

## Annex I

### FORMATION AND EVIDENCE OF CUSTOMARY INTERNATIONAL LAW

(Michael Wood)

1. Questions relating to sources lie at the heart of international law. The Commission's work in this field has been among its most important and successful, but has been largely confined to the law of treaties. It is proposed that a topic entitled "Formation and evidence of customary international law" be included in the Commission's long-term programme of work. The proposed title would not preclude the Commission from examining related aspects if this proved desirable, but the focus would be on formation (the process by which rules of customary international law develop) and evidence (the identification of such rules). As is always the case, it will be important, if and when the Commission takes up the topic, to define carefully from the outset the scope of the topic and to prioritize issues.

2. Notwithstanding the great increase in the number and scope of treaties, customary international law remains an important source of international law. The ideal of a fully codified law, rendering customary international law superfluous, even if it were desirable, is far from becoming a reality. In the past, much was written on the subject of customary international law. In recent years, there has been a tendency in some quarters to downplay its significance. At the same time, ideological objections to the role of customary international law have diminished. There now appears to be a revival of interest in the formation of customary international law, in part stimulated by the attempts, sometimes quite controversial, of domestic courts to grapple with the issue. The formation of customary international law now has to be seen in the context of a world of nearly 200 States and numerous and varied international organizations, both regional and universal.

3. There are differing approaches to the formation and identification of customary international law. Yet an appreciation of the process of its formation and identification is essential for all those who have to apply the rules of international law. Securing a common understanding of the process could be of considerable practical importance. This is so not least because questions of customary international law increasingly fall to be dealt with by those who may not be international law specialists, such as those working in the domestic courts of many countries, those in government ministries other than ministries of foreign affairs and those working for NGOs.

4. The aim is not to seek to codify "rules" for the formation of customary international law. Instead, the aim is to produce authoritative guidance for those called upon

to identify customary international law, including national and international judges. It will be important not to be overly prescriptive. Flexibility remains an essential feature of the formation of customary international law. In view of this, the Commission's final output in this field could take one of a number of forms. One possibility would be a series of propositions, with commentaries.

5. International courts have done something to clarify the issues, as have domestic courts, and there is a vast amount of writing on the subject. However, previous collective efforts to describe, systematically, the process of formation of customary international law, while containing much useful material, have not met with general approval,<sup>1</sup> and there remain considerable differences of approach among writers. Against this background, the International Law Commission, given its composition and collegial working methods, and its close relationship with States through the General Assembly, may be able to make a useful contribution.

#### General scheme

6. It is suggested that, for convenience, the topic be considered in a number of stages (though the division between them would not be rigid): underlying issues and collection of materials; some central questions concerning the identification of State practice and *opinio juris*; particular topics; and conclusions. The following paragraphs are intended to be illustrative; not all matters listed will necessarily be taken up, and others may be.

#### *Underlying issues and materials*

7. The first stage would cover some underlying issues, as well as reviewing the basic materials. It could include consideration of the following matters:

(a) Description of the scope of the topic and options for possible outputs. It is essential to ensure that the scope is clearly delimited. It will be necessary to delimit the

<sup>1</sup> "London statement of principles applicable to the formation of general customary international law" (with commentary), adopted in resolution 16/2000 (Formation of general customary international law) on 29 July 2000 by the International Law Association; see *Report of the Sixty-ninth Conference, London, 25–29 July 2000*, p. 39. For the plenary debate, see pp. 922–926. The "London statement of principles" is also at pp. 712–777, and the report of the working session of the Committee on Formation of Customary (General) International Law held in 2000 is at pp. 778–790. The Committee's six interim reports contain more detailed material.

topic *vis-à-vis* topics already considered or being considered, such as “Fragmentation” and “Treaties over time”, or topics which may be considered in the future, such as *jus cogens*. Which issues are actually covered would be a matter for the Commission in due course.

(b) Terminology/definitions. The use and meaning of the term “customary international law” or “rules of customary international law”, which seem to be the expressions in most common use (others are “international customary law”, “custom”, “international custom”), *lex lata*, *lex ferenda* and “soft law”. The establishment of a short lexicon of relevant terms, in all United Nations official languages, could be useful.

(c) Place of customary international law within the international legal system (*Lotus* principle; “*toile de fond*”<sup>2</sup>), including the relationship of “customary international law” to “general international law”, to “general principles of law” and to “general principles of international law”. This may require an examination of the use and meaning of the term “general international law”, which may connote something other than “customary international law”, and of the notion of a “merging of sources”, which raises among other things the relationship between customary international law and “general principles of law” (Article 38, paragraph 1 (c), of the Statute of the International Court of Justice). And it may require examination of the distinctions between rules of customary international law and “soft law”; between *lex lata* and *lex ferenda*; and between customary international law and mere usage, on the one hand, and informal treaties (including treaties not in written form) and subsequent practice relating to the interpretation of treaties, on the other.

(d) Analysis of Article 38, paragraph 1 (b), of the Statute of the International Court of Justice (including its *travaux préparatoires*) and of Article 38, paragraph 1 (c) and (d).

(e) Principal theories and approaches to the formation of rules of customary international law. The theoretical underpinnings of the subject are important, even though the ultimate aim will be to provide a practical aid to those called upon to investigate rules of customary international law. It will be necessary to address general questions of methodology: empirical research into State practice as well as deductive reasoning, as illustrated by some case law of international courts and tribunals. Practical considerations may affect methodology, especially in a world of nearly 200 States.

(f) Relevant case law of international and national courts and tribunals.

(g) Bibliography.

#### *State practice and opinio juris*

8. After having assembled the basic materials, and considered certain underlying issues, including general

<sup>2</sup> *Delimitation of the Maritime Boundary in the Gulf of Maine Area, Judgment, I.C.J. Reports 1984*, p. 246, at p. 291, para. 83.

questions of methodology as indicated in paragraph 7 (e) above, a second stage could cover some central questions of the traditional approach to the identification of rules of customary international law, in particular State practice and *opinio juris*:

(a) Identification of State practice. What counts as “State practice”? Acts and omissions, verbal and physical acts. How may States change their position on a rule of international law? Decisions of domestic courts and tribunals (and the executive’s response thereto). Beyond the State, whose acts? Certain international organizations, like the European Union? “Representativeness” of State practice (including regional diversity).<sup>3</sup>

(b) Nature, function and identification of *opinio juris sive necessitatis*.

(c) Relationship between the two elements, State practice and *opinio juris sive necessitatis*, and their respective roles in the identification of customary international law.

(d) How new rules of customary international law emerge; how unilateral measures by States may lead to the development of new rules; criteria for assessing whether deviations from a customary rule have given rise to a change in customary law; potential role of silence/acquiescence.

(e) Role of “specially affected States”.

(f) Element of time and density of practice; “instant” customary international law.

(g) Whether the criteria for the identification of a rule of customary law may vary depending on the nature of the rule or the field to which it belongs.

#### *Particular topics*

9. A third stage could cover particular topics, such as the following:

<sup>3</sup> It will be recalled that, at its first and second sessions in 1949 and 1950 respectively, the Commission, in accordance with the mandate in article 24 of its statute, considered the topic “Ways and means for making the evidence of customary international law more readily available”. The outcome was an influential report, which led to various important publications, on a national and international level (*Yearbook ... 1950*, vol. II, pp. 367–374; see also *The Work of the International Law Commission*, 7th ed. (United Nations publication, Sales No. E.07.V.9), vol. I, Part III, sect. A.2. The work of the Commission in relation to State practice has been described as follows: “The International Law Commission fully recognized the importance of State practice being widely available, and its Report did much to prompt action towards that end. Two developments, however, now [this was written in 1998] threaten the full attainment of the objectives set in 1950 by the Commission: first, the enormous proliferation in the available material on the many aspects of international law and relations; and second, the rising costs associated with its accumulation, storage, and distribution. With the added impact in recent years of revolutionary developments in global information technology, the subject covered by the Commission’s 1950 Report might repay renewed attention” (A. D. Watts, *The International Law Commission 1949–1998*, vol. III, Oxford University Press, 1999, p. 2106). It is suggested that the question of the access to State practice should indeed be revisited by the Commission, in parallel with the other works on customary international law covered by this syllabus.

(a) The “persistent objector” theory.

(b) Treaties and the formation of customary international law; treaties as possible evidence of customary international law; “mutual influence”/interdependence between treaties and customary international law.

(c) Resolutions of organs of international organizations, including the General Assembly of the United Nations, and international conferences, and the formation of customary international law; their significance as possible evidence of customary international law.

(d) Formation and identification of rules of special customary international law between certain States (regional, subregional, local or bilateral—“individualized” rules of customary international law). Does consent play a special role in the formation of special rules of customary international law?

#### *Conclusions*

10. The final stage could consolidate the outcomes of the earlier stages, in a form suitable for consideration and adoption by the Commission.

## Background materials

### A. International Law Commission

“Ways and means of making the evidence of customary international law more readily available: preparatory work within the purview of article 24 of the statute of the International Law Commission”, Memorandum submitted by the Secretary-General (A/CN.4/6 and Corr.1, United Nations publication, Sales No. 1949.V.6); available from the Commission’s website, documents of the first session.

Working paper prepared by the Secretariat (A/CN.4/W.9), reproduced in *Yearbook ... 1949*, summary record of the 31st meeting, pp. 228–229, footnote 10.

Article 24 of the statute of the International Law Commission, working paper by Mr. Manley O. Hudson, Special Rapporteur, *Yearbook ... 1950*, vol. II, document A/CN.4/16 and Add.1, pp. 24–33.

Report of the International Law Commission to the General Assembly on the work of its second session, *Yearbook ... 1950*, vol. II, pp. 367–374, paras. 24–94 (Part II, Ways and means for making the evidence of customary international law more readily available).

### B. Case law

#### 1. PERMANENT COURT OF INTERNATIONAL JUSTICE

S.S. “*Lotus*”, Judgment No. 9, 7 September 1927, *P.C.I.J., Series A, No. 10*, pp. 18, 20–22 and 28.

#### 2. INTERNATIONAL COURT OF JUSTICE

*Colombian-Peruvian asylum case*, Judgment of November 20th, 1950: *I.C.J. Reports 1950*, p. 266, at pp. 276–278.

*Reservations to the Convention on Genocide, Advisory Opinion: I.C.J. Reports 1951*, p. 15.

*Fisheries case*, Judgment of December 18th, 1951: *I.C.J. Reports 1951*, p. 116, at pp. 131 and 138–139.

*Nottebohm Case (second phase)*, Judgment of April 6th, 1955: *I.C.J. Reports 1955*, p. 4, at pp. 22–23.

*Case concerning Right of Passage over Indian Territory (Merits)*, Judgment of 12 April 1960: *I.C.J. Reports 1960*, p. 6, at pp. 39–44.

*North Sea Continental Shelf*, Judgment, *I.C.J. Reports 1969*, p. 3, paras. 60–83.

*Delimitation of the Maritime Boundary in the Gulf of Maine Area*, Judgment, *I.C.J. Reports 1984*, p. 246, paras. 83, 90, 94 and 110–111.

*Continental Shelf (Libyan Arab Jamahiriya/Malta)*, Judgment, *I.C.J. Reports 1985*, p. 13, paras. 26–34, 43–44 and 77.

*Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, Merits, Judgment, *I.C.J. Reports 1986*, p. 14, paras. 172–192, 201–209, 211 and 273.

*Frontier Dispute*, Judgment, *I.C.J. Reports 1986*, p. 554, para. 21.

*Maritime Delimitation in the Area between Greenland and Jan Mayen*, Judgment, *I.C.J. Reports 1993*, p. 38, para. 46.

*Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, *I.C.J. Reports 1996*, p. 226, paras. 64–73, 75, 79–82, 84 and 96.

*Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, Judgment, *I.C.J. Reports 1997*, p. 7.

*Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, Merits, Judgment, *I.C.J. Reports 2001*, p. 40.

*Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v. Belgium)*, Judgment, *I.C.J. Reports 2002*, p. 3, paras. 51–59.

*Dispute regarding Navigational and Related Rights (Costa Rica v. Nicaragua)*, Judgment, *I.C.J. Reports 2009*, p. 213, paras. 140–144, and the separate opinion of Judge Sepúlveda-Amor, paras. 20–28.

#### 3. INTERNATIONAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

*Prosecutor v. Duško Tadić a/k/a “Dule”*, Case No. IT-94-1-AR72, Decision on the Defence Motion of Interlocutory Appeal on Jurisdiction, Decision of 2 October 1995, International Tribunal for the Former Yugoslavia, *Judicial Reports 1994–1995*, vol. I, pp. 352 *et seq.*, para. 99.

*Prosecutor v. Kupreskić et al.*, Case No. IT-95-16-T, Judgment of 14 January 2000, Trial Chamber, International Tribunal for the Former Yugoslavia, *Judicial Reports 2000*, vol. II, pp. 1398 *et seq.*, paras. 524–525, 527, 531–534 and 540.

#### 4. ARBITRAL TRIBUNALS

*Mergé Case*, Decision No. 55 of 10 June 1955, Italian–United States Conciliation Commission, UNRIAA, vol. XIV (Sales No. 65.V.4), p. 236; see also ILR, vol. 22 (1955), p. 443.

