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

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## 5 | The role of international human rights and environmental law in situations of armed conflict

### 5.1 INTRODUCTORY REMARKS

Pursuant to the principle of permanent sovereignty over natural resources, States and peoples have the right to exploit their natural resources within the limits set by international law, including limits set by international human rights and environmental law. International human rights law formulates as a minimum obligation that “[i]n no case may a people be deprived of its own means of existence”.<sup>1</sup> In addition, both international human rights and environmental law formulate rights relating to public participation in decision making. Furthermore, international environmental law formulates several obligations of care with regard to the use of natural resources. These include an obligation to conserve and sustainably use particular natural resources that are considered important to several States or to the international community as a whole, including biological diversity, international watercourses, wetlands of international importance, threatened species and natural heritage.<sup>2</sup>

These obligations are not only relevant for States exploiting their own natural resources, but also for occupants. Although the rights and obligations of occupants are primarily regulated through international humanitarian law, it can be argued that international human rights and environmental law constitute additional sources of obligations for them because of the special responsibility of occupants as *de facto* authorities in occupied territory. This is also explicitly provided in Article 43 of the 1907 Hague Conventions, which stipulates that occupants must respect the laws in force in occupied territory unless they are “absolutely prevented” from doing so.

However, it is generally acknowledged that the outbreak of an armed conflict may alter the extent to which obligations under international law have to be fulfilled. The principal question posed in this chapter is therefore: to what

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1 See the identical Articles 1(2) of the ICESCR and the ICCPR, discussed in Chapter 1 of this study.

2 Relevant obligations can be inferred from the following treaties: the 1992 Convention on Biological Diversity, the 1997 UN Convention on the Law of the Non-Navigational Uses of International Watercourses, the 1971 Convention on Wetlands of International Importance Especially as Waterfowl Habitat, the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora, the 1979 Convention on the Conservation of Migratory Species of Wild Animals and the 1972 Convention for the Protection of the World Cultural and Natural Heritage. Also see Chapter 4 of this study.

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

The effects of armed conflict on treaties constitute a longstanding issue, which has not yet been fully resolved. The *Institut de Droit International* (IDI) issued a first set of draft articles dealing with the matter as early as 1912, followed by a second set in 1985.<sup>3</sup> Despite the early work of the IDI in this respect, the 1969 Vienna Convention on the Law of Treaties dodges the issue. Article 73 of the Vienna Convention stipulates that “[t]he provisions of the present Convention shall not prejudice any question that may arise in regard to a treaty [...] from the outbreak of hostilities between States”.

During the drafting process of the Vienna Convention, the International Law Commission (ILC) took – in the words of Anthony Aust – an “ostrich-like” position by arguing that the outbreak of hostilities between States should be considered as an “entirely abnormal condition”, which should not be regulated in a treaty dealing with “the general rules of international law applicable in the normal relations between states”.<sup>4</sup> Indeed, the reports of the Special Rapporteurs on the law of treaties Gerald Fitzmaurice and Humphrey Waldock both repeatedly emphasise that the effect of armed conflict on treaties raises special issues which should be addressed in a separate study.<sup>5</sup>

In 2004, the ILC finally decided to include the topic in its long-term programme of work, a decision that was endorsed by the UN General Assembly.<sup>6</sup> It led to the drafting of eighteen articles on the effects of armed conflict on treaties. These draft articles were adopted at the sixty-third session of the International Law Commission in 2011.<sup>7</sup> The UN General Assembly subsequently took note of the draft articles and decided to consider the form to be given to the articles at its session in 2014.<sup>8</sup>

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3 See *Règlement Concernant les Effets de la Guerre Sur les Traités*, Christiania (1912); and *The Effects of Armed Conflicts on Treaties*, Helsinki (1985).

4 A. Aust, *Modern Treaty Law and Practice*, Second edition, Cambridge: Cambridge University Press (2007), p. 308.

5 See the Second Report on the Law of Treaties of the Special Rapporteur, Sir Humphrey Waldock, *UN Doc. A/CN.4/156* and Add.1-3, Yearbook of the International Law Commission 1957, Vol. II, p. 79; and the Second Report on the Law of Treaties of the Special Rapporteur, Sir Gerald Fitzmaurice, *UN Doc. A/CN.4/107*, Yearbook of the International Law Commission 1957 Vol. II, p. 30.

6 See UN General Assembly Resolution 59/41 of 2 December 2004 on the Report of the International Law Commission on the work of its fifty-sixth session, para. 5.

7 Report of the International Law Commission on the work of its sixty-third session, *UN Doc. A/66/10* (2011), paras. 89-101.

8 See UN General Assembly Resolution 66/99 of 9 December 2011, paras. 3 and 4. The draft articles are included in the provisional agenda of the General Assembly's sixty-ninth session, to be held in 2014.

The draft ILC articles on the effects of armed conflict on treaties are clearly based on earlier work of the ILC, especially on its work in relation to the law on treaties and the law on state responsibility. The draft articles mirror several of the provisions of the Vienna Convention on the Law of Treaties, as well as the ILC Articles on the Responsibility of States for Internationally Wrongful Conduct, also known as the ILC Articles on State Responsibility. The close connection established by the ILC between its new draft articles on the effects of armed conflict on treaties and its earlier work considerably strengthens the authority of the draft articles and might prove conducive to their acceptance by States.

One innovative feature of the ILC draft articles is that they formulate the basic principle that the outbreak of an armed conflict does not *ipso facto* suspend or terminate the operation of treaties in force either between the parties to an armed conflict themselves or between parties to the conflict and third States. More specifically, the treaty relations between a belligerent State on the one hand, and third states on the other, continue to be governed by the law of peace, supplemented by the law of neutrality in international armed conflict.<sup>9</sup> Thus as a matter of principle, States involved in an armed conflict – whether international or internal<sup>10</sup> – remain under a duty to abide by their

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9 See, *inter alia*, M. Bothe; C. Bruch; J. Diamond; and D. Jensen, 'International Law Protecting the Environment During Armed Conflict: Gaps and Opportunities', *International Review of the Red Cross*, Vol. 92, No. 879 (2010), p. 581; E.V. Koppe, *The Use of Nuclear Weapons and the Protection of the Environment During International Armed Conflict*, Oxford: Hart Publishing, p. 336. Specifically on the law of neutrality, which is based on a duty of non-participation and impartiality for the neutral State as well as a right not to be adversely affected by the armed conflict, see M. Bothe, 'Neutrality, Concept and General Rules', in R. Wolfrum (ed.), *Encyclopedia of Public International Law*, Max Planck Institute for Comparative Public Law and International Law, Oxford: Oxford University Press (2012), Vol. VII, pp. 617-634; P. Hostettler, O. Danai, 'Neutrality in Land Warfare', in R. Wolfrum (ed.), *Encyclopedia of Public International Law*, Max Planck Institute for Comparative Public Law and International Law, Oxford: Oxford University Press (2012), Vol. VII, pp. 638-643, para. 1; L. Oppenheim, *International Law: A Treatise*, Vol. II, *Disputes, War and Neutrality*, seventh edition, edited By H. Lauterpacht, London/New York/Toronto: Longmans, Green and Co (1952); and E. Chadwick, *Traditional Neutrality Revisited: Law, Theory and Case Studies*, The Hague: Kluwer Law International (2002). Of course, the general principle of the continued applicability of treaty relations between a State involved in armed conflict and third States does not imply that these treaty relations remain unaffected in all circumstances. The following section discusses the suspension of treaties during armed conflict as well as circumstances precluding the wrongfulness of a State's acts.

10 A remarkable novelty of the ILC draft articles on the effects of armed conflict on treaties – as compared to those of IDI – is that these not only cover international armed conflict, but also internal armed conflicts in which government authorities are involved. Compare Article 1 of the Helsinki Resolution of the *Institut de Droit International* with Article 2 of the draft articles of the International Law Commission, *UN Doc. A/CN.4/L.777* of 11 May 2011 on the Effects of Armed Conflicts on Treaties: Titles and Texts of the Draft Articles on the Effects of Armed Conflicts on Treaties Adopted by the Drafting Committee on Second Reading. It should be noted that the ILC draft articles exclude armed conflicts between non-state armed groups without the involvement of government forces. This restriction

treaty obligations with regard to third States. Moreover, the articles formulate the principle that even between belligerent States *inter se*, whose relations are of course primarily regulated by international humanitarian law, the operation of treaties is considered not to be *ipso facto* terminated or suspended upon the outbreak of armed conflict.<sup>11</sup>

This chapter examines the implications of the basic principle formulated by the ILC for the legal framework governing the management and protection of natural resources during armed conflict. The ILC draft articles on the effects of armed conflict on treaties serve as a guideline throughout this chapter. There are two specific reasons for taking the ILC articles as a point of reference. In the first place, the ILC is a committee set up by the UN General Assembly pursuant to Article 13 of the UN Charter with the specific mandate to promote “the progressive development of international law and its codification”.<sup>12</sup> In accordance with its mandate, the ILC has been engaged in the preparation of a number of “draft articles”, some of which have subsequently been adopted by States in the form of treaties. The 1969 Vienna Convention on the Law of Treaties is a relevant example. Others, such as the ILC articles on State responsibility, are directly relied on by States and international courts, despite the fact that the articles are not contained in a legally binding document.

The second reason for taking the articles on the effects of armed conflict as a point of reference relates to the working method of the ILC, which is characterised by a constant dialogue with governments throughout the drafting process and which includes an extensive consideration of State practice. The drafting process of ILC articles – and in particular the views expressed by States with regard to the draft articles – therefore offers important insights into the process of customary international law making.

Section 2 examines the outbreak of armed conflict as grounds for the termination or suspension of treaties. Section 3 then takes a closer look at the general rules on the termination and suspension of treaties, codified in the Vienna Convention on the Law of Treaties. Section 4 examines circumstances precluding wrongfulness under the law of State responsibility for the non-

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relates to the scope of the draft articles as specified in draft Article 3, *i.e.*, that the articles apply only to situations in which at least one State party to a treaty is also a party to the conflict. See draft Article 3 and the first report on the effects of armed conflict on treaties prepared by Special Rapporteur Mr. Lucius Caflisch, *UN Doc. A/CN.4/627* of 22 March 2010, para. 21.

- 11 See, *e.g.*, Lassa Oppenheim, who had already declared in 1912 that “the opinion is pretty general that war by no means annuls every treaty”. See L. Oppenheim, *International Law: A Treatise*, Vol. II, *War and Neutrality*, second edition, New York/Bombay/Calcutta: Longmans, Green and Co. (1912), p. 129. Also see C. Greenwood, ‘Scope of Application of Humanitarian Law’, in D. Fleck, (ed.), *The Handbook of International Humanitarian Law*, Second Edition, Oxford: Oxford University Press (2008), p. 73; and A. Aust, *Modern Treaty Law and Practice*, Second edition, Cambridge: Cambridge University Press (2007), p. 310.
- 12 Statute of the International Law Commission, UN General Assembly Resolution 174 (II) of 21 November 1947, last amended by resolution 36/39 of 18 November 1981, Article 1.

performance of treaty obligations. Section 5 assesses the effects of armed conflict on obligations under customary international law. Finally, section 6 evaluates the role of international human rights and environmental law for the legal regime regarding the exploitation of natural resources in situations of armed conflict.

## 5.2 THE OUTBREAK OF ARMED CONFLICT AS GROUNDS FOR THE TERMINATION OR SUSPENSION OF TREATIES

This section assesses the outbreak of armed conflict as autonomous grounds for the termination or suspension of the operation of treaties. It first assesses the general rules formulated in the ILC draft articles and then examines the effects of armed conflict on human rights and environmental treaties specifically, looking both at the rules formulated in the ILC draft articles and at relevant case law.

