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Heike Krieger · Pablo Kalmanovitz ·
Eliav Lieblich · Stavros Evdokimos Pantazopoulos
Editors

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International Humanitarian Law and Neighbouring Frameworks

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Editorial

When modern international humanitarian law (IHL) began to take form in the nineteenth century, it emerged as the main, if not sole, regulatory framework that governed belligerent conduct during war. Amongst others, according to a traditional—but never undisputed—view, a formal state of war terminated all treaties in force between the belligerents. Of course, specific rules of the laws of war always had their ambiguities, and the mere notion of war was and still remains contested. Nonetheless, it was at least clear that when war was formally declared, belligerents and third parties were to look to the rules of *jus in bello* (supplemented by the laws on neutrality) for guidance.

Nowadays, however, this is far from the case. It is widely agreed that armed conflict does not *ipso facto* terminate treaties. More importantly, the twentieth century saw a dramatic increase in both substantive international legal frameworks and institutions of global governance. This "fragmentation" of international law has been frequently observed, questioned, decried, or celebrated. For better or for worse, it is clear today that all situations of armed conflict requiring international legal attention are regulated by more than just one international legal framework, as well as by a variety of formal and non-formal frameworks of global governance. Take, by way of example, the international law of belligerent occupation. In the past, the occupant's powers and duties were circumscribed by its obligation to ensure public order and safety in the territory, as reflected in the general and specific provisions of the Fourth Geneva Convention.[1] Today, each measure undertaken by the occupant may be additionally subject to diverse legal sources, such as international environmental law or international economic law, as well as to a myriad of other international legal instruments.

While this development has, of course, not been lost on scholars and practitioners of IHL, the traditional preoccupation within IHL has been on its relations with international human rights law, the law on the use of force (*jus ad bellum*), and international criminal law. Accordingly, many judicial decisions and countless

[1] Geneva Convention Relative to the Protection of Civilian Persons in Time of War, opened for signature 12 August 1949, UNTS 973 (entered into force 21 October 1950), Article 64.

scholarly publications have addressed the interactions between these bodies of law. Much less attention has been given to the relations between IHL and other normative frameworks which are no less important during armed conflict. This volume contributes to begin filling this gap. Our open call invited authors to discuss, both in general and specific terms, doctrinally and theoretically, interactions between IHL and other neighbouring frameworks, such as international environmental law; the law on foreign investor protection; international organizations law; counterterrorism; world trade law; the law of the sea, and more.

The volume contains four chapters dedicated to IHL and neighbouring legal frameworks. In Chap. 1, *Yiokasti Mouratidi* assesses whether and how the prevention principle under customary international environmental law can be utilized to interpret precautionary duties under IHL in the conduct of hostilities. The analysis centres around the concept of systemic integration under Article 31(3)(c) of the Vienna Convention on the Law of Treaties. Analysing IHL's targeting rules from the perspective of environmental harm, the author argues that there are still considerable loopholes and interpretative uncertainties within the legal frameworks, for instance concerning the interpretation of Article 58 Additional Protocol I to the 1949 Geneva Conventions. Building on the prevention principle and its due diligence standard under international environmental law, *Mouratidi* exemplifies how due diligence obligations could concretize belligerents' obligations under IHL. For example, she argues for applying a simplified version of the procedural duties stemming from Environmental Impact Assessments to targeting decisions. In order to make such suggestions practically workable, the author calls for the implementation of more concrete guidelines at the domestic level.

In Chap. 2, *Tobias Ackermann* and *Sebastian Wuschka* analyse the developing and relatively uncharted relationship between IHL and international investment law. As they argue, treaties for the protection of foreign investments continue to apply alongside IHL during armed conflict. *Ackermann* and *Wuschka* survey arbitral awards rendered in recent years in this context and delve into the possible interactions between such fields of international law. Normatively, the authors claim that IHL should affect the interpretation of investment treaties in order to prevent normative inconsistencies.

Chapter 3 by *Federica Paddeu* and *Kimberley Trapp* analyses the relationship between IHL and the International Law Commission's Articles on State Responsibility. It specifically considers whether the general defences in the law of state responsibility—namely, consent, self-defence, countermeasures, *force majeure*, distress, and state of necessity—apply to state violations of IHL. Their central claim is that only *force majeure* can have some legal effect, if only marginal, in the context of hostilities. Overall, the authors suggest that IHL either directly precludes the application of some defences (including consent or self-defence) or operates as the *lex specialis* in relation to the more general law contained in the Articles on State Responsibility—that is, IHL specifies the content of the defences under the particular circumstances of hostilities (e.g. countermeasures as reprisals or distress as necessity).

In Chap. 4, *Julien Antouly* and *Rebecca Mignot-Mahdavi* address the complex interactions between IHL, international counter-terrorism law, and domestic criminal law. Their discussion is grounded in the Sahel region, where multiple terrorist groups and several state forces have been involved in armed conflicts for over a decade now. Leveraging their close knowledge of domestic prosecutions associated with the Sahel conflicts, the authors document generalized neglect of IHL in domestic fora as well as excessive reliance on the "pre-emptive criminal policies" enabled by the counterterror framework. While opposing a *lex specialis* treatment of IHL relative to counterterrorism, *Antouly* and *Mignot-Mahdavi* do argue for giving IHL a more prominent normative role in domestic prosecutions, both as a way to introduce basic due process guarantees in criminal proceedings and to protect humanitarian actors from the overreach of counterterrorism laws.

Volume 25 includes, for the second consecutive time, a "Focus Section". While Volume 24's focus comprised a mini-symposium on Samuel Moyn's book *Humane*, we decided to dedicate Volume 25's Focus Section to current events, specifically to IHL controversies arising from Russia's aggression against Ukraine. The war is still raging, and grave, self-evident violations of IHL are one of its tragic features. In the section, we identified some liminal questions that are especially vexing from a legal perspective.

