International law and governance of natural resources in conflict and post-conflict situations

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1 Introduction

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1.1 Relationships between natural resource wealth and armed conflict

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1.2 THE ACTORS INVOLVED IN RESOURCE-RELATED ARMED CONFLICTS

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

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

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

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

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

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

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

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

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

1.2.1 Domestic governments

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

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

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

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

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

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

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

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

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

1.2.2 Foreign States

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

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

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

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

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

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

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

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

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

34 *Ibid*.

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

36 *Ibid*., para. 242.

37 *Ibid*., para. 243.

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

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

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

1.2.3 Armed groups

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

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

40 *Ibid*.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1.2.4 Companies

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1.3 Implications for strategies to address resource-related armed conflicts

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1.4 Definition of terms used in this book

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1.5 AIM OF THE BOOK

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

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

78 Kimberley Process Certification Scheme, Section I.

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

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

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

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

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

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

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

1.6 Structure of the book

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1.7 The approach to international law adopted in this book

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

1.7.1 Treaties and treaty interpretation

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1.7.2 Customary international law

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

99 *Ibid*.

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

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

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

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

1.7.3 Soft law

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1.7.4 Binding acts of international organizations: UN Security Council Resolutions

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

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

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

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

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

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

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

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

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

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

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

1.7.5 Principles of international law

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

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

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

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

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

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

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

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

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

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

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

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