permanente soevereiniteit uitgegroeid tot een volwaardig beginsel dat niet alleen rechten maar ook plichten omvat voor staten met betrekking tot het beheer van hun natuurlijke hulpbronnen. Voor het huidige onderzoek zijn met name de volgende twee plichten van belang. Het beginsel van permanente soevereiniteit omvat een plicht voor staten om de aan hen toegekende rechten over hun natuurlijke hulpbronnen uit te oefenen in het belang van nationale ontwikkeling en met het oog op het welzijn van de bevolking. Daarnaast moeten staten zorgvuldigheid betrachten met betrekking tot het milieu.

De plicht om natuurlijke hulpbronnen aan te wenden ten behoeve van ontwikkeling en het welzijn van de bevolking komt op twee manieren tot uiting. In de eerste plaats zijn de bevolking van een staat, alsmede specifieke groepen binnen een staat, begunstigden van het beginsel van permanente soevereiniteit over natuurlijke hulpbronnen. De opbrengsten die worden verkregen uit de exploitatie van natuurlijke hulpbronnen moeten worden gebruikt om ontwikkeling te stimuleren. Bovendien heeft dit proefschrift aangetoond dat het beginsel van permanente soevereiniteit, als onderdeel van het recht op zelfbeschikking, ook rechtstreeks toekomt aan volkeren. Daarmee zijn volkeren niet alleen begunstigden maar ook rechthebbenden van het beginsel van permanente soevereiniteit over natuurlijke hulpbronnen. De bevolking als geheel, maar ook minderheden en inheemse volkeren, hebben een recht om te participeren in besluitvorming omtrent het gebruik van natuurlijke hulpbronnen. Bovendien hebben deze groepen een recht om te profiteren

van de opbrengsten van natuurlijke hulpbronnen met het oog op hun ontwikkeling.

Naast deze sociale verplichtingen, hebben staten ook verplichtingen met betrekking tot de bescherming van het milieu. Internationaal milieurecht formuleert diverse verplichtingen voor staten die zij in acht moeten nemen wanneer zij hun natuurlijke hulpbronnen exploiteren. Staten hebben onder meer een plicht om het milieu en de natuurlijke hulpbronnen te beschermen en duurzaam te gebruiken; de rechten van toekomstige generaties veilig te stellen; schade te voorkomen aan het milieu van andere staten; en om een voorzorgsbenadering te betrachten met betrekking tot de bescherming van het milieu en natuurlijke hulpbronnen.

Daarnaast heeft dit proefschrift vormen van gemeenschappelijke regimes besproken, die tot doel hebben om de belangen van een grotere groep staten te beschermen. Voorbeelden van dergelijke regimes zijn het UNESCO Werelderfgoedverdrag uit 1972 en het Biodiversiteitsverdrag uit 1992. Diverse gemeenschappelijke regimes vragen staten om natuurlijke hulpbronnen binnen hun territoriale grenzen of jurisdictie te beschermen vanwege het specifieke belang dat deze natuurlijke hulpbronnen vertegenwoordigen voor de internationale gemeenschap. Staten die partij zijn bij dergelijke gemeenschappelijke regimes zijn derhalve een speciale verantwoordelijkheid aangegaan, die niet zomaar ophoudt wanneer een gewapend conflict uitbreekt binnen hun territorium. Dit betekent bijvoorbeeld dat overheden tijdens een gewapend conflict gehouden blijven om werelderfgoed binnen hun territorium te beschermen.

Uit het eerste deel van dit proefschrift blijkt derhalve dat het algemeen juridische kader voor het beheer van natuurlijke hulpbronnen binnen staten een aantal belangrijke beginselen bevat die ervoor moeten zorgen dat staten hun natuurlijke hulpbronnen exploiteren met het oog op het bereiken van duurzame ontwikkeling. Met name van belang zijn de beginselen van publieke participatie en duurzaam gebruik. Deze beginselen leggen bovendien de basis voor een juridisch raamwerk met betrekking tot het beheer van natuurlijke hulpbronnen in staten na afloop van een gewapend conflict.

Het beheer van natuurlijke hulpbronnen tijdens gewapend conflict

Het tweede deel van het proefschrift is ingegaan op de regels die van toepassing zijn op de exploitatie van natuurlijke hulpbronnen tijdens een gewapend conflict. In hoeverre en voor welke partijen is het algemene internationaalrechtelijke kader voor het beheer van natuurlijke hulpbronnen van toepassing; en welke regels formuleert het internationaal oorlogsrecht ten aanzien van het gebruik van natuurlijke hulpbronnen tijdens een gewapend conflict?