*Texaco-Calasiatic v. Government of the Libyan Arab Republic*, Award of 19 January 1977, ILR, vol. 53, p. 389, paras. 59–60, 69 and 83–89.

*English Channel (Case concerning the delimitation of the continental shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic)*, Decision of 30 June 1977, UNRIAA, vol. XVIII (Sales No. E/F.80.V.7), p. 3, paras. 45–47.

### C. International Law Association

Resolution 16/2000 (Formation of general customary international law), adopted on 29 July 2000 by the International Law Association, *Report of the Sixty-ninth Conference Held in London, 25–29 July 2000*, p. 39.

### D. Institute of International Law

“Problems arising from a succession of codification conventions on a particular subject”, resolution adopted on 1 September 1995 by the Institute of International Law, *Yearbook*, vol. 66, Part II, Session of Lisbon (1995), p. 445; available from www.idi-iil.org, “Resolutions”.

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## Annex II

### PROTECTION OF THE ATMOSPHERE

(Shinya Murase)

#### I. Introduction

1. The atmosphere (air mass), mostly existing in the troposphere and stratosphere, is the planet's largest single natural resource, and it is indispensable for the survival of humankind. Degradation of atmospheric conditions has long been a matter of serious concern to the international community.<sup>1</sup> While there have been a number of relevant conventions concluded for the protection of the transboundary and global atmosphere, these have nonetheless left substantial gaps in terms of geographical coverage, regulated activities, controlled substances and, most importantly, the applicable principles and rules. This piecemeal approach has had particular limitations for the atmosphere, which by its very nature warrants holistic treatment. There is no convention at present that covers the whole range of environmental problems of the atmosphere in a comprehensive and systematic manner. It is therefore believed that the Commission can make a significant contribution by codifying and progressively developing the relevant legal principles and rules on the basis of State practice and jurisprudence.

2. It is important to ensure that the International Law Commission be fully engaged with the international community's present-day needs. While the Commission's draft articles on international watercourses and on transboundary aquifers<sup>2</sup> contain some relevant provisions regarding the protection of the environment, the Commission has not dealt with any topic in the field of international environmental law since the conclusion of the topic on liability (in other words, the prevention of transboundary harm and allocation of loss),<sup>3</sup> which appears to be a significant omission at a time when the world is undergoing critical environmental degradation. It is therefore proposed that the Commission consider for its future work the topic "Protection of the atmosphere".

<sup>1</sup> See, for example, A.-C. Kiss and D. Shelton, *International Environmental Law*, 3rd ed., Ardsley (New York), Transnational Publishers, 2004, pp. 555–592. See also Sands, *Principles of International Environmental Law* (footnote 483 above), pp. 317–390; Birnie, Boyle and Redgwell, *International Law and the Environment* (footnote 483 above), pp. 335–378; D. Hunter, J. Salzman and D. Zaelke, *International Environmental Law and Policy*, 3rd ed., New York, Foundation Press, 2007, pp. 538–733; and X. Hanqin, *Transboundary Damage in International Law*, Cambridge University Press, 2003, pp. 200–203.

<sup>2</sup> *Yearbook ... 1994*, vol. II (Part Two), para. 222; and *Yearbook ... 2008*, vol. II (Part Two), paras. 53–54.

<sup>3</sup> *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, paras. 97–98; and *Yearbook ... 2006*, vol. II (Part Two), paras. 66–67.

#### II. Rationale for the proposed topic

3. There is abundant State practice and literature on the subject. The frequently cited award of the *Trail Smelter* arbitration<sup>4</sup> (United States, Canada, 1938, 1941) has been the leading case on transboundary air pollution. In the 1950s, atmospheric nuclear testing manifested itself as one of the first environmental issues confronted by the international community.<sup>5</sup> The *Nuclear Tests* cases (*Australia v. France*; *New Zealand v. France*, 1973, 1974) before the International Court of Justice sparked heated discussions relating to possible atmospheric pollution.<sup>6</sup> The Court also referred, in its advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons* in 1996, to the obligation of States to refrain from causing significant environmental damage from their transboundary pollution, including atmospheric pollution.<sup>7</sup> Accidents at nuclear facilities can have direct impacts on the environment of the atmosphere, as has been demonstrated by the accidents at Three Mile Island in 1979 and Chernobyl in 1986, as well as the damage to the Fukushima nuclear power plants caused by the huge earthquake and tsunami on 11 March 2011, which is currently a major concern for the international community. In the recent judgment of the *Pulp Mills on the River Uruguay (Argentina v. Uruguay)* case rendered on 20 April 2010, the Court

<sup>4</sup> *Trail Smelter*, UNRIAA, vol. III (Sales No. 1949.V.2), pp. 1905 *et seq.* An often-quoted passage of the 1941 award reads as follows: "Under the principles of international law ... no State has the right to use or permit the use of 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" (*ibid.*, p. 1965).

<sup>5</sup> See, for example, the *Daigo Fukuryū Maru* (Lucky Dragon No. 5) incident (Japan, United States) in 1954; S. Oda, "The hydrogen bomb tests and international law", *Die Friedens-Warte*, vol. 53, No. 2 (1956), pp. 126–135; and L. F. E. Goldie, "A general view of international environmental law: a survey of capabilities, trends and limits", in A.-C. Kiss (ed.), *The Protection of the Environment and International Law*, Workshop 1973, The Hague Academy of International Law, Leiden, Sijthoff, 1975, pp. 25–143, at pp. 72–73.

<sup>6</sup> *Nuclear Tests (Australia v. France)*, *Interim Protection, Order of 22 June 1973*, *I.C.J. Reports 1973*, p. 99; *Judgment, I.C.J. Reports 1974*, p. 253; (*New Zealand v. France*), *Interim Protection, Order of 22 June 1973*, *I.C.J. Reports 1973*, p. 135; and *Judgment, I.C.J. Reports 1974*, p. 457.

<sup>7</sup> *Legality of the Threat or Use of Nuclear Weapons* (see footnote 425 above), p. 241. The International Court of Justice stated thus in its opinion: "The existence of the general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of areas beyond national jurisdiction is now part of the corpus of international law relating to the environment" (pp. 241–242, para. 29).

referred in part to the issue of alleged air pollution (to the extent relevant to the river's aquatic environment).<sup>8</sup> Furthermore, the *Aerial Herbicide Spraying (Ecuador v. Colombia)* case currently pending before the International Court of Justice may also address the subject. The WTO case on the *United States—Standards for Reformulated and Conventional Gasoline* (1996) posed an important question of the compatibility of a country's domestic law (in this case, the United States Clean Air Act of 1990) with the trade provisions of the WTO/GATT.<sup>9</sup> Finally, relevant decisions of domestic courts may also be instructive.<sup>10</sup>

4. The relevant treaty and non-treaty practice includes the following:

- Convention on long-range transboundary air pollution (1979, entered into force 1983); Protocol to the 1979 Convention on long-range transboundary air pollution on long-term financing of the co-operative programme for monitoring and evaluation of the long-range transmission of air pollutants in Europe (EMEP) (1984); Protocol to the 1979 Convention on long-range transboundary air pollution on the reduction of sulphur emissions or their transboundary fluxes by at least 30 per cent (1985); Protocol to the 1979 Convention on long-range transboundary air pollution concerning the control of emissions of nitrogen oxides or their transboundary fluxes (1988); Protocol to the 1979 Convention on long-range transboundary air pollution concerning the control of emissions of volatile organic compounds or their transboundary fluxes (1991); Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution on Further Reduction of Sulphur Emissions (1994); Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution on Persistent Organic Pollutants (1998); Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution on Heavy Metals (1998); and Protocol to the 1979 Convention on Long-Range Transboundary Air Pollution to Abate Acidification, Eutrophication and Ground-level Ozone (1999);

- Vienna Convention for the Protection of the Ozone Layer (1985);

- Montreal Protocol on Substances that Deplete the Ozone Layer (1987);

- Council Directive on the limitation of emissions of certain pollutants into the air from large combustion plants (1988/2001);<sup>11</sup>

- Agreement on air quality between Canada and the United States (1991);<sup>12</sup>

- United Nations Framework Convention on Climate Change (1992);

- The Kyoto Protocol to the United Nations Framework Convention on Climate Change (1997);

- The ASEAN Agreement on Transboundary Haze Pollution (2002);<sup>13</sup>

- Stockholm Declaration on the Human Environment (1972);<sup>14</sup>

- Institute of International Law resolution on transboundary air pollution (1987);<sup>15</sup>

- Rio Declaration on Environment and Development (1992);<sup>16</sup>

- Draft articles on prevention of transboundary harm from hazardous activities (2001);<sup>17</sup>

- Draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities (2006).<sup>18</sup>

<sup>11</sup> Council Directive of 24 November 1988 on the limitation of emissions of certain pollutants into the air from large combustion plants, *Official Journal of the European Communities*, No. L 336, p. 1; and Directive 2001/80/EC of the European Parliament and of the Council of 23 October 2001 on the limitation of emissions of certain pollutants into the air from large combustion plants, *Official Journal of the European Communities*, No. L 309, p. 1.

<sup>12</sup> United Nations, *Treaty Series*, vol. 1852, No. 31532, p. 79.

<sup>13</sup> Entered into force on 25 November 2003.

<sup>14</sup> Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration) (1972) (*Report of the United Nations Conference on the Human Environment, Stockholm, 5–16 June 1972* (United Nations publication, Sales No. E.73.II.A.14), Part One, chap. I). Principle 21 of the Stockholm Declaration provides as follows: "States have, in accordance with the Charter of the United Nations and the principles of international law ... the responsibility to ensure that activities within their jurisdiction and control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction"; see also L. B. Sohn, "The Stockholm Declaration on the Human Environment", *Harvard International Law Journal*, vol. 14 (1973), p. 423.

<sup>15</sup> Article 2 provides as follows: "In the exercise of their sovereign right to exploit their resources pursuant to their own environmental policies, States shall be under a duty to take all appropriate and effective measures to ensure that their activities or those conducted within their jurisdiction or under their control cause no transboundary air pollution" (Institute of International Law, *Yearbook*, vol. 62, Part II, Session of Cairo (1987), p. 299; available from www.idi-ii.org, "Resolutions").

<sup>16</sup> *Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3–14 June 1992* (United Nations publication, Sales No. E.93.I.8 and corrigendum), vol. I: *Resolutions adopted by the Conference*, resolution 1, annex I.

<sup>17</sup> *Yearbook ... 2001*, vol. II (Part Two) and corrigendum, paras. 97–98.

<sup>18</sup> *Yearbook ... 2006*, vol. II (Part Two), paras. 66–67.

<sup>8</sup> *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, *Judgment*, I.C.J. Reports 2010, p. 14, at pp. 100–101, paras. 263–264. The issue was raised during the oral proceedings (8 June 2006, CR 2006/47, paras. 22, 28 and 34; available from www.icj-cij.org).

<sup>9</sup> WTO, report of the Appellate Body, *United States—Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R, 29 April 1996, pp. 16–17; and S. Murase, "Unilateral measures and the WTO Dispute Settlement", in S. S. C. Tay and D. C. Esty (eds.), *Asian Dragons and Green Trade: Environment, Economics and International Law*, Singapore, Times Academic Press, 1996, pp. 137–144.

<sup>10</sup> See, for example, *Massachusetts et al. v. Environmental Protection Agency et al.*, Decision of 2 April 2007, United States Supreme Court (549 U.S. 497; 127 S. Ct. 1438; 2007 U.S. LEXIS 3785), which was in part concerned with certain obligations of the Environmental Protection Agency to regulate emissions of greenhouse gases.

5. The rationale for the proposed project for codification and progressive development of international law is manifold: First and foremost, it is necessary to fill the gaps in the existing conventions relating to the atmosphere. The number of relevant conventions notwithstanding, they have remained a mere patchwork of instruments which cover only specific geographical areas and a limited range of regulated activities and controlled substances.<sup>19</sup> The incremental approach has its particular limitations for the protection of the atmosphere, which by its very nature warrants holistic treatment in the form of a framework convention by which the whole range of environmental problems of the atmosphere could be covered in a comprehensive and systematic manner. Thus, the present proposal envisages an instrument similar to Part XII of the United Nations Convention on the Law of the Sea on protection and preservation of the marine environment.

6. Second, the Commission will be expected to provide appropriate guidelines for harmonization and coordination with other treaty regimes outside international environmental law, which may come in conflict with the proposed convention during the compliance and implementation phases.<sup>20</sup> Third, it is also important that the proposed draft articles help provide the framework for harmonization of national laws and regulations with international rules, standards and recommended practices and procedures relating to the protection of the atmosphere. Fourth, it is hoped that the proposed project will establish guidelines on the mechanisms and procedures for cooperation among States in order to facilitate capacity-building in the field of transboundary and global protection of the atmosphere.

7. It is important to clearly distinguish between the notion of atmosphere and the notion of airspace. Article 1 of the 1944 Convention on International Civil Aviation reaffirms the rule of customary international law that “every State has complete and exclusive sovereignty over the airspace above its territory”. Although the legal principles, rules and regulations envisaged in the proposed draft articles are perhaps most applicable to certain activities conducted *on the ground* within a State’s territorial jurisdiction, there may be situations

where the activities in question may be conducted in the airspace above.<sup>21</sup> In such a context, it will be appropriate for the draft articles to reaffirm a State’s sovereignty over national airspace. It should be noted that the present project shall in no way be intended to affect the legal status of airspace as currently established in international law.