Marcela Prieto Rudolphy in Chap. 5 discusses the question of co-belligerency. Owing to the vast support received by Ukraine from third parties, mainly through the transfer of military equipment, a pressing question is whether—and under what circumstances—these third states may become parties to the conflict. To add a fresh perspective on the issue, *Prieto Rudolphy* takes a step back and addresses the topic through the lens of the ethics of war. For this purpose, she analyses what impact revisionist stances, such as those expressed by McMahan, exert on the concept of co-belligerency—a standpoint that has so far not been explored in the pertinent literature. She identifies certain tensions between these perspectives and doctrinal IHL approaches and suggests that a "humanitarian view" can relieve some, albeit not all, of such frictions. According to this author, the remaining tensions eventually exhibit the "fraught moral compromise" on which contemporary IHL is built.

Alejandro Chehtman and *Eduardo Rivera López* in Chap. 6 address the Russian blockade against Ukraine and, in particular, the underexplored question whether the rules concerning naval blockades are set out to exclusively protect the blockaded population, or rather, if they should additionally protect individuals in third-party states. In the Ukrainian context, this question is imperative since the blockade significantly disrupts the export of grains from Ukraine, which are essential for global food supply chains. While the authors acknowledge that the laws on blockades should take into account harms to those "outside" the blockaded area, they are sceptical as to whether the harm to third parties in the specific case of the Russian blockade amounts *in and of itself* to a violation of IHL. As *Chehtman* and *Rivera López* argue, a wider perspective should be upheld in order to understand the diverse factors that drive food prices up high globally, within which the Russian blockade is but one of those factors. Still, they argue that the blockade may be deemed unlawful by having established itself as a constitutive element of Russia's aggression.

The third contribution to our focus is Chap. 7 by *Frédéric Mégret* and *Camille Marquis Bissonnette*, which discusses legal avenues through which Vladimir Putin could be brought to trial for war crimes committed by Russian armed forces in Ukraine. The authors approach this subject by analysing the modes of liability of co-perpetration, ordering, and superior responsibility, as well as by reflecting in general terms on their legal viability and capacity to convey the significance of prosecuting heads of state. In the case of Putin, *Mégret* and *Marquis Bissonnette* argue that the strongest and most pertinent mode of liability is that of superior responsibility. In doing so, they discuss various ways to circumvent the ability of heads of state to insulate themselves from the day-to-day conduct of hostilities through governmental and military intermediaries.

Finally, and as usual, the volume concludes with the Year in Review section, compiled by the T.M.C. Asser Institute's *Catherine Gregoire*, *Noemi Zenk-Agyei*, and *Níamh Frame*. This chapter (Chap. 8) addresses developments concerning the classification of active armed conflicts during 2022, and it additionally offers an overview of relevant IHL-related international proceedings and evolutions in the field of arms control and disarmament over that year.

We thank the authors for their contributions and the peer reviewers for their useful comments. We would also like to express our gratitude to *Catherine Gregoire*, *Belén Guerrero Romero*, and *Srilatha Jayaraman* for their help in the editing process. We hope that the volume is both helpful and enjoyable to read.

Mexico City, Mexico — Pablo Kalmanovitz
Berlin, Germany — Heike Krieger
Tel Aviv, Israel — Eliav Lieblich
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Part I
International Humanitarian Law and Neighbouring Frameworks

Chapter 1
You Say Precautions, I Say Prevention: Towards the Systemic Integration of International Humanitarian Law and International Environmental Law

Yiokasti Mouratidi

Contents

Abstract Environmental harm during armed conflict is a cross-cutting issue that comes within the remit of both international humanitarian law (IHL) and international environmental law (IEL). Yet, until recently, the interrelationship between these two "neighbouring" frameworks has been underexplored, leading to a need for in-depth analysis of how norms from the two frameworks interact and consideration as to whether they can be harmonised. By identifying key gaps and uncertainties within the IHL targeting framework and corresponding precautionary duties as applied to the environment, this chapter examines the extent to which the IEL prevention principle can inform these. It does so through the lens of treaty interpretation, in particular the method of systemic integration reflected in Article 31(3)(c) of the Vienna Convention

This chapter is written in a personal capacity, and does not necessarily reflect the views of any institution the author is or has been affiliated with.

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on the Law of Treaties. By examining the IEL prevention principle and IHL precautionary duties side by side and setting out where and how they intersect, this chapter demonstrates the need for and potential of such analyses to standardise processes and decision-making that entail collateral environmental harm during the conduct of hostilities, with a view to providing greater environmental protection.

Keywords International humanitarian law · Conduct of hostilities · Collateral environmental harm · International environmental law · Systemic integration · Precautionary duties · Prevention principle · Treaty interpretation

1.1 Introduction

The environment has often been described as a "silent casualty of war".[1] Historically, this has only sporadically been an item of concern on the international community's agenda, with interest usually being sparked following specific catastrophic practices, such as the use of Agent Orange during the Vietnam War and oil spills in Kuwait during the First Gulf War.[2] In reality, however, less striking practices are common causes of environmental harm during armed conflicts,[3] whereby such harm is considered collateral or incidental to the conduct of hostilities between the belligerent parties. Common collateral harm includes water contamination, air pollution and the release of hazardous and toxic materials into soil.[4] This can result from the military target that is being attacked, such as energy facilities or chemical plants,[5] the specific means used to carry out an attack, such as explosive weapons,[6] or a combination of both.

The infliction of environmental harm during armed conflict lies at the "intersection"[7] of (at least)[8] two branches of international law: international environmental law (IEL) and international humanitarian law (IHL). Yet IHL developments on conflict-related environmental harm have largely followed their own trajectory, with little connection to the developments found under IEL.[9] In recent years, exploration of this interrelationship has gained momentum among scholars, with Bothe examining the

[1] ICRC 2020b.

[2] UNEP 2009, p 8. Accessed 4 June 2022.

[3] Sjöstedt 2021, pp 26–29.

[4] Biswas 2001, pp 304–306.

[5] For a recent example, see BBC News 2022.

[6] Action on Armed Violence 2020.

[7] Wyatt 2010, p 593.

[8] Other fields, beyond the scope of this chapter, include international criminal law and international human rights law.

[9] Lehto (2022), Roundtable Panel on Implementation of and Compliance with the International Law Protecting the Environment in Armed Conflict (Second International Conference on Environmental Peacebuilding, 3 February 2022). https://www.youtube.com/watch?v=f8Um9AggrgM. Accessed 25 May 2022.