De exploitatie van natuurlijke hulpbronnen is in de eerste plaats een commerciële activiteit, ook als de opbrengsten worden gebruikt om een gewapend conflict te financieren. Dit betekent dat het internationaal oorlogsrecht, dat situaties van gewapend conflict reguleert, slechts ten dele relevant is. Het

oorlogsrecht richt zich immers in de eerste plaats op daden van oorlogvoering en de effecten daarvan op de bevolking. Het houdt zich slechts zijdelings bezig met commerciële activiteiten. Andere rechtsgebieden, met name internationaal economisch recht, mensenrechten en internationaal milieurecht, blijven daarom eveneens van groot belang voor het beheer van natuurlijke hulpbronnen tijdens gewapend conflict, althans voor staten.

Het internationaalrechtelijke raamwerk voor het beheer van natuurlijke hulpbronnen tijdens gewapend conflict bestaat derhalve uit regels die afkomstig zijn uit verschillende rechtsgebieden. Welke regels gelden in welke situatie is afhankelijk van meerdere factoren, met name het soort conflict (internationaal of intern) en de actoren die de natuurlijke hulpbronnen exploiteren (de regering, andere staten of gewapende groeperingen). Niettemin zijn er enkele regels die in alle situaties en voor alle actoren gelden. Deze verplichtingen vloeien voort uit het oorlogsrecht, het enige rechtsgebied dat rechtstreeks verplichtingen formuleert voor gewapende groeperingen.

In de eerste plaats verbiedt het oorlogsrecht partijen bij een gewapend conflict om te plunderen. Dit verbod is van toepassing op alle gevallen waarin partijen bij een gewapend conflict zich natuurlijke hulpbronnen toe-eigenen voor persoonlijk gewin. Persoonlijk gewin kan breed worden opgevat, in de zin dat het alle vormen van toe-eigening omvat die geen directe militaire doeleinden dienen. Dit betekent, bijvoorbeeld, dat een bezetter de opbrengsten van natuurlijke hulpbronnen in bezet gebied niet mag gebruiken voor het stimuleren van de eigen economie. Daarnaast is het verbod tot plunderen een belangrijk middel om het roven van natuurlijke hulpbronnen door gewapende groeperingen of legereenheden aan te pakken, maar alleen voor zover de opbrengsten niet direct worden aangewend om de gewapende strijd te financieren. Als dat wel het geval is, worden de activiteiten gereguleerd door andere bepalingen. Deze gelden echter niet op dezelfde manier en in gelijke mate voor alle partijen bij een gewapend conflict.

Een andere verplichting die geldt voor alle partijen bij een gewapend conflict is het verbod om de bevolking uit te hongeren door objecten weg te nemen of te vernietigen die onmisbaar zijn voor de bevolking. In veel van de landen die in dit proefschrift zijn bestudeerd, is de lokale bevolking in hoge mate afhankelijk van de exploitatie van natuurlijke hulpbronnen om in de eerste levensbehoeften te voorzien. Een brede interpretatie van het verbod om de bevolking uit te hongeren, zoals door dit proefschrift gepropageerd, brengt met zich mee dat het partijen bij een gewapend conflict niet is toegestaan om de lokale bevolking opzettelijk de toegang te ontzeggen tot gebieden die door hen worden gebruikt om natuurlijke hulpbronnen te exploiteren, als zij daardoor niet langer in hun primaire levensonderhoud kunnen voorzien.

Naast deze algemene verplichtingen, gelden ook andere verplichtingen voor partijen bij een gewapend conflict. Deze zijn echter niet voor alle partijen gelijk. In de eerste plaats blijven overheden die verwikkeld zijn in een intern gewapend conflict, primair gehouden aan het algemene internationaalrechtelij-

ke raamwerk voor het beheer van natuurlijke hulpbronnen. Uiteraard kunnen die verplichtingen wel worden aangetast door het uitbreken van een gewapend conflict, een realiteit die ook is verdisconteerd in diverse verdragen.

