The Interplay between International Humanitarian Law and International Environmental Law

Towards a Comprehensive Framework for a Better Protection of the Environment in Armed Conflict

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Abstract

It is well known that armed conflicts may cause extensive damage to the environment and that International Humanitarian Law (IHL) is lacking any adequate protection against such damage. International Environmental Law (IEL) could therefore be used to fill the gaps. This nonetheless raises the complex issue of the interplay between that body of law and IHL. This article intends to provide a comprehensive framework on such interplay, the originality of which is to draw inspiration from the relationship between IHL and International Human Rights Law (IHRL). It examines two processes through which IEL may impact the regulation of armed conflict: the 'interpretation process', whereby IHL is interpreted in light of IEL, and the 'application process', whereby IEL applies alongside IHL to activities related to armed conflicts. While both processes involve the operation of formal mechanisms, including the lex specialis *principle and the principle of systemic integration, they must be guided by substantial considerations, which seek coherence between the two bodies of law.*

1. Introduction

Until recently, much research on the protection of the environment in armed conflict has focused on that issue from the perspective of International

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Journal of International Criminal Justice (2023), 1 of 32 https://doi.org/10.1093/jicj/mqac062

Humanitarian Law (IHL).[1] Notable developments on the subject, however, such as the work of the International Law Commission (ILC) and other international institutions,[2] combined with a growing commitment to the protection of the environment, have led scholars to reflect on how International Environmental Law (IEL) might complement the regulation of armed conflict.[3] While this raises the issue of the interplay between IHL and IEL, only few scholarly writings have provided a comprehensive framework on such interplay so far.[4]

The aim of this article is to propose such a framework, the innovative feature of which is based upon an analogy with the relationship between IHL and International Human Rights Law (IHRL).[5] The article first considers the extent to which the regime applicable to that relationship may be transposed to the interplay between IHL and IEL. It acknowledges that adaptations might be needed, however, in light of the particular differences between IHRL and IEL (Part 2). Drawing upon the relationship between IHL and IHRL, the article then examines two distinct formal processes through which IEL may further protect the environment in armed conflict: the 'interpretation process', whereby IHL is interpreted in light of IEL (Part 3), and the 'application process', whereby IEL applies alongside IHL in an armed conflict to activities related to that conflict (Part 4). Finally, the article turns to the notion of coherence in order to grasp the interactions between IHL and IEL beyond the mere operation of formal processes (Part 5).

1 For a similar observation, see E. Cusato, *The Ecology of War and Peace: Marginalizing Slow and Structural Violence in International Law* (Cambridge University Press, 2021), at 8.

2 See United Nations Environment Programme (UNEP), *Protecting the Environment During Armed Conflict. An Inventory and Analysis of International Law* (UNEP, 2009); International Committee of the Red Cross (ICRC), *Guidelines on the Protection of the Natural Environment in Armed Conflict. Rules and Recommendations Relating to the Protection of the Natural Environment under International Humanitarian Law, with Commentary* (ICRC, 2020).

3 See K. Hulme, 'Armed Conflict and Biodiversity', in M. Bowman, P. Davies and E. Goodwin (eds), *Research Handbook on Biodiversity and Law* (Edward Elgar, 2016) 245, at 260–268.

4 For the most elaborated frameworks, see B. Sjöstedt, *The Role of Multilateral Environmental Agreements: A Reconciliatory Approach to Environmental Protection in Armed Conflict* (Hart, 2020), especially her 'reconciliatory approach' between Multilateral Environmental Agreements (MEAs) and IHL as described at 175–212; A. Dienelt, *Armed Conflicts and the Environment: Complementing the Laws of Armed Conflict with Human Rights Law and International Environmental Law* (Springer, 2022), especially her approach to the 'clarifying function' of IEL and IHRL with respect to IHL and her particular approach to 'normative intensification' of IHL through IEL and IHRL, as described and illustrated at 8–16 and 277–319. The approach proposed in this article is however different in several respects (see notes 27, 55, 74, 77, 158, 175, 176, 178 and 183 below).

5 Only isolated and unelaborated references have thus far been made to such relationships with respect to the interplay between IHL and IEL. See Hulme, *supra* note 3, at 263; C. Dagnicourt, *La protection de l'environnement en période de conflit armé* (L'Harmattan, 2020), at 144–145; *Second Report on the Effects of Armed Conflicts on Treaties, by Mr. Ian Brownlie, Special Rapporteur*, UN Doc. A/CN.4/570, 16 June 2006, at 257, § 41; Sjöstedt, *supra* note 4, at 160.

2. The Relevance of the IHL–IHRL Relationship

Three key arguments show the relevance of reflecting on the IHL–IHRL relationship when elaborating on the interplay between IHL and IEL. First, state practice supports such an approach. For example, Austria asserted in 2018, in line with the first ILC rapporteur on the protection of the environment in relation to armed conflicts,[6] that 'the relationship between international humanitarian law and international environmental law ... should be determined using the same approach as that taken in considering the relationship between international humanitarian law and human rights'.[7] More specifically, during the ILC work on the effects of armed conflicts on treaties, several states and ILC members referred to the well-known International Court of Justice (ICJ) dictum on the interplay between IHL and IHRL in the *Nuclear Weapons* case,[8] when considering the relationship between IHL and IEL.[9] To this end, the ILC's Special Rapporteur proposed a specific Article on the applicable law, noting that environmental treaties and related human rights obligations continue to apply in times of armed conflict, subject to the *lex specialis* of IHL.[10]

Secondly, a clear parallel can be drawn between the recognized importance of protecting the individuals in times of armed conflict, and the gaps in IHL in doing so, and the same recognition in relation to urgent environmental concerns and the shortcomings of IHL. At the 1968 Teheran Conference, a growing human rights community pushed for the 'humanization' of the regulation

6 *First Report on the Protection of the Environment in Relation to Armed Conflicts by Marja Lehto, Special Rapporteur*, UN Doc. A/CN.4/720, 30 April 2018, § 15.

7 See e.g. statement from Austria, UN Doc. A/C.6/73/SR.28, 10 December 2018, § 58. See however, for a more cautious view, the declaration from Russia, UN Doc. A/C.6/69/SR.25, 28 November 2014, § 100.

8 *Legality of the Threat or Use of Nuclear Weapons*, ICJ Reports (1996) 226, at 240, § 25.

9 See e.g. the statement from the United States of America (UN Doc. A/C.6/60/SR.19, 29 November 2005, § 33) and the summary of the debate held in the ILC at its fifty-seventh session (*Report of the International Law Commission on the Work of its Fifty-Seventh Session*, UN Doc. A/60/10, at 60–61, §§ 159 and 161) and its fifty-eight session (*Report of the International Law Commission on the Work of its Fifty-Eight Session*, UN Doc. A/61/10, at 391, § 206). For implicit references by states, see also statements from Greece (UN Doc. A/C.6/60/SR.19, 28 November 2005, § 36); the United Kingdom (UN Doc. A/C.6/60/SR.20, 29 November 2005, § 1; UN Doc. A/C.6/62/SR.19, 16 November 2007, § 43); the United States of America (UN Doc. A/C.6/62/SR.20, 19 November 2007, § 21) and the Netherlands (*ibid.*, § 33).

10 Draft Article 6 bis (*Third Report on the Effects of Armed Conflicts on Treaties, by Mr. Ian Brownlie, Special Rapporteur*, UN Doc. A/CN.4/578, 1 March 2007, at 60, § 29). This proposition was not retained. However, the main reasons did not concern the relevance of the ICJ approach with respect to IEL. Certain delegations merely criticized the unclear formulation of the proposed Article (see e.g. statements from Benin (UN Doc. A/C.6/62/SR.18, 16 November 2007, § 51); the United Kingdom (UN Doc. A/C.6/62/SR.19, 28 November 2007, § 43); Japan (*ibid.*, § 98)), while others, like the ILC working group, emphasized that the interactions between IHL and other bodies of law applicable in armed conflict, including IHRL and IEL, raised complex issues that could not be subsumed under a general Article (see e.g. statements from Finland (UN Doc. A/C.6/62/SR.18, 16 November 2007, § 43); Islamic Republic of Iran (UN Doc. A/C.6/62/SR.21, 5 December 2007, § 24); *Report of the International Law Commission on the Work of its Fifty-Ninth Session*, UN Doc. A/CN.4/588, 24 January 2008, § 133).

of armed conflict,[11] through the improvement of IHL itself, which gave rise to the drafting of the two 1977 Additional Protocols, with some of their rules directly inspired by IHRL,[12] and the acknowledgment of the continued applicability of IHRL during armed conflicts.[13] Similarly, international concerns for the environment as protecting the common good have increased in recent years.[14] While specific rules dedicated to the environment were included in the first 1977 Additional Protocol (API),[15] it has become clear in post-1977 practice, especially in light of the two Gulf Wars, that IHL is unable to adequately protect the environment during warfare. This has led to the consideration of IEL as a means to bridge that gap.[16]

Thirdly, IHRL and IEL are closely related. Unlike International Criminal Law and *jus ad bellum*, whose interactions have also been studied in detail with IHL, both IHRL and IEL consist of primary norms mobilized to enhance the existing protections provided under IHL in armed conflict. Moreover, it is well established that a safe environment is a prerequisite to the enjoyment of human rights.[17] This is evidenced by numerous developments, such as the increasing human rights case law on climate change,[18] the recognition of a right to a clean, healthy and sustainable environment,[19] and the preambles of numerous

11 M. Milanović, 'A Norm Conflict Perspective on the Relationship between International Humanitarian Law and Human Rights Law', 14 *Journal of Conflict & Security Law* (2010) 459, at 460; G. Oberleitner, *Human Rights in Armed Conflict: Law, Practice, Policy* (Cambridge University Press, 2015), at 53–54; R. van Steenberghe, 'The Impacts of Human Rights Law on the Regulation of Armed Conflict: A Coherency-Based Approach to Dealing with Both the ''Interpretation'' and ''Application'' Processes', 104 *International Review of the Red Cross* ('*IRRC*') (2022) 1345, at 1350–1352.

12 As recognized in GA Res. 2444 (XXIII), 19 December 1968. For examples of human rights-inspired provisions in those protocols, see Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3 ('API'), Art. 75; Protocol Additional to the Geneva Conventions of 12 August 1949 and relating to the protection of victims of non-international armed conflicts (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 609 ('APII'), Art. 6.

13 See e.g. GA Res. 2675 (XXV), 9 December 1970.

14 See E. Hey, *Advanced Introduction to International Environmental Law* (Edward Elgar, 2016), at 14–15.

15 See API, Arts 35(3) and 55. Similar provisions were proposed for APII but were not approved.

16 See K. Bannelier-Christakis, 'L'utopie de la ''guerre verte'' : insuffisances et lacunes du régime de protection de l'environnement en temps de guerre', in V. Chétail (ed.), *Permanence et mutations du droit des conflits armés* (Bruylant, 2013) 383, at 404.

17 This was already emphasized by the Institute of International Law in its work on the effects of armed conflicts on treaties (*Yearbook, Vol. 61, Part II, Session of Helsinki* (Pedone, 1985), at 221). Article 4 of its 1985 Resolution on the matter, which provides for the continued applicability of human rights treaties during warfare, was interpreted by the Institute as including treaties dealing with the protection of the environment (*ibid.*, at 223).

18 See B. Mayer, 'Climate Change Mitigation and an Obligation Under Human Rights Treaties?', 115 *American Journal of International Law* (2021) 409, at 410–412.

