

IHL in the era of climate change: The application of the UN climate change regime to belligerent occupations

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Abstract

This article invites the reader on a journey through the legal arguments that would confirm the application of the United Nations (UN) climate change regime to belligerent occupations. Although the regime is silent on this issue, its application should not be limited to peacetime due to the seriousness of global climate change and its adverse effects on the environment and living entities. A harmonious interpretation and application of the UN climate change regime and the law of occupation would allow Occupying Powers to ensure the safety and well-being of the civilian population and contribute to the protection of the Earth's climate system.

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Keywords: climate change, Paris Agreement, international humanitarian law, law of occupation, armed conflict, belligerent occupation.

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Once, a knight was riding back to his castle when he saw a little sparrow lying on its back in the middle of the road, with its small legs up in the air.

Reining in his mount, the knight looked down and asked: “Why are you lying upside-down like that?”

“I heard that the heavens are going to fall today,” replied the bird.

The horseman laughed and asked: “And do you think that your spindly legs can hold up the heavens?”

“Well,” replied the sparrow, “one does what one can.”

Antonio Cassese¹

Introduction

The emission of greenhouse gases (GHGs) into the atmosphere by human activities has decisively caused a rise in the Earth’s temperature, a phenomenon known as anthropogenic climate change.² Due to the serious threat that climate change represents for the planet and the survival of living entities, States have decided to coordinate their action to stabilize and reduce the emission of GHGs by adopting the 1992 United Nations Framework Convention on Climate Change (UNFCCC),³ the 1997 Kyoto Protocol⁴ and the 2015 Paris Agreement,⁵ collectively referred to herein as the UN climate change regime. Despite climate change having an unusual macro scope and requiring a highly intense, permanent and long-term international cooperation, the treaties regulating this subject matter have a common feature: they are silent about their application during armed conflicts. This legal gap may give rise to uncertainties as to whether States Parties must respect the UN climate change regime during armed conflicts and, if so, how the rules and principles of international humanitarian law (IHL)

- 1 Quoted in “Antonio Cassese: The Stubborn Sparrow”, Episode 0: “The Knight and the Sparrow”, Geneva Graduate Institute, 8 December 2021, available at: www.graduateinstitute.ch/communications/news/new-podcast-series-antonio-cassese (all internet references were accessed in April 2023).
- 2 The Intergovernmental Panel on Climate Change (IPCC), created by the United Nations Environment Programme (UNEP) and the World Meteorological Organization, confirmed that the global average temperature has been increasing since the mid-twentieth century and that anthropogenic GHG emissions have been the dominant cause – in other words, that the human influence on Earth’s climate system is clear. IPCC, *AR4 Climate Change 2007: Synthesis Report – Summary for Policymakers*, 2007, pp. 2–5; IPCC, *AR5 Climate Change 2014: Synthesis Report – Summary for Policymakers*, 2015, pp. 2–7.
- 3 United Nations Framework Convention on Climate Change, 1771 UNTS 107, 9 May 1992 (entered into force 21 March 1994) (UNFCCC).
- 4 Kyoto Protocol to the United Nations Framework Convention on Climate Change, 2303 UNTS 162, 11 December 1997 (entered into force 16 February 2005) (Kyoto Protocol).
- 5 Paris Agreement, 3156 UNTS 107, 12 December 2015 (entered into force 4 November 2016).

should be interpreted and applied in an era in which climate change has become an international priority at all times.

This legal context is particularly relevant in the case of belligerent occupations, which are regulated by IHL. As is well known, these are – at least *a priori* – temporary situations, and the Occupying Power does not acquire sovereign rights over the occupied territory.⁶ Due to this temporality, occupations are governed by the general principle of preservation of the *status quo ante bellum*, according to which the Occupying Power can only adopt those measures that are necessary to restore and ensure public order and safety.⁷ As explained by Orkin and Ferraro, an Occupying Power must not adopt policies or measures that would introduce or result in permanent changes⁸ because one of the aims of the occupation regime is to facilitate transition and restoration of power to the legitimate authorities. It is worth recalling that occupations are ruled by conventional rules, including the 1907 Hague Convention IV with Respect to the Laws and Customs of War on Land and Its Annex (Hague Convention IV),⁹ the 1949 Geneva Convention IV relative to the Protection of Civilian Persons in Time of War (GC IV),¹⁰ and the 1977 Additional Protocol I to the Geneva Conventions.¹¹ IHL also contains customary norms applicable to such situations.¹²

This set of regulations is what has been called the “law of occupation”, and it was adopted and developed at a time when climate change did not exist, or at least was not yet publicly acknowledged as a global problem. Hence, the law of occupation has no specific rules related to how to deal with climate change in that concrete context. This raises questions regarding, first, the current scope of application of the law of occupation and the UN climate change regime, and second, how both legal regimes interact.¹³ The issue here is the tension that exists

6 Benvenisti defines a belligerent occupation as a situation where the forces of one or more States exercise control over the territory of another State without the latter’s permission, a situation regulated by international law because occupation does not transfer sovereignty over the territory to the Occupying Power: Eyal Benvenisti, “Occupation, Belligerent”, *Max Planck Encyclopedia of Public International Law*, May 2009, para. 1. Belligerent occupations are characterized, therefore, by their non-consensual nature: see Yoram Dinstein, *The International Law of Belligerent Occupations*, 2nd ed., Cambridge University Press, Cambridge, 2019, p. 39.

7 Eyal Benvenisti, *The International Law of Occupation*, Oxford University Press, Oxford, 2012, pp. 83–102.

8 Mikhail Orkin and Tristan Ferraro, “IHL and Occupied Territory”, *Humanitarian Law and Policy Blog*, 26 July 2022, available at: <https://blogs.icrc.org/law-and-policy/2022/07/26/armed-conflict-ukraine-ihl-occupied-territory/>.

9 Hague Convention (IV) with Respect to the Laws and Customs of War on Land and Its Annex, 18 October 1907 (entered into force 26 January 1910) (Hague Convention IV).

10 Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War of 12 August 1949, 75 UNTS 287 (entered into force 21 October 1950) (GC IV).

11 Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 UNTS 3, 8 June 1977 (entered into force 7 December 1978) (AP I).

12 Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, 2 vols, Cambridge University Press, Cambridge, 2005, available at: <https://ihl-databases.icrc.org/en/customary-ihl>.

13 As explained by Liebllich and Benvenisti, the law of occupation interacts nowadays with many “neighbouring” international legal frameworks and institutions because when it emerged in the nineteenth century, it was the only body of law that regulated military control over hostile territory.

between the temporary nature of belligerent occupations and the permanent and global nature of climate change. In this context, due to the seriousness of global climate change and the humanitarian situation faced by the civilian population during a belligerent occupation, it is necessary to reflect on the compatibility between these two international legal regimes. With that in mind, the purpose of this essay is to address the scope of application of the UN climate change regime and to determine whether it is applicable during armed conflicts and in concrete, belligerent occupations.

The thesis presented in this essay is that the UN climate change regime applies permanently regardless of the context (peacetime or wartime). Firstly, this is because the suspension of its application due to armed conflicts (or, in this case, a belligerent occupation) would diminish the efficacy of this legal regime and could be catastrophic for the Earth's climate system and living entities. The seriousness and permanent characteristic of the climate change problem requires that all parties to the regime constantly take action to limit temperature increases to 1.5°C above pre-industrial levels, and the temporality of a belligerent occupation cannot be an excuse for not respecting and implementing the regime in the occupied territory. Secondly, from a humanitarian perspective, the safety of the civilian population of the occupied territory is simultaneously threatened by two sources: climate change and the occupation. Hence, the population must be protected from the negative consequences of both threats and should therefore benefit from the protection of both legal regimes.

