

Precaution in International Environmental Law and Precautions in the Law of Armed Conflict

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Abstract

The protection of the environment in relation to armed conflict, in particular *during* armed conflict is a complex problem as it involves at least two different fields of international law, the law of armed conflict (international humanitarian law) and international environmental law. Their mutual relationship is a delicate issue. International humanitarian law is not necessarily *lex specialis*. Three principles deserve particular attention in this connection: as to general international environmental law, the principle of prevention and the precautionary principle, as to international humanitarian law the duty to take precautions. The terms *prevention* and *precaution* are used in different contexts in environmental law (both national and international) and in the law of armed conflict. The duty, imposed by international humanitarian law, to take precautions has much in common with, but must be distinguished from, the precautionary approach of general environmental law. This paper shows what these principles mean and how they relate to each other. It answers the question to what extent the rules based on these concepts are effective in restraining environmental damage being caused by military activities. The application of these principles in peace and war serves intergenerational equity and is thus an important element of sustainable development.

A. Introduction

The protection of the environment in relation to armed conflict, in particular *during* armed conflict, is a complex problem as it involves (at least) two different fields of international law: the law of armed conflict (international humanitarian law) and international environmental law. The division of a legal system into different areas or bodies of law is a phenomenon common to legal systems in general. It does not only exist in international law. Legal regulations evolve around particular problem situations as they are perceived by relevant actors at a particular time: for example, a matrimonial link is established by a contract, thus the general rules of contract law may apply. But that matrimonial relation is also regulated by family law, which is a distinct body of law. As for water resources, they may be subject to property law, but there may be distinct rules of water law. Thus, a particular situation is subject not only to one particular body of law, but it may come within the purview of several.

A legal system, as a rule, does not tolerate that the addressees of its norms receive incompatible or contradictory orders concerning one particular issue from different bodies of law belonging to the same legal system. Therefore, the relationship between those bodies of law has to be regulated as they apply to one particular situation. The *lex specialis* approach, i.e. that one body of law prevails and excludes the other, is one possible solution, but not the only one.¹ There are also possibilities of concurrent application with mutual adaptation or harmonization, in some contexts called mutual supportiveness. International environmental law and the international law of armed conflict (international humanitarian law) are such different bodies of law, which have evolved around completely different problem areas: on the one hand, the need, derived from

¹ The view that international humanitarian law is *lex specialis* in relation to human rights is based on some sentences in the *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, ICJ Reports 1996, 66, 78, para. 25, and *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinions, ICJ Reports 2002, 136, 178, para. 106. If *lex specialis* is understood in its usual meaning that it includes the application of other norms, the statement of the court is contradictory. It is therefore rightly criticized in legal doctrine, see *inter alia* M. Milanovic, 'The Lost Origins of Lex Specialis', in J.D. Ohlin (ed.), *Theoretical Boundaries of Armed Conflict and Human and Human Rights* (2016) 78-117; R. Kolb, 'Human Rights and Humanitarian Law', in R. Wolfrum (ed.), *Max Planck Encyclopedia of Public International Law*, available at www.mpepil.com (last visited 5 January 2020), in particular sec. 44. See also the relevant remark in this issue by M. Jacobsson & M. Lehto, 'Protection of the Environment in Relation to Armed Conflicts – An Overview of the International Law Commission's Ongoing Work', 10 *Goettingen Journal of International Law* (2020) 1, 31.

different reasons, to protect the natural environment and, on the other hand, the need to regulate the relationship between parties to an armed conflict, which involves a need to minimize damage for the sake of avoiding unnecessary losses and suffering, and the humanitarian need to protect victims.

A typical problem concerning the relationship between these two areas of international law is that damage which is considered acceptable under the law of armed conflict (at least according to a certain interpretation) would not be acceptable under environmental law. The major freedom to cause damage possibly granted by international humanitarian law is not the last word. International humanitarian law is not necessarily *lex specialis*,² at least not in the sense that, where causing damage would appear to be lawful under the law of armed conflict, international environmental law could not render it unlawful.