IEL precautionary approach alongside the IHL framework on precautions,[10] Hulme assessing the IHL duty to take "care" regarding the environment,[11] and Sjöstedt delving into the protection multilateral environmental agreements can provide during armed conflicts.[12]

Building upon this research, and pursuant to the theme of IHL and "neighbouring" frameworks, this chapter examines the following research question: to what extent can the customary IEL prevention principle inform the interpretation of precautionary duties under IHL in relation to environmental harm during the conduct of hostilities? The focus therefore is on examining these neighbouring frameworks through the lens of treaty interpretation. The prevention principle has been selected as the IEL rule for this analysis because its impact on the IHL rules on the conduct of hostilities remains unexplored. Moreover, whilst it uses the customary articulation of the prevention principle, due it being binding upon all states, the principle is also included within IEL treaties pertaining to specific environmental elements.[13] Thus, the ensuing analysis, with appropriate tailoring, could extend to the treaty-based codifications of the prevention principle. Whilst the analysis does not distinguish between international armed conflicts (IAC) and non-international armed conflicts (NIAC) except where necessary to address specific issues that arise in the context of either of these, the ensuing interpretation applies only *vis-à-vis* the obligations of a state that is a party to an armed conflict due to it being unexplored whether non-state armed groups (NSAG) have obligations under IEL. Nonetheless, an argument could be made that pursuant to the principle of equality of belligerents, insofar as a state's obligations under IHL are informed by IEL, the same interpretation should also apply to NSAGs.[14] This argument, as well as the exploration of subsequent implementation difficulties particular to NSAGs, merits further separate research.

The significance and relevance of this research question is threefold. Firstly, despite the ILC finalising its Draft Principles on the Protection of the Environment in Relation to Armed Conflicts (Draft Principles on PERAC) in late 2022, it is unlikely that states will agree a new treaty regarding this in the near future. It is therefore necessary to examine and clarify the extent to which existing rules can be tailored to the environment to enhance this protection. Secondly, the potential overlapping application of IEL and IHL is part of the broader phenomenon of fragmentation in international law.[15] In order to avoid the possibility of an obligation bearer having conflicting duties under different specialist legal regimes, it is necessary to strive for the harmonisation of different legal frameworks. Thirdly, the general IHL targeting framework is largely identical under customary international law for both IACs and

[10] Bothe 2020.

[11] Hulme 2010.

[12] Sjöstedt 2021.

[13] For example, Convention on Biological Diversity, opened for signature 5 June 1992, 1760 UNTS 69 (entered into force 29 December 1993), Article 3.

[14] Van Steenberghe 2022, pp 1373–1375.

[15] Bothe et al. 2010, p 580.

NIACs.[16] Whilst the Vienna Convention on the Law of Treaties 1969 (VCLT) applies to treaty interpretation,[17] there is growing discourse that it is equally applicable to interpreting rules of customary international law.[18] Therefore, the same analysis and conclusions as regards the interpretation of treaty rules on conduct of hostilities would also apply to the equivalent customary rules for IACs and NIACs, thereby pertaining to all armed conflicts. This is significant, since the majority of conflicts today are NIACs.

This chapter is divided into four sections. First, it places the need to explore the interrelationship between IEL and IHL in the context of the broader international legal framework, introducing and assessing the interpretational tool of "systemic integration", reflected in Article 31(3)(c) VCLT (Sect. 1.2). Next, it assesses how the general IHL targeting rules apply to the environment (Sect. 1.3). In light of apparent uncertainties in this framework, it then turns to the IEL prevention principle to consider how these gaps and ambiguities can be addressed (Sect. 1.4). The chapter culminates in an analysis of what "taking into account" the prevention principle when interpreting the IHL precautionary duties would look like in practice, noting potential limiting factors arising within the context of armed conflicts. This includes reflecting on the steps required to make the harmonisation of these rules a practical reality on the part of states (Sect. 1.5). In concluding, the chapter returns to the research question and provides thoughts on the need to undertake further comprehensive analysis on how specific IEL rules can inform the interpretation of specific IHL rules (Sect. 1.6). Thus, beyond the examination of the identified rules, this contribution may serve as a template of the issues to be examined when seeking to undertake such exercises.

1.2 The International Legal Order: Fragmentation, Interpretation and Harmonisation

The international legal framework is characterised by its horizontal nature.[19] Legal rules and organisations, whether law-making, judicial or quasi-judicial, exist in parallel with one another. Since the end of the Cold War, the international legal order has undergone unprecedented dynamic development, ranging from growth of specialist fields of law to the establishment of international organisations.[20] This ensuing pluralism led to concerns about fragmentation, i.e. the lack of homogeneity

[16] ICRC 2005, Rules 1, 7–24.

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

[18] Merkouris 2022.

[19] Higgins 1994, p 1.

[20] Peters 2017, p 673.

in the international legal system,[21] with legal obligations which may be in conflict or incompatible with one another.[22]

The need to avoid such conflicts from arising in the first place has led to efforts of harmonisation, an overarching objective of achieving enhanced coherence within the international legal system.[23] To this end, the International Law Commission (ILC) carried out a study on the issue of fragmentation, published in 2006, within which it noted that it cannot be over-stressed that whether there is a conflict depends on how the relevant rules are interpreted.[24] The process of interpretation can thus play an important role in pursuing harmonisation between different legal norms and to the extent that this is not achieved, determining that there is a conflict.[25]

The general rules of interpretation, found in Article 31 VCLT and also of a customary nature,[26] begin with the "ordinary meaning" of a provision's terms in their context and the treaty's object and purpose.[27] Under Article 31(3), the following shall be "taken into account" together with the context: any subsequent agreement between the parties regarding the interpretation of the treaty or application of its provisions (Article 31(3)(a)); any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation (Article 31(3)(b)); any relevant rules of international law applicable in the relations between the parties (Article 31(3)(c)). In case of outstanding ambiguity or manifest absurdity or unreasonableness after utilisation of the general rules, Article 32 sets out "supplementary" means of interpretation.