In light of the above, four main legal arguments are developed to justify the application of the UN climate change regime to belligerent occupations. The first argument concerns respect for the UN climate change regime by Occupying Powers when that regime is part of the laws in force in the occupied territory. The second relates to the extraterritorial application of the regime in the occupied territory as a consequence of the "GHG production-based system boundary" adopted by the regime and the harm prevention principle recognized in international environmental law (IEL). The third argument is based on the principle of legal stability and continuity of treaties developed by the International Law Commission (ILC) in its Draft Articles on the Effects of Armed Conflicts on Treaties (ILC Draft Articles),¹⁴ and the application of the principle to the UN climate change regime. And finally, the application of the UN climate change regime during belligerent occupations is legally possible due to the connection between this regime and international human rights law (IHRL), and the obligation of the Occupying Power to respect and guarantee the recognized human rights of the civilian population under its effective control, in particular those rights affected by the adverse effects of climate change.

Eliav Lieblich and Eyal Benvenisti, *Occupation in International Law*, Oxford University Press, Oxford, 2022, p. 3.

14 ILC, *Draft Articles on the Effects of Armed Conflicts on Treaties, with Commentaries*, in *Yearbook of the International Law Commission*, Vol. 2, Part II, 2011 (ILC Draft Articles).

The importance of clarifying the scope of application of the UN climate change regime

The UN General Assembly has recognized that climate change is a common concern of humanity, since climate is an essential condition which sustains life on Earth.¹⁵ The serious threat that climate change represents for the planet and living entities has mobilized international public opinion and has brought the issue to the attention of the whole world. In this regard, it has been said that climate change is a “civilizational wake-up call ... telling us we need to evolve”,¹⁶ and that we are “the last generation that can do something about it”.¹⁷ It has also been considered to be “the defining issue of our times”, and one that “presents a golden opportunity to promote prosperity, security and a brighter future for all”.¹⁸ Hulme believes that climate change is not just another international problem waiting for a solution; instead, he believes that it is “an environmental, cultural and political phenomenon which is reshaping the way we think about ourselves, about our societies and about humanity’s place on Earth”.¹⁹

Due to the global character, complexity and scientific uncertainties of climate change, from a legal perspective it was necessary to adopt a flexible international regime that would be easily adapted to the fluctuations of the phenomenon and the advances of science. The UN climate change regime follows the framework convention–protocol approach,²⁰ in which the UNFCCC establishes the legal structure for addressing climate change – objectives, principles and institutional architecture – and the protocols specify the concrete action that should be taken to achieve the objectives. For that reason, the UNFCCC is considered a living instrument as it is capable of evolving and responding to the scientific realities of climate change,²¹ through the conclusion of complementary treaties.

In this sense, the complementarity between the UNFCCC and the Paris Agreement can also be observed in their objectives. The UNFCCC’s Article 1 states that the ultimate objective of the Convention and future protocols – the long-term global goal – is to achieve the stabilization of GHG concentrations in

15 UNGA Res. 43/53, 6 December 1988.

16 Naomi Klein, “How Will Everything Change under Climate Change?”, *The Guardian*, 8 March 2015, available at: www.theguardian.com/environment/2015/mar/08/how-will-everything-change-under-climate-change.

17 Barack Obama, “Remarks by the U.S. President at U.N. Climate Change Summit”, UN Headquarters, New York, 23 September 2014, available at: <https://obamawhitehouse.archives.gov/the-press-office/2014/09/23/remarks-president-un-climate-change-summit>.

18 Ban Ki-Moon, “UN Secretary-General’s Remarks at Climate Leaders’ Summit”, Washington, DC, 11 April 2014, available at: www.un.org/sg/en/content/sg/statement/2014-04-11/secretary-generals-remarks-climate-leaders-summit.

19 Mike Hulme, “Why We Disagree about Climate Change”, May 2009, available at: www.mikehulme.org/wp-content/uploads/2009/10/Hulme-Carbon-Yearbook.pdf.

20 Lavanya Rajamani, “The United Nations Framework Convention on Climate Change: A Framework Approach to Climate Change”, in Daniel Farber and Marjan Peeters (eds), *Climate Change Law*, Edward Elgar, Cheltenham, 2016, p. 206.

21 *Ibid.*, p. 214.

the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. That level is specified in Article 2 of the Paris Agreement: the increase in the global average temperature must be held to well below 2°C above pre-industrial levels, and parties must make efforts towards limiting the temperature increase to 1.5°C above pre-industrial levels.

As mentioned before, the final provisions of both legal instruments are silent about their application during armed conflicts.²² In the case of the Paris Agreement, Voigt explains that the Durban Mandate (established at the 17th Conference of the Parties, in 2011) outlined several topics which were to become part of the work of the working group for drafting the new agreement, but the institutional provisions and final clauses were not explicitly mentioned in that mandate, and negotiations about them started later.²³

The ILC's Draft Principles on the Protection of the Environment in Relation to Armed Conflicts (ILC Draft Principles)²⁴ are a necessary starting point for elucidating the scope of application of the UN climate change regime. The Draft Principles are applicable before, during and after an armed conflict, including in situations of occupation (Draft Principle 1). Furthermore, Draft Principle 13 establishes the general rule that the environment shall be respected and protected in accordance with applicable international law, in particular the law of armed conflicts. This proposed rule is coherent with the content of Draft Principle 19 on the "General Environmental Obligations of an Occupying Power", which also specifies that an Occupying Power shall take environmental considerations into account in the administration of a territory.²⁵ In the Commentaries, the ILC clarifies that the phrase "applicable international law" in Draft Principles 13 and 19 refers to the law of armed conflict, but also to IEL²⁶ and IHRL.²⁷ As for the application of IEL in situations of armed conflict, the ILC

22 Bakker also highlights that in the Paris Agreement, the term "armed conflict" is not even mentioned and there is no explicit reference to what States commit to do to prevent the effects of climate change from contributing to or intensifying armed conflicts. Christine Bakker, "The Relationship between Climate Change and Armed Conflict in International Law: Does the Paris Climate Agreement Add Anything New?", *Peace Processes Online Review*, Vol. 2, No. 1, 2016, p. 7.

23 Christina Voigt, "Institutional Arrangements and Final Clauses", in Daniel R. Klein, María Pía Carazo Ortiz, Meinhard Doelle, Jane Bulmer and Andrew Higham (eds), *The Paris Agreement on Climate Change: Analysis and Commentary*, Oxford University Press, New York, 2017, p. 354.

24 ILC, *Draft Principles on the Protection of the Environment in Relation to Armed Conflicts*, in *Yearbook of the International Law Commission*, Vol. 2, Part II, 2022 (ILC Draft Principles).

25 As the law of occupation is part of IHL, the ILC clarified that Draft Principle 19 shall be read in the context of Draft Principle 13. *Ibid.*, p. 159.