### 5.2.1 General principles concerning the effects of armed conflict on treaties

In order to assess the precise effects of armed conflict on the applicability of individual treaties, the ILC draft articles formulate guidelines on the susceptibility of treaties to suspension, withdrawal or termination as a consequence of the outbreak of an armed conflict.<sup>13</sup> According to Article 4 of the ILC draft Articles, reference should first be made to the provisions of the relevant treaty. It states that “where a treaty itself contains provisions on its operation in situations of armed conflict, those provisions shall apply”. In this way, the ILC draft Articles follow the system set out in the 1969 Vienna Convention on the Law of Treaties, which determines that the termination, withdrawal from or suspension of the operation of a treaty may take place “in conformity with the provisions of the treaty”.<sup>14</sup>

Secondly, if the treaty does not contain an express provision on its operation, Article 5 of the ILC draft Articles prescribes that recourse must be made to the rules of international law on treaty interpretation in order to determine whether the treaty is susceptible to termination, withdrawal or suspension

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13 This may be considered one of the most innovative features of the ILC draft Articles on the Effects of Armed Conflict on Treaties, since it breaks away from the traditional approach consisting of a negative assumption that treaty relations will be discontinued during armed conflict.

14 See Article 54 of the 1969 Vienna Convention on the Law of Treaties (23 May 1969, 1155 U.N.T.S. 331) on termination and withdrawal and Article 57 on suspension.

in the event of an armed conflict.<sup>15</sup> Thus the text of the provisions should be seen in context and in the light of the object and purpose of the treaty.<sup>16</sup>

If the treaty itself does not provide any indication of its susceptibility to termination, withdrawal or suspension in the event of an armed conflict, recourse should be made to Article 6 of the draft Articles. This provision determines that regard shall be had to external factors indicating the susceptibility of a treaty to termination, withdrawal or suspension in the event of an armed conflict, including the nature of the treaty – in particular its subject matter, its object and purpose, its content and the number of parties to the treaty – as well as the characteristics of the armed conflict, such as its territorial extent, its scale and intensity, its duration, and, in the case of a non-inter-national armed conflict, the degree of outside involvement.<sup>17</sup>

This provision should be read together with Article 7, and the annex containing an indicative list of treaties “the subject matter of which involves an implication that they continue in operation, in whole or in part, during armed conflict”. These treaties include international human rights and environmental treaties, but also treaties which may cover these subject-matters, namely

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15 This refers to the customary rules on treaty interpretation. Although these rules have been codified in Articles 31 and 32 of the Vienna Convention on the Law of Treaties, the ILC preferred to include a general reference to the customary rules in the draft articles rather than a specific reference to the Vienna Convention. The reason for including such a general reference is twofold. First of all, it is intended to ensure that the provision also addresses those States that are not a party to the Vienna Convention. Secondly, it is meant as a concession to the committee members favouring a subjective approach to the question of continued applicability of treaties, focusing on the intention of the parties to the treaty rather than on the – objective – question whether the treaty is compatible with the situation of armed conflict. See the Effects of Armed Conflicts on Treaties, Statement of the Chairman of the Drafting Committee of 17 May 2011, pp. 9-10. For the customary international law status of these provisions, see, *inter alia*, the judgment of the International Court of Justice in *Oil Platforms* (Islamic Republic of Iran v. United States of America), Judgment of 6 November 2003, *I.C.J. Reports 2003*, p. 161, para. 41, in which the Court refers to “the general rules of treaty interpretation, as reflected in the 1969 Vienna Convention on the Law of Treaties”. For references to other ICJ cases confirming the customary international law status of these provisions, see M.E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties*, Leiden/Boston: Martinus Nijhoff Publishers (2009), p. 440, note 121.

16 Compare Article 31 of the Vienna Convention on the Law of Treaties. For a discussion of the rules on interpretation, see *inter alia* R.K. Gardiner, *Treaty Interpretation*, Oxford: Oxford University Press (2008); and U. Linderfalk, *On the Interpretation of Treaties: The Modern International Law as Expressed in the 1969 Vienna Convention on the Law of Treaties*, Law and Philosophy Library, Vol. 83, Dordrecht: Springer (2007).

17 The Commentary to the draft articles indicates that recourse to Article 6 may be made only when interpretation under Article 5 has not provided a conclusive answer. See the Statement of the Chairman of the Drafting Committee on the Effects of Armed Conflict on Treaties of 17 May 2011, p. 11. The present author expresses serious doubts with regard to this approach. Several of the factors mentioned in Article 6 are already part of the interpretation exercise under Articles 31 and 32 of the Vienna Convention to which Article 5 of the draft articles refers, including the subject matter of the treaty, its object and purpose and its content.



treaties declaring, creating or regulating a permanent regime or status and multilateral law-making treaties.<sup>18</sup> It is ultimately the subject-matter of the treaty which determines to what extent a treaty continues to apply during armed conflict. Special Rapporteur Lucius Caflisch indicates that “the survival of a treaty belonging to a category included in the list may be limited to only some of its provisions”.<sup>19</sup> This implies that parties to an armed conflict must carefully consider to what extent they must continue to respect their obligations under a particular treaty.

Although the list of treaties included in Article 7 is merely indicative and has also met with some criticism,<sup>20</sup> the inclusion in the list of international human rights treaties and environmental treaties, as well as categories which may cover these subject-matters, may be interpreted as a strong presumption in favour of the continued applicability of these types of treaties, in whole or in part, during an armed conflict. The following subsections examine the question of the continued applicability of these types of treaties in more detail.

### 5.2.2 Human rights instruments

This section discusses two issues. The first concerns the effects of armed conflict on human rights instruments in general, with a particular emphasis on the effects of armed conflict on the rights protected under the ICESCR and the ICCPR. The second part discusses the implications of this general framework for the right of a people not to be deprived of its means of subsistence, while

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18 In this regard, see the comments made by Switzerland, arguing that international environmental treaties may be said to fall within the category of multilateral law-making treaties. See *Effects of Armed Conflict on Treaties*, Comments and information received from Governments, *UN Doc. A/CN.4/622*, 15 March 2010, comments concerning draft Article 5 and its annex. For a study of the effects of armed conflict on international environmental agreements in particular, see S. Vöneky, ‘A New Shield for the Environment: Peacetime Treaties as Legal Restraints of Wartime Damage’, *Review of European Community & International Environmental Law* 9 (1) 2000, pp. 20–32.

19 International Law Commission, First report on the effects of armed conflicts on treaties, by Mr. Lucius Caflisch, Special Rapporteur, *UN Doc. A/CN.4/627* of 22 March 2010, para. 69.

20 For comments by governments in respect of the list, see *Effects of Armed Conflict on Treaties*, Comments and information received from Governments, *UN Doc. A/CN.4/622*, 15 March 2010, comments concerning draft Article 5 and its annex; and *UN Doc. A/C.6/60/SR.20* of 29 November 2005, para. 1 for critical remarks made by the United Kingdom in respect of the inclusion of international environmental treaties. See also the commentary of the United States in the Sixth Committee of the General Assembly: “Such a categorization of treaties was problematic, since treaties did not automatically fall into one of several categories. [...] It would be more useful, for the guidance of States, to enumerate the factors that might lead to the conclusion that a treaty or some of its provisions should continue or should be suspended or terminated in the event of armed conflict”. See *UN Doc. A/C.6/60/SR.2* of 29 November 2005, para. 34.

the third part focuses on rights relating to public participation in decision-making.

*General remarks concerning the effects of armed conflict on human rights instruments*  
The ILC draft articles on the effects of armed conflict suggest that human rights treaties continue to apply during armed conflict. This is supported first of all in the preamble of Additional Protocol II, which recalls that “international instruments relating to human rights offer a basic protection to the human person”. The legal effect of armed conflict on the operation of international human rights treaties has also been dealt with extensively in the case law of international tribunals, in particular in the case law of the International Court of Justice.

With regard to the operation of the International Covenant on Civil and Political Rights (ICCPR), the ICJ made a distinction between the derogable and non-derogable rights listed in the Convention.<sup>21</sup> In its *Nuclear Weapons Advisory Opinion*, the Court observed that the protection of the ICCPR “does not cease in times of war, except by operation of Article 4 of the Covenant whereby certain provisions may be derogated from in a time of national emergency”.<sup>22</sup>

In the *Nuclear Weapons Advisory Opinion*, the Court also commented on the relationship between international human rights law and international humanitarian law. In this respect it should be remembered that both international humanitarian law and international human rights law provide protection to human beings. However, they do so in very different ways. The primary aim of international humanitarian law is to regulate the horizontal relationship between parties to an armed conflict, and in doing so, to prevent unnecessary suffering for those not directly involved in the armed conflict.

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21 Article 4 (1) of the ICCPR permits States to derogate from their obligations under the Covenant “[i]n time of public emergency” – which may include an armed conflict. See General Comment No. 29 of the Human Rights Committee on Art. 4 (Derogations during a State of Emergency), UN Doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001. It must be noted that derogation and suspension, strictly speaking, have different legal effects. Where suspension temporarily sets aside the legal obligation, derogation does not affect the binding nature of the legal obligation as such. In the former case, a State is completely exempted from compliance with the legal obligation, while in the latter case it will have to justify non-compliance for each individual case. However, it may be argued that when a treaty provides for derogation from its provisions in situations of armed conflict, this must be interpreted as a strong indication against the susceptibility of the treaty to suspension in these particular circumstances. This conclusion is supported by the ILC in its commentary to the draft articles, which state that “the competence to derogate “in time of war or other public emergency threatening the life of the nation” certainly provides evidence that an armed conflict as such may not result in suspension or termination”. See Draft articles on the effects of armed conflicts on treaties, with commentaries, *Yearbook of the International Law Commission* (2011), Vol. II, Part Two, para. 50. Therefore, this section focuses on derogation rather than suspension of human rights treaties.

22 International Court of Justice, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, *I.C.J. Reports* 1996, para. 25.

On the other hand, international human rights law regulates the vertical relationship between governmental authorities and the persons falling within their jurisdiction.

In this particular case, the Court was confronted with the application of a right from which no derogation is permitted during armed conflict under Article 4 of the ICCPR, *i.e.*, the right to life. The Court determined that:

“the right not arbitrarily to be deprived of one’s life applies also in hostilities. The test of what is an arbitrary deprivation of life, however, then falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict which is designed to regulate the conduct of hostilities. Thus whether a particular loss of life, through the use of a certain weapon in warfare, is to be considered an arbitrary deprivation of life contrary to Article 6 of the Covenant, can only be decided by reference to the law applicable in armed conflict and not deduced from the terms of the Covenant itself”.<sup>23</sup>

It can be concluded from this case that – whenever obligations under human rights law are in conflict with obligations under international humanitarian law in situations of armed conflict – the relevant obligations under human rights law must be interpreted in the light of concurring rights or obligations under international humanitarian law.

