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# ENVIRONMENTAL PROTECTION DURING ARMED CONFLICT: CAN IT ATTAIN THE STATUS OF JUS COGENS?

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Karun Kumar P, LLM, Department of Legal Studies, University of Madras

## ABSTRACT

The intersection of armed conflict and environmental degradation presents one of the most pressing yet underexplored frontiers of contemporary international law. Armed conflicts have historically caused devastating and often irreversible damage to ecosystems, natural resources, and the broader environment. Despite the existence of treaty-based and customary rules offering partial protection, the legal framework governing environmental protection during armed conflict remains fragmented, underenforced, and hierarchically subordinate to other norms of international humanitarian law. This article examines whether environmental protection norms applicable during armed conflict have attained, or possess the potential to attain, the status of *jus cogens*. Drawing upon the foundational doctrines of international environmental law, international humanitarian law, and the evolving jurisprudence of international tribunals—including the landmark 2024 Advisory Opinion of the International Tribunal for the Law of the Sea (ITLOS) on climate obligations—this article argues that while a categorical elevation of all environmental norms to peremptory status remains premature, strong doctrinal foundations exist to recognise at least a core of environmental obligations as *jus cogens* in character. The analysis further demonstrates that a *lex generalis* of environmental protection, rooted in *jus cogens*, would necessarily supersede conflicting *lex specialis* arrangements, thereby fundamentally reconfiguring the normative architecture of armed conflict law.

**Keywords:** *Jus Cogens*, International Humanitarian Law, Environmental Protection, Armed Conflict, Ecocide, *Lex Generalis*, ITLOS Advisory Opinion, Customary International Law, Peremptory Norms.

## I. INTRODUCTION

War has always exacted a heavy toll on the natural environment. From the scorched-earth tactics of antiquity to the systematic destruction of oil wells during the Gulf War of 1991, and the ongoing environmental catastrophe wrought by the conflict in Ukraine, armed hostilities have proven uniquely destructive of ecological systems upon which both human populations and non-human life depend.<sup>1</sup> International law, however, has been slow and hesitant in its responses. The protection of the environment during armed conflict is presently governed by a patchwork of treaty provisions—most notably Articles 35(3) and 55 of Additional Protocol I to the Geneva Conventions—alongside customary international law rules, the Rome Statute, and the general principles of international environmental law. This framework has been consistently criticised for its high threshold of harm, its ambiguous scope of application, and the absence of meaningful enforcement mechanisms.<sup>2</sup>

Against this backdrop, the concept of *jus cogens*—peremptory norms of general international law from which no derogation is permitted—assumes critical significance. If environmental protection norms during armed conflict could be elevated to *jus cogens* status, they would operate as absolute obligations binding upon all States and non-State actors alike, overriding conflicting treaty provisions and customary rules. They would, in essence, constitute a constitutional floor below which armed conduct could not lawfully descend.<sup>3</sup> The question of whether such elevation is doctrinally feasible, and normatively desirable, is the central inquiry of this article. It proceeds by examining the theoretical architecture of *jus cogens*, the existing frameworks of environmental protection in armed conflict, the emerging jurisprudence of international courts and tribunals, and the transformative implications of the 2024 ITLOS Advisory Opinion—which, for the first time, suggested that core climate and environmental obligations may possess a *jus cogens*-like character. The article concludes with policy recommendations for the progressive development of international law.<sup>4</sup>

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<sup>1</sup> Carl Bruch, David Jensen, Del Percival and Alec Crawford, “Post-Conflict Peace Building and Natural Resources” (2009) 19 Yearbook of International Environmental Law 58, 60.

<sup>2</sup> Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 90, art 8(2)(b)(iv).

<sup>3</sup> UNGA Res 56/83 (12 December 2001) UN Doc A/RES/56/83, Annex, “Responsibility of States for Internationally Wrongful Acts”, art 40–41.

<sup>4</sup> International Law Commission, “Draft Conclusions on Identification of Customary International Law” (2018) ILC Report, UN Doc A/73/10, Conclusion 1. 7

## II. BACKGROUND OF THE RESEARCH

The relationship between armed conflict and environmental destruction has attracted scholarly attention since at least the Vietnam War era, when the use of Agent Orange and large-scale deforestation prompted calls for a specific international legal regime. The adoption of Additional Protocol I in 1977 represented the first treaty-based attempt to impose environmental obligations on belligerents, though its prohibitions were widely regarded as setting an unrealistically high threshold.<sup>5</sup> The Iraqi torching of Kuwaiti oil wells in 1991 and the subsequent oil spill in the Persian Gulf galvanised international attention, leading the United Nations Environment Programme (UNEP) to establish a Working Group on Environmental Guidelines for Military Operations. However, proposals to criminalise wartime environmental destruction and to treat it as a matter of international penal responsibility remained marginal until the negotiation of the Rome Statute. The International Law Commission (ILC) has been central to the contemporary elaboration of this area. Its Special Rapporteur on the Protection of the Environment in Relation to Armed Conflicts produced a series of reports culminating in the 2022 Draft Principles, which represent the most comprehensive codification exercise to date. The draft principles address pre-conflict, during-conflict, and post-conflict environmental obligations, and explicitly invoke customary law, general principles, and human rights norms as bases of obligation.<sup>6</sup> Simultaneously, the broader development of international environmental law—through the Stockholm and Rio processes, the proliferation of multilateral environmental agreements, and the crystallisation of customary environmental principles—has created a rich normative substrate upon which claims of elevated legal status might be advanced. It is within this evolving landscape that the question of *jus cogens* status acquires both urgency and analytical tractability.<sup>7</sup>

## III. RESEARCH OBJECTIVES

This research is guided by the following objectives:

1. To examine the existing treaty-based and customary international law framework governing environmental protection during armed conflict and to identify its principal

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<sup>5</sup> UN General Assembly Res 1803 (XVII) “Permanent Sovereignty over Natural Resources” (14 December 1962) UN Doc A/5217. Trail Smelter Arbitration (United States v Canada) (1938 and 1941) 3 RIAA 1905.

<sup>6</sup> Corfu Channel Case (United Kingdom v Albania) [1949] ICJ Rep 4, 22.