26 For instance, some scholars consider that international climate change law is not a self-contained regime because it sits squarely within the fields of IEL and public international law more broadly. See Daniel Bodansky, Jutta Brunnée and Lavanya Rajamani (eds), *International Climate Change Law*, 1st ed., Oxford University Press, Oxford, 2017, p. 11. Others believe that although international climate change law can be considered as a sub-area of IEL, due to its contemporary significance and the active negotiations and cooperation taking place between States, it is considered a unique area of international law. See Cinnamon Piñon Carlarne, Kevin Gray and Richard Tarasofsky (eds), *The Oxford Handbook of International Climate Change Law*, 1st ed., Oxford University Press, Oxford, 2016, pp. 6–7. Despite the academic divergences on whether the UN climate change regime is or is not a new branch different from IEL, here it is considered that the regime is part of IEL.

27 ILC Draft Principles, above note 24, p. 159.

considers that the claim that customary and conventional IEL continue to apply during such situations can be supported by the interpretation provided by the International Court of Justice (ICJ) in its Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons* (Nuclear Weapons Advisory Opinion), and by the ILC Draft Articles on the Effects of Armed Conflicts on Treaties.

Regarding the Nuclear Weapons Advisory Opinion, on that occasion the ICJ made an important authoritative statement on international environmental obligations and the interests of future generations.²⁸ Nevertheless, it also observed that it could not “reach a definitive conclusion as to the legality or illegality of the use of nuclear weapons by a State in an extreme circumstance of self-defence, in which its very survival would be at stake”.²⁹ The Advisory Opinion thus illustrates how in that moment, the protection of the environment was marginalized to favour sovereign security interests despite the evident and proven environmental destructiveness of nuclear weapons.³⁰ Therefore, this historic and international legal precedent raises the question of whether the seriousness of the global climate change problem is itself enough to presume or take for granted the application of the UN climate change regime during armed conflicts. The answer is negative. Thus, due to the interests at stake, and with the aim of avoiding States party to the regime excusing themselves from complying with it during armed conflicts due to national security reasons and of avoiding possible similar legal results before domestic or international courts, more legal arguments should be developed to support ILC Draft Principles 13 and 19 regarding the application of the UN climate change regime to belligerent occupations, so that States’ security interests are not privileged over the protection of the environment and the civilian population. While they are an authoritative legal instrument, the ILC Draft Principles are *per se* a soft-law instrument and are therefore not in force.

In this regard, one should be mindful of the fact that in general any armed conflict threatens the security of belligerent parties and that the “carbon footprint”³¹ of the concerned States, or their GHG emissions, usually skyrockets during armed conflicts.³² It thus follows that to protect current and future

28 ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, *ICJ Reports 1996* (Nuclear Weapons Advisory Opinion), paras 27–33. See also Edith Brown Weiss, “Opening the Door to the Environment and to Future Generations”, in Laurence Boisson de Chazournes and Philippe Sands (eds), *International Law, the International Court of Justice, and Nuclear Weapons*, Cambridge University Press, Cambridge, 1999, pp. 338–353.

29 Nuclear Weapons Advisory Opinion, above note 28, para. 97.

30 During the International Environmental Law Conference organized by the International Union for the Conservation of Nature (Oslo, 3–6 October 2022), Professor Cymie Payne mentioned in her presentation that “the environment is marginalized as soon as a commercial or security reason appears”.

31 The expression “carbon footprint” has been being used by NGOs advocating for increasing awareness and understanding of the environmental and derived humanitarian consequences of conflicts and military activities, and transparency from the military sector when reporting its GHG emissions. See, for example, the websites of the Conflict and Environment Observatory, available at: <https://ceobs.org/about/>; Scientists for Global Responsibility, available at: www.sgr.org.uk; and The Military Emissions Gap, available at: <https://militaryemissions.org/>.

32 On the relationship between armed conflicts and GHG emissions, see Eoghan Darbyshire and Doug Weir, “How Does War Contribute to Climate Change?”, Conflict and Environment Observatory, 14 June 2021, available at: <https://ceobs.org/how-does-war-contribute-to-climate-change/>; Linsey Cottrell and Eoghan

generations from the negative impacts of climate change, it is crucial to determine whether the UN climate change regime is applicable regardless of the factual context (peace or war), with the aim of avoiding States invoking national security interests to argue that the regime is only applicable during peacetime.³³ This legal determination is particularly important in the case of belligerent occupations because, as clearly pointed out by Spoerri, occupation law's prescriptions are frequently interpreted by the Occupying Power in a self-serving manner in order to reduce constraints on their discretionary powers.³⁴ Finally, it is worth mentioning that even if nowadays belligerent occupations are few in number compared with the number of international and non-international armed conflicts taking place,³⁵ GHG emissions from occupied territories have an impact on Earth's climate system, and climate change could also negatively affect those territories and their civilian populations. Thus, the scarcity of occupied territories in the world should not be used as an excuse for failing to apply the UN climate change regime in such territories. Just as the sparrow says to the knight in Cassese's tale, "one does what one can", so too do all States Parties share a common responsibility to address global climate change in all circumstances, including situations of occupation.

On why the UN climate change regime is applicable to belligerent occupations

Having clarified the importance of determining the scope of application of the UN climate change regime, the next step is to examine the legal arguments that would help us to make that determination. With the aim of presenting and explaining the arguments in a didactic manner, this article proposes to assess the issue through the lens of a theoretical "legal maps app" (similar to Google Maps) that guides legal experts and practitioners to arrive at their legal destination, which is the permanent application of the UN climate change regime, particularly during belligerent occupations.

Like any digital map application, this "legal maps app" has a departure point for our journey. That departure point is Principles 23 and 24 of the 1992 Rio Declaration on Environment and Development,³⁶ because these principles

Darbyshire, "The Military's Contribution to Climate Change", Conflict and Environment Observatory, 16 June 2021, available at: <https://ceobs.org/the-militarys-contribution-to-climate-change/>.

- 33 As they did before the ICJ when they argued that the principal purpose of environmental treaties and norms was the protection of the environment in times of peace. Nuclear Weapons Advisory Opinion, above note 28, para. 28.
- 34 Philip Spoerri, "The Law of Occupation", in Andrew Clapham and Paola Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict*, Oxford University Press, Oxford, 2015, p. 192.
- 35 See the Geneva Academy's Rule of Law in Armed Conflicts website, available at: www.rulac.org.
- 36 Rio Declaration on Environment and Development, UN Doc. A/CONF.151/26 (Vol. I), 12 August 1992. Principle 23 establishes: "The environment and natural resources of people under oppression, domination and occupation shall be protected." Principle 24 states: "Warfare is inherently destructive of sustainable development. States shall therefore respect international law providing protection for the environment in times of armed conflict and co-operate in its further development, as necessary."

operate as a “legal umbrella” that guides the conduct of States on the protection of the environment during armed conflicts. Based on the general principle of *pacta sunt servanda* (Article 26 of the Vienna Convention on the Law of Treaties (VCLT)),³⁷ the unanimously adopted Principle 24 asserts the application of all those relevant international rules – conventional, customary and general principles of law – that provide protection to the environment during armed conflicts³⁸ (without differentiating between international and non-international armed conflicts).³⁹ Principle 23, meanwhile, reaffirms the protection against environmental risks faced by people under oppression, domination and occupation.⁴⁰

Our “legal maps app” envisages four alternative routes towards the chosen destination (i.e., the permanent application of the UN climate change regime), all determined according to their time frame, and these will be analyzed in the following subsections. The short-term road examines whether or not the phrase “laws in force” in Article 43 of Hague Convention IV comprehends the UN climate change regime when the Occupied State is party to it. The first mid-term road concerns the possible extraterritorial application of the UN climate change regime in the occupied territory, while the second mid-term road is based on the application of the principle of legal stability and continuity of treaties during armed conflicts to the UN climate change regime. Finally, the long-term road relates to the interaction between IHL, the UN climate change regime and IHRL during belligerent occupations.

