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The International Law Commission and the Progressive Development and Codification of Principles of International Environmental Law

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**THE INTERNATIONAL LAW COMMISSION AND THE
PROGRESSIVE DEVELOPMENT AND CODIFICATION OF
PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW**

Nilüfer Oral*

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I. INTRODUCTION

International environmental law is a relatively new field that witnessed tremendous growth beginning in the 1970s. Since then, it has developed into a highly complex field with scientific, technical, and legal dimensions. One of the defining characteristics of international environmental law has been the development of a number of key principles that have been adopted in a mix of soft law and hard law instruments. This article will examine the contribution of the International Law Commission (“ILC” or “the Commission”) to the progressive development of international environmental law and its codification with a focus on principles of international environmental law.

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The ILC, when established in 1948, was provided a broad mandate that placed no limitations on the topics related to international law with a stated preference for public international law.¹ In 2018 the Commission celebrated its 70th anniversary. During these 70 years the Commission developed the foundation for many important treaties and instruments in different areas of international law. During these seven decades, however, the final output of the Commission that directly addresses environmental protection numbers only a handful. Relative to the plethora of international environmental law instruments adopted over the past decades, the contribution of the Commission appears to be quite modest and limited in scope. The Draft Articles on the Law of the Non-navigational Uses of International Watercourses (“International Watercourses Convention”) remains as the sole work of the Commission related to the protection of the environment that has achieved status as a binding international convention.²

This article will begin with a general overview of the key principles important to international environmental law and then then examine the work of the International Law Commission relevant to the protection of the environment and its contribution to the progressive development and codification of environmental law principles. The work of the Commission will be examined in three groups: first, the work on international watercourses and shared natural resources; second, the work of the Commission related to prevention and liability for transboundary harm; and thirdly, the current work of the Commission.

II. KEY PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW

The historical marker for the beginning of modern international environmental law is commonly recognized to be the 1972 United Nations Conference on the Human Environment (“UNCED”) and the adoption of the Stockholm Declaration and Principles.³ The next landmark event for environmental law is the 1992 United Nations Conference on the

¹ The Statute of the International Law Commission article 1 provides that “The International Law Commission shall have for its object the promotion of the progressive development of international law and its codification. 2. The Commission shall concern itself primarily with public international law, but is not precluded from entering the field of private international law.” G.A. Res. 174(II), Statute of the International Law Commission, art. 1 (Nov. 21, 1947) (as amended by subsequent resolutions).

² In 1997, the General Assembly adopted the Convention on the Non-Navigational Uses of International Watercourses. U.N. Convention on the Law of the Non-Navigational Uses of International Watercourses, *adopted* May 21, 1997 36 I.L.M. 700, 700 (entered into force Aug. 17, 2014); *see also* G.A. Res. 51/229 (July 8, 1997).

³ *See generally* U.N. Conference on the Human Environment, *Declaration of the United Nations Conference on the Human Environment* (June 16, 1972).

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Environment and Development (“Earth Summit”).⁴ Key outcomes of the Earth Summit included the Rio Declaration and Principles⁵ and Agenda 21.⁶ In between the 1972 Stockholm Declaration and the 1992 Rio Declaration was the seminal 1987 Brundtland Commission Report on our Common Future, which was instrumental in launching the concept of sustainable development.⁷

The 1972 Stockholm Principles and the 1992 Rio Principles have been influential in shaping international environmental law. Some of these principles reflected customary international law and others were *de lege ferende*.⁸ For example, the principle not to cause transboundary environmental harm (“prevention principle”), best known from the *Trail Smelter Case* arbitration and the *Corfu Channel Case*,⁹ was adopted in Principle 21 of the Stockholm Declaration, Principle 3 of the Rio Declaration, and in the Brundtland Commission report. It is an established principle of international law rooted in the maxim *sic utere tuo ut alienum non laedas* (the duty to exercise one’s rights in ways not to cause harm to others).¹⁰ In its 1996 *Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons*, the International Court of Justice famously declared that “[t]he existence of the general obligation of states to ensure that activities within their jurisdiction and control respect the environment of other states or of areas beyond national control is now part of the corpus of international law relating to the environment,” as stated in numerous other cases.¹¹

In several important international instruments, the principle of prevention is used as a limit to the well-established principle of the sovereign

4 The United Nations Conference on Environment and Development (“UNCED”) was held in Rio de Janeiro, Brazil, on June 3–14 1992. See U.N. Conference on Environment and Development, *Report of the United Nations Conference on Environment and Development*, U.N. Doc. A/CONF.151/26/Rev.1 (June 14, 1992).

5 U.N. Conference on Environment and Development, *supra* note 4, at annex I; see also THE RIO DECLARATION ON THE ENVIRONMENT AND DEVELOPMENT: A COMMENTARY 2 (Jorge E. Vinuales ed., 2015).

6 U.N. Conference on Environment and Development, *supra* note 4, at annex II.

7 See generally World Commission on Environment and Development, *Our Common Future* (Mar. 20, 1987).

8 PHILIPPE SANDS, *PRINCIPLES OF INTERNATIONAL ENVIRONMENTAL LAW* 35–37 (2d ed. 2003).

9 *Corfu Channel* (U.K. v. Alb.) Judgment, 1949 I.C.J. 4 (Apr. 9).

10 SANDS, *supra* note 8, at 249. The principle of *sic utere tuo et alienum non laedas* was the basis of the decision in the *Trail Smelter Case*, which has served as the principal precedent for the international law principle that no state may allow its territory to be used to cause harm to another State’s territory. (U.S./Can.), 3 R.I.A.A. 1905 (1941); see also TRANSBOUNDARY HARM IN INTERNATIONAL LAW: LESSONS FROM THE TRAIL SMELTER ARBITRATION 2–3 (Rebecca M. Bratspies & Russell A. Miller eds., 2006).

11 *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. Rep. 226, 241–42 (July 8).

right to exploit natural resources¹² (e.g., Stockholm Principle 21; Rio Principle 2; Convention on Biological Diversity (“CBD”) article 3; and United Nations Convention on the Law of the Sea (“UNCLOS”) articles 193 and 194).

The principle of cooperation is another recognized fundamental principle of customary international law as reflected in article 1 of the United Nations Charter. It has been applied specifically to the environment by United Nations General Assembly Resolution 3281 on the Charter of Human Rights and Duties of States. As a broad principle it has been recognized as a fundamental principle of international law.¹³ The formulation in Rio Principle 7 requires *inter alia* “global cooperation to *conserve, protect and restore the health and integrity of the Earth’s ecosystem.*”

The intergenerational principle ensures that the environment and its resources are preserved, or held in trust, for present and future generations.¹⁴ It is reflected in Stockholm Declaration Principles 1 and 2, Rio Principle 3, and article 3 of the United Nations Framework on Climate Change. It has been recognized by national courts,¹⁵ and there are a growing number of climate change cases invoking the intergenerational principle.¹⁶

The principle of sustainable development seeks to integrate protection of the environment with the needs of economic development. It was introduced in the 1987 Brundtland Commission Report, *Our Common Future*,¹⁷ and later adopted as Principles 1 and 4 of the 1992 Rio Declaration. The principle of sustainable development was recognized by the International Court of Justice in the *Gabčíkovo-Nagymaros Case*.¹⁸ Whether the principle of sustainable development is part of customary international law remains debated.¹⁹ Regardless, in 2015 the United Nations General Assembly by

¹² See, e.g., G.A. Res. 1803 (XVII), Permanent Sovereignty Over Natural Resources (Dec. 14, 1962).

¹³ See *MOX Plant (Ir. v. U.K.)*, Order of Dec. 3, 2001, 2001 ITLOS Rep. 95, 97; *Land Reclamation by Singapore in and around the Straits of Johor (Malay. v. Sing.)*, 27 R.I.A.A. 133, 137 (Perm. Ct. Arb. 2005).