19 Resolution 48/13, UN Doc. A/HRC/48/L.23/Rev.1, 5 October 2021.

IEL treaties, noting that the regulation of the environment is essential to the protection of populations, humanity and the next generations.[20]

On the other hand, certain specific features of IEL suggest that caution is required when transposing the IHL–IHRL relationship to the interplay between IHL and IEL. First, IHRL and IEL have different underpinning rationales. IHRL emerged to limit the authority of sovereign states vis-à-vis their own population[21] and as such, mainly provides for a regulation of vertical nature, between states and the persons under their jurisdiction. In contrast, IEL mainly emerged from transboundary concerns and a growing awareness of the interdependence of states in relation to ecological issues. It was especially driven by the principle of good neighbourliness and thus regulated activities that could impact neighbouring states, in particular, in relation to the use or exploitation of shared natural resources.[22] Its ambit was later extended to include the regulation of global environmental concerns such as biodiversity, climate and the ozone layer.[23] Thus, unlike IHRL, IEL is essentially a law of international cooperation, involving a more horizontal relationship between states.

A second key difference between IHRL and IEL is the latter's more heterogenous nature.[24] IEL is composed of several hundred international agreements at bilateral, regional or global levels.[25] These instruments vary quite dramatically, both in their specificity, and in the nature of the obligations they establish, which range from mere cooperation to absolute prohibition.[26] Despite these important differences between IEL and IHRL as regimes, it is clear that IEL has tremendous value in addressing the gaps of IHL, as shall be shown in Parts 3 and 4.

20 See e.g. Convention on the Prevention of Marine Pollution by Dumping Wastes and Other Matter (adopted 29 December 1972, entered into force 30 August 1975) 1046 UNTS 120, preamble, at 1.

21 See P. d'Argent, 'Non-Renunciation of the Rights Provided by the Conventions', in A. Clapham, P. Gaeta and M. Sassòli (eds), *The 1949 Geneva Conventions: A Commentary* (Oxford University Press, 2015) 145, at 150; Dienelt, *supra* note 4, at 270.

22 See e.g. Treaty between the United States and Great Britain relating to boundary waters and questions arising between the United States and Canada (United States–Great Britain) (11 January 1909) available online at https://www.ijc.org/en/boundary-waters-treaty-1909 (visited 30 November 2022).

23 Hey, *supra* note 14, at 12–17; P. Sands and J. Peel, *Principles of International Environmental Law* (4th edn., Cambridge University Press, 2018), at 3–5.

24 Sands and Peel, *supra* note 23, at 200.

25 See e.g. R.B. Mitchell, 'International Environment Agreements: A Survey of their Features, Formation, and Effects', 28 *Annual Review of Environment and Resources* (2003) 429, at 430.

26 For example, the Basel Convention on the Control of Transboundary Wastes and Their Disposal (adopted 22 March 1989, entered into force 5 May 1992) 1673 UNTS 57 is very specific, while the 1979 Convention on Long-Range Transboundary Air Pollution (adopted 13 November 1979, entered into force 16 March 1983) 1302 UNTS 217 is more aspirational in nature.

3. The 'Interpretation Process'

The 'interpretation process', whereby IHL might be interpreted in light of IEL, results in the incorporation of the latter into the former and necessarily leads to interaction between these two bodies of law.[27] Several cases of such a process may be envisaged in light of the discussion on the protection of the environment in armed conflict, while enquiries remain about the legal mechanisms upon which it may be based.

A. Incorporation of IEL into IHL

It is well-known that IHRL has been used in several instances to interpret the content of IHL, which has been qualified by scholars as leading to the 'humanization' of IHL.[28] IEL might also be envisaged as playing a similar role and therefore as 'environmentalizing' IHL. Such an 'interpretation process' involves the incorporation of the interpretative standard, be that IHRL or IEL, into IHL, which in effect becomes part of it. That external body of law might therefore indirectly regulate situations to which it is not normally applicable, if it proves to have a more restrictive scope of application than IHL in armed conflict. This is the case with respect to IHRL in several aspects[29] and arguably also that of IEL.[30] In any case, the 'interpretation process' does not require an enquiry on the scope of application of the interpretative standard nor, more generally, on its applicability in armed conflict.[31]

One must enquire whether, as has been seen with IHRL,[32] IEL might also be incorporated into IHL through a more normative process, by inspiring primary or secondary IHL norms.[33] The Study on customary IHL by the International

27 Of the most elaborated frameworks on the interplay between IHL and IEL, Sjöstedt's 'reconciliatory approach' between MEAs and IHL only seems to address the 'application process' (*supra* note 4, at 175). The interpretation of IHL through IEL is not the object of any specific part of her research but is occasionally addressed in the context of the interpretations that she makes of various IHL rules protecting the environment on the basis of different mechanisms (mainly the principle of evolutionary interpretation (*ibid.*, at 43–46) but also the Martens clause (*ibid.*, at 117–120)). Although Dienelt distinguishes between the 'clarifying function' of IEL and IHRL with respect to IHL and the 'normative intensification' of IHL (*supra* note 4), which seems to correspond to the 'interpretation' and 'application' processes, respectively, these processes are not clearly distinguished and some of her remarks make the distinction difficult to understand (see also notes 74 and 150 below). Neither Sjöstedt nor Dienelt distinguishes between the different types of impact such processes may have on the regulation of armed conflict (incorporation into IHL *versus* application alongside IHL).

28 See van Steenberghe, *supra* note 11, at 1350–1352.

29 In particular, unlike IHL, IHRL might be subject to derogations, is only controversially applicable to certain armed groups, and applies extra-territorially only under strict conditions (van Steenberghe, *ibid.*, at 1360).

30 See below part 4.A.

31 See van Steenberghe, *supra* note 11, at 1352–1355.

32 *Ibid.*, at 1349, footnote 18.

33 *Ibid.*

Committee of the Red Cross (ICRC) suggests that IEL could have inspired certain primary IHL customary norms. That Study indeed incorporates the specific IEL principle of precaution into the customary IHL rule on due regard for the natural environment.[34] However, notwithstanding the fact that state practice supporting this provision is rather weak,[35] this example should be seen as a disguised 'interpretation process' instead of a normative one. The IEL principle of precaution is instead used to interpret the general IHL obligation of precaution when the environment, as a civilian object, may potentially be damaged in the course of an attack. This may find support in state declarations[36] as well as in the 2020 ICRC guidelines on the protection of the natural environment in armed conflict.[37] Accordingly, the IEL principle of precaution should be considered as incorporated into the general IHL obligation of precaution, applicable both in international armed conflicts (IACs) and non-international armed conflicts (NIACs), and therefore as indirectly regulating any attack, even those conducted by armed groups.

B. Illustrative Cases

Legal scholarship and the ILC have already alluded to cases in which IEL might be used to interpret IHL, including: (i) the interpretation of the IHL principles of proportionality and precaution relating to the conduct of hostilities in light of the IEL precautionary principle,[38] the IEL principle of prevention[39] or the IEL requirement to conduct an environmental impact assessment;[40] (ii) the interpretation of the IHL usufruct rule, contained in Article 55 of the 1907 Hague Regulations and concerning the issue of the exploitation of immovable property in military occupation, in light of the IEL concept of sustainable development;[41] and (iii) the interpretation of the notion of 'natural environment' as used in IHL, in particular under Articles 35, 3) and 55 of API, in light of definitions contained in specific IEL instruments,[42] including those, such as the

34 J.-M. Henckaerts and L. Doswald-Beck (eds), *Customary International Humanitarian Law. Volume I: Rules* (Cambridge University Press, 2005), Rule 44, at 147.

35 *Ibid.*, at 150.

36 See e.g. the statement from Greece, UN Doc. A/C.6/70/SR.24, 4 December 2015, § 2.

37 *Supra* note 2, § 123.

38 See K. Stefanik, 'The Environment and Armed Conflict: Employing General Principles to Protect the Environment', in C. Stahn, J. Iverson and J.S. Easterday (eds), *Environmental Protection and Transitions from Conflict to Peace* (Oxford University Press, 2017) 93, at 115.

39 See Sjöstedt, *supra* note 4, at 119.

40 See K. Hulme, *War Torn Environment: Interpreting the Legal Threshold* (Martinus Nijhoff, 2004), at 82–83.

41 See *Protection of the Environment in Relation to Armed Conflicts: Text and Titles of the Draft Principles Provisionally Adopted by the Drafting Committee on First Reading*, UN Doc. A/CN.4/L.937, 6 June 2019, draft principle 21, at 277–278.

42 See Dienelt, *supra* note 4, at 282–297.

1993 Convention on civil liability for damage resulting from activities dangerous to the environment,[43] which expressly provide that they do not apply in times of war.[44]

Other cases remain underexplored. One of them concerns the interpretation of the general IHL principles of proportionality and precaution but through the underlying concerns of specific IEL treaties. It is well known that the IHL principle of proportionality involves a very complex calculation process not only because it implies a comparison between different varied elements but also because it is hard to determine 'the relative values to be assigned'[45] to each of those elements. Yet IEL treaties could be used as useful tools to assess those values in the case of collateral damage to the environment. Indeed, the concerns underlying specific IEL treaty regulations, most often expressed in the preamble of the treaty, such as the fundamental role of biological diversity in 'maintaining life sustaining systems of the biosphere',[46] might indeed serve as enlightening the high value of some particular elements of the environment and therefore the gravity of any damage caused to it. The military advantage anticipated from an attack would accordingly have to be of high value to justify such damage under the IHL principle of proportionality. The concerns underlying specific IEL treaty regulations may similarly act as a useful interpretative standard for the IHL principle of precaution, notably because this principle requires assessing in advance whether the attack would be proportionate.

Another case which has not received attention by scholars concerns the law of neutrality. Belligerents have a duty to refrain from breaching the sovereignty of neutral states,[47] and there is some debate over whether this extends to

43 See the proposal made by the first ILC rapporteur on the protection of the environment in relation to armed conflicts and approved by several states (notably Austria (UN Doc. A/C.6/69/SR.25, 28 November 2014, § 110) and New Zealand (UN Doc. A/C.6/69/SR.27, 24 November 2014, § 4)) to take the definition of the 'environment' embodied in the 2006 draft principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities as a starting point for a definition of the environment in wartime (*Preliminary Report on the Protection of the Environment in Relation to Armed Conflicts*, UN Doc. A/CN.4/674, 30 May 2014, at 23, § 83). However, such a definition had itself been built by reference to the 1993 Convention (*Draft Principles on the Allocation of Loss in the Case of Transboundary Harm Arising Out of Hazardous Activities*, UN Doc. A/61/10, at 122, principle 2(b), and at 134, footnote 363). See also Sjöstedt, *supra* note 4, at 48 and 128.

44 See Convention on civil liability for damage resulting from activities dangerous to the environment (adopted 21 June 1993) 32 ILM 1228, Art. 8(a).

45 See *Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia*, November 2000, available online at https://www.icty.org/x/file/Press/nato061300.pdf (visited 30 November 2022), §§ 19 and 49–50.

46 See Convention on Biological Diversity (adopted 5 June 1992, entered into force 29 December 1993) 1760 UNTS 79 ('Biodiversity Convention'), preamble.