The short-term road: The UN climate change regime and the laws in force in the occupied territory

As a branch of IHL, the law of occupation tries to find a balance between the interests of the Occupying Power, the interests of the legitimate authorities of the occupied territory, and the well-being of the local population.⁴¹ It establishes two core obligations of conduct for Occupying Powers that are interconnected. On the one hand, they must restore and maintain public order and civil life in the occupied territory (including the welfare of the population); on the other hand,

37 Vienna Convention on the Law of Treaties, 1155 UNTS 331, 23 May 1969 (entered into force 27 January 1980) (VCLT).

38 Marie-Louise Tougas, “Principle 24”, in Jorge E. Viñuales (ed.), *The Rio Declaration on Environment and Development: A Commentary*, Oxford University Press, Oxford, 2015, p. 573.

39 As clearly highlighted by Pavoni and Piselli, this principle does not contain specific normative prescriptions, but it has over the years become a significant and vibrant international law standard. Riccardo Pavoni and Dario Piselli, *Armed Conflicts and the Environment: An Assessment of Principle 24 of the Rio Declaration Thirty Years On*, University of Siena, February 2022, available at: <https://ssrn.com/abstract=4071106>. This can be observed in the ICJ’s Nuclear Weapons Advisory Opinion, when this principle was cited to support the Opinion’s interpretation and conclusion that environmental considerations must be taken into account when assessing whether an action is in conformity with the principles of necessity and proportionality. Nuclear Weapons Advisory Opinion, above note 28, para. 30.

40 Mara Tignino, “Principle 23”, in J. E. Viñuales (ed.), above note 38, p. 559.

41 E. Lieblich and E. Benvenisti, above note 13, p. 1; Hanne Cuyckens, *Revisiting the Law of Occupation*, Brill Nijhoff, Boston, MA, 2018, p. 103.

they must respect (unless absolutely prevented from doing so) the laws in force in the occupied territory (Article 43 of Hague Convention IV and Article 64 of GC IV).

Article 43 of Hague Convention IV can be thought of as a door left ajar, through which the UN climate change regime can enter and start interacting with the law of occupation, providing that the phrase “laws in force” from Article 43 is broadly interpreted.⁴² In this regard, Sassòli proposes a broad conception of the phrase and considers that it refers to the entire legal system of the occupied territory.⁴³ This means that it includes constitutions, decrees and ordinances, executive orders, national and municipal laws, and substantive and procedural law.⁴⁴ However, it is worth remembering that a State’s legal system consists of its domestic laws as well as those international customary and conventional rules in force and binding upon it (whose internal incorporation will depend on the monist or dualist system of law adopted by a State). Consequently, it can be affirmed that international legal rules in force for the Occupied State are included in the phrase “laws in force” found in Article 43, and that these rules are a source of obligations for the Occupying Power⁴⁵ because, as the *de facto* authority effectively controlling the territory (even a part of it), it is responsible for complying with them,⁴⁶ particularly those that would help to ensure the maintenance of public order and safety in the occupied territory.

The UN climate change regime is a good example of international binding rules that can help to ensure the maintenance of public order and safety in the occupied territory because the implementation of that regime, through the adoption of mitigation and adaptation measures by the Occupying Power, would tend to reduce the civil population’s vulnerability to climate change⁴⁷ and thereby help to maintain a healthy – local and global – environment for the enjoyment of human rights. Moreover, it would also contribute to keeping safe the Occupying

42 Gross considers that this provision became the cornerstone in the determination of the nature and scope of the Occupying Power’s responsibility: the occupation is temporary, and the Occupying Power is to manage the territory in a manner that protects civil life, exercising its authority as a trustee of the sovereign. Aeyal Gross, *The Writing on the Wall: Rethinking the International Law of Occupation*, Cambridge University Press, Cambridge, 2017, p. 18.

43 Marco Sassòli, “Legislation and Maintenance of Public Order and Civil Life by Occupying Powers”, *European Journal of International Law*, Vol. 16, No. 4, 2005, p. 669.

44 *Ibid.*; Yoram Dinstein, “Legislation under Article 43 of the Hague Regulations: Belligerent Occupation and Peacebuilding”, Occasional Paper Series, No. 1, Program on Humanitarian Policy and Conflict Research, Harvard University, Autumn 2004, p. 4; Yutuka Arai-Takahashi, *The Law of Occupation: Continuity and Change of International Humanitarian Law, and Its Interaction with International Human Rights Law*, Martinus Nijhoff, Leiden, 2009, p. 97.

45 See Theodor Meron, “Applicability of Multilateral Conventions to Occupied Territories”, *American Journal of International Law*, Vol. 72, No. 3, 1978; Marco Longobardo, *The Use of Armed Force in Occupied Territory*, Oxford University Press, Oxford, 2022, p. 45.

46 E. Benvenisti, above note 7, pp. 83–86; Daniëlla Dam-de Jong, *International Law and Governance of Natural Resources in Conflict and Post-Conflict Situations*, Cambridge University Press, New York, 2015, p. 157.

47 As an example, Hulme mentions that in drought-prone regions, those acting as occupiers must ensure the right to survival of the affected population, and one way to achieve this might be by actively rebuilding facilities or reconnecting damaged services. Karen Hulme, “Climate Change and International Humanitarian Law”, in Rosemary Rayfuse and Shirley V. Scott (eds), *International Law in the Era of Climate Change*, Edward Elgar, Cheltenham, 2012, pp. 209–210.

Power's armed forces deployed in the occupied territory. Therefore, respect for the UN climate change regime and the application of that regime to belligerent occupations are beneficial for all the parties affected by an armed conflict as well as for the Earth's climate system. In other words, from a humanitarian and environmental perspective, a broad interpretation of Article 43 of Hague Convention IV is needed because today's reality demands that Occupying Powers take action against climate change, as their inaction (or lack of adoption of adequate measures) could have a negative impact on the Earth's climate system, the local natural environment, and human beings – temporal and permanent – living in the occupied territory.

The first mid-term road: The extraterritorial application of the UN climate change regime to belligerent occupations

According to the information available at the UN Treaty Collection, the UNFCCC has been ratified by 198 States,⁴⁸ and the Paris Agreement by 195 States.⁴⁹ In the hypothetical case that only the Occupying Power is party to the UN climate change regime – because the occupied State never expressed its consent or because it decided to withdraw from it⁵⁰ – the Occupying Power will have to respect the regime in the occupied territory based on the “GHG production-based system boundary” implemented by the UN climate change regime. This system boundary has a territorial approach according to which GHG emissions are allocated to the State Party in whose territory they are generated,⁵¹ so that it can stabilize and reduce them by exercising its sovereign powers. A concrete example of this criterion is the obligation of States party to the Paris Agreement to submit every five years their domestic plans for climate action, known as “nationally determined contributions” (Article 3).⁵²

The said obligation could be interpreted in a restrictive manner as covering only those emissions produced in the metropolitan territories of the parties (in this case, Occupying Powers). However, the implementation of this obligation should be done through the spirit of the harm prevention principle, as the UN climate change

48 See the UN Treaty Collection website, available at: https://treaties.un.org/pages/ViewDetailsIII.aspx?src=TREATY&mtdsg_no=XXVII-7&chapter=27&Temp=mtdsg3&clang=_en.

