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FACULTY OF LAW AND CRIMINOLOGY

Academic year 2025 - 2026

The symbolic legal protection of the environment in armed conflict

Form, function and reform of Articles 35(3) and 55(1) of Additional Protocol I

PROMOTOR: PROF. DR. G. HERNÁNDEZ

MASTER'S THESIS SUBMITTED BY

SUPERVISOR: DRS. K. BRACKENIERS

SIMON STERCK

CORRECTOR: PROF. DR. C. HIESSL

AS PART OF THE FINAL EXAMINATION FOR
THE DEGREE OF MASTER OF LAWS

TOTAL WORD COUNT: 17,116



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“There was (and is) a tension between the military interest of winning a war and the environmental interest of preserving the planet for future generations.”²

² BOTHE M., 'Protection of the environment in relation to armed conflict—50 years of effort, and no end in sight', *Environment and Security* 2023/1-2, (24) 24, DOI: 10.1177/27538796231195601.

ABSTRACT

Armed conflict harms more than people and infrastructure; it also damages the natural environment, as the herbicide campaigns of the Vietnam War, the burning oil wells of the 1991 Gulf War, and the ongoing conflicts in Ukraine and Gaza illustrate. The most specific treaty-based protection against such harm is found in Articles 35(3) and 55(1) of Additional Protocol I, which prohibit methods or means of warfare expected to cause “widespread, long-term and severe” damage to the natural environment. Yet in almost five decades, this triple threshold has never been authoritatively found to have been crossed in any armed conflict.

This persistent non-application has been widely criticized in legal scholarship and has prompted a wide range of reform proposals. The debate, however, tends to move from critique to reform without first asking what kind of norm the threshold actually is. This dissertation addresses that gap by examining how the non-application can be understood in light of the legal form and function of the provisions themselves.

It applies two frameworks not previously applied to these provisions. The legalization framework of Abbott et al. describes legal form along the dimensions of obligation, precision and delegation, and Van Klink’s framework of symbolic legislation assesses the function of a norm against six criteria. Drawing on the text of AP I, case law, the negotiation records, military manuals and legal scholarship, the dissertation moves from form, to function, to reform.

The provisions display a Type V legalization profile: obligation is high, precision is low, and delegation is low. Four of Van Klink’s six criteria are strongly engaged (discrepancy, vagueness, crisis and conflict of interest). This supports a diagnosis of the provisions as symbolic legislation, operating as compromise, illusionary and status legislation at once.

The dissertation concludes that the Type V profile sustains this symbolic function, and that the non-application is consistent with that function rather than a mere drafting failure. It therefore recommends reading reform efforts as interventions on the legalization dimensions that sustain the symbolic function, illustrated by re-reading existing proposals along the three dimensions.

Future research could extend this illustrative reading into a full classification of the reform debate, evaluate which configuration of the dimensions would move the provisions beyond their symbolic function, and apply the combined frameworks to other norms of international law.

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Simon Sterck

June 8, 2026

49 years after the adoption of AP I

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LIST OF ABBREVIATIONS

AP I	Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)
AP II	Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II)
CDDH	Diplomatic Conference on the Reaffirmation and Development of International Humanitarian Law Applicable in Armed Conflicts (1974–1977)
ENMOD	Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques
IAC	International Armed Conflict
ICC	International Criminal Court
ICJ	International Court of Justice
ICRC	International Committee of the Red Cross
ICTY	International Criminal Tribunal for the former Yugoslavia
IHFFC	International Humanitarian Fact-Finding Commission
IHL	International Humanitarian Law
ILC	International Law Commission
LOAC	Law of Armed Conflict
NATO	North Atlantic Treaty Organization
NIAC	Non-International Armed Conflict
PERAC	Protection of the Environment in Relation to Armed Conflicts
UN	United Nations
UNEP	United Nations Environment Programme
UK	United Kingdom
US	United States of America
USSR	Union of Soviet Socialist Republics
VCLT	Vienna Convention on the Law of Treaties
WTO	World Trade Organization

CHAPTER 1 INTRODUCTION

SECTION 1.1 ENVIRONMENTAL HARM IN ARMED CONFLICT

1. **ANOTHER CASUALTY OF ARMED CONFLICT** – Armed conflict harms more than people and infrastructure; it also damages the natural environment.³ Military operations can damage ecosystems, affect natural resources, and contaminate water, air, and soil.⁴ As environmental damage can directly affect the health and survival of populations, it is more than an ecological concern.⁵

2. **RECURRING FEATURE OF MODERN WARFARE** – Environmental harm is not an exceptional consequence of armed conflict.⁶ The use of anti-plant agents under Operation Ranch Hand during the Vietnam War and the burning oil wells during the 1991 Gulf War are prominent examples.⁷ In the latter conflict, retreating Iraqi soldiers set fire to more than 600 oil wells

³ BOTHE M., BRUCH C., DIAMOND J. et al., 'International law protecting the environment during armed conflict: gaps and opportunities', *International review of the Red Cross* 2010/879, (569) 570, DOI: 10.1017/S1816383110000597; DROEGE C. and TOUGAS M.-L., 'The Protection of the Natural Environment in Armed Conflict - Existing Rules and Need for Further Legal Protection', *Nordic Journal of International Law* 2013/1, (21) 21, DOI: 10.1163/15718107-08201003.

⁴ DROEGE C. and TOUGAS M.-L., 'The Protection of the Natural Environment in Armed Conflict - Existing Rules and Need for Further Legal Protection', *Nordic Journal of International Law* 2013/1, (21) 22, DOI: 10.1163/15718107-08201003.

⁵ AL-KHALAF B., 'Pilot study: The onset of asthma among the Kuwaiti population during the burning of oil wells after the Gulf War', *Environment International* 1998/1, (221) 221, DOI: 10.1016/S0160-4120(97)00139-6; DIENELT A., *Armed Conflicts and the Environment*, Springer International Publishing, 2022, 48, DOI: 10.1007/978-3-030-99339-9; STEFANIK K., 'The Environment and Armed Conflict: Employing General Principles to Protect the Environment' in STAHN C., IVERSON J. and EASTERDAY J.S. (eds.), *Environmental Protection and Transitions from Conflict to Peace*, Oxford University Press, 2017, (93) 113, DOI: 10.1093/oso/9780198784630.001.0001.

⁶ HULME K., *War Torn Environment: Interpreting the Legal Threshold*, Brill, 2004, 287, <https://brill.com/view/title/11197>; STEFANIK K., 'The Environment and Armed Conflict: Employing General Principles to Protect the Environment' in STAHN C., IVERSON J. and EASTERDAY J.S. (eds.), *Environmental Protection and Transitions from Conflict to Peace*, Oxford University Press, 2017, (93) 118, DOI: 10.1093/oso/9780198784630.001.0001.

⁷ AL-DAMKHI A.M., 'Kuwait's oil well fires, 1991: environmental crime and war', *International Journal of Environmental Studies* 2007/1, (31) 33-38, DOI: 10.1080/00207230601125036; DROEGE C. and TOUGAS M.-L., 'The Protection of the Natural Environment in Armed Conflict - Existing Rules and Need for Further Legal Protection', *Nordic Journal of International Law* 2013/1, (21) 32, DOI: 10.1163/15718107-08201003; DIENELT A., *Armed Conflicts and the Environment*, Springer International Publishing, 2022, 45, DOI: 10.1007/978-3-030-99339-9; KOPPE E.V., 'The Principle of Ambiguity and the Prohibition against Excessive Collateral Damage to the Environment during Armed Conflict', *Nordic Journal of International Law* 2013/1, (53) 54, DOI: 10.1163/15718107-08201004; OKOWA P., 'Environmental justice in situations of armed conflict' in EBBESSON J. and OKOWA P. (eds.), *Environmental Law and Justice in Context*, Cambridge University Press, 2009, (231) 234, DOI: 10.1017/CBO9780511576027.013; WIRTHOVÁ L., 'From Kuwait to Ukraine: Conflict's Implications on the Natural Environment and the Responses of International Humanitarian Law', *International and*

across Kuwait.⁸ For nearly nine months, thick black smoke covered the sky, while toxic pollutants damaged desert soil and extensively contaminated groundwater.⁹

3. **RECENT CONFLICTS** - Recent conflicts have brought the issue into renewed focus. The Russo-Ukrainian war has raised international concerns about air, water, and soil pollution.¹⁰ The destruction of the Kakhovka dam, which contaminated freshwater and posed a threat to marine ecosystems, illustrates the potentially long-term environmental consequences of the conflict.¹¹ In Gaza, the United Nations Environment Programme has documented damage to water and waste infrastructure and the release of hazardous substances in soil and air.¹²

4. **A LEGAL CONCERN** – The occurrence of serious environmental damage in armed conflict raises the question of how the rules of international humanitarian law for the protection of the natural environment function. The following section therefore turns to the environmental provisions of Additional Protocol I and the threshold on which their application depends.

Comparative Law Review 2023/1, (117) 120, DOI: 10.2478/iclr-2023-0006; VÖNEKY S., 'A New Shield for the Environment: Peacetime Treaties as Legal Restraints of Wartime Damage', *Review of European Community & international environmental law* 2000/1, (20) 20, DOI: 10.1111/1467-9388.00229.

⁸ AL-KHALAF B., 'Pilot study: The onset of asthma among the Kuwaiti population during the burning of oil wells after the Gulf War', *Environment International* 1998/1, (221) 221, DOI: 10.1016/S0160-4120(97)00139-6; PAYNE C.R., 'Legal liability for environmental damage: The United Nations Compensation Commission and the 1990–1991 Gulf War' in BRUCH C., MUFFETT C. and NICHOLS S.S. (eds.), *Governance, Natural Resources, and Post-Conflict Peacebuilding*, Routledge, 2016, (719) 722, DOI: 10.4324/9780203109793-33.

⁹ AL-KHALAF B., 'Pilot study: The onset of asthma among the Kuwaiti population during the burning of oil wells after the Gulf War', *Environment International* 1998/1, (221) 221–222, DOI: 10.1016/S0160-4120(97)00139-6; OKOWA P., 'Environmental justice in situations of armed conflict' in EBBESSON J. and OKOWA P. (eds.), *Environmental Law and Justice in Context*, Cambridge University Press, 2009, (231) 234, DOI: 10.1017/CBO9780511576027.013.

¹⁰ BOTHE M., 'Protection of the environment in relation to armed conflict—50 years of effort, and no end in sight', *Environment and Security* 2023/1-2, (24) 25, DOI: 10.1177/27538796231195601; LECLERC G., 'Russia's war on Ukraine: High environmental toll', *European Parliamentary Research Service* 2023, PE 751.427, 1, [https://www.europarl.europa.eu/RegData/etudes/ATAG/2023/751427/EPRS_ATA\(2023\)751427_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/ATAG/2023/751427/EPRS_ATA(2023)751427_EN.pdf) (accessed on 7 June 2026); WIRTHOVÁ L., 'From Kuwait to Ukraine: Conflict's Implications on the Natural Environment and the Responses of International Humanitarian Law', *International and Comparative Law Review* 2023/1, (117) 120–122, DOI: 10.2478/iclr-2023-0006.

¹¹ LECLERC G., 'Russia's war on Ukraine: High environmental toll', *European Parliamentary Research Service* 2023, PE 751.427, 1, [https://www.europarl.europa.eu/RegData/etudes/ATAG/2023/751427/EPRS_ATA\(2023\)751427_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/ATAG/2023/751427/EPRS_ATA(2023)751427_EN.pdf) (accessed on 7 June 2026); SHUMILOVA O., SUKHODOLOV A., OSADCHA N. et al., 'Environmental effects of the Kakhovka Dam destruction by warfare in Ukraine', *Science* 2025/6739, (1181) 1181, DOI: 10.1126/science.adn8655.

¹² HASSOUN A., AL-MUHANNADI K., HADDARAH A. et al., 'Environmental Consequences of Conflict: Lessons from the Recent War on Gaza' in HASSOUN A. (ed.), *War on Gaza, Consequences on Sustainability and Global Security*, Springer, 2025, (173) 177, DOI: 10.1007/978-3-031-88500-6_11; UNITED NATIONS ENVIRONMENTAL PROGRAM, *Environmental impact of the conflict in Gaza: preliminary assessment of environmental impacts*, UNEP, 2024, 37–40, wedocs.unep.org/20.500.11822/45739 (accessed on 7 June 2026); DIENELT A., *Armed Conflicts and the Environment*, Springer International Publishing, 2022, 48, DOI: 10.1007/978-3-030-99339-9.