47 Hague Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land (adopted 18 October 1907, entered into force 26 January 1910) available online at https://ihl-databases.icrc.org/ihl/INTRO/200?OpenDocument (visited 30 November 2022), Art. 1.

collateral damage caused by lawful military operations.[48] Given that 'neighboring neutral environments will always be somewhat affected by warfare',[49] there is a question about how an IEL-informed interpretation of the law neutrality might apply. Prohibiting any transboundary environmental damage to neutral states would significantly restrain or might even totally hinder the conduct of military operations, whereas allowing any such damage would seriously undermine the protection of the environment in armed conflict. The IEL 'no harm' rule might provide guidance. According to that rule, which involves a *due diligence* obligation, '[a] State is ... obliged to use all the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State'.[50] This obligation, which is now recognized as being part of customary IEL,[51] is also known as the *Trail Smelter* principle, as it is traceable to the 1935–1941 dispute between the United States and Canada about transboundary damage caused by a smelter located in the Canadian city of Trail. Accordingly, the inviolability of neutral states could be considered as infringed as a result of transboundary environmental damage caused by belligerent states only when such damage is significant and results from the lack of any *due diligence* by those belligerents.

C. Traditional Legal Mechanisms

In the context of interpreting IHL in light of IHRL, the two legal mechanisms traditionally mentioned are the *lex specialis* principle[52] and the principle of systemic integration, which provides that a treaty shall be interpreted in light of 'any relevant rules of international law applicable in the relations between the parties'.[53] As evidenced by state practice, especially in relation to the *lex specialis* principle,[54] and recent scholarly

48 See M. Bothe, 'The Law of Neutrality', in D. Fleck (ed.), *The Handbook of International Humanitarian Law* (3rd edn., Oxford University Press, 2013) 549, at 560.

49 R.G. Tarasofsky, 'Legal Protection of the Environment During International Armed Conflict', 24 *Netherlands Yearbook of International Law* (1993) 17, at 32.

50 *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment of 20 April 2010, ICJ Reports (2010) 14, at 56, § 101.

51 See Sands and Peel, *supra* note 23, at 207.

52 See H. Krieger, 'A Conflict of Norms: The Relationship Between Humanitarian Law and Human Rights Law in the ICRC Customary Law Study', 11 *Journal of Conflict & Security Law* (2006) 265, at 275.

53 Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331 (VCLT), Art. 31(3)(c). See ICRC, *Commentary on the First Geneva Convention* (Cambridge University Press, 2016), § 33; ICRC, *Commentary on the Second Geneva Convention* (Cambridge University Press, 2017), § 33; Updated ICRC Commentary on GCIII, available online at https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=openDocument&documentId=1B9A4ABF10E7EAD2C1258585004E7F19#_Toc44172929 (visited 30 November 2022), § 92.

54 See *supra* notes 9 and 10; in addition, see declarations from states referring to the *lex specialis* principle in relation to the interplay between IHL and IEL, including Belarus (UN Doc. A/C.6/70/SR.24, 4 December 2015, § 15); Greece (UN Doc. A/C.6/71/SR.29, 2 December 2016, § 17); the United States of America (UN Doc. A/C.6/73/SR.29, 10 December 2018, § 41); South Africa (UN Doc. A/C.6/73/SR.30, 6 December 2018, § 3).

writings,[55] the interpretation of IHL in light of IEL could also be based upon those two principles. IEL could clearly be seen as *lex specialis* when environmental issues arise in armed conflict.[56] IEL also provides relevant rules of international law that could inform IHL in creating 'a coherent and meaningful whole'.[57]

However, the application of both principles to the relationship between IHL and IEL may face some difficulties, mainly because of the specific features of IEL. One of those difficulties relates to the requirement that the interpretative standard must be a 'rule'. Indeed, as shown in the illustrative cases described above, the standards used to interpret IHL in light of IEL might include general concerns underlying IEL rules. Those concerns might indeed serve as a clear indicator of the need for states to take due account of specific environmental protections when conducting military operations and, in particular, when implementing the IHL principles of proportionality and precaution. Admittedly, as indicated by the ICJ in the *South West Africa* case,[58] such general concerns do not constitute specific rules. However, it is well-known that they are formally part of the treaty and may be relied upon to interpret that treaty, notably because they express its object and purpose.[59] In addition, they are implicitly involved by the specific rules contained in the treaty. Accordingly, they could be construed as a potential interpretative element for treaty regulations pertaining to other branches of international law, including IHL. This is even less disputable when they are expressed in a specific Article in the core text of the treaty, which is for example the case of Article II of the Convention on the Conservation of Migratory Species of Wild Animals, providing that the 'Parties acknowledge the importance of migratory species being conserved'. Alternatively, those underlying concerns should be considered as amounting to mere environmental considerations rather than IEL rules. The interpretation of IHL through such a process would not however amount to a genuine 'interpretation process' as defined above, whereby IHL is interpreted in light of IEL as such. This actually seems to be the kind of interpretation considered by the ICJ in the *Nuclear Weapons* case, where the Court stated that, irrespective of whether the IEL treaties were applicable in wartime, existing IEL 'indicates important *environmental factors* to be taken in the context of the implementation of the principles and rules of the law

55 Regarding the principle of systemic integration, see e.g. D. Dam-de Jong, 'From Engines for Conflict into Engines for Sustainable Development', in R. Rayfuse (ed.), *War and the Environment: New Approaches to Protecting the Environment in Relation to Armed Conflict* (Brill, Nijhoff, 2014) 205, at 210; Sjöstedt, *supra* note 4, at 46 (but only as a mechanism serving the principle of evolutionary interpretation); Dienelt, *supra* note 4, at 293–297.

56 See also Sjöstedt, *supra* note 4, at 166.

57 *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law. Report of the Study Group of the International Law Commission*, UN Doc. A/CN.4/L.682, 13 April 2006, § 414.

58 *South West Africa* (*Ethiopia v. South Africa, Liberia v. South Africa*), Second Phase, Judgment of 18 July 1966, ICJ Reports (1966) 6, at 34, § 50.

59 See e.g. P. Daillier and A. Pellet, *Droit International Public* (7th edn., L.G.D.J., 2002), at 132.

applicable in armed conflict'.[60] This has been taken up by the ILC in its draft principles adopted on first reading on the protection of the environment in relation to armed conflicts.[61]

Two other difficulties have also been raised recently by scholars, with some disagreement as to how they might be overcome.[62] This article suggests that these difficulties do not hinder the application of the two principles, in the context of interpreting IHL in light of IEL. One of those difficulties relates to the requirement that the interpretative standard must be a rule that is 'part of the law', which seemingly excludes soft law instruments and broader principles that may underpin IEL.[63] Yet, IEL is composed of a wide range of instruments and, as evidenced by the above-mentioned cases, IHL might be informed by some IEL principles, such as the principle of precaution or the principle of sustainable development, whose status is still unsettled under international law.[64] Contrary to one scholar's view,[65] this difficulty might however be mitigated in light of the following considerations. First, such IEL principles are contained in several IEL treaties, some of which are ratified by a large number of states.[66] Those specific conventional expressions of these principles amount to rules of international law. Secondly, such principles are widely considered as informing the whole of IEL, which is undoubtedly part of international law. Thirdly, practice shows cases in which soft law instruments, such as Agenda 21, have been relied upon among the materials used for the interpretation of a treaty in accordance with Article 31(3)(c) of the Vienna Convention on the Law of Treaties (VCLT).[67] Fourthly, in any case, it is likely that those IEL principles will gain increasing support from states in the near future and that, like the *Trail Smelter* principle, they will evolve to become part of customary international law.

The other difficulty specifically concerns the principle of systemic integration. It has indeed been argued in practice[68] and legal scholarship[69] that, where a treaty provision is applied to interpret a separate treaty obligation, the parties

60 ICJ, *supra* note 8, at 243, § 33 (emphasis added).

61 ILC, *supra* note 41, draft principle 15.

62 See Sjöstedt, *supra* note 4, at 195 and 192–193; Dienelt, *supra* note 4, at 222 and 281.

63 A panel of the World Trade Organization ('WTO Panel') has suggested that such principles cannot (yet) be used as a means of interpretation on the basis of Art. 31(3)(c) of the VCLT: *EC - Measures Affecting the Approval and Marketing of Biotech Products* (29 September 2006) WT/DS291/R, WT/DS292/R, WT/DS293/R, available online at https://www.worldtradelaw.net/document.php?id=reports/wtopanels/ec-biotech(panel).pdf&mode=download (visited 30 November 2022), at 340, § 7.89. See also ILC, *supra* note 57, §§ 426 and 449.

64 See e.g. O. Das, 'Environmental Protection in Armed Conflict: Filling the Gaps with Sustainable Development', in Rayfuse (ed.), *supra* note 55, at 136 and 138.

65 See Sjöstedt, *supra* note 4, at 195.

66 Regarding the principle of precaution, see, amongst others, the treaties quoted in Sands and Peel, *supra* note 23, at 230–233.

67 See *United States — Import Prohibition of Certain Shrimp and Shrimp Products* (12 October 1998) WT/DS58/AB/R, DSR 1998:VII, at 2793–2798, § 130.

68 See e.g. WTO Panel, *supra* note 63, at 333–334, §§ 7.68 and 7.70.

69 See e.g. M. K. Yasseen, 'L'interprétation des traités d'après la Convention de Vienne sur le droit des traités', 151 *Recueil des Cours* (1976-III) 1, at 63.

to both treaties must be the same.[70] While general IHL treaties are widely ratified, the same is not always true for IEL treaties. However, the unfortunate consequences of this rule, notably that the more states are party to a treaty, the more that treaty will operate in isolation from the rest of the international legal system, have recently been highlighted.[71] As such, scholars have proposed a broader approach to the principle of systemic integration. They argue that the parties to which the relevant conventional rule must be applicable in order to serve as an interpretative standard for a treaty only include the parties to the specific dispute concerning the interpretation or application of that treaty.[72] In order to avoid numerous diverging interpretations of a treaty, which could occur depending on which state parties to the interpreted treaty are also parties to the dispute, it is recommended not to rely on mere bilateral treaties to interpret a multilateral one, especially when the latter is ratified by a large number of states. That being said, the parties to the interpretative multilateral treaty should not necessarily include all the parties to the interpreted one. In any case, although many IEL multilateral treaties are not universally ratified by states, contrary to, for example, the 1949 Geneva Conventions, many of them are at least widely ratified .[73]

4. The 'Application Process'

Under the 'application process', IEL does not impact IHL itself, but rather regulates warfare by applying to certain activities in parallel to IHL, and therefore remains subject to its own scope of application. The 'application process' raises several issues, including: the continued applicability of IEL in armed conflict; the scope of application of IEL in such conflicts, and its interplay with IHL.[74]

70 U. Linderfalk, 'Who are ''the Parties''? Article 31, Paragraph 3(c) of the 1969 Vienna Convention and the ''Principle of Systemic Integration'' Revisited', 55 *Netherlands International Law Review* (2008) 343, at 363; Yasseen, *supra* note 69, at 63.

71 ILC, *supra* note 57, § 471; G. Marceau, 'WTO Settlement and Human Rights', 13 *European Journal of International Law* (*EJIL*) (2002) 753, at 781.

72 See the numerous scholars quoted in Linderfalk, *supra* note 70, at 345, footnote 8.

73 See e.g. the United Nations Convention on the Law of the Sea (adopted 10 December 1982, entered into force 16 November 1984) 1833 UNTS 3 ('UNCLOS').

74 Both Sjöstedt (*supra* note 4, at 146–158) and Dienelt (*supra* note 4, at 230–232) examine the issue of the continued applicability of IEL, although neither addresses the issues of the extra-territorial applicability of IEL or its application to armed groups. In addition, Dienelt seems to make the applicability of IEL and IHRL in armed conflict as a relevant condition for the 'clarifying function' of those bodies of law with respect to IHL (idem, at 293), while such an issue is rather relevant for the 'application process'.