The validity of multilateral environmental agreements (MEAs), as well as the application of international customary environmental law, is thus not excluded by the mere fact that a State (a party to a MEA) is involved in an armed conflict. This is obvious in the relationship between a party to an international conflict and States not parties to that conflict, as their relationship is governed by the law of neutrality. One of the basic principles of the law of neutrality is that the relations between neutral States and States parties to an armed conflict are not affected or modified by the existence of that conflict,³ except for certain specific modification provided for by the law of neutrality, such as trade and maritime commerce. In this sense, the law applicable between neutral and belligerent States is that which governs normal peaceful relations.

The same reasoning applies in the relation between a State on whose territory a non-international armed conflict takes place and any other State. The internal situation of a State, including the existence of an armed conflict taking place on its territory, does not affect its relation with third States, subject to such exceptions as may be derived from a state of necessity.

But also between the parties to an armed conflict, the existence of this conflict neither excludes the continued applicability of environmental agreements

² M. Bothe *et al.*, 'International Law Protecting the Environment During Armed Conflict: Gaps and Opportunities', 92 *International Review of the Red Cross* (2010) 879, 569, 579-581 [Bothe *et al.*, *International Law Protecting the Environment during Armed Conflict*]; see also J. Wyatt, 'Law-making in the Intersection of International Environmental Law, Humanitarian and Criminal Law: the Issue of Damage to the Environment in International Armed Conflict', 92 *International Review of the Red Cross* (2010) 879, 593, 636-639.

³ M. Bothe, 'The Law of Neutrality', in D. Fleck (ed.), *The Handbook of International Humanitarian Law* (2013) 3rd., 549, 560.

nor that of general international environmental law. The International Law Commission (ILC) dealt with this problem in its Articles on the effects of armed conflicts on treaties.⁴ As a general principle, the Articles state (Art. 3):

“The existence of an armed conflict does not *ipso facto* terminate or suspend the operation of treaties: as between the States parties to the conflict [...]”

Whether a treaty is terminated by the armed conflict is a matter of treaty interpretation (Art. 5). Certain factors indicate whether a treaty is susceptible to termination. They include (Art. 6[a]):

“[...]the nature of the treaty, in particular its subject-matter, its object and purpose, its content [...]”

Art. 7 adds an indicative list of subject-matters “[...]which involves an implication[...]” that the treaty continues in operation. This list (Annex) includes

“[...] (c) Multilateral law-making treaties; [...] (g) Treaties relating to the international protection of the environment; (h) Treaties relating to international watercourses [...]”.

The coexistence of the law of armed conflict and other fields of international law which continue to be applicable during an armed conflict was also recognized by the ILC at the very beginning of its current work on the subject.⁵ This is reflected in Principle 3 of the version of the Principles adopted by the ILC in 2019 (hereinafter ILC Principles).⁶

“States shall, pursuant to their obligations under international law, take effective legislative, administrative, judicial and other measures to enhance the protection of the environment in relation to armed conflict.”

This text presupposes the continued application of fields of international law other than the law of armed conflict during such conflicts.⁷

Thus, international environmental law matters during armed conflicts. International humanitarian law does not necessarily constitute *lex specialis* in

⁴ *Report of the International Law Commission on the Work of its Sixty-third Session*, UN Doc A/66/10, 26 April - 3 June and 4 July - 12 August 2011, 175-217.; see also C. Droege & M.-L. Tougas, ‘The Protection of the Natural Environment in Armed Conflict – Existing Rules and the Need for Further Legal Protection’, in R. Rayfuse (ed.), *War and the Environment. New Approaches to Protecting the Environment in Relation to Armed Conflict* (2014), 11, 37-42 [Droege & Tougas, *The Protection of the Natural Environment in Armed Conflict*].

⁵ This issue, M. Jacobsson & M. Lehto, ‘Protection of the Environment in Relation to Armed Conflicts – An Overview of the International Law Commission’s Ongoing Work’, 10 *Goettingen Journal of International Law* (2020) 1, 29.

⁶ *Report of the International Law Commission on the Work of its Seventy-first Session*, UN Doc. A/74/10, 29 April - 7 June and 8 July - 9 August 2019, 211-215.