¹⁴ Edith Brown Weiss, *In Fairness to Future Generations*, 32 ENV'T: SCI. & POL'Y FOR SUSTAINABLE DEV. 7 (1990); Edith Brown Weiss, *Our Rights and Obligations to Future Generations for the Environment*, 84 AM. J. INT'L L. 198 (1990).

¹⁵ The first case brought based on the intergenerational principle was *Oposa v. Factoran*, G.R. No. 101083, 224 S.C.R.A. 792 (July 30, 1993) (Phil.).

¹⁶ See *Hof's-Haag* 9 oktober 2018, ECLI:NL:GHDHA:2018:2591 (Urgenda Foundation/The State of the Netherlands); *Juliana v. United States (Children's Trust)*, 339 F. Supp. 3d 1062, 1070 (D. Or. 2018).

¹⁷ World Commission on Environment and Development, *supra* note 7.

¹⁸ *Gabčíkovo-Nagymaros Project (Hung./Slovk.)*, Judgment, 1997 I.C.J. Rep. 7, 78 (Sept. 25).

¹⁹ Virginia Barral, *Sustainable Development in International Law: Nature and Operation of an Evolutive Legal Norm*, 23 EUR. J. INT'L L. 377, 377 (2012).

consensus adopted the Sustainable Development Goals, which has made environmental protection an integral part of development at multiple levels.²⁰

Another important principle of international environmental law is the precautionary approach, which was adopted under Rio Principle 15²¹ and several major international and regional environmental instruments and national legislation such as: the Vienna Convention for the Protection of the Ozone Layer,²² Montreal Protocol on Substances that Deplete the Ozone Layer,²³ United Nations Framework Convention on Climate Change (“UNFCCC”),²⁴ Convention on Biological Diversity,²⁵ United Nations Fish Stocks Agreement,²⁶ the 1996 Dumping Protocol,²⁷ and several United Nations Environment Programme (“ENEP”) Regional Seas Conventions and protocols.²⁸

²⁰ See G.A. Res. 70/1, Transforming Our World: The 2030 Agenda for Sustainable Development (Sept. 25, 2015).

²¹ Principle 15 provides that “In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.” U.N. Conference on Environment and Development, *Rio Declaration on Environment and Development*, *supra* note 5, at ¶ 15.

²² Vienna Convention for the Protection of the Ozone Layer, *opened for signature* Mar. 22, 1985, 26 I.L.M. 1516 (entered into force May 22, 1985).

²³ Montreal Protocol on Substances That Deplete the Ozone Layer, *opened for signature* Sept. 16, 1987, 1522 U.N.T.S. 3 (entered into force Nov. 1987).

²⁴ United Nations Framework Convention on Climate Change, *opened for signature* May 9, 1992, 1771 U.N.T.S. 107 (entered into force Mar. 21, 1994).

²⁵ Convention on Biological Diversity, *opened for signature* June 5, 1992, 1760 U.N.T.S. 79 (entered into force Dec. 9, 1993).

²⁶ Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks, *opened for signature* Dec. 4, 1995, 34 I.L.M. 1542 (entered into force Dec. 11, 2001).

²⁷ 1996 Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Waste and Other Matter, 1972, *opened for signature* Nov. 7, 1996, 36 I.L.M. 1 (entered into force Mar. 24, 2006).

²⁸ See Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention), *opened for signature* Sep. 22, 1992, 2354 U.N.T.S. 67 (entered into force Mar. 25 1998); Convention for the Protection of the Marine Environment of the North-East Atlantic (OSPAR Convention), *opened for signature* Sept. 1992, 1546 U.N.T.S. 119 (entered into force Mar. 25 1998); Convention for the Protection of the Mediterranean Sea against Pollution, *amended* June 10, 1995 by the Convention for the Protection of the Marine Environment and the Coastal Region of the Mediterranean, 1102 U.N.T.S. 27 (entered into force Jul. 9, 2004); Protocol for the Protection of the Mediterranean Sea against Pollution from Land-Based Sources, *amended* Mar. 7, 1996, (amendment entered into force May 18, 2006); Protocol on the Protection of the Marine Environment of the Black Sea from Land-Based Sources and Activities, *adopted* April 17, 2009 (not in force); The Protocol for the Protection of the Marine and Coastal Environment of the Western Indian Ocean from Land-Based Sources and Activities, *adopted* Mar. 31, 2010 (not in force); Protocol For The Protection Of The Caspian Sea Against Pollution From Land-Based Sources And Activities To The Framework Convention For The Protection Of The Marine Environment Of The Caspian Sea, *adopted* Dec. 12, 2012 (not in force); Convention on the Protection of the Marine Environment of the Baltic Sea Area (Helsinki Convention) 1507 U.N.T.S. 167, (entered into

Also linked to the prevention principle and the precautionary approach/principle is Rio Principle 17, which requires that environmental assessments be undertaken at the national level for proposed activities that are likely to have a significant adverse impact on the environment. The International Court of Justice and other international tribunals have recognized the principle as an obligation under customary international law to conduct environmental impact assessments for transboundary shared resources.²⁹

Principle 22 of the Stockholm Declaration and Principle 13 of the Rio Declaration both highlighted the need for liability and compensation for environmental harm. The right of public participation, access to environmental information and justice, as reflected in Rio Principle 10 was another important principle to emerge from the Earth Summit and was the impetus for the Aarhus Convention on Access to Information.³⁰ Principle 10 has been reflected in multiple global and regional instruments.³¹

There are other principles and approaches that make up the corpus of international environmental law, some of which will be discussed where appropriate.

III. THE WORK OF THE INTERNATIONAL LAW COMMISSION

During the period between the 1970s and 2008 the Commission worked on four topics related to protection of the environment. The first were the Draft Articles on the Law of the Non-Navigational Uses of International Watercourses, which marked the debut of the Commission taking up topics related to environmental protection. This was followed by the 2001 Draft Articles on the Prevention of Transboundary Harm from Hazardous

force Jan. 17, 2000) (final amendments entered into force on July 1, 2014); Annex I On The Prevention And Elimination of Pollution From Land-Based Sources, *amended* on July 24, 1998 (updated May 9, 2002, Feb. 7, 2005, and May, 18 2006).

²⁹ Pulp Mills on the River Uruguay (Arg. v. Uru.), Judgment, 2010 I.C.J. Rep. 135 (Apr. 20); Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nic.); Construction of a Road in Costa Rica Along the San Juan River (Nicar. v Costa Rica), Judgment, 2015 I.C.J. Rep. 665 (Dec. 16). In the South China Sea case, however, the Tribunal noted that Article 206 of UNCLOS only requires States to conduct assessments “as far as practicable” when they have reasonable grounds for believing that planned activities under their jurisdiction or control may cause substantial pollution of or significant and harmful changes to the marine environment. The qualification of “as far as practicable,” as pointed out by the Arbitral Tribunal, implies a certain degree of discretion. *In re* South China Sea Arbitration (The Republic of Phil. v. China), Case No. 2013-19, Award, at ¶ 948 (Perm. Ct. Arb. 2016).

³⁰ Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters, *opened for signature* June 25, 1998, 2161 U.N.T.S. 447 (entered into force Oct. 30, 2001).

³¹ Jonas Ebesson, *Principle 10: Public Participation, in THE RIO DECLARATION ON ENVIRONMENT AND DEVELOPMENT: A COMMENTARY* 287 (Jorge Vinuales ed., 2015).

