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# The Work of the International Law Commission related to Environmental Issues

*Ion GÂLEA*

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# Comentarii privind activitatea organizațiilor internaționale în domeniul dreptului internațional

# Commentaries regarding the Activities of International Bodies in the Field of International Law

## The Work of the International Law Commission related to Environmental Issues

***Ion GÂLEA***[1]

***Abstract:*** This brief study exposes in an evolutionary manner the work of the International Law Commission related to environment. It approaches the topic in a chronological manner and from a horizontal point of view, having in mind that not all topics concern directly the environment. Thus, the works related to law of the sea, international waterways, transboundary aquifers, state responsibility are covered, even if there is only an indirect link between environmental protection and these topics. Moreover, the paper analyzes the recent works related to protection of the atmosphere and protection of environment in case of armed conflict.

***Key-words:*** *International Law Commission, environment, pollution, resources.*

### I. Introduction

Codification and progressive development of international law are the key words of the mandate of the International Law Commission (hereinafter "ILC").[2] The two notions comprise also a process – the process of evolution

[1] *Ion Gâlea is Senior Lecturer in Public International Law and International Organizations at the University of Bucharest, Faculty of Law. He held the position of director general for legal affaris (legal advisor) within the Ministry of Foreign Affairs of Romania between 2010 and 2016. Since 2016, he is the Ambassador of Romania to the Republic of Bulgaria.* The opinions expressed in this paper are solely the author's and do not engage the institutions he belongs to.

[2] See Arthur Watts, *The International Law Commission, 1949-1998. Vol. I, The Treaties*, Oxford University Press, 1999, p. 1-21; R. Jennings, *The progressive development of international law and its codification,* BYBIL, vol. 24 (1947), p. 301-329.

of international law, through adaptation, interpretation of existing principles and formation of customary international law, in order to respond to changes in society. International normativity is never a "certain thing": it has been "construed as a *continuum*".[1] International law is subject to constant change, to constant process of identification: it is also a matter of "more or less".[2] It is just the case of the environmental issues: evolutions in technology, evolutions in the impact that the human community has on the planet as a whole, are factors that require evolution of law.

At the first glance, it might appear that environmental issues are a recent concern of the ILC. Nevertheless, even from the first Survey of International Law in Relation to the Work of Codification of the International Law Commission of 1949,[3] it was pointed out, in the section concerning "Obligations related to territorial jurisdiction" – that:

> "*In the same category of duties grounded in the exclusive jurisdiction of States over their territory may be considered the obligation of the State to prevent its territory from causing economic injury to neighbouring territory in a manner not permitted by international law. The award in the Trail Smelter Arbitration case—in which it was held that a State is responsible for injury done to the neighbouring territory by noxious fumes emanating from works operated within the State—provides an instructive example of this category of duties. They comprise the obligation to take measures both of a preventive nature and of active co-operation with other States […]. They cover the duties of States with regard to the use of the flow of international and non-national rivers in such matters as the pollution of and interference with the flow of rivers*.".[4]

However, concerns for protection of the environment were only in an incipient phase at the time of the beginning of the activities of the ILC. The first 14 topics selected by the Commission in 1949[5] did not include any reference to aspects that might directly concern environmental protection.

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[1] Jean d'Aspremont, *Formalism and the Sources of International Law. A Theory of the Ascertainment of Legal Rules,* Oxford University Press, 2013, p. 1.

[2] *Ibid,* also quoting M. Koskenniemi, *From Apology to Utopia: the Structure of International Legal Argument*, Cambridge University Press, 2005, p. 393.

[3] Preparatory work within the purview of article 18, paragraph 1, of the of the International Law Commission - Programme of work, doc. A/CN.4/1/Rev.1 Memorandum Sumbitted by the Secretary General, 1949.

[4] *Ibid*., p. 34-35, para. 58.

[5] ILC, Doc. A/CN.4/13 and Corr. 1-3 Report of the International Law Commission on the work of its first Session, 12 April 1949 , Official Records of the General Assembly, Fourth Session, Supplement No. 10, Yearbook of the ILC, 1949, vol. I, p. 281, para. 16.

However, an important number of topics covered in an indirect manner the protection of the environment, in the early years of the activity of the Commission: law of the sea, state responsibility, international waterways, and international aquifers. Over the years, international environmental law evolved, alongside with international concerns over protection of the environment (and alongside with the continuing "deteriorating state of the global environment").[1] The International Law Commission, on its turn, attempted to cover topics which with more direct relevance for the environmental protection, as protection of the atmosphere and protection of the environment in case of armed conflicts.

The present study has the purpose to outline, in an evolutionary and chronological manner, the work achieved by the International Law Commission in the field of environmental protection. It attempts to evaluate whether the contribution of the ILC is materialized in a more decisive manner by the crystallization of general concepts and principles of a horizontal nature, rather than by the achievement of "final results of certain topics".

