

Yearbook of International Humanitarian Law

Volume 25

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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 *Cehtman* 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
Berlin, Germany
Tel Aviv, Israel
July 2023

Pablo Kalmanovitz
Heike Krieger
Eliav Lieblich

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