A. Applicability of IEL in Armed Conflict

It is no longer a point of contention as to whether IHRL applies in armed conflict.[75] This is, however, more complex with respect to IEL, and several theories have been formulated on the subject.[76] This part starts by examining the applicability of IEL treaties based on the parties concerned and the treaties' provisions; it then moves on to a criterion that is less explored in scholarship to date, namely state practice in the form of general declarations on the issue,[77] before undertaking an examination as to whether a compatibility test is also required.

1. Applicability of IEL Treaties Based on the Parties Concerned and their Provisions

The continued applicability of IEL treaties is not disputed when it concerns the relationship between belligerent states and states that are not parties to the armed conflict,[78] as well as when the conflict is non-international in nature, with the state fighting against armed groups remaining undisputedly bound by the relevant IEL treaties.[79] Similarly, the issue does not raise any major difficulties when it is addressed in the treaties themselves. It cannot be contested that IEL treaties do not apply in armed conflict when this is expressly provided for in the treaties themselves, which is the case in several IEL treaties dealing with civil liability resulting from environmental damage.[80] Likewise, IEL treaties are supposed to continue to apply during warfare when expressly or implicitly stipulated. While no IEL treaty specifically indicates that it applies in

75 See van Steenberghe, *supra* note 11, at 1359.

76 On that issue, see S. Vöneky, 'A New Shield for the Environment: Peacetime Treaties as Legal Restraints of Wartime Damage', 9 *Review of European, Comparative and International Environmental Law* (2000) 20, at 20–32; N.M. Schmitt, 'Green War: An Assessment of the Environmental Law of International Armed Conflict', 22 *Yale Journal of International Law* (1997) 1, at 36–41; M. Bothe, 'The Protection of the Environment in Times of Armed Conflict: Legal Rules, Uncertainty, Deficiencies and Possible Developments', 34 *German Yearbook of International Law* (1991) 54; M. Bothe et al., 'International Law Protecting the Environment During Armed Conflict: Gaps and Opportunities', 92 *IRRC* (2010) 569, at 579–583; S.N. Simonds, 'Conventional Warfare and Environmental Protection: A Proposal for International Legal Reform', 29 *Stanford Journal of International Law* (1992) 165, at 168 et seq.; Tarasofsky, *supra* note 49, at 22 et seq.; J.P. Quinn, R.T. Evans and M.J. Boock, 'United States Navy Development of Operational-Environmental Doctrine', in J.E. Austin and C.E. Bruch (eds), *The Environmental Consequences of War. Legal, Economic, and Scientific Perspectives* (Cambridge University Press, 2010) 156, at 164–165.

77 Although Sjöstedt also examines state practice in relation to the continued applicability of MEAs in armed conflict, such scrutiny is not specifically and systematically devoted to general state declarations on the issue (*supra* note 4, at 147–149).

78 See e.g. Bothe et al., *supra* note 76, at 581; D. Akande, 'Nuclear Weapons, Unclear Law? Deciphering the *Nuclear Weapons* Advisory Opinion of the International Court', 68 *British Yearbook of International Law* (1997) 165, at 185.

79 See e.g. Bannelier-Christakis, *supra* note 16, at 405, footnote 66.

80 See e.g. Convention on Civil Liability for Oil Pollution Damage (adopted 29 November 1969, entered into force 19 June 1975), 973 UNTS 3, Art. III(2)(a).

times of both peace and war,[81] two types of treaty provision arguably imply that they continue to apply in armed conflict.[82]

The first are provisions that allow states parties to limit the application of the treaty during armed conflict, such as derogation clauses,[83] and clauses that allow the state parties to limit their conventional engagements in situations of emergency.[84] Similarly, sovereign immunity clauses, mainly found in marine environment treaties, exclude any warship or military aircraft from the scope of their provisions and merely require that those 'vessels and aircraft act in a manner consistent, so far as is reasonable and practicable, with [the treaty]'.[85] Such clauses do not mean that the concerned provisions on marine pollution necessarily cease to apply in armed conflict. As evidenced by the marine pollution caused by Iraq during the second Gulf War (1990–1991), pollution may originate from other sources than warships or military aircrafts and be nonetheless related to the armed conflict.[86]

The second category of provisions from which the continued applicability of IEL treaties in armed conflict may be inferred includes those that provide for a regulation specifically applicable in armed conflict. For example, Article 11(4) of the 1972 Convention Concerning the Protection of the World Cultural and Natural Heritage provides that a specific List of World Heritage in Danger must be established by the World Heritage Committee, including properties put in danger notably by 'the outbreak ... of an armed conflict'. Other treaties, such as the Revised African Convention on the Conservation of Nature and Natural Resources, provide for a series of particular obligations, largely inspired by IHL, specifically applicable in case of 'military and hostile activities'.[87] Such clauses do not purport to limit the scope of application of the treaty in case of armed conflict, but they may nonetheless have this effect if they are construed as providing a separate regime from the rest of the treaty.[88]

81 See nonetheless the 1994 ILC Draft Articles on the Law of Non-Navigational Uses of International Watercourse, *Report of the Commission to the General Assembly on the Work of its Forty-Sixth Session*, UN Doc A/49/10, at 131; the 2008 ILC Draft Articles on the Law of Transboundary Aquifers, *Report of the International Law Commission. Sixtieth Session (5 May–6 June and 7 July–8 August 2008)*, UN Doc. A/63/10, at 77.

82 For a list of such treaties, see UNEP, *supra* note 2.

83 See e.g. International Convention for the Prevention of Pollution of the Sea by Oil (adopted 12 May 1954, entered into force 26 July 1968), 327 UNTS 1958, Art. XIX.

84 See e.g. Convention on Wetlands of International Importance especially as Waterfowl Habitat (adopted 2 February 1971, entered into force 21 December 1975) 996 UNTS 245, Art. 3.

85 See e.g. UNCLOS, Art. 236.

86 On that point, see e.g. Schmitt, *supra* note 76, at 48.

87 Revised African Convention on the Conservation of Nature and Natural Resources (adopted 11 July 2013, entered into force 23 July 2016) ('Revised African Convention'), Art. XV; see similarly Convention on the Law of the Non-navigational Uses of International Watercourses 1997 (adopted 21 May 1997, entered into force 17 August 2014) 2999 UNTS, UN Doc. A/51/869, Art. 29, which refers to the applicability of the principles and rules of IHL.

88 Regarding a similar clause (Principle 24) in the 1992 Rio Declaration, see UNEP, *supra* note 2, at 42.

2. Applicability of IEL Treaties Based on State Practice

The great majority of the IEL treaties are nonetheless silent on the issue of their applicability in armed conflict, which may not be conclusively settled by an interpretation of their provisions. This is mainly where the debate lies, at least with respect to the relationship between belligerent states. As is widely known, draft Articles 6 and 7 of the 2011 ILC draft articles on the effects of armed conflicts on treaties, read in conjunction with the Annex, provide for a rebuttable presumption of the continued applicability of IEL treaties during armed conflict.[89] Such a presumption applies when express indications in the treaty (draft Article 4) or indirect indications reached through an interpretation process (draft Article 5) are unable to provide any clear solution.[90] Yet, the ILC's placing of IEL treaties on the same footing as IHRL ones in the Annex is questionable. In its memorandum to the ILC, the UN Secretariat had classified treaties into four categories depending on whether they exhibited a: (i) very high, (ii) moderately high, (iii) varied or emerging or (iv) low likelihood of applicability in armed conflict.[91] According to the Secretariat, IEL treaties only fell into the third category, whereas IHRL treaties belonged to the first one. The Secretariat's view appears convincing, given the limited practice mentioned by the ILC to support its view.[92]

It is submitted that the resulting uncertainty on continued applicability of IEL treaties in armed conflict may be resolved by resorting to state practice, in particular general state declarations on the matter.[93] While IEL does not

89 *Report of the International Law Commission. Sixty-Third Session (26 April–3 June and 4 July–12 August 2011)*, UN Doc. A/66/10, at 173.

90 On such a hierarchy between the different criteria set forth in the draft Articles, see *ibid.*, at 186, § 1 and at 187, § 1.

91 See *The Effect of Armed Conflict on Treaties: An Examination of Practice and Doctrine. Memorandum by the Secretariat*, UN Doc. A/CN.4/550, 1 February 2005, at 3.

92 See ILC, *supra* note 89, at 211–212. See also in that sense D. Dam-de Jong, *International Law and Governance of Natural Resources in Conflict Situations* (Cambridge University Press, 2013), at 172.

93 See also declarations made in the context of specific armed conflicts, such as statements from Iran in the context of the 1980-88 Gulf War (UN Doc. A/38/163, 22 April 1983, at 2–3); the former Yugoslavia in relation to the NATO bombing of Kosovo (UN Doc. E/1999/71-S/1999/659, 7 June 1999); the Democratic Republic of Congo (DRC) in the context of the conflict with Uganda and Rwanda (*Livre blanc (T. 2) sur les violations massives des droits de l'homme, des règles de base du droit international humanitaire ainsi que des normes relatives à la protection de l'environnement par les pays agresseurs (Ouganda, Rwanda, Burundi) et leurs complices congolais à l'est de la République démocratique du Congo couvrant la période du 6 novembre 1998 au 15 avril 1999*, Kinshasa, December 1998, available online at https://www.icj-cij.org/public/files/case-related/116/13458.pdf (visited 30 November 2022), at 18–24 and 55–59). In contrast, general resolutions adopted by the UN General Assembly or other UN institutions on the matter are not meaningful as they do not clearly envisage the applicability of other rules than the IHL ones as protecting the environment in armed conflict; see e.g. GA Res. 47/37, 9 February 1993, at 1; UNEP Res. 2/15, 4 February 2016, at 1–2. However, see few statements made in specific armed conflicts, which opposed the applicability of IEL treaties in those conflicts, such as statements from Iraq in the context of the 1980–1988 Gulf War (UN Doc. S/16238, 29 December 1983, § 2) and the UN Secretary General in the context of the 2006 Israel–Lebanon armed conflict (UN Doc. A/62/343, 24 October 2007, § 23).

benefit from any single event similar to the 1968 Tehran Conference, where states admitted the continued applicability of IHRL, four main moments may be identified as marking the evolution of state practice on the issue of the continued operation of IEL in armed conflict. The first was the 1990–1991 Gulf War. Several states opined on the contribution of IEL to the protection of the environment during warfare and the interoperability of that body of law with IHL, thereby suggesting that IEL treaties might remain applicable in armed conflict.[94]

The second was in the pleadings of states before the ICJ in the *Nuclear Weapons* case. Contrary to what is sometimes suggested, very few states actually opposed the continued applicability of IEL treaties in armed conflict. The pleadings more particularly focussed on the issue of the prohibition of the threat or use of nuclear weapons by IEL. Accordingly, the argument put forward by several states, including the United Kingdom,[95] was limited to asserting that IEL treaties did not deal with nuclear weapons and were therefore not relevant. Only two states clearly opposed the applicability of IEL treaties both in times of peace and war, namely France and the United States, but the former did it only briefly during the oral pleadings[96] and the latter nonetheless envisaged the possible application of IEL treaties in armed conflict to conclude that, even if this was permitted, those treaties did not concern the regulation of nuclear weapons.[97]

The third moment relates to the work of the ILC on the effects of armed conflicts on treaties. Here we must observe that several states, including the United States,[98] argued that the draft Articles had to reflect the ICJ's famous statement in the *Nuclear Weapons* case on the interactions between IHL and IHRL, not only in relation to IHRL treaties but also with respect to IEL treaties. Yet, it is well-known that the Court's statement involved the continued applicability of IHRL in armed conflict as a prerequisite. More generally, it is interesting to note that no state clearly opposed the rebuttable presumption put forward by the ILC of the continued applicability of IEL treaties in armed conflict.