Whilst the factors listed in Article 31(3) VCLT are part of the mandatory interpretation process, there is no hierarchy amongst these.[28] The relevance and importance of particular rules will therefore vary depending on the provision at hand.[29] Particularly relevant for the purposes of the cohesion of the international legal order is Article 31(3)(c). The revival in interest in the specific function and purpose of this provision has been accredited to the International Court of Justice's (ICJ) explicit use in the 2003 *Oil Platforms* case.[30] Subsequently, the aforementioned ILC report on fragmentation confirmed the practical importance of Article 31(3)(c) in light of growing pluralism in the international legal order, as a legal basis for tackling fragmentation.[31] The report recognised Article 31(3)(c) as embodying the principle

[21] McLachlan 2005, p 285.

[22] Peters 2017, p 678.

[23] Matz-Lück 2006, p 42.

[24] ILC 2006, p 69.

[25] McLachlan 2005, p 286.

[26] ICJ *Guinea-Bissau v Senegal*, Arbitral Award of 31 July 1989, Judgment of 12 November 1991, [1991] ICJ Rep 53, para 48.

[27] VCLT, above n. 17, Article 31(1).

[28] McLachlan 2005, p 290.

[29] Ibid., p 310.

[30] Todeschini 2018, p 378; ICJ, *Iran v USA*, Judgment, 6 November 2003 (*Oil Platforms*), [2003] ICJ Rep, p 161.

[31] ILC 2006, paras 410–480.

of systemic integration,[32] enabling rules "to appear as parts of some coherent and meaningful whole".[33]

1.2.1 Article 31(3)(c) VCLT: Requirements

The first requirement under Article 31(3)(c) VCLT is that external provisions used for interpretation purposes are "rules", meaning they stem from the formal sources of international law, i.e. treaties, customary international law and general principles of law.[34] Combined with the requirement that they are "applicable", non-binding instruments are understood to be outside the scope of this,[35] although there is debate as to the role of soft law in treaty interpretation.[36] The second requirement is that the rules are "relevant". Whilst this is understood to mean that the rules concern the same subject matter,[37] other factors such as the object and purpose of the rules at hand may also assist in determining their relevance.[38]

Finally, the rules must be "applicable in the relations between the parties". When it comes to the interpretation of multilateral treaties, it is disputed whether all parties to the treaty must be bound by the external rule, or only those to the dispute.[39] Given that the IEL rule to be used in this contribution is customary, therefore binding on all states, it is not necessary to address this question. Instead, the more significant issue is clarity whether the external rules must apply at the time of the conclusion of the treaty, or at the time of interpreting and applying the treaty. The former approach reflects the fact that upon agreeing a treaty, parties do so whilst "bearing in mind the normative framework" at that moment in time.[40] Contrastingly, the latter approach reflects the fact that treaties do not exist in a static vacuum but are interpreted and applied in light of evolving understandings and developments.[41]

To this end, the ILC suggests that rather than having a general and abstract applicable choice between the "past and present", it is necessary to consider the treaty language itself and whether it provides for taking into account future developments.[42] Relevant factors include whether the terms are "evolutionary" rather than static and/

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[32] Ibid., para 33.

[33] Ibid., para 414.

[34] Merkouris 2015, p 19.

[35] Villager 2009, p 433.

[36] Gardiner 2015, p 310; notably, the European Court of Human Rights (ECtHR) does utilise soft law instruments for the purposes of Article 31(3)(c), see Tzevelekos 2010.

[37] Todeschini 2018, p 362.

[38] Bhat 2019, p 190.

[39] ILC 2006, para 428.

[40] Ibid., para 476.

[41] Ibid., paras 476–478.

[42] Ibid., para 478.

or the obligations are framed in general terms.[43] The ICJ has also held upon considering the specific terms of a treaty, it may be the case that it "is not static, and is open to adapt to emerging norms of international law."[44]

1.2.2 Purpose, Use and Limitations

The primary purpose of Article 31(3)(c) VCLT is to promote coherence in international law and reduce fragmentation.[45] Pursuant to the goal of harmonisation, when multiple norms pertain to the same subject, their interpretation should strive to be conciliatory.[46] Whilst systemic integration is grounded in Article 31(3)(c) VCLT, judicial institutions also sometimes resort to this technique implicitly, without citing this provision.[47] For example, the ICJ has proclaimed that the interpretation and application of international law "cannot remain unaffected by the subsequent development of law" but rather has to take place "within the framework of the entire legal system prevailing at the time of interpretation".[48] Typically, the technique has been used when a provision is unclear, to resolve this ambiguity by taking into account a rule from a different legal framework.[49] It has also been used when provisions are "open-textured", such that taking into account other rules will assist in providing content to the rule.[50]

From this perspective, there are limits to the utility of this tool to achieve harmonisation. According to Sjöstedt, as a rule of interpretation, it cannot "substitute, displace, or modify" rules, but only be used to offer clarity.[51] Reliance on this provision has thus been criticised at times for purporting to "reconcile the irreconcilable", stretching this method in the name of harmonisation.[52] Another risk is that rules from other legal frameworks may be "abused" to interpret another legal rule,[53] for example by judicial institutions whose expertise does not extend to rules from other specialist legal frameworks. A further limitation, according to Sjöstedt, is that Article

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[43] Ibid.

[44] ICJ, *Gabčíkovo-Nagymaros Project* (*Hungary v Slovakia*), Judgment, 25 September 1997 (*Gabčíkovo-Nagymaros*), [1997] ICJ Rep 7, p 68.

[45] McLachlan 2005, p 281.

[46] Tzevelekos 2010, p 631.

[47] Todeschini 2018, p 378.

[48] ICJ, *Legal Consequences for States of Continued Presence of South African in Namibia (South-West Africa) Notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion, 21 June 1971, [1971] ICJ Rep 16, pp 32–33.

[49] McLachlan 2005, p 312.

[50] Ibid.

[51] Sjöstedt 2021, pp 11–12.

[52] ECtHR, *Case of Hassan v UK, Grand Chamber Judgment*, 16 September 2014, Application No. 29750/09, Partly Dissenting Opinion of Judge Spano Joined by Judges Nicolaou, Bianku and Kalaydjieva, para 16.