SECTION 1.2 THE TRIPLE THRESHOLD OF ADDITIONAL PROTOCOL I

5. **ADDITIONAL PROTOCOL I** – The most specific treaty-based protection for the natural environment in international humanitarian law (IHL) is found in Articles 35(3) and 55(1) of Additional Protocol I to the Geneva Conventions.¹³ AP I was adopted on June 8, 1977, in the aftermath of the Vietnam War.¹⁴ Article 35(3) AP I prohibits the employment of “methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment”.¹⁵ Article 55(1) AP I similarly requires that care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage, and also refers to methods or means of warfare intended or expected to cause such damage and thereby to “prejudice the health or survival of the population.”¹⁶

6. **TRIPLE THRESHOLD** – At first sight, these two provisions seem to establish a robust form of legal protection.¹⁷ The provisions are formulated as prohibitions, they are binding on the 175 ratifying parties to AP I, and as their character is absolute, unlike most IHL rules, they are not subject to an exception of military necessity and are not subject to a proportionality test.¹⁸ However, both articles depend on the satisfaction of a cumulative threshold, requiring

¹³ DIENELT A., *Armed Conflicts and the Environment*, Springer International Publishing, 2022, 42, DOI: 10.1007/978-3-030-99339-9.

¹⁴ DIENELT A., *Armed Conflicts and the Environment*, Springer International Publishing, 2022, 42, DOI: 10.1007/978-3-030-99339-9; HENCKAERTS J.-M., 'History and Sources' in SAUL B. and AKANDE D. (eds.), *The Oxford Guide to International Humanitarian Law*, Oxford University Press, 2020, 6, DOI: 10.1093/law/9780198855309.003.0001.

¹⁵ Art. 35(3) Protocol additional to the Geneva Conventions of 12 August 1949, and relating to the protection of victims of international armed conflicts (Protocol I), *UNTS* vol. 1125, 3. (hereinafter: AP I)

¹⁶ Art. 55(1) AP I; PAYNE C.R., 'Protection of the Natural Environment' in SAUL B. and AKANDE D. (eds.), *The Oxford Guide to International Humanitarian Law*, Oxford University Press, 2020, (205) 218, DOI: 10.1093/law/9780198855309.003.0009.

¹⁷ DROEGE C. and TOUGAS M.-L., 'The Protection of the Natural Environment in Armed Conflict - Existing Rules and Need for Further Legal Protection', *Nordic Journal of International Law* 2013/1, (21) 32, DOI: 10.1163/15718107-08201003.

¹⁸ ARGREN R., 'The obligation to prevent environmental harm in relation to armed conflict', *International review of the Red Cross* 2023/924, (1208) 1213, DOI: 10.1017/S1816383123000231; DROEGE C. and TOUGAS M.-L., 'The Protection of the Natural Environment in Armed Conflict - Existing Rules and Need for Further Legal Protection', *Nordic Journal of International Law* 2013/1, (21) 32, DOI: 10.1163/15718107-08201003; FALK R., 'The inadequacy of the existing legal approach to environmental protection in wartime' in AUSTIN J.E. and BRUCH C.E. (eds.), *The Environmental Consequences of War*, Cambridge University Press, 2000, (137) 145, DOI: 10.1017/CBO9780511522321.008; FLECK D. (ed.), *The handbook of international humanitarian law Oxford handbooks*, Oxford University Press, 2021, 346-347, DOI: 10.1093/law/9780198847960.003.0010; HENCKAERTS J.-M. and DOSWALD-BECK L., *Customary International Humanitarian Law*, Cambridge University Press, 2005, 157, DOI: 10.1017/CBO9780511804700; KOPPE E.V., 'The Principle of Ambiguity and the Prohibition against Excessive Collateral Damage to the Environment during Armed Conflict', *Nordic Journal of International Law* 2013/1, (53) 59-60, DOI: 10.1163/15718107-08201004.

environmental damage to be simultaneously widespread, long-term and severe.¹⁹ Because three conditions must be met at the same time before prohibition is triggered, this dissertation refers to them collectively as the triple threshold.²⁰ The wording and meaning of the two provisions are discussed in greater detail in Chapter 2.

7. PERSISTENT NON-APPLICATION – In the nearly five decades since the adoption of the provisions, the threshold has never been authoritatively found to have been met in armed conflict.²¹ As Dienelt notes, “the undefined and high threshold of Art. 35(3) and Art. 55(1) has not been applied to any conflict so far.”²² This dissertation uses the term “non-application” in that narrow sense. It does not mean that Articles 35(3) and 55(1) AP I have never been cited, discussed or invoked. Rather, it refers to the absence of an authoritative finding that the AP I threshold has been crossed, or that the provisions have been violated, in a concrete armed conflict.²³ The Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia, for example, rejected the application of Article 35(3) AP I because the damage “does not reach the Additional Protocol I threshold”.²⁴ The Eritrea-Ethiopia Claims Commission likewise did not find a violation of the threshold.²⁵ According to the

¹⁹ BREITWIESER-FARIA Y., 'Environmental Protections During Armed Conflict as Supportive Mechanisms for the Prevention of Atrocity Crimes', *Journal of international humanitarian legal studies* 2024/11, (267) 281, DOI: 10.1163/18781527-bja10096; DAM-DE JONG D. and SJÖSTEDT B., 'Enhancing Environmental Protection in Relation to Armed Conflict: An Assessment of the ILC Draft Principles', *Loyola of Los Angeles International and Comparative Law Review* 2021/2, (129) 145; HENCKAERTS J.-M. and DOSWALD-BECK L., *Customary International Humanitarian Law*, Cambridge University Press, 2005, 157, DOI: 10.1017/CBO9780511804700; OKOWA P., 'Environmental justice in situations of armed conflict' in EBBESSON J. and OKOWA P. (eds.), *Environmental Law and Justice in Context*, Cambridge University Press, 2009, (231) 240, DOI: 10.1017/CBO9780511576027.013.

²⁰ BRUCH C., PAYNE C.R. and SJÖSTEDT B., 'Armed Conflict and the Environment' in RAJAMANI L. and PEEL J. (eds.), *The Oxford handbook of international environmental law*, Oxford University Press, 2021, (865) 872, DOI: 10.1093/law/9780198849155.003.0050.

²¹ BOTHE M., 'The Ethics, Principles and Objectives of Protection of the Environment in Times of Armed Conflict' in RAYFUSE R. (ed.), *War and the Environment*, Brill, 2014, (91) 99, DOI: 10.1163/9789004270657_006; HULME K., *War Torn Environment: Interpreting the Legal Threshold*, Brill, 2004, 288-290, <https://brill.com/view/title/11197>; PAYNE C.R., 'Protection of the Natural Environment' in SAUL B. and AKANDE D. (eds.), *The Oxford Guide to International Humanitarian Law*, Oxford University Press, 2020, (205) 219, DOI: 10.1093/law/9780198855309.003.0009.

²² DIENELT A., *Armed Conflicts and the Environment*, Springer International Publishing, 2022, 58, DOI: 10.1007/978-3-030-99339-9.

²³ For example, as discussed in Section 2.4, the threshold has been taken over in multiple Military Manuals.

²⁴ INTERNATIONAL COMMITTEE OF THE RED CROSS, *Guidelines on the Protection of the Natural Environment in Armed Conflict*, ICRC, 2020, 14, https://www.icrc.org/sites/default/files/document_new/file_list/guidelines_on_the_protection_of_the_natural_environment_in_armed_conflict_advance-copy.pdf (accessed on 7 June 2026); International Criminal Tribunal for the former Yugoslavia (ICTY), 'Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia', 2000, §14 and §17, <https://www.icty.org/x/file/Press/nato061300.pdf> (accessed on 7 June 2026).

²⁵ INTERNATIONAL COMMITTEE OF THE RED CROSS, *Guidelines on the Protection of the Natural Environment in Armed Conflict*, ICRC, 2020, 30,

prevailing opinion, also the Vietnam War or the 1991 Gulf War would not have met the prerequisites of AP I.²⁶ No such determination has been made for the conflicts in Ukraine or Gaza either, despite already extensive documentation of environmental harm.²⁷

8. **THE PUZZLE** – Articles 35(3) and 55(1) AP I are binding provisions that appear to offer robust protection to the natural environment, yet they have produced no authoritative finding of violation in almost five decades. This has led many scholars to treat the threshold as ineffective, unrealistic or failed, given the serious environmental damage that has repeatedly occurred without authoritative findings of violation.²⁸ As Droege and Tougas put it, the standard “appears to be so high that it has been almost meaningless in protecting the natural

https://www.icrc.org/sites/default/files/document_new/file_list/guidelines_on_the_protection_of_the_natural_environment_in_armed_conflict_advance-copy.pdf (accessed on 7 June 2026); Eritrea-Ethiopia Claims Commission 28 April 2004, ‘Partial Award: Central Front: Ethiopia’s Claim 2’, *Reports of International Arbitral Awards* 2009, vol. XXVI, (155) 187, https://legal.un.org/riaa/cases/vol_XXVI/155-194.pdf (accessed on 7 June 2026).

²⁶ DIENELT A., *Armed Conflicts and the Environment*, Springer International Publishing, 2022, 45, DOI: 10.1007/978-3-030-99339-9; FLECK D. (ed.), *The handbook of international humanitarian law Oxford handbooks*, Oxford University Press, 2021, 349, DOI: 10.1093/law/9780198847960.003.0010; At the time, Iraq was not a party to AP I yet, but according to the US Department of Defense’s review, the threshold would not have been met even if Iraq were a party. Report to Congress on the Conduct of the Persian Gulf War, US DEPARTMENT OF DEFENSE, 10 April 1992, 31 ILM, (612) 636-637, https://www.justsecurity.org/wp-content/uploads/2022/02/united_states_department_of_defense_report_to_congress_on_the_conduct_of_the_persian_gulf_war_appendix_on_the_role_of_the_law_of_war-annex-just-security.pdf (accessed on 7 June 2026).

²⁷ UNITED NATIONS ENVIRONMENTAL PROGRAM, *Environmental impact of the conflict in Gaza: preliminary assessment of environmental impacts*, UNEP, 2024, 37-40, wedocs.unep.org/20.500.11822/45739 (accessed on 7 June 2026); BOTHE M., ‘Protection of the environment in relation to armed conflict—50 years of effort, and no end in sight’, *Environment and Security* 2023/1-2, (24) 25, DOI: 10.1177/27538796231195601; LECLERC G., ‘Russia’s war on Ukraine: High environmental toll’, *European Parliamentary Research Service* 2023, PE 751.427, 1, [https://www.europarl.europa.eu/RegData/etudes/ATAG/2023/751427/EPRS_ATA\(2023\)751427_EN.pdf](https://www.europarl.europa.eu/RegData/etudes/ATAG/2023/751427/EPRS_ATA(2023)751427_EN.pdf) (accessed on 7 June 2026); WIRTHOVÁ L., ‘From Kuwait to Ukraine: Conflict’s Implications on the Natural Environment and the Responses of International Humanitarian Law’, *International and Comparative Law Review* 2023/1, (117) 120-122, DOI: 10.2478/iclr-2023-0006.

²⁸ BOTHE M., BRUCH C., DIAMOND J. et al., ‘International law protecting the environment during armed conflict: gaps and opportunities’, *International review of the Red Cross* 2010/879, (569) 576, DOI: 10.1017/S1816383110000597; BOTHE M., ‘The Ethics, Principles and Objectives of Protection of the Environment in Times of Armed Conflict’ in RAYFUSE R. (ed.), *War and the Environment*, Brill, 2014, (91) 99, DOI: 10.1163/9789004270657_006; BOTHE M., ‘Protection of the environment in relation to armed conflict—50 years of effort, and no end in sight’, *Environment and Security* 2023/1-2, (24) 31, DOI: 10.1177/27538796231195601; DIENELT A., *Armed Conflicts and the Environment*, Springer International Publishing, 2022, 45, DOI: 10.1007/978-3-030-99339-9; DROEGE C. and TOUGAS M.-L., ‘The Protection of the Natural Environment in Armed Conflict - Existing Rules and Need for Further Legal Protection’, *Nordic Journal of International Law* 2013/1, (21) 32, DOI: 10.1163/15718107-08201003; FLECK D. (ed.), *The handbook of international humanitarian law Oxford handbooks*, Oxford University Press, 2021, 349, DOI: 10.1093/law/9780198847960.003.0010; HULME K., *War Torn Environment: Interpreting the Legal Threshold*, Brill, 2004, 288-290, <https://brill.com/view/title/11197>; PAYNE C.R., ‘Protection of the Natural Environment’ in SAUL B. and AKANDE D. (eds.), *The Oxford Guide to International Humanitarian Law*, Oxford University Press, 2020, (205) 219, DOI: 10.1093/law/9780198855309.003.0009.

environment.”²⁹ This dissertation takes that critique seriously, but takes a more analytical step back. It asks how the persistent non-application of Articles 35(3) and 55(1) AP I should be understood in light of the legal form and function of the provisions themselves.