49 See the UN Treaty Collection website, available at: https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-7-d&chapter=27&clang=_en. Due to the number of States Parties to both legal instruments, it can also be argued that the UN climate change regime has become general customary law. Whether or not this has happened, Baxter explains that in the case of treaties with a high number of States Parties, it is difficult to demonstrate the existence of the customary rule outside the treaty because of the low number of non-party States whose practices or behaviours can be surveyed or analyzed for that purpose. Richard Baxter, “Treaties and Customs”, *Collected Courses of the Hague Academy of International Law*, Vol. 129, Hague Academy of International Law, Leiden, 1970, p. 64.

50 UNFCCC, above note 3, Art. 25; Paris Agreement, above note 5, Art. 28.

51 Scott explains that according to this territorial system boundary, emissions are allocated to the country in which goods and services are produced rather than the country in which they are consumed. Joanne Scott, “Unilateralism, Extraterritoriality and Climate Change”, in Daniel Farber and Marjan Peeters (eds), *Climate Change Law*, Edward Elgar, Cheltenham, 2016, pp. 168–169.

52 *Ibid.*

regime is part of IEL.⁵³ The harm prevention principle is considered the cornerstone⁵⁴ or the *raison d'être* of IEL;⁵⁵ it reflects a rule of customary nature;⁵⁶ it is included in paragraph 8 of the preamble to the UNFCCC; and its application during belligerent occupations is also proposed in ILC Draft Principles 19.2 and 21.⁵⁷ According to the harm prevention principle, a State has the responsibility to ensure that activities within its jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of its national jurisdiction.⁵⁸ The ICJ has interpreted that the harm prevention principle has a due-diligence nature, meaning that States are obliged to use all means at their disposal to avoid environmental harm.⁵⁹

The notion of “jurisdiction or control” over a space is a key component of the harm prevention principle because it connects the concerned State with the environment of that space and its protection. Coincidentally, the notion of “control” is also important in the law of occupation⁶⁰ because according to Article 42 of Hague Convention IV, a territory is considered occupied when “it is actually placed under the authority of the hostile army”.⁶¹ As explained

- 53 Duvic-Paoli and Viñuales mention that the prevention principle performs important interpretive functions of treaty provisions relating to other matters, such as to clarify or update their content or to conciliate different considerations. Leslie-Anne Duvic-Paoli and Jorge Viñuales, “Principle 2”, in J. E. Viñuales (ed.), above note 38, p. 120.
- 54 Leslie-Anne Duvic-Paoli, *The Prevention Principle in International Environmental Law*, Cambridge University Press, Cambridge, 2018, p. 2; Philippe Sands, Jacqueline Peel, Adriana Fabra and Ruth Mackenzie, *Principles of International Environmental Law*, 3rd ed., Cambridge University Press, Cambridge, 2012, p. 191.
- 55 L.-A. Duvic-Paoli and J. Viñuales, above note 53, p. 107.
- 56 Nuclear Weapons Advisory Opinion, above note 28, para. 29; ICJ, *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, *ICJ Reports 2010*, para. 101.
- 57 An example of the application of the harm prevention principle to other international law regimes is the case of the law of the sea. Article 194(2) of the UN Convention on the Law of the Sea provides that States “shall take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other states and their environment, and that pollution arising from incidents or activities under their jurisdiction or control does not spread beyond the areas where they exercise sovereign rights in accordance with [the] Convention”. United Nations Convention on the Law of the Sea, 1833 UNTS 3, 10 December 1982 (entered into force 16 November 1994).
- 58 See Principle 21 of the 1972 Stockholm Declaration on the Human Environment and Principle 2 of the 1992 Rio Declaration. Brunnée explains that the harm prevention rule finds its conceptual origins not in the protection of the environment but in the mutual limitation of sovereign rights to the use and enjoyment of territory. She further clarifies that the harm prevention rule should be understood as an obligation of conduct that requires States to exercise due diligence in the face of risks of significant transboundary environmental harm. Jutta Brunnée, “Harm Prevention”, in Lavanya Rajamani and Jacqueline Peel (eds), *The Oxford Handbook of International Environmental Law*, 2nd ed., Oxford University Press, Oxford, 2021, pp. 269, 283.
- 59 ICJ, *Pulp Mills*, above note 56, para. 101.
- 60 Kalandarishvili-Mueller points out that the notion of control is not only important for classifying situations of military occupation, but also plays a significant role in wider international law as each branch uses and positions control in different tests and with different thresholds: Natia Kalandarishvili-Mueller, *Occupation and Control in International Humanitarian Law*, Routledge, Abingdon, 2020, p. 3.
- 61 Benvenisti considers that the occupation’s authority derives not from a right to control but from the fact of control that depends on a factual determination of the occupant’s effective control over certain territory: E. Benvenisti, above note 7, p. 43.

by Vité, two conditions must be fulfilled for occupation to exist: (1) the Occupying Power is able to exercise effective control over a territory that does not belong to it, assuming this status when its troops are deployed in the concerned territory and it is in a position to exercise its own power; and (2) its intervention has not been approved by the legitimate sovereign (even if there is no armed resistance).⁶² Consequently, there is a connection between the harm prevention principle and the law of occupation through the notion of “control”.

A harmonic interpretation and application of the Paris Agreement and the harm prevention principle in a context of belligerent occupation would therefore allow us to conclude that the Paris Agreement should be applied in an extraterritorial manner to those areas under the jurisdiction or control of States Parties, such as in the case of occupied territories. Accordingly, the Occupying Power would be responsible for controlling GHG emissions from the occupied territory under its effective control (in order to avoid worsening the climate change situation), should take concrete actions to mitigate those GHG emissions and to protect the civil population from climate change during the occupation, and should include in its nationally determined contributions those GHGs produced in the occupied territory when that space is under its effective control.⁶³

62 Sylvain Vité, “Typology of Armed Conflicts in International Humanitarian Law: Legal Concepts and Actual Situations”, *International Review of the Red Cross*, Vol. 91, No. 873, 2009, p. 74. See also Hortensia Gutierrez Posse, *Elementos de derecho internacional humanitario*, Editorial Eudeba, Buenos Aires, 2014, pp. 94–95; Tristan Ferraro (ed.), *Expert Meeting: Occupation and Other Forms of Administration of Foreign Territory*, ICRC, Geneva, 2011, pp. 16–26; ICJ, *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, *ICJ Reports 2005*, para. 173.