8. The present proposal does not duplicate the previous work of the Commission. The Commission adopted draft articles on prevention of transboundary harm from hazardous activities in 2001<sup>22</sup> and draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities in 2006.<sup>23</sup> Both drafts contain important provisions potentially applicable to atmospheric damage. However, the scope of application of these drafts is, on the one hand, too broad (as they are intended to cover all types of environmental harm) and, on the other hand, too limited (as they focus on the questions related to prevention and allocation of loss caused by transboundary harm and hazardous activities). Since they do not adequately address the protection of atmospheric conditions as such, it is proposed that the Commission tackle the problem in a comprehensive and systematic manner, but, at the same time, with a specific focus on the atmosphere.

### III. Physical characteristics of the atmosphere

9. In order to determine the definition, scope and objective of the exercise for codification and progressive development of international law on the protection of the atmosphere, as well as to characterize the legal status of the atmosphere, it is first necessary to understand the physical structure and characteristics of the atmosphere.

10. The “atmosphere” is “the envelope of gases surrounding the earth”.<sup>24</sup> The main components (and proportion) of gases in the atmosphere are nitrogen (78.08 per cent), oxygen (20.95 per cent), argon (0.93 per cent) and carbon dioxide (0.03 per cent), with additional trace gases in tiny concentrations (0.01 per cent). The atmosphere exists in what is called the atmospheric cell. It is divided vertically into four atmospheric spheres (from the lower to upper layers: troposphere, stratosphere, mesosphere and thermosphere) on the basis of the temperature characteristics (see fig. 1).

<sup>19</sup> In recent years, there has been growing scientific evidence that so-called “tropospheric ozone” and “black carbon” are the two substances in the atmosphere directly threatening both the air quality and climate change. It is said that, for climate change, the so-called “greenhouse gases” identified in the United Nations Framework Convention on Climate Change are responsible for only 60 per cent, while these substances are responsible for some 40 per cent. This clearly demonstrates the *linkage* between the transboundary air pollution and climate change, and also the *gap* existing in the current treaty regime which needs to be filled by a comprehensive multilateral convention on the atmosphere. See the study by the United Nations Environment Programme (UNEP) and WMO on “Measures to limit near-term climate change and improve air quality: the UNEP/WMO integrated assessment of tropospheric ozone and black carbon” of 2011. It may also be noted that, for instance, Europe now struggles to meet standards for air quality as a result of the pollutants carried from other regions of the world. This is indicative of the fact that even regional air pollution problems cannot be solved without considering their causes and effects in the global framework.

<sup>20</sup> See S. Murase, “Perspectives from international economic law on transnational environmental issues”, *Collected Courses of The Hague Academy of International Law, 1995*, vol. 253 (1995), pp. 283–431.

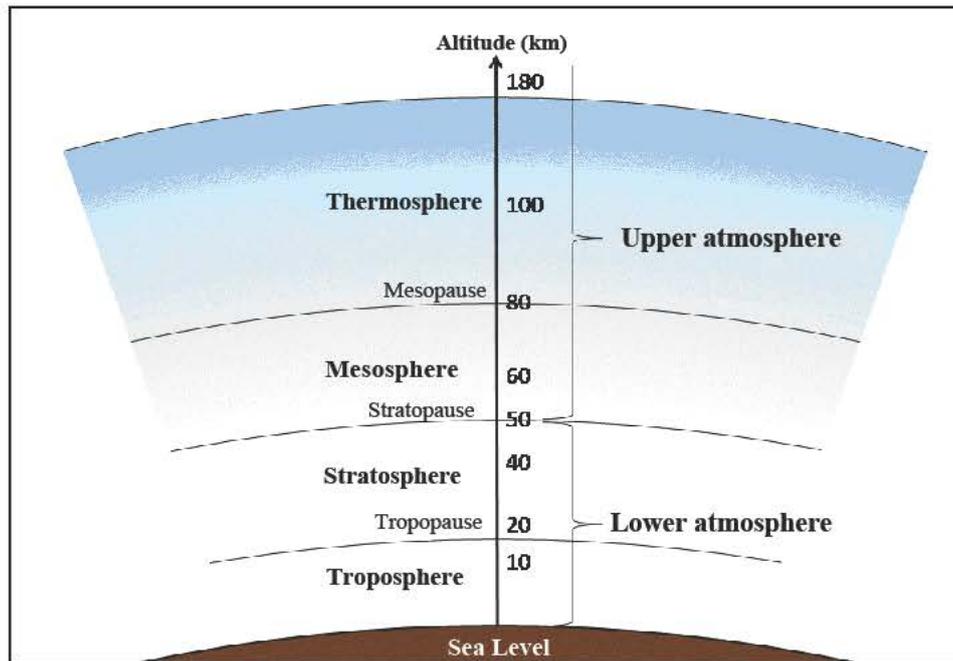
<sup>21</sup> Annex 16 to the 1944 Convention on International Civil Aviation is entitled “Environmental protection” (see ICAO, “Environmental protection: Annex 16 to the Convention on International Civil Aviation”, vols. I (5th ed.) and II (3rd ed.) (2008)). The ICAO has established rules on the “Aircraft Engine Emissions Standards and Recommended Practices” since 1980, with a view to achieving “maximum compatibility between the safe and orderly development of civil aviation and the quality of the human environment” (ICAO Assembly resolution A18-11, para. (2) (Doc 8958 - A18-RES)). These Emissions Standards establish rules, *inter alia*, for vented fuel (Part II) and emissions certification (Part III), including emissions limits for smoke and certain chemical particles.

<sup>22</sup> See footnote 17 of the present annex above.

<sup>23</sup> See footnote 18 of the present annex above.

<sup>24</sup> *Concise Oxford English Dictionary*, 12th ed., Oxford University Press, 2011.

Figure 1. The zonation of the atmosphere



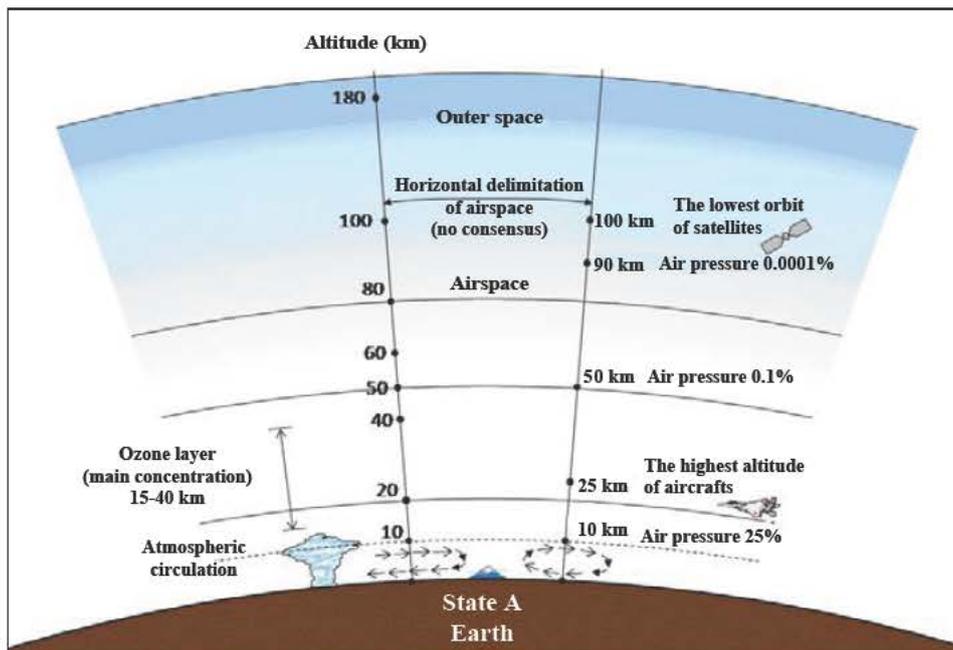
11. As the altitude increases, the gases in the atmosphere gradually dilute. Approximately 80 per cent of air mass exists in the troposphere and approximately 20 per cent in the stratosphere. In the troposphere and the stratosphere, the relative proportions of most gases are fairly stable; scientifically these spheres are grouped together as the *lower atmosphere*, which extends to an average altitude of 50 km, and are distinguished from the *upper atmosphere*. The atmosphere moves and circulates around the earth

in a complicated manner, which is called “atmospheric circulation”.<sup>25</sup> The gravitational influence of the sun and moon also affects its movements by creating “atmospheric tides”.<sup>26</sup>

<sup>25</sup> G. Jones *et al.*, *Collins Dictionary of Environmental Science*, Glasgow, Harper Collins Publishers, 1990, p. 40.

<sup>26</sup> M. Allaby, *A Dictionary of the Environment*, 3rd ed., New York University Press, 1989, p. 34.

Figure 2. The delimitation of the atmosphere



12. Both human and natural environments can be adversely affected by certain changes in the condition of the atmosphere. There are three particularly important causes for the degradation of the atmosphere.<sup>27</sup> First, the introduction of harmful substances into the troposphere and lower stratosphere causes changes in atmospheric conditions (in other words, air pollution). The major contributing causes of air pollution are acids, nitrous oxides (NO<sub>x</sub>), sulphur oxides (SO<sub>x</sub>) and hydrocarbon emissions such as carbon dioxide (CO<sub>2</sub>). Strong horizontal winds, for example jet streams,<sup>28</sup> can quickly transport and spread these trace gases horizontally all over the globe, far from their original sources (although vertical transport is very slow). Second, chlorofluorocarbons (CFCs) and halons emitted into the upper troposphere and stratosphere cause ozone depletion. The ozone layer, as its name implies, contains significant amounts of ozone (O<sub>3</sub>), a form of oxygen. The main concentrations of ozone are at altitudes of 15 to 40 km (maximum concentrations are between 20 and 25 km). The ozone layer filters out ultraviolet radiation from the sun, which may cause skin cancer and other injuries to life. Third, changes in the composition of the troposphere and lower stratosphere cause climate change. The main cause of human-induced climate change is additional trace gases, such as carbon dioxide (CO<sub>2</sub>), nitrous oxide (N<sub>2</sub>O), methane (CH<sub>4</sub>), CFCs and tropospheric ozone (O<sub>3</sub>). These are called “greenhouse gases”.<sup>29</sup> Conditions within the troposphere heavily affect the weather on the earth’s surface, including cloud formation, haziness and precipitation. Most gases and aerosols are expunged by a natural “cleansing process” in the troposphere, but when emissions overwhelm this process, climate change begins to occur.

13. These three main international issues concerning the atmosphere—air pollution, ozone depletion and climate change—relate to the *troposphere* and the *stratosphere*,<sup>30</sup> although major contributing factors may be different in each case. The upper atmosphere—the mesosphere and thermosphere—which comprises approximately 0.0002 per cent of the atmosphere’s total mass, is of little concern regarding the environmental problems under consideration, not to mention the vast regions of outer space where there is no air.

#### IV. Legal issues to be considered

14. The final outcome of this project is envisaged as a comprehensive set of draft articles for a framework convention on the protection of the atmosphere. Part XII of the United Nations Convention on the Law of the Sea, on the protection and preservation of the marine environment, may provide an example of the form that these draft articles could take. The legal issues to be considered, among others, will be as follows.

<sup>27</sup> See R. Dolzer, “Atmosphere, protection”, in R. Bernhardt (ed.), *Encyclopedia of Public International Law*, vol. 1, Amsterdam, North-Holland, 1992, p. 289.

<sup>28</sup> Jet streams are westerly winds (flowing from west to east) moving around the upper stratum of the troposphere. They move at a high speed of 240 to 720 km per hour.

<sup>29</sup> In recent years, however, scientists are finding that black carbon and troposphere ozone are also responsible for climate change. See footnote 19 of the present annex above.

<sup>30</sup> Kiss and Shelton, *International Environmental Law* (footnote 1 of the present annex above), pp. 556–562 (chap. 12, “Atmosphere, stratosphere and climate”).

15. (**Definition**) Embarking on the formulation of relevant principles and rules on the protection of the atmosphere, the Commission will first need to define the atmosphere. The atmosphere—or air mass—is a mixture of gases that surrounds the earth, most of it existing in the troposphere and stratosphere. It may also be necessary to address not only the physical make-up of the atmosphere, but also its role as a medium for transporting pollutants. This definition will also clearly distinguish the notion of airspace and its distinct relevance from the definition of atmosphere.

16. (**Scope**) In clarifying the scope of the project, it should be made clear first that the proposed draft articles are addressed only to damage caused by human activities, and accordingly, their scope would not extend, for instance, to the damages caused by volcanic eruption and desert sand (unless these are exacerbated by human activity). Second, the draft articles should make clear the objects to be protected, natural and human environments, and the intrinsic relationship between the two. Third, it should be necessary to refer to the different modalities of the environmental damage in the atmosphere; one is the introduction of (deleterious) substances into the atmosphere and another, the alteration in the balance of composition of the atmosphere.