[53] Howe 2007.

31(3)(c) operates within the framework of Article 31, where a number of other rules also operate without priority.[54]

In light of these perceived difficulties and limitations, scholars have turned to suggesting alternative techniques for achieving harmonisation. Particularly in the context of IHL and IEL, Sjöstedt put forward the concept of a "reconciliatory approach", which would enable harmonisation also with non-binding soft law instruments, prevalent within IEL,[55] even though there is no obligation for doing so.[56] Similarly, van Steenberghe puts forward a "coherency-based approach", dismissing the principle of systemic integration due to it not determining which rules are "relevant" for the purpose of interpreting the rule at stake.[57] Finally, Dienelt has identified the need to go beyond the existing framework of Article 31(3)(c) when examining the interaction of more than two specialist legal frameworks, such as IHL, IEL and IHRL in the context of environmental protection during armed conflict; in doing so, we must look for the "common objectives" that intersect these regimes such as to underpin their harmonious interpretation.[58]

Notwithstanding the above, Article 31(3)(c) VCLT provides the clearest formal grounds for achieving harmonisation,[59] thereby lending legal and methodological legitimacy to this exercise. Dismissing the utility of this provision risks leading to a meta-fragmentation in the approaches to addressing fragmentation, proposing techniques for how the interrelationship of different legal frameworks and individual rules is to be determined without first utilising the existing legal framework for interpretation. This gap is therefore addressed herein, by using Article 31(3)(c) to examine the extent to which a customary IEL principle can inform the interpretation of general IHL targeting rules, bearing in mind the traditional use, purpose and limitations of this tool.

1.2.3 The Harmonisation of IHL and IEL: Developments

Turning to developments to date in the harmonisation of IHL and IEL, this subsection considers pronouncements that have been made regarding this interrelationship by four international institutions: the ICJ, the International Committee of the Red Cross (ICRC), the United National Environmental Programme (UNEP) and the ILC. Throughout this, it considers the extent to which Article 31(3)(c) VCLT is the tool used either implicitly or explicitly to address these regime interactions.

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[54] Sjöstedt 2021, pp 11–12.

[55] Whilst soft law instruments are themselves not binding, within IEL certain instruments have played a key normative role in leading to the crystalising of customary rules, see Dupuy and Viñuales 2018, pp 40–41.

[56] Sjöstedt 2021, p 78.

[57] Van Steenberghe 2022, p 1366.

[58] Dienelt 2022.

[59] ILC 2006, para 420.

One of the earliest significant developments in the interrelationship between IHL and IEL came from the ICJ's *Nuclear Weapons* Advisory Opinion (1996), which stated:

> existing international law relating to the protection and safeguarding of the environment… indicates important environmental factors that are properly to be taken into account in the context of the implementation of the principles and rules of the law applicable in armed conflict.[60]

It thereafter refers specifically to the IHL principles of necessity and proportionality, noting that respect for the environment is one of the elements to consider in making these assessments. This has been understood to mean that rules and principles of IEL must be "taken into account" during armed conflicts,[61] even though the reference is to environmental "factors", rather than IEL. It is therefore unclear whether this represents an articulation of the pursuit of systemic integration between these bodies of law, although some scholars consider it does.[62]

In 2020, the ICRC updated its Guidelines on the Protection of the Natural Environment in Armed Conflict (Guidelines), originally published in 1994. Whilst these were limited to analysing the relevant rules of IHL, they made some general observations regarding its relationship with IEL. Firstly, as regards IEL treaty rules that continue to apply during armed conflicts, it stated that where a rule under IEL is more protective of the environment than the parallel IHL rule, they should be considered to be incompatible only if there are "clear reasons",[63] without elaborating on such reasons. Secondly, the Guidelines noted that the interaction between two rules from IEL and IHL applying in parallel is "highly context specific".[64] Thus, whilst recognising the potential interaction between IEL and IHL, the ICRC did not provide any specific detail on this.

Perhaps the greatest development in the harmonisation of IHL and IEL led by the ICRC is the explicit inclusion of the IEL "precautionary approach" in customary Rule 44 of its Customary IHL Study.[65] According to Rule 44, "[l]ack of scientific certainty as to the effects on the environment of certain military operations does not absolve a party to the conflict from taking such precautions". In doing so, the ICRC went beyond the nuanced interpretative framework of systemic integration, in that it purports to create a new, freestanding rule in IHL, based on IEL. This has been controversial, primarily due to practice being insufficient to support the existence of this customary rule within IHL.[66] In addition, the status of the precautionary approach within IEL is not settled, thus highlighting the aforementioned risk of abusing norms which do not fall within the remit of expertise of the institutions undertaking the process of

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[60] ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 8 July 1996 (*Nuclear Weapons*), [1996] ICJ Rep 226, para 33.

[61] Droege and Tougas 2013, p 47.

[62] Dupuy and Viñuales 2018, p 427.

[63] ICRC 2020b, para 35.

[64] Ibid., para 37.

[65] ICRC 2005, Rule 44.

[66] Sjöstedt 2021, p 68.

interpretation. Nonetheless, it demonstrates the broad objective of harmonisation in international law, moving IHL closer to IEL.[67]

In 2009, UNEP published an extensive inventory on the protection afforded by different branches of international law to the environment during armed conflict. One of its findings included that "[u]nless otherwise stated, IEL continues to apply during armed conflicts and could be used as a basis for protection" and accordingly IEL could also be used to interpret incomplete or insufficiently clear norms of IHL.[68] Despite this finding, the report is largely limited to describing the IEL framework, including treaties, customary and soft law instruments, and examining their continuing application during armed conflict, without going into analysis of the impact these can have on the interpretation of IHL rules.