63 As an example of the extraterritorial application of the UN climate change regime, some States party to the Paris Agreement with territorial disputes made interpretative declarations when expressing their consent to be bound (as reservations are prohibited). For instance, in the case where the United Kingdom ratified the Agreement and its application was extended to the territory of Gibraltar, the king of Spain declared that Gibraltar is a non-autonomous territory subject to a decolonization process, whose international relations come under the responsibility of the United Kingdom. The declaration can be read at: https://treaties.un.org/Pages/ViewDetails.aspx?src=IND&mtdsg_no=XXVII-7-d&chapter=27&clang=_en. Moreover, the war between the Russian Federation and the Republic of Ukraine has motivated these two States to rely on the Paris Agreement as a source of legal argument to assert their sovereign rights over the disputed territories by including the Crimean GHG emissions as part of their respective territories. See Michael Birnbaum, “At War, Russia Aims to Claim Ukraine’s Land—and Its Carbon Emissions”, *Washington Post*, 18 October 2022, available at: www.washingtonpost.com/climate-environment/2022/10/18/russia-ukraine-crimea-emissions/. Regardless of the legality or illegality of the exercise of sovereign powers in a given territory, and the diplomatic strategies that countries can implement to support their legal claims, the measuring and reducing of GHG emissions from an occupied territory should be depoliticized in the interests of the protection of Earth’s climate system. A practical approach should be implemented to shed light on this issue for all States party to the UN climate change regime. This could take the form, for instance, of a resolution by the Conference of the Parties which clarifies that the inclusion of GHG emissions from territories under occupation in reporting by the Occupying Power shall not constitute a basis for asserting, supporting or denying a claim to territorial sovereignty or create any rights of sovereignty over an occupied territory, as was successfully agreed in Article 4 of the 1959 Antarctic Treaty for disputed territories in that area. This would help to ensure that territorial disputes and belligerent occupations do not affect the continuous application of

The second mid-term road: The principle of legal stability and continuity of treaties and the UN climate change regime

Another route that the “legal maps app” offers to arrive at our destination point is related to the principle of legal stability and continuity of treaties. According to this principle, it is presumed that the existence of an armed conflict does not *ipso facto* terminate and suspend the operation of a treaty, as proposed by ILC Draft Article 3.⁶⁴ When the concerned treaty does not contain provisions on its operation in situations of armed conflict, in Draft Article 6, the ILC has proposed a non-exhaustive list of factors that could serve to determine the susceptibility to termination, suspension or withdrawal of a treaty, which may or may not be relevant for it depending on the circumstances.⁶⁵ Subparagraph (a) focuses on those factors in relation to the treaty itself, while subparagraph (b) deals with those related to the characteristics of the armed conflict.

According to Draft Article 6, the treaty-related factors that could be considered for the determination are the nature of the treaty (in particular, its subject matter), its object and purpose, its content, and the number of parties to the treaty.⁶⁶ Subparagraph (a) is linked to Draft Article 7, which proposes an indicative list (found in the Annex) of categories of treaties whose subject matter involves an implication that they continue in operation during armed conflicts.⁶⁷ The ILC recognizes that in certain cases, the proposed categories are overlapping.⁶⁸ The categories included in the list that are relevant for the purposes of this paper are the ones related to “treaties declaring, creating or regulating a permanent regime or status or related permanent rights” (Annex, subparagraph (b)) and “treaties relating to the international protection of the environment” (Annex, subparagraph (g)).

Based on the treaty-related factors included in Draft Article 6(a), from the content of the UNFCCC and the Paris Agreement, as well as considering the number of States Parties they have, it can be inferred that both legal instruments

the UN climate change regime and, consequently, the effective measurement and reduction of GHG emissions.

64 ILC Draft Articles, above note 14, Art. 3. The Draft Articles follow the criteria developed previously by the Institute of International Law in its 1985 resolution on the effects of armed conflicts on treaties. In Article 2 of that resolution, the Institute proposed that “[t]he mere outbreak of an armed conflict does not *ipso facto* terminate or suspend the operation of treaties in force between the parties to the armed conflict”. And in Article 3 of the resolution, it is proposed that “[t]he outbreak of an armed conflict renders operative between the parties the treaties which expressly provide that they are to be operative during an armed conflict or which by reason of their nature or purpose are to be regarded as operative during an armed conflict”. See Institute of International Law, *Yearbook*, Vol. 61, Part I, Session of Helsinki 1985, Preparatory Work, pp. 25–27. The principle of legal stability and continuity of treaties is also one of the arguments that the ILC invoked to support the conclusion that treaties relating to the international protection of the environment may continue in operation during armed conflict. ILC Draft Principles, above note 24, p. 160.

65 ILC Draft Articles, above note 14, p. 119.

66 Some of these factors are related to the general rule of interpretation of treaties established in Article 31 of the VCLT.

67 ILC Draft Articles, above note 14, p. 120

68 *Ibid.*

are multilateral treaties related to the protection of the environment, open to consent by any State or regional economic integration organizations, and they have achieved almost universal ratification. Besides this, the general subject matter (the protection of the environment) and the objective (the stabilization of GHG concentrations in the atmosphere) of this legal regime are connected to the magnitude, duration, seriousness and uncertainties of climate change. It is precisely due to these characteristics of the climate change problem that those treaties have established a permanent regime with the aim of enabling States Parties to take constant collective action in order to tackle the problem effectively, because this issue will affect humanity for several generations. As highlighted by Thorgeirsson, the UNFCCC is in essence a planetary risk-management treaty,⁶⁹ and this feature can be extended to the entire regime. Furthermore, this special feature of the UN climate change regime – as an environmental permanent regime (following Draft Article 7's criteria) – can also be inferred from the preamble of the UNFCCC, in which the States Parties acknowledge that climate change is a problem surrounded by uncertainties with regard to timing, magnitude and regional patterns (paragraph 5), and that they are determined to protect the climate system for present and future generations (paragraph 23) because the global nature of the climate change problem and its adverse effects are a common concern of humankind (paragraph 1).

The permanent application of the UN climate change regime can also be inferred from the fact that the regime has been established to deal with a global environmental problem. Besides this, with the aim of stabilizing GHG concentrations in the atmosphere and achieving “net zero”, the regime intends to modify collective and individual behaviour connected to patterns of production and consumption, and this transition will take decades. Moreover, it can be considered that the regime seeks to serve the interests of the international community as a whole by having as its primary objective the protection of a common environmental good⁷⁰ (the climate system), as well as the protection of human health, safety and life on Earth for present and future generations. Consequently, considering that Earth's climate system is a common concern of humankind, the permanent application of the regime can be confirmed as it plays a critical legal role in addressing the problem. Finally, the regime's permanent application is necessary as a way of maximizing the effectiveness of the regime and the efforts made so far to cope with the climate problem.

As for the armed conflict-related factors listed in ILC Draft Article 6(b), these include the territorial extent of the armed conflict, its scale and intensity, its duration and, in the case of non-international armed conflicts, the degree of outside involvement. The duration factor is key in the determination of the continuous application of the UN climate change regime because of an intrinsic

69 Halldór Thorgeirsson, “Objective (Article 2.1)”, in D. R. Klein *et al.* (eds), above note 23, p. 124.

70 Silja Voneky, “Peacetime Environmental Law as a Basis of State Responsibility for Environmental Damage Caused by War”, in Jay Austin and Carl Bruch (eds), *The Environmental Consequences of War*, Cambridge University Press, Cambridge, August 2010, pp. 211–212; UNEP, *Protecting the Environment during Armed Conflict: An Inventory and Analysis of International Law*, November 2009, p. 44.

characteristic of belligerent occupations: they are supposed to be temporary situations because it is expected that the legitimate authorities will return to power soon.⁷¹ However, this temporality should not be an excuse for precluding the application of the UN climate change regime during this type of armed conflict. This is because the essence of the law of occupation is to find a balance between, on the one hand, the protection of the life and property of inhabitants (included the local environment) as well as respect for the sovereign rights of the ousted government;⁷² and, on the other hand, the fulfilment of the security and military needs of the Occupying Power.⁷³ It is precisely the protection of life and the environment of the occupied territory that triggers the necessity of applying the UN climate change regime during belligerent occupations in order to reduce the adverse effects of climate change in the occupied territory. In other words, the UN climate change regime has to be applied during belligerent occupations for humanitarian and environmental reasons, and even more so in case of prolonged occupations.⁷⁴ Therefore, the negative impact of climate change on the civilian population⁷⁵ and the environment, and the lack of action by the Occupying Power in reducing GHG emissions in the occupied territory, as well as in adopting mitigation and adaptation measures to reduce and prevent those climate consequences, would be contrary to the object and purpose of the UN climate change regime – including the harm prevention principle – and the humanitarian spirit of the law of occupation.