The study will be divided in three parts. The first will analyse "early" topics, which covered the protection of the environment in a horizontal manner; the second will cover the topic of state responsibility, from which very important general principles of environmental protection were derived and the third part will deal with the most recent topics that cover the issue of the environment in a more direct manner.

## II. Topics covering the environment in a horizontal manner

Even from the beginning of its work, the International Law Commission touched upon elements of environmental protection in an indirect manner, on the topics of the law of the sea, international waterways and, subsequently, international aquifers.

### *Law of the sea*

In the 1950s, the law of the sea was on the agenda of the International Law Commission (regime of the high seas and regime of the territorial sea). The topic was completed in 1957, with the proposal to convene an international conference of plenipotentiaries. The ILC has proposed draft articles on

[1] R. E. Kim, K. Bosselmann, *International Environmental Law in the Anthropocene: Towards a Purposive System of Multilateral Environmental Agreements*, Transnational Environmental Law, vol. 2, Issue 2, October 2013, p. 285-309.

territorial sea and on the high seas[1], and it is to be noted that article 48 concerning the high seas proposed the establishment of a general obligation to prevent pollution at high seas.[2] The article was incorporated, in essence, in articles 24 and 25 of the 1958 Convention on the High Seas.[3] At the same time, the Commission devoted eight articles to "conservation of living resources at high seas",[4] but they were not taken over in the 1958 Convention. Nevertheless, they might have served as a "point of departure" for negotiations that led to what became Part XII of UNCLOS (protection and preservation of marine environment).

***International waterways***

A topic that was inscribed on the agenda of the ILC for more than 20 years was "the law of non-navigational uses of international waterways". The Commission included this topic in its programme of work in 1971, in response to the recommendation of the General Assembly in resolution 2669 (XXV) of 8 December 1970. The work begun by the several Special Rapporteurs: Richard D. Kearney, Stephen M. Schwebel, Jens Evensen and Stephen C. McCaffrey, was continued by Mr. Robert Rosenstock who was appointed Special Rapporteur for the topic by the Commission at its forty-fourth session in 1992.[5]

The Commission adopted, in 1994, 33 Draft articles, which were recommended as a basis for the elaboration of a convention.[6] The articles represented an elaborated work of codification, on the basis of a high number of specific river regimes throughout the world, multilateral conventions, documents of international organizations or works of the ILA

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[1] Arthur Watts, *op. cit.*, p. 31-108.

[2] ILC, Doc. A/CN.4/104 Report of the International Law Commission on the Work of its Eighth Session, 23 4 July 1956, Official Records of the General Assembly, Eleventh Session, Supplement No. 9, Yearbook of ILC, 1956, vol. II, p. 285

[3] *UNTS, 1963, vol. 450, I, p. 12, no. 6465.*

[4] ILC, Doc. A/CN.4/104 Report of the International Law Commission on the Work of its Eighth Session, 23 4 July 1956, Official Records of the General Assembly, Eleventh Session, Supplement No. 9, Yearbook of ILC, 1956, vol. II, P. 286-291.

[5] ILC, Report of the International Law Commission 1994, Doc. A/CN.4/SER.A/1994/Add.l, Yearbook of the ILC, vol. II, Part II, p. 88, para. 210, 211; see also J. Bruhacs, *The law of non-navigational uses of international waterways,* Martinus Nijhoff Publishers, 1993, p. 77-80; Stephen C. McCaffrey, *The Path to the UN Watercourses Convention and Beyond,* in Laurence Boisson de Chazournes, Makane Moïse Mbengue, Mara Tignino, Kolman Sangbana (ed.), *The UN Convention on the Law of the Non-Navigational Use of International Watercourses. A Commentary,* Oxford University Press, 2018, p. 1-18.

[6] ILC, Report of the International Law Commission 1994, Doc. A/CN.4/SER.A/1994/Add.l, Yearbook of the ILC, vol. II, Part II,., p. 89, para. 219.

(as the ""Helsinki Rules on the Uses of the Waters of International Rivers"). The general principles contained by these articles included: i) equitable and reasonable utilization and participation (regarded by the ILC as a "fundamental principle" and "well-established rule",[1] ii) the obligation to exercise due diligence to utilize an international watercourse in such a way as not to cause significant harm to other watercourse State,[2] iii) general obligation to cooperate and exchange of data and information; iv) obligation to exchange information and notify planned measures with possible adverse effects, as well as to conduct consultations and negotiations related to planned measures. The Draft articles contained a section related to protection and preservation of ecosystems[3] - including the obligation to prevent, control and reduce pollution that may cause a significant harm.[4] The ILC also proposed a mechanism for settling disputes, which comprised, inter alia, a Fact-finding commission. At the same session, in 1994, the ILC adopted a resolution on transboundary groundwater, which recommended the principles of the draft articles on non-navigational uses of waterways to be applied also to groundwaters[5] – which later served for starting a new topic.