⁷ *Ibid.*, 216.

the sense that it excludes the application of international environmental law.⁸ Details as to their exact relationship remain to be analyzed.

Three principles deserve particular attention in this connection: as to the principle of prevention and the precautionary principle in general international environmental law, and as to the principle of precaution in international humanitarian law. The distinction between these is somewhat blurred by the fact that the terms *prevention* and *precaution* are used in different contexts in environmental law (both national and international) and in the law of armed conflict. The duty, imposed by international humanitarian law, to take precautions has, as will be shown, much in common with, but must be distinguished from, the precautionary approach of general environmental law. This paper will show what the three principles mean and how they relate to each other. It endeavors to answer the question as to what extent the rules based on these concepts are effective in restraining environmental damage caused by military activities.

B. Environmental Law

In the context of environmental law, *prevention* means that measures must be taken to prevent environmental damage before it occurs, in contradistinction to repression or redress. States have a *duty of due diligence* to prevent environmental damages being caused outside their territory by activities taking place inside their territory.⁹ The principle is formulated in Principle 21 of the Stockholm Declaration on the Environment:

“States have [...] the responsibility to ensure 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.”¹⁰

This principle involves three threshold questions: first, the level of damage to be expected and to be prevented and, second, the required probability of such damage. The third question, related to the first two, is what level of diligence is *due*. It is similar to the problem of degrees of culpability known from criminal or tort law.

The leading case stating the principle is the *Trail Smelter* Arbitral Award, which states that there is no

⁸ See the sources quoted *supra* note 1.

⁹ A. Proelß, ‘Prinzipien des Internationalen Umweltrechts’, in A. Proelß (ed.), *Internationales Umweltrecht* (2017) 69, 77-84 [Proelß, Prinzipien des internationalen Umweltrechts].

¹⁰ Declaration on the Environment, *Report on the United Nations Conference on the Human Environment*, 16 June 1972, U.N. Doc A/CONF.48/4, at 5 [Stockholm Declaration].

“[...] right to use or to permit the use of its territory in such a manner as to cause injury [...] when the case is of serious consequence and the injury is established by clear and convincing evidence”.¹¹

The damage to be expected must be serious (first threshold) and certain (second threshold, supported by “[...] clear and convincing evidence”). Taking into account modern standards of environmental law, this is less than satisfactory. However, in the *Pulp Mills* case between Argentina and Uruguay, the International Court of Justice (ICJ) essentially kept to this very standard, even if the first threshold was lowered to ‘significant’. The Court held that the effect of the mill on biodiversity and the effects of the air pollution caused by it on water quality were not proven,¹² and therefore there was¹³ “[...] no conclusive evidence [...] that Uruguay has not acted with the requisite degree of due diligence [...]”

The *precautionary principle* sets a more demanding standard for preventive measures to be taken, namely that measures have to be taken in case of a risk of damage which cannot (yet?) be predicted with certainty, in particular because of a lack of knowledge. The principle requires, in other words, environmental decision-makers to err on the side of caution. An additional reason for restraining or prohibiting certain activities, even if it cannot be predicted with certainty that they will cause significant environmental damage, is the need to leave room for future activities. This is an important element of the duty to protect the right of future generations.¹⁴ Thus, the precautionary principle is a crucial tool to implement sustainable development.

The principle has been included in a number of MEAs, yet in many different versions. They derive from, and develop, the traditional due diligence obligation formulated in the *Trail Smelter* award. An example of a somewhat cautious application of the new version of the principle by a court is the *Southern Bluefin Tuna* decision of the International Tribunal for the Law of the Sea relating to the sustainable exploitation of the Southern Bluefin Tuna stocks.¹⁵ The Tribunal addresses the problem of scientific uncertainty:

¹¹ *Trail Smelter Case (United States v. Canada)*, Award of Arbitral Tribunal, 11 March 1941, 3 Reports of International Arbitral Awards (2006), 1905, 1965.

¹² *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, ICJ Reports 2010, 28, 90, para. 262 [Pulp Mills Case].

¹³ *Ibid.*, para. 265.

¹⁴ M. Bothe, ‘Environment, Development, Resources’, 318 Recueil des Cours (2005), 333, 488.