Zowel mensenrechtenverdragen als milieuverdragen kennen mechanismen die het landen mogelijk maken in dringende omstandigheden af te wijken van hun verplichtingen. Deze mechanismen gaan echter niet zover dat het landen zou zijn toegestaan af te wijken van de kernverplichtingen onder de verdragen. Zo kunnen staten bijvoorbeeld niet afwijken van het verbod om volkeren hun bestaansmiddelen te ontnemen, zoals neergelegd in Artikel 1 lid 2 van het Internationaal Verdrag inzake Economische, Sociale en Culturele Rechten en het Internationaal Verdrag inzake Burgerrechten en Politieke Rechten. Deze bepaling versterkt daarmee het oorlogsrechtelijke verbod om in conflictsituaties objecten weg te nemen of te vernietigen die onmisbaar zijn voor de bevolking.

In de tweede plaats heeft dit proefschrift gekeken naar de rechten en plichten van staten met betrekking tot de natuurlijke hulpbronnen van een andere staat in situaties van gewapend conflict. Deze rechten en plichten worden primair beheerst door internationaal oorlogsrecht. Twee verschillende situaties kunnen zich voordoen. Wanneer een staat effectieve controle uitoefent over (een deel van) het grondgebied van een andere staat geldt het bezettingsrecht, dat bezetters een beperkt recht geeft om de natuurlijke hulpbronnen in bezet gebied te exploiteren. Het recht op vruchtgebruik, zoals neergelegd in Artikel 55 van het Haagse Reglement van 1907, staat bezetters, onder stringente voorwaarden, toe de natuurlijke hulpbronnen in bezet gebied te exploiteren om te voorzien in de kosten van de administratie van die gebieden.

Wanneer een staat militair aanwezig is in een andere staat zonder effectieve controle uit te oefenen over grondgebied, gelden andere regels. In die gevallen mogen staten zich natuurlijke hulpbronnen niet toe-eigenen, behalve wanneer – in de woorden van Artikel 23(g) van het Haagse Reglement van 1907 – dit "door oorlogsnoodzaak gebiedend wordt gevorderd". Deze uitzondering leent zich er niet toe om systematische exploitatie van natuurlijke hulpbronnen van een vijand te rechtvaardigen. Dit betekent dat het internationaal oorlogsrecht min of meer een totaalverbod bevat voor staten om de natuurlijke hulpbronnen van hun vijand te exploiteren, wanneer zij geen effectieve controle uitoefenen over grondgebied.

Een dergelijk totaalverbod bestaat tot slot ook voor gewapende groeperingen die geen effectieve controle uitoefenen over grondgebied. Wanneer zij dit wel doen, kunnen zij in twee gevallen een beperkt recht hebben om natuurlijke hulpbronnen te exploiteren. Dit is het geval wanneer gewapende groeperingen namens een andere staat handelen of wanneer gewapende groeperingen door andere staten worden erkend als formele partij bij een conflict. In die gevallen geldt het recht tot vruchtgebruik, zoals dat ook voor bezetters geldt.

Het eerste deel van dit proefschrift heeft tot slot vastgesteld dat het internationaalrechtelijke kader voor de exploitatie van natuurlijke hulpbronnen tijdens gewapend conflict wellicht lastig is om te overzien, maar dat het zeker

niet incompleet is. De verplichtingen van partijen bij een gewapend conflict zijn weliswaar niet gelijk, maar er bestaan regels voor alle partijen. Een nationale overheid die partij is bij een gewapend conflict blijft grotendeels gehouden aan algemene regels van internationaal economisch recht, mensenrechten en internationaal milieurecht, terwijl de voornaamste verplichtingen voor gewapende groeperingen en andere staten primair in het oorlogsrecht zijn te vinden.

Desondanks vertoont het juridische kader ook een aantal imperfecties. Het bestaande juridische kader zou op een aantal vlakken moeten worden verduidelijkt en opnieuw geïnterpreteerd. Dit proefschrift heeft twee onderwerpen geïdentificeerd die met name aandacht verdienen. Dit zijn enerzijds de bescherming van het milieu en anderzijds de juridische positie van gewapende groeperingen. Er bestaan bijvoorbeeld geen regels die gewapende groeperingen verplichtingen opleggen met betrekking tot de bescherming van het milieu. Dit hangt deels samen met het tweede gesignaleerde probleem, namelijk de juridische positie van gewapende groeperingen. Het huidige recht kent gewapende groeperingen in bijna geen enkel geval een recht toe om natuurlijke hulpbronnen te exploiteren, met als gevolg het ontbreken van randvoorwaarden wanneer zij dit wel doen.