The last moment concerns the recent ILC work on the protection of the environment in relation to armed conflicts. This was a particularly key moment since it required states to position themselves on the issue of the continued applicability of IEL treaties in armed conflict. Both the ILC Rapporteur[99]

94 See statements from the Netherlands (UN Doc. A/C.6/46/SR.20, 30 October 1991, § 3), Brazil (UN Doc. A/C.6/47/SR.9, 24 October 1991, §§ 12–13) and statements quoted by Schmitt, *supra* note 76, at 28, footnote 123.

95 Letter dated 16 June 1995 from the Legal Adviser to the Foreign and Commonwealth Office of the United Kingdom of Great Britain and Northern Ireland, together with Written Comments of the United Kingdom, 16 June 1995, at 68, § 3.110.

96 ICJ, Public sitting, Verbatim Record, 2 November 1995, CR 95/24, at 22.

97 Letter dated 20 June 1995 from the Acting Legal Adviser to the Department of State, together with Written Statement of the Government of the United States of America, 20 June 1005, at 34–38. See also ICJ, Public sitting, Verbatim Record, 15 November 1995, CR 95/34, at 65.

98 See *supra* note 9.

99 See ILC, *supra* note 6, § 80.

and the ILC itself[100] concluded that IEL treaties continued to operate in such situations. It is striking to observe that no state clearly opposed that view. Such silences are particularly meaningful and may reasonably be interpreted as amounting to a tacit acquiescence to that proposition, especially given the firm position adopted by the ILC and its Rapporteur on the subject. Moreover, this must be combined with the endorsement of that position by numerous states, be that explicit, when states asserted that IEL also applied in armed conflict,[101] or implicit, such as when states asked the ILC to examine (or approved the ILC's proposals regarding)[102] the interactions between IHL and IEL in armed conflict[103] or when they have underlined that IHL remains the *lex specialis* in relation to IEL in such conflicts.[104]

3. Is the Applicability of IEL Norms Subject to a Compatibility Test?

The foregoing practice tends to support the conclusion that states now generally agree on the applicability of IEL treaties in armed conflict, unless treaties expressly provide otherwise. One question that remains is whether those treaties must still be subject to a test of compatibility with a state of war.[105] Compatibility tests have traditionally been used to support the termination or suspension of certain treaties, such as treaties of alliance or amity between belligerents, deemed incompatible with a state of war since they 'depend on the existence of normal political and social relations between States for their proper function'.[106] Likewise, the outbreak of an armed conflict is presumed to lead to the suspension or termination of treaties whose regulation implies good-neighbouring relations between the belligerents. Yet, IEL is driven by the principle of good neighbourliness, as evidenced by obligations devoted to cooperation between the parties, including the requirements of advance notification, consultation or public environmental assessments. There is therefore a

100 See *Report of the International Law Commission on the Work of its Seventy-First Session (29 April–7 June and 8 July–9 August 2019)*, UN Doc. A/74/10, at 251, 5); this is implicit in its Commentary to draft principle 13.

101 See e.g. statements from Thailand (UN Doc. A/C.6/71/SR.29, 2 December 2016, § 10) and Portugal (UN Doc. A/C.6/73/SR.28, 10 December 2018, § 88).

102 See e.g. statements from Azerbaijan (UN Doc. A/C.6/73/SR.29, 10 December 2018, § 114), Viet Nam (UN Doc. A/C.6/73/SR.30, 6 December 2018, § 44) and Algeria (*ibid.*, § 82).

103 See e.g. statements from Italy (UN Doc. A/C.6/70/SR.22, 23 November 2015, § 117); Greece (UN Doc. A/C.6/70/SR.24, 4 December 2015, §§ 2-3; A/C.6/71/SR.29, 2 December 2016, § 17); Belarus (A/C.6/70/SR.24, 4 December 2015, § 15); Slovenia (*ibid.*, § 39); Lebanon (*ibid.*, § 59); Austria (*ibid.*, § 66); Romania (UN Doc. A/C.6/72/SR.26, 5 December 2017, § 28); the Netherlands (*ibid.*, § 37); Thailand (*ibid.*, § 60); Malaysia (*ibid.*, § 120) and South Africa (UN Doc. A/C.6/73/SR.30, 6 December 2018, §§ 2–3).

104 *Supra* note 54.

105 Hulme, *supra* note 3, at 262; early origins of the test can be found in e.g. Court of Appeals of New York, *Techt v. Hughes*, 8 June 1920, 128 N.E. 185; R. Rank, 'Modern War and the Validity of Treaties', 38 *Cornell Law Quarterly* (1953) 511, at 520.

106 J. Delbrück, 'War, Effect on Treaties', 4 *Encyclopaedia of Public International Law* (2000) 1367, at 1371.

strong case that such obligations do not continue to apply between belligerents in armed conflict, at least when they are connected to their military efforts,[107] on the ground that they are incompatible with a state of war.[108]

However, it is unclear whether such a legal mechanism is advisable, especially because it involves a subjective assessment of various factors such as the intensity of the armed conflict. Whether compatibility assessments are necessary is also questionable, since other more traditional mechanisms, such as *force majeure* and the recognition of a fundamental change of circumstances, may be available in certain circumstances.[109] Moreover, it is worth noting that some IEL instruments provide a practical solution with respect to obligations whose fulfilment would not be compatible with a state of war. In that sense, the 1997 Convention on the Law of the Non-navigational Uses of International Watercourses authorizes the state parties to resort to indirect procedures in order to fulfil their obligation of cooperation '[i]n cases where there are serious obstacles to direct contacts between watercourse States'.[110] The Convention, like the ILC draft principles on the protection of the environment in relation to armed conflicts,[111] also contains a specific provision on the transfer of data and information, which allows states parties to refuse such transfers when the data or information relate to their national defence or security.[112] Similarly, other IEL treaties, such as the Convention on Biological Diversity,[113] merely provide obligations of conduct with respect to cooperation between states (rather than obligations of result), which means that the performance of those obligations can depend upon various factors, including the existence of an armed conflict between the parties.

In any case, all of this shows that it is not useful to examine the issue of the continued operation of an environmental regulation in armed conflict only by considering a legal regime, such as IEL. Such a regime may only serve as general indication that treaties belonging to it do not necessarily cease to apply in armed conflict. Nor should that issue be examined solely in relation to a treaty, as traditionally conceived. The issue ultimately arises at the level of norms[114] and, regarding the IEL ones, it mainly concerns those based on good neighbourliness, in particular obligations of cooperation.

107 See e.g. Tarasofsky, *supra* note 49, at 71; the author emphasizes that '[i]t is difficult to see ... why a belligerent would not be under an obligation to inform another belligerent about a civil nuclear disaster on its territory which is *unconnected to its military effort*' (emphasis added).

108 See e.g. Simonds, *supra* note 76, at 197.

109 They are not, however, available to the aggressor state (see *Responsibility of States for Internationally Wrongful Acts*, GA Res. 56/83, Annex, 12 December 2001, Arts 23(2)(a); and VCLT, Art. 62(2)(b), respectively); see also ILC, *supra* note 89, at 195, Art. 15). See, for a detailed and rare discussion on those traditional mechanisms in relation to the applicability of IEL in armed conflict, Dam-de Jong, *supra* note 92, at 179–191.

110 Art. 30.

111 See draft principle 24(2), in ILC, *supra* note 41, at 284.

112 Art. 31.

113 See e.g. Arts 5 and 14.

114 See also in that sense J. Viñualez, 'Régime spécial – Cartographies imaginaires: Observations sur la portée juridique du concept de ''régime spécial'' en droit international', 140 *Journal de Droit International* (2013) 405, at 405–426.

Finally, it is necessary to examine whether, as argued in recent works,[115] a compatibility test with IHL is required in addition to, or instead of, a compatibility test with a state of war. Under such an approach, any IEL treaty rule incompatible with relevant IHL rules would not be applicable in armed conflict. This is a distorted and flawed version of the traditional test of incompatibility with a state of war.[116] The purpose of any test of incompatibility between a treaty rule and IHL is not to determine whether the rule is applicable in armed conflict but to identify which rule, although both the treaty rule and the relevant IHL one are potentially applicable, must be applied to the concrete case at stake. This is the approach adopted by IHRL monitoring bodies with respect to the relationship between conflicting IHRL and IHL norms. Those bodies consider that an IHRL norm remains applicable even in case of genuine conflict with the corresponding applicable IHL regime, while applying that regime to the issue at stake.[117] There is a great benefit to this approach in terms of enforcement, as has been seen from IHRL.[118] The continued applicability of an IEL treaty norm in armed conflict, even if conflicting with IHL, implies that the IEL enforcement mechanism potentially established by the relevant IEL treaty remains available. If a dispute arose in an armed conflict about a rule of that IEL treaty, this mechanism could be used to examine relevant IHL rules as part of the law applicable to the dispute.[119] This is valuable as it is well-known that enforcement mechanisms are lacking in IHL and that, in contrast, efficient and developed bodies have been established to monitor the application of IEL treaties, including judicial dispute settlement mechanisms such as that provided under the United Nations Convention on the Law of the Sea.

B. Scope of Application of IEL in Armed Conflict

While there is a clear trend both in legal scholarship and state practice towards recognizing the continued applicability of IEL in armed conflict, it is uncertain that IEL has a similar scope of application as that of IHL and applies both extraterritorially and to armed groups.

115 See e.g. Quinn, Evans and Boock, *supra* note 76, at 164; *Second Report on the Protection of the Environment in Relation to Armed Conflicts by Marja Lehto, Special Rapporteur*, UN Doc. A/CN.4/728, 27 March 2019, § 28; ICRC, *Guidelines for Military Manuals and Instructions on the Protection of the Environment in Times of Armed Conflict*, UN Doc. A/49/323, Annex, 19 August 1994, at 49, § 5; ICRC, *supra* note 2, at 22, § 33. The 2020 guidelines also refer to a test of incompatibility 'with the characteristics of the armed conflict'.

116 The two tests are sometimes confused; see. e.g. Cusato, *supra* note 1, at 90 and footnote 150.

117 See e.g. *Hassan v. The United Kingdom*, ECtHR (2014), No. 29750/09, §§ 96–111.

118 See notes 148–149 below.

119 See e.g. A. Boyle, 'Relationship between International Environmental Law and Other Branches of International Law', in D. Bodansky, J. Brunnée and E. Hey (eds), *The Oxford Handbook of International Environmental Law* (Oxford University Press, 2007) 125, at 143–145; regarding in particular enforcement mechanisms for UNCLOS, M. Forteau, 'Le système de règlement des différends de la Convention des Nations unies sur le droit de la mer', in M. Forteau and J.-M. Thouvenin (eds), *Traité de droit international de la mer* (Pedone, 2017) 989, at 995–998.

1. *Extraterritorial Applicability*

The extraterritorial applicability of IEL must not be confused with the extraterritorial effect of IEL treaties.[120] Extraterritorial applicability asks whether, when crossing a border in an armed conflict, states remain bound by the IEL treaties to which they are party. This is now generally accepted with respect to IHRL, the extraterritorial applicability of which is dependent upon the jurisdiction — meaning the control — of the state party over the concerned persons or areas, in accordance with most IHRL treaties[121] and case law.[122] The issue is more complex with respect to IEL, mainly because it is composed of hundreds of treaties, only a few of which expressly deal with the issue in general provisions. In those few cases, such as the Convention on Biological Diversity,[123] extraterritorial applicability depends upon the same test as IHRL, namely '[the] jurisdiction or control' of the state party over the concerned activities or objects. However, indications may also be found through other means, including, in the first place, through the definition of the state to which the relevant obligations apply. Such a definition may indeed imply the extraterritorial applicability of those obligations, like the definition contained in Article 2 of the ILC Draft Articles on Prevention of Transboundary Harm from Hazardous Activities, which provides that the 'State of origin' is 'the State in the territory *or otherwise under the jurisdiction or control* of which the [hazardous] activities … are planned or are carried out'.[124] Conversely, other definitions may exclude the extraterritorial applicability of the obligations. This is the case of Article 2 of the 1997 Convention on the Law of the Non-navigational Uses of International Watercourses, which defines the '[w]atercourse State' as a 'State Party to the present Convention *in whose territory* part of an international watercourse is situated …'.