Activities, which was formerly titled International Liability For Injurious Consequences Arising Out of Acts Not Prohibited by International Law;³² the 2006 Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous Activities (the Principles on Allocation of Loss); and the Draft Articles on the Law of Transboundary Aquifers.³³

Since 2011, the Commission has embarked upon two new topics for protection of the environment: the draft principles on protection of the environment in relation to armed conflict and Draft Guidelines on Protection of the Atmosphere.³⁴ These new topics also are the first time that the protection of the environment has been the central focus of the work of the Commission and not simply a component. Furthermore, the Draft Guidelines on Protection of the Atmosphere marks the first foray of the Commission into the global commons.

A. *Work of the Commission on International Watercourses and Shared Natural Resources*

This section will examine the work of the ILC for the progressive development and codification of international law, including environmental law principles relevant to protection of the environment for international watercourses and shared natural resources.

1. Non-navigational Uses of Watercourses

Sands notes that “[t]he rules of international environmental to protect freshwater resources, including international watercourses, from pollution and over-use are reflected in piecemeal and *ad hoc* responses to problems”³⁵ Examples of the *piecemeal* approach are reflected in the non-binding 1966 ILA Helsinki Rules on the Uses of the Waters of International Rivers,³⁶ the 1992 United Nations Economic Commission for Europe (“UNECE”) Helsinki Convention on the Protection and Use of Transboundary Watercourses and International Lakes,³⁷ the 1994 Danube River Protection

³² 1 THE WORK OF THE INTERNATIONAL LAW COMMISSION 219–29 (9th ed. 2017).

³³ The topic of shared natural resources also included oil and gas but this was eventually discontinued.

³⁴ Topics under consideration. *Id.*

³⁵ SANDS, *supra* note 8, at 461.

³⁶ Int’l Law Ass’n, Rep. of the Fifty-Second Conference held at Helsinki in 1966, *The Helsinki Rules on the Uses of the Waters of International Rivers*, at 484 (1966) [hereinafter *Helsinki Rules*].

³⁷ Convention on the Protection and Use of Transboundary Watercourses and International Lakes, *opened for signature* Mar. 17, 1992, 1936 U.N.T.S. 269 (entered into force Feb. 6, 2013). In 2003, the

Convention,³⁸ and a number of other non-binding instruments adopted under the auspices of different international organizations.³⁹

The need to address this gap in international law was recognized early on by the International Law Commission, whose work on the law on the non-navigational uses of watercourses goes back to the adoption of the 1970 General Assembly Resolution 2669 on the progressive development and codification of the rules of international law relating to international watercourses.⁴⁰ The work of the Commission on the non-navigational uses of international law watercourse spans a period over 20 years counting a total of five Special Rapporteurs who were appointed during this period.⁴¹ The draft articles were eventually adopted by the Commission at its 46th session in 1994.⁴² The draft articles were referred to the General Assembly in 1996 and adopted by the General Assembly in 1997 as the Convention on the Law of Non-Navigational Uses of International Watercourses (“International Watercourses Convention”).⁴³ Unfortunately, the lengthy trajectory of International Watercourses Convention required another 17 years until it entered in force on August 17, 2014.

During this time period other instruments came into play on water courses, notably the UNECE Helsinki Convention on the Protection and Use of Transboundary Watercourses and International Lakes, the status of which was amended from being a regional UNECE instrument to one open to global accession.⁴⁴ Nonetheless, in 1997 the International Watercourses Convention represented an important step forward in establishing a global framework for the non-navigational uses of international watercourses.

Water Convention was amended to allow accession by countries outside the UNECE region. As of March 1st, 2016, all member States of the United Nations can accede to the Convention. See *Introduction: About the UNECE Water Convention*, UNECE, <https://www.unece.org/env/water/text/text.html> (last visited Mar. 16, 2019).

³⁸ Convention on Cooperation for the Protection and Sustainable Use of the Danube River (Danube River Convention), *opened for signature* June 29, 1994, (entered into force Oct. 22, 1998), available at <http://www.icpdr.org/main/icpdr/danube-river-protection-convention>.

³⁹ See SANDS, *supra* note 8, at 465; see also Julio Barberis, *The Development of International Law of Transboundary Groundwater*, 31 NAT. RESOURCES J. 167, 172–75 (1991).

⁴⁰ The request was made by the Government of Finland. See General Assembly Resolution 2669 (XXV) on *Progressive Development and Codification of the Rules of International Law Relating to International Watercourses: Note by the Secretariat*, U.N. Doc. A/CN.4/244/REV.1 (1971), reprinted in [1971] 2 Y.B. Int'l L. Comm'n 207, U.N. Doc. A/CN.4/SERJV/1971/Add.1 (Part 2).

⁴¹ The five Special Rapporteurs were: Mr. Richard D. Kearney, Stephen Schwebel, Jens Evensen, Stephen C. McCaffrey, and Robert Rosenstock.

⁴² Draft Articles on the Law of the Non-Navigational Uses of International Watercourses, Int'l Law Comm'n, Rep. on the Work of its Forty-Sixth Session, U.N. Doc. A/49/10, at 89 (1994) [hereinafter Draft Articles].

⁴³ International Watercourses Convention, *supra* note 2.

⁴⁴ Convention on the Protection and Use of Transboundary Watercourses and International Lakes, *supra* note 37.

A number of key principles of international law are codified in the 1997 International Watercourses Convention. The preamble expressly refers to the 1992 Rio Principles and Agenda 21, as well as the principle of present and future generations. More important, in the operative parts, the Convention codified a number of principles, notably, the principle requiring Watercourse States to utilize an international watercourse in an equitable and reasonable manner (article 5).⁴⁵ The Watercourse States, as provided in article 7, are also under an obligation to not cause *significant harm* to other States.⁴⁶ However, missing is a definition of harm. For example, as will be examined further on, the Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities provide a definition of harm that includes persons, property and the environment. Moreover, the Commission adopted the threshold of *significant harm*. Whereas, some earlier instruments and case law employed the threshold of *appreciable harm*.⁴⁷ Stockholm Principle 21 and Rio Principle 2, on the other hand, make no reference to any threshold of harm. They provide, *in part*, that States have the “responsibility to ensure that activities within their jurisdiction or control *do not cause damage* to the environment of other States or of areas beyond the limits of national jurisdiction.”⁴⁸

One important difference between the draft articles adopted by the Commission and the International Watercourses Convention adopted by the General Assembly is the former required that Watercourse States employ *due diligence* in utilizing an international watercourse so as to not cause significant harm to other watercourse States.⁴⁹ However, this was not included in the Convention as adopted. The Commission commentaries provide an extensive discussion of the meaning of due diligence. This is particularly relevant in light of the number of decisions by the International Court of Justice and other international tribunals concerning due diligence obligations in relation to environmental protection of shared natural resources.⁵⁰ The commentaries explain that the obligation of due diligence,

⁴⁵ International Watercourses Convention, *supra* note 2, at 705.

⁴⁶ *Id.* at 706; Ryan B. Stoa, *The United Nations Watercourses Convention on the Dawn of Entry into Force*, 47 VAND. J. TRANSNAT'L L. 1321, 1324 (2014).

⁴⁷ See Barberis, *supra* note 39, at 171–75.

⁴⁸ See U.N. Conference on Environment and Development, *supra* note 4, at annex I (emphasis added).

⁴⁹ Draft Articles, *supra* note 42, at 102.