Daarom pleit dit proefschrift ervoor om gewapende groeperingen een recht op vruchtgebruik toe te kennen in alle gevallen waarin zij effectieve controle uitoefenen over een deel van het grondgebied van de staat en niet alleen in die gevallen waarin gewapende groeperingen handelen namens een andere staat of wanneer zij zijn erkend door andere staten. Hoewel er zeker ook nadelen kleven aan een dergelijke uitbreiding van de rechten van gewapende groeperingen, is een belangrijk voordeel dat het gewapende groeperingen een stimulans geeft om internationaal oorlogsrecht te respecteren, terwijl er ook duidelijke voorwaarden worden gesteld aan de uitoefening van die rechten. Bovendien staat een dergelijke uitbreiding van rechten in individuele gevallen niet in de weg aan een besluit tot het nemen van dwangmaatregelen.

Het beheer van natuurlijke hulpbronnen als onderdeel van conflictoplossing en wederopbouw

Tot slot heeft het derde deel van dit proefschrift een aantal juridische en politieke mechanismen onderzocht die zijn ontwikkeld om gewapende conflicten gerelateerd aan natuurlijke hulpbronnen te beëindigen. Dit zijn in de eerste plaats sanctieregimes die door de VN Veiligheidsraad zijn ingesteld om de handel in conflictgoederen te bestrijden. De vraag die centraal stond is welke benadering de Veiligheidsraad kiest om de rol van natuurlijke hulpbronnen in het voortduren en aanwakkeren van conflicten tegen te gaan. Daarnaast bespreekt dit deel enkele informele politieke mechanismen die speciaal zijn ingesteld om de handel in conflictgoederen te bestrijden en/of het beheer van natuurlijke hulpbronnen in een land te verbeteren. Welke standaarden ontwik-

kelen deze mechanismen voor het beheer van natuurlijke hulpbronnen in conflictgebieden en vormen dit soort informele politieke mechanismen een geloofwaardig alternatief voor formele juridische mechanismen?

Hoofdstuk 7 heeft verschillende sanctieregimes besproken die de VN Veiligheidsraad heeft ingesteld om gewapende conflicten gerelateerd aan natuurlijke hulpbronnen tot een einde te brengen en duurzame vrede te bereiken. Uit dit hoofdstuk blijkt dat de Veiligheidsraad volop heeft geëxperimenteerd met verschillende soorten maatregelen, waaronder selectieve grondstoffenembargo's en bevriezing van tegoeden en reisverboden voor personen en organisaties die betrokken zijn bij de illegale handel in grondstoffen. Hierbij heeft de Veiligheidsraad voortdurend geprobeerd middelen te vinden om de sanctieregimes effectiever te maken, waaronder een certificeringssysteem voor diamanten, een wederopbouwprogramma voor de overheidsadministratie en de houtindustrie in Liberia en het aannemen van *due diligence* richtlijnen voor mineralen afkomstig uit de Democratische Republiek Congo.

Verder heeft de Veiligheidsraad in verschillende resoluties inhoudelijke standaarden geformuleerd voor het beheer van natuurlijke hulpbronnen in conflictgebieden. In relatie tot diamanten, bijvoorbeeld, heeft de Veiligheidsraad geëist dat een certificeringsregime zou worden ontwikkeld dat effectief, transparant en internationaal verifieerbaar zou zijn en waarover de overheid verantwoording zou moeten afleggen. Met betrekking tot hout, riep de Veiligheidsraad staten, internationale organisaties en andere entiteiten op om de nieuwe regering van Liberia te helpen om verantwoordelijke en duurzame praktijken in de houtindustrie te bewerkstelligen. Daarnaast heeft de Veiligheidsraad staten in meer algemene zin opgeroepen om natuurlijke hulpbronnen te exploiteren met het oog op het stimuleren van ontwikkeling. In het geval van Liberia ten tijde van het regime van President Charles Taylor, ging de Veiligheidsraad zelfs een stap verder. In Resolutie 1408 (2002), riep de Veiligheidsraad het regime van Taylor op om dringende stappen te nemen om ervoor te zorgen dat opbrengsten uit de houtindustrie zouden worden gebruikt voor legitieme sociale, humanitaire en ontwikkelingsdoeleinden.