In its *Advisory Opinion on the Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, the Court based its views on its previous opinion in *Nuclear Weapons* and considered that there are three possible scenarios with respect to the relations between international human rights law and international humanitarian law: international humanitarian law is exclusively applicable, international human rights law is exclusively applicable, or both these branches of international law are concurrently applicable.<sup>24</sup> The Court further extended the protection of human rights instruments, including

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<sup>23</sup> *Ibid.*

<sup>24</sup> International Court of Justice, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion of 9 July 2004, *I.C.J. Reports 2004*, p. 136, para. 106. Also see E.V. Koppe, *The Use of Nuclear Weapons and the Protection of the Environment During International Armed Conflict*, *Studies in International Law*, Vol. 18, Oxford, Hart (2008), p. 347, who distinguishes a fourth situation, namely a situation in which neither international human rights law nor international humanitarian law would be applicable. The present author doubts whether such a situation would be possible, at least with regard to the rights protected under the ICCPR, because the possibility to derogate from particular human rights in situations of public emergency under this convention – including situations of internal disturbances not amounting to armed conflict – does not render the rights as such completely inoperative. After all, Article 4 (1) determines that the provisions may only be derogated from “to the extent strictly required by the exigencies of the situation”. In this respect also see: Minimum humanitarian standards, Analytical report of the Secretary-General submitted pursuant to Commission on Human Rights resolution 1997/21, *UN Doc. E/CN.4/1998/87*, 5 January 1998, para. 54.

the ICCPR and the International Covenant on Economic, Social and Cultural Rights (ICESCR), to situations of occupation.<sup>25</sup>

The Court confirmed its earlier case law in its judgment in the *Case concerning Armed Activities on the Territory of the Congo*, when it concluded that “both branches of international law, namely international human rights law and international humanitarian law, would have to be taken into consideration” in situations of armed conflict and that “international human rights instruments are applicable ‘in respect of acts done by a State in the exercise of its jurisdiction outside its own territory’, particularly in occupied territories”.<sup>26</sup>

In addition to the case law of the International Court of Justice, several judgments of regional human rights courts have dealt with the application of human rights to conflict situations.<sup>27</sup> First, in its order for provisional measures against Libya issued during the internal conflict that broke out in February 2011, the newly set-up African Court on Human and Peoples’ Rights ordered the Gaddafi regime to “immediately refrain from any action that would result in loss of life or violation of physical integrity of persons, which could be a breach of the provisions of the Charter or of other international human rights instruments to which it is a party”.<sup>28</sup> Similarly, the Inter-American Court of Human Rights consistently applies the Inter-American Convention on Human Rights in situations of internal armed conflict.<sup>29</sup> Finally, the European Court of Human Rights has also applied the rights protected under the European Convention on Human Rights in conflict situations, in particular in situations of internal armed conflict and occupation.<sup>30</sup>

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25 International Court of Justice, Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion of 9 July 2004, *I.C.J. Reports 2004*, p. 136, paras. 111-112.

26 International Court of Justice, Case concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Judgment of 19 December 2005, *I.C.J. Reports 2005*, p. 168, para. 216. It is interesting to note that, by applying the ICCPR to situations of occupation, the International Court of Justice explicitly departs from the original intentions of the parties to the ICCPR. See on this M.J. Dennis, ‘Application of Human Rights Treaties Extraterritorially in Times of Armed Conflict and Military Occupation’, *American Journal of International Law*, Vol. 99, No. 1, pp. 119-141.

27 Where the current section deals with the application of human rights law to situations of armed conflicts by human rights bodies, see C. Byron, ‘A Blurring of the Boundaries: The Application of International Humanitarian Law by Human Rights Bodies’, *Virginia Journal of International Law*, Vol. 47(4) (2006-2007), pp. 839-896 for an analysis of the application of international humanitarian law by human rights bodies.

28 Commission on Human and Peoples’ Rights v. Great Socialist People’s Libyan Arab Jamahiriya, Application No. 004/2011, Order for provisional measures, 25 March 2011.

29 See the judgments of the Inter-American Court of Human Rights in the Las Palmeras Case, Judgment of 4 February 2000 (preliminary objections), para. 32 and the Case of Bámaca-Velasquez v. Guatemala, Judgment of 25 November 2000 (merits), para. 207.

30 For occupation, see, e.g., the judgments of the European Court for Human Rights in *Loizidou v. Turkey* (preliminary objections), Application No. 15318/89, Judgment of 23 March 1995 and in *Al-Skeini and Others v. the UK*, Application No. 55721/07, Judgment of 7 July 2011.

Special reference should be made in this respect to the Chechnya cases before the European Court of Human Rights. Several cases have been filed before the Court against Russia for violations of the European Convention on Human Rights as a result of its military operations in Chechnya, including violations of the right to life.<sup>31</sup> The situation in Chechnya clearly suggests the application of both the common Articles 3 of the 1949 Geneva Conventions and the provisions of the 1977 Additional Protocol II. In other words, the situation can be characterised as an internal armed conflict to which the less stringent rules of international humanitarian law apply when it comes to the protection of human lives. Nevertheless, the European Court directly applied human rights standards to assess the legality of the conduct of the Russian security forces. In this respect, one of the important considerations of the Court was that Russia had not declared a state of “war or other public emergency”, as required under the European Convention for the Protection of Human Rights to derogate from the Convention’s provisions.<sup>32</sup>

It may therefore be concluded that human rights treaties continue to apply during armed conflict. This is particularly the case for situations of internal armed conflict and for situations of occupation. In situations of occupation, the case law of the ICJ shows that in occupied territory an occupant must respect its own obligations arising from treaties to which it is a party, at least those with extraterritorial effects. In addition, international humanitarian law – in particular, Article 43 of the 1907 Hague Regulations – provides that an occupant must respect the laws in force in occupied territory. As argued above, this may include relevant treaties to which the occupied State is a party.

Although the continued applicability of human rights treaties certainly covers the non-derogable rights protected under the ICCPR, a similar conclusion can be drawn with regard to the derogable rights protected under the ICCPR and, to a lesser extent, for economic, social and cultural rights protected under the ICESCR. As regards derogable rights under the ICCPR, it should be noted that derogation is permitted only under exceptional circumstances and to the extent necessary in view of the situation, which implies that derogation must

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31 See, e.g., the following cases before the European Court of Human Rights: *Khashiyev and Akayeva v. Russia*, Applications nos. 57942/00 and 57945/00, Judgment of 24 February 2005; *Isayeva v. Russia*, Application no. 57950/00, Judgment of 24 February 2005; and *Estamirov and Others v. Russia*, Application no. 60272/00, Judgment of 12 October 2006.

32 See e.g. European Court of Human Rights, *Isayeva v. Russia*, Application no. 57950/00, Judgment of 24 February 2005, para. 191: “The Court considers that using this kind of weapon in a populated area, outside wartime and without prior evacuation of the civilians, is impossible to reconcile with the degree of caution expected from a law-enforcement body in a democratic society. No martial law and no state of emergency has been declared in Chechnya, and no derogation has been made under Article 15 of the Convention (see § 133). The operation in question therefore has to be judged against a normal legal background”.

be justified in each individual case.<sup>33</sup> In addition, as the Chechnya cases before the European Court for Human Rights show, a State may only derogate from its obligations under human rights treaties when it explicitly invokes this right. As regards rights protected under the ICESCR, the *Israeli Wall Opinion* confirms their applicability to situations of occupation, depending on the nature and duration of the occupation. From the *Israeli Wall Opinion* it can be inferred that a State exercising jurisdiction over an occupied territory over a longer period of time is considered bound by the provisions of the ICESCR.<sup>34</sup>

It can be concluded from the case law examined in this section that international law contains two basic principles for determining the applicable law in situations where both international humanitarian law and international human rights law contain relevant rules. First, it is necessary to determine whether there is any conflict between the rules of international humanitarian law and human rights law. A conflict occurs when the rules from the two fields of international law point in different directions. This was the case in the *Nuclear Weapons Advisory Opinion*, where the right to life protected under the ICCPR clashed with the rules regarding the use of weapons under international humanitarian law. In these situations, the *lex specialis* principle must be applied, implying that the relevant rules of international humanitarian law prevail over the rules of international human rights law. However, in many cases, rules of international humanitarian and human rights law that apply to similar situations complement each other. In these cases, the principle of harmonious interpretation must be applied, implying that the rules from the two fields

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33 Article 4 (1) of the ICCPR permits States to take measures derogating from their obligations under the Covenant in case of a public emergency which “threatens the life of the nation”, but these measures may not be inconsistent with their other obligations under international law – including under international humanitarian law – and may only be taken “to the extent strictly required by the exigencies of the situation”. See General Comment No. 31 of the Human Rights Committee on the Nature of the General Legal Obligation Imposed on States Parties to the Covenant, UN Doc. CCPR/C/21/Rev.1/Add. 13, 26 May 2004, para. 11 for an express confirmation that the Covenant applies also in situations of armed conflict. Also see General Comment No. 29 of the Human Rights Committee on Art. 4 (Derogations during a State of Emergency), UN Doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001, para. 3, which stipulates that “[t]he Covenant requires that even during an armed conflict measures derogating from the Covenant are allowed only if and to the extent that the situation constitutes a threat to the life of the nation”. See also E.V. Koppe, *The Use of Nuclear Weapons and the Protection of the Environment During International Armed Conflict*, Studies in International Law, Vol. 18, Oxford: Hart (2008), p. 347.

34 Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, *I.C.J. Reports 2004*, Advisory Opinion of 9 July 2004, p. 136, para. 112. For more details, see S. Vité, ‘The Interrelation of the Law of Occupation and Economic, Social and Cultural Rights’, *International Review of the Red Cross*, Vol. 90, No. 871 (2008), pp. 629-651.

of international law should be interpreted in such a way as “to give rise to a single set of compatible obligations”.<sup>35</sup>

*Implications for the prohibition against depriving a people of its means of subsistence*  
As regards the implications of these general rules set out in the case law of international tribunals for the right of peoples not to be deprived of their means of subsistence, as protected under Article 1(2) of the ICESCR and the ICCPR, it should first of all be noted that Article 1 of the ICCPR is not listed in Article 4 among the rights from which no derogation is permitted. Nevertheless, at the same time, the prohibition against depriving peoples of their means of subsistence is framed in absolute terms. The identical Articles 1(2) of the ICESCR and the ICCPR provide that *in no case* may a people be deprived of its means of subsistence. This may be regarded as a strong presumption in favour of its continued applicability during armed conflict.

This presumption is further strengthened by Article 25 of the ICESCR and Article 47 of the ICCPR, which expressly provide that “[n]othing in the present Covenant shall be interpreted as impairing the inherent right of all peoples to enjoy and utilize fully and freely their natural wealth and resources”. It may therefore be concluded that Article 1 has a special status compared to other rights protected under the Covenants.

The special status of the identical Articles 1 of the ICESCR and the ICCPR has been confirmed on several occasions. For example, in its General Comment No. 24 regarding reservations, the Human Rights Committee, stated that a “reservation to article 1 denying peoples the right to determine their own political status and to pursue their economic, social and cultural development, would be incompatible with the object and purpose of the Covenant”.<sup>36</sup> Furthermore, in its commentary on the draft articles on State responsibility the ILC argued that, in relation to the permissibility of countermeasures, the prohibition against depriving peoples of their means of subsistence constitutes a fundamental human right which may not be affected by – otherwise lawful – countermeasures.<sup>37</sup>

The question arises what the special status of Article 1(2) of the 1966 Covenants implies for the application of the provision in situations of armed

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35 International Law Commission, Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law, Yearbook of the International Law Commission, 2006, Vol. II, Part Two, p. 408.

36 Human Rights Committee, General Comment No. 24 on Issues Relating to Reservations Made Upon Ratification or Accession to the Covenant or the Optional Protocols thereto, or in Relation to Declarations under Article 41 of the Covenant, 4 November 1994, *UN Doc. CCPR/C/21/Rev.1/Add.6* (1994), para. 9.

37 Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, UN Doc. A/56/10, *Yearbook of the International Law Commission* 2001, Vol. II, Part Two, p. 132, para. 7.

conflict. Current case law of the International Court of Justice, and in particular the *Nuclear Weapons Advisory Opinion*, indicates that in situations of armed conflict, human rights law must be interpreted with reference to relevant rules of international humanitarian law. However, as explained in the previous section, this is only the case when there is a conflict between the relevant rules of these fields of law, as in the *Nuclear Weapons Advisory Opinion*, where the prohibition against arbitrarily depriving someone of his life under international human rights law was thought to be at odds with the right under international humanitarian law to use weapons that cause civilian casualties. The question is therefore whether there is a conflict between the prohibition against depriving peoples of their means of subsistence and a relevant rule of international humanitarian law. It is only then that the *lex specialis* principle applies.