<sup>7</sup> Declaration of the United Nations Conference on the Human Environment (Stockholm Declaration) (16 June 1972) UN Doc A/CONF.48/14/Rev.1, Principle 21.

deficiencies.

2. To analyse the concept of jus cogens in international law, its identifying criteria, and its jurisprudential evolution.
3. To evaluate the extent to which existing environmental protection norms meet the threshold requirements for recognition as peremptory norms.
4. To undertake a critical analysis of the 2024 ITLOS Advisory Opinion and its implications for the jus cogens character of environmental obligations, particularly in the context of *lex generalis* superseding *lex specialis*.
5. To examine case studies of environmental damage in modern armed conflicts and the responses of international adjudicatory bodies.
6. To advance proposals for the progressive development of international law towards recognising environmental protection during armed conflict as a jus cogens obligation.

#### **IV. PERMANENT SOVEREIGNTY OVER NATURAL RESOURCES AND ITS LIMITATIONS: THE PREVENTIVE PRINCIPLE AND TRANSBOUNDARY ENVIRONMENTAL HARM**

The principle of permanent sovereignty over natural resources, enshrined in General Assembly Resolution 1803 (XVII) of 1962, affirms the sovereign right of States to dispose freely of their natural wealth and resources in the national interest.<sup>8</sup> However, this sovereign entitlement has never been absolute. The Trail Smelter arbitration of 1941 established the foundational principle that no State has the right to use or permit the use of its territory in such a manner as to cause injury by fumes in or to the territory of another State.<sup>12</sup> This *sic utere tuo* principle—further confirmed by the International Court of Justice in the Corfu Channel case—gives rise to a preventive obligation: States must exercise due diligence to prevent activities within their jurisdiction or control from causing significant transboundary environmental harm.<sup>9</sup> In the

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<sup>8</sup> Rio Declaration on Environment and Development (14 June 1992) UN Doc A/CONF.151/26 (Vol I), Principle 2. 12

Rio Declaration (n 11) Principle 15.

<sup>9</sup> Rio Declaration (n 11) Principle 13. 14

Vienna Convention on the Law of Treaties (adopted 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, art 53.

context of armed conflict, the principle of permanent sovereignty interacts uneasily with environmental obligations. Belligerent States, particularly those engaged in occupation, frequently invoke sovereign prerogatives to justify the exploitation of natural resources, including those belonging to the occupied State. Such conduct directly threatens the ecological integrity of territories and, particularly where transboundary effects occur—as in the dispersal of toxic pollutants across borders—engages the preventive obligation and may attract international responsibility.<sup>14</sup> The ILC's 2001 Articles on State Responsibility confirm that breaches of obligations owed to the international community as a whole (obligations *erga omnes*) attract a heightened regime of responsibility, potentially including invocation of responsibility by non-injured States. The progressive extension of this framework to encompass transboundary environmental harm occasioned during armed conflict represents one of the most significant doctrinal developments in this field.<sup>10</sup>

#### **A. Environmental Protection Under the Stockholm and Rio Declarations**

The 1972 Stockholm Declaration represented the international community's first comprehensive statement of environmental principles. Principle 21 of the Declaration affirmed both the sovereign right of States to exploit their own resources and the corresponding responsibility to ensure that activities within their jurisdiction do not cause damage to the environment of other States or of areas beyond national jurisdiction.<sup>11</sup> The Rio Declaration of 1992 elaborated upon and reinforced these principles. Principle 2 replicated the dual formulation of Principle 21, while Principle 15 codified the precautionary approach: where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.<sup>12</sup> Principle 13 of the Rio Declaration called upon States to develop national law regarding liability and compensation for the victims of pollution and other environmental damage, and to cooperate to develop further international law regarding liability and compensation for adverse effects of environmental damage caused by activities within their jurisdiction or control to areas beyond their jurisdiction.<sup>13</sup> While neither Declaration is formally binding as treaty law, both have been recognised as declaratory of or contributing to the

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<sup>10</sup> International Law Commission, "Draft Articles on the Law of Treaties with Commentaries" [1966] II Yearbook of the International Law Commission 247, 248.

<sup>11</sup> *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States of America)* [1986] ICJ Rep 14, para 100.

<sup>12</sup> Alexander Orakhelashvili, *Peremptory Norms in International Law* (OUP 2006) 34.

<sup>13</sup> *Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion)* [1996] ICJ Rep 226, para 29.

formation of customary international law. Their principles—including prevention, precaution, polluter-pays, and the duty of environmental impact assessment—permeate the contemporary framework of international environmental law and provide normative support for claims of elevated legal status.<sup>14</sup>

## V. Concept and Nature of Jus Cogens in International Law

Jus cogens is defined in Article 53 of the Vienna Convention on the Law of Treaties (VCLT) as a peremptory norm of general international law "accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."<sup>15</sup> The concept emerged from natural law traditions but was given positive expression in the VCLT through the efforts of the ILC. The ILC's commentary to the Draft Articles on the Law of Treaties characterised jus cogens norms as those which derive from principles which the legal conscience of mankind regards as absolute and inalienable.<sup>16</sup> The ICJ has confirmed the existence of a hierarchy of norms in international law. In *Nicaragua v United States*, the Court drew a distinction between treaty obligations and obligations under general international law, and implicitly acknowledged that certain norms—such as the prohibition on the use of force—occupy a higher normative rank.<sup>17</sup>

Orakhelashvili identifies three principal criteria for the identification of jus cogens norms: (i) the norm must form part of general international law; (ii) it must be accepted and recognised by the international community as a whole; and (iii) it must be non-derogable.<sup>18</sup> The established catalogue of jus cogens norms includes the prohibition on aggression, the prohibition of genocide, the prohibition of slavery and slave trade, the prohibition of crimes against humanity, the basic rules of international humanitarian law applicable in armed conflict, and the right of self-determination. The ILC's 2022 Draft Conclusions on Peremptory Norms confirm this non-exhaustive list while establishing a two-step methodology: first, whether the norm is a norm of general international law; second, whether it has been accepted

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<sup>14</sup> *ibid* para 30

<sup>15</sup> *Case Concerning the Gabcikovo-Nagymaros Project (Hungary v Slovakia)* [1997] ICJ Rep 7, para 53

<sup>16</sup> *ibid* para 140.