⁵⁰ *Pulp Mills on the River Uruguay (Arg. v. Uru.)*, Judgment, 2010 I.C.J. Rep. 135, ¶ 197 (Apr. 20); *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Advisory Opinion, 50 I.L.M. 458, ¶ 115 (Feb. 1, 2011); *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission*, Advisory Opinion, Case No. 21, ¶ 131 (Apr. 2, 2015),

as reflected in article 7, is one of conduct and not result. In other words, the obligation is not one that guarantees no harm.⁵¹ The responsibility of State arises if it fails to enact legislation, to enforce its laws of “not preventing or terminating an illegal activity, or for not punishing the person responsible for it.”⁵² The commentaries provide a number of examples for the due diligence in treaties.⁵³

The principle of cooperation is reflected in article 8 of the International Watercourses Convention. Sub-paragraph 1 of article 8 requires that “Watercourse States shall cooperate on the basis of sovereign equality, territorial integrity and mutual benefit in order to attain optimal utilization and adequate protection of an international watercourse.” In its commentaries to the draft articles, the Commission refers to a number of other environmental protection instruments addressing cooperation, such as General Assembly Resolution 2995 (XXVII) on cooperation between States in the field of the environment, Resolution 3129 (XXVIII) on cooperation in the field of the environment concerning natural resources shared by two or more States, and Principle 24 of the Stockholm Declaration.⁵⁴ Subsequent to the adoption of the 1996 draft articles, the obligation of cooperation in the context of shared resources was taken up by the International Tribunal for the Law of the Sea (“ITLOS”). Notably, in a unanimous judgment, ITLOS stated that the duty to cooperate is “a fundamental principle in the regime of the prevention of pollution of the marine environment under Part XII of the Convention and general international law”⁵⁵ as reaffirmed in the *Land Reclamation* case (*Malaysia v. Singapore*).⁵⁶

An important contribution of the International Watercourses Convention is the detailed provisions concerning the duty to notify and consult with other States concerning activities with possible adverse effects (article 12).⁵⁷ In addition, the 1997 Convention requires States to engage in a regular exchange of data and information on a regular basis concerning the

https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.21/advisory_opinion/C21_AdvOp_02.04.pdf [hereinafter SRFC Advisory Opinion].

⁵¹ Draft Articles on the Law of the Non-Navigational Uses of International Watercourses, *supra* note 42, at 103.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* at 106.

⁵⁵ *The MOX Plant* (Ir. v. U.K.), Provisional Measures, 41 I.L.M. 405, 417 (2002).

⁵⁶ *Land Reclamation by Singapore in and around the Straits of Johor* (Malay. v. Sing.), Provisional Measures, 27 U.N. Rep. Int'l Arb. Awards 133–45 (2005).

⁵⁷ International Watercourses Convention, *supra* note 2, at 6–9. See Abiy Chelkeba, *Notification and Consultation of Projects in Transboundary Water Resources: Conference Building Rather than Legal Obligation in the Context of GERD*, 11 MIZAN L. REV. 125, 152 (2017).

condition of the watercourse (article 9).⁵⁸ These are also important principles for prevention of harm and prevention of pollution or other forms of environmental degradation.

In regard specifically to environmental protection, articles 20–23 in the Convention establish clear obligations for States to protect and preserve ecosystems, either individually or jointly to prevent, reduce, and control pollution; to prevent the introduction of alien or new species; and to protect and preserve the marine environment. It is notable that the Commission has included a reference to “ecosystems,” which it had only been recently introduced in the 1992 Convention on Biological Diversity.⁵⁹ The Commission drew on the work of the Economic Commission for Europe.⁶⁰ The Convention has also adopted a broader hydrological approach in linking international watercourses to the marine environment, a matter of central importance for addressing land-based sources of pollution of the marine environment.

The International Watercourses Convention remains the sole work of the Commission related to environmental protection that has become an international binding convention. It is recognized as having codified customary international law.⁶¹ The Convention has only been ratified and acceded to by 36 States.⁶² By contrast, the UNECE Water Convention has been ratified by 43 States, albeit from the UNECE region.⁶³ McIntyre observes that despite the low number of State ratification, the International Watercourses Convention is “likely to enjoy considerable authority both as the most highly developed legal codification in the area and by virtue of the

⁵⁸ International Watercourses Convention, *supra* note 2, at 6.

⁵⁹ While the “ecosystem” was first introduced in article 2 of the CBD it was not until 2000 that it was defined and developed under COP 5 Decision V/6. See *COP 5 Decision V/6*, CONVENTION ON BIOLOGICAL DIVERSITY (May 15-26, 2000), <https://www.cbd.int/decision/cop/default.shtml?id=7148>.

⁶⁰ See Stephen C. McCaffrey (Special Rapporteur), *Seventh Rep. on the Law of the Non-Navigational Uses of International Watercourses*, U.N. Doc. A/CN.4/436 & Corr. 1–3, at 60 (Mar. 15, 1991).

⁶¹ Owen McIntyre, *International Water Resources Law-Relative Priority Accorded to Environmental Protection*, 38 ENVTL. POL’Y & L. 131, 136 (2008).

⁶² See *Convention on the Law of the Non-Navigational Uses of International Watercourses*, U.N. TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-12&chapter=27&lang=en (last visited June 23, 2019).

⁶³ See *Convention on the Protection and Use of Transboundary Watercourses and International Lakes*, U.N. TREATY COLLECTION, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XXVII-5&chapter=27&clang=_en (last visited June 23, 2019).

legitimacy of the ILC as the body charged within the UN system with the codification and progressive development of international law”⁶⁴

2. 2008 Articles on the Law of Transboundary Aquifers

In 2000, the Commission included the topic of shared resources on its long-term work programme. In 2002, the Commission proceeded to place it on its programme of work, appointing a Special Rapporteur.⁶⁵ The Commission initially considered examining two separate topics: transboundary aquifers and oil and gas. The work on transboundary aquifers was completed with the adoption in 2008 of a draft preamble and 19 draft articles,⁶⁶ which were referred to the General Assembly. In 2010 the work of the Commission on oil and gas was discontinued.⁶⁷

The Draft Articles on the Law of Transboundary Aquifers parallels the International Watercourses Convention in regard to the principles adopted. In its preamble it also expressly refers to the Rio Declaration and Agenda 21, and like the 1997 Convention, the preamble also makes reference to principles of present and future generations. Parallel to the 1997 International Watercourse Convention, the 2008 Draft Articles on the Law of Transboundary Aquifers adopted the principle of equitable and reasonable utilization (article 4),⁶⁸ also listing a set of non-exhaustive factors to define equitable and reasonable utilization (article 5).⁶⁹

Other key principles of international environmental law adopted by the Law of Transboundary Aquifers include the principle of prevention of significant harm (article 6),⁷⁰ duty to cooperate (article 7),⁷¹ duty to conduct environmental impact assessments for planned activities (article 15),⁷² and

⁶⁴ OWEN MCINTYRE, ENVIRONMENTAL PROTECTION OF INTERNATIONAL WATERCOURSES UNDER INTERNATIONAL LAW 65 (2007).

⁶⁵ Chusei Yamada was appointed as Special Rapporteur.

⁶⁶ Int’l Law Comm’n, Rep. to the General Assembly on the Work of Its Sixtieth Session, U.N. Doc. A/CN.4/SER.A/2008/Add.1 (Part 2), ¶¶ 53, 54 (2008).

⁶⁷ Int’l Law Comm’n, Rep. to the General Assembly on the Work of Its Sixty-Second Session, U.N. Doc. A/CN.4/SER.A/2010/Add.1 (Part 2), ¶¶ 377, 384 (2010).

⁶⁸ Int’l Law Comm’n, Rep. on the Work of Its Sixtieth Session, U.N. Doc. A/63/10, at 21 (2008).

⁶⁹ *Id.* at 21–22.

⁷⁰ Article 6 (1) states that “Aquifer States shall, in utilizing transboundary aquifers or aquifer systems in their territories, take all appropriate measures to prevent the causing of significant harm to other aquifer States or other States in whose territory a discharge zone is located.” *Id.* at 22.

⁷¹ Article 7 (1) provides that “Aquifer States shall cooperate on the basis of sovereign equality, territorial integrity, sustainable development, mutual benefit and good faith in order to attain equitable and reasonable utilization and appropriate protection of their transboundary aquifers or aquifer systems.” *Id.* at 23.

⁷² *Id.* at 25.