The works of the Commission on non-navigational uses of waterways were crucially important not only because they served as a basis for the adoption of the Convention on the Law of the Non-navigational Uses of International Watercourses,[6] but for the work in support of identification and future crystallization of customary law on the matter. The Convention entered into force in 2014 and yet only 36 States are parties to it.

***Shared natural resources (Transboundary aquifers)***

[1] *Ibid.* p. 97, para. 2.

[2] *Ibid.*, p. 103.

[3] *Ibid.*, p. 119,

[4] For the topic of inland waterways pollution, see also Slavko Bogdanovic, *International Law of Water Resources. Contribution of the ILA (1954-2000),* Kluwer Law International, 2001, p. 64, 109, 313-327.

[5] Resolution on Confined Transboundary Groundwater, adopted by the ILC at its forty-sixth session, in 1994, and submitted to the General Assembly as a part of the Commission's report covering the work of that session on the topic *Law of the non-navigational uses of international watercourses*. The report, which also contains the text of, and commentaries on, the draft articles on the law of the non-navigational uses of international watercourses, appears in *Yearbook of the International Law Commission, 1994*, vol. II, p. 135.

[6] Adopted by the General Assembly of the United Nations on 21 May 1997. Entered into force on 17 August 2014; see General Assembly resolution 51/229, annex, Official Records of the General Assembly, Fifty-first Session, Supplement No. 49 (A/51/49), UNTS vol. 2999 (2014), no. 52106

It was only in 2000 when Robert Rosenstock proposed the introduction of the topic "Shared natural resources of States". The proposal for the introduction of the topic mentioned, as a general statement, that "*The environment in general and the global commons raise many of the same issues but a host of others as well. There can be no doubt that sustainable development requires optimal use of resources*".[1] Moreover, it is useful to point out that the initial proposal questioned whether the Commission should consider taking on both the topic of "General principles of environmental law" and a topic on "Shared natural resources".[2] In 2002, the Commission decided to include the topic in the long programme of work and appointed as special rapporteur Mr. Chusei Yamada.[3] Between 2003 and 2008 the Special Rapporteur adopted 5 reports. It is to be noted that the Commission focused its attention on groundwaters. Having in mind the position of States[4] and following the position of the Special Rapporteur, the Commission narrowed the topic to „Law of transboundary aquifers", leaving aside „Oil and gas".[5]

As a final outcome, the ILC adopted in 2008 the Draft articles on the law of transboundary aquifers.[6] The merit of the document is to be able to ballance the divergent position of States – some opted for a legally binding document, some for a non-binding set of draft articles – in order to help the

[1] ILC, Doc. ILC(LII)/WG/LT/L.1/Add.1, Report of the Working Group on the Long-Term Programme of Work, 25 July 2000, p. 17.

[2] ILC, Syllabuses on Topics Recommended for Inclusion in the Long-Term Programme of Work of the Commission, Report of the International Law Commission on the work of its fifty-second session, Doc. A/55/10 (2000), Yearbook of the International Law Commission, 2000, vol. II, p. 141.

[3] ILC, Doc. A/CN.4/SER.A./2002/Add. 1, Summary of the Work of the Commission in its 54th Session, Yearbook of the International Law Commission, 2002, para. 20, 100; see also Rene Marti-Nagle, Stephanie Hawkins, *Trasnboundary Aquifers,* in Mara Tignino, Christian Bréthaut (ed.), *Research Handbook on Freshwater Law and International Relations,* Edward Elgar Publishing, 2018, p. 305-335, 320.

[4] ILC, Doc. A/CN.4/580 Fourth report on shared natural resources: transboundary groundwaters, by Mr. Chusei Yamada, Special Rapporteur, 6 March 2007, p. 2, para. 4-5.

[5] *Ibid.,* p. 3, para. 15.

[6] ILC, Draft articles on the law of transboundary aquifers, Text adopted by the International Law Commission at its sixtieth session, in 2008, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/63/10).

*As the views of Governments on the final form of the draft articles were divided, the Commission decided to recommend to the General Assembly a two-step approach, consisting of the General Assembly: (a) taking note of the draft articles to be annexed to its resolution and recommending that States concerned make appropriate bilateral and regional arrangements for the proper management of their transboundary aquifers on the basis of the principles enunciated in the draft articles; and (b) considering, at a later stage, the elaboration of a convention on the basis of the draft articles*- p. 22, para. 3.

identification of possible norms of customary international law under cristallysation. Thus, principles like equitable and reasonable utilization, the obligation not to cause significant harm (article 6 – which includes the obligation to take appropriate measures in case that a harm is produced) certainly serve in a decisive manner the continuing shaping of international law.[1]