17. (**Objective**) Because of its dynamic and fluctuating character, the atmosphere needs to be treated as a *single global unit* for the purpose of environmental protection. While recognizing the difference of *modalities* in legal responses between transboundary air pollution and global atmospheric problems, both should be treated within the same legal framework based on the functional notion of the atmosphere for the purpose of codification and progressive development of international law on the subject. In other words, the atmosphere should be treated comprehensively for the purpose of its environmental protection.

18. (**Legal status of the atmosphere**) There are at least five concepts that may be considered relevant to the legal status of the atmosphere: airspace; shared or common natural resources; common property; common heritage; and common concern (common interest).<sup>31</sup> Each of these concepts should here be carefully considered as to whether and to what extent it is applicable to the protection of the atmosphere. For example, States may well wish to reaffirm their sovereignty over the atmosphere that exists within their airspace for the reasons stated above in paragraph 7.

19. (**Basic principles for the protection of the atmosphere**) Applicability of the well-known principles including the following will have to be considered: general obligations of States to protect the atmosphere; obligations of States *vis-à-vis* other States not to cause

<sup>31</sup> See A. E. Boyle, “International law and the protection of the global atmosphere: concepts, categories and principles”, in R. Churchill and D. Freestone (eds.), *International Law and Global Climate Change*, London, Graham and Trotman, 1991, pp. 7–19; see also J. Brunnée, “Common areas, common heritage, and common concern”, in D. Bodansky, J. Brunnée and E. Hey (eds.), *The Oxford Handbook of International Environmental Law*, Oxford University Press, 2007, pp. 550–573.

significant harm to the atmosphere; the principle of *sic utere tuo ut alienum non laedas* to be applicable to the activities under the jurisdiction or control of a State; general obligations of States to cooperate; the principle of equity; the principle of sustainable development; and common but differentiated obligations.

20. **(Measures of prevention and precaution to protect the atmosphere)** One of the outstanding issues in this project will be the differentiation and relationship between the traditional “preventive” principle and the relatively new “precautionary” principle. Preventive measures should be taken where the probable damage is foreseeable with clear causal links and proofs, whereas, in contrast, precautionary measures ought to be taken even where the damage is scientifically uncertain. Environmental impact assessments will be crucial for certain situations.

21. **(Implementation of obligation)** Implementation of the prescribed obligations should be carried out through the domestic law of each State. Unilateral domestic measures and the effect of extraterritorial application have been sensitive issues in international environmental law. The role of relevant international organizations and the Conferences of the Parties should not be overlooked. Conflict and coordination with trade law will also be particularly important.

22. **(Mechanisms for cooperation)** Desirable procedures for cooperation, technical and other forms of cooperation, and pertinent measures for capacity-building should all be explored.

23. **(Procedural rules for compliance)** Notification, exchange of information, consultation, reporting systems, pledge and review, and promotional and enforcement procedures, among others, shall be considered.

24. **(Responsibility and liability)** Attribution of responsibility, due diligence, liability for high-risk activities and civil liability are no doubt critical issues to be considered in connection with the State’s obligations under paragraphs 19 to 23 above.

25. **(Dispute settlement)** While recognizing the specific nature of each dispute settlement body, questions of general nature such as jurisdiction, admissibility and standing, and proof of scientific evidence should be considered.

## V. Basic approaches

26. The Commission, charged with the work of codification and progressive development of international law, will not directly engage political issues. While the topic on climate change, for instance, often inspires impassioned political and policy debate, the Commission, composed as it is of legal experts, will deal only with the *legal* principles and rules pertaining to the protection of the atmosphere rather than the development of policy proposals. In so doing, the Commission’s product will take the uncoordinated legal frameworks that have heretofore been set up to handle only discrete and specific atmospheric problems and rationalize them into a single, flexible code. This synthesis will hopefully lay the groundwork for a future convention covering substantive issues, and in the meantime help States, international organizations and civil society at large in clarifying the legal implications of their activities in this field.

27. It is important that the legal principles and rules on the subject be considered by the Commission within the framework of *general international law*. This implies that the work of the Commission should resist the tendency towards “fragmentation” caused by dominant “single-issue” approaches to international environmental law. In other words, the legal principles and rules on the atmosphere should, as far as possible, be considered in relation to doctrines and jurisprudence of general international law. It also implies that the work of the Commission should extend to applying the principles and rules of general international law to various aspects of the problem pertaining to the protection of the atmosphere.

## VI. Cooperation with other bodies

28. Cooperation with other bodies is conceivable in various ways for conducting a study and elaborating draft articles on the protection of the atmosphere. The International Law Association, among others, has conducted a number of studies relating to the present subject. The author conducted preliminary informal consultations with the legal experts of UNEP in Nairobi in January 2011. He also held preliminary consultations in July 2011 at the International Environment House in Geneva with the experts of Geneva-based international environmental organizations and several secretariats of multilateral environmental agreements.

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## Annex III

### PROVISIONAL APPLICATION OF TREATIES

(Giorgio Gaja)

#### I. Introduction

1. Treaty clauses concerning the application of treaties that include them are remarkably varied.

According to article 24, paragraph 1, of the 1969 Vienna Convention on the law of treaties, “[a] treaty enters into force in such manner and upon such date as it may provide or as the negotiating States may agree”; paragraph 2 of the same article sets out, a residual rule, that, “[f]ailing any such provision or agreement, a treaty enters into force as soon as consent to be bound by the treaty has been established for all the negotiating States”. It is clear that the provisional application of a treaty, which is considered in article 25 of the Convention, concerns the application of the treaty before it enters into force within the meaning of article 24. It is equally clear that provisional application is something short of entry into force.

The interest to advance the application of a treaty may depend on a number of reasons. One is the perceived need for matters covered by the treaty to be dealt with urgently. For instance, the 1986 Convention on early notification of a nuclear accident, which was adopted in the aftermath of the Chernobyl accident, provided for its provisional application in article 13. Another reason for resorting to provisional application is to obviate the risk that the entry into force of a treaty be unduly delayed. An example may be taken from article 7 of Protocol No. 14 *bis* to the Convention for the Protection of Human Rights and Fundamental Freedoms.

Article 25 of the 1969 Vienna Convention considers that the provisional application of a treaty is based on the agreement of the States concerned. Paragraph 1 of that article states that “[a] treaty or part of a treaty is applied provisionally pending its entry into force if: (a) [t]he treaty itself so provides; or (b) [t]he negotiating States have in some other manner so agreed”. The latter case is that of an agreement specifically directed to determine provisional application, such as the 1947 Protocol of Provisional Application of the General Agreement on Tariffs and Trade. The first case also refers to an agreement; although it is expressed in a treaty which is not yet in force, it operates irrespective of the entry into force of the treaty. One could apply to a treaty clause concerning provisional application article 24, paragraph 4, of the 1969 Vienna Convention, which reads as follows: “The provisions of a treaty regulating the authentication of its text, the establishment of the consent of States to be bound by the treaty, the manner or date of its entry into force, reservations, the functions of the depositary and *other matters arising necessarily before the entry into force of the treaty apply from the time of the adoption of the text*\*”.

2. Neither article 2 of the 1969 Vienna Convention, on “Use of terms”, nor article 25 of the same Convention contains a definition of “provisional application”. This term had not been used in the draft articles prepared by the International Law Commission.<sup>1</sup> It is essential to define what provisional application consists of in order to determine its legal effects and consider certain issues that the 1969 Vienna Convention addresses only in part: the preconditions of provisional application and its termination. These matters will be illustrated in the following paragraphs.

3. To simplify the analysis, the present paper only considers treaties between States, including those that establish an international organization. Thus, only the 1969 Vienna Convention is referred to here. However, similar problems arise when a treaty is concluded by an international organization either with States or with other international organizations. It is noteworthy that article 25 of the 1986 Vienna Convention is merely an adaptation of article 25 of the 1969 Vienna Convention.

#### II. Meaning of provisional application

4. Identifying the basis of provisional application in an agreement between States does not necessarily imply that the agreement has a precise content. States may give a variety of legal effects to their agreements. In the absence of a specification of those effects by the parties to an agreement, different views have been expressed on the meaning of provisional application.

According to one opinion, the States concerned are bound by the agreement to apply the treaty in the same way as if the treaty had entered into force. Following this view, the agreement on provisional application represents a parallel engagement to the treaty. The main peculiarity of this agreement is a greater flexibility concerning termination.

The opposite view is that by agreeing to the provisional application of a treaty, States are not bound to apply the treaty. They merely express the intention to apply it on the understanding that the other States concerned will do the same. Should, however, one State fail to apply the treaty provisionally, it would not incur international responsibility towards the other States. These States would probably terminate, for lack of reciprocity, their provisional application of the treaty with regard to the deviating State. One reason suggested for this solution is

<sup>1</sup> *Yearbook ... 1966*, vol. II, document A/6309/Rev.1, Part II, pp. 177 *et seq.*, para. 38.

that the agreement on provisional application may be concluded by a State organ that does not have the power to bind the State to the treaty under internal law.

A third opinion is a variation of the second one. While States are not bound to apply the treaty, the agreement on provisional application entitles them to disregard, if they do so in compliance with the treaty, obligations that they may have in their reciprocal relations under international law.

A fourth opinion considers the agreement on provisional application as an indication that the entry into force of the treaty, when and if it occurs, will be retrospective. Until the treaty enters into force, the States concerned are not bound by the treaty but, if they do not comply with its provisions, they risk being found eventually in breach of the treaty.

5. Four recent arbitration decisions concerning the Energy Charter Treaty dwell on the meaning of provisional application under article 45 (1) of that Treaty.<sup>2</sup> In *Kardassopoulos v. Georgia*,<sup>3</sup> the arbitral tribunal considered that provisional application is “not the same as entry into force. But the [Energy Charter Treaty’s] provisional application is a course to which each signatory ‘agrees’ in Article 45(1): it is (subject to other provisions of the paragraph) thus a matter of legal obligation” (para. 209). According to this tribunal, “the language used in Article 45(1) is to be interpreted as meaning that each signatory State is obliged, even before the [Energy Charter Treaty] has formally entered into force, to apply the whole [Treaty] as if it had already done so” (para. 211). In the Tribunal’s view, there was “a sufficiently well-established practice of provisional application of treaties to generate a generally accepted understanding of what is meant by that notion” (para. 219).

A similar opinion on the meaning of provisional application in the Energy Charter Treaty was expressed by the arbitration tribunals in *Yukos Universal Limited (Isle of Man) v. the Russian Federation*, *Veteran Petroleum Limited (Cyprus) v. the Russian Federation* and *Hulley Enterprises Limited (Cyprus) v. the Russian Federation*. These decisions, rendered by the same panel on the same date (30 November 2009),<sup>4</sup> quoted approvingly at length the decision in *Kardassopoulos v. Georgia*. They also asserted “the principle that provisional application of a treaty creates binding obligations” (para. 314 of each of these three decisions).

<sup>2</sup> Article 45, paragraph (1), of the Energy Charter Treaty: “Each signatory agrees to apply this Treaty provisionally pending its entry into force for such signatory in accordance with Article 44, to the extent that such provisional application is not inconsistent with its constitution, laws or regulations.”

<sup>3</sup> *Kardassopoulos v. Georgia*, ICSID Case No. ARB/05/18, Decision on Jurisdiction of 6 July 2007; available from <http://italaw.com/documents/Kardassopoulos-jurisdiction.pdf> and <https://icsid.worldbank.org/>.

<sup>4</sup> Permanent Court of Arbitration, *Yukos Universal Limited (Isle of Man) v. the Russian Federation*, Case No. AA 227; *Veteran Petroleum Limited (Cyprus) v. the Russian Federation*, Case No. AA 228; and *Hulley Enterprises Limited (Cyprus) v. the Russian Federation*, Case No. AA 226, Interim Awards on Jurisdiction and Admissibility of 30 November 2009. The text of the interim awards is available from [www.encharter.org](http://www.encharter.org), “Dispute Settlement”.

An in-depth analysis of international decisions and of State practice should allow the Commission to establish a presumption concerning the meaning of provisional application of a treaty.

### III. The preconditions of provisional application

6. The definition of the meaning of provisional application of a treaty has some important implications with regard to its preconditions, which would need to be discussed on the basis of the conclusions reached about the definition. Should one follow the second or the fourth opinion referred to above, the agreement on provisional application would not have as such any legal effect and should not raise any question concerning the internal law concerning competence to conclude a treaty.

Should one, on the contrary, view the agreement on provisional application as implying that the States concerned are bound to apply the treaty, the internal law relating to the conclusion of executive agreements becomes relevant. The constitutions of certain States even prohibit the conclusion of agreements providing for provisional application of treaties.<sup>5</sup> A full assimilation between agreements on provisional application and executive agreements is prevented by the greater flexibility that the former agreements have with regard to termination.

The third opinion may also raise some questions concerning the internal law on competence to conclude treaties insofar as the non-compliance with existing obligations under international law does not come within the competence of the State authorities which concluded the agreement on provisional application.