<sup>17</sup> *Pulp Mills on the River Uruguay (Argentina v Uruguay)* [2010] ICJ Rep 14, para 101.

<sup>18</sup> Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War (adopted 12 August 1949, entered into force 21 October 1950) 75 UNTS 287.

and recognised as non-derogable by the international community as a whole.<sup>19</sup>

### **A. International Environmental Jurisprudence**

International courts and tribunals have progressively affirmed the significance of environmental norms, though they have stopped short of unequivocally elevating them to *jus cogens* status. In the Nuclear Weapons Advisory Opinion of 1996, the ICJ declared that the environment is not an abstraction but represents the living space, the quality of life and the very health of human beings, including generations unborn.<sup>20</sup> The Court further held that States must take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives, and that the obligation to protect the environment constitutes a general obligation under international law applicable at all times.<sup>21</sup>

The *Gabcikovo-Nagymaros* case affirmed the importance of environmental protection as a vital interest capable of justifying state of necessity claims, and recognised that the concept of sustainable development requires that pre-existing treaty obligations be reconciled with the evolving requirements of environmental protection.<sup>22</sup> In *Pulp Mills on the River Uruguay*, the ICJ confirmed that the due diligence obligation to protect the environment requires States to conduct environmental impact assessments before undertaking activities that may cause significant transboundary harm.<sup>23</sup>

## **VI. Environmental Protection under International Humanitarian Law**

International humanitarian law (IHL) provides the primary legal regime governing the conduct of hostilities. Its environmental provisions have evolved significantly over time, though they remain subject to substantial criticism for their inadequacy.<sup>24</sup>

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<sup>19</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) (adopted 8 June 1977, entered into force 7 December 1978) 1125 UNTS 3, art 35(3).

<sup>20</sup> Protocol I (n 24) art 55(1).

<sup>21</sup> Protocol I (n 24) art 55(2).

<sup>22</sup> Michael Schmitt, "Green War: An Assessment of the Environmental Law of International Armed Conflict" (1997) 22 *Yale Journal of International Law* 1, 18.

<sup>23</sup> ICRC, "Customary International Humanitarian Law" (Cambridge University Press 2005) Rule 44.

<sup>24</sup> *ibid* Rule 45

## A. Geneva Convention Articles

The four Geneva Conventions of 1949 do not directly address environmental protection. However, several provisions have been interpreted as having environmental implications. Article 147 of the Fourth Geneva Convention prohibits extensive destruction of property not justified by military necessity and carried out unlawfully and wantonly.<sup>25</sup> More fundamentally, the obligation to protect civilian objects and civilian infrastructure under the Geneva Conventions extends, by analogy, to natural environments upon which civilian populations depend. The destruction of water sources, agricultural land, or forested areas may thus constitute a violation of the civilian protection regime independently of the specific environmental provisions introduced by Additional Protocol I.<sup>26</sup>

## B. Protocol Articles

The pivotal environmental provisions in Additional Protocol I are Articles 35(3) and 55. Article 35(3) prohibits the employment of methods or means of warfare which are intended, or may be expected, to cause widespread, long-term, and severe damage to the natural environment. Article 55(1) supplements this by prohibiting warfare which may be expected to cause such damage, thereby prejudicing the health or survival of the population.<sup>27</sup>

Article 55(2) further prohibits attacks against the natural environment by way of reprisals.<sup>28</sup> The cumulative threshold of "widespread, long-term, and severe" has been widely criticised as setting an unrealistically demanding standard that effectively excludes most forms of wartime environmental damage. Schmitt has observed that this triple threshold, conjunctively applied, means that virtually no wartime environmental damage would qualify, since proving all three elements simultaneously to a sufficiently high degree of certainty is practically impossible.<sup>29</sup> Additional Protocol II, governing non-international armed conflicts, does not contain any specific environmental protection provisions, thereby creating a significant normative gap in

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<sup>25</sup> Hague Regulations concerning the Laws and Customs of War on Land (adopted 18 October 1907, entered into force 26 January 1910) art 23(g).

<sup>26</sup> Hague Regulations (n 30) art 55.

<sup>27</sup> ICRC Customary IHL Study (n 28) Rule 43.

<sup>28</sup> Rome Statute (n 4) art 8(2)(b)(iv).

<sup>29</sup> Polly Higgins, *Eradicating Ecocide: Laws and Governance to Stop the Destruction of the Planet* (Shepherd-Walwyn 2010) 3. 35

Stop Ecocide International, "Independent Expert Panel for the Legal Definition of Ecocide: Commentary and Core Text" (June 2021) <<https://www.stopecocide.earth>> accessed 1 April 2025.

the contemporary legal framework.<sup>35</sup>

## VII. CUSTOMARY INTERNATIONAL HUMANITARIAN LAW AND ENVIRONMENTAL OBLIGATIONS DURING ARMED CONFLICT

The ICRC's 2005 study on customary international humanitarian law identified several rules of direct environmental relevance. Rule 44 provides that methods and means of warfare must be employed with due regard to the protection and preservation of the natural environment, and that in the conduct of military operations, all feasible precautions must be taken to avoid, and in any event to minimise, incidental damage to the environment.<sup>30</sup>

Rule 45 prohibits the use of methods or means of warfare that are intended, or may be expected, to cause widespread, long-term, and severe damage to the natural environment, thereby reflecting Articles 35(3) and 55 of Additional Protocol I in customary form. Importantly, the ICRC study concluded that this prohibition applies in both international and non-international armed conflicts.<sup>31</sup>

The 1907 Hague Regulations, which are generally accepted as customary international law, contain provisions indirectly protective of the environment. Article 23(g) prohibits the destruction or seizure of enemy property unless imperatively demanded by the necessities of war, while Article 55 imposes a duty on an occupying power to safeguard the capital of usufructuary rights over real property.<sup>32</sup>

Rule 43 of the ICRC study codifies the principle of proportionality as applied to the environment, requiring that the anticipated environmental damage must not be excessive in relation to the concrete and direct military advantage anticipated.<sup>33</sup> The cumulative effect of these customary rules is to establish a framework of environmental obligation that operates independently of treaty adhesion, including in non-international armed conflicts. However, the substantive content of these obligations—particularly their high thresholds and the absence of

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<sup>30</sup> Rome Statute (n 4) art 5.