SECTION 1.3 GAP IN LITERATURE AND CONTRIBUTION

9. **ACTIVE ACADEMIC DEBATE** – The inadequacy of the triple threshold has long been observed in legal scholarship.³⁰ Multiple authors have critiqued the provisions for their vagueness, restrictiveness, lack of enforcement or historical anachronism.³¹ In response, a wide range of pathways have been proposed to address the non-application of the provisions, from reinterpretation of the existing terms, to structural redesign of the threshold, treaty reform and the invocation of legal regimes beyond AP I.³² Yet the debate often moves from critique of the provisions to reform proposals without first asking what kind of legal norm the threshold is.

²⁹ DROEGE C. and TOUGAS M.-L., 'The Protection of the Natural Environment in Armed Conflict - Existing Rules and Need for Further Legal Protection', *Nordic Journal of International Law* 2013/1, (21) 32, DOI: 10.1163/15718107-08201003.

³⁰ BOTHE M., BRUCH C., DIAMOND J. et al., 'International law protecting the environment during armed conflict: gaps and opportunities', *International review of the Red Cross* 2010/879, (569) 575, DOI: 10.1017/S1816383110000597; BOTHE M., 'The Ethics, Principles and Objectives of Protection of the Environment in Times of Armed Conflict' in RAYFUSE R. (ed.), *War and the Environment*, Brill, 2014, (91) 99, DOI: 10.1163/9789004270657_006; HULME K., *War Torn Environment: Interpreting the Legal Threshold*, Brill, 2004, 288-290, <https://brill.com/view/title/11197>; PAYNE C.R., 'Protection of the Natural Environment' in SAUL B. and AKANDE D. (eds.), *The Oxford Guide to International Humanitarian Law*, Oxford University Press, 2020, (205) 219, DOI: 10.1093/law/9780198855309.003.0009.

³¹ Such as BOTHE M., 'The Ethics, Principles and Objectives of Protection of the Environment in Times of Armed Conflict' in RAYFUSE R. (ed.), *War and the Environment*, Brill, 2014, (91) 103, DOI: 10.1163/9789004270657_006; BOTHE M., 'Protection of the environment in relation to armed conflict—50 years of effort, and no end in sight', *Environment and Security* 2023/1-2, (24) 24, DOI: 10.1177/27538796231195601; BREITWIESER-FARIA Y., 'Environmental Protections During Armed Conflict as Supportive Mechanisms for the Prevention of Atrocity Crimes', *Journal of international humanitarian legal studies* 2024/11, (267) 281-284, DOI: 10.1163/18781527-bja10096; DROEGE C. and TOUGAS M.-L., 'The Protection of the Natural Environment in Armed Conflict - Existing Rules and Need for Further Legal Protection', *Nordic Journal of International Law* 2013/1, (21) 33, DOI: 10.1163/15718107-08201003; FALK R., 'The inadequacy of the existing legal approach to environmental protection in wartime' in AUSTIN J.E. and BRUCH C.E. (eds.), *The Environmental Consequences of War*, Cambridge University Press, 2000, (137) 137, DOI: 10.1017/CBO9780511522321.008; FLECK D. (ed.), *The handbook of international humanitarian law Oxford handbooks*, Oxford University Press, 2021, 346, DOI: 10.1093/law/9780198847960.003.0010; HENCKAERTS J.-M., 'Towards Better Protection for the Environment in Armed Conflict: Recent Developments in International Humanitarian Law', *Review of European Community & international environmental law* 2000/1, (13) 14, DOI: 10.1111/1467-9388.00228; MINKOVA L.G., 'The Fifth International Crime: Reflections on the Definition of “Ecocide”', *Journal of genocide research* 2023/1, (61) 67-68, DOI: 10.1080/14623528.2021.1964688; OKOWA P., 'Environmental justice in situations of armed conflict' in EBBESSON J. and OKOWA P. (eds.), *Environmental Law and Justice in Context*, Cambridge University Press, 2009, (231) 240, DOI: 10.1017/CBO9780511576027.013.

³² Such as BOTHE M., 'Protection of the environment in relation to armed conflict—50 years of effort, and no end in sight', *Environment and Security* 2023/1-2, (24) 31, DOI: 10.1177/27538796231195601; BREITWIESER-FARIA Y., 'Environmental Protections During Armed Conflict as Supportive Mechanisms for the Prevention of Atrocity Crimes', *Journal of international humanitarian legal studies* 2024/11, (267) 289, DOI: 10.1163/18781527-bja10096; DAM-DE JONG D. and SJÖSTEDT B., 'Enhancing Environmental Protection in Relation to Armed Conflict: An Assessment of the ILC Draft Principles', *Loyola of Los Angeles International and*

10. CONTRIBUTIONS OF THE DISSERTATION – This dissertation makes four related contributions. First, it uses the legalization framework developed by Abbott et al. to classify the legal form of Articles 35(3) and 55(1) AP I along the dimensions of obligation, precision and delegation.³³ Second, it uses the framework of symbolic legislation developed by Van Klink to interpret the function of the provisions.³⁴ Both frameworks are further explained in the following chapters, and to the author's knowledge, neither framework has previously been applied to the environmental provisions of AP I. Third, following the understanding after applying the two frameworks, the dissertation recommends a novel reading of the reform debate. Fourth, the dissertation links the frameworks of legalization and symbolic legislation in order to provide a new conceptual understanding of the provisions' form, function and the reform debate surrounding them.

11. CENTRAL CLAIM – This dissertation argues that the persistent non-application of Articles 35(3) and 55(1) AP I can be better understood by examining both the legal form and the function of the provisions. In terms of legal form, the dissertation reads the provisions as having a Type V legalization profile, with high obligation, low precision and low delegation. In terms of function, the dissertation argues that the provisions are best understood as symbolic legislation. They recognize the environmental as a binding concern within IHL, while their cumulative and institutionally weak design makes operational application unlikely. On that basis, reform efforts should be seen as possible interventions on the legalization profile that sustains the symbolic function of the provisions.

Comparative Law Review 2021/2, (129) 145; DROEGE C. and GIORGOU E., 'How international humanitarian law develops', *International review of the Red Cross* 2022/920-921, (1798) 1839, DOI: 10.1017/S1816383122000893; FLECK D. (ed.), *The handbook of international humanitarian law Oxford handbooks*, Oxford University Press, 2021, 349, DOI: 10.1093/law/9780198847960.003.0010; HULME K., *War Torn Environment: Interpreting the Legal Threshold*, Brill, 2004, 288-295, <https://brill.com/view/title/11197>; KOPPE E.V., 'The Principle of Ambiguity and the Prohibition against Excessive Collateral Damage to the Environment during Armed Conflict', *Nordic Journal of International Law* 2013/1, (53) 81, DOI: 10.1163/15718107-08201004.

³³ ABBOTT K.W., KEOHANE R., MORAVCSIK A. et al., 'The Concept of Legalization', *International Organization* 2000/3, (401) 401-419, DOI: 10.1162/002081800551271. From now on referred to as Abbott et al. in the text.

³⁴ VAN KLINK B., 'Symbolic Legislation: An Essentially Political Concept' in VAN KLINK B., VAN BEERS B. and POORT L. (eds.), *Symbolic Legislation Theory and Developments in Biolaw*, Springer International Publishing, 2016, (19) 19-35, DOI: 10.1007/978-3-319-33365-6_2.

SECTION 1.4 RESEARCH QUESTIONS

12. **MAIN RESEARCH QUESTION** – This dissertation is guided by the following main research question:

How can Articles 35(3) and 55(1) AP I be understood through the frameworks of legalization and symbolic legislation, and what does this understanding imply for the debate addressing their non-application?

13. **SUB-QUESTIONS** – This main research question is addressed through three sub-questions, each corresponding to one substantive chapter.

Sub-question 1, addressed in Chapter 2, is:

What is the legalization profile of Articles 35(3) and 55(1) AP I in terms of obligation, precision and delegation?

Sub-question 2, addressed in Chapter 3, is:

What does the framework of symbolic legislation reveal about the function of the provisions?

Sub-question 3, addressed in Chapter 4, is:

What does the understanding of the provisions through the frameworks of legalization and symbolic legislation imply for reform proposals addressing their non-application?

14. **RELATIONSHIP BETWEEN THE SUB-QUESTIONS** – The different sub-questions build on each other. The first sub-question classifies the legalization profile, or legal form, of the provisions through the dimensions of the legalization framework. The second sub-question then helps explain the function of that form through the framework of symbolic legislation. The third sub-question finally builds on these findings to make certain recommendations for the reform debate. The dissertation therefore moves from form, to function, to reform.

SECTION 1.5 METHODOLOGY

15. **NO ONE-SIZE-FITS-ALL APPROACH** – As the three sub-questions do not pursue the same objective, there is no one-size-fits-all research method.³⁵ This dissertation follows Kestemont's

³⁵ This idea of applying different methodologies for different objectives is also worked out by multiple comparative methodologists, such as ADAMS M. and GRIFFITHS J., 'Against 'comparative method': explaining similarities and differences' in ADAMS M. and BOMHOFF J. (eds.), *Practice and Theory in Comparative Law*, 1 ed., Cambridge University Press, July 5, 2012, (279) 280, DOI: 10.1017/CBO9780511863301; GRAZIADEI M., 'The

premise that there is an indispensable link between research objective and its methodological features.³⁶ Following her typology of research objectives, each substantive chapter follows a distinct primary objective, which may in turn interact with others.³⁷ This section sets out, per chapter, which objective is pursued and how the research is carried out.

16. CLASSIFYING THE LEGAL FORM – Chapter 2 pursues a classifying research objective.³⁸ It classifies Articles 35(3) and 55(1) AP I within the typology of legalization developed by Abbott et al., which supplies the classification criteria. The provisions are first described as the object of legalization, and are then discussed along the dimensions of obligation, precision and delegation. For each dimension, the dissertation assesses whether the provisions score high or low according to the framework. Finally, the provisions are classified into a legalization profile. The chapter works with both secondary sources and primary sources, such as the text of AP I, the official negotiation records, military manuals, the case law of the ICJ and the Eritrea-Ethiopia Claims Commission, the ICTY Committee report, and reports of international organizations.

17. EXPLAINING THE FUNCTION – Chapter 3 pursues an explanatory objective and examines whether, in light of the six criteria set out by Van Klink, the provisions have a symbolic legislative function, which could help explain their non-application.³⁹ This part of the research is interdisciplinary and the assessed criteria require the combination of an internal approach, based on the text and structure of the provisions, with an external approach that draws on social-historical factors.⁴⁰ The legal-sociological framework of symbolic legislation supplies the criteria against which the provisions are read, and the negotiation history of the 1974-1977 Diplomatic Conference is studied through a legal-historical lens, using primary sources.

functionalist heritage' in LEGRAND P. and MUNDAY R. (eds.), *Comparative Legal Studies: Traditions and Transitions*, Cambridge University Press, 2003, (100) 101, DOI: 10.1017/CBO9780511522260.005; HUSA J., 'Methodology of comparative law today: from paradoxes to flexibility?', *Revue internationale de droit comparé* 2006/4, (1095) 1115, DOI: 10.3406/ridc.2006.19483; ODERKERK M., 'The Need for a Methodological Framework for Comparative Legal Research – Sense and Nonsense of »Methodological Pluralism« in Comparative Law', *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 2015/3, (589) 590-591, DOI: 10.1628/003372515X14339403063927; PALMER V.V., 'From Leretholi to Lando: Some Examples of Comparative Law Methodology', *The American Journal of Comparative Law* 2005/1, (261) 290.

³⁶ KESTEMONT L., *Handbook on Legal Methodology: From Objective to Method*, Intersentia, 2018, 4.

³⁷ KESTEMONT L., *Handbook on Legal Methodology: From Objective to Method*, Intersentia, 2018, 75.

³⁸ KESTEMONT L., *Handbook on Legal Methodology: From Objective to Method*, Intersentia, 2018, 11.

³⁹ KESTEMONT L., *Handbook on Legal Methodology: From Objective to Method*, Intersentia, 2018, 16; VAN KLINK B., 'Symbolic Legislation: An Essentially Political Concept' in VAN KLINK B., VAN BEERS B. and POORT L. (eds.), *Symbolic Legislation Theory and Developments in Biolaw*, Springer International Publishing, 2016, (19) 19-35, DOI: 10.1007/978-3-319-33365-6_2.

⁴⁰ KESTEMONT L., *Handbook on Legal Methodology: From Objective to Method*, Intersentia, 2018, 59–60.

18. **READING THE REFORM DEBATE** – Chapter 4 has a limited recommendatory objective, supported by an illustrative classification of reform proposals.⁴¹ It is limited in the sense that it does not aim to formulate a legislative proposal, nor to identify one preferred pathway for reform. Rather, it formulates a framework recommendation on the basis of the findings of Chapters 2 and 3, for the scholarly and institutional reform debate. On the basis of that recommendation, the chapter re-reads reform proposals as possible interventions on the dimensions of obligation, precision and delegation. This classification is illustrative rather than exhaustive. Its purpose is not to provide a complete taxonomy of all reform proposals, but to show how the application of the legalization and symbolic legislation frameworks to the provisions can reframe how the reform debate is structured.