### IV. Termination of provisional application

7. Article 25, paragraph 2, of the 1969 Vienna Convention sets out that, “[u]nless the treaty otherwise provides or the negotiating States have otherwise agreed, the provisional application of a treaty or part of a treaty with respect to a State shall be terminated if that State notifies the other States between which the treaty is being applied provisionally of its intention not to become a party to the treaty”. Practice shows that States sometimes resort to termination of provisional application without specifying that they intend not to become a party to the treaty. This is probably due to the fact that the required specification is of little significance, since the notification by a State of its intention not to become a party to a treaty does not prevent the same State from later becoming a party to the treaty.

8. A question that may need to be addressed is whether, before notifying termination, a State should give notice. Although rare in practice, a notice would have the advantage of making it possible for all the parties to the agreement on provisional application of a treaty to terminate it at the same time.

<sup>5</sup> Constitutional provisions are referred to in the reservations made by certain States (Colombia, Costa Rica, Guatemala and Peru) to article 25 of the 1969 Vienna Convention, *Multilateral Treaties Deposited with the Secretary-General* (available from <http://treaties.un.org>), chap. XXIII.1. A similar concern appears to underlie the reservation made to the same article by Brazil, *ibid.*

9. Although the 1969 Vienna Convention does not specify it, it is clear that provisional application also terminates when the treaty enters into force. The provisions in the Convention concerning termination of treaties appear to be generally relevant for the agreement on provisional application. The ground set out in article 54 is particularly important, since it concerns termination “by consent of all the parties”. Should the agreement on provisional application be viewed as imposing obligations on the States concerned, article 60 would also be relevant insofar as it provides for the possibility that a material breach may be invoked to terminate the treaty.

10. The 1969 Vienna Convention does not specify the consequences of termination of an agreement on provisional application of a treaty. One could envisage that article 70 of the Convention, which considers consequences of termination of a treaty in general, also applies to an agreement on provisional application. According to that article, termination “(a) [r]eleases the parties from any obligations further to perform the treaty; (b) [d]oes not affect any right, obligation or legal situation of the

parties created through the execution of the treaty prior to its termination”. One further question would be whether breaches of obligations under rules of international law which occurred on the basis of the provisional application of a treaty entail international responsibility once the provisional application terminates.

## V. Conclusions

11. A study by the Commission based on a thorough analysis of practice would elucidate the issues considered in the preceding paragraphs. This study may lead to the drafting of a few articles that would supplement the scant rules contained in the 1969 Vienna Convention. These articles could address in return the meaning of provisional application, its preconditions and its termination.

12. The Commission could also elaborate some model clauses that would be of assistance to States intending to give a special meaning to the provisional application of a treaty or set out particular rules on its preconditions or termination.

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## Annex IV

### THE FAIR AND EQUITABLE TREATMENT STANDARD IN INTERNATIONAL INVESTMENT LAW

(Stephen C. Vasciannie)

#### I. Context

1. International investment issues have played an increasingly important role in inter-State relations in the period since World War II. Thus, today, public international law recognizes a number of concepts that clarify relations between and among States in investment matters; it also incorporates various concepts that set out relationships between States, on the one hand, and foreign investors, on the other. One such concept, applicable to States in their relations *inter se*, and to relations between States and foreign investors, is that of fair and equitable treatment. It is proposed that the International Law Commission undertake an examination of the concept of fair and equitable treatment in international investment law.

2. In recent years, the concept of fair and equitable treatment has assumed considerable prominence in the practice of States. This position of prominence is owed in large part to the emergence of bilateral investment treaties as the main sources of law in the field of investment. There are currently more than 3,000 bilateral investment treaties in force between States, with the vast majority setting out treaty obligations between developed, capital-exporting countries, on the one hand, and developing, capital-importing countries, on the other. Almost all of these treaties expressly incorporate a reference to the fair and equitable treatment standard in a form which assures foreign investors that they will receive fair and equitable treatment from the host country of the foreign investment. At the same time, the fair and equitable treatment standard has also had a place in other areas of State practice. So, for example, the Convention establishing the Multilateral Investment Guarantee Agency, the Protocol of Colonia for the Promotion and Reciprocal Protection of Investments in the MERCOSUR, the Treaty establishing the Common Market for Eastern and Southern Africa, the Protocol on Promotion and Protection of Investments coming from non-MERCOSUR State Parties, the Energy Charter Treaty, the ASEAN Agreement for the Promotion and Protection of Investments, and NAFTA all incorporate the fair and equitable treatment standard as one of the means by which foreign investments are to be protected.

3. In addition, the standard of fair and equitable treatment has also been supported by States in negotiations which have not resulted in treaties. One of the earliest references to the standard of equitable treatment in investment relations is to be found in the Havana Charter

for an International Trade Organization (1948).<sup>1</sup> Although this treaty did not enter into force, its failure has not been attributed to the acceptance of the fair and equitable treatment standard. Other draft treaties incorporating the standard have included the Economic Agreement of Bogotá (1948), the draft Convention on Investments Abroad (1959),<sup>2</sup> and the Organisation for Economic Co-operation and Development (OECD) draft Convention on the Protection of Foreign Property (1967).<sup>3</sup> Similarly, the draft United Nations code of conduct on transnational corporations,<sup>4</sup> negotiated initially against the backdrop of the effort to introduce a New International Economic Order in the decade of the 1970s, incorporated the fair and equitable treatment standard. The OECD draft multilateral agreement on investment,<sup>5</sup> negotiated by OECD member States only, also incorporated the standard.

4. There is also support for the concept of fair and equitable treatment in the work of some international organizations and NGOs. Thus, with respect to the former, the World Bank, in its 1992 Guidelines on the Treatment of Foreign Direct Investment,<sup>6</sup> expressly recommended the standard. With respect to the latter, in 1949, the International Chamber of Commerce in its International Code of Fair Treatment for Foreign Investments<sup>7</sup> supported the idea of fair treatment by identifying some of the putative elements of this standard. Subsequently, in 1972, the International Chamber of Commerce, in its Guidelines for International Investment, referred to the need to ensure "fair and equitable treatment" for the property of foreign investors.<sup>8</sup> The Pacific Basin Charter on International

<sup>1</sup> *United Nations Conference on Trade and Employment, held at Havana, Cuba, from November 21, 1947, to March 24, 1948: Final Act and Related Documents* (United Nations publication, Sales No. 1948.II.D.4).

<sup>2</sup> *Journal of Public Law*, vol. 9, No. 1 (1960), pp. 116 *et seq.*

<sup>3</sup> OECD, *Draft Convention on the Protection of Foreign Property and Resolution of the Council of the OECD on the Draft Convention*, Paris, 1967.

<sup>4</sup> Report of the Commission on Transnational Corporations, *Official Records of the Economic and Social Council, 1983, Supplement No. 7 (E/1983/17/Rev.1-E/C.10/1983/S/5/Rev.1)*, annex II.

<sup>5</sup> OECD, DAF/FE/MAI(98)7/REV1, 22 April 1998; available from [www.oecd.org/investment/internationalinvestmentagreements/multilateralagreementoninvestment.htm](http://www.oecd.org/investment/internationalinvestmentagreements/multilateralagreementoninvestment.htm).

<sup>6</sup> The World Bank Group, *Legal Framework for the Treatment of Foreign Investment (Vol. II): Guidelines. Report to the Development Committee and Guidelines on the Treatment of Foreign Direct Investment*, 1992, pp. 33 *et seq.*

<sup>7</sup> UNCTAD, *International Investment Instruments: a Compendium. Volume III: Regional Integration, Bilateral and Non-governmental Instruments* (UNCTAD/DTCI/30(Vol.III)), 1996, pp. 273 *et seq.*

<sup>8</sup> *Ibid.*, pp. 279 *et seq.*, at p. 287.

Investments, approved by the Pacific Basin Economic Council in 1995, also supported the idea that “fair and reasonable” treatment should be granted to foreign investments as a matter of law.<sup>9</sup>

5. At various levels, therefore, the practice of States and other entities acknowledges the significance of the fair and equitable treatment standard in international law. Notwithstanding the prominence of this standard, however, the meaning and scope of fair and equitable treatment remain controversial. In the first place, although States have entered into numerous treaties incorporating the standard, it is not altogether clear what States intend to incorporate in the treaty by the use of this form of words. Secondly, States have not always incorporated the fair and equitable treatment standard in the same way in their investment treaties: this prompts questions as to whether divergent formulations have been used to capture different possible meanings of the expression. And, thirdly, because the form of words “fair and equitable treatment” is inherently broad, uncertainty has arisen over how the standard is to be applied in practice.

6. Against this background, it is not surprising that questions concerning the meaning and scope of the fair and equitable treatment standard have become the subject of a fair degree of litigation in recent years. These cases have been largely decided by arbitral tribunals, which have sought to give meaning to the standard, as set out in particular bilateral investment treaties or in NAFTA. In the light of the approach suggested in one arbitral decision, the NAFTA Free Trade Commission took the opportunity to issue a clarification as to the meaning of the phrase “fair and equitable treatment” as used in NAFTA. But even following this clarification, uncertainty remains on the meaning of the phrase. In the light of this uncertainty, there is scope for the International Law Commission to offer an analysis of the fair and equitable treatment standard which helps to clarify the law and to lend greater certainty to the State practice on the subject. The objective will not be to seek to decide these cases anew, but rather to extract from the cases an assessment of the state of the law concerning the meaning and components of the fair and equitable treatment standard in investment relations. Some of the cases that will need to be considered in this analysis are set out in the table of cases in Appendix II to this prospectus.

## II. Some issues for consideration

7. The central question to be considered will be the meaning of the concept of fair and equitable treatment as used in international investment instruments. In response to this question, it is proposed that the following issues be considered:

(a) *Form.* What are the different forms in which the fair and equitable treatment standard has been incorporated into bilateral and multilateral instruments? In some instances, the fair and equitable treatment is stated as a free-standing concept, while in others it is combined, sometimes in the same operative provision, with other standards of treatment for investors, such as “full protection

and security”, “treatment required by international law”, “most-favoured-nation treatment” and “national treatment”. In some instances, the fair and equitable treatment is incorporated in a non-binding form, and occasionally it is included in instruments as a preambular provision. The study will therefore need to address these different forms, and assess the extent to which the different forms may give rise to different legal consequences.

(b) *Relationship with contingent standards.* In the vast majority of bilateral investment treaties, foreign investors are given the assurance not only of fair and equitable treatment, but also of most-favoured-nation treatment and national treatment. These standards are different from each other, with the latter two being contingent standards, meaning that their content in particular cases is determined by the treatment offered to a defined category of investors. The fair and equitable treatment standard is a non-contingent standard, but in practice the treatment given to an investor may be fair or unfair depending on how other investors are treated in the host country. The question, then, is whether a treaty may define the relationship between the fair and equitable treatment standard and other standards. As part of this, consideration should also be given to the identification of what, in particular, a provision on fair and equitable treatment actually adds to a treaty that also incorporates the contingent standards of most-favoured-nation treatment and national treatment.

(c) *Relationship with “full protection and security”.* As noted above, the fair and equitable treatment standard is often incorporated with the standard of “full protection and security”. The analysis proposed here will consider the relationship between these two non-contingent standards. This will require an analysis of the meaning of the concept of full protection and security and an assessment of whether this concept actually incorporates elements of protection to foreign investors that are not already inherent in the fair and equitable standard of treatment.

(d) *Is fair and equitable treatment synonymous with the international minimum standard?* One view in the literature of fair and equitable treatment (and to some extent in the jurisprudence on the concept) is that the fair and equitable treatment standard is really the same as the international minimum standard that is regarded by some States as the standard of treatment required for the treatment of foreign investors as a matter of customary international law. The international minimum standard, as stated for example in the *Neer* claim,<sup>10</sup> has arguably not been accepted by a significant number of States. Traditionally, Latin American countries have maintained that customary international law requires the host State to accord the foreign investor treatment no less favourable than that accorded to national investors. Therefore, if the fair and equitable treatment standard is synonymous with the international minimum standard, Latin American countries will, to a significant extent, now be party to several treaties that require them to give investors the international minimum standard, whether or not that standard is required under customary international law.

<sup>9</sup> *Ibid.*, pp. 375 *et seq.*, at p. 378.

<sup>10</sup> *L. F. H. Neer and Pauline Neer (U.S.A.) v. United Mexican States, Mexico–U.S.A. General Claims Commission*, 15 October 1926, UNRIIAA, vol. IV (Sales No. 1951.V.1), p. 60.

(e) *Is fair and equitable treatment an independent standard?* The study will also consider an alternative view concerning the meaning of the fair and equitable standard to that mentioned in the preceding subparagraph (d). The alternative view is that the fair and equitable treatment standard is an independent standard which, on the plain meaning of words, is different from the international minimum standard. In this view, the plain meaning of words requires States that assure investors fair and equitable treatment to give to those investors treatment that is not unfair and not inequitable in all the circumstances under consideration. On this reading, the standard will require arbitrators to assess the treatment accorded to the foreign investor in the light of all the circumstances of the case. The elements of what is fair and equitable in this approach will be developed on a case-by-case basis.