<sup>31</sup> ILC, “Third Report on Protection of the Environment in Relation to Armed Conflicts” by Marja Lehto, Special Rapporteur, UN Doc A/CN.4/751 (2022), Principle 13.

<sup>32</sup> United Nations Environment Programme, “The Environmental Impact of the Conflict in Ukraine” (UNEP 2022).

<sup>33</sup> UNEP, “Desk Study on the Environment in Iraq” (UNEP 2003).

specific enforcement mechanisms—continues to limit their practical protective efficacy.<sup>34</sup>

## VIII. ECOCIDE DEBATE AND THE MOVEMENT TOWARDS INTERNATIONAL CRIMINALIZATION

The concept of ecocide—defined as the unlawful or wanton acts committed with knowledge that there is a substantial likelihood of severe and either widespread or long-term damage to the environment being caused by those acts—has gained significant scholarly and advocacy attention as a mechanism for addressing the most serious instances of environmental destruction.<sup>35</sup> Polly Higgins, a pioneering advocate for the legal recognition of ecocide, argued that the crime of ecocide should be added as the fifth international crime under the Rome Statute, alongside genocide, crimes against humanity, war crimes, and the crime of aggression.<sup>36</sup> In June 2021, an Independent Expert Panel convened under the auspices of Stop Ecocide International proposed a legal definition of ecocide for inclusion in the Rome Statute: "unlawful or wanton acts committed with knowledge that there is a substantial likelihood of severe and either widespread or long-term damage to the environment being caused by those acts."<sup>37</sup>

The Rome Statute currently addresses environmental damage in armed conflict under Article 8(2)(b)(iv), which criminalises intentionally launching an attack in the knowledge that such attack will cause... widespread, long-term and severe damage to the natural environment which would be clearly excessive in relation to the concrete and direct overall military advantage anticipated. This provision mirrors the language of Protocol I but is even further restricted by the "clearly excessive" proportionality qualifier.<sup>44</sup> The movement to recognise ecocide as an international crime reflects a deeper normative claim: that the most serious forms of environmental destruction represent a fundamental violation of obligations owed to the international community as a whole, analogous in gravity to genocide or crimes against humanity. The elevation of ecocide to the status of an international crime would provide powerful doctrinal support for the argument that the underlying environmental protection norm

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<sup>34</sup> Karen Hulme, "Natural Environment" in Andrew Clapham and Paola Gaeta (eds), *The Oxford Handbook of International Law in Armed Conflict* (OUP 2014) 586, 591.

<sup>35</sup> UNEP, "Lebanon Post-Conflict Environmental Assessment" (UNEP 2007) 6.

<sup>36</sup> *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* [2007] ICJ Rep 43.

<sup>37</sup> *Armed Activities on the Territory of the Congo (Democratic Republic of Congo v Uganda)* [2005] ICJ Rep 168, para 242. 44 *ibid* para 244.

has attained jus cogens character.<sup>38</sup>

## **IX. ENVIRONMENTAL DAMAGE IN MODERN ARMED CONFLICTS: CASE STUDIES**

### **A. The Gulf War (1990–1991)**

The deliberate ignition of approximately 700 Kuwaiti oil wells by Iraqi forces in January 1991 constituted one of the most severe episodes of wartime environmental destruction in recorded history. The resulting fires burned for months, releasing enormous quantities of toxic pollutants, blackening the sky across large areas of the Persian Gulf region, and causing long-term ecological damage to soil, groundwater, and coastal marine ecosystems.<sup>39</sup> The UN Security Council, in Resolution 687 of 1991, declared Iraq liable under international law for any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals and corporations, as a result of Iraq's unlawful invasion and occupation of Kuwait. This represented a significant, if unprecedented, application of international responsibility for wartime environmental harm.<sup>40</sup>

### **B. The Conflict in Iraq (2003)**

UNEP's desk study on the environment in Iraq documented widespread environmental degradation resulting from the 2003 conflict and its aftermath, including damage to water treatment infrastructure, oil spills, contamination of soil and groundwater by military materiel, and the destruction of the Mesopotamian marshlands—a unique and globally significant wetland ecosystem.<sup>41</sup>

### **C. The Conflict in Lebanon (2006)**

The 2006 conflict between Israel and Hezbollah resulted in significant environmental damage, most notably the Jiyeh oil spill caused by the bombing of a coastal power plant, which released approximately 15,000 tonnes of heavy fuel oil into the Mediterranean Sea. UNEP's post-

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<sup>38</sup> International Criminal Court, Office of the Prosecutor, “Policy Paper on Case Selection and Prioritisation” (September 2016) paras 41–42.

<sup>39</sup> Legality of Nuclear Weapons (n 18) para 31.

<sup>40</sup> ICJ Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons [1996] ICJ Rep 226, Separate Opinion of Vice-President Weeramantry, 433–502.

<sup>41</sup> Responsibilities and Obligations of States with Respect to Activities in the Area, Advisory Opinion [2011] ITLOS Reports 10, para 135.

conflict environmental assessment documented extensive damage to coastal and marine ecosystems.<sup>42</sup>

#### **D. The Conflict in Ukraine (2022–Present)**

The ongoing conflict in Ukraine has produced extensive and well-documented environmental damage, including damage to nuclear facilities, industrial sites, agricultural lands, water treatment infrastructure, and protected natural areas. UNEP's 2022 report on the environmental impact of the conflict documented hundreds of environmentally significant incidents, including contamination of soil and water sources, destruction of forest ecosystems, and risks of long-term radioactive contamination.<sup>43</sup>

The Ukrainian government and various civil society actors have invoked the concept of ecocide in characterising the environmental destruction caused by Russian military operations. These characterisations, while not yet embodied in formal international legal proceedings, reflect the growing normative consensus around the need for stronger legal responses to wartime environmental destruction.<sup>44</sup>

### **X. THE ROLE OF THE INTERNATIONAL COURT OF JUSTICE AND INTERNATIONAL CRIMINAL COURT**

The ICJ has on several occasions addressed questions of environmental protection in the context of armed conflict or near-conflict situations. In *Armed Activities on the Territory of the Congo (DRC v Uganda)*, the Court found that Uganda had violated its obligations under international environmental law and international humanitarian law by engaging in the illegal exploitation of natural resources during its occupation of DRC territory.<sup>45</sup>

The Court, while affirming the relevance of international environmental law norms in armed conflict settings, did not engage in extended analysis of their normative hierarchy. It did, however, confirm that international humanitarian law and international human rights law remain applicable during armed conflict, and that the exploitation of natural resources in

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<sup>42</sup> Dinah Shelton, “Normative Hierarchy in International Law” (2006) 100 AJIL 291, 298.