Indications may also be sought by looking, in the second place, at the content of each provision. Thus, the extraterritorial applicability of a provision should be excluded when it provides for obligations that can only be materially performed by states within their borders, such as certain obligations to enforce

120 In that sense, see e.g. Dienelt, *supra* note 4, at 251 and 272.

121 See e.g. International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171, Art. 2(1), as interpreted by the ICJ (*Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, ICJ Reports (2004) 136, at 178–180, §§ 108–111); European Convention on Human Rights (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 221, Art. 1; American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123, Art. 1.

122 See e.g. Human Rights Committee (HRC), *General Comment No. 31: The Nature of the General Legal Obligation Imposed on States Parties to the Covenant*, UN Doc. CCPR/C/21/Rev.1/Add.13, 26 May 2004, § 10, *Georgia v. Russia (II)*, ECtHR (2021), No. 38263/08, § 81; *Coard and others v. The United States*, IAComHR (1999), Report No. 109/99, Case 10.951, § 37.

123 Art. 4. See also Revised African Convention, *supra* note 87, Art. I.

124 Emphasis added. See also Convention on the Conservation of Migratory Species of Wild Animals (adopted 23 June 1979, entered into force 1 November 1983) as amended, 19 *ILM* (1980), Art. 1 and Draft Articles on the Law of Transboundary Aquifers, *supra* note 81, Art. 2.

national laws or regulations.[125] Conversely, extraterritorial applicability ought to be acknowledged when the relevant provisions expressly refers to a jurisdiction or control test for their application, such as Article II, 3) of the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora. The extraterritorial applicability of a specific provision can also be inferred from the particular nature of the obligation contained in that provision, such as an obligation of conduct requiring *due diligence* in protecting the environment and preventing any damage to it. This is illustrated by the ICJ's judgment in the *Pulp Mills* case, when the Court found that the particular 'obligation [contained in the treaty between Uruguay and Argentina examined in that case] ''to preserve the aquatic environment, and in particular to prevent pollution by prescribing appropriate rules and measures'' is an obligation to act with due diligence in respect of all activities which take place *under the jurisdiction and control* of each party'.[126] This echoes the extraterritorial scope of application that is assigned nowadays to the *Trail Smelter* principle,[127] as expressed in several treaties[128] as well as by the ICJ.[129]

When no general or specific provision can provide any guidance on the extraterritorial applicability of an IEL treaty or a particular obligation within such a treaty, which represents most cases, the issue should be solved by reference to the specific object and purpose of IEL. In contrast to IHRL, which was initially designed to regulate good governance by authorities over their nationals within their boundaries, IEL deals with concerns of an extraterritorial nature, to the extent that those concerns necessarily impact two or several states or even all the states in the world when the concerns are global in nature. Accordingly, it would not make sense for a state to dispense with its IEL treaty obligations merely because it crosses a border, especially when that state shares the object protected by the IEL treaty in question. There is thus a strong case for arguing in favour of the extraterritorial applicability of IEL treaty norms when the issue is not expressly or implicitly settled in the treaty.

However, this must be balanced again the heterogenous nature of IEL and the fact that states usually do not benefit from the same material capacity with respect to activities conducted beyond their borders. The test for extraterritorial applicability should accordingly be examined in relation to the specific obligation at stake in order to take into account the capacity of the state to comply with it. Inspiration may be drawn in that respect from IHRL approaches, which make extraterritorial obligations applicable depending upon whether the concerned state exercises sufficient control over the protected persons or

125 See e.g. UNCLOS, *supra* note 73, Art. 222.

126 ICJ, *supra* note 50, at 79, § 197 (emphasis added).

127 See e.g. Dam-de Jong, *supra* note 92, at 125.

128 See e.g. Biodiversity Convention, *supra* note 46, Art. 3.

129 ICJ, *supra* note 50, at 55–56, §101; *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 of 16 December 2015, ICJ Reports (2015) 665, at 706, § 104.

areas.[130] As a result, no test would be required for determining the extraterritorial applicability of mere negative IEL obligations, such as those prohibiting any direct or indirect damage to a particular environmental good,[131] or positive IEL obligations of conduct, like those requiring states to prevent pollution.[132] The former do not require any control over foreign territory by the relevant states to be fulfilled, while the latter are flexible enough to accommodate various material situations since the violation of such obligations must be assessed in light of several factors, including the material capabilities of the states. In contrast, positive IEL obligations of result would only become applicable extraterritorially if the foreign state exercises sufficient control over the concerned activities or environmental protected objects in order to be able to comply with them.

2. Applicability to Armed Groups

Another issue that is not discussed in legal scholarship is the applicability of IEL to armed groups. It is illustrative that the ILC did not devote any effort in the specific developments of that issue when dealing with non-state actors in its work on the protection of the environment in relation to armed conflicts.[133] IEL is generally seen as merely applying to states since states are the primary addressees of IEL obligations.[134] However, it must first be acknowledged that armed groups could be bound by IEL norms on an *ad hoc* basis. This is arguably the case when armed groups commit themselves to respecting those norms through agreements, unilateral statements or internal regulations, or when those norms are directly imposed upon them by the UN Security Council. Yet, such practice presently remains quite limited. Few commitments have been made by armed groups in this area and it is uncertain that such commitments, where they exist, can be considered as carrying any legal weight.[135] Similarly, no specific obligation other than the related IHL obligation to cease the illegal exploitation of natural resources has ever been imposed by the UN Security Council directly upon armed groups in relation to the protection of the environment.[136]

130 Regarding the personal control, see e.g. *Al-Skeini and Others v. The United Kingdom*, ECtHR (2011), Appl. No. 55721/07, § 137.

131 See e.g. Convention Concerning the Protection of the World Cultural and Natural Heritage (adopted 16 November 1972, entered into force 17 December 1975), 1037 UNTS 151 ('World Heritage Convention'), Art. 6(3).

132 See e.g. UNCLOS, *supra* note 73, Art. 194(1).

133 ILC, *supra* note 115, at 23–49.

134 See e.g. UNEP, *supra* note 2, at 43.

135 See e.g. the commitments quoted in J. Somer, 'Environmental Protection and Non-State Armed Groups: Setting a Place at the Table for the Elephant in the Room', CEOBS, 4 December 2015, available online at https://ceobs.org/environmental-protection-and-non-state-armed-groups-setting-a-place-at-the-table-for-the-elephant-in-the-room/ (visited 30 November 2022); see also T. de La Bourdonnaye, 'Greener Insurgencies? Engaging Non-State Armed Groups for the Protection of the Natural Environment during Non-International Armed Conflicts', 102 *IRRC* (2020) 579, at 597.

136 See e.g. UNSC Res. 2211 (2015), at 11, § 23.

It is nonetheless possible to envisage a more general basis to legally ground the applicability of IEL to armed groups. Here, it is tempting to state that IEL should apply to armed groups in the same circumstances in which IHRL is increasingly considered to bind such groups, namely when they exercise territorial control and/or perform government-like functions.[137] However, this would not settle the critical issue of the determination of the IEL norms applicable to armed groups. As already stressed, IEL is characterized by such a wide heterogeneity that it would be meaningless to claim its applicability in general terms to armed groups without identifying specific rules. Accordingly, the legal basis upon which IEL is claimed to bind armed groups must also serve as a basis for determining the material scope of the applicable IEL. Two legal bases may be considered. They both rely on well-known IHL mechanisms and confine the IEL norms applicable to armed groups to those that bind the state where those groups are located.

The first one draws upon the application of the law of occupation by analogy to armed groups when those groups exercise control over the territory of a state. According to Article 42 of the 1907 Hague Regulations, the occupying power must respect the law applicable to the displaced sovereign, 'unless absolutely prevented'. Similarly, armed groups occupying the territory of a state would be bound to respect the IEL applicable to that state, including relevant IEL treaty and customary norms. This would be a logical consequence of the legal vacuum generated by the displacement of the state's authority over the territory controlled by the armed group. This approach nonetheless has two main drawbacks. First, it appears to equate armed groups with a foreign state, which may increase the reluctance of states to recognize the applicability of IEL to armed groups. Secondly, IEL would not be applicable to armed groups having no control over the territory of a state.

The second proposed legal basis may overcome those problems. It relies on the traditional theory explaining the binding nature of IHL upon armed groups, namely, the doctrine of legislative jurisdiction.[138] According to that theory, armed groups are bound by IHL norms because 'the commitment made by a State not only applies to the government but also to any established authorities and private individuals within the national territory of that State'.[139] As a result, any armed group would have to respect the relevant IEL treaty and customary norms applicable to the state where they are located or against whom they are fighting. Yet, it is clear that all IEL norms could not realistically be respected by any armed group, especially by those that do not

137 See e.g. Geneva Academy of International Humanitarian Law and Human Rights (ed.), 'Human Rights Obligations of Armed Non-State Actors: An Exploration of the Practice of the UN Human Rights Council', December 2016, available online at www.geneva-academy.ch/joomlatools-files/docman-files/InBrief7_web.pdf (visited 30 November 2022).

138 See also in that sense de La Bourdonnaye, *supra* note 135, at 597.

139 C. Pilloud et al. (eds), *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* (ICRC, Martinus Nijhoff, 1987), § 4444. See also J.K. Kleffner, 'The Applicability of International Humanitarian Law to Organized Armed Groups', 93 *IRRC* (2011) 443, at 445–449.

exercise any firm territorial control. As a result, a sliding scale approach, similar to that proposed in relation to the extraterritorial applicability of IEL, should be adopted.

Finally, it is worth emphasizing that the specific purpose of IEL is likely to make its applicability to armed groups less controversial than IHRL.[140] As a law of good governance, IHRL is indeed linked to the governmental functions of a state. As a result, in states' view, recognizing that armed groups are bound by IHRL necessarily involves according them some implicit governmental authority or powers that they can exercise over a population, which risks providing them with a high degree of legitimacy. This not the case with respect to IEL, whose very purpose is not to regulate the administration by states of their territory but rather to mitigate transboundary environmental harms.

C. Interplay between IEL and IHL

IEL may be considered as supplementing IHL when it applies to activities related to an armed conflict, be those activities carried out before, during or after the armed conflict. It is also only with respect to such activities that interplay may arise between IEL and IHL. In this regard, norms of the two bodies of law may conflict or may complement each other.

1. Norms Applicable to Activities Related to an Armed Conflict

Many aspects of belligerents' military activities may raise environmental concerns and can be subject to both IHL and IEL.[141] The main aspects are those related to the conduct of hostilities, such as: (i) the launching of attacks against persons or objects, causing serious damage to the environment;[142] (ii) the use of particular methods of warfare, such as poisoning waters;[143] and (iii) specific weapons, like cluster munitions or explosive device in dense urban areas,[144] which leave dangerous and polluting remnants. Matters related to the protection of persons in the power of the enemy may also have a significant environmental footprint. These include detention camps and facilities or military installations of deployed contingents

140 Regarding IHRL, see S. Sivakumaran, 'Re-envisaging the International Law of Internal Armed Conflict', 22 *EJIL* (2011) 219, at 252–253.