(f) *Does the fair and equitable treatment standard now represent customary international law?* Given that more than 3,000 bilateral investment treaties incorporate the fair and equitable treatment standard, and bearing in mind that various multilateral instruments rely on the provision, the question arises whether this standard is now a part of customary international law. This question arises whether the standard is synonymous with the international minimum standard, largely from the practice of States. The Commission is expected to embark upon a study on the formation and evidence of customary international law, so some of the tools of analysis used in that study will be relevant for this particular question, and vice versa. It may be sufficient, at this stage, to mention that the mere fact of a significant level of practice does not normally, on its own, give rise to a rule of customary international law. Thus, in assessing whether the fair and equitable treatment standard represents customary international law, reference will also need to be made to the requisite *opinio juris* of States and whether the practice in question is of a widespread and uniform character, including the practice of States “specially affected”. Decisions of arbitral tribunals in the cases noted in Appendix II, and elsewhere, will need to be incorporated fully into this discussion.

(g) *Is fair and equitable treatment a principle of international law?* There is a minority view that the fair and equitable treatment standard reflects a principle of law, which is applicable with respect to all States. The basis of this viewpoint is that all States can be expected to treat nationals and foreigners with fairness, because fairness must be inherent in the activities of States. This line of argument tends to suggest that fair and equitable treatment is a part of the rule of law. The validity of this contention will need to be assessed.

8. Another set of issues to be studied concern the content and scope of the fair and equitable treatment standard. In some respects, these issues overlap with issues concerning the meaning of the standard. The issues that may be considered here include:

(a) *What are the elements of fair and equitable treatment in practice?* Arbitral tribunals have considered various elements of the standard, and have either accepted or rejected different suggestions as to what constitute the components of fair and equitable treatment. So, for example, there is some support for the view that a particular

State action may fall short of the fair and equitable treatment standard if it (i) is discriminatory; (ii) amounts to a denial of justice; (iii) is undertaken in bad faith; (iv) falls short of the due process guarantees in the State concerned; (v) disrupts the legitimate expectations of the foreign investor; or (vi) falls short of standards of transparency. It has also been suggested that conduct on the part of a State may fall short of the fair and equitable treatment standard if it undermines the stability of business relationships in the host country, or if it goes against rules on which the foreign investor had relied in entering the host country.

(b) *In what ways has fair and equitable treatment affected other provisions of bilateral investment treaties?* In some arbitral decisions, it has been accepted that the fair and equitable treatment standard may apply to a set of circumstances even where another provision of a bilateral investment treaty is more specific and directly applicable. This has happened, for example, in the case of investment damage arising from armed conflict, where there was a directly applicable provision on armed conflict; this provision did not prevent the tribunal from applying the more general provision on fair and equitable treatment standard. Thus, the study will need to examine whether there are limits to the circumstances in which the fair and equitable treatment standard may be applied. It may be possible that the standard is a “catch-all” provision meant to apply when other provisions do not provide a solution which coincides with the interests of justice, as interpreted by the arbitral tribunal or other decision-making body.

9. The concept of fair and equitable treatment also raises issues pertaining to the relationship between international law and domestic law. To begin with, when a host provides an assurance of fair and equitable treatment in its treaty relations, this may actually have only an indirect impact on the foreign investor whom it intended to be the beneficiary of the treatment standard. In day-to-day activities, the foreign investor will be subject to domestic law, and will, in the first instance, be inclined to invoke domestic law for the protection of investment interests. Thus, the question whether, and to what extent, the fair and equitable treatment standard has become a part of domestic legal systems will be of considerable practical significance to investors. This question will also be of importance to States whose nationals seek to derive protection pursuant to the fair and equitable treatment standard; for, if countries that accept the standard do not, at the same time, implement it in their national laws, then the impact of the standard will be reduced in practice.

10. On a related point, the proposed study concerning fair and equitable treatment would also need to consider whether, and to what extent, this treatment standard is already an inherent part of national systems of law. As a starting point, it may be fair to suggest that all legal systems seek to embrace fairness and equitable treatment for individuals. One question that arises, therefore, concerns the precise ways in which adherence to the fair and equitable treatment standard in investment relations adds to, or clarifies, rights and duties in the domestic legal systems of host countries. Generally, the fair and equitable treatment standard, when interpreted by an international tribunal, provides the opportunity for an external body to assess whether State behaviour conforms with

fairness and equity as a matter of international law. However, in practice, following the decision of the external tribunal, administrative bodies in national jurisdictions have to apply the meaning attributed to the fair and equitable treatment standard in domestic law. The study will therefore need to consider ways in which domestic policymakers and implementing bodies react to decisions of international tribunals on the meaning of fair and equitable treatment. This discussion should also prompt the question whether, and to what extent, there is a body of administrative law that may now be broadly applicable in the area of treatment of foreign investors.

11. Although the concept of fair and equitable treatment has developed largely in the context of international investment law, there are significant links between this concept and other areas of law. So, for example, it is fair to suggest that when the foreign investor is perceived as an individual person, the treatment accorded to that person must respect universally recognized individual human rights, including the right to property. At the same time, the treatment accorded by foreign investors to individuals within host countries must also conform to standards of human rights. In the light of such considerations, the study on fair and equitable treatment should not focus narrowly on the concept; rather, it should consider the implications of the concept for different stakeholders in the investment process, and should seek guidance on the meaning of the notion of fairness from diverse areas of international and national law.

### III. Questions concerning the final product

12. It is difficult to say with any degree of certainty what type of document should emerge from the study proposed here. One possibility would be to put forward a statement concerning the meaning of the standard, outlining some

of the implications that are likely to arise for States that provide an assurance of fair and equitable treatment in their treaty relations. It would also be possible to consider the respective meanings of the different forms which the fair and equitable treatment standard has taken in various treaties. On this approach, the study will help to clarify the law in one of the more contentious issues of modern practice.

13. It is also fair to suggest that the final form of the study on fair and equitable treatment may be influenced by the approach that the Commission decides to take in respect of the final form of the products of its work on the topic of most-favoured-nation treatment and on the study of customary international law.

14. It may be possible that a set of guidelines for States could emerge from this study. The guidelines could indicate whether the fair and equitable treatment standard reflects customary international law, and then set out the implications which are likely to follow for States if they formulate the fair and equitable treatment standard in one of a number of different ways.

15. It is suggested that, irrespective of the final form, the study will be of relevance to States. In the busy international law office, lawyers may have neither the time nor the opportunity to study the jurisprudence concerning fair and equitable treatment. Yet, given the proliferation of investment treaties with this provision in place, the meaning to be given to the standard is significant for many States. Against this background, a clear statement of the law on this point, from an authoritative source, will be useful. Taken together with the work of the Commission on the most-favoured-nation clause, the study will help to enhance the Commission's work in the topical area of international investment law.

## Appendix I

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## Appendix II

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## Annex V

# PROTECTION OF THE ENVIRONMENT IN RELATION TO ARMED CONFLICTS

(Marie G. Jacobsson)

### I. Introduction

1. It has long been recognized that the effect on the environment during and after an armed conflict may pose a serious threat to the livelihoods and even the existence of individual human beings and communities. The effect on the environment differs from other consequences of an armed conflict, since it may be long-term and irreparable. It may remain long after the conflict and prevent an effective rebuilding of the society, destroy pristine areas or disrupt important ecosystems.

2. The protection of the environment in armed conflicts has been primarily viewed through the lens of the laws of warfare, including international humanitarian law. However, this perspective is too narrow, as modern international law recognizes that the international law applicable during an armed conflict may be wider than the laws of warfare. This is also recognized by the International Law Commission in its recent work on the effects of armed conflicts on treaties. This work takes as its starting point (art. 3) the presumption that the existence of an armed conflict does not *ipso facto* terminate or suspend the operation of treaties. The combined implication of article 7 and the annex of treaties is that, because of their subject matter, several categories of treaties relevant to the protection of the environment may continue in operation during periods of armed conflict.<sup>1</sup>

### II. Background<sup>2</sup>

3. The need to protect the environment in times of armed conflict is not a twenty-first century idea, or even a twentieth century idea. On the contrary, it is possible to trace legal rules relating to the natural environment and its resources back to ancient times. Such rules were closely connected with the need of individuals to have access to natural resources essential for their survival, such as clean

water. Given the conditions under which war then was conducted, as well as the means and methods used, there was limited risk of extensive environmental destruction.

4. This changed during the twentieth century when technological development placed the environment at a greater risk of being permanently destroyed through destruction caused by nuclear weapons or other weapons of mass destruction, but also through destruction caused by conventional means and methods of warfare. Technological development went hand in hand with a rising awareness of the need to protect the environment for the benefit of existing and future generations.

5. It is possible to identify three periods since the adoption of the Charter of the United Nations when the protection of the environment in relation to armed conflict was addressed with the aim of enhancing the legal protection. The first phase started in the early 1960s, the second in the early 1990s and the third in the 2010s.

6. The *first phase*, which began in the 1960s, was spurred, on the one hand, by the means and methods of warfare during the Viet Nam war and, on the other hand, by the rising awareness of the need to protect the environment in more general terms (the birth of international environmental law). The Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration)<sup>3</sup> (a political declaration in 1972) signals an attempt to expand the *Trail Smelter*<sup>4</sup> principle beyond a bilateral context (Principle 21). The sensitive issue of the use of nuclear weapons was addressed, in vague terms, in Principle 26. Although no decisive legal conclusions can be drawn from the Stockholm Declaration, it gave a signal of what was the concern and what was to come in the Rio Declaration on Environment and Development (Rio Declaration)<sup>5</sup> of 1992 (see below).

7. A few years later, specific provisions addressing the protection of the environment were included in international humanitarian law treaties. It is worth quoting two articles, article 35 and article 55 of the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed

<sup>1</sup> At the current session, the Commission adopted, on second reading, a set of 18 draft articles and an annex (with an indicative list of treaties the subject matter of which provides an indication that they continue in operation, in whole or in part, in time of armed conflict), with commentaries thereto. Draft article 3 was entitled “General principle” and article 7 “Continued operation of treaties resulting from their subject matter”. The indicative list of treaties annexed includes treaties relating to the international protection of the environment, treaties relating to international watercourses and related installations and facilities, treaties relating to aquifers and related installations and facilities, treaties relating to human rights, treaties on international criminal justice and, for obvious reasons, treaties on the law of armed conflict, including treaties on international humanitarian law (see above, chap. VI, sect. E, paras. 100–101).

<sup>2</sup> This section is by necessity brief and incomplete. It serves only as a frame of historical reference.

<sup>3</sup> *Report of the United Nations Conference on the Human Environment, Stockholm, 5–16 June 1972* (United Nations publication, Sales No. E.73.II.A.14), Part One, chap. I.

<sup>4</sup> *Trail Smelter*, UNRIAA, vol. III (Sales No. 1949.V.2), pp. 1905 *et seq.*

<sup>5</sup> *Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3–14 June 1992* (United Nations publication, Sales No. E.93.I.8 and corrigendum), vol. I: *Resolutions adopted by the Conference*, resolution 1, annex I.

conflicts (Protocol I) (1977), not least because they partly seem to contradict each other. Article 35, paragraph 3, reads as follows:

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.<sup>6</sup>

Article 55 reads as follows:

1. Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. 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.

2. Attacks against the natural environment by way of reprisals are prohibited.

8. In addition, the Convention on the prohibition of military or any other hostile use of environmental modification techniques, which aims exclusively to protect the environment, was adopted.<sup>7</sup> The standard-setting article 1, paragraph 1, reads as follows:

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.

9. During the 1980s, the Iran–Iraq war drew the attention of States and organizations to the need for enhanced protection of the environment during armed conflicts. This is evidenced by, for example, the request from the Commission of the European Communities for a report on the matter.<sup>8</sup>

10. The *second phase* started with the Iraq–Kuwait war in 1990. The burning of oil wells and other environmentally disastrous effects of the war awoke the international community to the effect of modern warfare on the environment. In addition, the United Nations Compensation Commission (UNCC) was established and entrusted with cases relating to loss or damage of the environment and the depletion of natural resources.<sup>9</sup> In its reports, the UNCC discusses each claim for compensation separately and gives reasons for their acceptance, denial or adjustment. This provides a substantial amount of case law although the UNCC relies on the criteria provided by the Security Council and its own Governing Council, and not on international law *per se*. It is noteworthy that the UNCC awarded some compensation

<sup>6</sup> This is repeated in the preamble of 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 (1980).

<sup>7</sup> The Convention provides for review conferences to be held at least every five years, but thus far, only two review conferences have been held, in 1984 and in 1992.

<sup>8</sup> M. Bothe *et al.*, “Protection of the environment in times of armed conflict”, Report to the Commission of the European Communities, SJ/110/85 (1985).

<sup>9</sup> The UNCC was established under Security Council resolution 687 of 3 April 1991. The mandate of the UNCC is more closely related to the old so-called “Hague rules” (Hague Conventions respecting the laws and customs of war on land), which contain regulations on compensation for violations of the laws of war, than to the Geneva Conventions for the protection of war victims and the Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I).

for all these claims, including for indirect damage to wetlands from water consumption by refugees.