¹⁵ *Southern Bluefin Tuna Cases (Australia v. Japan; New Zealand v. Japan)*, Judgment, 27 August 1999, ITLOS Case Nos. 3 & 4, paras 77 - 80, available at <https://www.itlos.org/>

“79. Considering that there is *scientific uncertainty* regarding measures to be taken to conserve the stock of southern bluefin tuna and that there is no agreement among the parties as to whether the conservation measures taken so far have led to the improvement in the stock of southern bluefin tuna;

80. Considering that, although the Tribunal cannot conclusively assess the scientific evidence [...] , it finds that measures should be taken as a matter of urgency ... to avert further deterioration of the southern bluefin tuna stock;”

This is the essence of the precautionary principle. Environmentally relevant decision-makers may err, but they may only err on the safe side. Scientific uncertainty is no excuse for disregarding the possibility of environmental damage.

By insisting on the requirement of “[...] conclusive evidence [...]” of damage, the ICJ, in its *Pulp Mills* decision, implicitly rejected the application of the precautionary principle and thus did nothing less than neglecting a fundamental value of current international law, namely the principle of sustainable development. For related reasons, the Court is rightly and heavily criticized by the Joint Dissenting Opinion of Judges Simma and Al Kwasaneh: the Court, as the two Judges claim, failed to adopt a forward-looking attitude where the scientific community is divided on the requirements of the precautionary principle.¹⁶

C. Law of Armed Conflict

The term *precautions* appears in two provisions of Protocol I Additional to the Geneva Conventions (AP I),¹⁷ namely Art. 57 (measures to be taken by an attacker) and 58 (measures to be taken by a State which may become the target of an attack).¹⁸

fileadmin/itlos/documents/cases/case_no_3_4/published/C34-O-27_aug_99.pdf (last visited 24 March 2020) (emphasis added).

¹⁶ *Pulp Mills Case*, *supra* note 12, Joint Dissenting Opinion of Judges Simma and Al Kwasaneh, 117-119, paras 18-25.

¹⁷ Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 1125 UNTS 3.

¹⁸ See W. A. Solf, ‘Chapter IV: Precautionary Measures’, in M. Bothe, K.J. Partsch & W.A. Solf, *New Rules for Victims of Armed Conflicts*, 2nd ed. (2013), 400, 400-417; Droegge &

“Art. 57

Precautions in attack

(1) In the conduct of military operations, *constant care shall be taken* to spare the civilian population, civilians and civilian objects.

(2) With respect to attacks, the following *precautions* shall be taken:

(a) those who plan or decide upon an attack shall

(i) do everything feasible to verify that the objectives to be attacked are neither civilians nor civilian objects [...]

(ii) take all feasible *precautions* in the choice of means and methods of attack with a view to avoiding, and in any case minimizing, incidental loss of civilian life, injury to civilians and damage to civilian objects; [...]

Art. 58

Precautions against the effects of attacks

The Parties to the conflict shall, to the maximum extent feasible:

[...] endeavor to remove the civilian population ... from the vicinity of military objectives;

avoid locating military objectives within or near densely populated areas;

take the other necessary *precautions* to protect the civilian population [...] against the dangers resulting from military operations.”

The *precautions* to be taken by the attacker relate to both the principle of distinction (if an element of the environment is a civilian object) and to the principle of proportionality regarding collateral damage.¹⁹ They must be “[...] feasible [...]” or “[...] reasonable [...]” for the purpose of avoiding or minimizing expected civilian damage. In this sense, the duty resembles the *due diligence* principle. The attacking commander must evaluate the possibility of damage to civilians and civilian objects and must assess its degree and probability. The precautions to be taken, for the same purpose, by the target State “[...] to the maximum extent feasible [...]” are imposed upon that State in its own interest.

Tougas, *supra* note 4, 24-26 (emphasis added).

¹⁹ Droege & Tougas, *supra* note 4, 24; M. Bothe, ‘The Ethics, Principles and Objectives of Protection of the Environments in Times of Armed Conflict’, in R. Rayfuse (ed.), *War and the Environment. New Approaches to Protecting the Environment in Relation to Armed Conflict* (2014), 91, 98, 101 [Bothe, The Ethics, Principles and Objectives of Protection of the Environments in Times of Armed Conflict].