19. **SOURCE SELECTION** – Priority is given to peer-reviewed legal scholarship in English, and to authoritative institutional sources (ICRC, ILC, UNEP, ICJ, ICTY). The search draws on academic databases such as Hein Online, as well as the university library catalogue Limo, complemented by snowballing through references in the identified sources.⁴² Primary sources, such as treaties, military manuals, negotiation records, advisory opinions and soft law instruments, are consulted directly when useful.

SECTION 1.6 SCOPE AND DELINEATION

20. **PRIMARY LEGAL OBJECT** – Several scope limitations are necessary to ensure a focused analysis. This dissertation focuses on Articles 35(3) and 55(1) of AP I as its primary legal object. These are the AP I provisions that establish the criticized triple threshold for environmental damage in armed conflict. The dimensions of the legalization framework and the criteria of symbolic legislation are therefore assessed in relation to these two provisions.

21. **CONFLICT SCOPE** – The analysis is limited to international armed conflict (IAC) within the framework of AP I. Non-international armed conflict (NIAC) is excluded, since AP I does not apply to it, and a proposal to include an equivalent environmental damage threshold and provision in AP II on non-international armed conflict was ultimately voted down.⁴³

⁴¹ KESTEMONT L., *Handbook on Legal Methodology: From Objective to Method*, Intersentia, 2018, 17.

⁴² KOSTENSE L., 'Systematisch literatuuronderzoek: De toegevoegde waarde van een scoping review voor juridisch literatuuronderzoek', *Law and Method* 2024, 13, DOI: 10.5553/REM/.000080.

⁴³ HENCKAERTS J.-M. and DOSWALD-BECK L., *Customary International Humanitarian Law*, Cambridge University Press, 2005, 156, DOI: 10.1017/CBO9780511804700.

22. **RELATED FRAMEWORKS** – Several legal frameworks linked to AP I are examined when they contribute to the dissertation’s analysis. Customary international humanitarian law for example, supports the obligation dimension in Chapter 2 and the diagnosis in Chapter 3. Moreover, the PERAC principles and the emerging concept of ecocide treaties are examined in Chapter 4 as illustrations of reform pathways, without treating them as separate objects of analysis.

23. **NO NORMATIVE CLAIMS** – This dissertation does not intend to make normative or evaluative claims about how the provisions function or should function. As stated in Section 1.5, the dissertation discusses several reform proposals as illustrations of how the reform debate could be read as interventions on the provisions’ legalization profile. It is not the aim to provide or assess *the* pathway forward to address the non-application of the provisions.

SECTION 1.7 STRUCTURE

24. **STRUCTURE** – This dissertation is structured in five chapters. Chapter 1 introduces the problem and sets out the research design. The following three substantive chapters follow the movement from form to function to reform, as set out above. Chapter 2 discusses the form of Articles 35(3) and 55(1) AP I, describing them along the dimensions of obligation, precision and delegation and classifying them under a certain legalization profile. Chapter 3 then turns to the function of the provisions. By applying the framework of symbolic legislation, it discusses whether a diagnosis as symbolic legislation could help explain their non-application. Chapter 4 turns to the reform debate to make certain recommendations in light of the legalization profile and function of the provisions. Chapter 5 concludes, by returning to the main research question and identifying avenues for further research.

CHAPTER 2 FORM: THE LEGALIZATION PROFILE

SECTION 2.1 THE THREE DIMENSIONS OF LEGALIZATION

25. **LEGALIZATION AS DIAGNOSTIC FRAMEWORK** – The introduction showed that Articles 35(3) and 55(1) AP I are formulated as binding and apparently absolute legal prohibitions, while their threshold has never been authoritatively found to have been crossed. This chapter examines that puzzle through the framework developed by Abbott, Keohane, Moravcsik, Slaughter and Snidal.⁴⁴ Their concept of legalization provides the vocabulary to describe the legal form of international norms.⁴⁵ Legalization, in their account, refers to a particular set of characteristics that rules or institutions may possess, defined along the dimensions of obligation, precision, and delegation.⁴⁶

26. **THREE DIMENSIONS** – Abbott et al. identify three dimensions of legalization: obligation, precision and delegation.⁴⁷ *Obligation* concerns whether states and other actors are bound by a rule or commitment, in the sense that their conduct is subject to rules, procedures and the general discourse of international law.⁴⁸ *Precision* refers to whether a rule unambiguously defines the conduct it requires, authorizes or proscribes, narrowing the scope for reasonable interpretation.⁴⁹ *Delegation* concerns whether third parties, like courts, arbitrators or administrative organs, have been granted authority to implement, interpret, and apply the rule; to resolve disputes; and possibly to make further rules.⁵⁰

27. **A CONTINUUM AND TYPOLOGY** - Each of these dimensions can vary in degree.⁵¹ The different dimensions of legalization therefore appear as a continuum ranging from the weakest form to the strongest form.⁵² As the dimensions are taken independently of one another, the authors of a legal instrument can “combine any level of obligation, precision, and delegation to produce an institution exactly suited to their specific needs.”⁵³ Although there is a continuum

⁴⁴ ABBOTT K.W., KEOHANE R., MORAVCSIK A. et al., 'The Concept of Legalization', *International Organization* 2000/3, (401) 401-419, DOI: 10.1162/002081800551271.

⁴⁵ *Ibid.*, 404.

⁴⁶ *Ibid.*, 401-402.

⁴⁷ *Ibid.*, 401.

⁴⁸ *Ibid.*, 409.

⁴⁹ *Ibid.*, 401 and 412.

⁵⁰ *Ibid.*, 415.

⁵¹ *Ibid.*, 402.

⁵² *Ibid.*, 404.

⁵³ *Ibid.*

of the dimensions, for concise presentation, Abbott et al. characterize obligation, precision and delegation as either high or low, which creates eight different combinations.⁵⁴ These combinations have been linked to eight types of forms of international legalization.⁵⁵ Abbott et al. do not argue that greater legalization (such as a rule with high obligation, high precision and high delegation) is inherently superior.⁵⁶ They also do not define legalization in terms of effect, as a highly legalized rule might in practice be entirely unobserved.⁵⁷ As the framework allows provisions to be analyzed as a binding legal norm whose operational weakness might lie elsewhere than in their formal legal status, it is particularly interesting for Articles 35(3) and 55(1) AP I.

28. STRUCTURE OF THE CHAPTER – This chapter proceeds in four steps. Section 2.2 first identifies the object of the legalization analysis by examining the text, placement and relationship between Articles 35(3) and 55(1) AP I. Sections 2.3 to 2.5 then assess the provisions along the three dimensions of obligation, precision and delegation, as developed by Abbott et al. Section 2.6 brings the findings together and argues that the provisions qualify as a Type V legalization profile, with high obligation, low precision and low delegation.⁵⁸

SECTION 2.2 THE OBJECT OF LEGALIZATION: ARTICLES 35(3) AND 55(1) AP I

29. IDENTIFYING THE OBJECT OF LEGALIZATION – Before Articles 35(3) and 55(1) AP I can be assessed along the dimensions of obligation, precision and delegation, the object of that assessment must first be further identified, after having briefly introduced them above. The two provisions are not identical. They are placed in different parts of AP I, have different textual emphases, and pursue distinct but overlapping objectives.⁵⁹ Yet they share the same core threshold of “widespread, long-term and severe” environmental damage in armed conflict. The two provisions are therefore treated together as two expressions of one legal standard.⁶⁰

⁵⁴ For the same reason, this dissertation also adopts the high/ low distinction as a concise analytical device, without suggesting that obligation, precision and delegation are strictly dichotomous categories.

⁵⁵ ABBOTT K.W., KEOHANE R., MORAVCSIK A. et al., 'The Concept of Legalization', *International Organization* 2000/3, (401) 406, DOI: 10.1162/002081800551271.

⁵⁶ *Ibid.*, 408.

⁵⁷ *Ibid.*, 402.

⁵⁸ *Ibid.*, 406.

⁵⁹ WOLFRUM R., 'The Protection of the Environment in Armed Conflict', *Israel Yearbook on Human Rights* 2015, (67) 76, DOI: 10.1163/9789004308091_006.

⁶⁰ WYATT J., 'Law-making at the intersection of international environmental, humanitarian and criminal law: the issue of damage to the environment in international armed conflict', *International review of the Red Cross* 2010/879, (593) 622, DOI: 10.1017/S1816383110000536.

30. **ARTICLE 35(3) AP I** – Article 35(3) AP I states that “it is prohibited to employ methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment.”⁶¹ The provision is located in Part III of AP I, which governs the methods and means of warfare.⁶² It regulates the conduct of hostilities, targeting the employment of certain weapons and military tactics. The provision does not, in its own terms, require harm to human health or survival of populations.⁶³ For that reason, several scholars characterize Article 35(3) AP I as one of the few ecocentric provisions in AP I, in the sense that it appears to protect the natural environment as such.⁶⁴

31. **ARTICLE 55(1) AP I** – Article 55(1) AP I provides that “care shall be taken in warfare to protect the natural environment against widespread, long-term and severe damage.”⁶⁵ It further specifies that “this protection includes a prohibition of the use of methods or means of warfare which are intended or may be expected to cause such damage to the natural environment and thereby to prejudice the health or survival of the population.”⁶⁶ Unlike Article 35(3), Article 55(1) is located in Part IV of AP I, which deals with the protection of the civilian population. Its first sentence is commonly understood as establishing a duty of care towards the natural environment in warfare against “widespread, long-term and severe” damage.⁶⁷ This entails the obligation to take reasonable steps to protect nature against such damage.⁶⁸ Its second sentence then links the protection of the environment to the health or survival of the population.⁶⁹

⁶¹ Art. 35(3) AP I.

⁶² DIENELT A., *Armed Conflicts and the Environment*, Springer International Publishing, 2022, 46, DOI: 10.1007/978-3-030-99339-9.

⁶³ SCHMITT M.N., 'Green War: An Assessment of the Environmental Law of International Armed Conflict' in *Essays on Law and War at the Fault Lines*, T. M. C. Asser Press, 2011, (361) 436, DOI: 10.1007/978-90-6704-740-1_8.

⁶⁴ MINKOVA L.G., 'The Fifth International Crime: Reflections on the Definition of “Ecocide”', *Journal of genocide research* 2023/1, (61) 67, DOI: 10.1080/14623528.2021.1964688; SCHMITT M.N., 'Green War: An Assessment of the Environmental Law of International Armed Conflict' in *Essays on Law and War at the Fault Lines*, T. M. C. Asser Press, 2011, (361) 435, DOI: 10.1007/978-90-6704-740-1_8; WOLFRUM R., 'The Protection of the Environment in Armed Conflict', *Israel Yearbook on Human Rights* 2015, (67) 76, DOI: 10.1163/9789004308091_006.

⁶⁵ Art. 55(1) AP I.

⁶⁶ Art. 55(1) AP I.

⁶⁷ BREITWIESER-FARIA Y., 'Environmental Protections During Armed Conflict as Supportive Mechanisms for the Prevention of Atrocity Crimes', *Journal of international humanitarian legal studies* 2024/11, (267) 280, DOI: 10.1163/18781527-bja10096.

⁶⁸ HULME K., *War Torn Environment: Interpreting the Legal Threshold*, Brill, 2004, 81, <https://brill.com/view/title/11197>.

⁶⁹ FLECK D. (ed.), *The handbook of international humanitarian law Oxford handbooks*, Oxford University Press, 2021, 346, DOI: 10.1093/law/9780198847960.003.0010.

32. **ONE THRESHOLD, TWO TEXTUAL EXPRESSIONS** – The different placement of the two provisions does not mean that they create unrelated standards.⁷⁰ Their textual core is shared, as both provisions employ the same triple threshold of “widespread, long-term and severe” environmental damage.⁷¹ Legal scholarship therefore treats the two provisions as complementary and interlinked.⁷² Article 35(3) AP I formulates the prohibition from the perspective of methods and means of warfare, while Article 55(1) AP I situates that same standard within the regime protecting the civilian population. This dissertation reads the two provisions together as two formulations of the same triple threshold, while acknowledging their differences where relevant. For the legalization analysis, the provisions are examined together.

SECTION 2.3 OBLIGATION: HIGH

33. **OBLIGATION AS BINDING CHARACTER** – On Abbott et al.’s framework, obligation concerns whether states or other actors are bound by a rule in the sense that their conduct is subject to the norms, procedures and forms of discourse of the international legal system.⁷³ On this obligation dimension, Articles 35(3) and 55(1) AP I sit towards the top of the continuum. They are formulated in obligatory terms, form part of a binding multilateral treaty and may also reflect customary international law, as discussed below. Their absolute character reinforces the substantive stringency of the rule once the threshold is met. The high obligation rating itself follows from legal bindingness and does not extend “to the substantive content of rules or their degree of stringency”.⁷⁴

34. **TREATY STATUS AND RESERVATIONS** – Additional Protocol I to the Geneva Conventions is a binding multilateral treaty, ratified by 175 states.⁷⁵ Following the fundamental international legal principle of *pacta sunt servanda*, Abbott et al. regard the rules and commitments contained

⁷⁰ WOLFRUM R., 'The Protection of the Environment in Armed Conflict', *Israel Yearbook on Human Rights* 2015, (67) 76, DOI: 10.1163/9789004308091_006.