11. In parallel, the item of protection of the environment was placed on the agenda of the United Nations: first under the heading “Exploitation of the environment as a weapon in times of armed conflict and the taking of practical measures to prevent such exploitation” and subsequently under “Protection of the environment in times of armed conflict”.<sup>10</sup> The Secretary-General submitted his first report on the protection of the environment in times of armed conflict in 1992<sup>11</sup> and a second report in 1993.<sup>12</sup> In essence, these reports reproduced information received from the ICRC. The report of 1993 suggested what issues could be examined by the Sixth Committee. The issues included the question of the “[a]pplicability in armed conflict of international environmental law; general clarification and action in case of revision of the treaties”.<sup>13</sup> At that time, the item had lost its place as an independent agenda item. Instead, it was dealt with under the item “United Nations Decade of International Law”.<sup>14</sup>

12. The ICRC was mandated by the General Assembly to work on the issue. As a consequence, expert meetings were held, and the issue was also on the agenda of the International Conferences of the Red Cross and Red Crescent. One result was the Guidelines for military manuals and instructions on the protection of the environment in times of armed conflict, annexed to the report submitted by the ICRC to the forty-eighth session of the United Nations General Assembly.<sup>15</sup> Due to lack of political support for any modification of the law of armed conflict as reflected in existing treaty provisions, annexing the Guidelines to a resolution and inviting States to disseminate them was as far as it was possible to go at the time.<sup>16</sup>

13. It should be recalled that the United Nations Conference on Environment and Development took place in 1992. The conference adopted the Rio Declaration, which clearly stipulates in Principle 24 and Principle 23, respectively:

Warfare is inherently destructive of sustainable development. States shall therefore respect international law providing protection for the environment in times of armed conflict and cooperate in its further development, as necessary.

And:

The environment and natural resources of people under oppression, domination and occupation shall be protected.

<sup>10</sup> Originally, in 1991, Jordan proposed to include the item on the agenda (see A/46/141), and the proposal was accepted. In 1992, the General Assembly included the topic “Protection of the environment in times of armed conflict” on its agenda and allocated it to the Sixth Committee (see General Assembly decision 46/417 of 9 December 1991).

<sup>11</sup> A/47/328.

<sup>12</sup> A/48/269.

<sup>13</sup> *Ibid.*, para. 110.

<sup>14</sup> See General Assembly resolution 47/37 of 25 November 1992, in particular para. 4.

<sup>15</sup> A/48/269, paras. 4 *et seq.*

<sup>16</sup> General Assembly resolution 49/50 of 9 December 1994, operative paragraph 11. The lack of a broad support for bringing the issue forward was further evidenced by the lack of development relating to the Convention on the prohibition of military or any other hostile use of environmental modification techniques.

14. The *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*<sup>17</sup> repeatedly addresses the protection of the environment, for example by including damage to or the destruction of the natural environment or objects that are not in themselves military objectives as collateral casualties or collateral damage. The legal aspect of protecting the environment is particularly relevant in naval warfare since belligerents and third parties may have legitimate and competing claims to use an area outside the sovereignty of a State.<sup>18</sup>

15. The armed conflicts in the former Yugoslavia also bore evidence of the disastrous effects on the environment of both legal and illegal means and methods of warfare. At the same time, pressing concern from the international civil community forced States to address one particular aspect of international humanitarian law of direct relevance to the protection of the environment: the use of anti-personnel landmines. It is obvious that the lack of implementation of the existing provisions in 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, brought about devastation, not only to those individual civilians that were maimed by the landmines, but also to their effective and secure use of land after the war was over. The examples of the Balkans, Cambodia and Mozambique are self-explanatory. In addition to the lack of implementation, a major concern was the simple fact that the existing convention was not applicable in non-international armed conflicts. As a result, the Convention and its Protocol on prohibitions or restrictions on the use of mines, booby-traps and other devices were revised. However, this was not enough for those States and individual groups that wanted a more extensive ban. On a parallel track, the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction was negotiated and adopted.

16. The legally interesting aspect of this development is that the initial reluctance on the part of important militarily powerful States to modify the laws of armed conflict did not prevent the parallel development of a regime for the protection of the civilian population and its base of subsistence.

17. The *third phase* started in the early 2010s. It is difficult to connect the beginning of this phase with any particular war, but rather it stems from a growing awareness of the need to protect the environment as such. Indeed, several wars such as those in Iraq, Kosovo and Lebanon all bore evidence that war-torn societies pay a high environmental price. At the same time, international courts and tribunals addressed the issue of the protection of the environment in court practice. The negative effects on the environment were also raised by fact-finding missions. Starting with the legal cases in the 1990s, it

was no longer sufficient to seek for legal answers in the realm of the laws of warfare. The development of environmental law and international criminal law could not be neglected, and it is worth noticing that the International Criminal Court has jurisdiction over crimes that cause certain damage to the environment.<sup>19</sup>

### III. Work done by other bodies

18. As mentioned above, the ICRC summoned expert meetings and presented important reports during the 1990s, including the Guidelines for military manuals and instructions on the protection of the environment in times of armed conflict (1994). The perspective of the ICRC is, for obvious reasons, that of international humanitarian law. This in essence poses the question of the extent to which existing international humanitarian law contains principles, rules or provisions that aim to protect the environment during an armed conflict. It is often noted that the environment needs to be protected in order to achieve the goal of protecting civilians and their livelihoods. But it is likewise pointed out that the environment as such needs protection. The underlying assumption is that the environment is civil in nature. This is evidenced by the two-volume explanation of customary international humanitarian law by the ICRC, published in 2005.<sup>20</sup> Three of the rules identified by the ICRC as customary law, namely rules 43–45, relate particularly to natural resources and environmental protection during armed conflicts. Rule 44 reads as follows:

Methods and means of warfare must be employed with due regard to the protection and preservation of the natural environment. In the conduct of military operations, all feasible precautions must be taken to avoid, and in any event to minimize, incidental damage to the environment. Lack of scientific certainty as to the effects on the environment of certain military operations does not absolve a party to the conflict from taking such precautions.<sup>21</sup>

19. In 2010, the ICRC raised the issue on the current state of international humanitarian law. In its presentation on the topic “Strengthening legal protection for victims of armed conflict”, the ICRC drew the conclusion that humanitarian law needs to be reinforced in order to protect the natural environment.<sup>22</sup> The ICRC apparently concluded that the extensive development of international environmental law in recent decades had not been matched by a similar development in international humanitarian law. The clarification and development of international humanitarian law for the protection of the environment had lagged behind. It is a noteworthy conclusion since the ICRC predominantly expressed concern over the lack of the implementation of international humanitarian law provisions.

20. The *International Law Association* has issued several reports of relevance to the topic. Of direct relevance is the 2004 report from the Committee on Water Resources Law. Chapter X (arts. 50–55) is entirely devoted to the topic

<sup>17</sup> International Institute of Humanitarian Law, *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, Cambridge University Press, 1995.

<sup>18</sup> The Manual on International Law Applicable to Air and Missile Warfare (Program on Humanitarian Policy and Conflict Research (HPCR) of Harvard University, *Manual on International Law Applicable to Air and Missile Warfare* (2009); available from <https://reliefweb.int/report/world/manual-international-law-applicable-air-and-missile-warfare>) also contains specific rules regarding the protection of the natural environment (see rules 88–89).

<sup>19</sup> Article 8 of the Rome Statute of the International Criminal Court (1998).

<sup>20</sup> J.-M. Henckaerts and L. Doswald-Beck, *Customary International Humanitarian Law*, ICRC/Cambridge University Press, vol. I: Rules, 2009, and vol. II: Practice, 2005.

<sup>21</sup> *Ibid.*, vol. I: Rules, p. 147.

<sup>22</sup> Address by Mr. Jakob Kellenberger, President of the ICRC, of 21 September 2010; available from [www.icrc.org/eng/resources/documents/statement/ihl-development-statement-210910.htm](http://www.icrc.org/eng/resources/documents/statement/ihl-development-statement-210910.htm).

of the protection of waters and water installations during war or armed conflict.<sup>23</sup> Another report is the 2010 report on reparations for victims of armed conflict.<sup>24</sup> It is also worth mentioning the 2006 report of the International Law Association's Committee on Transnational Enforcement of Environmental Law. While it does not specifically discuss the protection of the environment in the context of armed conflict, it does propose rules relating to the standing of individuals to bring claims for the destruction of the environment and other access to justice issues.<sup>25</sup>

21. The *International Union for Conservation of Nature* has formed a Specialist Group on Armed Conflict and the Environment, which is undertaking two related activities: exploring current questions of the law of armed conflict as it relates to the protection of the environment and assessing experiences in post-conflict management of natural resources and the environment. A survey on the status of international law protecting the environment during armed conflict, including opportunities for strengthening the law and its implementation, is apparently under way.

22. *UNEP* and the *Environmental Law Institute*, together with leading specialists in international law and the ICRC, have conducted a legal assessment of the protection of the environment during armed conflicts which produced the 2009 report *Protecting the Environment During Armed Conflict—an Inventory and Analysis of International Law*. The report examines four main bodies of international law that provide protection for the environment during armed conflicts: international humanitarian law, international criminal law, international environmental law and human rights law. The report culminates with a number of key findings explaining why the environment still lacks effective protection in times of armed conflict. It also makes recommendations for how these challenges can be addressed and the legal framework strengthened.

#### IV. The United Nations Environment Programme's proposal to the International Law Commission

23. It was out of concern "that the environment continues to be the silent victim of armed conflicts worldwide" that *UNEP* and the *Environmental Law Institute* "undertook a joint assessment of the state of the existing legal framework protecting natural resources and the environment during armed conflict"<sup>26</sup> in 2009. The assessment is the result of an international expert meeting held by *UNEP* and the ICRC in March 2009. Based on 10 key findings, the report provides for 12 recommendations, among them that the Commission, as "the leading [United Nations] body with expertise in international law", should "examine the existing international law for protecting the

<sup>23</sup> International Law Association, *Report of the Seventy-first Conference Held in Berlin, 16–21 August 2004*, London, 2004, pp. 334 *et seq.*, at pp. 394–398.

<sup>24</sup> *Ibid.*, *Report of the Seventy-fourth Conference Held in The Hague, 15–19 August 2010*, London, 2010, pp. 291 *et seq.*

<sup>25</sup> *Ibid.*, *Report of the Seventy-second Conference Held in Toronto, 4–8 June 2006*, London, 2006, pp. 655 *et seq.* Its main focus seems to be domestic remedies for environmental claims, but the report also discusses the rejected draft article 7, which would have allowed judicial proceedings against a Government for breaches of international environmental law.

<sup>26</sup> *UNEP, Protecting the Environment During Armed Conflict—an Inventory and Analysis of International Law*, 2009, p. 9.

environment during armed conflict and recommend how it can be clarified, codified and expanded".<sup>27</sup>

The report suggests that the following issues be addressed:

- [a]n inventory of the legal provisions and the identification of gaps and barriers to enforcement;
- [a]n exploration of options for clarifying and codifying this body of law;
- [t]he definition of key terms such as "widespread," "long-term," and "severe," ...;
- [t]he consideration of the applicability of multilateral environmental agreements during armed conflicts as part of its ongoing analysis of the "effect of armed conflicts on treaties;"
- [e]xtending protection of the environment and natural resources in the context of non-international armed conflict; and
- [c]onsidering how the detailed standards, practice and case law of international environment law could be used to help clarify gaps and ambiguities in international humanitarian law.<sup>28</sup>

#### V. Major issues raised by the topic

24. The proposal submitted by the *UNEP* report raises the issue of whether the suggested topic would be a suitable topic for the Commission.

25. The Commission should continue to keep an open mind with respect to proposals submitted to it. Proposals submitted by the General Assembly, other bodies within the United Nations system and States carry a special weight. It should be noted that the Commission has tried to encourage other United Nations bodies to submit proposals to the Commission at least since 1996.<sup>29</sup> Hence, the suggestion by *UNEP* deserves serious consideration, particularly since it *prima facie* appears a well-founded proposal.

26. So, what are the major issues raised by the topic?

27. The applicable law in relation to armed conflict clearly extends beyond the realm of the laws of warfare. It is not sufficient to refer to international humanitarian law as *lex specialis* in the hope of finding a solution to a specific legal problem. Other areas of international law, such as human rights, may also be applicable. The International Court of Justice has clearly recognized this.

More generally, the Court considers that the protection offered by human rights conventions does not cease in case of armed conflict, save through the effect of provisions for derogation of the kind to be found in Article 4 of the International Covenant on Civil and Political Rights. As regards the relationship between international humanitarian law and human rights law, there are thus three possible situations: some rights may be exclusively matters of international humanitarian law; others may be exclusively matters of human rights law; yet others may be matters of both these branches of international law. In order to answer the question put to it, the Court will have to take into consideration both these branches of international law, namely human rights law and, as *lex specialis*, international humanitarian law.<sup>30</sup>

<sup>27</sup> *Ibid.*, Recommendation 3, p. 53.

<sup>28</sup> *Ibid.*

<sup>29</sup> *Yearbook ... 1996*, vol. II (Part Two), pp. 84–85, para. 148, and p. 88, para. 165.

<sup>30</sup> *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion (see footnote 284 above), p. 178, para. 106.