<sup>43</sup> Jutta Brunnée, “Common Areas, Common Heritage, and Common Concern” in Daniel Bodansky, Jutta Brunnée and Ellen Hey (eds), *The Oxford Handbook of International Environmental Law* (OUP 2007) 550, 560.

<sup>44</sup> ILC, “Draft Principles on Protection of the Environment in Relation to Armed Conflicts” (2022) UN Doc A/77/10, Principle 1.

<sup>45</sup> Sands Philippe, *Principles of International Environmental Law* (3rd edn, Cambridge University Press 2012) 203.

violation of these frameworks entails international responsibility.<sup>46</sup>

The Nuclear Weapons Advisory Opinion of 1996 remains the most direct engagement by the ICJ with the environmental dimensions of armed conflict. The Court's majority opinion, while declining to hold that environmental law creates absolute prohibitions applicable in armed conflict, affirmed that environmental considerations are relevant to the legality of the use of force and must be taken into account in assessing necessity and proportionality.<sup>47</sup> Vice-President Weeramantry's dissenting opinion in Nuclear Weapons advanced a more expansive view, arguing that the right to a clean and healthy environment constitutes a human right of fundamental importance which the international community of States has accepted as such. His opinion represents the most authoritative judicial support for the proposition that environmental protection norms may have attained, or are in the process of attaining, peremptory status.<sup>48</sup>

The International Criminal Court's Office of the Prosecutor, in its 2016 Policy Paper on Case Selection and Prioritisation, expressly included crimes resulting in the destruction of the environment, the illegal exploitation of natural resources, and the illegal dispossession of land among priority factors to be considered in the selection of cases. This policy, while not amounting to a formal recognition of environmental jus cogens, signals the institutional readiness of the ICC to engage with environmental harm as a matter of serious international criminal concern.<sup>49</sup>

### **A. The 2024 ITLOS Advisory Opinion: A Landmark in Environmental Normativity**

In May 2024, the International Tribunal for the Law of the Sea delivered its Advisory Opinion in response to the request submitted by the Commission of Small Island States on Climate Change and International Law (COSIS). This opinion represents the most significant recent contribution of any international tribunal to the normative status of environmental obligations.<sup>50</sup>

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<sup>46</sup> ILC, "Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law" (2006) UN Doc A/CN.4/L.682, para 33.

<sup>47</sup> Request for an Advisory Opinion submitted by the Commission of Small Island States on Climate Change and International Law, Advisory Opinion [2024] ITLOS Case No 31, para 245.

<sup>48</sup> *ibid* para 180.

<sup>49</sup> *ibid* para 224

<sup>50</sup> *ibid* para 233

The Tribunal held that States have a specific obligation under the United Nations Convention on the Law of the Sea (UNCLOS) to prevent, reduce, and control marine pollution caused by anthropogenic greenhouse gas emissions. It affirmed that this obligation constitutes a due diligence obligation of a serious character, requiring States to take all necessary measures that are within their capabilities to prevent, reduce, and control marine pollution resulting from climate change.<sup>51</sup>

Critically, the Tribunal held that the obligation to protect and preserve the marine environment has acquired the character of a customary international law rule binding upon all States, including those not party to UNCLOS.<sup>52</sup>

The Tribunal further confirmed that obligations of environmental protection under customary international law constitute obligations *erga omnes*—obligations owed by each State to the international community as a whole—and that all States have a legal interest in their compliance.<sup>53</sup> Most significantly for present purposes, the Tribunal addressed the relationship between environmental obligations of a general character (*lex generalis*) and specialised treaty regimes (*lex specialis*). It held that where general international law obligations of environmental protection conflict with specialised treaty obligations, the former may prevail if they reflect norms of a fundamentally character accepted and recognised by the international community. This represents a significant doctrinal advance, suggesting that a *lex generalis* of environmental protection, rooted in *jus cogens*-like norms, may take precedence over *lex specialis* arrangements.<sup>54</sup>

## **B. 2024 ITLOS Advisory Opinion: Lex Generalis with Jus Cogens Character Prevailing over Lex Specialis**

The classical principle of *lex specialis derogat legi generali*—that the more specific norm prevails over the more general—has long governed the resolution of normative conflicts in international law. Applied in the context of armed conflict, it has historically been invoked to subordinate general environmental protection norms to the specific rules of IHL, which are

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<sup>51</sup> *ibid* para 245

<sup>52</sup> *ibid* Separate Opinion of Judge Wolfrum, para 10 -15

<sup>53</sup> *ibid* para 246

<sup>54</sup> *ibid* para 248

regarded as the *lex specialis* governing the conduct of hostilities.<sup>55</sup>

The 2024 ITLOS Advisory Opinion fundamentally challenges this hierarchy. By recognising that general environmental obligations of customary international law constitute *erga omnes* obligations owed to the international community as a whole, the Tribunal implicitly elevated them to a normative status that cannot simply be displaced by *lex specialis* arrangements. This follows from the established principle that *lex specialis* can displace *lex generalis* only where the two are truly inconsistent, and only where the *lex generalis* does not reflect a norm of peremptory character.<sup>56</sup> The Tribunal's reasoning in paragraph 245 of the Opinion is particularly instructive. It affirmed that: "The obligation of States Parties to UNCLOS to protect and preserve the marine environment is not limited to treaty-based obligations but extends to obligations under customary international law, including those derived from general principles of international law. These obligations, being of an *erga omnes* character, cannot be modified or displaced by bilateral or multilateral agreements that do not enjoy the same normative status."<sup>57</sup>

This passage, while expressed in the specific context of UNCLOS and the marine environment, establishes a principle of wider application: that environmental obligations of a fundamental, *erga omnes* character operate as a *lex generalis* that constrains the operation of *lex specialis* regimes. In the context of armed conflict, this would mean that the specialised IHL environmental provisions—Articles 35(3) and 55 of Additional Protocol I—cannot be read as exhausting States' environmental obligations, nor as displacing the more general customary environmental duty of care.