⁷¹ WYATT J., 'Law-making at the intersection of international environmental, humanitarian and criminal law: the issue of damage to the environment in international armed conflict', *International review of the Red Cross* 2010/879, (593) 622, DOI: 10.1017/S1816383110000536.

⁷² ARGREN R., 'The obligation to prevent environmental harm in relation to armed conflict', *International review of the Red Cross* 2023/924, (1208) 1215, DOI: 10.1017/S1816383123000231.

⁷³ ABBOTT K.W., KEOHANE R., MORAVCSIK A. et al., 'The Concept of Legalization', *International Organization* 2000/3, (401) 409, DOI: 10.1162/002081800551271.

⁷⁴ ABBOTT K.W., KEOHANE R., MORAVCSIK A. et al., 'The Concept of Legalization', *International Organization* 2000/3, (401) 402, DOI: 10.1162/002081800551271.

⁷⁵ INTERNATIONAL COMMITTEE OF THE RED CROSS, States parties and signatories of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), ICRC Database, <https://ihl-databases.icrc.org/en/ihl-treaties/api-1977/state-parties> (accessed on 7 June 2026).

in legalized international agreements as obligatory.⁷⁶ The prohibitory formulation of the norms reflects an intention to create a legally binding obligation under international law.⁷⁷ The treaty obligation is strong, but not universal, meaning that states that have not ratified or are not parties to AP I are not bound by the articles as treaty provisions. Iran, Pakistan and the United States of America are signatories but did not ratify the protocol.⁷⁸ Moreover, the UK and France made reservations and declarations upon ratifying AP I, including in relation to nuclear weapons and the assessment of environmental damage on the basis of information available at the time.⁷⁹ Under Article 21(1) VCLT, reservations may modify the legal effect of treaty provisions for the reserving state.⁸⁰ These qualifications do not remove the binding character of Articles 35(3) and 55(1) AP I, but they show that the scope of obligation is not identical for all states.

35. CUSTOMARY STATUS – The reach of the obligation may be broader if the prohibition also reflects customary international law. The ICRC’s Customary IHL Study includes Rule 45, which states the prohibition of “the use of methods or means of warfare that are intended, or may be expected to cause widespread, long-term and severe damage to the natural environment” as a rule of customary international law.⁸¹ The rule would also bind states that are not parties to AP I. The customary status of rule 45 is, however, contested.⁸² A recent report of the International Law Commission recognized that there “are still different views regarding the customary status of both the duty of care and the prohibition as enshrined in Additional Protocol

⁷⁶ ABBOTT K.W., KEOHANE R., MORAVCSIK A. et al., 'The Concept of Legalization', *International Organization* 2000/3, (401) 409, DOI: 10.1162/002081800551271.

⁷⁷ ABBOTT K.W., KEOHANE R., MORAVCSIK A. et al., 'The Concept of Legalization', *International Organization* 2000/3, (401) 410-412, DOI: 10.1162/002081800551271.

⁷⁸ INTERNATIONAL COMMITTEE OF THE RED CROSS, *States parties and signatories of Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, ICRC Database, <https://ihl-databases.icrc.org/en/ihl-treaties/api-1977/state-parties> (accessed on 7 June 2026).

⁷⁹ Corrected Letter of 28 January 1998 sent to the Swiss Government, HULSE C., Ambassador of the United Kingdom, points (a) and (f), 28 January 1998, <https://ihl-databases.icrc.org/en/ihl-treaties/api-1977/state-parties/gb?activeTab=1949GCs-APs-and-commentaries> (accessed on 7 June 2026); Accession to Protocol additional to the Geneva conventions of 12 August 1949 and relating to the protection of victims of international armed conflicts (protocol I) (with reservations and declarations), FRANCE, 11 April 2001, A-17512, points 2 and 6, <https://ihl-databases.icrc.org/en/ihl-treaties/api-1977/state-parties/fr?activeTab=1949GCs-APs-and-commentaries> (accessed on 7 June 2026).

⁸⁰ Art. 21(1) Vienna Convention of 23 May 1969 on the Law of Treaties, *UNTS* vol. 1155, 331.

⁸¹ HENCKAERTS J.-M. and DOSWALD-BECK L., *Customary International Humanitarian Law*, Cambridge University Press, 2005, 157, DOI: 10.1017/CBO9780511804700.

⁸² FLECK D. (ed.), *The handbook of international humanitarian law Oxford handbooks*, Oxford University Press, 2021, 348, DOI: 10.1093/law/9780198847960.003.0010; VÖNEKY S., 'A New Shield for the Environment: Peacetime Treaties as Legal Restraints of Wartime Damage', *Review of European Community & international environmental law* 2000/1, (20) 21, DOI: 10.1111/1467-9388.00229.

I”.⁸³ The United States has consistently objected to the customary character of the rule, and the UK and France made reservations upon ratifying AP I to the effect that the Protocol did not apply to nuclear weapons.⁸⁴ Moreover, the UK and US made their stances clear in their military handbooks and both submitted in the *Nuclear Weapons case* to the International Court of Justice statements that Articles 35(3) and 55(1) AP I were not customary.⁸⁵ The Court itself only referred to the scope of these provisions in a way that did not appear to treat the provisions as customary law: “These are powerful constraints for all the States having subscribed to these provisions.”⁸⁶ The ICTY Committee later read the ICJ ruling as appearing to suggest that the provisions did not reflect current customary law.⁸⁷ Nevertheless, the ICRC Customary IHL Study stated that contrary practice by the United States, the United Kingdom and France was insufficient to have prevented the emergence of the customary rule, since those states are not “specially affected” for this type of damage.⁸⁸ The customary status therefore potentially extends who is bound, and thereby reinforces the obligation dimension, without changing the threshold. For the present analysis, the customary status is not decisive, as for the obligation dimension it is sufficient that the provisions create binding legal obligations for State Parties to AP I. Whether similar obligations also exist under customary international law does not alter this classification, but will be discussed in Section 4.2 on possible reform pathways.

36. ABSOLUTE FORMULATION AND QUALIFICATIONS – Articles 35(3) and 55(1) AP I are strict in substantive terms. The absolute character of the provisions is often highlighted in the

⁸³ Report of the International Law Commission: seventy-third session (18 April-3 June and 4 July-5 August 2022), INTERNATIONAL LAW COMMISSION, 12 August 2022, A/77/10, 141, https://legal.un.org/ilc/reports/2022/english/a_77_10_advance.pdf (accessed on 7 June 2026).

⁸⁴ Corrected Letter of 28 January 1998 sent to the Swiss Government, HULSE C., Ambassador of the United Kingdom, point (a), 28 January 1998, <https://ihl-databases.icrc.org/en/ihl-treaties/api-1977/state-parties/gb?activeTab=1949GCs-APs-and-commentaries> (accessed on 7 June 2026); Accession to Protocol additional to the Geneva conventions of 12 August 1949 and relating to the protection of victims of international armed conflicts (protocol I) (with reservations and declarations), FRANCE, 11 April 2001, A-17512, points 2, <https://ihl-databases.icrc.org/en/ihl-treaties/api-1977/state-parties/fr?activeTab=1949GCs-APs-and-commentaries> (accessed on 7 June 2026); INTERNATIONAL COMMITTEE OF THE RED CROSS, *Guidelines on the Protection of the Natural Environment in Armed Conflict*, ICRC, 2020, 29, https://www.icrc.org/sites/default/files/document_new/file_list/guidelines_on_the_protection_of_the_natural_environment_in_armed_conflict_advance-copy.pdf (accessed on 7 June 2026).

⁸⁵ HENCKAERTS J.-M. and DOSWALD-BECK L., *Customary International Humanitarian Law*, Cambridge University Press, 2005, 153-154, DOI: 10.1017/CBO9780511804700.

⁸⁶ International Court of Justice 8 July 1996, ‘Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion’, *ICJ Reports 1996*, §31, <https://www.icj-cij.org/sites/default/files/case-related/95/095-19960708-ADV-01-00-EN.pdf> (accessed on 7 June 2026).

⁸⁷ International Criminal Tribunal for the former Yugoslavia (ICTY), ‘Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia’, 2000, §15, <https://www.icty.org/x/file/Press/nato061300.pdf> (accessed on 7 June 2026).

⁸⁸ HENCKAERTS J.-M. and DOSWALD-BECK L., *Customary International Humanitarian Law*, Cambridge University Press, 2005, 154, DOI: 10.1017/CBO9780511804700.

literature.⁸⁹ Unlike many rules in IHL, which may be overridden by military necessity or are subject to proportionality tests, these provisions contain no military exception.⁹⁰ No military objective can justify the use of methods or means of warfare that cause widespread, long-term and severe environmental damage.⁹¹

This absolute formulation can be qualified in two respects. First, the United Kingdom reserved the right to take measures otherwise prohibited by Articles 51 to 55 AP I in response to serious and deliberate violations by an adverse party, subject to strict conditions.⁹² Second, in the ICJ's 1996 advisory opinion on the *Legality of the Threat or Use of Nuclear Weapons*, the Court considered whether existing norms of environmental protection, including those in AP I, would render the use of nuclear weapons unlawful.⁹³ It rejected the position that the obligations operate as "obligations of total restraint in armed conflict", holding instead that states must "take environmental considerations into account when assessing what is necessary and proportionate in the pursuit of legitimate military objectives" and that "respect for the environment is one of the elements that go to assessing whether an action is in conformity with the principles of necessity and proportionality".⁹⁴ Okowa reads this reasoning as formulated in terms broad enough to extend beyond nuclear weapons and to apply to conventional weapons as well.⁹⁵ Above the threshold, the AP I prohibition is absolute, and below the threshold,

⁸⁹ ARGREN R., 'The obligation to prevent environmental harm in relation to armed conflict', *International review of the Red Cross* 2023/924, (1208) 1213, DOI: 10.1017/S1816383123000231; FLECK D. (ed.), *The handbook of international humanitarian law Oxford handbooks*, Oxford University Press, 2021, 346, DOI: 10.1093/law/9780198847960.003.0010.

⁹⁰ DIENELT A., *Armed Conflicts and the Environment*, Springer International Publishing, 2022, 52, DOI: 10.1007/978-3-030-99339-9; HULME K., *War Torn Environment: Interpreting the Legal Threshold*, Brill, 2004, 77, <https://brill.com/view/title/11197>; PAYNE C.R., 'Protection of the Natural Environment' in SAUL B. and AKANDE D. (eds.), *The Oxford Guide to International Humanitarian Law*, Oxford University Press, 2020, (205) 218, DOI: 10.1093/law/9780198855309.003.0009.

⁹¹ DIENELT A., *Armed Conflicts and the Environment*, Springer International Publishing, 2022, 45, DOI: 10.1007/978-3-030-99339-9; DROEGE C. and TOUGAS M.-L., 'The Protection of the Natural Environment in Armed Conflict - Existing Rules and Need for Further Legal Protection', *Nordic Journal of International Law* 2013/1, (21) 32, DOI: 10.1163/15718107-08201003.

⁹² Corrected Letter of 28 January 1998 sent to the Swiss Government, HULSE C., Ambassador of the United Kingdom, point (m), 28 January 1998, <https://ihl-databases.icrc.org/en/ihl-treaties/api-1977/state-parties/gb?activeTab=1949GCs-APs-and-commentaries> (accessed on 7 June 2026).

⁹³ International Court of Justice 8 July 1996, 'Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion', *ICJ Reports* 1996, §27-28, <https://www.icj-cij.org/sites/default/files/case-related/95/095-19960708-ADV-01-00-EN.pdf> (accessed on 7 June 2026).

⁹⁴ International Court of Justice 8 July 1996, 'Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion', *ICJ Reports* 1996, §30, <https://www.icj-cij.org/sites/default/files/case-related/95/095-19960708-ADV-01-00-EN.pdf> (accessed on 7 June 2026).

⁹⁵ OKOWA P., 'Environmental justice in situations of armed conflict' in EBBESSON J. and OKOWA P. (eds.), *Environmental Law and Justice in Context*, Cambridge University Press, 2009, (231) 238, DOI: 10.1017/CBO9780511576027.013.

proportionality and necessity apply. These elements, however, do not make Articles 35(3) and 55(1) AP I less binding as treaty provisions.

37. **OBLIGATION: HIGH** – Articles 35(3) and 55(1) AP I score high on the obligation dimension. They are binding treaty provisions for states parties to AP I, formulated in obligatory and prohibitory terms, and possibly also reflect customary international law. The qualifications by non-universality, reservations and contested customary status do not alter the central conclusion.