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the principle of notification (article 15(2)) (duty to notify another State of planned activities that may have significant adverse effect upon another State.)⁷³ Once again, no definition of *significant* harm is provided.

Similar to the International Watercourses Convention, article 10 of the Law of Transboundary Aquifers refers to “ecosystems” and requires that States “take all appropriate measures to protect and preserve ecosystems within, or dependent upon, their transboundary aquifers or aquifer systems.” Once more, following the approach of the Convention, States have an obligation to “individually and, where appropriate, jointly, prevent, reduce and control pollution of their transboundary aquifers or aquifer systems, including through the recharge process, that may cause significant harm to other aquifer States.”⁷⁴

However, the Law of Transboundary Aquifers marks a precedence as the first time the Commission has employed the principle of precaution. Article 12 obligates that Aquifer States to “take a precautionary approach in view of uncertainty about the nature and extent of a transboundary aquifer or aquifer system and of its vulnerability to pollution.”

B. Transboundary Harm from Hazardous Activities

1. The 2001 Articles on Prevention of Transboundary Harm from Hazardous Activities

The work of the International Law Commission on the prevention of transboundary harm has its roots in work of the Commission on the topic of State responsibility. It had been agreed early on that the work of the Commission on State responsibility would be limited to unlawful activities under international law and that the Commission would take up State liability for lawful activities afterwards.⁷⁵ In 1978 a working group was established to do a preliminary examination of the scope and nature of the topic. The work of the Commission was eventually undertaken in two streams: one stream addressing prevention of harm and the other addressing liability, which respectively became the Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities and the Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous Activities.

The work on the Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities involved several working groups and the

⁷³ *Id.* at 25.

⁷⁴ *Id.* at 24.

⁷⁵ 1 UNITED NATIONS, THE WORK OF THE INTERNATIONAL LAW COMMISSION 219 (9th ed. 2017).

appointment of two Special Rapporteurs.⁷⁶ In 1998 the final draft articles, consisting of a preamble and 19 articles, were adopted by the Commission in 2001 at its 53rd session and submitted to the General Assembly.⁷⁷

The work of the Commission on the Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities is an excellent example of the progressive development and codification of a specific principle of customary international law, in this case the principle of prevention. The Commission developed the principle into specific primary obligations.⁷⁸ The scope of the draft articles apply only to activities not prohibited by international law and which involve a risk of causing significant transboundary harm through their physical consequences.⁷⁹ The commentaries explain that the draft articles intend to “deal with the concept of prevention in the context of authorization and regulation of hazardous activities which pose a significant risk of transboundary harm.”⁸⁰ The commentaries also highlight the importance of prevention in terms of a policy preference to prevent harm, as compensation “often cannot restore the situation prevailing prior to the event or accident.”⁸¹

The commentaries expressly refer to the seminal *Trail Smelter Case*; Principle 21 of the Stockholm Declaration; Principle 2 of the Rio Declaration; General Assembly resolution 2995 (XXVII) of 15 December 1972 on cooperation between States in the field of the environment; principle 3 of the Principles of conduct in the field of the environment for the guidance of States in the conservation and harmonious utilization of natural resources shared by two or more States, adopted by the Governing Council of UNEP in 1978; and the International Court of Justice advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*.⁸²

For the first time, the Commission has defined the scope of the meaning of “harm” which is not limited to the environment but also applies to persons and property.⁸³ The Commission also opted for the high threshold of *significant* transboundary harm (article 1). For example, “risk of causing of harm” is defined as “a *high probability* of causing significant transboundary harm and a low probability of causing disastrous transboundary harm”

⁷⁶ The Special Rapporteurs were Robert Q. Quentin-Baxter and Julio Barbosa.

⁷⁷ Int'l Law Comm'n, Rep. to the General Assembly on the Work of Its Fifty-third Session, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2), ¶¶ 91, 92, 97, 98 (2001).

⁷⁸ Daniel Barstow Magraw, *Transboundary Harm: The International Law Commission's Study of "International Liability"*, 80 AM. J. INT'L L. 305, 306–07 (1986).

⁷⁹ Int'l Law Comm'n, *supra* note 77, at 146.

⁸⁰ *Id.* at 148.

⁸¹ *Id.*

⁸² *Legality of the Threat or Use of Nuclear Weapons*, *supra* note 11.

⁸³ Int'l Law Comm'n, *supra* note 77, at 146.

(article 2 (a)).⁸⁴ No guidance is provided, however, to distinguish between significant and disastrous transboundary harm. The issue of the threshold of harm is an important question as it triggers certain obligations and responsibilities.

In article 3, which codifies the prevention principle, the State of origin is under the obligation to “take all appropriate measures to prevent significant transboundary harm or at any event to minimize the risk thereof.” The commentaries explain that article 3 is based on the fundamental principle *sic utere tuo ut alienum non laedas* as reflected in Principle 21 of the Stockholm Declaration.⁸⁵ Moreover, the commentaries explain that article 3 read together with article 4 goes beyond Principle 21 and sets out specific obligations of States. According to the commentaries, “The article thus emphasizes the primary duty of the State of origin to prevent significant transboundary harm; and only in case this is not fully possible it should exert its best efforts to minimize the risk thereof”⁸⁶

Key principles codified in the draft articles are: prevention of significant transboundary harm (article 3), duty of cooperation (article 4), duty of due diligence (article 5), requirement of prior authorization (article 6), duty to conduct environmental impact assessments (article 7),⁸⁷ notification of risks of significant transboundary harm (article 8)⁸⁸ and of emergency situations (article 17),⁸⁹ consultations on taking preventive measures (article 9),⁹⁰ duty to exchange information (article 12),⁹¹ and duty to provide information to the public (article 13).⁹² In addition, the draft articles require the State of origin to prepare contingency plans in the case of emergencies (article 16).⁹³

The contribution of the Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities lies not in simply in codifying key principles of international environmental law deemed to

⁸⁴ *Id.* (emphasis added).

⁸⁵ *Id.*

⁸⁶ *Id.* at 153.

⁸⁷ *Id.* at 146.

⁸⁸ *Id.* at 146–47.

⁸⁹ *Id.* at 147.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities, with commentaries* [2001] 2 Y.B. INT’L L. COMM’N 165 art. 13 provides that “States concerned shall, by such means as are appropriate, provide the public likely to be affected by an activity within the scope of the present articles with relevant information relating to that activity, the risk involved and the harm which might result and ascertain their views.”

⁹³ *Id.* at 168 art. 16.

represent customary law,⁹⁴ but also in filling a gap for a global framework outlining the primary obligation of States in the implementation of the duty to prevent transboundary harm or the of *sic utere tuo ut alienum non laedas*.

2. The 2006 Principles on the Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous Activities

One of the gaps in international law was the lack of a common set of obligations and principles defining international liability for transboundary harm.⁹⁵ Under Principle 22 of the Stockholm Declaration, States committed to cooperating to develop international law regarding liability and compensation for victims of environmental pollution and harm and Principle 13 of the Rio Declaration to develop national law regarding liability and compensation. The second stream of the work of the Commission related to the allocation of liability for transboundary harm is directly related to this.

In 2002 the Commission included the topic on its programme of work and appointed a Special Rapporteur.⁹⁶ In 2006 the Commission adopted a draft preamble and eight Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising out of Hazardous Activities and submitted them to the General Assembly.⁹⁷

The preamble to the draft principles make express reference to Rio Principle 13, where States are required to “develop national law regarding liability and compensation for the victims of pollution and other environmental damage” and to Principle 16 requiring, *inter alia*, that States internalize environmental costs, also known as the “polluter pays principle.”⁹⁸ Reference is also made to the 2001 Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities. However, the draft principles go further in elaborating the meaning of certain terms than

⁹⁴ Authors agree that the *Articles on Prevention of Transboundary Harm from Hazardous Activities* is considered to reflect the codification of customary international law. See, e.g., PATRICIA BIRNIE, ALAN BOYLE & CATHERINE REDGWELL, *INTERNATIONAL LAW AND THE ENVIRONMENT* 141 (Oxford 2009); RODA VERHEYEN, *CLIMATE CHANGE DAMAGE AND INTERNATIONAL LAW: PREVENTION DUTIES AND STATE RESPONSIBILITY* 154 (Brill 2005).