International humanitarian law does not contain provisions that expressly allow parties to an armed conflict to deprive the civilian population of its means of subsistence. Rather, it contains several rules that are aimed at protecting the civilian population against such practices. As the very least, parties to an armed conflict may not attack, destroy, remove or render useless objects indispensable to the survival of the civilian population. In addition, international humanitarian law contains prohibitions against pillage and the seizure of property outside situations of military necessity that go beyond the prohibition to remove objects indispensable to the civilian population.<sup>38</sup>

It can therefore be argued that the prohibition against depriving peoples of their means of subsistence incorporated in Article 1(2) of the ICESCR and the ICCPR remains fully applicable in situations of armed conflict. The prohibition against attacking, destroying, removing or rendering useless objects indispensable to the survival of the civilian population must be regarded as a minimum guarantee, while the prohibitions against pillage and against seizing property outside situations of military necessity can be regarded as providing complementary protection.

#### *Implications for rights relating to public participation in decision making*

Chapter 3 discussed the right to internal self-determination and argued that this right entails a right for the population of a State and for specific groups within society to participate in decision making regarding exploitation projects. For indigenous peoples this right is inextricably linked to their right to enjoy their culture under Article 27 of the ICCPR. For individual members of the population, it can be argued that their right to be involved in decision making is expressed in the right to participate in the conduct of public affairs under Article 25 of the ICCPR.

As far as Article 27 of the ICCPR is concerned, the Human Rights Committee explicitly stated that “a State may not reserve the right to [...] deny to minor-

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38 These prohibitions are discussed in more detail in the following chapter.



ities the right to enjoy their own culture, profess their own religion, or use their own language".<sup>39</sup> The Committee also noted that Article 27 of the ICCPR is a right "of profound importance".<sup>40</sup> However, the Committee's Comment relates to the subject of treaty reservations, rather than the issue of the suspension of treaties as a result of armed conflict. Moreover, the Comment relates to the right of minorities to enjoy their culture in general and not to the right to public participation arising from this.

Furthermore, none of the provisions cited above provides for a direct right to public participation. Pursuant to Article 1 of the ICCPR, States are required to establish procedures that allow the exercise of the right to internal self-determination in practice, but this obligation does not automatically afford citizens a direct right to participate in decision making. That right cannot be automatically inferred from Article 25 of the ICCPR either, as that provision deals only with the right to participate in the conduct of public affairs in a general way.

Generally speaking, it may be argued that the right of a State to derogate from relevant provisions of the human rights covenants providing indirectly for public participation in decision making, in particular, Articles 1, 25 and 27 of the ICCPR, is only permitted to the extent necessary in view of the situation. The right of a government to limit the exercise of specific rights in situations of armed conflict does not relieve a government of its obligations under human rights law in general. Therefore, arguably a State must respect its obligation to consult local communities regarding projects that directly affect them, but only insofar as this obligation is compatible with the situation of armed conflict.

### 5.2.3 International environmental treaties

The ILC draft articles on the effects of armed conflict on treaties not only formulate a presumption of continued applicability for international human rights instruments, but also for international environmental treaties. The decision of the ILC to include environmental treaties in the indicative list annexed to Article 7 is quite remarkable, as there is hardly any conclusive case law or practice to base this presumption on. The ICJ's *Nuclear Weapons Advisory Opinion* is an exception in this respect. In this opinion, the Court briefly touched upon the legal effects of armed conflict on international environmental treaties.

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39 Human Rights Committee, General Comment No. 24: Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations under Article 41 of the Covenant, 4 November 1994, *CCPR/C/21/Rev.1/Add.6*, para. 8.

40 *Ibid.*, para. 10.

The Court took a cautious view and only addressed the actual question put to it, namely whether the obligations stemming from environmental treaties would preclude the threat or use of nuclear weapons in legitimate self-defence.<sup>41</sup> It argued “that the issue is not whether the treaties relating to the protection of the environment are or are not applicable during an armed conflict, but rather whether the obligations stemming from these treaties were intended to be obligations of total restraint during military conflict”.<sup>42</sup>

The Court also stated that it did “not consider that the treaties in question could have intended to deprive a State of the exercise of its right of self-defence under international law because of its obligations to protect the environment”, but that nevertheless, “States must take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives”. It went on to consider that “respect for the environment is one of the elements that go to assessing whether an action is in conformity with the principles of necessity and proportionality”. Therefore this Opinion implies that environmental standards must be taken into account in the interpretation of the international humanitarian law principles of necessity and proportionality.

A similar approach was adopted by an ICTY Committee established to review the NATO bombing campaign against the Federal Republic of Yugoslavia.<sup>43</sup> This Committee used the international humanitarian law principles of necessity and proportionality in order to assess the legitimacy of the environmental damage inflicted by the NATO bombing campaign in former Yugoslavia.<sup>44</sup> It concluded that the principle of proportionality requires a balancing exercise between the military advantage obtained by an attack on the one hand, and damage to the environment on the other. The Committee stated in this respect that “in order to satisfy the requirement of proportionality, attacks against military targets which are known or can reasonably be assumed to cause grave environmental harm may need to confer

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41 The original request for an Advisory Opinion asked the Court to render its opinion on the following question: “Is the threat or use of nuclear weapons in any circumstance permitted under international law?” See UN General Assembly Resolution 49/75 of 15 December 1994. In this respect, also see the written statement of the United Kingdom to the request for an advisory opinion, which contains a clear exposé of the issues to be considered by the International Court of Justice.

42 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, *I.C.J. Reports* 1996, para. 30.

43 Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, published on 14 June 2000, available through <<http://www.icty.org>> (last consulted on 23 November 2012).

44 The Committee considered in this regard that the environmental effects of the NATO bombing campaign “are best considered from the underlying principles of the law of armed conflict such as necessity and proportionality”. *Ibid.*, para. 15. For a critical assessment of the report on this point, see M. Bothe, ‘The Protection of the Civilian Population and NATO Bombing on Yugoslavia: Comments on a Report to the Prosecutor of the ICTY’, *European Journal of International Law*, Vol. 12, No. 3 (2001), pp. 531-535.

a very substantial military advantage in order to be considered legitimate”.<sup>45</sup> From the perspective of environmental protection, this interpretation of the principle of proportionality at first seems highly unsatisfactory. It implies that, when the stakes are sufficiently high, causing grave harm to the environment can be considered legitimate, as long as this harm does not reach the threshold of “widespread, long-term and severe” damage to the environment. However, at the same time it also implies that the threshold for environmental damage is considerably lower when such a “very substantial military advantage” cannot be anticipated.

Both the *Nuclear Weapons Advisory Opinion*, as well as the report of the ICTY Committee, focus on environmental damage resulting from military attacks. The *Nuclear Weapons Advisory Opinion* addressed the question of permissible environmental damage only against the background of the right to self-defence, which is too narrow a context to deal with this question. Neither the ICJ nor the ICTY Committee addressed the broader question of the continued applicability of international environmental law as such in situations of armed conflict.

This question is highly relevant for the purposes of the present book, as international environmental treaties formulate obligations of care that may qualify the right of States to exploit natural resources in situations of armed conflict. In addition, combined environmental and trade treaties, like CITES, can be instrumental in curbing the trade in conflict resources. In the light of the general presumption of the ILC in favour of the continued applicability of international environmental law in situations of armed conflict and in the absence of specific guidelines arising from the case law of the ICJ or any other authority, the best way to proceed is to take a closer look at the relevant treaties themselves.

Looking at international environmental treaties, it becomes apparent first of all that these treaties rarely contain express provisions on their applicability in situations of armed conflict.<sup>46</sup> CITES, for example, is completely silent on the matter. However, there are a few treaties that do contain provisions which implicitly provide for their applicability – or inapplicability – in situations of armed conflict. The UN Convention on the Law of the Non-Navigational Uses of International Watercourses, which contains a *renvoi* to the relevant rules of international humanitarian law, is an example of this.<sup>47</sup> Article 29 of this Convention provides that “international watercourses and related installations, facilities and other works shall enjoy the protection accorded by

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<sup>45</sup> *Ibid.*, para. 22.

<sup>46</sup> A study by UNEP indicates that around 20 per cent of international environmental treaties provide for their discontinuance during armed conflict, while the remaining 80 per cent either does not provide any answer or is inconclusive on its operation during armed conflict. See UNEP, ‘Protecting the Environment During Armed Conflict: An Inventory and Analysis of International Law’, Nairobi (2009).

<sup>47</sup> UN Convention on the Law of the Non-Navigational Uses of International Watercourses, 21 May 1997, 36 ILM 700 (1997).

the principles and rules of international law applicable in international and non-international armed conflict and shall not be used in violation of those principles and rules".

This provision can be interpreted in two ways. The first interpretation regards this provision as a confirmation of the complementary protection afforded by international humanitarian law to international waterways in situations of armed conflict. It should be noted that international waterways can have strategic relevance to parties to an armed conflict, *e.g.*, as supply lines or transportation routes. In contrast, the second interpretation regards this provision as a confirmation of the inapplicability of the convention in situations of armed conflict in favour of the application of the relevant rules of international humanitarian law.

The Commentary of the ILC, which was responsible for drafting the convention, shows a preference for the first interpretation. The Commentary indicates in this respect that Article 29 "simply serves as a reminder that the principles and rules of international law applicable in international and internal armed conflict contain important provisions concerning international watercourses and related works", but that "[o]f course, the present articles themselves remain in effect even in time of armed conflict".<sup>48</sup>

When there is no conflict between the relevant rules of international humanitarian law and the Watercourses Convention,<sup>49</sup> there is no reason to assume that the latter ceases to apply. The Watercourses Convention contains several obligations that are relevant for the protection of watercourses in situations of peace as well as in situations of armed conflict. For example, Article 5 of the Convention, formulates an obligation for watercourse States to utilise an international watercourse in their territories "in an equitable and reasonable manner". Furthermore, Article 7 stipulates that "[w]atercourse States shall, in utilizing an international watercourse in their territories, take all appropriate measures to prevent the causing of significant harm to other watercourse States". These obligations qualify the right of States parties to the Watercourses Convention to exploit the natural resources of international watercourses, including alluvial diamonds.

The UNESCO World Heritage Convention is another example. It includes a provision on safeguarding of world heritage threatened by armed conflict. Article 11(4) of the UNESCO World Heritage Convention provides for the

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48 International Law Commission, Draft Articles on the Law of the Non-navigational Uses of International Watercourses and Commentaries thereto, *Yearbook of the International Law Commission* 1994, Vol. II, Part Two, p. 131, paras. 1 and 3.

49 A conflict may occur if an international watercourse is used by one of the parties to an armed conflict in a way as to make an effective contribution to an armed conflict, for example, when an international watercourse is used to transport weapons. In these cases, the watercourse can become a military objective, which means that it can be subject to a military attack. See Chapter 6 of this study for the definition of a military objective and the relevant rules that apply to these objectives.

possibility of placing natural heritage threatened by “the outbreak or the threat of an armed conflict” on a list of “World Heritage in Danger”.<sup>50</sup> In this way, the convention implicitly provides for its continued application in conflict situations. Several World Heritage sites in the DR Congo and Côte d’Ivoire have been placed on the list because of threats associated with the conflicts raging in those States.

The continued applicability of this convention in situations of armed conflict also directly affects the obligations of States involved in an international armed conflict. Article 6(3) of the UNESCO World Heritage Convention formulates a prohibition for States against taking “any deliberate measures which might damage directly or indirectly” natural heritage “situated on the territory of other States Parties to this Convention”. In the first place, this means that States may not deliberately launch an attack which could cause damage to World Heritage sites. However, it also implies that States may not exploit natural resources situated in world heritage parks, if such exploitation would cause damage to the natural heritage. This implies, for example, that Uganda and Rwanda may have acted in violation of the convention when they undertook the exploitation of natural resources within and around UNESCO World Heritage sites in the DR Congo, including ivory poaching, logging and mining. These activities have posed a significant threat to the integrity of these biodiversity reserves.<sup>51</sup>

In addition to provisions that indicate the continued applicability of environmental treaties, there may be conflict clauses in these treaties which indicate their operation during armed conflict. Article 22 (1) of the Biodiversity Convention, for example, determines that the provisions of the convention

“shall not affect the rights and obligations of any Contracting Party deriving from any existing international agreement, except where the exercise of those rights and obligations would cause a serious damage or threat to biological diversity”.