Finally, the ILC began working on the Draft Principles on PERAC in 2013, concluding in May 2022; these were subsequently adopted by the UN General Assembly in December 2022.[69] The Draft Principles on PERAC take a chronological approach: pre-conflict, during armed conflict, including occupation, and post-conflict. Most notably for the purposes of this chapter, Draft Principle 13(1) PERAC, pertaining to the phase during armed conflict, states that "[t]he natural environment shall be respected and protected in accordance with applicable international law and, in particular, the law of armed conflict". In the accompanying commentary, the ILC notes that the law of armed conflict is cited due to being the set of rules "specifically designed" for armed conflicts, but that other rules of international law providing environmental protection, including IEL, "retain their relevance". To this end, it cites the aforementioned ICJ Advisory Opinion on *Nuclear Weapons*.[70]

An earlier draft commentary to Draft Principle 13 PERAC noted that the law of armed conflict is *lex specialis* during armed conflict, but that other rules of international law providing environmental protection, including IEL, "remain relevant".[71] The final version, however, moved the reference to *lex specialis* to an opening "General Commentary" section:

> The draft principles were prepared bearing in mind that the law of armed conflict, where applicable, is *lex specialis* but that other rules of international law, to the extent that they do not enter into conflict with it, also remain applicable. Such rules may generally complement and inform the application of the law of armed conflict.[72]

On the one hand, this seems to be putting the cart before the horse: it should first be assessed whether norms can be reconciled and only to the extent that this is not possible should *lex specialis* arise. In previous work, the ILC has confirmed that *lex specialis* does not come into play simply because two provisions pertain to the same subject matter, but some actual inconsistency must exist or a "discernible

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[67] Ibid., p 84.

[68] UNEP 2009, Finding 8.

[69] UN General Assembly (2022) Resolution: Protection of the Environment in Relation to Armed Conflict, UN Doc. A/RES/77/104.

[70] ILC 2022a, p 141.

[71] ILC 2019, p 251.

[72] ILC 2022a, p 97.

intention" that one is to exclude the other.[73] Moreover, without explanation it asserts that IHL always provides the special rule over IEL on a regime-wide basis, rather than recognising the need to determine this on a context and rule specific basis.[74] On the other hand, the ILC is reinforcing that IEL can be used to complement and inform IHL norms. Thus, in line with the aim of harmonisation, IEL is not completely displaced but plays a "residual part" in interpreting IHL.[75] As such, in its Commentary to the Draft Principles on PERAC the ILC seems to implicitly reflect the notion of systemic integration as in Article 31(3)(c) VCLT.

Moreover, prior to the finalisation of the Draft Principles on PERAC, in early 2022 states submitted comments to the Draft Principles and Commentary. Israel was firmly against what it called the "forced integration" of IHL and IEL.[76] Contrastingly, Portugal and the Nordic countries expressed they are "pleased" that the ILC's Draft Principles confirm that IHL incorporates rules from *inter alia* IEL;[77] Spain considered it would be "desirable" to have more integration between IEL and IHL in the Draft Principles;[78] Japan and Switzerland considered the ILC's work should explain further the relationship between IEL and IHL in practice.[79] Of the states that did address IEL, therefore, there was primarily a positive response but also a desire for further clarity in what this interrelation means in practice. Scholars have also previously expressed disappointment at the lack of exploration by the ILC of how different identified fields of international law actually interplay.[80]

Overall, there has been a piecemeal movement towards acknowledging that IEL can inform the interpretation of IHL norms. However, there is vagueness around the harmonisation of IHL and IEL in practice and the understanding of this interrelationship is currently superficial. The remainder of this chapter fills this gap by utilising Article 31(3)(c) VCLT, examining IHL targeting rules and the IEL prevention principle side by side and assessing how IEL can be "taken into account" to inform IHL.

[73] ILC 2001a, p 140.
[74] Duffy 2020, p 49.
[75] ILC 2006, para 85.
[76] ILC 2022b, pp 13–18.
[77] Ibid., p 72.
[78] Ibid., p 23.
[79] Ibid., p 72.
[80] Dienelt 2016, p 55.

1.3 The General Targeting Framework and the Environment

Before examining the general targeting framework as applied to the environment, it is worth briefly outlining the IHL rules which explicitly address the environment. As will be seen, it is the latter's perceived weaknesses which arguably lead to the need to examine how the general framework can provide greater environmental protection.

Articles 35(3) and 55(1) Additional Protocol I 1977 to the Geneva Conventions of 1949 (API) pertain specifically to the environment in international armed conflicts (IACs).[81] The former prohibits means and methods of warfare which "are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment". The latter requires "care" to be taken in warfare to protect the natural environment from "widespread, long-term and severe damage", including a prohibition on using means and methods of warfare causing such harm and thereby prejudicing the health or survival of the population. The two provisions provide an absolute limitation to environmental harm beyond a certain threshold, which cannot be justified under other IHL rules, such as military necessity.[82]

However, difficulties arise in the utility and application of these provisions. Firstly, the requirements of "widespread, long-term and severe" environmental damage in both provisions are not defined, either in the treaty, the ICRC's Commentary or *travaux préparatoires* to API.[83] Secondly, the factors are cumulative, so even if they were clear, some consider that these provisions are of next to no practical relevance due to setting the threshold of harm very high.[84] Indeed, in light of these difficulties, scholarly-led conferences were held in the early 1990s regarding a "Fifth Geneva Convention" pertaining to environmental protection during armed conflicts.[85] Finally, API is not universally ratified and pertains only to IACs, with no equivalent provisions in treaties pertaining to NIACs; whilst according to the ICRC the two provisions are of customary nature in IACs, the position as regards NIACs is not certain.[86]

Given the above difficulties, it has been suggested that environmental protection could be better achieved by turning instead to the long-standing general targeting rules of IHL, which extend to the environment.[87] These apply distinctly and alongside the absolute prohibitions under Articles 35 and 55 API.[88] The key targeting rules underpinning the regime on the conduct of hostilities during armed conflicts are

[81] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, opened for signature 8 June 1977, 1125 UNTS 3 (entered into force 7 December 1979) (API).

[82] Fleck 2021, pp 346–347.

[83] ICRC 2020b, para 51.

[84] Fleck 2021, p 346.

[85] Plant 1992.

[86] ICRC 2005, Rule 45.

[87] Baker 1993, p 351.