The foregoing analysis, based on ILC Draft Article 6 and subparagraphs (b) and (g) of the Annex related to ILC Draft Article 7, allows us to conclude that the intrinsic characteristics of the UN climate change regime explained above, as well as

- 71 Vaios Koutroulis, “The Application of International Humanitarian Law and International Human Rights Law in Situation of Prolonged Occupation: Only a Matter of Time?”, *International Review of the Red Cross*, Vol. 94, No. 885, 2012, p. 167. Cuyckens highlights that since occupation disrupts the normal order of things, creating a distinction between effective control and sovereign title, it has been construed to be of a short-term duration and the law advocates for a quick return to normality by any form of bringing the conflict to an end. H. Cuyckens, above note 41, p. 108.
- 72 Eyal Benvenisti, “The Origin of the Concept of Belligerent Occupation”, *Law and History Review*, Vol. 26, No. 3, 2008, p. 622.
- 73 This explains why the regime is both “permissive (accepting that an occupier exercises certain powers) and prohibitive (putting limits on the occupier’s actions)”. P. Spoerri, above note 34, pp. 185–186.
- 74 Koutroulis clarifies that neither conventional nor customary IHL distinguishes between “short-term” occupations and “prolonged” ones; hence, no distinct legal category of prolonged occupation exists in IHL, and the adjective “prolonged” is descriptive. However, this author points out that the duration of an occupation does not leave the interpretation and application of IHL and IHRL completely unaffected, the central question being how much leeway the Occupying Power should be accorded when administering the occupied territory. V. Koutroulis, above note 71, pp. 168, 170, 176.
- 75 Bakker explains that the vulnerability of the environment and the civilian population caused by the hostilities themselves is often exacerbated by the effects of climate change (severe drought and water shortages, rising sea levels, extreme weather events): C. Bakker, above note 22, p. 7. In this regard, the ICRC has pointed out that countries in conflict are the most vulnerable to the climate crisis because their capacity to adapt to a changing climate is drastically limited by the disruptive impact that wars have on them, and because they are among those most neglected when it comes to climate action and finance. See ICRC, “Seven Things You Need to Know about Climate Change and Conflict”, 9 July 2020, available at: www.icrc.org/en/document/climate-change-and-conflict; ICRC, “COP27 – The ICRC’s Call to Strengthen Climate Action in Conflict Settings”, 24 October 2022, available at: www.icrc.org/en/document/cop27-icrc-calls-ahead-of-cop27-climate-change-and-conflict.

the well-known negative consequences that climate change is having on the environment itself and on humanity, are enough to justify the permanent application of the regime regardless of the context (peacetime or wartime), because the regime's interrupted application or suspension due to armed conflict can be catastrophic in general for Earth's climate system and in particular for the civilian population affected by the armed conflict. As mentioned by the ILC, in the case of environmental treaties that are widely ratified and that have a global scope, it may be difficult to conceive of the suspension of those treaties exclusively between the parties to the armed conflict, because "obligations established under such treaties protect a collective interest and are owed to a wider group of States than the ones involved in the conflict or occupation".⁷⁶

The long-term road: The holistic application of IHL, IHRL and the UN climate change regime during belligerent occupations

Finally, the fourth route offered by the "legal maps app" concerns the relationship between and application of IHL, IHRL and the UN climate change regime during belligerent occupations. It is introduced as the "long-term road" because the question of how these three branches of public international law interact does not have a definitive answer yet. For instance, the ILC, in its study on *Fragmentation of International Law*,⁷⁷ considers that the principle of systemic integration (Article 31(3)(c) of the VCLT) is the key tool to be used for interpreting and determining the relationship between general international norms and norms of self-contained regimes, in order to maintain the coherence of public international law. However, the ILC concludes that the VCLT alone is not enough to give an answer to the emergence of conflicting rules and overlapping legal regimes, because it does not give sufficient recognition to special types of treaties and the special rules that may be useful for their application and interpretation. Finally, the ILC concludes that the whole complex of inter-regime relations is a legal black hole, and wonders what principles of conflict solution might be used for dealing with conflicts between two regimes or between instruments across regimes. In this regard, the ILC Draft Principles provide an answer to the applicability of other international legal regimes that protect the environment during armed conflicts, besides IHL. Yet, in the Draft Principles, the ILC does not propose how that interaction and application should take place or the criteria for resolving possible normative contradictions between IHL, IHRL and IEL, this being left to the consideration of States and stakeholders.

76 ILC Draft Articles, above note 14, p. 66. An example of a similar international legal regime that confirms the ILC's approach is the treaties adopted in the late 1980s to deal with the depletion of the ozone layer, which are also silent about their application during armed conflict.

77 ILC, *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, as corrected by UN Doc. A/CN.4/L.682/Corr.1, 11 August 2006 (finalized by Marti Koskeniemi).

As for the application of IHRL during armed conflicts,⁷⁸ the ICJ has confirmed that “the protection offered by human rights conventions does not cease in case of armed conflict”, and has also affirmed that the 1966 International Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights are applicable in respect of acts carried out by a State in the exercise of its jurisdiction outside its own territory, particularly in occupied territories, confirming the extraterritorial application of the Covenants.⁷⁹ This interpretation is emblematic because it has opened the door for other international legal regimes, like IHRL, to contribute to and strengthen the humanitarian and legal protections provided during armed conflicts, in particular in situations of belligerent occupation.⁸⁰

This opened door is an interesting one to be crossed by IHRL hand in hand with the UN climate change regime (as part of IEL), with the aim of providing humanitarian protection to civilian populations simultaneously affected by armed conflict (in this case, belligerent occupation) and the adverse effects of climate change. For instance, the Paris Agreement’s preamble expressly connects the UN climate change regime and IHRL by acknowledging that States Parties should – when taking action to address climate change – respect, promote and consider their respective obligations on human rights (paragraph 11). Carazo highlights that this acknowledgement is important because the Paris Agreement is the first multilateral environmental agreement to incorporate express reference to human rights, this being considered as revolutionary.⁸¹

The express connection between the two regimes is a legal advantage that must be seized, and its implementation during belligerent occupations can take place in two ways. Firstly, it can take place through the intimate interlink between the climate change crisis and the enjoyment of recognized human rights. There are several fundamental human rights that are already being affected across the planet – like the rights to life, to health, and to food and water – as a

78 See Cordula Droegge, “The Interplay between International Humanitarian Law and International Human Rights Law in Situations of Armed Conflict”, *Israel Law Review*, Vol. 40, No. 2, 2007; Nehal Bhuta (ed.), *The Frontiers of Human Rights*, Oxford University Press, Oxford, 2016; Gerd Oberleitner, *Human Rights in Armed Conflict: Law, Practice, Policy*, Cambridge University Press, Cambridge, 2015; Daniel Ivo Odon, *Armed Conflict and Human Rights Law Protecting Civilians and International Humanitarian Law*, Routledge, London, 2021; Jens David Ohlin (ed.), *Theoretical Boundaries of Armed Conflict and Human Rights*, Cambridge University Press, Cambridge, 2016.