A significant development is represented by the introduction of a „general obligation to protect and preserve the ecosystems within a transboundary aquifer and also the outside ecosystems dependent on the aquifer",[2] as well as a general obligation to general obligation to prevent, reduce and control pollution of their transboundary aquifers that may cause significant harm to other aquifer States through the transboundary aquifers and the aquifer-related environment.[3]

Article 15 of the Draft articles establishes general obligations in case of planned activities that might have significant adverse effects upon other States: the obligation to assess the significant adverse effects, the obligation to notify concerned States and the obligation to consult and negociate with concerne States.[4]

The relevance of the two above mentioned topics for the advancement of the customary international law is beyond doubt. It could be pointed out that, even if interpreted a bilateral treaty, the ICJ mentioned in 2010 that the respective treaty:

> "*has to be interpreted in accordance with a practice, which in recent years has gained so much acceptance among States that it may now be considered a requirement under general international law to undertake an environmental impact assessment where there is a risk that the proposed industrial activity may have a significant adverse impact in a transboundary context, in particular, on a shared resource. Moreover, due diligence, and the duty of vigilance and prevention which it implies, would not be considered to have been*

[1] Gabriel Eckstein, Francesco Sindico, *The Law of Transboundary Aquifers: Many Ways of Going Forward, but Only One Way of Standing Still,* Review of European Community and International Environmental Law, vol. 23 (I), 2014, p. 32-42, 40 – the authors indicate that the Draft Articles have been invoked by national jurisdictions, such as Decision of the Supreme Court of Justice of Costa Rica, Constitutional Chamber, Voto N. 10-006922 (16 April 2010), paragraph LXVIII – in this sense, the authors quote N. Boeglin, *Acuíferos Transfronterizos: Respuestas Desde el Derecho Internacional y Vacíos en Centroamérica*, Boletín Geológico y Minero, vol. 123, no. 3, (2012), p. 240.

[2] *Ibid,* p. 33, article 10.

[3] *Ibid.*, p. 34, article 12.

[4] *Ibid.*, p. 37.

*exercised, if a party planning works liable to affect the régime of the river or the quality of its waters did not undertake an environmental impact assessment on the potential effects of such works*".[1]

## III. State Responsibility

The "International responsibility" was included, even from 1949, on the provisional list of topics suitable for codification. Nevertheless, even from 1973, the General Assembly recommended that the ILC "undertake at an appropriate time a separate study on the topic of international liability for injurious consequences arising out of performance of other activities".[2] In 1997, the Commission decided to split the issue of prevention from the issue of allocation of loss following state liability.[3] Thus, two topics appeared, in the end, relevant for the general issue of environment protection: prevention of transboundary damage from hazardous activities and international liability in case of loss from transboundary harm arising out of hazardous activities.[4]

### *Prevention of transboundary damage*

The Articles on Prevention of Transboundary Harm from Hazardous Activities were adopted by the International Law Commission in 2001.[5] The Articles are presented, practically, in the form of a draft Convention: they consist of a preamble and nineteen articles: Scope (article 1); Use of terms

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[1] *Pulp Mills on the River Uruguay (Argentina v. Uruguay),* Judgment, ICJ Reports 2010, p. 14, 83, para. 204.

[2] UN General Assembly, Resolution 3071 (XXVIII), 30 November 1973, para. 3 c).

[3] ILC, Doc. A/CN.4/483 Report of the International Law Commission on the work of its forty-ninth session, 12 May 18 July 1997, Official Records of the General Assembly, Fifty-second session, Supplement No.10, Yearbook of the Internatioanl Law Commission, 1997, vol. II, p. 16, para. 110-111.

[4] Malgosia Fitzmaurice, *International Responsibility and Liability, Oxford University Press, 2008, 2012,* p. 22-24; Alain Pellet, *The Definition of Responsibility in International Law,* in James Crawford, Alain Pellet, Simon Olesson (ed.), *The Law of International Responsibility,* Oxford University Press, 2010, p. 3-16; James Crawford, *The System of International Responsibility,* in James Crawford, Alain Pellet, Simon Olesson (ed.), *The Law of International Responsibility,* Oxford University Press, 2010, p. 17-26.

[5] ILC, Articles on Prevention of Transboundary Harm from Hazardous Activities, adopted by the Commission at its fifty-third session, in 2001, and submitted to the General Assembly as a part of the Commission's report covering the work of that session. The report, which also contains commentaries on the draft articles, appears in Official Records of the General Assembly, Fifty-sixth Session, Supplement No. 10 (A/56/10), p. 34; see also Pemmaraju Sreenivasa Rao, *Introduction,* Articles on Prevention of Transboundary Harm from Hazardous Activities, available at http://legal.un.org/avl/ha/apthha/apthha.html (accessed 15 August 2019).