It is relevant to note that the 1907 Hague Regulations, the 1949 Geneva Conventions and the 1977 Additional Protocols contain several rights for parties to an armed conflict which could be in conflict with their obligations under the Biodiversity Convention. Examples include the right of parties to an armed conflict to destroy property of the hostile party in cases of military necessity; as well as the right of parties to launch an attack against parts of the environment that constitute military objectives. Article 22 of the Biodiversity Conven-

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50 UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage, 16 November 1972, 1037 UNTS 151.

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

tion makes it clear that the exercise of these rights may not cause a serious damage or threat to biological diversity.<sup>52</sup>

It can be concluded that international environmental conventions generally remain applicable in situations of armed conflict, unless the relevant convention provides otherwise. However, it should be noted that the obligations of the parties to these conventions can change as a result of an armed conflict. Many international environmental conventions contain clauses which are more lenient to States with regard to the implementation of their obligations in view of special circumstances. Article 6 of the 1992 Biodiversity Convention, for example, provides that parties have to implement the general measures for conservation and sustainable use “in accordance with [their] particular conditions and capabilities”. Of course, such clauses could be invoked by parties to the convention in situations of armed conflict as a reason not to implement part of their obligations under the convention.

#### 5.2.4 Conclusions on the outbreak of armed conflict as a ground for the termination or suspension of treaties

This section has shown that the outbreak of an armed conflict does not automatically suspend the obligations for States under relevant international human rights and environmental treaties. However, this does not imply that these two fields of law apply fully in situations of armed conflict. In some cases international human rights law expressly grants States the right to derogate from their obligations under relevant conventions. The ICCPR contains an express provision allowing for the derogation of rights under the convention in cases of national emergency, including armed conflicts. For the purposes of this book, the right of States to derogate from their obligations under the ICCPR includes a right to derogate to a certain extent from provisions that indirectly provide for public participation by the population of a State.

Furthermore, some of the obligations of States under international human rights treaties may be at odds with rights formulated by international humanitarian law for parties to an armed conflict. This can be illustrated with reference to the ICJ’s *Nuclear Weapons Advisory Opinion*, where the International Court of Justice had to consider whether the use of nuclear weapons in situations of armed conflict would constitute a violation of the right to life under international human rights law. In cases where a particular right under international humanitarian law (*i.e.*, the right to cause casualties in situations of armed conflict) is at odds with an obligation under international human

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52 What constitutes “serious damage or threat” can be discerned from the ILC commentary to the Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, discussed in Chapter 4 of this book. Damage to the environment can be considered “serious” when it is substantial in the sense of encompassing “significant” damage.

rights law (*i.e.*, the prohibition against arbitrarily depriving someone of his life), the rules of human rights law must be applied in the light of the relevant provisions of international humanitarian law. No such express conflict was established in relation to the rights that are relevant to this book. In fact, it appears that the relevant prohibitions under international human rights law and international humanitarian law are complementary.

Whether particular obligations of international environmental law continue to apply must be established first of all with reference to the treaties themselves. It is relevant to note that some of the environmental conventions that contain relevant obligations for States with respect to the exploitation of natural resources contain provisions indicating their continued applicability in situations of armed conflict. The most relevant examples are the 1972 UNESCO World Heritage Convention and the 1992 Convention on Biological Diversity. Both conventions contain provisions that in practice qualify the right of States to exploit natural resources in situations of armed conflict, most notably by prohibiting certain forms of environmental damage. These apply in all circumstances.

Therefore it can be concluded that the outbreak of an armed conflict has some effect on the applicability of international human rights law and international environmental law, but that most obligations continue to apply to some extent. The following section discusses other grounds for the termination or suspension of treaties under general international law and assesses their relevance for the applicability of international human rights and environmental law in situations of armed conflict.

### 5.3 TERMINATION OR SUSPENSION OF TREATIES UNDER THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES

Article 18 of the draft ILC articles on the effects of armed conflict on treaties provides that the draft articles “are without prejudice to the termination, withdrawal or suspension of treaties as a consequence of, *inter alia*: (a) a material breach; (b) supervening impossibility of performance; or (c) a fundamental change of circumstances”. The current section addresses all these grounds for the termination, withdrawal or suspension of a treaty which are codified in the 1969 Vienna Convention on the Law of Treaties.

#### 5.3.1 Material breach

A material breach by a party to a treaty entitles the other parties to terminate or suspend the operation of the treaty. Article 60 of the 1969 Vienna Convention on the Law of Treaties defines a material breach as either “a repudiation of the treaty not sanctioned by the present Convention”, meaning *a contrario*

that repudiations that are sanctioned by the Vienna Convention do not constitute material breaches for the purposes of Article 60,<sup>53</sup> or – and this is more relevant to the present book – “the violation of a provision essential to the accomplishment of the object and purpose of the treaty”. A provision is considered “essential” if it is “considered by a party to be essential to the effective execution of the treaty”.<sup>54</sup> This includes provisions that touch directly on the central purposes of the treaty, as well as provisions of an ancillary character.

Article 60 of the 1969 Vienna Convention clearly delineates the circumstances in which parties may invoke material breach as a reason to terminate a treaty or suspend its operation. In the case of multilateral treaties, which are most relevant to the current study, Article 60(2)(a) provides that a treaty may be suspended or terminated by all the parties to the treaty by unanimous agreement, either between themselves and the defaulting State only, or between all the parties. This possibility is of limited relevance for the current study, as it is not directly related to the circumstances regarding the outbreak of an armed conflict.

In addition, Article 60(2)(b) and (c) recognise two circumstances for unilateral responses, which are limited to suspension. A right to suspend the operation of a treaty in case of material breach accrues first to specially affected parties under section 2(b). The pollution of a State’s territory as a result of the violation of an obligation under a multilateral environmental treaty is a relevant example of this.<sup>55</sup>

Secondly, according to Article 60(2)(c) of the Vienna Convention, such a right accrues to other parties “if the treaty is of such a character that a material breach of its provisions by one party radically changes the position of every party with respect to the further performance of its obligations under the treaty”. The drafting history of Article 60 shows that this provision specifically referred to so-called “integral agreements”, i.e., treaties which require the

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53 Bruno Simma and Christian Tams state in this respect that “[t]he reference to repudiation ‘sanctioned by the present Convention’ makes clear that claims of invalidity of treaties pursuant to Articles 46 to 53 of the Convention, or for the suspension and/or termination of treaties pursuant to Articles 54 to 64, do not constitute material breaches. In addition, it follows from Article 73 of the Convention that repudiations justified under the law of State responsibility or the United Nations Charter cannot bring Article 60 into operation either”. See B. Simma & C.J. Tams, ‘Article 60: Termination or Suspension of the Operation of a Treaty as a Consequence of its Breach’, in O. Corten & P. Klein (eds.), *The Vienna Convention on the Law of Treaties: A Commentary*, Oxford: Oxford University Press, Vol. II, p. 1358.

54 International Law Commission, Reports of the International Law Commission on the second part of its seventeenth session and on its eighteenth session, *UN Doc. A/6309/Rev.1*, in *Yearbook of the International Law Commission* (1966), Vol. II, p. 255.

55 See B. Simma & C.J. Tams, ‘Article 60: Termination or Suspension of the Operation of a Treaty as a Consequence of its Breach’, in O. Corten & P. Klein (eds.), *The Vienna Convention on the Law of Treaties: A Commentary*, Oxford: Oxford University Press, Vol. II, pp. 1364-1365 for this and other examples.



interdependent performance of obligations by all parties for the achievement of its objective.<sup>56</sup> Typical examples include disarmament treaties.

For the purposes of the present study, the question arises whether Article 60 allows a party to suspend the operation of the treaty in the case of a breach of *erga omnes* obligations. As argued above, several environmental conventions contain *erga omnes partes* obligations. In this respect, Bruno Simma and Christian Tams argue that, for the purposes of Article 60(2)(b), the fact that all States can be held to have a legal interest in the observation of the treaty does not make these States specially affected in the case of a breach of the treaty.<sup>57</sup> Therefore it can be argued that this provision cannot be invoked by a State as a ground to suspend the operation of environmental treaties.

Article 60(2)(c) raises another question. Can a breach of an *erga omnes* obligation have the effect of “radically changing the position of all other parties with respect to the performance of their obligations under the treaty”? This question could be rephrased to ask whether those environmental treaties that protect common goods can be considered to constitute integral treaties. In general this is not the case, as obligations under international environmental law are usually not interdependent in the sense that the parties have made their performance of the treaty dependent on the performance by other parties, as is the case with regard to disarmament treaties. Therefore it can be argued that Article 60(2)(c) does not provide grounds for the suspension of the operation of such treaties either.

There may, however, be exceptions to this rule, in particular when parties have agreed to achieve particular targets, as in the case of the 1997 Kyoto Protocol to the 1992 UN Framework Convention on Climate Change. This instrument could be considered an integral treaty in the sense of Article 60(2)(c) of the Vienna Convention. However, it should be noted that a material breach of a specialised instrument such as the Kyoto Protocol would not affect the general obligations of States under the Climate Convention itself.

The final issue relates to the suspension of humanitarian treaties. Article 60(5) of the 1969 Vienna Convention provides that a treaty cannot be suspended in the case of a material breach of “provisions relating to the protection of the human person contained in treaties of a humanitarian character”. The term “treaties of a humanitarian character” refers primarily to international humanitarian law treaties. However, arguably, it refers to human rights treaties

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56 *Ibid.*, p. 1365. Simma and Tams define integral treaties as treaties “the objective of which can only be achieved through the interdependent performance of obligations by all parties”.

57 *Ibid.*, p. 1366.

as well.<sup>58</sup> This implies that human rights treaties cannot be suspended in response to a material breach by another party.

In conclusion, it may be argued that Article 60 of the 1969 Vienna Convention formulates the general rule that a treaty may be suspended – and in some cases terminated – in response to a material breach by one of the parties. However, the provision sets out clear and strict rules for the legality of such responses. Most importantly, suspension is mainly open to parties that are specially affected by the breach. For the purposes of the present book, the provision is therefore primarily relevant in situations of international armed conflict. It affords a belligerent State a right to suspend the operation of a treaty in the case of a material breach committed by another State, provided that the former State suffers damage from the breach of obligations. For the purposes of this book, such damage will usually concern extraterritorial damage to the environment.

### 5.3.2 Supervening impossibility of performance

According to Article 61 of the 1969 Vienna Convention, supervening impossibility of performance can be invoked as a reason to terminate, withdraw from or suspend the operation of a treaty if the performance of the treaty has become impossible due to the temporary or permanent disappearance or destruction of an object indispensable for the execution of the treaty.<sup>59</sup>

Thus the impossibility of performance must be directly linked to the disappearance or destruction of an object which was essential for the performance of the treaty.<sup>60</sup> Relevant examples for the purposes of the current book include the destruction of a particular site protected under the Ramsar or the World Heritage Convention or the extinction of a species protected by a wildlife treaty. Therefore the mere loss of control by a State over territory in which the site or species is situated does not meet the requirements of the Vienna Convention.

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58 See the drafting history of Article 60 (5) of the Vienna Convention. United Nations Conference on the Law of Treaties, Official Records, *UN Doc. A/CONF.39/11*, p. 354, para. 12. The Swiss delegate proposing the insertion of Article 60(5) did not only mention the Geneva Conventions, but also “conventions of equal importance concerning the status of refugees, the prevention of slavery, the prohibition of genocide and the protection of human rights in general”.

59 In the case of the temporary disappearance of an object indispensable for the operation of a treaty, a party may only suspend the operation of the treaty.

60 See P. Bodeau-Livinec & J. Morgan-Foster, ‘Article 61: Supervening Impossibility of Performance’, in O. Corten & P. Klein (eds.), *The Vienna Convention on the Law of Treaties: A Commentary*, Oxford: Oxford University Press, Vol. II, p. 1383.