79 ICJ, *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, *ICJ Reports 2004*, paras 106–113. This interpretation was later confirmed by the Court in *Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)*, Judgment, *ICJ Reports 2005*, paras 216–217. See also Nuclear Weapons Advisory Opinion, above note 28, para. 25.

80 The UN Human Rights Committee has the same approach concerning the application of the 1966 International Covenant on Civil and Political Rights, as expressed in its General Comment No. 31, in which it interpreted that “a State party must respect and ensure the rights laid down in the Covenant to anyone within the power or effective control of that State Party, even if not situated within the territory of the State Party”. Human Rights Committee, 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, paras 10–12.

81 María Pía Carazo, “Contextual Provisions (Preamble and Article 1)”, in D. R. Klein *et al.* (eds), above note 23, p. 114.

consequence of climate change and the lack or inadequacy of policy action from governments.⁸² Secondly, it could take place through the international (and domestic) recognition of the human right to a safe, clean, healthy and sustainable environment. This recognition is important because it enhances “the enjoyment of rights holders, and the accountability of duty bearers to respect, protect and fulfil this right”.⁸³ Legal action on this issue has been taken by States,⁸⁴ international organizations and international tribunals. For instance, the UN Human Rights Council⁸⁵ and UN General Assembly⁸⁶ have expressly recognized the right to a healthy environment as a human right that is important for the enjoyment of other human rights, that is related to other rights and existing international law, and whose promotion requires the full implementation of multilateral environmental agreements under the principles of IEL. Besides this, Article 24 of the African Charter on Human and Peoples’ Rights recognizes the right to a general satisfactory environment.⁸⁷ Furthermore, when the Inter-American Court of Human Rights had the first opportunity to analyze States’ obligations arising from the need to protect the environment under the American Convention on Human Rights, it considered that

the right to a healthy environment is recognized explicitly in the domestic laws of several States of the region, as well as in some provisions of the international *corpus iuris* The human right to a healthy environment has been understood as a right that has both individual and also collective connotations. In its collective dimension, the right to a healthy environment constitutes a universal value that is owed to both present and future generations. That said, the right to a healthy environment also has an individual dimension insofar as its violation may have a direct and an indirect impact on the individual owing to its connectivity to other rights, such as the rights to health, personal integrity, and life. Environmental degradation may cause irreparable harm to human beings; thus, a healthy environment is a fundamental right for the existence of humankind.⁸⁸

82 UNEP and Sabin Center for Climate Change, *Climate Change and Human Rights*, Nairobi, 2015, pp. 2–10; Office of the High Commissioner for Human Rights (UN Human Rights), *Understanding Human Rights and Climate Change*, Report Submitted during the 21st Conference of the Parties to the UNFCCC, 2015; Male’ Declaration on the Human Dimension of Global Climate Change, 14 November 2007.

83 UN Human Rights, UNEP and United Nations Development Programme, *What Is the Right to a Healthy Environment?*, Information Note, 2022, available at: www.undp.org/sites/g/files/zskgke326/files/2023-01/UNDP-UNEP-UNHCHR-What-is-the-Right-to-a-Healthy-Environment.pdf.

84 Many States have already recognized the human right to a healthy environment in their constitutions or domestic law. See David Boyd, *Report of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment*, UN Doc. A/73/188, 19 July 2018; David Boyd, *The Environmental Rights Revolution: A Global Study of Constitutions, Human Rights, and the Environment (Law and Society)*, UBC Press, Vancouver, 2011.

85 HRC Res. 48/13, 18 October 2021. This resolution was historic because it was the first time that this right had been recognized at the global level.

86 UNGA Res. 76/300, 28 July 2022.

87 Article 24 provides: “All peoples shall have the right to a general satisfactory environment favorable to their development.”

88 Inter-American Court of Human Rights, *The Environment and Human Rights*, Advisory Opinion OC-23/17, 15 November 2017, paras 58–59.

Consequently, either because of the intimate connection between climate change and adverse effects on basic human rights or because of the consecration of the human right to a healthy environment as a right in itself, Occupying Powers will have to apply IHRL and the UN climate change regime in the occupied territory under their effective control because they are obliged to respect and adopt appropriate measures to protect those basic and recognized human rights of the civilian population⁸⁹ whose enjoyment can be affected or worsened due to the effects of climate change in the occupied territory.⁹⁰ Occupying Powers will have to adapt to governance challenges,⁹¹ as the exercise of jurisdiction or control over a territory does not come without responsibilities. Lastly, an immediate legal consequence of the connection between the UN climate change regime and IHRL would be the constant respect and application of the UN climate change regime regardless of the context.⁹²

Conclusions

Current belligerent occupations are taking place in a context of global climate change, a problem that represents a challenge for the civilian populations of occupied territories simultaneously affected by the adverse consequences of it and by the armed conflict. IHL is silent about belligerent parties' duties regarding climate change, and the UN climate change regime is silent about its application in situations of armed conflict. Nevertheless, as clearly highlighted by Slade, silence from the UN climate change regime on the links between armed conflict and climate does not mean silence from IHL, in particular, because both legal regimes share the same humanitarian concern towards the well-being of people.⁹³ Global climate change does not distinguish between peacetime and times of armed conflict, as the application of public international law does; it is simply happening, and it is happening constantly. Therefore, both legal regimes – together with IHRL – can be applied in a complementary manner so that Occupying Powers can take action against the adverse effects of climate change in order to maintain the

89 It is worth recalling that the European Court of Human Rights (ECtHR) has confirmed the application of the European Convention on Human Rights in situations of occupation: see ECtHR, *Loizidou v. Turkey*, Judgment, 18 December 1996; ECtHR, *Cyprus v. Turkey*, Judgment, 10 May 2001.

90 Although not in situations of armed conflict, climate change applications have been submitted before the ECtHR, and future decisions taken by the Court can be an important precedent for all States (including Occupying Powers) concerning human rights and climate change. See ECtHR, *Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, Appl. No. 53600/20, 17 March 2021; ECtHR, *Carême v. France*, Appl. No. 7189/21, 28 January 2021.

91 H. Cuyckens, above note 41, p. 104.

92 As clearly pointed out by Sassòli, today it is no longer possible to divide international law (and its branches) into the law of war and the law of peace because IHL is not the only branch of public international law that provides answers to humanitarian problems arising in armed conflicts. Marco Sassòli, *International Humanitarian Law*, Edward Elgar, Cheltenham, 2019, p. 422.

93 Tuiloma Neroni Slade, "International Humanitarian Law and Climate Change", in Suzannah Linton, Tim McCormack and Sandesh Sivakumaran (eds), *Asia-Pacific Perspectives on International Humanitarian Law*, Cambridge University Press, Cambridge, 2009, p. 655.

safety and well-being of the civilian populations of occupied territories and to contribute to the protection of Earth's climate system. The application of the UN climate change regime should not be limited to peacetime and should remain in force during armed conflicts, including belligerent occupations, due to humanitarian and environmental reasons. Regrettably, IHL is "sometimes charged with being a war behind".⁹⁴ Hence, in order to keep IHL updated and able to tackle climate change during belligerent occupations, it is necessary to take into account environmental considerations when interpreting the law of occupation, with a view to establishing the permanent application of the UN climate change regime regardless of the context. This is the global and legal momentum for interpreting the law of occupation in light of environmental considerations so that it can be well suited to contemporary challenges.

94 Marco Sassòli, Antoine Bouvier and Anne Quintin (eds), *How Does Law Protect in War?*, Vol. 1, ICRC, Geneva, 2011, p. 149.