28. The underlying assumption of the Court's reasoning is also recognized by the Commission, *inter alia* in its work on fragmentation<sup>31</sup> and in its recent work on the effects of armed conflicts on treaties. This work takes as its starting point (art. 3) the presumption that the existence of an armed conflict does not *ipso facto* terminate or suspend the operation of treaties.<sup>32</sup>

29. Even if one were to assume that only the law of armed conflict is applicable during an armed conflict, that law is also applicable before and after the armed conflict since it contains rules relating to measures taken before and after an armed conflict. Therefore, it is obvious that applicable rules of the *lex specialis* (the law of armed conflict) co-exist with other rules of international law.

30. It seems as if no State or judicial body questions the parallel application of different branches of international law, such as human rights law, refugee law and environmental law. It also seems as if States and judicial bodies are uncertain as to the precise extension and balance of those areas of the law. At the same time, there is an expressed need to analyse and come to conclusions with respect to this problem. This is a new development in the application of international law, and States are faced with concrete problems of urgent needs. The case of the environmental effects of the war in the Democratic Republic of the Congo provides an important example of how internal wars force the population to flee and resettle—often in or near sensitive forest ecosystems. In such a situation, does the 1972 Convention for the protection of the world cultural and natural heritage continue to apply?

## VI. Proposal

31. Beginning almost two decades ago, several legal and semi-legal bodies have addressed the issue of the protection of the environment in times of armed conflict. This is a clear indication both of the existence of a legal problem and of the need to address the matter.

It is therefore proposed that the Commission examine the topic in its long-term programme of work. The aim should be as follows:

- to identify the extent of the legal problem;
- to identify any new developments in case law or in customary law;
- to clarify the applicability of and the relationship between international humanitarian law, international criminal law, international environmental law and human rights law;
- to develop further the findings of the Commission's work on the effects of armed conflicts on treaties, particularly on matters concerning the continued application of treaties relating to the protection of the environment and human rights;
- to clarify the relation between existing treaty law and new legal developments (including legal reasoning);
- to suggest what needs to be done to achieve a uniform and coherent system (so as to prevent the risk of fragmentation);
- to envisage the formulation of applicable rules and formulate principles of general international law of relevance for the topic.

32. The topic would also fit well into the ambitions expressed by the Commission in 1997, namely that the Commission should not restrict itself to traditional topics, but should also consider those that reflect new developments in international law and pressing concerns of the international community as a whole.<sup>33</sup>

33. The final outcome could be either a draft framework convention or a statement of principles and rules on the protection of the environment in times of armed conflict.

34. The time frame envisaged should be five years. The first three years should be devoted to identifying existing rules and conflicts of rules. The fourth and fifth years should be devoted to operative conclusions and finalization of the outcome document in whatever form the Commission may deem most appropriate.

<sup>31</sup> Report of the Study Group of the Commission on fragmentation of international law (see footnote 421 above).

<sup>32</sup> See footnote 1 of the present annex above.

<sup>33</sup> *Yearbook ... 1997*, vol. II (Part Two), pp. 71–72, para. 238; and *Yearbook ... 1998*, vol. II (Part Two), p. 110, para. 553.

## Appendix I

### Examples of relevant treaties and non-treaty practice

#### 1. The laws of warfare and international criminal law

- (a) *Treaties directly addressing the protection of the environment in relation to armed conflict*
- (i) Convention on the prohibition of military or any other hostile use of environmental modification techniques (1976).
- (ii) Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I), especially article 35, paragraph 3, and article 55, paragraph 1.
- (iii) 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, and its Protocol III on prohibitions or restrictions on the use of incendiary weapons (1980).
- (iv) The Rome Statute of the International Criminal Court (1998), especially articles 6, 7 and 8.
- (b) *International humanitarian law and disarmament treaties that indirectly protect the environment in relation to armed conflict*
- (i) Convention (IV) respecting the laws and customs of war on land (Hague Convention IV) (1907).
- (ii) Convention (V) respecting the rights and duties of neutral Powers and persons in case of war on land (Hague Convention V) (1907).
- (iii) Convention (XIII) concerning the rights and duties of neutral Powers in naval war (Hague Convention XIII) (1907).
- (iv) Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare (1925).
- (v) Geneva Convention relative to the Protection of Civilian Persons in Time of War (Convention IV) (1949).
- (vi) Convention for the Protection of Cultural Property in the Event of Armed Conflict (1954), its (First) Protocol for the Protection of Cultural Property in the Event of Armed Conflict (1954), and Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict (1999).
- (vii) Treaty banning nuclear weapon tests in the atmosphere, in outer space and under water (1963).
- (viii) Treaty on the Non-Proliferation of Nuclear Weapons (1968).
- (ix) Convention on the prohibition of the development, production and stockpiling of bacteriological (biological) and toxin weapons and on their destruction (1972).
- (x) Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of non-international armed conflicts (Protocol II) (1977).
- (xi) Convention on the prohibition of the development, production, stockpiling and use of chemical weapons and on their destruction (1993).
- (xii) Comprehensive Nuclear-Test-Ban Treaty (1996).
- (xiii) Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on their Destruction (1997).
- (xiv) Convention on Cluster Munitions (2008).
- (xv) Examples of special regimes:
- (1) Treaty concerning the Archipelago of Spitsbergen (1920);
  - (2) Convention relating to the Non-Fortification and Neutralisation of the Aaland Islands (1921);
  - (3) The Antarctic Treaty (1959);
  - (4) Treaty for the Prohibition of Nuclear Weapons in Latin America (Treaty of Tlatelolco) (1967);
  - (5) South Pacific Nuclear Free Zone Treaty (1985);
  - (6) Treaty on the Southeast Asia Nuclear Weapon-Free Zone (1995);
  - (7) African Nuclear-Weapon-Free Zone Treaty (1996);
  - (8) Treaty on a Nuclear-Weapon-Free Zone in Central Asia (2006).
- (c) *General principles and rules of international humanitarian law of relevance to the protection of the environment in relation to armed conflict*
- (i) The principle of distinction.
  - (ii) The rule of military necessity.
  - (iii) The principle of proportionality.
  - (iv) The principle of humanity.

(d) *Other instruments related to the corpus of the law of warfare*

(i) The *San Remo Manual on International Law Applicable to Armed Conflicts at Sea* (1994).

(ii) The Customary Law Rules by the International Committee of the Red Cross (ICRC) (2005).

(iii) The Manual on International Law Applicable to Air and Missile Warfare by the Program on Humanitarian Policy and Conflict Research (HPCR) of Harvard University (2009).

(iv) Numerous General Assembly resolutions address the question of the protection of the environment in relation to armed conflict. They are not cited here.

(e) *Cases in courts and tribunals in which the issue of the protection of the environment in relation to armed conflict has been addressed*

(i) Case law of the International Court of Justice:

(1) *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996.

(2) *Legality of Use of Force*, Orders of 2 June 1999.<sup>34</sup>

(3) *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment of 19 December 2005.

(ii) Decisions of international tribunals such as the decision of the International Criminal Court on the *Prosecution's Application for a Warrant of Arrest against Omar Hassan Ahmad Al Bashir* of 4 March 2009, the second decision of the International Criminal Court on the *Prosecution's Application for a Warrant of Arrest* of 12 July 2010 and decisions by the UNCC.

## 2. International environmental law

### (a) Multilateral environmental agreements

(i) Multilateral environmental agreements that directly or indirectly provide for their application in relation to armed conflict:

(1) Universal conventions:

(a) International Convention for the Prevention of Pollution of the Sea by Oil (1954);

(b) Convention on wetlands of international importance especially as waterfowl habitat (1971);

(c) Convention for the protection of the world cultural and natural heritage (1972);

(d) Convention on the prevention of marine pollution by dumping of wastes and other matter (1972);

(e) International Convention for the Prevention of Pollution from Ships, 1973 (MARPOL Convention), as amended by its Protocol of 1978 relating to the International Convention for the prevention of pollution from ships, 1973;

(f) Convention on long-range transboundary air pollution (1979);

(g) United Nations Convention on the Law of the Sea (1982);

(h) Convention on the Law of the Non-navigational Uses of International Watercourses (1997).

(2) Regional conventions:

(a) Convention for the protection of the Mediterranean Sea against pollution (1976), amended and renamed Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean (1995);

(b) Convention for the protection and development of the marine environment of the wider Caribbean region (1983);

(c) African Convention on the Conservation of Nature and Natural Resources (2003).

(ii) Multilateral environmental agreements that specifically provide for suspension, derogation or termination in relation to armed conflict:

(1) Convention on third party liability in the field of nuclear energy (1960);

(2) Vienna Convention on civil liability for nuclear damage (1963);

(3) International Convention on Civil Liability for Oil Pollution Damage (1969);

(4) Convention on Civil Liability for Damage Resulting from Activities Dangerous to the Environment (1993).

(iii) Multilateral environmental agreements that may be of relevance for the protection of the environment in relation to armed conflict:

(1) Convention on early notification of a nuclear accident (1986);

<sup>34</sup> On 2 June 1999 the Court delivered its orders in the following eight cases between Serbia and Montenegro and members of NATO: *Legality of Use of Force (Yugoslavia v. Belgium)*, *Provisional Measures, Order of 2 June 1999*, I.C.J. Reports 1999, p. 124; *(Yugoslavia v. Canada)*, *ibid.*, p. 259; *(Yugoslavia v. France)*, *ibid.*, p. 363; *(Yugoslavia v. Germany)*, *ibid.*, p. 422; *(Yugoslavia v. Italy)*, *ibid.*, p. 481; *(Yugoslavia v. Netherlands)*, *ibid.*, p. 542; *(Yugoslavia v. Portugal)*, *ibid.*, p. 656; *(Yugoslavia v. Spain)*, *ibid.*, p. 761; *(Yugoslavia v. United Kingdom)*, *ibid.*, p. 826; and *(Yugoslavia v. United States of America)*, *ibid.*, p. 916.

(2) Basel Convention on the control of transboundary movements of hazardous wastes and their disposal (1989);

(3) Convention on biological diversity (1992);

(4) Convention to combat desertification in those countries experiencing serious drought and/or desertification, particularly in Africa (1994).

(b) *Customary international environmental law as reflected in the following sources*

(i) The *Trail Smelter*<sup>35</sup> principle.

(ii) Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration)<sup>36</sup> (1972).

(iii) World Charter for Nature<sup>37</sup> (1982).

(iv) Rio Declaration on Environment and Development (Rio Declaration)<sup>38</sup> (1992).

(v) Programme of Action for Sustainable Development (Agenda 21)<sup>39</sup> (1992).

(vi) General Assembly resolutions 47/37 of 25 November 1992 on the protection of the environment in times of armed conflict and 49/50 of 9 December 1994 on the United Nations Decade of International Law.

(vii) World Summit on Sustainable Development<sup>40</sup> (2002).

(viii) UNEP Governing Council Decision 23/1/IV<sup>41</sup> (2005).

<sup>35</sup> See footnote 4 of the present annex above.

<sup>36</sup> See footnote 3 of the present annex above.

<sup>37</sup> General Assembly resolution 37/7 of 28 October 1982, annex.

<sup>38</sup> *Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3–14 June 1992* (United Nations publication, Sales No. E.93.I.8 and corrigendum), vol. I: *Resolutions adopted by the Conference*, resolution 1, annex I.

<sup>39</sup> *Ibid.*, annex II.

<sup>40</sup> See *Report of the World Summit on Sustainable Development, Johannesburg (South Africa), 26 August–4 September 2002* (A/CONF.199/20, United Nations publication, Sales No. E.03.II.A.1).

<sup>41</sup> UNEP, Report of the Governing Council, twenty-third session (21–25 February 2005), *Official Records of the General Assembly*,

### 3. Human rights law

#### *Framework conventions*

(i) Universal Declaration of Human Rights<sup>42</sup> (1948).

(ii) International Covenant on Civil and Political Rights (1966).

(iii) International Covenant on Economic, Social and Cultural Rights (1966).

(iv) Other instruments of international human rights law:

(1) Declaration on Social Progress and Development, especially articles 9 and 25<sup>43</sup> (1969);

(2) Convention on the Elimination of All Forms of Discrimination against Women (1979);

(3) Declaration on the Right to Development<sup>44</sup> (1986);

(4) Convention on the rights of the child (1989);

(5) Convention (No. 169) concerning indigenous and tribal peoples in independent countries (1989);

(6) United Nations Millennium Declaration<sup>45</sup> (2000);

(7) Declaration on the Rights of Indigenous Peoples<sup>46</sup> (2007).

(v) Regional conventions:

(1) Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights) (1950);

(2) American Convention on Human Rights: “Pact of San José, Costa Rica” (1969);

(3) African Charter on Human and Peoples’ Rights (1981).

*Sixtieth Session, Supplement No. 25 (A/60/25)*, annex, p. 19.

<sup>42</sup> General Assembly resolution 217 A (III) of 10 December 1948.

<sup>43</sup> General Assembly resolution 2542 (XXIV) of 11 December 1969.

<sup>44</sup> General Assembly resolution 41/128 of 4 December 1986.

<sup>45</sup> General Assembly resolution 55/2 of 8 September 2000.

<sup>46</sup> General Assembly resolution 61/295 of 13 September 2007, annex.

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<sup>47</sup> Extract with updated additions from the UNEP report *Protecting the Environment During Armed Conflict—an Inventory and Analysis of International Law*, 2009, p. 69.

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