⁹⁵ Pemmaraju Sreenivasa Rao, *International Liability for Transboundary Harm*, 34 ENVTL. POL'Y & L. 224, 225 (2007).

⁹⁶ The Commission appointed Pemmaraju Sreenivasa to be the Special Rapporteur.

⁹⁷ Int'l Law Comm'n Rep. to the G.A., U.N. Doc. A/CN.4/SER.A/2006/Add.1, at ¶¶ 62, 63 (2006). The General Assembly took note of the draft principles in resolution 61/36 of 4 December 2006.

⁹⁸ U.N. Conference on Environment and Development, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26 (Vol. I), annex I at princ. 16 (Aug. 12, 1992) provides in full “National authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment.”

did the 2001 Draft Articles on the Prevention of Transboundary Harm from Hazardous Activities. For example, *damage* is defined in the 2001 draft articles to mean “significant damage caused to persons, property or the environment.”⁹⁹ The 2006 draft principles further include as a part of the meaning of *damage cultural heritage; loss or damage by impairment of the environment; costs of reasonable measures of reinstatement of the property, or environment, including natural resources; and the costs of reasonable response measures* (principle 2 (a)(i)).

Key principles of international environmental law adopted in the draft principles include: to provide *prompt and adequate compensation* for victims of transboundary damage (principles 3 and 4) and *to preserve and protect the environment in the event of transboundary damage, especially with respect to mitigation of damage to the environment and its restoration or reinstatement* (principle 3 (b)),¹⁰⁰ no-fault liability (principle 4(2)),¹⁰¹ prompt notification by the State of origin to States affected or likely to be affected (principle 5(a)),¹⁰² consultation and cooperation (principle 5(c)),¹⁰³ and due diligence obligations (principle 8).¹⁰⁴

The principles, however, have been criticized in particular for focusing on civil liability of private operators and not including state liability.¹⁰⁵ In addition, the principles apply only to transboundary harm on the territory over which a State exercises jurisdiction and control, excluding application to the areas beyond national jurisdiction or the global commons.¹⁰⁶ The principles do not provide guidance on the substance of what constitutes “*prompt, adequate and effective*” remedies deferring details to national laws or future international regimes.¹⁰⁷ Despite certain short-comings, nonetheless, the Commission has followed closely the key principles and instruments of international environmental law to fill a gap in international law through progressive development and codification.

⁹⁹ *Draft Principles on Prevention of Transboundary Harm from Hazardous Activities, with commentaries*, [2006] 2 Y.B. INT'L L. COMM'N 166 princ. 5(a).

¹⁰⁰ *Id.* princ. 4(1).

¹⁰¹ *Id.* princ. 4(2).

¹⁰² *Id.* princ. 5(a).

¹⁰³ *Id.* princ. 5(c).

¹⁰⁴ Principle 8 requires “Each State should adopt the necessary legislative, regulatory and administrative measures to implement the present draft principles.” *Id.* princ. 8.

¹⁰⁵ Gunther Handl, *International Accountability for Transboundary Environmental Harm Revisited: What Role of State Liability*, 37 ENVTL. POL'Y & L. 117 (2007).

¹⁰⁶ Pemmaraju Sreenivasa Rao, *International Liability for Transboundary Harm*, 34 ENVTL. POL'Y & L. 224, 227 (2004).

¹⁰⁷ *Draft Principles on the Prevention of Transboundary Harm from Hazardous Activities*, *supra* note 99, princ. 7.

IV. CURRENT WORK OF THE COMMISSION

The International Law Commission has resumed working on topics related to environmental protection in two areas: one concerns the protection of the environment in relation to armed conflict and the other, protection of the atmosphere. The work is on-going but adequately advanced to make an assessment as to the contribution to the progressive development and codification of international environmental law.

A. *Protection of the Environment in Relation to Armed Conflict*

The importance of addressing protection of the environment during war and occupation was recognized in Principles 23 and 24 of the Rio Declaration. Principle 24 states that, “Warfare is inherently destructive of sustainable development. States shall therefore respect international law providing protection for the environment in times of armed conflict and cooperate in its further development, as necessary.” And Principle 24 provides that “The environment and natural resources of people under oppression, domination and occupation shall be protected.”

The work of the Commission on the protection of the environment in relation to armed conflict grew out of a report by UNEP concerned over the lacunae in international law.¹⁰⁸ The report provided recommendations that specifically included that the ILC, as “the leading body with expertise in international law,” should “examine the existing international law for protecting the environment during armed conflict and recommend how it can be clarified, codified and expanded.”¹⁰⁹ Two years later the topic was placed on the long-term programme of the Commission and a Special Rapporteur was appointed.¹¹⁰ It was decided that the outcome would be a set of draft principles. The draft principles are organized in different temporal periods: pre-conflict, during conflict, and post-conflict, as well as the situation of occupation.

¹⁰⁸ See UNITED NATIONS ENVIRONMENT PROGRAMME, PROTECTING THE ENVIRONMENT DURING ARMED CONFLICT: AN INVENTORY AND ANALYSIS OF INTERNATIONAL LAW (2009), <https://www.unenvironment.org/resources/report/protecting-environment-during-armed-conflict-inventory-and-analysis-international>.

¹⁰⁹ *Id.* at 53. See INT’L L. COMM’N, REP. ON PROTECTION OF THE ENVIRONMENT IN RELATION TO ARMED CONFLICTS, annex E, <http://legal.un.org/docs/?path=../ilc/reports/2011/english/annex.pdf&lang=EFSRAC> (last visited June 21, 2019).

¹¹⁰ The first Special Rapporteur was Marie G. Jacobsson in 2013 who was followed by Marja Lehto in 2017.

The work of the Commission on protection of the environment in relation to armed conflict represents an example of inter-disciplinary work that derives from different specialized areas of international law involved. The question is: To what extent has the Commission adopted existing principles of international environmental law and applied these to the international law of armed conflict?

First, the application of the principle of prevention is found in the statement of purposes of the draft principles, which are “aimed at enhancing the protection of the environment in relation to armed conflict, including through preventive measures for minimizing damage to the environment during armed conflict and through remedial measures.”¹¹¹ While not identical to, it nonetheless echoes the language of prevention in article 3 of the 2001 Draft Articles on the Prevention of Transboundary Harm.¹¹² The due diligence obligation is also reflected in draft principle 4, requiring that States, subject to their obligations under international law, take effective legislative, administrative, judicial, and other measures to enhance the protection of the environment in relation to armed conflict.

The Draft Principles on Protection of the Environment in Relation to Armed Conflict marks the first time the work of the Commission has included protected areas (draft principle 5), one of the important tools of environmental law.¹¹³ Another precedence for the work of the Commission is the recognition of indigenous peoples in relation to protection of the environment (draft principle 6). The important relationship between the environment and indigenous peoples has been recognized in a number of instruments including principle 21 of the Rio Declaration, the 2002 Johannesburg Declaration on Sustainable Development,¹¹⁴ the 2007 United Nations Declaration on the Rights of Indigenous Peoples,¹¹⁵ and the *ILO Convention Concerning Indigenous and Tribal Peoples in Independent Countries*.¹¹⁶

Draft principle 6 represents an important contribution to the progressive development and codification of the law of indigenous peoples as it details

¹¹¹ Int'l Law Comm'n, Rep. on the Work of Its Seventieth Session, U.N. Doc.A/73/10, at 247 princ. 2 (2018).