Ondanks de belangrijke bijdrage die sanctieregimes hebben geleverd aan het oplossen van conflicten, is ook naar voren gekomen dat er beperkingen zijn verbonden aan dit type maatregelen. Naast inherente beperkingen, blijkt ook dat de Veiligheidsraad niet in alle omstandigheden bereid is sanctieregimes in te stellen. De Veiligheidsraad heeft zijn bevoegdheden primair gebruikt om één specifieke vorm van een bedreiging van de vrede en veiligheid aan te pakken. De meeste sanctieregimes hebben tot doel de nationale overheid te helpen om haar autoriteit te herstellen over natuurlijke hulpbronnen die ten prooi zijn gevallen aan subversieve entiteiten. Slechts in enkele gevallen heeft de Veiligheidsraad zijn bevoegdheden gebruikt om een overheid te raken, maar de meeste van die sanctieregimes waren niet direct gerelateerd aan een gewapend conflict waarin natuurlijke hulpbronnen een belangrijke rol speelden. Hieruit kan worden geconcludeerd dat de Veiligheidsraad er de voorkeur aan

geeft het beginsel van permanente soevereiniteit over natuurlijke hulpbronnen te respecteren, zelfs wanneer het duidelijk is dat een overheid zijn verplichtingen onder internationaal recht schendt.

Parallel aan de sanctieregimes ingesteld door de Veiligheidsraad, zijn de afgelopen jaren diverse informele politieke mechanismen tot stand gekomen die tot doel hebben de handel in conflictgoederen aan te pakken en/of het beheer van natuurlijke hulpbronnen in landen te verbeteren. Deze vrijwillige initiatieven zijn ontwikkeld door partnerschappen tussen staten, non-gouvernementele organisaties en het bedrijfsleven. Diverse van die initiatieven zijn door de Veiligheidsraad aangemerkt als belangrijke mechanismen om gewapende conflicten gerelateerd aan natuurlijke hulpbronnen aan te pakken.

Hoofdstuk 8 van dit proefschrift heeft een drietal van dergelijke initiatieven onderzocht. Dit zijn het Kimberley Proces voor de handel in conflictdiamanten als een voorbeeld van een certificeringsmechanisme dat de handel in conflictgoederen bestrijdt; het Extractive Industries Transparancy Initiative (EITI) als een voorbeeld van een mechanisme dat transparantie en verantwoording stimuleert met betrekking tot het beheer van natuurlijke hulpbronnen door overheden; en de OESO *due diligence* richtlijnen voor verantwoord ketenbeheer van grondstoffen uit conflict- en risicogebieden als een voorbeeld van een mechanisme dat de verantwoordelijkheid van bedrijven bij het winnen van grondstoffen tracht te verbeteren.

De belangrijkste bijdrage van deze initiatieven aan het oplossen van grondstofgerelateerde conflicten is gelegen in hun standaardiseringfunctie. De initiatieven ontwikkelen standaarden die tot doel hebben transparantie in het beheer van natuurlijke hulpbronnen te verbeteren, overheden te stimuleren verantwoording af te leggen voor het door hen gevoerde beleid ten aanzien van grondstoffen en de sociale verantwoordelijkheid van bedrijven vorm te geven.

Een vraag die kan worden gesteld is waarom de initiatieven slechts vrijwillige afspraken formuleren in plaats van juridisch bindende verplichtingen. De reden voor deze keuze kan niet zonder meer worden gevonden in de participatie van entiteiten zonder verdragsluitende bevoegdheid in de initiatieven. De initiatieven zijn misschien wel ontwikkeld door partnerschappen waarbij non-gouvernementele organisaties en bedrijven zijn betrokken, maar uiteindelijk is daarvan weinig merkbaar in de uitvoering. De reden voor de vrijwillige afspraken waarop de initiatieven zijn gebaseerd moet derhalve worden gevonden in andere factoren, zoals tijdswinst bij het opstellen van de regels en flexibiliteit van de herzieningsprocedures, die ervoor zorgen dat de initiatieven snel kunnen worden aangepast aan de omstandigheden.