(article 2); Prevention (article 3); Cooperation (article 4); Implementation (article 5); Authorization (article 6); Assessment of risk (article 7); Notification and information (article 8); Consultations on preventive measures (article 9); Factors involved in an equitable balance of interests (article 10); Procedures in the absence of notification (article 11); Exchange of information (article 12); Information to the public (article 13); National security and industrial secrets (article 14); Non-discrimination (article 15); Emergency preparedness (article 16); Notification of an emergency (article 17); Relationship to other rules of international law (article 18); Settlement of disputes (article 19)[1].

The draft articles are very important for the further configuration of customary international law. Principles like prevention, cooperation, the obligation to conduct authorization and assesment of risk, as well as the obligation to notify, could be part of an emerging trend towards cristalizing norms of customary international law.[2] Nevertheless, the Articles also contain innovative proposals related to settlement of disputes – a Fact-finding Commission is envisaged in this sense.

As the Commission pointed out:

> *„Prevention of transboundary harm arising from hazardous activities is an objective well emphasized by principle 2 of the Rio Declaration on Environment and Development (Rio Declaration) and confirmed by ICJ in its advisory opinion on the Legality of the Threat or Use of Nuclear Weapons as now forming part of the corpus of international law*".[3]

The International Court of Justice recognized that acknowledged that the principles of prevention, notification and assessment (conducting environmental impact assessment) are now part of customary international law, having their source in the principle of due dilligence, according to which a State must not "allow knowingly its territory to be used for acts contrary to the rights of other States".[4] Indeed, the principles of the ILC

[1] Ibid.

[2] Michael Montjoie, *The Concept of Liability in the Absence of an International Wrongful Act,* in James Crawford, Alain Pellet, Simon Olesson (ed.), *The Law of International Responsibility,* Oxford University Press, 2010, p. 504-513, 512.

[3] ILC, Articles on Prevention of Transboundary Harm from Hazardous Activities, Yearbook of the International Law Commission, 2001, part. II, p. 148, para. 3.

[4] *Pulp Mills on the River Uruguay (Argentina v. Uruguay),* Judgment, ICJ Reports 2010 (I), pp. 55-56, para. 101; *Corfu Channel (United Kingdom v. Albania),* Merits, Judgment, ICJ Reports 1949, p. 22; *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica),* Judgment, ICJ Reports 2015, p. 665, 706, para. 104.

Draft Convention had an important impact on the future development of the law – as the International Court of Justice acknowledged:

> „*If the environmental impact assessment confirms that there is a risk of significant transboundary harm, the State planning to undertake the activity is required, in conformity with its due diligence obligation, to notify and consult in good faith with the potentially affected State, where that is necessary to determine the appropriate measures to prevent or mitigate that risk*".[1]

***Liability in case of loss arising out of Hazardous Activities***

The Interantional Law Commission contiued the work on the topic of liability for injurious consequences and concluded in in 2006, when it adopted the text of the preamble and a set of eight draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities.[2]

The principles – which are merely recommendation for measures to be implemented in domestic law – act as a safety net, even if it has been affired that the work on this topic has not been "as influential to international law as the work programme on State Responsibility".[3] As the Commission points out, they are presented „in the context of the relevant provisions of the Rio Declaration on Environment and Development ("Rio Declaration").[4] One of the purposes of the principles, according to point 3 (b), is „*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*".[5] The principles include the duty to provide prompt and adequate compensation (principle 4), the duty to take response measures

[1] *Certain Activities Carried Out by Nicaragua in the Border Area (Costa Rica v. Nicaragua) and Construction of a Road in Costa Rica along the San Juan River (Nicaragua v. Costa Rica),* Judgment, ICJ Reports 2015, p. 665, 705-706, para. 104.

[2] ILC, Draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, Text adopted by the International Law Commission at its fifty-eighth session, in 2006, and submitted to the General Assembly as a part of the Commission's report covering the work of that session (A/61/10); Yearbook of the International Law Commission, 2006, vol. II, Part Two, p. 59.

[3] Benoit Mayer, *The International Law on Climate Change,* Cambdridge University Press, 2018, p. 82.

[4] *Ibid.*, p. 59, para. 1.

[5] ILC, Draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, Yearbook of the International Law Commission, 2006, vol. II, Part Two, p. 72.