[88] Henckaerts and Constantin 2014, pp 474–477.

military necessity,[89] distinction,[90] and proportionality.[91] To give effect to these rules, parties to the conflict are obliged to take precautions in attacks and against the effects of attacks.[92] However, because these general rules are not specifically tailored to the environment, there are uncertainties in their application to the same. It has therefore been suggested that IEL may assist in filling these gaps within the IHL regime.[93]

1.3.1 Application of General Rules to the Environment

The starting point in applying the general targeting framework to the environment is that elements of the environment are most often civilian objects but can be subject to change.[94] This will be the case if they meet the criteria for a military objective in Article 52(2) API, namely an object which by its "nature, location or use" makes an "effective contribution to military action and whose total or partial destruction, capture or neutralisation, in the circumstances ruling at the time, offers a definite military advantage". Given the wide-ranging aspects of the environment, from flora to water resources and even the atmosphere, the exact parameters of when these elements may become military objectives are not always clearcut. It has been suggested, for example, that soldiers moving across nature areas transform the latter into a military objective.[95] This remains unsettled, with diverging views on the ease with which areas become military objectives due to the presence of combatants.[96]

If part of the environment becomes a military objective, then it must be assessed whether other provisions of API prohibit attacking this. This would include the threshold of "widespread, long-term and severe" damage under Articles 35(3) and 55(1) API, in which case the attack could not be justified under military necessity. However, even if certain aspects of the environment become a military objective, the attack may still be unlawful if damage caused to other aspects of the environment retaining their civilian character, together with civilians and other civilian objects, is excessively disproportionate to the military advantage anticipated. Examples of incidental harm which would have to be weighed against the military advantage could be air and soil pollution resulting from attacks on industrial facilities, sewage leaks and wastewater, and oil pollution originating from industrial or oil extraction facilities.[97]

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[89] For the first modern codification of military necessity, see Instructions for the Government of Armies of the United States in the Field, 24 April 1863 (Lieber Code), Article 14

[90] API, above n. 81, Article 48.

[91] Ibid., Article 51(5)(b).

[92] Ibid., Articles 57 and 58 API respectively.

[93] Bothe et al. 2010, p 571.

[94] Ibid., p 576; ILC Commentary on Draft Principle 13(3) and 14 ILC 2022a.

[95] Fleck 2021, pp 343–344.

[96] Droege and Tougas 2013, p 28.

[97] Fleck 2021, p 341.

When the environment retains its status as a civilian object, IHL permits damage to be caused to it as a result of an attack against a military objective, where such an attack is justified by military necessity, the collateral environmental harm does not reach the threshold of widespread, long-term and severe, and is proportionate, together with harm to other civilian objects, to the military aim pursued.[98] In order to make these assessments, parties to the conflict must meet their obligations to take precautions in attacks. As long as targeting decisions conform to this, environmental harm is viewed as "collateral damage" permissible under IHL. In order to enable opposing parties to the conflict to also comply with their obligations in attacks, parties must also take precautions against the effects of attacks during peacetime and once conflict breaks out.

Proceeding on the basis that the environment retains its status as a civilian object, expected harm to this must form part of the proportionality assessment, together with any other civilian objects or civilians anticipated to suffer harm. Accordingly, the threshold for environmental harm to be disproportionate is "excessive" as against the anticipated military advantage. Whilst damage that is widespread, long-term and severe may meet this threshold, lesser harm may also satisfy this and/or the anticipated military gains may be comparatively low.[99]

The proportionality principle has been criticised for its imprecise wording and terminology,[100] particularly in relation to what it means *in concreto* and how it is to be applied.[101] It envisages a balancing exercise between variable factors that differ significantly, such as loss of civilian life with anticipated military advance, and there is also no established formula for determining when collateral damage will be "excessive". Even though assessing the proportionality of an intended attack is mandatory, the question remains on how to define, quantify and balance the extent of the environmental damage foreseen in relation to the anticipated military advantage.[102] What it ultimately entails is a value judgment, since the factors to be balanced are so different in nature that to balance them quantitatively is impossible.[103] Moreover, the operational impact of the proportionality principle *vis-à-vis* environmental harm requires clarity.[104] In other words, what are the procedural steps to assess whether incidental harm to the environment is "excessive", and how is this harm weighed up in the proportionality assessment? Such an assessment and evaluation is also relevant for the purposes of precautions in the choice of means and methods of attack such as to avoid or minimise incidental environmental harm.

On the flipside, Article 58 API requires parties to a conflict to take precautions "to the maximum extent feasible" in relation to the harmful effects of attacks. According

[98] Thürer 2011, p 93.

[99] ICRC 2020b, p 55.

[100] ICRC 1987, para 1977

[101] ICTY 2000, paras 71–79.

[102] Henckaerts and Constantin 2014, pp 474–477.

[103] Ibid.

[104] Ibid., pp 485–486.

to the ICRC, this provision extends to taking measures during peacetime.[105] For example, states are required to take precautions relating to where they locate military objectives during peacetime,[106] such as to minimise the risk of indiscriminate attacks in the event that an armed conflict breaks out. Parties to the conflict shall "endeavour" to remove civilian objects from the vicinity of military objectives and avoid locating military objectives in or near densely populated areas.

The "real tragedy" relating to this provision is that the all-surrounding nature of the environment means it cannot, for example, be "removed" from the vicinity of military objectives as envisaged by Article 58(a) API.[107] Seemingly the most relevant provision in relation to precautions against the effects of attacks is Article 58(c), which requires parties to "take the other necessary precautions to protect … civilian objects under their control against the dangers resulting from military operations". For example, the ICRC's 2020 Guidelines highlight the issue of conflict in zones of major ecological importance or particular fragility and therefore consider that the choice of location of fixed military installations forms part of precautionary measures to be taken during peacetime; after the outbreak of a conflict, precautions can include informing the parties to the conflict of conservation areas, even seeking to agree to designate such locations as demilitarised zones prohibiting the presence of combatants and military material.[108] However, there is no definitive checklist regarding the scope of "other necessary precautions" in relation to the environment and how to determine appropriate precautionary measures.

Thus, in line with the traditional use and purpose of Article 31(3)(c) VCLT, the open-textured and general formulations of these provisions provide an opportunity to consider whether, and if so how, the IEL prevention principle can inform their interpretation.