Ondanks hun vrijwillige basis, hebben de initiatieven wel resultaten opgeleverd. Het Kimberley Proces heeft de smokkel in diamanten uit conflictgebieden grotendeels tot een halt weten te roepen. Daarnaast gaan steeds meer voormalige conflictlanden ertoe over om de EITI-standaarden te implementeren. Tot slot blijkt uit een project van de OESO in het Afrikaanse Grote Merengebied

dat bedrijven langzamerhand het belang van *due diligence* beginnen in te zien. Deze resultaten kunnen slechts ten dele direct aan de initiatieven worden toegeschreven. Uit de praktijk blijkt dat het succes van dit soort vrijwillige initiatieven afhangt van een vijftal factoren: 1) de bereidheid van de betrokken actoren om de afspraken na te komen; 2) de betrokkenheid van alle relevante actoren; 3) de aanwezigheid van een effectief systeem om te monitoren of de afspraken daadwerkelijk worden nagekomen; 4) de aanwezigheid van effectieve nationale wetgeving om de afspraken te implementeren; 5) steun van buitenaf.

Dit deel van het proefschrift heeft geconcludeerd dat de sanctieregimes ingesteld door de Veiligheidsraad en de vrijwillige initiatieven een significante bijdrage hebben geleverd aan het aanpakken van de meest acute problemen gerelateerd aan de rol van natuurlijke hulpbronnen in gewapende conflicten. Daarnaast is het echter noodzakelijk om op zoek te gaan naar meer structurele oplossingen om te voorkomen dat natuurlijke hulpbronnen gewapende conflicten in stand houden of zelfs aanwakkeren. Effectiviteit, transparantie en verantwoordingsstructuren zijn belangrijke onderdelen van strategieën gericht op conflictbeëindiging. Er is echter meer voor nodig om ervoor te zorgen dat natuurlijke hulpbronnen op een verantwoordelijke wijze worden beheerd, zodat nieuwe conflicten worden voorkomen. Specifiek van belang is om publieke participatie en duurzaamheid rechtstreeks te integreren in strategieën gericht op conflictbeëindiging en wederopbouw. Als aan deze aspecten in een vroeg stadium aandacht wordt gegeven, dan verhoogt dit de kans op een blijvende vrede aanzienlijk.

Conclusie

Dit proefschrift heeft onderzocht welke bijdrage het internationaal recht kan leveren aan het beëindigen van bestaande gewapende conflicten en het voorkomen van nieuwe conflicten die gerelateerd zijn aan natuurlijke hulpbronnen. Een belangrijke bijdrage van het internationaal recht bestaat uit het stellen van regels voor het beheer van natuurlijke hulpbronnen voor nationale overheden, zowel in vredestijd als ten tijde van gewapend conflict. Daarnaast bevat het internationaal recht regels voor partijen tijdens een gewapend conflict ten aanzien van het gebruik van natuurlijke hulpbronnen. Al met al kan worden gesteld dat het internationaal recht de uitdagingen die voortkomen uit gewapende conflicten gerelateerd aan natuurlijke hulpbronnen redelijk aan kan. Het internationaal recht stelt niet alleen inhoudelijke regels, maar biedt ook het kader voor de Veiligheidsraad om actie te ondernemen in concrete gevallen. Daarbij vormen politieke mechanismen, zoals het Kimberley Proces, EITI en de OESO-richtlijnen, een waardevolle aanvulling op het internationaalrechtelijke kader.

Desondanks heeft dit proefschrift ook enkele mankementen gesignaleerd. Dit geldt met name het gebrek aan regelgeving met betrekking tot de bescherming van het milieu tijdens gewapend conflict en de te restrictieve regels die

gelden voor gewapende groeperingen met betrekking tot het gebruik van natuurlijke hulpbronnen. Beide onderwerpen verdienen meer aandacht, met name met het oog op wederopbouw na een gewapend conflict. Het is lastig om structurele vrede en duurzame ontwikkeling na een conflict te bewerkstelligen als de natuur ernstig is aangetast door roofbouw, met als doel zoveel mogelijk natuurlijke hulpbronnen te bemachtigen. In sommige gevallen kan het daarom beter zijn om een praktijk te reguleren dan om deze compleet te verbieden. Dit is de reden waarom dit proefschrift ervoor pleit om regels te stellen voor het gebruik van natuurlijke hulpbronnen door gewapende groeperingen, in ieder geval wanneer zij een deel van het grondgebied onder hun controle hebben.