One question that arises is whether the impossibility can be of a juridical nature as well. This possibility was originally rejected by the ILC. According to Fitzmaurice, admitting a juridical impossibility would have the result

“that a country could always obtain release from its treaty obligation by entering into other incompatible obligations. In such cases there is not impossibility in the sense that the treaty cannot be executed, but merely in the sense that it cannot be executed without involving a breach of another treaty”.<sup>61</sup>

In other words, a State may not invoke supervening impossibility of performance as a ground to suspend its obligations under one treaty, for example, a human rights or environmental treaty, because of a perceived conflict with its obligations under another treaty, for example, an international humanitarian law treaty.

However, it is possible to envisage situations in which the juridical impossibility is not linked to a conflict of norms, but to the actual disappearance of a juridical object indispensable to the execution of the treaty. The termination of a legal regime or a radical change in the situation on which the performance of the treaty was based would be an example of this.

This issue was raised by Hungary before the International Court of Justice in the case concerning the *Gabčíkovo-Nagymaros Project*. Hungary argued that “the essential object of the Treaty [...] had permanently disappeared and that the Treaty had thus become impossible to perform”.<sup>62</sup> Although the Court rejected Hungary’s argument in this particular case, it did not as such refute the possibility that the disappearance of a juridical object could fall within the scope of Article 61 of the Vienna Convention.

According to Pierre Bodeau-Livinec and Jordan Morgan-Foster: “What matters is that the impossibility of performance is material, due to the absence of a necessary element for the implementation of the treaty”.<sup>63</sup> Within these strict confines, it does not matter whether the object that disappeared was of a physical or juridical nature.

Furthermore, according to Article 61 (2), a State may not invoke the ground if the impossibility results from its own behaviour, because the impossibility is the result either of a breach by that State of its obligations under the relevant treaty or of its other international law obligations. In the case concerning the *Gabčíkovo-Nagymaros Project*, the International Court of Justice expressly relied

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61 Second Report on the Law of Treaties of the Special Rapporteur, Sir Gerald Fitzmaurice, *UN Doc. A/CN.4/107, Yearbook of the International Law Commission* 1957, Vol. II, p. 50.

62 International Court of Justice, Case concerning the *Gabčíkovo-Nagymaros Project* (Hungary v. Slovakia), Judgment of 25 September 1997, *I.C.J. Reports* 1997, p. 7, para.103.

63 P. Bodeau-Livinec & J. Morgan-Foster, ‘Article 61: Supervening Impossibility of Performance’, in O. Corten & P. Klein (eds.), *The Vienna Convention on the Law of Treaties: A Commentary*, Oxford: Oxford University Press, Vol. II, p. 1391.

on this provision in response to Hungary's claim that the essential object of the treaty between itself and Slovakia had permanently disappeared.<sup>64</sup>

For the purposes of the present book, this limitation implies, *inter alia*, that an aggressor State cannot invoke supervening impossibility of performance as a ground for suspending its obligations under treaties to which it is a party.<sup>65</sup> It also implies that a State that destroys World Heritage sites within its own territory because these protected sites are used by non-state armed groups as a shelter, for example, cannot invoke the justification to terminate or suspend the operation of the UNESCO World Heritage Convention.

Therefore it is clear that Article 61 of the Vienna Convention only in very exceptional circumstances allows States to invoke supervening impossibility of performance as a justification for the termination, withdrawal or suspension of treaty obligations. Indeed, it is hard to imagine situations relevant to this book that would meet the requirements set by this provision.

### 5.3.3 Fundamental change of circumstances

According to Article 62 of the Vienna Convention, the principle of *rebus sic stantibus* or fundamental change of circumstances can be invoked when the circumstances existing at the time that the treaty was concluded constituted an essential basis for the consent of the parties to be bound by the treaty *and* if the effect of the change were radically to transform the extent of obligations still to be performed under the treaty.<sup>66</sup> Furthermore, the fundamental change may not relate to circumstances which the parties to the treaty must have been able to foresee.

According to the ILC, the provision serves as a "safety valve" for "cases in which, failing any agreement, one party may be left powerless under the treaty to obtain any legal relief from outmoded and burdensome provisions".<sup>67</sup>

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64 A claim which was refuted all together by the ICJ. See the International Court of Justice, Case concerning the Gabčíkovo-Nagymaros Project (Hungary v. Slovakia), Judgment of 25 September 1997, *I.C.J. Reports*, 1997, p. 7, para. 103.

65 Compare in this regard Article 15 of the ILC draft Articles on the Effects of Armed Conflict to Treaties, UN Doc. A/CN.4/L.777, 11 May 2011, which prohibits an aggressor State from terminating or withdrawing from a treaty or suspending its operation as a consequence of an armed conflict that results from the act of aggression if the effect would be to the benefit of that State.

66 For an explanation of these conditions, see the Second Report on the Law of Treaties of the Special Rapporteur, Sir Gerald Fitzmaurice, *UN Doc. A/CN.4/107*, Yearbook of the International Law Commission 1957, Vol. II, pp. 32-33.

67 International Law Commission, *Document A/6309/Rev. I: Reports of the International Law Commission on the second part of its seventeenth session and on its eighteenth session*, Yearbook of the International Law Commission (1966), Vol. II, p. 258. See also the Second Report on the Law of Treaties of the Special Rapporteur, Sir Gerald Fitzmaurice, *UN Doc. A/CN.4/*

This was also recognised by the International Court of Justice in the case concerning the *Gabčíkovo-Nagymaros Project*, in which the Court reasoned that “the stability of treaty relations requires that the plea of fundamental change of circumstances be applied only in exceptional cases”.<sup>68</sup> Thus a plea of fundamental change of circumstances can only be considered as a last resort.

The exceptional nature of a justification for the termination, withdrawal from or suspension of the operation of a treaty is reflected in the conditions set by Article 62 of the Vienna Convention. The conditions are cumulative and must be interpreted narrowly. First, the change of circumstances must be objective. It must refer to “external elements independent of the will of the parties”.<sup>69</sup> Furthermore, the change must be *fundamental* in the sense of affecting circumstances which constituted the essential basis of the consent of the parties to be bound by the treaty and in the sense of radically transforming the extent of obligations still to be performed under the treaty.

Therefore, in the first place, the change must alter the core of the agreement between the parties. Secondly, the change must radically transform the obligations under the treaty, meaning that “[t]he change must have increased the burden of the obligations to be executed to the extent of rendering the performance something essentially different from that originally undertaken”.<sup>70</sup>

The last condition for invoking the plea of fundamental change of circumstances is that the change may not relate to circumstances that the parties to the treaty should have been able to foresee. The outbreak of an armed conflict is generally considered to constitute a circumstance that the parties were not able to foresee when they concluded a treaty, which makes the provision relevant to this book. Finally, Article 62 contains a provision similar to Article 61, providing that a party invoking the ground cannot take advantage of its own breach of an obligation.<sup>71</sup>

For the purposes of the current book, the question whether the existence of a peaceful situation in a State “constituted an essential basis of the consent of the parties to be bound by the treaty” and whether the effect of the outbreak of armed conflict radically transforms “the extent of obligations still to be performed under the treaty” are both crucial. In these circumstances, the question whether the outbreak of an armed conflict radically alters the relation-

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107, *Yearbook of the International Law Commission* (1957), Vol. II, p. 32, which already recognized the residual nature of the justification.

68 International Court of Justice, *Gabčíkovo-Nagymaros Project* (Hungary v. Slovakia), Judgment of 25 September 1997, *I.C.J. Reports* 1997, p. 7, para. 104.

69 M.N. Shaw & C. Fournet, ‘Article 62: Fundamental Change of Circumstances’, in O. Corten & P. Klein (eds.), *The Vienna Convention on the Law of Treaties: A Commentary*, Oxford: Oxford University Press, Vol. II, p. 1424.

70 International Court of Justice, *Fisheries Jurisdiction case* (Federal Republic of Germany v. Iceland), Judgment of 2 February 1973, *I.C.J. Reports* 1973, para. 43.

71 Statement in Vienna by the Dutch delegation, reported in M.E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties*, Leiden/Boston: Martinus Nijhoff Publishers (2009), p. 776.

ships between the parties to the treaty is a decisive element.<sup>72</sup> This is not automatically the case. While the outbreak of an armed conflict can certainly affect the capacity of the State to respect its obligations under international and human rights obligations, it does not necessarily affect the relationship between the belligerent State and other States to the treaty. Therefore this ground for the suspension of a treaty is primarily relevant in the relationship between belligerents *inter se*.

#### 5.3.4 Conclusions on the relevance of other grounds for the termination or suspension of treaties in situations of armed conflict

The previous section demonstrated that the outbreak of an armed conflict does not automatically suspend the operation of international human rights or environmental treaties, except where relevant treaties provide otherwise. States wishing to suspend the operation of their obligations under international human rights or environmental law therefore have to resort to the general grounds for the termination or suspension of treaties, codified in the 1969 Vienna Convention on the Law of Treaties.

This section has shown that the primary objective of the system established by the 1969 Vienna Convention for the termination and suspension of treaties is to maintain stability in treaty relations. Therefore States can invoke the grounds for the termination or suspension of treaties only in exceptional circumstances. For the purposes of this book, there are some situations that would allow States to suspend their obligations under relevant treaties.

First, States can suspend their treaty obligations in response to a material breach by another State. However, this possibility exists only for a material breach that directly affects the State concerned. A material breach of a treaty that protects a natural resource shared by two or more States is an example of this. Secondly, supervening impossibility of performance can be invoked if the object of protection of a treaty has disappeared. The destruction of a wetland protected under the Ramsar Convention or a natural heritage site protected under the UNESCO World Heritage Convention are relevant examples. Finally, a fundamental change of circumstances can be invoked if the outbreak of an armed conflict radically alters the relationships between the parties to a treaty and their mutual obligations. A treaty regulating the common use of a shared natural resource, concluded between States that have subsequently engaged in an armed conflict with each other, is an example of this.

It can therefore be concluded that in most cases States remain bound by their obligations under relevant treaties. The main exceptions are international

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72 See M.N. Shaw & C. Fournet, 'Article 62: Fundamental Change of Circumstances', in O. Corten & P. Klein (eds.), *The Vienna Convention on the Law of Treaties: A Commentary*, Oxford: Oxford University Press, Vol. II, p. 1430.

environmental treaties and concern the relationship between belligerent States *inter se*. States must continue to respect their obligations to neutral States. In addition, internal armed conflicts do not generally entail a right for States to suspend their obligations under international environmental or human rights treaties.

#### 5.4 CIRCUMSTANCES PRECLUDING WRONGFULNESS

If a treaty cannot be terminated or suspended on the basis of one of the grounds discussed in the previous section, a State involved in an armed conflict may wish to preclude the wrongfulness of its conduct by invoking one of the circumstances discussed in this section. This argument lasts only as long as the circumstances persist. In the *Gabčíkovo-Nagymaros Project* case, the International Court of Justice emphasised that a State must resume its international obligations as soon as the situation changes.<sup>73</sup>

Circumstances precluding wrongfulness are based on the domain of State responsibility. Their function is not to affect treaty obligations as such, but rather to remove the responsibility of a State for the breach of an obligation. In its commentary to the Articles on State Responsibility, the International Law Commission emphasised that circumstances precluding wrongfulness “act as a shield rather than a sword”.<sup>74</sup>

The Articles on State Responsibility list six circumstances precluding the wrongfulness of an act that would otherwise constitute a breach of the international obligations of the State concerned. These are consent (Article 20), self-defence (Article 21), countermeasures (Article 22), *force majeure* (Article 23), distress (Article 24) and necessity (Article 25). The situations of *force majeure* and necessity are the most relevant for this book.<sup>75</sup>

##### 5.4.1 Force majeure

A situation of *force majeure* is defined in Article 23 of the ILC Articles on State Responsibility as “the occurrence of an irresistible force or of an unforeseen event, beyond the control of the State, making it materially impossible in the circumstances to perform the obligation”. Therefore there are three criteria

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73 International Court of Justice, *Gabčíkovo-Nagymaros Project* (Hungary v. Slovakia), Judgment, *I.C.J. Reports* 1997, p. 7, para. 101.