Both types of duties are obligations of conduct, not of result. They apply to environmental damage to the extent that elements of the environment constitute civilian objects. The duty to take precautions means that an expected, i.e. foreseeable civilian damage must be avoided. This implies threshold questions similar to those already discussed for peacetime environmental law, namely the degree of certainty of damage which would occur if the precautions were not taken, and the severity of the damage to be avoided.

Related to the precautions required by Art. 58 are rules which prohibit attacks on certain defined areas, namely “non-defended localities” (Art. 59 AP I) and “demilitarized zones” (Art. 60 AP I). Both can be characterized as measures to be taken by a possible target State to avoid damage to these areas or to persons who are in these areas. If certain requirements are met, the non-defended locality may not be attacked, and military operations may not be extended to demilitarized zones. A non-defended locality may be established pursuant to a unilateral declaration or by agreement between the parties, whereas the demilitarized zone may only be established by agreement between the parties. Similar concepts may be used to protect valuable elements of the environment.²⁰

The specific provision on environmental damage (Art. 55 AP I) does not use the term precaution, but prescribes that “[c]are shall be taken [...]”.²¹ Interpreted in the light of the second sentence of that article and Art. 35, the essential prescription of Art. 55 is a prohibition of the said damage. The term “care” is also used in Art. 57 para. 1. The “precautions” prescribed by Art. 57 para. 2 are thus a means to fulfill the duty to take care. The damage to be avoided according to Art. 55, i.e. the second threshold question just mentioned, is too restrictively defined: it is only prohibited if it is (cumulatively) “[...] widespread, long-term, and severe [...]”. There is general agreement that this is a far cry from an adequate standard of environmental protection.²²

The customary law of armed conflict has, however, added an additional principle to the rules on environmental protection, namely the *due regard* principle. Methods and means of warfare must be employed with due regard to

²⁰ See the statement of the President of the International Committee of the Red Cross, J. Kellenberger, ‘Strengthening Legal Protection for Victims of Armed Conflicts: The ICRC Study on the Current State of International Humanitarian Law’, 92 International Review of the Red Cross (2010) 879, 799, 803; see also Droege & Tougas, *supra* note 4, 34, 35.

²¹ See K. Hulme, ‘Taking Care to Protect the Environment Against Damage: A Meaningless Obligation?’, 92 International Review of the Red Cross (2010) 879, 675, 678-682, 688-690.

²² Bothe *et al.*, ‘International Law Protecting the Environment During Armed Conflict’, *supra* note 2, 576; Droege & Tougas, *supra* note 4, 225.

the protection and preservation of the natural environment. This was, for the first time, formulated as a rule of armed conflict law in the *San Remo Manual on the Law of Naval Warfare*,²³ inspired by the frequent use of the term in the 1982 Law of the Sea Convention,²⁴ and then recognized in the International Committee of the Red Cross (ICRC) Customary Humanitarian Law Study (rule 44),²⁵ later also in the *Air and Missile Warfare Manual*.²⁶ This principle implies a question of the standard similar to the due diligence principle, namely what degree of regard is due, or what exactly is the threshold of the due regard obligation. This is a question the answer to which remains to be concretized in practice.²⁷ This answer will determine what is the real difference between the treaty obligation to *take care* and the customary law obligation of *due regard*. State practice shows a certain inclination to accept the threshold contained in Arts. 35 and 55 AP I.²⁸

A particular field of the customary law of armed conflict is the law of occupation, which is only in part regulated by Geneva Convention IV but constitutes to a larger extent customary law formulated in the Hague Regulations.²⁹ Art. 55 of the Regulations as developed by State practice constitutes a crucial rule obliging the occupying power to respect the requirements of sustainable

²³ L. Doswald-Beck (ed.), *San Remo Manual on International Law Applicable to Armed Conflict at Sea* (1995), 14, 15, paras 34, 35, 44.