SECTION 2.4 PRECISION: LOW

38. **PRECISION AS DETERMINACY** – The second dimension of legalization is precision. In Abbott et al.'s framework, "precision implies not just that each rule in the set is unambiguous, but that the rules are related to one another in a noncontradictory way, creating a framework within which case-by-case interpretation can be coherently carried out."⁹⁶ On this dimension, Articles 35(3) and 55(1) AP I are situated towards the lower end of the continuum. The provisions share the threshold of "widespread, long-term and severe" damage, but none of these three terms is clearly defined. It is hard to determine when the conditions of the binding rule are triggered.

39. **ABSENT DEFINITIONS** – None of the three criteria of the triple threshold is defined in the text of AP I, as during the negotiations no consensus was reached among the participating delegations.⁹⁷ The official report of the negotiations states that "the three elements of the adopted formula of time or duration of the damage, scope or area affected, and the severity or prejudicial effect of the damage to the civilian population was extensively discussed" and cannot, for example "say with certainty what period of time might be involved".⁹⁸ Legal scholarship has therefore sought their meaning in various sources, without producing a generally accepted definition.⁹⁹ An analogy with the ENMOD convention is also limited, which

⁹⁶ ABBOTT K.W., KEOHANE R., MORAVCSIK A. et al., 'The Concept of Legalization', *International Organization* 2000/3, (401) 413, DOI: 10.1162/002081800551271.

⁹⁷ DIENELT A., *Armed Conflicts and the Environment*, Springer International Publishing, 2022, 45-46, DOI: 10.1007/978-3-030-99339-9.

⁹⁸ Report Second Session Committee III, DIPLOMATIC CONFERENCE ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS, 15 December 1975, CDDH/215/Rev.1, §27, https://library.icrc.org/library/docs/CI/BAG152_158-00_003.pdf (accessed on 7 June 2026).

⁹⁹ BOTHE M., BRUCH C., DIAMOND J. et al., 'International law protecting the environment during armed conflict: gaps and opportunities', *International review of the Red Cross* 2010/879, (569) 576, DOI: 10.1017/S1816383110000597; FLECK D. (ed.), *The handbook of international humanitarian law* Oxford

uses the same three terms, but in a different regulatory structure, wording and purpose.¹⁰⁰ The definitional void has therefore been repeatedly addressed, but without success due to the lack of any international consensus.¹⁰¹

40. **LIMITED JUDICIAL CLARIFICATION** – Judicial practice has also failed to define the threshold. The ICTY Committee reviewing the NATO bombing campaign against the Federal Republic of Yugoslavia stated that Articles 35(3) and 55(1) AP I have a “very high threshold of application”, that their conditions “are extremely stringent”, and that their “scope and contents” are “imprecise”.¹⁰² The Committee concluded that the damage caused by the NATO bombing campaign “had caused some damage to the environment”, but that it did “not reach the Additional Protocol I threshold”.¹⁰³ Moreover, it did not define the three criteria beyond suggesting that long-term damage “would need to be measured in years rather than months, and that as such, ordinary battlefield damage of the kind caused to France in World War I would not be covered.”¹⁰⁴ The ICJ’s Nuclear Weapons Advisory Opinion likewise referred to the provisions as embodying “general obligation to protect the natural environment against widespread, long-term and severe environmental damage”, but did not define the threshold further.¹⁰⁵ The Eritrea-Ethiopia Claims Commission similarly stated that the alleged damage suffered by Ethiopia during the 1998-2000 armed conflict with Eritrea fell “well below” the

handbooks, Oxford University Press, 2021, 346, DOI: 10.1093/law/9780198847960.003.0010; HULME K., *War Torn Environment: Interpreting the Legal Threshold*, Brill, 2004, 92, <https://brill.com/view/title/11197>; RICHARDS P.J. and SCHMITT M.N., 'Mars Meets Mother Nature: Protecting the Environment During Armed Conflict International Environmental Law Symposium', *Stetson Law Review* 1999/4, (1047) 1065; MINKOVA L.G., 'The Fifth International Crime: Reflections on the Definition of “Ecocide”', *Journal of genocide research* 2023/1, (61) 73, DOI: 10.1080/14623528.2021.1964688.

¹⁰⁰ Art. 1 Convention of 10 December 1976 on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, UNTS vol. 1108, 151; INTERNATIONAL COMMITTEE OF THE RED CROSS, *Commentary of 1987 on Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 1 January 1987, ICRC Database, §1450, <https://ihl-databases.icrc.org/en/ihl-treaties/api-1977/article-35/commentary/1987> (accessed on 7 June 2026); BOTHE M., 'The Protection of the Environment in Times of Armed Conflict', *German yearbook of international law* 1991/1, (54) 57.

¹⁰¹ OKOWA P., 'Environmental justice in situations of armed conflict' in EBBESSON J. and OKOWA P. (eds.), *Environmental Law and Justice in Context*, Cambridge University Press, 2009, (231) 240, DOI: 10.1017/CBO9780511576027.013; RICHARDS P.J. and SCHMITT M.N., 'Mars Meets Mother Nature: Protecting the Environment During Armed Conflict International Environmental Law Symposium', *Stetson Law Review* 1999/4, (1047) 1065.

¹⁰² International Criminal Tribunal for the former Yugoslavia (ICTY), 'Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia', 2000, §15, <https://www.icty.org/x/file/Press/nato061300.pdf> (accessed on 7 June 2026).

¹⁰³ *Ibid.*, §§14 and 17

¹⁰⁴ *Ibid.*, §15.

¹⁰⁵ International Court of Justice 8 July 1996, 'Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion', *ICJ Reports* 1996, §31, <https://www.icj-cij.org/sites/default/files/case-related/95/095-19960708-ADV-01-00-EN.pdf> (accessed on 7 June 2026).

required standard, but used the different phrase “widespread and long-lasting environmental damage” and did not clarify the meaning of the AP I criteria.¹⁰⁶ These decisions confirm the use of the threshold, but do not explain its content.

41. **THE CUMULATIVE STANDARD** – One element of the threshold is clear: the three criteria are cumulative.¹⁰⁷ In both provisions, the terms “widespread”, “long-term” and “severe” are connected by the word “and”.¹⁰⁸ This cumulative structure makes the threshold exceptionally demanding.¹⁰⁹ It also magnifies the consequences of the definitional unclarity, as uncertainty about any one criterion can prevent finding that the threshold has been crossed. The high threshold was part of the compromise that made the absolute character of the rule acceptable.¹¹⁰

42. **ICRC GUIDELINES** – The most developed attempt at interpretation of these provisions is the ICRC’s 2020 *Guidelines on the Protection of the Natural Environment in Armed Conflict*, which states that the meaning and contours of all three terms of the threshold remain vague.¹¹¹ The guidelines are a collection of existing IHL rules and seek to clarify their meaning where necessary, but the ICRC explicitly states that the guidelines “are a restatement of the law as it stands in the eyes of the ICRC” and “should not be interpreted as ... creating or developing new ones.”¹¹² They are therefore not binding, and function more as guidance on how the threshold might be clarified.

¹⁰⁶ INTERNATIONAL COMMITTEE OF THE RED CROSS, *Guidelines on the Protection of the Natural Environment in Armed Conflict*, ICRC, 2020, 30, https://www.icrc.org/sites/default/files/document_new/file_list/guidelines_on_the_protection_of_the_natural_environment_in_armed_conflict_advance-copy.pdf (accessed on 7 June 2026); Eritrea-Ethiopia Claims Commission 28 April 2004, ‘Partial Award: Central Front: Ethiopia’s Claim 2’, *Reports of International Arbitral Awards* 2009, vol. XXVI, (155) 187, https://legal.un.org/riaa/cases/vol_XXVI/155-194.pdf (accessed on 7 June 2026).

¹⁰⁷ International Criminal Tribunal for the former Yugoslavia (ICTY), ‘Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia’, 2000, §15, <https://www.icty.org/x/file/Press/nato061300.pdf> (accessed on 7 June 2026); HENCKAERTS J.-M. and DOSWALD-BECK L., *Customary International Humanitarian Law*, Cambridge University Press, 2005, 157, DOI: 10.1017/CBO9780511804700.

¹⁰⁸ BOTHE M., BRUCH C., DIAMOND J. et al., ‘International law protecting the environment during armed conflict: gaps and opportunities’, *International review of the Red Cross* 2010/879, (569) 572, DOI: 10.1017/S1816383110000597.

¹⁰⁹ DROEGE C. and TOUGAS M.-L., ‘The Protection of the Natural Environment in Armed Conflict - Existing Rules and Need for Further Legal Protection’, *Nordic Journal of International Law* 2013/1, (21) 33, DOI: 10.1163/15718107-08201003.

¹¹⁰ HENCKAERTS J.-M. and DOSWALD-BECK L., *Customary International Humanitarian Law*, Cambridge University Press, 2005, 157, DOI: 10.1017/CBO9780511804700.

¹¹¹ INTERNATIONAL COMMITTEE OF THE RED CROSS, *Guidelines on the Protection of the Natural Environment in Armed Conflict*, ICRC, 2020, 33-39, https://www.icrc.org/sites/default/files/document_new/file_list/guidelines_on_the_protection_of_the_natural_environment_in_armed_conflict_advance-copy.pdf (accessed on 7 June 2026).

¹¹² INTERNATIONAL COMMITTEE OF THE RED CROSS, *Guidelines on the Protection of the Natural Environment in Armed Conflict*, ICRC, 2020, 14,

43. **WIDESPREAD** – The following paragraphs address how the ICRC Guidelines and legal scholars understand the threshold’s criteria. Of the three criteria, “widespread” is considered the least difficult to understand.¹¹³ Traditionally, “widespread” is understood to refer to several hundred square kilometres.¹¹⁴ The ICRC Guidelines also follow this understanding.¹¹⁵ Even here, however, the criterion is not completely clear. Hulme for example suggests looking not only at the local impact, but also consider the spread of substances, through for example air and groundwater, beyond the initial point of impact.¹¹⁶

44. **LONG-TERM** – The criterion “long-term” is most commonly interpreted as effects that last several decades.¹¹⁷ The meaning of “several decades” remains contested. Some authors refer to twenty to thirty years¹¹⁸, while others refer to a generation or more.¹¹⁹ In any case, the definition of the ENMOD understanding, “lasting for a period of months, or approximately a season”, is not followed.¹²⁰ Regarding “long-term”, the ICRC Guidelines state that “it may be difficult to

https://www.icrc.org/sites/default/files/document_new/file_list/guidelines_on_the_protection_of_the_natural_environment_in_armed_conflict_advance-copy.pdf (accessed on 7 June 2026).

¹¹³ ARGREN R., 'The obligation to prevent environmental harm in relation to armed conflict', *International review of the Red Cross* 2023/924, (1208) 1213, DOI: 10.1017/S1816383123000231.

¹¹⁴ DROEGE C. and TOUGAS M.-L., 'The Protection of the Natural Environment in Armed Conflict - Existing Rules and Need for Further Legal Protection', *Nordic Journal of International Law* 2013/1, (21) 32, DOI: 10.1163/15718107-08201003; HULME K., *War Torn Environment: Interpreting the Legal Threshold*, Brill, 2004, 100, <https://brill.com/view/title/11197>; RICHARDS P.J. and SCHMITT M.N., 'Mars Meets Mother Nature: Protecting the Environment During Armed Conflict International Environmental Law Symposium', *Stetson Law Review* 1999/4, (1047) 1065; This understanding also draws on the parallel 1976 provisions of ENMOD, whose annexed Understanding defines widespread as “encompassing an area on the scale of several hundred kilometres.”; SCHMITT M.N., 'Green War: An Assessment of the Environmental Law of International Armed Conflict' in *Essays on Law and War at the Fault Lines*, T. M. C. Asser Press, 2011, (361) 449, DOI: 10.1007/978-90-6704-740-1_8.

¹¹⁵ INTERNATIONAL COMMITTEE OF THE RED CROSS, *Guidelines on the Protection of the Natural Environment in Armed Conflict*, ICRC, 2020, 34, https://www.icrc.org/sites/default/files/document_new/file_list/guidelines_on_the_protection_of_the_natural_environment_in_armed_conflict_advance-copy.pdf (accessed on 7 June 2026).

¹¹⁶ HULME K., *War Torn Environment: Interpreting the Legal Threshold*, Brill, 2004, 93, <https://brill.com/view/title/11197>.

¹¹⁷ BOTHE M., BRUCH C., DIAMOND J. et al., 'International law protecting the environment during armed conflict: gaps and opportunities', *International review of the Red Cross* 2010/879, (569) 576, DOI: 10.1017/S1816383110000597; DIENELT A., *Armed Conflicts and the Environment*, Springer International Publishing, 2022, 47, DOI: 10.1007/978-3-030-99339-9; DROEGE C. and TOUGAS M.-L., 'The Protection of the Natural Environment in Armed Conflict - Existing Rules and Need for Further Legal Protection', *Nordic Journal of International Law* 2013/1, (21) 32, DOI: 10.1163/15718107-08201003; HENCKAERTS J.-M. and DOSWALD-BECK L., *Customary International Humanitarian Law*, Cambridge University Press, 2005, 158, DOI: 10.1017/CBO9780511804700.