74 Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, *Yearbook of the International Law Commission* 2001, Vol. II, Part Two, p. 71.

75 Self-defence, as relevant as it is in general to a situation of armed conflict, is left out of consideration. It seems too far-fetched to argue that the exploitation of the natural resources of another State constitutes a lawful measure of self-defence, as required by Article 21 of the Articles on State Responsibility.

that have to be met. First, the situation concerned must be brought about by an irresistible force or an unforeseen event. The outbreak of an armed conflict could qualify as such an “unforeseen event” if it was not easily foreseeable.<sup>76</sup> Secondly, the unforeseen event must be beyond the control of the State concerned. This criterion is not elaborated in any further detail, but it implies that the State must be in a position in which it has no reasonable means at its disposal to alter the situation. Finally, there must be a direct link between the unforeseen event and the material impossibility of performance. The ILC Commentary explicitly mentions the loss of control over a portion of the State’s territory as a result of an insurrection as an example of a material impossibility.<sup>77</sup>

For the purposes of the present study, *force majeure* could therefore be invoked by a State for breaches of its obligations under international human rights and environmental conventions in territories under the control of armed groups. While these situations do not justify the suspension of a treaty based on supervening impossibility of performance, the State can preclude the wrongfulness of its acts by invoking *force majeure*. Of course, as soon as the State regains control over its territory, it must resume its obligations under the relevant conventions.

There is, however, one important additional condition that must be fulfilled for a State to be able to successfully appeal to *force majeure*. Article 61 (2) of the ILC Articles excludes a plea of *force majeure* if the situation of *force majeure* is due, either solely or in combination with other factors, to the conduct of the State invoking it, or if the State has assumed the risk of that situation occurring. A considerable degree of responsibility is therefore required before a State can be assumed to have brought about the situation of *force majeure*. According to the ILC Commentary, the State must either have played a substantial role in bringing about the situation of *force majeure* or it must have explicitly accepted responsibility for the occurrence of a particular risk.<sup>78</sup>

For the purposes of the present study, this would imply, for example, that a government that does not actively attempt to stop the violations of international human rights and environmental treaties in territories under the control of armed groups could be barred from invoking a plea of *force majeure*. Côte d’Ivoire provides a relevant example in this respect. In 2003, a government of national unity was installed in the country as part of the peace process which included the government in control of the south of the country, and the rebel group *Forces Nouvelles* in control of the north of the country. However, the subsequent report of the Panel of Experts on Côte d’Ivoire concluded that the government of national unity’s efforts to redeploy local government ad-

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76 Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, *Yearbook of the International Law Commission* 2001, Vol. II, Part Two, p. 76.

77 *Ibid.*

78 *Ibid.*, p. 78.



ministration in the north of the country were inadequate, as a result of which local warlords were able to remain in control over this part of the territory.<sup>79</sup> This example illustrates that a government can indirectly be responsible for the occurrence of a situation of *force majeure* because of its lax attitude.

#### 5.4.2 Necessity

Necessity arises only in exceptional circumstances where there is an irreconcilable conflict between an essential interest, either of the State invoking necessity or of the international community on the one hand, and a legal obligation on the other.<sup>80</sup>

According to Article 25 of the ILC Articles on State Responsibility, a plea of necessity must meet the following cumulative requirements. First, the breach of an international obligation must be “the only way for the State to safeguard an essential interest against a grave and imminent peril”. The question of what constitutes an “essential interest” of a State must be determined on a case-by-case basis.<sup>81</sup> Obviously the national security of a State would certainly constitute such an interest. For the purposes of the present study, it is interesting to note that the preservation of the environment has expressly been recognized as an essential interest within the scope of this provision.<sup>82</sup>

In addition, the essential interest of the State must be protected against a “grave and imminent peril”. In the *Gabčíkovo-Nagymaros Project* case, the International Court of Justice stated that the terms “grave and imminent peril” imply that a state of necessity cannot exist without a peril “duly established at the relevant point in time”, although a degree of uncertainty about the future is permitted as long as the peril

“appearing in the long term might be held to be “imminent” as soon as it is established, at the relevant point in time, that the realization of that peril, however far off it might be, is not thereby any less certain and inevitable”.<sup>83</sup>

Moreover, the wrongful conduct must be the “only way” open to the State to protect its essential interest. Therefore necessity may not be invoked to

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79 See in particular: Final report of the Group of Experts submitted in accordance with paragraph 11 of Security Council Resolution 1842 (2008) of 9 October 2009, *UN Doc. S/2009/521*, paras. 30-41.

80 Draft articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, *Yearbook of the International Law Commission* 2001, Vol. II, Part Two, p. 80.

81 *Ibid.*, p. 83.

82 International Court of Justice, *Gabčíkovo-Nagymaros Project* (Hungary v. Slovakia), Judgment of 25 September 1997, *I.C.J. Reports* 1997, p. 7, para. 53.

83 *Ibid.*, para. 54.

excuse behaviour for which reasonable, and more proportionate, alternatives were available.

In addition to these requirements, Article 25 of the ILC Articles provides that a State invoking necessity may not “seriously impair an essential interest of the State or States towards which the obligation exists, or of the international community as a whole”. Thus a State may not invoke necessity to justify a breach of obligations relating to the essential interests of other States or of the international community as a whole. Finally, according to Article 25, no appeal can be made to necessity if “the international obligation in question excludes the possibility of invoking necessity” – which is, for example, the case for certain provisions under international humanitarian law – or if “the State has contributed to the situation of necessity”.

These requirements entail two important consequences for the purposes of the present study. First, a State that breaches an international obligation in order to protect the environment against a grave and imminent danger could in principle invoke the plea of necessity. This is because the preservation of the environment has expressly been recognised to constitute an “essential interest”. In contrast, States cannot invoke necessity to justify particular actions that harm the environment for reasons of national security, because such actions would touch upon the essential interests of other States. This is particularly the case when their actions are directed against an object that is subject to a common regime, such as the regimes protecting natural heritage, endangered species or biological diversity.

Therefore it can be concluded that necessity cannot be invoked by States to justify breaches of international environmental agreements which affect the essential interests of the international community, such as the Biodiversity Convention. Nor can it be invoked by States that have contributed to the occurrence of an armed conflict.<sup>84</sup> Furthermore, it is interesting to note that a plea of necessity could in theory be invoked by another State as a justification for taking action to safeguard a natural heritage site against its destruction by the parties to the armed conflict. However, whether such action would include entering the territory of a State involved in an armed conflict without its permission is doubtful, as the State that undertook such an operation would have to demonstrate that there was no other reasonable alternative to prevent the destruction of the natural heritage site.

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84 Compare Koppe, who asserts for the situation of international armed conflict that “[o]nly states using force in self-defense comply with the requirement that the non-performance of their obligations under conventional and customary international law is not the result of their own behavior”. See E.V. Koppe, *The Use of Nuclear Weapons and the Protection of the Environment During International Armed Conflict*, Studies in International Law, Vol. 18, Oxford: Hart (2008), p. 364.

## 5.5 CUSTOMARY INTERNATIONAL LAW

The previous sections discussed the continued applicability of treaty law in situations of armed conflict. However, this book has also identified some principles that apply independently from treaties. Relevant principles of customary international law include the principle of permanent sovereignty over natural resources, the principle of sustainable use of natural resources and the principle of prevention of environmental damage. Arguably, these principles could continue to apply irrespective of the applicability of the treaty in which they are incorporated.<sup>85</sup>

### 5.5.1 The principle of permanent sovereignty over natural resources

The principle of permanent sovereignty is relevant to the situation of armed conflict in several ways. First, it entails an obligation for third States to respect a State's sovereignty over natural resources. This obligation imposes clear limits on what a State involved in an international armed conflict is permitted to do with the natural resources of its adversary. Secondly, the principle of permanent sovereignty entails obligations for the national government with regard to the exploitation of natural resources. One condition inherent in the principle of permanent sovereignty is the obligation to exercise sovereignty over natural resources for national development and the well-being of the people of the State. It is this condition that is of particular relevance for the current book.

The principle of permanent sovereignty over natural resources has been applied to situations of armed conflict on several occasions. First, it was referred to in several UN Security Council resolutions relating to the armed conflict in the DR Congo.<sup>86</sup> Furthermore, in a more general vein, the sovereign right of states to exploit their own natural resources was reaffirmed in a presidential statement of the Security Council concerning the maintenance of international peace and security.<sup>87</sup>

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85 Compare Article 10 (Obligations imposed by international law independently of a treaty) of the ILC draft articles on the effects of armed conflict on treaties and Article 43 of the Vienna Convention on the Law of Treaties.

86 See, e.g., UN Security Council Resolutions 1291 (2000), 1304 (2000), 1332 (2000), 1341 (2001), 1355 (2001), 1493 (2003), and 1533 (2004).

87 Statement by the President of the Security Council made in connection with the Council's consideration of the item entitled Maintenance of International Peace and Security, *UN Doc. S/PRST/2007/22*, 25 June 2007. See in this regard also 'The Plundering of Natural Resources and Destruction of the Environment in Times of Armed Conflict', in W.J.M. van Genugten, M.P. Scharf, and S.E. Radin (ed.), *Criminal Jurisdiction 100 Years after the 1907 Hague Peace Conference*, Proceedings of the 2007 Hague Joint Conference on Contemporary Issues of International Law, p. 242 (2009).

In addition, in its resolutions concerning the Israeli occupation of Palestinian territory, the UN General Assembly expressly declared the principle of permanent sovereignty over natural resources to be applicable to the natural resources of territories under occupation. Resolution 66/225 of 29 March 2012, in which the UN General Assembly reaffirms “the principle of the permanent sovereignty of peoples under foreign occupation over their natural resources”<sup>88</sup> is one example.

Similarly, in a report on the implications of the United Nations resolutions on permanent sovereignty over natural resources on the occupied Palestinian and other Arab territories and on the obligations of Israel concerning its conduct in these territories under international law, the UN Secretary-General stated that the principle of permanent sovereignty over natural resources and the law of belligerent occupation “strengthen and reinforce each other”.<sup>89</sup>

The decision of the International Court of Justice in the *Congo-Uganda* case does not appear to be in line with this. In that case, the DR Congo had invoked the principle of permanent sovereignty as a principle relevant to the situation of the illegal exploitation, looting and plundering of natural resources by members of the Ugandan army. After the Court determined that the principle of permanent sovereignty was part of customary international law, it noted that there was nothing in the UNGA resolutions defining the principle of permanent sovereignty to suggest “that they are applicable to the specific situation of looting, pillage and exploitation of certain natural resources by members of the army of a State militarily intervening in another State [...] The Court does not believe that this principle is applicable to this type of situation.”<sup>90</sup>

The precise meaning of the Court’s judgment in this respect remains unclear. Does the Court say that the principle of permanent sovereignty is not applicable at all to the situation of armed conflict or is its inapplicability confined to the specific situation at hand?<sup>91</sup> In this respect, it should be noted that in general the Court does not exclude the applicability of the principle of permanent sovereignty to the situation of armed conflict. Instead, it refers to “this” type of situation. The decision could therefore be determined by the specific circumstances of the case –i.e., that the looting, pillage, and exploitation

88 UN General Assembly Resolution 66/225 on ‘Permanent sovereignty of the Palestinian people in the Occupied Palestinian Territory, including East Jerusalem, and of the Arab population in the occupied Syrian Golan over their natural resources,’ adopted on 29 March 2012.

89 UN Secretary-General, Report on the implications, under international law, of the United Nations resolutions on permanent sovereignty over natural resources, on the occupied Palestinian and other Arab territories and on the obligations of Israel concerning its conduct in these territories, *UN Doc. A/38/265*, 21 June 1983, para. 47.

