coddify the principles for sustainability set forth in it. The Earth Charter is thus thought to complement the IUCN Draft International Covenant on Environment and Development, which in turn is designed as a rough draft for a hard law instrument that integrates principles on environment and development from existing international declarations and binding agreements. The Earth Charter, as opposed to the Draft Covenant, is a declaration by the people making an appeal to decision-makers worldwide toward building a just, sustainable and peaceful global society. During the discussions, however, many state delegates objected that the document cannot be adopted in this form as their home governments would first need to set up formal hearings to review the Earth Charter or are yet to render a decision whether even to consider it at all. The adopted version toned down the language to read that the Director General, in consultation with IUCN members and Commissions, is to examine and review the document and make a recommendation at the Third Session of the World Conservation Congress as to an appropriate response.

In view of IUCN’s recent appointment as Observer to the General Assembly of the United Nations, the resolution IUCN’s Relations with the United Nations System (GOV007 rev. 1, p. 314) requests the IUCN to review its role how to contribute most efficiently to the work of the UN since it is the only international organisation with expertise in issues of the environment, biodiversity, and nature conservation and sustainable natural resource use. The first step should be to arrange to open a formal office for the IUCN Observer Mission at the UN Headquarters in New York City. Further, the Environmental Law Programme is requested “to continue monitoring documents of the United Nations and to undertake an ongoing review of the agenda of the United Nations, in order to advise the Secretariat and the other Commissions on any agenda items and other ongoing relevant issues in which the IUCN and the assembled expertise of its commissions should assist the work of the United Nations.” The Environmental Law Programme is also to provide a regular list of UN documents relevant to the environment as a service to the Union and post it on the Internet web site of IUCN.

In gearing up for the 10-year review of the United Nations Conference on Environment and Development, the resolution Preparing for Rio +10 (PRG013 rev. 1) “urges IUCN’s Council, Commissions and Secretariat to undertake all steps necessary in order to ensure that IUCN will be able to offer valuable input during the preparations for and during the Rio+10 conference.” Further, the Director General is requested, should funding be available, to form a working group that is to facilitate networking and collaboration among NGOs who are also interested in taking part in the Rio+10 process.

Lamenting the lack of information and insufficient involvement in international environmental affairs by the popularly elected representatives in local, regional, national and trans-national assemblies, the resolution Cooperation with Parliaments (GOV012, see p. 317), calls upon the Director General to negotiate a memorandum of understanding with the Secretary-General of the Inter-Parliamentary Union (IPU) in order to intensify cooperation with the IPU and its member parliaments. The hope is to “develop and maintain the necessary contacts and exchange of information with IPU member parliaments throughout the world who approach IUCN for advice on certain matters or express a general interest in policy questions pertaining to environmental conservation and sustainable development.”

Notes
1 Commission on Environmental Education.
2 The Jordan Times, mistakenly reported on October 10, 2000 that the widow of the late Wolfgang E. Burhenne, Françoise Burhenne-Guilmin presented the award. To allay worries of readers of this journal and his fellow ICEL members, the author would like to remark that our editor-in-chief is still, of course, alive and well.
3 In conjunction with the West Coast Environmental Law Institute, Vancouver, Canada.
4 Convention on Biological Diversity.
5 A second revised text of the IUCN Draft International Covenant on Environment and Development (IUCN Environmental Policy and Law Paper No. 31 Rev.), prepared by the IUCN/CEL in collaboration with ICEL, has been distributed among Ministries of Justice and Ministries in charge of environmental affairs in the hope of stimulating debate in the United Nations General Assembly on the prospects of adopting such a Covenant.

Martens Clause for Environmental Protection

by Dinah Shelton* and Alexandre Kiss**

The World Conservation Congress held in Amman, Jordan from 4-11 October 2000 (see page 313), adopted a landmark recommendation on environmental protection. Several IUCN member organizations and States moved adoption of the recommendation, which was drafted by Commission on Environmental Law (CEL) members Dinah Shelton and Alexandre Kiss. The recommendation urges all United Nations member States to endorse a policy that respects a minimum standard for environmental protection in the absence of relevant international conventional law or regulation. The minimum standard applies “until a more complete international code of environmental protection has been adopted.” The level of protection afforded the biosphere and all its constituent elements and processes is to be based upon principles of international law “derived from established custom, from dictates of the public conscience, and from the principles and fundamental values of humanity acting as steward for present and future generations.”