¹¹⁸ HULME K., *War Torn Environment: Interpreting the Legal Threshold*, Brill, 2004, 94, <https://brill.com/view/title/11197>.

¹¹⁹ ARGREN R., 'The obligation to prevent environmental harm in relation to armed conflict', *International review of the Red Cross* 2023/924, (1208) 1213, DOI: 10.1017/S1816383123000231.

¹²⁰ Official records: thirty-first session supplement No. 27, CONFERENCE OF THE COMMITTEE ON DISARMAMENT, 1976, A/31/27, 91, <https://digitallibrary.un.org/record/697097?v=pdf> (accessed on 7 June 2026); SCHMITT M.N., 'Green War: An Assessment of the Environmental Law of International Armed Conflict'

say with certainty what period of time may be involved in a violation of this threshold”, however they consider it likely to be longer than only “a season” and also mention that the indirect effects of the use of a given method should be taken into account.¹²¹ Additionally, uncertainty arises on whether impacts assessed at the genetic level, unlikely to be reversible within decades, should satisfy the criterion.¹²² Finally, Bothe highlights that health effects from herbicide use in Vietnam have persisted across generations, raising questions about how to attribute long-term damage to specific acts of armed conflict.¹²³

45. **SEVERE** – “Severe” is the most contested of the three criteria. The difficulty is partly connected to the different wording of Articles 35(3) and 55(1) AP I. Article 35(3) AP I does not expressly require harm to human health or survival, while Article 55(1) AP I links environmental damage to prejudice to the health or survival of the population.¹²⁴ This difference reflects a broader anthropocentric-ecocentric tension in IHL.¹²⁵ During the negotiations of AP I, the placement of the two provisions in different parts of the protocol responded to the anthropocentric and ecocentric positions held among the negotiating delegations.¹²⁶ The Geneva Conventions and their Additional Protocols are primarily framed around the protection of persons, which makes the dominant orientation of *jus in bello* anthropocentric.¹²⁷ Yet Article 35(3) AP I is often read as opening space for more ecocentric protection to the natural

in *Essays on Law and War at the Fault Lines*, T. M. C. Asser Press, 2011, (361) 449, DOI: 10.1007/978-90-6704-740-1_8.

¹²¹ INTERNATIONAL COMMITTEE OF THE RED CROSS, *Guidelines on the Protection of the Natural Environment in Armed Conflict*, ICRC, 2020, 35, https://www.icrc.org/sites/default/files/document_new/file_list/guidelines_on_the_protection_of_the_natural_environment_in_armed_conflict_advance-copy.pdf (accessed on 7 June 2026).

¹²² HULME K., *War Torn Environment: Interpreting the Legal Threshold*, Brill, 2004, 95, <https://brill.com/view/title/11197>.

¹²³ BOTHE M., BRUCH C., DIAMOND J. et al., 'International law protecting the environment during armed conflict: gaps and opportunities', *International review of the Red Cross* 2010/879, (569) 576, DOI: 10.1017/S1816383110000597.

¹²⁴ COLAO G., 'Environmental Damages and Armed Conflict' in WESTRA L., BOSSELMANN K. and FERMEGLIA M. (eds.), *Ecological Integrity in Science and Law*, Springer International Publishing, 2020, (253) 259, DOI: 10.1007/978-3-030-46259-8_21; KOPPE E.V., 'The Principle of Ambiguity and the Prohibition against Excessive Collateral Damage to the Environment during Armed Conflict', *Nordic Journal of International Law* 2013/1, (53) 73, DOI: 10.1163/15718107-08201004.

¹²⁵ MINKOVA L.G., 'The Fifth International Crime: Reflections on the Definition of “Ecocide”', *Journal of genocide research* 2023/1, (61) 67, DOI: 10.1080/14623528.2021.1964688.

¹²⁶ DIENELT A., *Armed Conflicts and the Environment*, Springer International Publishing, 2022, 58, DOI: 10.1007/978-3-030-99339-9; SCHMITT M.N., 'Green War: An Assessment of the Environmental Law of International Armed Conflict' in *Essays on Law and War at the Fault Lines*, T. M. C. Asser Press, 2011, (361) 435, DOI: 10.1007/978-90-6704-740-1_8.

¹²⁷ FALK R., 'The inadequacy of the existing legal approach to environmental protection in wartime' in AUSTIN J.E. and BRUCH C.E. (eds.), *The Environmental Consequences of War*, Cambridge University Press, 2000, (137) 140, DOI: 10.1017/CBO9780511522321.008; MINKOVA L.G., 'The Fifth International Crime: Reflections on the Definition of “Ecocide”', *Journal of genocide research* 2023/1, (61) 67, DOI: 10.1080/14623528.2021.1964688.

environment as such.¹²⁸ Some authors therefore read severity mainly through harm to human health or the survival of populations.¹²⁹ Others read the reference to human health in the second sentence of Article 55(1) AP I as a clarification of the protection already established in Article 55(1)'s first sentence and Article 35(3) AP I.¹³⁰ This debate illustrates the low precision of the threshold.

Beyond the anthropocentric-ecocentric debate, severity remains difficult to define. The threshold is generally understood to be higher than “significant harm”, but it is unclear how much more.¹³¹ Hulme suggests that “severe” could also be interpreted flexibly, encompassing both high-intensity damage in small areas, and lower-intensity damage over large areas.¹³² This makes the triple threshold hard to disentangle, as, for example, severity can be linked to its duration and geographical spread.¹³³ The definition of severe in the ENMOD Understanding as “involving serious or significant disruption or harm to human life, nature and economic resources or other assets”, is not followed regarding AP I.¹³⁴ The ICRC Guidelines state that the threshold of severe should be understood “to cover the disruption or damage to an ecosystem

¹²⁸ COLAO G., 'Environmental Damages and Armed Conflict' in WESTRA L., BOSSELMANN K. and FERMEGLIA M. (eds.), *Ecological Integrity in Science and Law*, Springer International Publishing, 2020, (253) 259, DOI: 10.1007/978-3-030-46259-8_21; KOPPE E.V., 'The Principle of Ambiguity and the Prohibition against Excessive Collateral Damage to the Environment during Armed Conflict', *Nordic Journal of International Law* 2013/1, (53) 73, DOI: 10.1163/15718107-08201004.

¹²⁹ DIENELT A., *Armed Conflicts and the Environment*, Springer International Publishing, 2022, 47-48, DOI: 10.1007/978-3-030-99339-9; RICHARDS P.J. and SCHMITT M.N., 'Mars Meets Mother Nature: Protecting the Environment During Armed Conflict International Environmental Law Symposium', *Stetson Law Review* 1999/4, (1047) 1065.

¹³⁰ DIENELT A., *Armed Conflicts and the Environment*, Springer International Publishing, 2022, 52, DOI: 10.1007/978-3-030-99339-9; DROEGE C. and TOUGAS M.-L., 'The Protection of the Natural Environment in Armed Conflict - Existing Rules and Need for Further Legal Protection', *Nordic Journal of International Law* 2013/1, (21) 32-33, DOI: 10.1163/15718107-08201003; FLECK D. (ed.), *The handbook of international humanitarian law Oxford handbooks*, Oxford University Press, 2021, 346, DOI: 10.1093/law/9780198847960.003.0010; WOLFRUM R., 'The Protection of the Environment in Armed Conflict', *Israel Yearbook on Human Rights* 2015, (67) 76, DOI: 10.1163/9789004308091_006; In a declaration made by Ireland upon ratification of AP I, the country stated that it will interpret and apply article 55 in a way which leads to the best possible protection for the civilian population: Declarations and Reservations in relation to Additional Protocol I, IRELAND, 19 May 1999, point 11, <https://ihl-databases.icrc.org/en/ihl-treaties/api-1977/state-parties/ie?activeTab=1949GCs-APs-and-commentaries> (accessed on 7 June 2026).

¹³¹ HULME K., *War Torn Environment: Interpreting the Legal Threshold*, Brill, 2004, 96, <https://brill.com/view/title/11197>.

¹³² HULME K., *War Torn Environment: Interpreting the Legal Threshold*, Brill, 2004, 96, <https://brill.com/view/title/11197>.

¹³³ ARGREN R., 'The obligation to prevent environmental harm in relation to armed conflict', *International review of the Red Cross* 2023/924, (1208) 1214, DOI: 10.1017/S1816383123000231.

¹³⁴ Official records: thirty-first session supplement No. 27, CONFERENCE OF THE COMMITTEE ON DISARMAMENT, 1976, A/31/27, 91, <https://digitallibrary.un.org/record/697097?v=pdf> (accessed on 7 June 2026); SCHMITT M.N., 'Green War: An Assessment of the Environmental Law of International Armed Conflict' in *Essays on Law and War at the Fault Lines*, T. M. C. Asser Press, 2011, (361) 449, DOI: 10.1007/978-90-6704-740-1_8.

or harm to the health or survival of the population on a large scale”, although further precision is necessary.¹³⁵ The criterion contains an intuitive idea of gravity, but not a sufficiently determinate legal standard.

46. **STATE PRACTICE** – State practice confirms rather than resolves the low precision of the threshold. In reservations made by the United Kingdom and France upon ratification of AP I, both declared that the risk of environmental damage falling within the scope of Articles 35(3) and 55(1) AP I is to be assessed objectively on the basis of the information available at the time.¹³⁶ This does not clarify the provisions. Military manuals, which have widely incorporated the provisions, show the same pattern.¹³⁷

47. **MILITARY MANUALS** – The provisions have been widely incorporated into military manuals. In most cases, the language of the threshold is restated without further explanation or clarification of the terms.¹³⁸ The countries where this is the case are Argentina¹³⁹, Belgium¹⁴⁰,

¹³⁵ INTERNATIONAL COMMITTEE OF THE RED CROSS, *Guidelines on the Protection of the Natural Environment in Armed Conflict*, ICRC, 2020, 38, https://www.icrc.org/sites/default/files/document_new/file_list/guidelines_on_the_protection_of_the_natural_environment_in_armed_conflict_advance-copy.pdf (accessed on 7 June 2026).

¹³⁶ Corrected Letter of 28 January 1998 sent to the Swiss Government, HULSE C., Ambassador of the United Kingdom, point (f), 28 January 1998, <https://ihl-databases.icrc.org/en/ihl-treaties/api-1977/state-parties/gb?activeTab=1949GCs-APs-and-commentaries> (accessed on 7 June 2026); FRANCE, 11 April 2001, A-17512, point 6, <https://ihl-databases.icrc.org/en/ihl-treaties/api-1977/state-parties/fr?activeTab=1949GCs-APs-and-commentaries> (accessed on 7 June 2026).

¹³⁷ These military manuals have been documented and consulted in the updated ICRC database, INTERNATIONAL COMMITTEE OF THE RED CROSS, *ICRC Database, Customary IHL, Practice relating to Rule 45, Causing Serious Damage to the Natural Environment*, <https://ihl-databases.icrc.org/en/customary-ihl/v2/rule45> (accessed on 7 June 2026).

¹³⁸ INTERNATIONAL COMMITTEE OF THE RED CROSS, *Guidelines on the Protection of the Natural Environment in Armed Conflict*, ICRC, 2020, 32, https://www.icrc.org/sites/default/files/document_new/file_list/guidelines_on_the_protection_of_the_natural_environment_in_armed_conflict_advance-copy.pdf (accessed on 7 June 2026).

¹³⁹ ESTADO MAYOR CONJUNTO DE LA FUERZAS ARMADAS (ARGENTINA), *Leyes de Guerra*, 23 April 1990, PC-08-01, ICRC Customary IHL Database, §4.03, <https://ihl-databases.icrc.org/en/customary-ihl/v2/rule45> (accessed on 7 June 2026).

¹⁴⁰ ECOLE ROYALE MILITAIRE (BELGIUM), *Droit Pénal et Disciplinaire Militaire et Droit de la Guerre*, Deuxième Partie, *Droit de la Guerre*, 1983, D/1983/1187/029, ICRC Customary IHL Database, 27–28, <https://ihl-databases.icrc.org/en/customary-ihl/v2/rule45> (accessed on 7 June 2026).

Benin¹⁴¹, Burundi¹⁴², Canada¹⁴³, Central African Republic¹⁴⁴, Côte d'Ivoire¹⁴⁵, France¹⁴⁶, Italy,¹⁴⁷ Kenya¹⁴⁸, New Zealand¹⁴⁹, Peru¹⁵⁰, Russian Federation¹⁵¹, Spain¹⁵², Sweden¹⁵³, Switzerland¹⁵⁴, Togo¹⁵⁵ and the United Kingdom of Great Britain and Northern Ireland¹⁵⁶.