1.4 The IEL Prevention Principle and Systemic Integration

Having identified how key IHL targeting rules apply to the environment, this section describes the development of the IEL prevention principle as a due diligence obligation of states to not cause damage to the environment of other states or areas beyond national jurisdiction. Thereafter, it examines whether it meets the requirements of Article 31(3)(c) VCLT such as to inform the interpretation of the identified IHL framework.

IEL originates and revolves around the prevention of harm,[109] which has evolved from a state-centric concern to protect the sovereign rights of neighbouring states

[105] ICRC 1987, para 2244.
[106] ICRC 2020b, p 62.
[107] Hulme 2010, p 687.
[108] ICRC 2020b, pp 63–64.
[109] Brunnée 2021.

towards protecting the environment per se, reflected in the prevention principle.[110] The IEL no-harm rule was first articulated in the United States (US) *Trail Smelter* case:

> 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… when the case is of serious consequence and the injury is established by clear and convincing evidence.[111]

Whilst the facts of this case concerned transboundary pollution by fumes, the ICJ confirmed as customary a general articulation of the rule in the *Corfu Channel* case in 1949, namely "every state's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other states."[112] It is a rule for determining liability once environmental harm is caused to another state.[113]

A move towards broadening the scope and focus of the no-harm rule was first evident in Principle 21 of the Stockholm Declaration 1972, a soft law instrument. This provided that states have the sovereign right to exploit their own resources, as well as the duty that "activities within their jurisdiction or control do not cause damage to the environment of other States or *of areas beyond the limits of national jurisdiction*".[114] This formulation provided for the "progressive development" of the no-harm rule,[115] by pertaining also to areas beyond the jurisdiction of states, such as the high seas. It thereby seeks to protect the environment per se as opposed to the state-centric focus of the no-harm rule.

This shift in focus led to what is understood today as the prevention principle, perceived as removing any spatial considerations as to where the harm materialises.[116] Given today's understanding of the interconnectedness of the environment and that "safeguarding the ecological balance" is an essential interest of all states,[117] harm to "common goods", such as the climate, biodiversity and endangered species,[118] may disrupt this balance. Adverse effects to the climate, for example, are transcending the territory of all states.[119] Thus, "transboundary" is no longer limited to a traditional conception of fumes passing from one state to another, as in *Trail Smelter.* When environmental harm in a state's own territory presents a risk

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[110] Dupuy and Viñuales 2018, p 66.

[111] Trail Smelter Arbitral Tribunal, *United States v Canada* (1938 and 1941), 3 RIAA 1905 (*Trail Smelter*), p 1965.

[112] ICJ, *The Corfu Channel Case* (*UK v Albania*), Judgment on the Merits, 9 April 1949, [1949] ICJ Rep 4 (*Corfu Channel*), p 22.

[113] Dupuy and Viñuales 2018, p 66.

[114] Declaration of the United Nations Conference on the Human Environment, adopted 16 June 1972, UN Document A/CONF.48/14/Rev 1, Principle 21; see also Rio Declaration on Environment and Development, adopted 13–14 June 1992, UN Document A/CONF.151/26, vol 1, (Rio Declaration) Principle 2.

[115] Dupuy and Viñuales 2018, p 66.

[116] Duvic-Paoli and Viñuales 2020, pp 301–302.

[117] *Gabčíkovo-Nagymaros*, above n. 44, para 53.

[118] Vöneky 2001; Afriansyah 2013, p 84.

[119] Dupuy and Viñuales 2018, p 98.

of significant harms to these perceived "common goods", the prevention principle applies.

The customary nature of the prevention principle was formally confirmed for the first time by the ICJ in the *Nuclear Weapons* Advisory Opinion.[120] The ICJ initially framed this as a "general obligation" of states, with later elaboration in the *Pulp Mills* case that the principle originates from the due diligence that a state is required to exercise in its territory.[121] Thus, the prevention principle pertains to duties prior to any environmental harm actually materialising.[122] The underlying rationale is that prevention is better than cure, given the often irreversible nature of environmental damage.[123] It therefore requires "anticipatory investigation, planning, and action" from states prior to their potentially harmful activities.[124]

Whilst closely linked, the prevention principle is distinct from the no-harm rule,[125] as it is an obligation of conduct to prevent harm rather than an obligation of result not to cause harm.[126] The prevention principle will be held to be breached if a state does not fulfil its due diligence obligations when there is risk of significant (transboundary) harm, regardless of whether that harm materialises.[127] It also differs from the so-called precautionary approach, which was included in the ICRC's Customary IHL study. Accordingly, whilst the precautionary approach requires that lack of full scientific certainty as to serious or irreversible environmental consequences is not used as an excuse for inaction,[128] the prevention principle plays a role in responding to risks of harm that are certain.[129]

As a due diligence standard, the prevention principle is contextual.[130] Generally, it requires states to take appropriate regulatory and policy measures relating to private and public actors.[131] As regards specific planned activities, there are two key procedural IEL duties that the customary prevention principle can give rise to, according to ICJ jurisprudence. At the outset, a state must first ascertain whether a certain activity which has the potential to adversely affect the environment of another state entails a risk of significant transboundary harm.[132] If so, this would in turn trigger the

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[120] *Nuclear Weapons*, above n. 60, para 30.

[121] ICJ, *Case Concerning Pulp Mills on the River Uruguay* (*Argentina v Uruguay*), Judgment, 20 April 2010, [2010] ICJ Rep 14 (*Pulp Mills*) para 101.

[122] Sands and Peel 2012, p 201.

[123] *Gabčíkovo-Nagymaros*, above n. 44, para 140.

[124] Nanda and Print 2013, p 62.

[125] Trouwborst 2009, p 111.

[126] Brunnée 2021, p 276.

[127] Ibid., p 279.

[128] Rio Declaration, above n. 114, Principle 15.

[129] Duvic-Paoli and Viñuales 2020.

[130] Brunnée 2021, p 274.

[131] *Pulp Mills*, above n. 121, para 197; ibid., p 275.

[132] ICJ, *Certain Activities Carried out by Nicaragua in the Border Area* (*Costa Rica v Nicaragua*), Judgment, 16 December 2015, [2015] ICJ Rep 665 (*Certain Activities*), para 104.