¹¹² Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, with Commentaries, Int'l Law Comm'n, Rep. on the Work of Its Fifty-Third Session, U.N. Doc. A/56/10, at 153 (2001).

¹¹³ Protection of the Environment in Relation to Armed Conflicts, Int'l Law Comm'n, Rep. on the Work of Its Sixty-Eighth Session, U.N. Doc. A/CN.4/L.870/Rev.1, at 2 (Aug. 12, 2016).

¹¹⁴ Rep. of the World Summit on Sustainable Development, U.N. Doc. A/Conf.199/20, at 4 (Sept. 4, 2002).

¹¹⁵ G.A. Res. 61/295, at 8 (Sept. 13, 2007).

¹¹⁶ Convention Concerning Indigenous and Tribal Peoples in Independent Countries, Rep. of the Int'l Labour Off. on Its Seventy-Sixth Session, U.N. Doc. No. 169 (June 27, 1989).

the actions States should take. These include the principle of due diligence to “take appropriate measures, in the event of an armed conflict, to protect the environment of the territories that indigenous peoples inhabit.”¹¹⁷ And in the case where after an armed conflict the environment of the territories inhabited by indigenous people has been adversely affected, “States should undertake effective consultations and cooperation with the indigenous peoples concerned, through appropriate procedures and in particular through their own representative institutions, for the purpose of taking remedial measures.” No similar provision is yet in any international environmental agreement or for that matter in the corpus of law, including customary international law, concerning armed conflict.

Other draft principles in the current work of the Commission on the topic of protection of the environment in relation to armed conflict includes the obligation to respect and protect the natural environment in accordance with applicable international law and, in particular, the law of armed conflict. The draft principles also include reference to restoration of the natural environment in the post-conflict situation. One interesting principle “encourages cooperation among relevant actors, including international organizations, to do post-armed conflict environmental assessments and remedial measures.”¹¹⁸ The draft commentary explains that the term “environmental assessment” is distinct from an “environmental impact assessment,” which is typically undertaken *ex ante* as a preventive measure. Whereas, in a post-armed conflict situation the function has a broader scope and “is intended to meet various needs and policy processes, which, depending on the requirements, are distinct in scope, objective and approach.”¹¹⁹ The commentary explains that such assessments are to be encouraged as otherwise “if the environmental impacts of armed conflict are left unattended, there is strong likelihood that they may lead to ‘further population displacement and socio-economic instability,’ thereby ‘undermining recovery and reconstruction in post-conflict zones’ and ‘triggering a vicious cycle.’”¹²⁰

The principle of public access to information is reflected in Draft Principle 18 and applies to the post-conflict period within the context of taking remedial measures. Accordingly, “States and relevant international organizations shall share and grant access to relevant information in accordance with their obligations under international law.” It is notable that

¹¹⁷ Protection of the Environment in Relation to Armed Conflicts, Int’l Law Comm’n, Draft principle 6(1), Rep. on the Work of Its Sixty-Eighth Session, U.N. Doc. A/CN.4/L.876, at 2 (Aug. 12, 2016).

¹¹⁸ *Id.*

¹¹⁹ Int’l Law Comm’n, *supra* note 111, at 273.

¹²⁰ *Id.* at 264.

draft principle 18 is linked to existing obligations of States under international law. The draft commentary explains that the use of “in accordance with their obligations under international law” refers to obligations under the law of armed conflict, such as keeping a record of the placement of landmines.¹²¹ In addition, the commentary enumerates the different instruments of international environmental law concerning the right of access to information.¹²² In all cases, application of the international environmental law principle of the right of public access to information under the law of armed conflict should be recognized as an important contribution.

The draft principles concerning occupation include the principle of prevention requiring that the Occupying Power “take appropriate measures to prevent significant harm to the environment of the occupied territory that is likely to prejudice the health and well-being of the population of the occupied territory.”¹²³ In previous work the Commission did not qualify the scope of the prevention principle to the *health and well-being of the population*.

Draft principle 20 is a precedence where, for the first time, the Commission refers expressly to the principle of sustainable development.¹²⁴ Draft principle 21 applies the principle of prevention and due diligence requiring the Occupying Power prevent transboundary environmental harm and “exercise due diligence to ensure that activities in the occupied territory do not cause significant harm to the environment of areas beyond the occupied territory.” According to the draft commentary, the language is derived from the *Pulp Mills* case.¹²⁵

B. *Protection of the Atmosphere*

In 2013 the Commission decided to place protection of the atmosphere on its active agenda and appointed a Special Rapporteur.¹²⁶ The undertaking by the Commission of the topic of protection of the atmosphere was the first undertaking of a topic related to the global commons. In the original Syllabus,

¹²¹ *Id.* at 269.

¹²² *Id.* at 269–70.

¹²³ *Id.* at 240 n.1086.

¹²⁴ *Id.* Specifically, it provides that: “To the extent that an Occupying Power is permitted to administer and use the natural resources in an occupied territory, for the benefit of the population of the occupied territory and for other lawful purposes under the law of armed conflict, it shall do so in a way that ensures their sustainable use and minimizes environmental harm.” *Id.*

¹²⁵ *Id.* at 242.

¹²⁶ *Summaries of the Work of the Int’l Law Comm’n*, INT’L LAW COMM’N, http://legal.un.org/ilc/summaries/8_8.shtml (last updated Nov. 20, 2018). Professor Shinya Murase was appointed as Special Rapporteur.

the proposal envisioned a set of draft articles for the protection of the atmosphere comparable to Part XII of the United Nations Convention for the Law of the Sea.¹²⁷ However, this ambitious approach was significantly curtailed by the Commission, which imposed a number of restrictions upon the topic.

First, the Commission decided that the outcome would be a set of guidelines “that do not seek to impose on current treaty regimes legal rules or legal principles not already contained therein.”¹²⁸ Second, a number of principles of international environmental law were expressly excluded such as addressing the liability of States and their nationals, the polluter-pays principle, the precautionary principle, common but differentiated responsibilities, and the transfer of funds and technology to developing countries, including intellectual property rights. In addition, the work of the Commission was not to interfere with relevant political negotiations, including on climate change, ozone depletion, and long-range transboundary air pollution,¹²⁹ and was not to deal with specific substances, such as black carbon, tropospheric ozone, and other dual-impact substances, which are the subject of negotiations among States. Furthermore, the project was not to seek to “fill” gaps in the treaty regimes. The restrictive approach of the Commission was met with criticism.¹³⁰

The decision to limit the scope of the work of the Commission on the protection of the atmosphere raises concerns as to whether the Commission, instead of working to progressively develop and codify international law related to the protection of the atmosphere, has adopted a regressive approach. This question is further highlighted by the somewhat curious decision by the Commission to reject the well-accepted principle of the *common concern of humankind* in favor of the less known *pressing concern of the international community as a whole*, an internal criteria of the Commission in selecting topics.¹³¹ Whereas, the principle of common concern has been adopted in the preambles of the UNFCCC and the CBD,

¹²⁷ U.N. Convention on the Law of the Sea Part XII, *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 397 (entered into force Nov. 16, 1994).

¹²⁸ Int'l Law Comm'n, Rep. on the Work of Its Sixty-Eighth Session, U.N. Doc. A/71/10, at 281 n.1231 (2018).