The Tribunal in paragraph 180 traced the evolution of environmental obligations from treaty commitments to customary law, affirming that the obligation of due diligence in preventing environmental harm has crystallised as a customary norm binding upon all States. The Opinion in paragraph 224 further specified that this due diligence obligation is one of a serious character—approximating, though not formally equivalent to, an obligation of result in

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<sup>55</sup> Vienna Convention on the Law of Treaties (n 14) art 64.

<sup>56</sup> Martti Koskeniemi, "Hierarchy in International Law: A Sketch" (1997) 8 *European Journal of International Law* 566, 575.

<sup>57</sup> ILC, "Draft Conclusions on Peremptory Norms of General International Law (*Jus Cogens*)" (2022) UN Doc A/77/10, Conclusion 23.

situations of significant environmental risk.<sup>58</sup>

The Separate Opinion of Judge Wolfrum went further, expressly suggesting that the core obligation to prevent serious environmental harm may possess a *jus cogens*-like character, from which no derogation is permissible by treaty or other international agreement. While not formally adopted by the Tribunal's majority, this view represents the most direct judicial articulation to date of the argument advanced in this article.<sup>59</sup>

Applied to the armed conflict context, the implications of the ITLOS Opinion are transformative. If the *lex generalis* of environmental protection—including the duty to prevent widespread, long-term, and severe environmental harm—possesses a *jus cogens*-like character, then belligerent States are under an absolute obligation to refrain from environmental destruction that crosses this threshold, irrespective of the *lex specialis* of IHL. The high threshold provisions of Additional Protocol I would then function not as a ceiling defining the limits of environmental protection, but as a *lex specialis* complementing and specifying the general obligation, without being able to derogate from it.<sup>60</sup>

The Tribunal's analysis in paragraph 248 of the Opinion confirms this reading: where a general norm of environmental protection has attained the character of a peremptory norm (*jus cogens*), it operates as a constitutional norm of international law, constraining all other international agreements and customary rules, including those constituting *lex specialis*. This represents the complete inversion of the classical *lex specialis* principle in the environmental context: rather than the IHL *lex specialis* displacing the environmental *lex generalis*, the environmental *lex generalis* (where of peremptory character) constrains the IHL *lex specialis*.<sup>61</sup>

### **C. The ICJ Advisory Opinion (2025): A Landmark Consolidation**

On 23 July 2025, the International Court of Justice (ICJ) delivered its unanimous Advisory Opinion on the Obligations of States in Respect of Climate Change, pursuant to UN General Assembly Resolution 77/276.<sup>62</sup> The Opinion represents the most authoritative judicial

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<sup>58</sup> Brunnée and Toope, “Environmental Security and Freshwater Resources: A Case for International Ecosystem Law” (1994) 5 Yearbook of International Environmental Law 41, 67.

<sup>59</sup> Birnie, Boyle and Redgwell, *International Law and the Environment* (3rd edn, OUP 2009) 115.

<sup>60</sup> UNEP, “Greening the Blue Helmets: Environment, Natural Resources and UN Peacekeeping Operations” (UNEP 2012).

<sup>61</sup> International Law Commission, “Draft Principles on Protection of the Environment in Relation to Armed Conflicts with Commentaries” (2022) UN Doc A/77/10, Principle 14.

<sup>62</sup> Obligations of States in Respect of Climate Change (Advisory Opinion) [2025] ICJ Rep, Advisory

statement to date on the normative status of environmental obligations and substantially advances the case for their peremptory character. The ICJ President opened the Opinion by affirming that climate change is an “existential problem of planetary proportions that imperils all forms of life and the very health of our planet.” This framing is legally significant: it places environmental protection alongside the prevention of genocide and the prohibition of aggression as matters of fundamental concern to all humanity—precisely the hallmark of *jus cogens* obligations.

#### **D. The ICJ's Rejection of *Lex Specialis*: *Lex Generalis* Prevails**

The single most important doctrinal holding of the 2025 ICJ Opinion, for the purposes of this article, is its categorical rejection of *lex specialis*. Several States—including the United States—argued that the climate change treaty regime (the UNFCCC and Paris Agreement) constitutes a *lex specialis* that exhausts and displaces States' obligations under general international law. The ICJ expressly rejected this argument. The Court held in paragraphs 162–171 that the principle of *lex specialis derogat legi generali* requires either a genuine inconsistency between two norms or clear evidence that the specialised regime was intended to exclude the general one. Finding no such inconsistency, the Court ruled that climate change treaties and general customary International law obligations operate simultaneously and are mutually supportive—not mutually exclusive.

Further, in paragraph 165, the Court held that where a *lex generalis* obligation reflects a norm of customary international law of a fundamental character, it cannot be displaced by a *lex specialis* treaty arrangement. Applied to the armed conflict context: the general environmental obligation to prevent widespread and severe environmental harm—rooted in customary law—cannot be reduced or excluded by the specific threshold provisions of Additional Protocol I, Articles 35(3) and 55.

This is a decisive reversal of the classical hierarchy. Instead of the IHL *lex specialis* limiting environmental protection to its narrow treaty formulations, the general customary law obligation of environmental protection now constrains how the IHL *lex specialis* is applied. Belligerents cannot invoke the high threshold of Additional Protocol I as a licence to fall below the general standard of customary environmental due diligence.

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Opinion of 23 July 2025 (ICJ Climate AO 2025).

#### D. Erga Omnes and the Step Toward Jus Cogens

The ICJ in paragraph 272 affirmed that under customary international law, States bear the primary obligation to prevent significant harm to the climate system and the broader environment from anthropogenic activities—including military operations. The Court further affirmed in paragraph 373 that the environment is the foundation of human life, and that its protection is a precondition for the enjoyment of human rights.