²⁴ See, indicatively, *United Nations Convention on the Law of the Sea*, 10 December 1982, Arts. 56-60, 1833 UNTS 397, 418-420.

²⁵ J.-M. Henckaerts & L. Doswald-Beck, 'Due Regard for the Natural Environment in Military Operations (Practice Relating to Rule 44)', in J.-M. Henckaerts & L. Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol II. (2005), 860; available at <https://www.icrc.org/en/doc/assets/files/other/customary-international-humanitarian-law-ii-icrc-eng.pdf> (last visited 20 January 2020).

²⁶ Program on Humanitarian Policy and Conflict Research at Harvard University (ed.), *Manual on International Law Applicable to Air and Missile Warfare* (2009), 32, Rule 89.

²⁷ See D. Fleck, 'The Protection of the Environment in Armed Conflict: Legal Obligations in the Absence of Specific Rules', 82 *Nordic Journal of International Law* (2013) 1, 7, 12-15; D. Fleck, 'The Protection of the Environment in Armed Conflict: Legal Obligations in the Absence of Specific Rules', in R. Rayfuse (ed.), *War and the Environment. New Approaches to Protecting the Environment in Relation to Armed Conflict* (2014), 45, 50; Bothe, 'The Ethics, Principles and Objectives of Protection of the Environments in Times of Armed Conflict', *supra* note 19, 105.

²⁸ Hulme, *supra* note 21, 684-687.

²⁹ H.-P. Gasser & K. Dörmann, 'The Protection of the Civilian Population', in D. Fleck (ed.), *The Handbook of International Humanitarian Law* 3rd ed. (2013), 231, 264-307.

development.³⁰ This is recognized by Principle 21 of the ILC Principles³¹ relating to the sustainable use of natural resources in situations of occupation:

“To the extent that an Occupying Power is permitted to administer and use the natural resources in an occupied territory, for the benefit of the population of the occupied territory and for other purposes under the law of armed conflict, it shall do so in a way that *ensures their sustainable use and minimizes environmental harm*.”³²

D. Relationship Between the Principles of Peacetime Environmental Law and the Relevant Rules of the Law of Armed Conflict

On this basis, a few remarks on the relationship between the obligation of due diligence in general environmental law and the rules on protection in times of armed conflict are possible.

The duty of a potential target State to take precautions (Art. 58 AP I) amounts to the application of the *principle of prevention* in time of peace. It requires States which may become target States to take preventive measures designed to reduce the risk of environmental damage caused by war. The principle of prevention relates to all causes of environmental damage, be it caused by a relevant actor's own activities, a third party, or natural events not attributable to any actor.

First, planning decisions must therefore be taken in a way which enables the State to fulfill the duties to take precautions in time of armed conflict. Important military installations may not be placed close to valuable or especially vulnerable civilian objects. Second, the regime of environmentally sensitive areas (protected areas) must be shaped in a way which would allow for establishing them as non-defended areas or demilitarized zones in times of armed conflict. This would keep the deleterious effects of hostilities away from environmentally sensitive areas. It is postulated as a development of international humanitarian law that procedures are created to establish environmentally vulnerable areas as

³⁰ M. Bothe, ‘The Administration of Occupied Territory’, in A. Clapham, P. Gaeta & M. Sassòli (eds), *The 1949 Geneva Conventions* (2015), 1455, 1477.

³¹ See *Report of the International Law Commission on the Work of its Seventy-First session*, *supra* note 6.

³² (Emphasis added).

specially protected zones in times of armed conflict.³³ This has been recognized by the ILC Principles:³⁴

“Principle 4, Designation of protected zones:
States should designate, by agreement or otherwise, areas of major environmental and cultural importance as protected zones.”

“Principle 17, Protected zones:
An area of major environmental and cultural importance designated by agreement as a protected zone shall be protected against any attack, as long as it does not contain a military objective.”