(principle 5), as well as the duty to provide domestic judicial and administrative remedies (principle 6).[1]

## IV. Topics with direct connection to environment protection

In 2011, two topics which are intrinsically related to environment protection have been recommended to be included in the long term working programme: "protection of the atmoshphere" and "protection of environment in relation to armed conflicts".[2] The two topics were included in the programme of work in 2013.[3] It would be interesting to point out the words of Shyina Murase, when proposing the topic "protection of the atmosphere" to be included in the long-term programme of work:

> "*It is important to ensure that the International Law Commission be fully engaged with the international community's present-day needs. While the Commission's draft articles on international watercourses and on transboundary aquifers contain some relevant provisions regarding the protection of the environment, the Commission has not dealt with any topic in the field of international environmental law since the conclusion of the topic on liability (in other words, the prevention of transboundary harm and allocation of loss), which appears to be a significant omission at a time when the world is undergoing critical environmental degradation. It is therefore proposed that the Commission consider for its future work the topic "Protection of the atmosphere*".[4]

### *Protection of the atmosphere*

The decision to include the topic "protection of the atmosphere" on the programme of work of the ILC was accompanied by the following understanding:

> "(*a*) Work on the topic will proceed in a manner so as not to interfere with relevant political negotiations, including on climate change,

[1] See also Alan Boyle, *Liability for Injurious Consequences of Acts not Prohibited by International Law*, in James Crawford, Alain Pellet, Simon Olesson (ed.), *The Law of International Responsibility,* Oxford University Press, 2010, p. 103-124.

[2] ILC, Report of the International Law Commission on the Work of its 63-rd Session, 2011, Doc. A/66/10, Yearbook of the International Law Commission, 2011, vol. II, p. 189, 211.

[3] ILC, Report of the International Law Commission, Sixty-fifth session (6 May–7 June and 8 July–9 August 2013) Doc. A/68/10, Yearbook of the International Law Commission, 2013, vol. II, para. 168.

[4] *Ibid.,* p. 189.

ozone depletion, and long-range transboundary air pollution. The topic will not deal with, but is also without prejudice to, questions such as: 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;

(*b*) The topic will also not deal with specific substances, such as black carbon, tropospheric ozone, and other dual-impact substances, which are the subject of negotiations among States. The project will not seek to "fill" gaps in the treaty regimes;

(*c*) Questions relating to outer space, including its delimitation, are not part of the topic;

(*d*) The outcome of the work on the topic will be draft guidelines that do not seek to impose on current treaty regimes legal rules or legal principles not already contained therein.

The Special Rapporteur's reports would be based on such understanding."[1]

The special rapporteur appointed by the ILC, Shyina Murase, elaborated until now five reports. According to the special rapporteur, the purpose of this project is progressive development and codification of international law in a fourfold manner: "i) First, the project aims to identify the status of customary international law, established or emerging, examining the gaps and overlaps, if any, in existing law relating to the atmosphere; ii) Second, it aims to provide appropriate guidelines for harmonization and coordination among treaty regimes within and outside international environmental law. The issue of trade and the environment will prove to be a challenge in that area; iii) Third, the proposed draft guidelines will help to clarify a framework for the harmonization of national laws and regulations with international rules, standards and recommended practices and procedures relating to the protection of the atmosphere; iv) Fourth, the project aims to establish guidelines on the mechanisms and procedures for cooperation among States in order to facilitate capacity-building in the field of transboundary and global protection of the atmosphere".[2]

[1] *Ibid.*, para. 168.

[2] ILC, Doc. A/CN.4/667, 14 February 2014, First Report of Special Rapporteur S. Murase, Protection of the atmoshpere, p. 8, para. 13.

At the 70th Session in 2018, the Drafting Committee addopted the texts and titles of 12 draft guidelines and preamble on first reading.[1] It would be noted that, on one side, the document contain general statements – as the ones in the preamble of the Draft Guideline:

> "*Acknowledging that the atmosphere is essential for sustaining life on Earth, human health and welfare, and aquatic and terrestrial ecosystems, […] Recognizing therefore that the protection of the atmosphere from atmospheric pollution and atmospheric degradation is a pressing concern of the international community as a whole*".[2]

Nevertheless, important elements which may serve to the codification or on-going crystallization of norms of customary international law are to be identified: general obligation to protect the atmosphere (guideline 3); environmental impact assessment (guideline 4); sustainable use of the atmosphere (guideline 5), equitable and reasonable utilization of the atmosphere (guideline 6), prudence and caution with respect to large scale modifications (guideline 7). The guidelines also contain correct – but rather general – statements related to cooperation among States, national implementation, compliance and dispute settlement.

The guidelines raise one of the most important questions of international law – interrelation between different sets of norms (guideline 9). Nevertheless, no new or clear answer is provided:

> "[different sets of norms]…should, to the extent possible, be identified, interpreted and applied in order to give rise to a single set of compatible obligations, in line with the principles of harmonization and systemic integration, and with a view to avoiding conflicts. This should be done in accordance with the relevant rules set forth in the Vienna Convention on the Law of Treaties of 1969, including articles 30 and 31, paragraph 3 (c), and the principles and rules of customary international law".[3]

At its 3450th meeting, on 9 August 2018, the Commission decided to transmit the draft guidelines on the protection of the atmosphere, through the Secretary-General, to Governments and international organizations for

[1] ILC, Doc. A/CN.4/L.909, Protection of the atmosphere, Texts and titles of draft guidelines and preamble adopted by the Drafting Committee on first reading, 6 June 2018.