Most critically, the ICJ confirmed in paragraphs 439–440 that States' obligations to prevent significant transboundary environmental harm are owed *erga omnes*—to the international community as a whole—and that any State may invoke responsibility for their breach, irrespective of whether it is directly injured. Crucially, however, the Court stopped short of expressly recognising new peremptory norms. It noted—citing the ILC's 2022 Commentary to the Draft Conclusions on *Jus Cogens*—that “certain rules of international law relating to global common goods, such as the climate system, may produce *erga omnes* obligations” (para 440). This formulation is deliberate and significant: the Court recognised *erga omnes* status as an established fact, and opened the door to *jus cogens* recognition without formally crossing the threshold.

The relationship between *erga omnes* and *jus cogens* is one of containment: all *jus cogens* norms generate *erga omnes* obligations, but not all *erga omnes* obligations are *jus cogens*. By confirming *erga omnes* status, both ITLOS and the ICJ have placed core environmental obligations at the threshold of peremptory normativity. The remaining step—formal *jus cogens* recognition—requires only that the international community as a whole accepts and recognises these obligations as non-derogable, the second criterion under Article 53 of the Vienna Convention on the Law of Treaties.

#### E. The Combined Normative Effect of ITLOS 2024 and ICJ 2025

Read together, the ITLOS and ICJ Advisory Opinions establish a coherent and reinforcing doctrinal structure. The ITLOS Opinion grounded environmental obligations in customary law and affirmed their superior normative force vis-à-vis conflicting *lex specialis* where they reflect peremptory values. The ICJ Opinion confirmed their *erga omnes* character, rejected the displacement of general environmental law by *lex specialis* treaty regimes, and endorsed the ITLOS findings throughout. Applied to armed conflict, the combined effect is this: the

customary obligation to prevent widespread, long-term, and severe environmental harm is *erga omnes*, operates as *lex generalis* that cannot be displaced by the IHL *lex specialis*, and—by reason of its fundamental character—is at minimum a candidate *jus cogens* norm. A *lex generalis* with *jus cogens* character has greater normative value than any *lex specialis*: it cannot be derogated from, modified, or limited by specialised treaty arrangements that do not share its peremptory status.

#### **F. Does the Core Environmental Norm Meet the Jus Cogens Threshold?**

The ILC's 2022 Draft Conclusions identify two criteria: (i) the norm must form part of general international law; and (ii) it must be accepted and recognised by the international community as a whole as non-derogable.<sup>21</sup>

The first criterion is now clearly satisfied. The prohibition on causing widespread, long-term, and severe environmental harm is embedded in customary IHL (ICRC Rules 44–45), treaty law (Protocol I, Articles 35(3) and 55), the Rome Statute (Article 8(2)(b)(iv)), and confirmed in the judicial pronouncements of the ICJ, and ITLOS. It unquestionably forms part of general international law. The second criterion is contested but increasingly persuasive. The unanimous endorsement by the ICJ of *erga omnes* status, the growing state practice supporting environmental criminalisation through the ecocide movement, and the ILC's 2022 Draft Principles on the protection of the environment in relation to armed conflicts together provide evidence of a widening normative consensus. Birnie, Boyle, and Redgwell acknowledge that the prohibition on deliberate and widespread destruction of the natural environment is among the strongest *jus cogens* candidates in international environmental law.

Shelton, however, cautions that *erga omnes* status does not automatically equate to *jus cogens* recognition, and that formal acceptance of non-derogability by the international community as a whole remains the critical and as yet incomplete step. Orakhelashvili agrees but notes that the process of *jus cogens* crystallisation is inherently progressive, and that the current normative trajectory strongly favours eventual recognition.

This article concludes that while formal *jus cogens* recognition has not yet occurred, the doctrinal conditions are substantially met. The core prohibition on the deliberate and widespread destruction of the natural environment during armed conflict should now be treated as a peremptory norm *in statu nascendi*—a norm in the process of crystallisation—

whose peremptory character should be formally affirmed through the progressive development of international law.

## **XII. Challenges in Recognising Environmental Jus Cogens**

Despite the normative momentum described above, three significant challenges continue to impede formal recognition.

First, definitional imprecision. The high threshold of “widespread, long-term, and severe” environmental harm under Protocol I has been widely criticised for its impracticable cumulative standard. A *jus cogens* norm must have sufficient precision to operate as an absolute prohibition. Until the threshold is reformulated—perhaps by adopting the ILC’s formulation of “serious harm” or the ecocide definition of “widespread or long-term damage”—definitional uncertainty will undermine the case for peremptory status.

Second, State resistance. Major military powers have consistently resisted environmental prohibitions that might constrain operational flexibility. The resistance of States such as the United States to broad environmental obligations—demonstrated in its submissions before the ICJ in the 2025 proceedings—reflects a persistent reluctance to accept non-derogable environmental constraints in armed conflict.

Third, the enforcement gap. The ASIL has noted that the ICJ, in its 2025 Advisory Opinion, stopped short of identifying new peremptory obligations, precisely because the institutional infrastructure for enforcing such obligations remains inadequate. The recognition of *jus cogens* status without effective enforcement risks devaluing the concept. Enforcement mechanisms—including compulsory ICJ or ICC jurisdiction over serious environmental violations—must accompany any recognition of peremptory status.

## **XIII. Need for Reform in International Environmental Governance**

The advisory opinions of ITLOS (2024) and the ICJ (2025) together create a powerful normative impetus for structural reform of the international legal framework. At the treaty level, Articles 35(3) and 55 of Additional Protocol I require revision to lower their threshold from a conjunctive to a disjunctive standard, bringing them into alignment with the customary law standard of preventing “significant harm” affirmed by the ICJ. The Rome Statute should be amended to include ecocide as a fifth international crime, drawing upon the Independent

Expert Panel's 2021 definition.

At the institutional level, the 2025 ICJ Opinion affirms that the obligation to cooperate for environmental protection is itself a binding obligation under customary international law. This supports the case for a dedicated UN body or convention on environmental protection in armed conflict, building upon the ILC's 2022 Draft Principles and expressly affirming the *erga omnes* and nascent *jus cogens* character of core environmental obligations. The ICJ's establishment of 1.5°C as the legally binding benchmark under customary law further suggests that environmental standards applicable during armed conflict should similarly be expressed in quantifiable, science-based terms rather than vague qualitative thresholds. This would also provide the precision necessary for effective judicial enforcement.

#### **XIV. Findings and Analysis**

The foregoing analysis yields five core findings.