Another question is the interpretation of the *due regard principle* in the law of armed conflict. What is the level and probability of damage to which due regard must be paid? It is submitted that this principle must be interpreted in the light of the *precautionary principle* of peacetime environmental law. Due regard requires the military decision-maker to take into account future environmental damage which may be caused but is not certain. The ICRC Customary Law Study suggests that this is a rule of customary law. To quote the commentary to rule 44, already mentioned:³⁵

“There is practice to the effect that lack of scientific certainty as to the effects on the environment of certain military operations does not absolve parties to a conflict from taking proper precautionary measures to prevent undue damage. As the potential effect on the environment will need to be assessed during the planning of an attack, the fact that there is bound to be some uncertainty as to its full impact on the environment means that the *precautionary principle* is of particular relevance to such an attack. The precautionary principle in environmental law has been gaining increasing recognition. There is, furthermore, practice to the effect that this environmental law principle applies to armed conflict.”

³³ See the statement of the President of the International Committee of the Red Cross, J. Kellenberger, *supra* note 20, 803.

³⁴ See *Report of the International Law Commission on the Work of its Seventy-First session*, *supra* note 6.

³⁵ Henckaerts & Doswald-Beck, ‘Due Regard for the Natural Environment in Military Operations’, *supra* note 25 (Emphasis added).

It has previously been stated here that it is one of the functions of the precautionary principle to avoid a situation where there is no room for future use of the environment, where the latter, either as a resource or as a basis for the carrying capacity of the Earth, is exhausted. Thus, the precautionary principle is a decisive tool for preserving the rights of future generations and to heed the requirements of sustainable development. Military activities are not exempt from the ensuing duties. This is a constitutional principle of current international law.

E. Conclusion

The problem discussed in this paper is an example of a general structural problem of current international law. The international legal system is, on the one hand, characterized by fragmentation,³⁶ and on the other hand by an adherence to overarching values. Different areas of the law – humanitarian law, environmental law, trade law, and even particular treaties – live a life of their own. This not only characterizes the law-making fora; these *regimes* entertain specific and specialized epistemic communities of their own which accompany and determine their functioning. This phenomenon is a necessary condition of the functioning of international law. The ensuing specialization creates a commonality of interests between relevant actors, which most often is the driving force of legal development and proper application of the law.

The fragmentation is, on the other hand, mitigated or counterbalanced by the existence of overarching values. The interdependence between the fragmented parts or areas of international law cannot be denied. A comprehensive look at the problems raised within the international community is necessary. This is why a trend towards avoiding conflicts, towards mutual recognition or tolerance, towards rapprochement between different areas of international law or between different regimes, can be observed.³⁷ As the European Court of Human Rights put it, there is a “[...] spirit of systemic harmonization [...]”.³⁸ This is based on the fact that the international community is characterized by an adherence to common values, a trend for which the

³⁶ J. Pauwelyn, ‘Fragmentation of International Law’, in Wolfrum (ed.), *supra* note 1; A. Peters, ‘The Refinement of International Law: From Fragmentation to Regime Interaction and Politization’, 15 *International Journal of Constitutional Law* (2017) 3, 671, 672-682.

³⁷ Peters, *supra* note 36, 685-687.

³⁸ *Al-Dulimi & Montana Management Inc. v. Switzerland*, ECtHR Application No. 5809/082016, Judgment of 21 June 2016, 67, para. 140.

term *constitutionalization* has been coined.³⁹ By this term, the structure of the international system is compared to the structure of national legal systems, which are governed by a *constitution*. The constitution determines the functioning of the State and prevails over rules of an inferior rank. Although this comparison may appear somewhat audacious, it nevertheless reflects the reality of current international discourses. Sustainable development and intergenerational equity are relevant for human activities in all areas. They apply in peace and war. They constitute most prominent constitutional and overarching values of the international order.⁴⁰ They must also determine the behavior of parties to an armed conflict where the protection of the environment is at stake.

³⁹ T. Klein, *Die Konstitutionalisierung im Völkerrecht: Konstruktion und Elemente Einer Idealistischen Völkerrechtslehre* (2012), on the possible transfer of the notion of *constitution* to the international legal order at 117-119 (English summary at 707), on international law as an order of values 18-27 (English summary at 705); See also M. Hakimi, 'Constructing an International Community', 111 *American Journal of International Law* (2017) 2, 317, 333-356.

⁴⁰ Proelß, *supra* note 9, 97-102.