Tot slot is het van groot belang om staten die een gewapend conflict hebben doorgemaakt te helpen bij het opbouwen van instituties met betrekking tot het beheer van natuurlijke hulpbronnen. De Veiligheidsraad, met zijn brede en zware bevoegdheden, zou zijn rol op dit vlak moeten uitbreiden, al is het maar om het werk van andere verbanden, zoals het Kimberley Proces, EITI, de OESO, regionale organisaties en de VN Vredesopbouwcommissie, een steuntje in de rug te geven. Daarbij is het van belang dat voldoende aandacht wordt besteed aan de basisvoorwaarden van een goed beheer van natuurlijke hulpbronnen. Naast effectiviteit, transparantie en het afleggen van verantwoording over gevoerd beleid zijn dit publieke participatie in besluitvormingsprocedures en duurzaamheid. Het is alleen op deze manier dat natuurlijke hulpbronnen kunnen veranderen van motoren voor conflict in motoren voor ontwikkeling.

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Situations	Principal resolutions and overview of relevant decisions
General	Resolution 1459 (2003): expresses its support for the Kimberley Process Certification Scheme
Angola	Resolution 864 (1993): installs an arms embargo and an embargo on the export of petroleum to Angola Resolution 1127 (1997): installs travel and aviation sanctions Resolution 1173 (1998): installs an import ban on diamonds that are not controlled through the Certificate of Origin regime of the Angolan government Resolution 1176 (1998): brings into effect the diamond sanctions Resolution 1237 (1999): establishes the Fowler Commission Resolution 1295 (2000): welcomes steps in the direction of devising a more comprehensive system of controls in relation to diamonds Resolution 1448 (2002): terminates the sanctions regime
Cambodia	Resolution 668 (1990): endorses the framework for a comprehensive political settlement of the conflict Resolution 792 (1992): expresses support for the national moratorium on

Côte d'Ivoire	Resolution 1572 (2004): installs an arms embargo, travel ban and assets freeze and establishes the Sanctions Committee Resolution 1584 (2005): establishes the Group of Experts Resolution 1643 (2005): installs diamond sanctions Resolution 1727 (2006): requests the Kimberley Process to communicate information about the production and illicit export of diamonds Resolution 1782 (2007): renews the sanctions until 31 October 2008 and decides to review the sanctions in light of progress achieved in the implementation of the peace process Resolution 1842 (2008): renews the sanctions until 31 October 2009 and decides to review the sanctions in light of progress achieved in the implementation of the peace process Resolution 1893 (2009): renews the sanctions until 31 October 2010 and introduces an exemption for diamonds that will be used solely for scientific research and analysis coordinated by the Kimberley Process Resolution 1946 (2010): renews the sanctions Resolution 1980 (2011): renews the diamond sanctions and conditions the lifting of the diamond sanctions on cooperation with the Kimberley Process Resolution 2045 (2012): renews the diamond sanctions and urges the authorities to adopt an action plan for the implementation of the Kimberley Process Resolution 2101 (2013): renews the sanctions until 30 April 2014; reiterates the conditions set out in Resolution 2045; and encourages the authorities to participate in an OECD-hosted programme with regard to the implementation of the Due Diligence Guidance

DR Congo	Resolution 1291 (2000): expresses its serious concern at reports of illegal exploitation of natural resources in the DR Congo Resolution 1355 (2001): expresses its concern over the findings of the Panel of Experts on the Illegal Exploitation of Natural Resources and Other Forms of Wealth of the Democratic Republic of the Congo Resolution 1457 (2003): strongly condemns the illegal exploitation of the natural resources of the Democratic Republic of the Congo and demands that all States concerned take immediate steps to end these illegal activities Resolution 1493 (2003): installs an arms embargo and expresses its intention to consider means to end the illegal exploitation of natural resources Resolution 1533 (2004): establishes a Sanctions Committee and Group of Experts Resolution 1596 (2005): amends and expands the arms embargo; imposes targeted travel and financial measures on particular leaders of armed groups; demands neighbouring States to impede the flow of illegal natural resources through their territories Resolution 1698 (2006): requests the Group of Experts and the Secretary-General reports relating to the illegal exploitation of natural resources and expresses its intention to consider measures with respect to natural resources Resolution 1857 (2008): extends the travel ban and asset freeze to individuals providing support to armed groups through the illicit trade of natural resources Resolution 1896 (2009): mandates the Group of Experts to produce recommendations to the Committee for guidelines for the exercise of due diligence by the importers, processing industries and consumers of mineral products regarding the purchase, sourcing, acquisition and processing of mineral products from the DRC. Resolution 1925 (2010): includes natural resources related tasks in MONUSCO's mandate Resolution 1952 (2010): supports taking forward the Group of Experts' recommendations on guidelines for due diligence; calls upon all States to take appropriate steps to raise awareness of the due diligence guidelines and to urge importers, processing