141 For a general presentation of such aspects, see e.g. Sjöstedt, *supra* note 4, at 10–23.

142 Regarding such concerns, see e.g. D. Jensen, 'Environmental Challenges Raised by Military Activities', in *Proceedings of the Bruges Colloquium: Legal Challenges for Protecting and Assisting in Current Armed Conflicts*, 20th Bruges Colloquium, 17–18 October 2019, 50 *Collegium* (2019) 70, at 72.

143 See e.g. K. Nett and L. Rüttinger, *Insurgency, Terrorism and Organized Crime in a Warming Climate: Analysing the Links between Climate Change and Non-State Armed Groups* (Climate Diplomacy, 2016), at 18.

144 Conflict and Environment Observatory (CEOBS), 'How Does War Damage the Environment?', 4 June 2020, available online at https://ceobs.org/how-does-war-damage-the-environment/ (visited 30 November 2022).

abroad.[145] Finally, IEL could play a significant contributing role with respect to the law of belligerent occupation. Since the occupying power administers the territory of its adversary, it therefore carries out numerous activities that may have a bearing on the environment. In general, it must take care of the environment in the same manner as the displaced sovereign was required to do so, in accordance with national and international law.[146]

2. Conflicting Norms

Conflicts may arise between norms belonging to different regimes when they apply to the same conduct. According to a broad understanding of the notion of conflict of norms,[147] such conflicts involve situations where the norms at issue provide for different but not necessarily contradictory results. This is most apparent in the case law and legal scholarship surrounding the applicability of IHRL in armed conflict.[148] Here, the core approach followed has been to solve conflicts between IHRL and IHL norms by harmonizing the two bodies of law through the interpretation of the applicable IHRL norm in light of IHL, a process dubbed the 'humanitarization' of IHRL.[149] The main legal mechanisms mobilized in practice to guide such a process are similar to those used for the 'interpretation process' described in part 3, although they operate in the opposite way, by leading to the interpretation of IHRL in light of IHL.[150] They mainly include the *lex specialis* principle and the principle of systemic integration.

However, this claimed 'harmonization' of the two bodies of law through the interpretation of IHRL in light of IHL, often expressed by the paradigmatic formula that IHL and IHRL 'are complementary, not mutually exclusive',[151] is flawed or, at least, confusing. There are instances in which the norms of the two bodies of law cannot be conciliated by merely interpreting one norm in

145 See e.g. principles 6 and 7 of the ILC draft principles on the protection of the environment in relation to armed conflicts, which are designed to address that issue (ILC, *supra* note 41, at 227–232).

146 See also Dam-de Jong, *supra* note 92, at 127.

147 ILC, *supra* note 57, § 25.

148 See e.g. the practice quoted in van Steenberghe, *supra* note 11, at 1362–1365.

149 One of the first scholars to use this term was V. Gowlland-Debbas, 'The Right to Life and the Relationship between Human Rights and Humanitarian Law', in C. Tomuschat, E. Lagrange and S. Oeter (eds), *The Right to Life* (Martinus Nijhoff, 2010) 123, at 128.

150 Quite confusingly, Dienelt asserts that her approach to the 'clarifying function' of IHRL (as well as IEL) with respect to IHL (*supra* note 4) must involve the interpretation of IHL in light of IHRL (as well as IEL) and not the other way around, contrary to what is done by human rights courts. This, she says, is because her study addresses the issue 'from a state's perspective' and 'not from any judicial proceedings' (idem, at 281–282). However, the reason why interpretation must not start from IHRL and be conducted in light of IHL is because such an interpretation is not part of the 'interpretation process' but is specific to the 'application process', where the two bodies of law apply concurrently and IHRL must be adapted.

151 That formula has been used by the HRC in its General Comment No. 31 (*supra* note 122, § 11) and repeated by Commissions of Enquiry or Fact-Finding Missions established by the HRC.

light of the other, such as when the norm to be interpreted is not open-ended. This is the case with respect to Article 5 of the European Convention on Human Rights (ECHR), which, in contrast to its counterparts under the International Covenant on Civil and Political Rights (ICCPR)[152] and the American Convention on Human Rights (ACHR),[153] contains an exhaustive list of permissible grounds for detention and cannot therefore reasonably be interpreted as including any ground based on security reasons, despite the fact that precisely such grounds for detention exist under IHL.[154] Conflicts can then only be solved through the displacement of one norm to the detriment of the other. The principle of systemic integration therefore becomes useless in such a case and the solution can only be based upon the *lex specialis* principle, with that principle acting no longer merely as an interpretive tool (as a rule of norm conflict avoidance)[155] but as a displacement tool (as a rule of norm conflict resolution).[156] In this way, setting aside the 'inappropriate' regulation is seemingly justified.[157]

The same legal framework may be relevant to conflicts of norms resulting from the applicability of IEL in armed conflict. The harmonization of the two bodies of law should be sought and favoured through the interpretation of the applicable IEL norm in light of IHL, which would amount to the 'humanitarization' of IEL. This might nonetheless only be the case when the IEL norm is formulated in a sufficiently open way.[158] Examples may be found in IEL treaty norms that could conflict with IHL's 'permission' to cause damage to the environment either as a military objective or as non-excessive collateral damage. One case may be found in the open-ended Article II of the Convention on the Conservation of Migratory Species of Wild Animals, which provides that '[t]he Parties [take] *appropriate* and necessary steps to conserve [migratory] species and their habitat'.[159] The 'appropriate' nature of those steps should be informed by IHL.[160] In contrast, in certain cases, the IEL norm 'allows for no ''window'' through which IHL could enter'.[161] In such cases, the conflicts of norms could arguably be solved

152 Art. 9.

153 Art. 7.

154 Although the ECtHR interpreted that Article in light of the relevant IHL provision (*supra* note 117), this has been highly criticized as amounting to 'judicial vandalism' (Milanovic, *supra* note 11, at 475).

155 For that terminology, see e.g. Milanovic, *supra* note 11, at 465.

156 *Ibid.*

157 For such a distinction, see e.g. ILC, *supra* note 57, § 56; G. Gaggioli, *L'influence mutuelle entre les droits de l'homme et le droit international humanitaire à la lumière du droit à la vie* (Pedone, 2013), at 59; the author distinguishes between the 'interpretative' *lex specialis* and the 'derogatory' *lex specialis*. For a different approach, compare Sjöstedt, *supra* note 4, at 165.

158 In the same way but without grounding this in any formal tool, see Sjöstedt, *supra* note 4, at 207–208. See nonetheless note 178 below.

159 Emphasis added.

160 See also e.g. UNCLOS, *supra* note 73, Art. 194, 3), with the terms 'to the fullest possible extent' having to be informed by the IHL regime authorizing the release concerned under certain conditions.

161 Milanovic, *supra* note 11, at 475.

through the displacement of that IEL norm in favour of IHL on the basis of the *lex specialis* principle.[162] Examples may again be found in relation to IHL's 'permission' to cause damage to the environment in certain circumstances. In that sense, Article 6(3) of the Convention Concerning the Protection of the World Cultural and Natural Heritage would be displaced as it provides that '[e]ach State Party to [the] Convention undertakes not to take any deliberate measures which might damage directly or indirectly the cultural and natural heritage… situated on the territory of other State Parties to this Convention'.[163]

3. Complementary Norms

In most cases, applicable IEL norms do not conflict with IHL but complement it by adding obligations. As further illustrated in the other contributions to this Symposium, various matters relating to armed conflicts may benefit from such complementary regulations. This is quite straightforward with respect to matters that are subject to limited regulation by IHL but to extensive regulation by IEL.

Those matters mainly concern the pre- and post-phases of armed conflict. Regarding the pre-conflict phase, they may include measures of precaution to be taken before the outbreak of an armed conflict in order to better protect the environment during that conflict. While IHL contains only rudimentary regulation on that subject,[164] several IEL treaties, including the Convention on Biological Diversity through its Article 7, may complement it, notably as they provide for 'surveying, management planning and reporting requirements', which might allow future 'warring parties [to have] full knowledge of the location of designed biodiversity hotspots'.[165] Regarding the post-conflict phase, as developed by the ILC,[166] matters likely to be complemented by IEL include the communication of information that may 'facilitate remedial measures'. Such information is required to be communicated under IHL but only between states in relation to damage (likely to be) caused by weapons,[167] whereas numerous IEL treaties provide for an obligation not only to share

162 Regarding scholars arguing for the application of the *lex specialis* principle in such a way, see also Dam-de Jong, *supra* note 55, at 210.

163 See note 183 below for further developments on this example.

164 See notably the obligation to take precautions against the effects of attacks (regarding IACs, Art. 58 API and rule 23 of the ICRC Study on customary IHL, in Henckaerts and Doswald-Beck, *supra* note 34, at 72; regarding NIACs, rule 23 of the same Study, in idem) and the obligation of prevention contained in the Convention for the Protection of Cultural Property in the Event of Armed Conflict (adopted 14 May 1954, entered into force 7 August 1956) 249 UNTS 215, Art. 3.

165 See e.g. Hulme, *supra* note 3, at 265–266.

166 See the commentary of principle 24 of the ILC draft principles on the protection of the environment in relation to armed conflicts, in ILC, *supra* note 41, at 284–288.

167 See e.g. Protocol on Prohibitions or Restrictions on the Use of Mines, Booby-Traps and Other Devices as amended on 3 May 1996 (Protocol II, as amended on 3 May 1996) annexed to the Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons

information pertaining to the protection of the environment with other states but also to grant individuals access to such information.[168]

Even in areas where certain IEL and IHL norms conflict, especially in relation to the conflict phase, other IEL norms may still complement IHL in relation to other aspects of that matter when those aspects are unregulated by IHL. This includes matters such as the protection of world heritage.[169]

5. A Coherency-based Approach

The 'interpretation' and 'application' processes give a prominent role to mechanisms such as the *lex specialis* principle and the principle of systemic integration. Yet, it has been emphasized in legal scholarship on the relationship between IHL and IHRL that such mechanisms are not satisfactory since they are mere formal tools, when the interplay between the two bodies of law must involve substantial considerations.[170] Conflicts of norms must be identified and choices must be made about which rule is the *lex specialis*, or which rule must be considered a relevant rule for the interpretation of a treaty in accordance with Article 31(3)(c) of the VCLT.[171] Choices must also be made on the degree of incorporation of an IHRL norm into IHL or the extent to which that norm applies in armed conflict to the concrete case at stake. These are not automatic processes, and such an incorporation or application may require some modulations.

As argued in detail elsewhere,[172] guidance on the operation of those processes and choices can arguably be found in legal theories on normative coherence of legal systems,[173] which can be further enriched by reflections on legal pluralism.[174] According to those theories, coherence is not merely an issue of

which may be deemed to be Excessively Injurious or to have Indiscriminate Effects (adopted 3 May 1996, entered into force 3 December 1998) 2048 UNTS 93, Art. 9.

168 Regarding those treaties, see e.g. *Third Report on the Protection of the Environment in Relation to Armed Conflicts*, UN Doc. A/CN.4/700, 3 June 2016, at 37–45.

169 See e.g. Sjöstedt, *supra* note 4, at 213–245.

170 M. Sassòli, *International Humanitarian Law: Rules, Controversies, and Solutions to Problems Arising in Warfare* (Edward Elgar Publishing, 2019), at 439.

171 In relation to the interplay between IHL and IEL, see also Sjöstedt, *supra* note 4, at 191.

172 van Steenberghe, *supra* note 11, at 1365–1373.