90 *Congo-Uganda* case, *supra*, note 11 at para. 244.

91 Compare N.J. Schrijver, ‘Natural Resources, Permanent Sovereignty over’, in R. Wolfrum (ed.), *Encyclopedia of Public International Law*, Max Planck Institute for Comparative Public Law and International Law, Oxford: Oxford University Press (2012), para. 18.

were committed by individual members of the Ugandan army in the absence of sufficient evidence of a systematic policy of the Ugandan government aimed at the plunder of the natural resources of the DRC.<sup>92</sup>

Moreover, the Court's decision does not appear to affect the rights and obligations inherent in the principle of permanent sovereignty. This conclusion follows, first of all, from the decision itself. When it comes to determining Uganda's international responsibility, the Court explicitly refers to Article 21 of the 1981 African Charter of Human and Peoples' Rights, which formulates the right of all peoples to freely dispose of their natural resources and, in case of spoliation, formulates a right for a dispossessed people to the lawful recovery of its property, as well as to adequate compensation.<sup>93</sup>

In other words, the Court seems to acknowledge that the right of peoples to freely dispose of their natural resources does impose specific obligations on Uganda as an occupying power, if not on the basis of custom, then at least on the basis of treaty law. Furthermore, in his declaration, Judge Koroma stated that the rights and interests arising from the 1962 Declaration on Permanent Sovereignty over Natural Resources "remain in effect at all times, including during armed conflict and during occupation."<sup>94</sup>

Therefore it can be argued that the principle of permanent sovereignty over natural resources continues to apply in times of armed conflict, both in relation to third States and in relation to a State's own natural resources. Of course, the obligation to exploit natural resources for the well-being of the people does not prohibit a government from using the proceeds of resource exploitation for military expenditure. Fighting rebel groups that undermine State authority can perfectly well be "for the well-being of the people". Nevertheless, the obligation for a government to act for the well-being of the people arguably does entail a general obligation for the government to account for its decisions in this respect.

#### 5.5.2 The environmental principles of sustainable use and prevention of environmental damage

Other principles that are of particular relevance for the exploitation of natural resources in situations of armed conflict are the principles of sustainable use and prevention of environmental damage. Arguably these principles apply both to the exploitation by a State of its own natural resources and in relation to the natural resources of a third State. Despite their relevance for situations of armed conflict, there have not been many references to these principles in

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92 Compare *Ibid.* and P.N. Okowa, 'Natural Resources in Situations of Armed Conflict: Is there a Coherent Framework for Protection?' *International Community Law Review* 9 (2007), p. 2.

93 *Congo-Uganda* case, *supra*, note 11 at para. 245.

94 *Ibid.*, (declaration of Judge Koroma) [emphasis in original].

the practice of UN bodies in relation to specific armed conflicts. The UN Security Council has referred to the concept of sustainability only in a few of its resolutions, mainly with indirect references.<sup>95</sup> Nevertheless, the systematic exploitation of natural resources “with little regard to sustainable [...] practices”, as happened in Liberia under Charles Taylor, is arguably not permitted except in situations of military necessity.<sup>96</sup>

The obligation to prevent damage to the environment of other States has been explicitly applied to situations where a State exercises *de facto* control in another State. Arguably this principle therefore applies in situations of occupation.<sup>97</sup> Moreover, there is no reason why it would cease to apply in the relationship between a belligerent State and third States. In this respect, it should be noted that the law of neutrality even assures the territorial inviolability of neutral States.<sup>98</sup>

One important implication of the obligation to prevent damage to the environment of other States concerns the related obligation to conduct an Environmental Impact Assessment, an obligation which, according to the International Court of Justice in the *Pulp Mills* case, constitutes a “requirement under general international law [...] where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context”.<sup>99</sup> Arguably the obligation to conduct an EIA not only applies when there is a risk of damage to the environment of other States, but also when there is a risk of damage to natural resources or parts of the environment that are important to the larger community of States, even if these natural resources are found entirely within the territory of a single State. Reference can be made to natural resources that are subject to common regimes, such as biological diversity and particular ecosystems and species.

The obligation to conduct an EIA requires States to conduct an assessment of the risks of the project for the environment both before the start of the project and during its exploitation. A situation of armed conflict does not relieve States of this responsibility, especially not for the exploitation projects that are to be conducted in parts of the State territory where no fighting occurs. Moreover, an EIA is a flexible instrument that can be adapted to all circum-

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95 These resolutions relate to armed conflicts in Cambodia and Liberia respectively. For more details, see Chapter 7 of this study.

96 Report of the Panel of Experts on Liberia established pursuant to Security Council Resolution 1343 (2001), paragraph 19, concerning Liberia, *UN Doc. S/2001/1015* of 26 October 2001, para. 33.

97 See the commentary of the ILC on its Draft articles on Prevention of Transboundary Harm from Hazardous Activities, *Yearbook of the International Law Commission*, Vol. II, Part Two (2001), p. 151, para. 12, as discussed in Chapter 4 of this study.

98 E.V. Koppe, *The Use of Nuclear Weapons and the Protection of the Environment During International Armed Conflict*, *Studies in International Law*, Vol. 18, Oxford: Hart (2008), p. 361.

99 International Court of Justice, *Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, *I.C.J. Reports*, 2010, para. 204.

stances. Therefore, the extent to which States have to assess the risks arising from a project will depend on the factual circumstances.

## 5.6 THE ROLE OF INTERNATIONAL HUMAN RIGHTS AND ENVIRONMENTAL LAW IN SITUATIONS OF ARMED CONFLICT

This chapter has examined whether and to what extent States remain bound by international human rights and environmental law when conducting exploitation activities in situations of armed conflict. It argued that the exploitation of natural resources by States as a commercial activity continues to be regulated by the legal framework that applies to the management of natural resources in situations of peace. This implies that States remain bound by their obligations under international human rights and environmental law in situations of armed conflict. There are two exceptions to this basic assumption.

First, as the case law of the International Court of Justice shows, situations of armed conflict are primarily governed by the rules of international humanitarian law. In cases where the relevant rules of international human rights and environmental law clash with this field of international law, there is a presumption that the rules of international humanitarian law prevail. However, in cases where there is no apparent clash between the relevant rules from the different fields of international law, the relevant rules complement each other. As the following chapter will show, international humanitarian law contains only few specialised rules that apply to the management of natural resources. In addition, these rules do not directly conflict with relevant rules of international human rights and environmental law.

The existence of an armed conflict may alter the extent of the obligations to be fulfilled by States under international human rights and environmental law. There are factors that are inherent in international human rights and environmental treaties which have an impact on the performance of their obligations during an armed conflict. For obligations under international human rights law, the principal issue affecting the operation of human rights instruments during an armed conflict concerns the possibility of derogating from the provisions of the treaties. This applies particularly to the ICCPR, which contains an express provision on derogation.

Derogation permits States to deviate from their obligations under human rights treaties in situations of public emergency, including armed conflicts. Derogation is permitted in exceptional circumstances only after a situation of public emergency has been announced. Moreover, derogation does not annul the obligation itself. States have to justify not respecting their obligations in each individual case.

This chapter has argued that the possibility of derogating from particular human rights may have an impact on the rights of individuals and minorities to participate in decision making, but it does not affect the basic prohibition

against depriving a people of their means of subsistence, incorporated in the identical Articles 1(2) of the ICCPR and the ICESCR. This prohibition is framed in absolute terms, which implies that derogation from the prohibition is not permitted under any circumstance.

As far as environmental obligations are concerned, it should be noted that many provisions in environmental treaties are lenient with regard to the implementation of the substantive obligations by States. This leniency can be seen at two levels. First, environmental obligations are generally not executed automatically. The implementation of environmental obligations often requires the formulation of plans and policies at the national level. Examples include the provisions of the Biodiversity Convention relating to the *in situ* (Article 8) and *ex situ* (Article 9) conservation of biological diversity, the provisions in the UNESCO World Heritage Convention on the protection, conservation and preservation of world heritage (in particular, Article 5) and the provisions in the Ramsar Convention on Wetlands on the listing and conservation of wetlands (i.e., Articles 2 and 4).

Secondly, the implementation of obligations under international environmental treaties is often conditional on the respective capabilities of States. Examples include obligations incorporated in the Convention on the Conservation of Migratory Species of Wild Animals, the Biodiversity Convention and the Climate Change Convention, which require implementation only as far as this is possible and appropriate.<sup>100</sup> This implies that States could deviate from these obligations in situations of armed conflict, if their implementation were not possible or appropriate.

However, as a minimum, it can be argued that States cannot act contrary to their core obligations under international environmental treaties. This results from their general obligation to act in good faith with regard to the implementation of their treaty obligations. This not only applies for exploitation activities in inter-state armed conflicts, but also for the exploitation of public natural resources in intra-state conflicts. In both cases, the *rationale* for the continued applicability of international environmental law is based on the need to protect the interests of third States. As argued above, many obligations under international environmental law serve to protect the interests of a larger community of States. The occurrence of an armed conflict does not diminish these obligations.

This chapter also examined the possibilities for States to terminate or suspend the operation of treaties in situations of armed conflict. More in

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<sup>100</sup> See, for example, Article III (4) of the Convention on the Conservation of Migratory Species of Wild Animals, which determined that Parties "shall endeavour [...] where feasible and appropriate; [...] as appropriate...; and to the extent feasible and appropriate...". Similarly, Articles 8 to 11 of the Biodiversity Convention formulate obligations for parties to be implemented "as far as possible and appropriate". Similarly, the principle of common but differentiated responsibilities, expressed in the Climate Change Convention, implies a degree of leniency as well.



particular, it examined three possibilities for suspension: the suspension of a treaty in the case of a material breach of that treaty by another party to the treaty; supervening impossibility of performance; and fundamental change in circumstances. Arguably States can only suspend their treaty obligations in exceptional circumstances. Therefore in most cases States remain bound by their obligations under relevant treaties. The exceptions mainly affect international environmental treaties and concern the relationship between belligerent States *inter se*.

In addition, this chapter examined circumstances precluding the wrongfulness of otherwise illegal conduct. More in particular, it examined *force majeure* and necessity as circumstances that would preclude the wrongfulness of acts of States contrary to their treaty obligations under international human rights and environmental treaties. Most relevant to the current study is the conclusion that a State can invoke *force majeure* for breaches of its obligations under international human rights and environmental conventions in territories under the control of armed groups, but only to the extent that it was factually impossible for the State to prevent the violation of the relevant obligations.

Furthermore, States continue to be bound by their obligations under customary international law in situations of armed conflict. The most relevant example of a customary international law obligation concerns the principle of permanent sovereignty and the inherent condition that a government must exercise permanent sovereignty for national development and the well-being of the population. As a minimum, this implies that a government remains accountable for its use of the proceeds of natural resources exploitation. Another example concerns the obligation to conserve and sustainably use natural resources, as incorporated, *inter alia*, in the Ramsar Convention on the Protection of Wetlands, the UNESCO World Heritage Convention and CITES. Arguably, this principle qualifies the right of States to exploit their natural resources, even in situations of armed conflict.

Another customary international law obligation which continues to apply for States involved in an armed conflict is the obligation to prevent damage to the environment of other States resulting from exploitation activities, including an obligation to conduct an environmental impact assessment when an activity could entail risks for the environment. These obligations continue to be relevant in situations of armed conflict.

In conclusion, it can be argued that international human rights and environmental law provide a basic framework qualifying the right of governments to freely dispose of the State's natural resources in situations of armed conflict. The extent to which these fields of international law can in fact regulate the commercial exploitation of natural resources by governments in situations of armed conflict in a meaningful way depends on a number of factors. This chapter has discussed several of these factors. In a more general vein, it can be argued that the extent to which international human rights and environmental law continue to effectively regulate the management of natural

resources by governments depends on the gravity of the conflict situation, including the measure of control exercised by a government over the State's territory.