The language of the recommendation is adapted from...
the Martens Clause, which is contained in preambular paragraph nine of the Convention Respecting the Laws and Customs of War on Land of 29 July 1899 and in the eighth preambular paragraph of the Revised Hague Convention (IV) Respecting the Laws and Customs of War on Land (18 October 1907). The clause finds echoes in the Geneva Conventions of 1949 and is reiterated in Article 1(2) of Protocol (I) Additional to the Geneva Conventions of 12 August 1949 and Relating to the Protection of Victims of International Armed Conflicts. It was also included in Resolution XXIII of the United Nations Conference on Human Rights, held in Tehran from 22 April-13 May 1968, and subsequently approved by the General Assembly of the United Nations.

The Martens Clause has proved to be of fundamental importance in providing a minimum legal standard to govern the conduct of all persons in times of armed conflict when no other international law is applicable. The drafters of the Hague Convention realized that they could not regulate all the circumstances of armed conflict and that unforeseen cases would arise that should not be left to the arbitrary judgment of military commanders. In particular, there was concern that technological developments in armaments and other methods of warfare could escape regulation and thus could be the basis of massive destruction of human society.

The Martens Clause imported into humanitarian law a dynamic dimension that was not limited by time, bringing in fundamental principles beyond those contained in written conventions. It permitted constant and spontaneous development of norms as needed in the common interest of humanity due to scientific, technological, military, social and historical evolution. The concept responds to the fundamental purpose of humanitarian law: the preservation of humanity.

The meaning of the Martens Clause has been understood in two ways. First, it makes it clear that customary international law remains valid so long as it is not altered by codification in international agreements. Second, it establishes that international principles can be the source of new rules when new means and methods of warfare develop in the future. In regard to the latter, a commentator on the Martens Clause has demonstrated the importance of evolving norms in respect of a specific problem: “mankind as a species is now confronted with a crisis of survival because of nuclear weapons and other weapons of mass destruction.”

The new environmental Martens Clause, which applies during peacetime as well as during armed conflicts, is of particular importance because present international law applicable in armed conflicts includes only a few principles aimed at environmental protection. Moreover, environmental law outside the context of armed conflicts has significant lacunae. Like the original Martens Clause, the IUCN resolution reflects the need for appropriate measures at the national and international, individual and collective, private and public levels to ensure human survival against the environmental consequences of destructive human activities. Environmental regulation, like the regulation of warfare, is likely to be responsive in most instances, coming after the technological and economic changes that make evident the need for norms and standards.

As a consequence, it is essential that all relevant actors base their conduct on an international minimum standard derived from the principles of international law. Relevant environmental principles that can be the source of obligations include the duty to prevent environmental harm and the precautionary principle. By calling for application of the minimum standard in peacetime as well as during armed conflicts, the IUCN resolution reflects the fact that most environmental harm occurs as a result of daily human activities, from industrial emissions to household waste disposal. States are now asked to base their responses to this harm on an international minimum standard derived from principles of international law, the laws of humanity, and the dictates of the public conscience.

Notes

1 “Until a more complete code of the laws of war has been issued, the High Contracting Parties deem it expedient to declare that, in cases not included in the Regulations adopted by them, the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.” The Martens Clause is so called after Friedrich von Martens, the Russian delegate who chaired the 11th meeting of the Second Committee of the Second Commission of the First Hague Peace Conference of 1899.

2 See Articles 63/62/142/158 restricting the impact of denouncing the Conventions. The denouncing power remains bound to fulfil obligations arising “by virtue of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience.”


4 Two provisions expressly mentioning environmental protection were included in Protocol I to the Geneva Conventions of 12 August 1949, adopted on 10 June 1977. Article 35(3) provides: “It is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment.” Article 55 adds, “1. Care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage. This protection includes the prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population. 2. Attacks against the natural environment by way of reprisals are prohibited.”