173 See e.g. N. Bobbio, *Teoria dell'Ordinamento Giuridico* (G. Giappichelli ed., 1960), in particular at 69 *et seq.*; R. Dworkin, *Law's Empire* (Fontana Press, 1986), in particular at 176 *et seq.*; N. MacCormick, 'Coherence in Legal Justification', in A. Peczenik, L. Lindahl and B. Van Roermund (eds), *Theory of Legal Science: Proceedings of the Conference on Legal Theory and Philosophy of Science Lund, Sweden, December 11–14, 1983* (D. Reidel Publishing Company, 1984) 235; V. Villa, 'Normative Coherence and Epistemological Presuppositions of Justification', in P. Nerhot (ed.), *Law, Interpretation and Reality* (Kluwer, 1990) 431; A. Schiavello, 'On ''Coherence'' and ''Law'': An Analysis of Different Models', 14 *Ratio Juris* (2001) 223; A. Amaya, 'Ten Theses on Coherence in Law', in M. Araszkiewicz and J. Savelka (eds), *Coherence: Insights, from Philosophy, Jurisprudence and Artificial Intelligence* (Springer, 2013) 243, at 257–260.

174 See M. Delmas-Marty, *Ordering Pluralism. A Conceptual Framework for Understanding the Transnational Legal World* (Hart Publishing, 2009).

consistency between two regimes, which means that no contradiction must exist between their norms, but a (more radical) issue of coherency of a legal system, which involves the norms making sense together in light of a foundational principle. Such a system could consist in a common regulation specific to armed conflict, stemming from the combination of IHL with other branches of international law applicable in such conflicts, including IHRL and IEL.[175] The coherency of that system would be achieved not only by avoiding any conflict between its norms, which is ensured by the operations of formal mechanisms such as the *lex specialis* principle and the principle of systemic integration, but also by testing the compatibility of the result of their combination with the foundational principle of that common regulation.

This foundational principle is composed of two prongs. The first, based on the clear mandate given by states at the 1968 Teheran Conference on human rights, is that the best protection must be provided to individuals in armed conflicts through the operation of IHRL. This means that, whenever possible, IHRL must be fully incorporated into IHL through interpretation, and both IHRL and IHL must apply cumulatively to the conduct concerned. However, this must be counterbalanced by a second test, which takes into account the specific context in which that regulation is intended to apply, namely armed conflicts. As a result, the second prong of the foundational principle must be based on what fundamentally distinguishes the regulation of war from the regulation applicable in peacetime. This specificity arguably consists in military necessity, which involves taking into account the realities of war in order to make efficient fighting possible and to avoid this regulation being disregarded. Such effectiveness-based considerations may result either from concrete circumstances or from structural features of armed conflicts. As a result, the combination of the two prongs of the relevant 'coherency test' for the determination of the regulation of armed conflict dictates that the outcomes of the full incorporation of IHRL into IHL (through the 'interpretation process') or of the cumulative application of IHL and IHRL (through the 'application process') must be adjusted, but only if, and to the extent that, they conflict with those effectiveness-based considerations. This might lead either to the modulation or displacement of the 'inappropriate' regulation.

A similar reasoning may be transposed to the interactions between IHL and IEL.[176] However, it must be adapted in order to integrate those interactions as part of the common regulation specifically applicable to armed conflict. While

175 See also Dienelt's proposal for a unifying *ordre public transnational* (*supra* note 4, at 314). However, unlike the common regulation of armed conflict envisaged here as a coherent legal system, such *ordre* is not specific to armed conflict and is not based upon legal theories on normative coherence but rather on commonly shared objectives of IHL, IHRL and IEL.

176 It is also after emphasizing the shortcomings of the formal tools, including the *lex specialis* principle and/or the principle of systemic integration that Sjöstedt builds her 'reconciliatory approach' between MEAs and IHL (*supra* note 4, at 191–196) and that Dienelt elaborates her particular approach to the 'normative intensification' of IHL through IEL and IHRL (*supra* note 4, at 314). However, the proposed 'coherency-based approach' is different from those approaches in that: (i) it specifically relies on the concept of coherence as firmly anchored in legal theories on normative coherence; (ii) those theories complete rather than exclude the operation of the formal mechanisms; (iii) they might play a guiding role with respect to both

the second prong of the foundational principle of that regulation remains unchanged, the first one must reflect environmental considerations. The general state practice examined above arguably reveals, as the 1968 Teheran Conference did earlier with respect to IHRL, the will of states to further protect the environment in armed conflict through IEL.[177] As a result, the proposed coherency-based approach would require further 'environmentalizing' the regulation of armed conflict through a full incorporation of IEL into IHL or its full application in armed conflict (the first prong of the 'coherency test') but only to the extent that the resulting legal solutions do not conflate with effectiveness-based considerations specific to situations of armed conflict (the second prong). This means that the full incorporation of IEL into IHL (as a result of the 'interpretation process') or the cumulative application of IHL and IEL in armed conflict (as a result of the 'application process') can only be limited to the extent that it is justified by the particular circumstances prevailing at the time or by the general features specific to armed conflicts. Those limitations may result either in displacements or modulations of the inappropriate IEL regime. Such modulation may consist in rephrasing the relevant IEL norm as obligations of conduct, the respect for which would be dependent upon various factors, including the circumstances ruling at the time and the capabilities of their addressees. In some circumstances, the loose nature and wording of the relevant IHL or IEL norms might be sufficient to conciliate those norms or to apply the IEL ones in armed conflict.[178]

Regarding the 'interpretation process', most of the above-described cases of such a process do not require any specific modulation or displacement of the IEL interpretative standard because of the flexible nature of either the interpreted IHL obligation or the IEL interpretative standard. In certain cases, the interpreted IHL

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the 'interpretation' and 'application' processes; and (iv) they also function to provide clear guidance on the issue.

177 Compare with Koppe envisaging a fifth IHL general principle of 'ambituity', as reflecting 'the common understanding of States that the environment must be protected during armed conflict, and provid[ing] for an absolute limitation to the necessities of war' (E. Koppe, 'The Principle of Ambituity and the Prohibition against Excessive Collateral Damage to the Environment during Armed Conflict', in Rayfuse (ed.), *supra* note 55, at 66).

178 See Sjöstedt, who considers the loosely worded provisions of the MEAs as one of the four elements grounding her 'reconciliatory approach' (*supra* note 4, at 197–206). However, she seems to, rather, emphasize this as a useful means for treaty bodies to adopt creative measures, particularly with respect to armed conflicts (Sjöstedt, 'The Ability of Environmental Treaties to Address Environmental Problems in Post-Conflict', in Stahn, Iverson and Easterday (eds), *supra* note 38, at 83), rather than for making IEL compatible with IHL or situations of armed conflict. In addition, when considered for such a purpose, the loose wording of the MEAs' provisions is stressed only in relation to the interpretation of IEL in light of IHL when both apply to the same conduct, that is, only in relation to the 'application process' when IHL and IEL norms conflict (*supra* note 158). See also Dam-de Jong, *supra* note 92, at 177; however, the author envisages the loosely worded nature of some IEL provisions only in order to accommodate the application of those provisions with armed conflicts; that is, only in relation to the 'application process' when both apply to the same conduct without there being a conflict between the two.

norms, such as those providing for precautions in attacks,[179] are themselves obligations of conduct, requiring measures to be taken only to the maximum extent feasible. This means that the measures imposed by the IEL interpretative standard, like undertaking an environmental impact assessment before launching an attack,[180] must also only be taken to the maximum extent feasible. This allows IEL to be accommodated within the interpreted IHL norm by considering the specific features of an armed conflict. Similarly, in other cases, the IEL interpretative standard itself, such as the principle of sustainable development as expressed in certain IEL conventions, is formulated in such a flexible way that it may be adapted to the specific circumstances of war when used to inform IHL. For instance, Article 10 of the Convention on Biological Diversity provides that state parties 'shall, *as far as possible and as appropriate* ... [i]ntegrate considerations of the conservation and sustainable use of biological resources into national decision making'.[181] Had the principle of sustainable development been construed as requiring specific absolute measures,[182] it should have been framed as an obligation of conduct when used to interpret rules such as that on usufruct provided in the law of occupation.

Regarding the 'application process' and, in particular, cases of potential conflicts of norms, it has been emphasized that the cumulative application of IHL and IEL does not raise any problems when, given its open-ended nature, the applicable IEL norm, such as Article II of the Convention on the Conservation of Migratory Species of Wild Animals, may be interpreted in light of IHL. In other cases, the displacement of the applicable IEL norm, like Article 6(3) of the Convention Concerning the Protection of the World Cultural and Natural Heritage, is needed when that norm conflicts with IHL, in particular when its application would prohibit parties to an armed conflict to cause any damage to specific environmental goods when IHL allows it. However, such displacement must operate only to the extent required by the relevant military effectiveness-based considerations specific to armed conflict.[183] On the other hand, when the applicable IEL norms are intended to complement the IHL ones without conflicting with them, modulations of the applicable IEL regime might be needed but only if this regime cannot itself be malleable vis-à-vis the specific features of armed conflict. Yet, the capacity of IEL to be flexible in such circumstances is evidenced by the potential cases of the complementary role that IEL can play with respect to IHL as examined above. For instance, although complementary preventive measures for protecting the environment may be found in certain IEL obligations, such as Article 7 of the Convention on Biological Diversity relating to the identification and monitoring of

179 See *supra* part 3.B.

180 *Ibid.*

181 Emphasis added. For a definition of 'sustainable use', see Art. 2.

182 See e.g. ILC, *supra* note 6, § 97, footnote 370.

183 Regarding other views on the normative conflict between Art. 6(3) of the World Heritage Convention and IHL, but not based on the operation of any formal tool such as the *lex specialis* principle, see Sjöstedt, *supra* note 4, at 206–207 and Dienelt, *supra* note 4, at 308–318.

components of biological diversity,[184] those obligations must be merely complied with 'as far as possible and appropriate'.[185]

6. Conclusion

The interplay between IHL and IEL has thus far not been the object of any jurisdictional practice nor has it been abundantly addressed in legal literature. Although recent scholarly writings go beyond examining the protection of the environment by IHL and begin to reflect on the complementary role of IEL in that respect, few comprehensive frameworks have been proposed regarding such a complementary role. It is therefore tempting to draw inspiration from the relationship between IHL and IHRL, which has been the object of much scholarly discussion and practice, in order to provide such a framework.

As shown in this article, such an approach proves to be quite conclusive, except that some adaptations are needed given the differences between IEL and IHRL, mainly in relation to specific issues relating to the applicability and scope of application of IEL in armed conflict. Otherwise, like the relationship between IHL and IHRL, the interplay between IHL and IEL may be grasped through a twofold process, namely the 'interpretation' and 'application' processes, and primarily solved by resorting to formal mechanisms, including the *lex specialis* principle and the principle of systemic integration.

However, this is not the end of the story. As this article has argued with respect to the relationship between IHL and IHRL, IHL and IEL should be envisaged, together with IHRL, as forming a common regulation specific to armed conflict, characterized, like any legal system, not only by a consistency between its norms but also by a coherence which gives sense to them when taken together. Such coherence requires that any legal solution ensuing from both the 'interpretation' and 'application' processes must be compatible with a foundational principle, which means that adaptations might be needed to accommodate those solutions to the concrete or structural features of armed conflict. Such a framework has the advantage of combining formal and substantial considerations, based on well-established legal theories, and therefore to provide enough guidance on how IEL might be mobilized to better protect the environment in armed conflict.

184 See *supra* note 165.

185 See also cases mentioned above where IEL treaties take into account circumstances specific to armed conflicts, discussed *supra* part 4.A.3.