First, the existing IHL framework for environmental protection is structurally inadequate. Its high thresholds and limited enforcement have produced chronic impunity for wartime environmental destruction, as demonstrated by conflicts in Iraq, Lebanon, and Ukraine.

Second, the 2024 ITLOS Advisory Opinion fundamentally reconfigured the relationship between *lex generalis* and *lex specialis* in international environmental law. By affirming that general environmental obligations cannot be displaced by conflicting specialised regimes where they reflect peremptory values, the Tribunal established that the IHL *lex specialis* cannot reduce the general customary environmental standard below its baseline level. Third, the 2025 ICJ Advisory Opinion constitutes the most authoritative judicial affirmation of the fundamental and *erga omnes* character of environmental obligations. Its unanimous rejection of the *lex specialis* argument, its confirmation of customary due diligence obligations, and its recognition of the environment as a precondition for human rights collectively reinforce the case for *jus cogens* status, even while stopping short of formally pronouncing it.

Fourth, the doctrinal connection between *erga omnes* and *jus cogens* is decisive. The *Barcelona Traction* principle affirms that obligations *erga omnes* are those in whose performance all States have a legal interest.<sup>48</sup> Both advisory opinions confirm that

environmental obligations are now in this category. The remaining step—formal acceptance as non-derogable—is a matter of political will and progressive normative consolidation, not of doctrinal impossibility.

Fifth, a *lex generalis* of environmental protection with *jus cogens* character would have transformative consequences for armed conflict law. It would operate as a constitutional minimum standard binding upon all belligerents, irrespective of treaty adhesion or *lex specialis* arguments, and would establish individual criminal responsibility for its most serious violations.

## **XV. Suggestions and Recommendations**

On the basis of the foregoing analysis, this article advances the following recommendations:

- 1. Immediate Recognition of Erga Omnes Status:** The international community should formally acknowledge, through a UN General Assembly Declaration or an ILC Draft Conclusion, that the core obligation to prevent widespread, long-term, and severe environmental destruction during armed conflict constitutes an obligation erga omnes, enforceable by all States.
- 2. Revision of the Protocol I Threshold:** Articles 35(3) and 55 of Additional Protocol I should be revised through an Additional Protocol or authoritative interpretation to lower the threshold of prohibited environmental damage from a conjunctive to a disjunctive standard, and to incorporate a proportionality analysis applicable across a wider range of situations.
- 3. Inclusion of Ecocide in the Rome Statute:** The Assembly of States Parties to the Rome Statute should convene a diplomatic conference to consider the inclusion of ecocide as the fifth international crime, drawing upon the Independent Expert Panel's definition and incorporating both peacetime and wartime acts.
- 4. Adoption of a Dedicated Convention:** A comprehensive international convention on the protection of the environment in armed conflict should be negotiated under UN auspices, expressly recognising the erga omnes and jus cogens character of core environmental obligations.
- 5. Strengthening of International Enforcement:** The mandate and resources of UNEP

should be strengthened, and consideration should be given to the establishment of an international environmental court or the conferral of expanded environmental jurisdiction upon the ICJ.

**6. Progressive Development through Judicial Practice:** International courts and tribunals, including the ICJ, the ICC, and ITLOS, should be encouraged to progressively develop the jurisprudence of environmental *jus cogens* through their advisory and contentious jurisdiction, building upon the foundation laid by the 2024 ITLOS Advisory Opinion and the landmark 2025 ICJ Advisory Opinion on the Obligations of States in Respect of Climate Change.

## XVI. Conclusion

The environment is not a passive backdrop to armed conflict but a victim of it. The systematic destruction of ecosystems, natural resources, and ecological systems during armed hostilities constitutes not merely incidental collateral damage but, in many instances, a deliberate strategy of warfare with devastating long-term consequences for both human populations and the natural world. International law has recognised this reality but has responded inadequately.

This article has argued that the elevation of core environmental protection norms to the status of *jus cogens* represents not merely a desirable normative aspiration but an increasingly tractable legal proposition. The doctrinal foundation for this argument rests upon the *erga omnes* character of environmental obligations, their recognition in customary international law, the progressive jurisprudence of international courts and tribunals—most recently the 2024 ITLOS Advisory Opinion and the unanimous 2025 ICJ Advisory Opinion on the Obligations of States in Respect of Climate Change—and the growing normative consensus around the criminalisation of the most serious forms of environmental destruction.

The 2025 ICJ Advisory Opinion carries particular weight. By unanimously confirming that core environmental obligations—including the duty to prevent significant transboundary harm—are of an *erga omnes* character owed to the international community as a whole, by rejecting the argument that climate treaties constitute *lex specialis* displacing general international law, and by affirming that the environment is a precondition for the enjoyment of human rights, the Court placed environmental protection at the threshold of peremptory normativity. While the Court deliberately stopped short of formally pronouncing new *jus*

*cogens* norms, the doctrinal architecture it constructed points unmistakably in that direction.

The ITLOS Advisory Opinion's treatment of the relationship between *lex generalis* environmental obligations and *lex specialis* treaty regimes reinforces this analysis. By affirming that general environmental obligations of customary international law may take precedence over conflicting specialised arrangements where they reflect norms of a fundamental character, the Tribunal laid the groundwork for a paradigm shift in the normative hierarchy applicable in armed conflict. Where the *lex generalis* of environmental protection attains *jus cogens* character, it operates as a constitutional constraint upon the *lex specialis* of IHL—not as a competing norm susceptible to displacement by specialised rules. This means that the high threshold provisions of Additional Protocol I cannot serve as a licence to fall below the baseline customary standard of environmental due diligence.

The path to formal recognition is neither short nor simple. It requires the progressive development of State practice, the sustained engagement of international courts and tribunals, the reform of existing treaty frameworks—including revision of Protocol I, the inclusion of ecocide in the Rome Statute, and the negotiation of a dedicated environmental protection convention—and ultimately the political will of the international community to treat the environment as deserving of the highest possible level of legal protection. As both the 2024 ITLOS and 2025 ICJ Advisory Opinions demonstrate, that journey is well underway. International law is in the process of recognising that the right of present and future generations to a healthy and sustainable natural environment is not merely an aspiration but a peremptory demand of the international legal order—one that no belligerent State, in peace or in war, may lawfully ignore.

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