[2] *Ibid.*, p. 1.

[3] *Ibid.*, p. 3.

comments and observations, with the request that such comments and observations be submitted to the Secretary-General by 15 December 2019.[1]

***Protection of the environment in relation to armed conflicts***

Although concerns regarding the protection of the environemnt in case of armed conflicts were longstanding,[2] the International Law Commission inscribed the topic on the current programme of work in 2013. With respect to the second topic – protection of the environment in relation to armed conflicts, in 2013 the ILC appointed Ms. Marie Jacobsson as special rapporteur.[3] She presented three reports, in 2014, 2015 and 2016. Subsequently, Ms Marja Letho was appointed as special rapporteur and she presented two reports, in 2018 and 2019.

As a starting point, it would be useful to quote Specal Rapporteur Marie Jacobsson, in her first preliminary report report:

> „The protection of the environment in armed conflicts to this point has been viewed primarily through the lens of the law of armed conflict. However, this perspective is too narrow, as modern international law recognizes that the international law applicable during an armed conflict may be wider than the law of armed conflict. […] Accordingly, applicable rules of the *lex specialis* (the law of armed conflict) coexist with other rules of international law".[4]

This issue was largely addressed in the debates within the 6th Committee: Several States commented on the issue of complementarity, or the interplay of different areas of international law. While it was agreed that international humanitarian law was *lex specialis* during an armed conflict, speakers also

[1] ILC, Report of the International Law Commission, Seventieth session (30 April–1 June and 2 July–10 August 2018) A/73/10, Yearbook of the International Law Commission, 2018, vol. II, p. 158, para. 76.

[2] See, for example, Robert E. Linhard, *Protection of the Environment during Armed Conflict and other Military Operations,* in R. Grunawalt, J.E. King, R.S. McClain (ed.), *Protection of the Environemnt during Armed Conflict,* International Law Studies, vol. 69, Naval War College, 1995, p. 57-63.

[3] ILC, Report of the International Law Commission Sixty-fifth session (6 May–7 June and 8 July–9 August 2013), Doc. A/68/10, Yearbook of the International Law Commission, 2013, vol. II, p. 72, para. 131.

[4] ILC, Doc. A/CN.4/674, Preliminary report of the *Special Rapporteur*, Ms. Marie G. Jacobsson, *Protection of the environment in relation to armed confclitcs,* 30 May 2014, paras. 2, 5.

saw a need to address human rights and environmental obligations within the scope of the topic.[1]

The approach of the first Special Rapporteur was „*that the topic be approached from a temporal perspective*, rather than from the perspective of particular regimes of international law, such as environmental law, the law of armed conflict and human rights law. It is thus proposed that the Commission proceed to consider the topic in three temporal phases: before, during and after an armed conflict (phase I, phase II and phase III, respectively). The proposed approach is intended to make the topic more manageable and easier to delimit".[2]

At its sixty-ninth session (2017), the Commission established a Working Group to consider the way forward in relation to the topic as Ms. Jacobsson was no longer with the Commission, and decided to appoint Ms. Marja Lehto as the new Special Rapporteur.[3]

In 2016, the Commission provisionally adopted draft principles 1, 2, 5 and 9 to 13, and commentaries thereto, and took note of draft principles 4, 6 to 8, and 14 to 18 (principles applicable after an armed conflict), which had been provisionally adopted by the Drafting Committee. In 2018, the Commission provisionally adopted draft principles 4, 6 to 8, and 14 to 18 as well as commentaries thereto. Also at the seventieth session, the Commission took note of draft principles 19, 20 and 21 (principles applicable in situation of occupation) provisionally adopted by the Drafting Committee at the same session.[4]

The general principles provisionally adopted util present are worth mentioning: the general obligation to take effective measures for the protection of environment in relation to armed conflicts (principle 4), designation of protected areas (principle 5), an innovative rule related to protection of the environment of indiginous people (principle 6), as well as general recommendations to include provisions related to environment in presence of force agreements (principle 7) and obligations related to peace operations (principle 8).

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[1] ILC, Doc. A/CN.4/728, Second report of the *Special Rapporteur*, Ms. Marja Lehto, *Protection of the environment in relation to armed confclitcs,* 21 March 2019, p. 2, para. 3.

[2] *Ibid.*, p. 17, para. 58.

[3] ILC, Report of the International Law Commission Sixty-ninth session (1 May-2 June and 3 July-4 August 2017), doc. A/72/10, Yearbook of the International Law Commission, 2017, vol. II, p. 211, para. 255, 262.

[4] ILC, Report of the International Law Commission, Seventieth session (30 April–1 June and 2 July–10 August 2018) A/73/10, Yearbook of the International Law Commission, 2018, vol. II, p. 240, para. 168-171.