¹²⁹ *Id.*

¹³⁰ See Peter H. Sand & Jonathan B. Weiner, *Towards a New International Law of the Atmosphere?*, 7 GOETTINGEN J. INT'L L. 195, 196 (2016); Yota Negishi, *The International Law Commission Celebrating Its 70th Anniversary: Dresser le bilan pour l'avenir 'à venir'*, 7 ESIL REFLECTIONS 1–9, 4–5 (2018); Plakokefalos Ilias, *International Law Commission and the Topic 'Protection of the Atmosphere': Anything New on the Table?*, SHARES RESEARCH PROJECT ON SHARED RESPONSIBILITY (Nov. 1, 2013), <http://www.sharesproject.nl/international-law-commission-and-the-topic-protection-of-the-atmosphere-anything-new-on-the-table>.

¹³¹ See [1997] 2 Y.B. Int'l L. Comm'n 71–72, U.N. Doc. A/CN.4/SER.A/1991/Add.1 (Part 2).

both of which are recognized to have universal character.¹³² One other instance of the Commission adopting standards out-of-step with the existing international environmental law is the exclusion of “energy” from the definition of “pollution.”¹³³ Major international conventions, such as UNCLOS¹³⁴ and the UNECE 1979 Convention on Long-range Transboundary Air Pollution, include “energy” in the definition of pollution.¹³⁵ Ironically, in making these modifications, the Commission may have defied its own mandate to not “impose on current treaty regimes legal rules or legal principles not already contained therein.”¹³⁶

Other principles of international environmental law adopted by the Commission include the obligation to conduct environmental impact assessments, the obligation of international cooperation,¹³⁷ and the equitable and reasonable utilization of the atmosphere. In this case, the Commission has incorporated principles of international environmental law by including the principle of present and future generations.¹³⁸ In addition, the draft guidelines have included the principle of sustainable utilization, which can be seen as a recognition of the principle of sustainable development.¹³⁹ In what appears to be an effort to adopt a more diluted version of the principle of precaution, which the Commission expressly excluded, activities of *intentional large-scale modification of the atmosphere* are to be conducted with prudence and caution. Notably missing, however, is any direct reference to States. The reluctance of the Commission to make express reference to the principle of precaution directly contradicts its approach in the 2008 Law of Aquifers, which adopted it.¹⁴⁰

The draft guidelines also injected certain novel concepts for the work of the Commission. One was to introduce the principles of harmonization and

¹³² See Sand & Weiner, *supra* note 130, at 216. The Commission explains this decision to be based on the concern that the “legal consequences of the concept of common concern of humankind remain unclear at the present stage of development of international law relating to the atmosphere. It was considered appropriate to express the concern of the international community as a matter of a factual statement, and not as a normative statement, as such, of the gravity of the atmospheric problems.”

¹³³ Int’l Law Comm’n, *supra* note 128, at 283. Draft guideline defines atmospheric pollution to mean “the introduction or release by humans, directly or indirectly, into the atmosphere of substances contributing to deleterious effects extending beyond the State of origin of such a nature as to endanger human life and health and the Earth’s natural environment.”

¹³⁴ See U.N. Convention on the Law of the Sea Part I art. 1(1)(4), *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 397 (entered into force Nov. 16, 1994).

¹³⁵ See 1979 Convention on Long-range Transboundary Air Pollution art. 1(a), *opened for signature* Nov. 13, 1979, 1302 U.N.T.S. 217.

¹³⁶ Int’l Law Comm’n, *supra* note 128, at 281 n.123.

¹³⁷ Int’l Law Comm’n, *supra* note 111, at 184.

¹³⁸ *Id.* at 181.

¹³⁹ *Id.* at 179.

¹⁴⁰ *Id.* at 24.

systemic integration, which derive from international trade law but are not familiar to international environmental law.¹⁴¹ In the author's opinion it remains uncertain whether the principle of seeking a harmonious interpretation of different fields of law in relation to protection of the atmosphere will enhance or diminish existing standards. The draft guidelines did include reference to indigenous peoples although not to the same extent as the draft principles for protection of the environment in relation to armed conflict. The novelty, however, introduced by the draft guidelines was the first ever reference by the Commission to the "people of least developed countries and people of low-lying coastal areas and small island developing States affected by sea-level rise."¹⁴² In addition, the draft guidelines is the first time the work of the Commission has included a compliance mechanism to promote compliance by States with their international obligations to protect the atmosphere.¹⁴³

V. CONCLUSION

In 70 years, the work of the Commission relevant to protection of the environment has been modest. It is beyond the scope of this article to assess the different reasons for the modest output of the Commission other than to observe that the technical and specialized nature of international environmental law, which is equally broad in scope, understandably make it a field where the Commission might prefer to tread cautiously. The main focus of this article is to gauge how the work of the Commission has contributed to the progressive development and codification of international environmental law, in particular focusing on key principles that are integral to international environmental law.

Overall, the work of the Commission has adopted, and in some cases, elaborated on the key principles of international environmental law. Without doubt the work of the Commission on the International Watercourse Convention is at the center if its work on environmental issue as the only outcome to achieve binding status. It has adopted an ecosystem approach in requiring Watercourse States to protect and preserve the ecosystems of international watercourses;¹⁴⁴ prevent, reduce, and control pollution;¹⁴⁵ and

¹⁴¹ *Id.* at 160.

¹⁴² *Id.* See the draft commentaries which provides a lengthy list of international instruments highlighting the importance of least developed countries.

¹⁴³ *Id.* at 196.

¹⁴⁴ U.N. Convention on the Law of the Non-Navigational Uses of International Watercourses, *supra* note 2.

¹⁴⁵ *Id.*

protect and preserve the marine environment.¹⁴⁶ The Convention has also codified other principles, in particular the principles of prevention of harm, conduct environmental assessments, international cooperation consultation, and detailed development of the obligation to notify other States.

Secondly, the work of the Commission in developing the principle of prevention also stands out in particular. First, the Commission has clearly linked it to the due diligence principle. Second, the Commission opted for the high threshold of *significant harm*. Moreover, in its work on Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, the Commission established a set of primary obligations defining the principle of prevention in this context.

The work of the Commission has consistently adopted the principle of cooperation, consultation and notification of harm, to conduct environmental impact assessments, due diligence, and prompt and adequate compensation. On the other hand, the principles of precaution, future generations, and sustainable development have been adopted only relatively recently.

The current work of the Commission presents a mixed picture. On the one hand, the Commission has taken important steps to reflect contemporary practice, as seen in the draft principles on protection of the environment in relation to armed conflict, which has included protected areas, consultation with indigenous peoples, and public access to information.¹⁴⁷

By contrast, in its work on draft guidelines on protection of the atmosphere the Commission seems to have taken some backward step by imposing a set of controversial limitations. Moreover, its rejection of the well-accepted principle of common concern of human kind and modification of the definition of pollution to exclude “energy” appear regressive and not consistent with its mandate for the progressive development of international law and its codification.

In assessing the work of the Commission, it is important to understand that the Commission is not a legislative body nor is it an academic body. It is an authoritative body composed of recognized experts in international law from different regions of the world representing different legal perspectives and traditions. It is for this reason that, as Owen McIntyre observed that even if the International Watercourses Convention has a low number of ratifications it is “likely to enjoy considerable authority . . . by virtue of the legitimacy of the ILC as the body charged within the UN system with the

¹⁴⁶ *Id.*

¹⁴⁷ During the seventy-first session of the ILC held April 8–June 7 and July 8–August 9, 2019, the Commission adopted additional draft principles with further potential to progressively advance principles of environmental law. However, as the seventy-first session was still in progress at the time of the completion of this present article the author felt it to be premature to include these.

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codification and progressive development of international law”¹⁴⁸ This holds true for all the work of the Commission related to protection of the environment. Whether or not they become treaties or not, the recognition by the Commission of these key principles of international environmental law stand as significant contributions to the progressive development and codification of international environmental law. Consequently, the Commission should be wary of contradicting accepted and emerging principles of international environmental law and rather employ its unique position to contribute to the progressive development and codification of this important and dynamic subject of international law.

¹⁴⁸ MCINTYRE, *supra* note 64, at 65.