Iraq	Resolution 661 (1990): installs a comprehensive import and export embargo and an asset freeze; introduces humanitarian exemptions Resolution 687 (1991): affirms that Iraq is liable under international law for the depletion of natural resources in Kuwait; decides to create a compensation fund to pay for the damage inflicted by Iraq; broadens the exemptions to the export embargo to cover foodstuffs notified pursuant to the 'no-objections procedure' Resolution 986 (1995): establishes the 'Oil-for-Food programme' Resolution 1409 (2002): revises the 'Oil-for-Food programme' through the introduction of a Goods Review List Resolution 1483 (2003): terminates the 'Oil-for-Food programme'; notes the establishment of a Development Fund for Iraq; and underlines that the Development Fund shall be used in a transparent manner to meet the humanitarian needs of the Iraqi people, for the economic reconstruction and repair of Iraq's infrastructure, for the continued disarmament of Iraq, and for the costs of Iraqi civilian administration, and for other purposes benefiting the people of Iraq

Liberia	Resolution 788 (1992): installs an arms embargo Resolution 1343 (2001): establishes a Sanctions Committee and a Panel of Experts; renews the arms embargo and installs diamond sanctions; demands the government of Liberia to cease import of Sierra Leone rough diamonds which are not controlled through the Sierra Leonean Certificate of Origin regime; and calls upon the government to establish an effective Certificate of Origin regime for trade in rough diamonds that is transparent and internationally verifiable Resolution 1408 (2002): calls upon the government to take urgent steps to ensure that revenue from the timber industry is used for legitimate social, humanitarian and development purposes Resolution 1478 (2003): installs a timber embargo; reiterates its call upon the government to establish a Certificate of Origin regime for Liberian rough diamonds; rrefers to the Kimberley Process; proposes to exempt from the embargo rough diamonds controlled by a transparent and internationally verifiable Certificate of Origin regime Resolution 1521 (2003): terminates the previous sanctions regime; installs sanctions on diamonds and timber products from Liberia; encourages the government to join the Kimberley Process; encourages the government to establish oversight mechanisms for the timber industry that will promote responsible business practices, and to establish transparent accounting and auditing mechanisms Resolution 1579 (2004): encourages the government to implement the Liberia Forest Initiative and the necessary reforms in the Forest Development Authority in order to meet the conditions for the lifting of the timber sanctions Resolution 1647 (2004): encourages the Liberian government to implement the Governance and Economic Management Assistance Program as a means to expedite the lifting of the sanctions Resolution 1689 (2006): lifts the timber sanctions Resolution 1753 (2007): lifts the diamond sanctions Resolution 1854 (2008): supports the decision of Liberia to take part in EITI
Libya	Resolution 1970 (2011): installs an arms embargo, a travel ban and an asset freeze, targeting Qhadafi's family members Resolution 1973 (2011): extends the asset freeze to all entities under the control of Libyan authorities, including the Libyan National Oil Corporation Resolution 2009 (2011): terminates the asset freeze in relation to the National Oil Corporation

Sierra Leone	Resolution 1132 (1997): installs a travel ban, an arms embargo and a petroleum embargo; establishes a Sanctions Committee Resolution 1306 (2000): installs an import ban on diamonds, exempting from the measures diamonds controlled by an effective Certificate of Origin regime; calls for an exploratory hearing to assess the role of diamonds in the Sierra Leonean conflict and the link between diamonds and the violation of the arms embargo Resolution 1385 (2001): renews the diamond embargo Resolution 1446 (2002): renews the diamond embargo
Southern Rhodesia	Resolution 217 (1965): calls upon all States to break all economic relations with Southern Rhodesia Resolution 232 (1966): installs sanctions, including an import embargo on several commodities Resolution 253 (1968): extends the sanctions to all products and commodities originating from or destined to Southern Rhodesia, exempting humanitarian goods Resolution 460 (1979): lifts the sanctions

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