In March 2019, the special rapporteur Ms. Marja Letho presented her second report, which focuses on how the international rules and practices concerning natural resources may enhance the protection of the environment during and after such conflicts. It focuses on illegal exploitation of natural resources and unintended environmental effects of human displacement.[1]

This second report is accompanied by the formulation of new draft principles, related to the: *corporate due dilligence, Mertens clause, Environmental modification techniques, pillage, responsibility and liability, corporate responsibility, human displacement.*

The Commission is expected to continue its work on this topic in 2020.

## V. Conclusion

The role of the International Law Commission for the process of codification and progressive development of international law is well known. It is an important brick in the development of international law in the field of protection of environment – as our planet, international law is a living instrument, that evolves continuously.

As the ICJ has put it even from 1997, in the *Gabcikovo-Nagymaros* case,

> *„Throughout the ages, mankind has, for economic and other reasons, constantly interfered with nature. In the past, this was often done with- out consideration of the effects upon the environment. Owing to new scieritific insights and to a growing awareness of the risks for mankind - for present and future generations - of pursuit of such interventions at an unconsidered and unabated pace, new norms and standards have been developed, set forth in a great number of instruments during the last two decades. Such new norms have to be taken into consideration, and such new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past*".[2]

It is expected that the International Law Commission continues its work. Thus, in 2018, the Commission decided to include in the long-term programme of work the topic „Sealevel rise in relation to international law".

At its seventieth session (2018), the Commission decided to include the topic "Sea-level rise in relation to international law" in its long-term

[1] ILC, Doc. A/CN.4/728, Second report of the *Special Rapporteur*, Ms. Marja Lehto, 21 March 2019.

[2] ICJ Reports, 1997, p. 78, para. 140.

programme of work.[1] In 2019, the Commission decided to include the topic in its programme of work and established „an open-ended Study Group on the topic, to be co-chaired, on a rotating basis, by Mr. Bogdan Aurescu, Mr. Yacouba Cissé, Ms. Patrícia Galvão Teles, Ms. Nilüfer Oral and Mr. Juan José Ruda Santolaria".[2] Three issues will be covered by the Study Group: law of the sea, statehood, protection of persons affected by sea-level rise.[3]

The importance of this topic is related to the conceptual approach that the Commission will have to adopt, in order to identify the responses that international law provide to changes in the environment and the society. As the 2030 Agenda for Sustainable Development recognizes, "*Climate change is one of the greatest challenges of our time and its adverse impacts undermine the ability of all countries to achieve sustainable development. Increases in global temperature, sea-level rise, ocean acidification and other climate change impacts are seriously affecting coastal areas and low-lying coastal countries [...]. The survival of many societies, and of the biological support systems of the planet, is at risk*."[4] As emphasized by members of the Study Group," sea-level rise has become a global phenomenon and thus creates global problems, impacting on the international community as a whole".[5]

The role of the International Law Commission will continue to be to identify and follow the continuous evolution of international law. International law is a living instrument, that follows and shapes changes in the international community. The whole work of the Commission with respect to environment – from approaching the topic in a horizontal manner to focusing on detailed topics like protection of the atmosphere or protection of

[1] ILC, Report of the International Law Commission, Seventieth session (30 April–1 June and 2 July–10 August 2018) A/73/10, Yearbook of the International Law Commission, 2018, vol. II, para. 369.

[2] ILC, Report of the International Law Commission, Seventy-first session (29 April–7 June and 8 July–9 August 2019), A/74/10, Yearbook of the Interantional Law Commission, 2019, vol. II, p. 340, para. 265.

[3] *Ibid.*, p. 340, para. 269; Bogdan Aurescu, *The Legal Effects of the Sea-level Rise on the Work Programme of the UN International Law Commission,* Romanian Journal of International Law, no. 20 (July-December 2018), pp. 72-82.

[4] UN General Assembly Resolution A/RES/70/1, 25 September 2015, para. 14; see also ILC, Syllabus, Recommendation of the Working-Group on the long-term programme of work, Report of the International Law Commission, Seventieth session (30 April–1 June and 2 July–10 August 2018) A/73/10, Yearbook of the International Law Commission, 2018, vol. II, Annex B, p 326, para. 2.

[5] ILC, Syllabus, Recommendation of the Working-Group on the long-term programme of work, Report of the International Law Commission, Seventieth session (30 April–1 June and 2 July–10 August 2018) A/73/10, Yearbook of the International Law Commission, 2018, vol. II, Annex B, p 326, para. 1.

environment in relation to armed conflicts – proves the evolutionary chacarter of the international law and of the approaches of the ILC. International law is likely to correspond to the phrase of Galileo Galilei „*eppur si muove*" – it evolves continuously. Thus, it will be for the ILC to follow and discover this[1] continuous evolution.

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