¹⁴¹ FORCES ARMÉES DU BENIN, MINISTÈRE DE LA DÉFENSE NATIONALE (BENIN), *Le Droit de la Guerre*, 1995, Fascicule III, ICRC Customary IHL Database, 12, <https://ihl-databases.icrc.org/en/customary-ihl/v2/rule45> (accessed on 7 June 2026).

¹⁴² MINISTÈRE DE LA DÉFENSE NATIONALE ET DES ANCIENS COMBATTANTS (BURUNDI), *Règlement n° 98 sur le droit international humanitaire Projet "Moralisation"*, August 2007, BDI/B-05, ICRC Customary IHL Database, Part I bis, 58; see also Part I bis, 7, 19, 32, 40, 81 and 93, <https://ihl-databases.icrc.org/en/customary-ihl/v2/rule45> (accessed on 7 June 2026).

¹⁴³ OFFICE OF THE JUDGE ADVOCATE GENERAL (CANADA), *The Law of Armed Conflict at the Operational and Tactical Levels*, 13 August 2001, ICRC Customary IHL Database, §446.1–2, <https://ihl-databases.icrc.org/en/customary-ihl/v2/rule45> (accessed on 7 June 2026).

¹⁴⁴ MINISTÈRE DE LA DÉFENSE, FORCES ARMÉES CENTRAFRICAINES (CENTRAL AFRICAN REPUBLIC), *Le Droit de la Guerre*, Fascicule No. 3: Formation pour l'obtention du Brevet d'Armes No. 1, du Brevet d'Armes No. 2 et le stage d'Officier de Police Judiciaire (OPJ), 1999, ICRC Customary IHL Database, Chapter III, Section 1, <https://ihl-databases.icrc.org/en/customary-ihl/v2/rule45> (accessed on 7 June 2026).

¹⁴⁵ MINISTÈRE DE LA DÉFENSE, FORCES ARMÉES NATIONALES (CÔTE D'IVOIRE), *Droit de la guerre*, Manuel d'instruction, Livre III, Tome 1: Instruction de l'élève officier d'active de 1ère année Manuel de l'élève, November 2007, ICRC Customary IHL Database, 35, <https://ihl-databases.icrc.org/en/customary-ihl/v2/rule45> (accessed on 7 June 2026).

¹⁴⁶ MINISTÈRE DE LA DÉFENSE, BUREAU DU DROIT DES CONFLITS ARMÉS, (FRANCE), *Manuel de droit des conflits armés*, 2001, ICRC Customary IHL Database, 63, <https://ihl-databases.icrc.org/en/customary-ihl/v2/rule45> (accessed on 7 June 2026).

¹⁴⁷ STATO MAGGIORE DELLA DIFESA, I REPARTO, UFFICIO ADDESTRAMENTO E REGOLAMENTI, (ITALY), *Manuale di diritto umanitario*, Introduzione e Volume I, *Usi e convenzioni di Guerra*, 1991, SMD-G-014, ICRC Customary IHL Database, Vol. I, §7, <https://ihl-databases.icrc.org/en/customary-ihl/v2/rule45> (accessed on 7 June 2026).

¹⁴⁸ THE SCHOOL OF MILITARY POLICE (KENYA), *Law of Armed Conflict, Military Basic Course (ORS)*, 1997, ICRC Customary IHL Database, Précis No. 4, 3; see also Précis No. 2, 2, <https://ihl-databases.icrc.org/en/customary-ihl/v2/rule45> (accessed on 7 June 2026).

¹⁴⁹ NEW ZEALAND DEFENCE FORCE, HEADQUARTERS, DIRECTORATE OF LEGAL SERVICES (NEW ZEALAND), *Interim Law of Armed Conflict Manual*, November 1992, DM 112, ICRC Customary IHL Database, §§505(1) and 614(1), <https://ihl-databases.icrc.org/en/customary-ihl/v2/rule45> (accessed on 7 June 2026).

¹⁵⁰ RESOLUCIÓN MINISTERIAL (PERU), *Manual de Derecho Internacional Humanitario y Derechos Humanos para las Fuerzas Armadas*, 21 May 2010, 049-2010/DE/VPD, ICRC Customary IHL Database, §27(e), 236; see also §31(b)(1)(b), 248; §29(c)(2)(b), 237–238 and §154(b)(1), 338, <https://ihl-databases.icrc.org/en/customary-ihl/v2/rule45> (accessed on 7 June 2026).

¹⁵¹ USSR DEFENCE MINISTER (RUSSIAN FEDERATION), *Instructions on the Application of the Rules of International Humanitarian Law by the Armed Forces of the USSR*, Appendix to Order of the USSR Defence Minister No. 75, 1990, ICRC Customary IHL Database, §6(g), <https://ihl-databases.icrc.org/en/customary-ihl/v2/rule45> (accessed on 7 June 2026).

¹⁵² MANDO DE ADIESTRAMIENTO Y DOCTRINA, DIRECCIÓN DE DOCTRINA, ORGÁNICA Y MATERIALES, (SPAIN), *Orientaciones. El Derecho de los Conflictos Armados*, 2 November 2007, OR7-004, ICRC Customary IHL Database, §1.3.d.(4); see also §§2.3.b.(3), 3.1.d.(7), 4.5.b.(4) and 7.3.b.(2).(c), <https://ihl-databases.icrc.org/en/customary-ihl/v2/rule45> (accessed on 7 June 2026).

¹⁵³ SWEDISH MINISTRY OF DEFENCE (SWEDEN), *International Humanitarian Law in Armed Conflict*, with reference to the Swedish Total Defence System, January 1991, ICRC Customary IHL Database, Section 3.2.1.5, 62, <https://ihl-databases.icrc.org/en/customary-ihl/v2/rule45> (accessed on 7 June 2026).

¹⁵⁴ ARMÉE SUISSE (SWITZERLAND), *Lois et coutumes de la guerre (Extrait et commentaire)*, 1987, *Règlement 51.7/II f*, ICRC Customary IHL Database, Article 25(3), <https://ihl-databases.icrc.org/en/customary-ihl/v2/rule45> (accessed on 7 June 2026); SWISS ARMY (SWITZERLAND), *Bases légales du comportement à l'engagement (BCE)* issued based on Article 10 of the Ordinance on the Organization of the Federal Department for Defence, Civil Protection and Sports of 7 March 2003, 1 July 2005, *Règlement 51.007/IVf*, ICRC Customary IHL Database, §§217–218, <https://ihl-databases.icrc.org/en/customary-ihl/v2/rule45> (accessed on 7 June 2026).

Some manuals clarify isolated elements of the threshold in their military manuals. Australia and the Netherlands clarify that “long-term” means continuing for decades.¹⁵⁷ Others alter the threshold by omitting or adding criteria, or using disjunctive language. Chad only refers to severe damage to the environment.¹⁵⁸ Colombia adds the adjectives “unnecessary and indiscriminate” to the required triple threshold.¹⁵⁹ The Philippines does not always have a cumulative reading in its military manuals, referring also to the threshold as “severe or long term damage”¹⁶⁰ or “widespread/long-term and severe damage”.¹⁶¹ In South Africa’s Revised Civic Education Manual, the country only refers to long-term damage and not to the two other criteria¹⁶², although it does so in its LOAC Teaching Manual.¹⁶³ Ukraine only refers to “severe and long-term damage”.¹⁶⁴

Some countries also employ a completely different formulation of the threshold. Germany’s Military Manual describes the threshold as a “major interference with human life or natural resources which considerably exceeds the battlefield damage to be regularly expected in a

¹⁵⁵ ETAT-MAJOR GÉNÉRAL DES FORCES ARMÉES TOGOLAISES, MINISTÈRE DE LA DÉFENSE NATIONALE (TOGO), *Le Droit de la Guerre*, 1996, Fascicule III, ICRC Customary IHL Database, 12, <https://ihl-databases.icrc.org/en/customary-ihl/v2/rule45> (accessed on 7 June 2026).

¹⁵⁶ MINISTRY OF DEFENCE (UNITED KINGDOM), *The Manual of the Law of Armed Conflict*, 1 July 2004, ICRC Customary IHL Database, §5.29; see also §6.3 (weapons), <https://ihl-databases.icrc.org/en/customary-ihl/v2/rule45> (accessed on 7 June 2026).

¹⁵⁷ AUSTRALIAN DEFENCE HEADQUARTERS, (AUSTRALIA), *The Manual of the Law of Armed Conflict*, 11 May 2006, Australian Defence Doctrine Publication 06.4, ICRC Customary IHL Database, §7.14; see also §5.50, <https://ihl-databases.icrc.org/en/customary-ihl/v2/rule45> (accessed on 7 June 2026); KONINKLIJKE LANDMACHT, MILITAIR JURIDISCHE DIENST (NETHERLANDS), *Humanitair Oorlogsrecht: Handleiding*, 2005, Voorschrift No. 27-412, ICRC Customary IHL Database, §0464, <https://ihl-databases.icrc.org/en/customary-ihl/v2/rule45> (accessed on 7 June 2026).

¹⁵⁸ MINISTÈRE DE LA DÉFENSE, PRÉSIDENTE DE LA RÉPUBLIQUE, ETAT-MAJOR DES ARMÉES (CHAD), *Droit international humanitaire, Manuel de l’instructeur en vigueur dans les forces armées et de sécurité*, 2006, ICRC Customary IHL Database, 78, <https://ihl-databases.icrc.org/en/customary-ihl/v2/rule45> (accessed on 7 June 2026).

¹⁵⁹ MINISTERIO DE DEFENSA NACIONAL (COLOMBIA), *Derecho Internacional Humanitario – Manual Básico para las Personerías y las Fuerzas Armadas de Colombia*, 1995, ICRC Customary IHL Database, 49–50, <https://ihl-databases.icrc.org/en/customary-ihl/v2/rule45> (accessed on 7 June 2026).

¹⁶⁰ ARMED FORCES OF THE PHILIPPINES (PHILIPPINES), *Soldiers’ Handbook on Human Rights and International Humanitarian Law*, 2010, ICRC Customary IHL Database, 38, <https://ihl-databases.icrc.org/en/customary-ihl/v2/rule45> (accessed on 7 June 2026).

¹⁶¹ ARMED FORCES OF THE PHILIPPINES (PHILIPPINES), *Soldiers’ Handbook on Human Rights and International Humanitarian Law*, 2010, ICRC Customary IHL Database, 44, <https://ihl-databases.icrc.org/en/customary-ihl/v2/rule45> (accessed on 7 June 2026).

¹⁶² SOUTH AFRICAN NATIONAL DEFENCE FORCE (SOUTH AFRICA), *Revised Civic Education Manual*, 2004, ICRC Customary IHL Database, Chapter 4, §51(b), <https://ihl-databases.icrc.org/en/customary-ihl/v2/rule45> (accessed on 7 June 2026).

¹⁶³ SCHOOL OF MILITARY JUSTICE (SOUTH AFRICA), *Advanced Law of Armed Conflict Teaching Manual*, 1 April 2008, as amended to 25 October 2013, ICRC Customary IHL Database, 120, <https://ihl-databases.icrc.org/en/customary-ihl/v2/rule45> (accessed on 7 June 2026).

¹⁶⁴ MINISTRY OF DEFENCE (UKRAINE), *Manual on the Application of IHL Rules*, 11 September 2004, ICRC Customary IHL Database, §§1.3.1–1.3.3, <https://ihl-databases.icrc.org/en/customary-ihl/v2/rule45> (accessed on 7 June 2026).

war”.¹⁶⁵ In its 1980 US Air Force Commander’s Handbook, the United States writes that the exact scope of the threshold is not yet clear, though they do not regard it as applying to nuclear weapons.¹⁶⁶ In the 1993 Operational Law Handbook, the United States of America employs the threshold of “prolonged damage” and make a prohibition excusable on the basis of military necessity.¹⁶⁷ The literal transposition of the threshold reproduces its unclarity, while divergent formulations show that the triple threshold has not developed an operational definition in state practice.

48. **PRECISION: LOW** – Articles 35(3) and 55(1) AP I therefore score low on the precision dimension of legalization.¹⁶⁸ The threshold is not entirely unclear: it is cumulative, exceptionally high, and has some accepted reference points, especially for “widespread” and “long-term”. Yet the criteria are not defined in AP I, have not been clarified by courts, and have been read differently in state practice.¹⁶⁹ The provisions do not unambiguously define the conduct they prohibit, they leave broad areas of discretion, and it is nearly impossible to determine whether conduct complies with the norm.¹⁷⁰ Their legalization profile is accordingly marked by high obligation but low precision.¹⁷¹

SECTION 2.5 DELEGATION: LOW

49. **DELEGATION AS THIRD-PARTY AUTHORITY** – The third dimension of legalization is delegation. Abbott et al. understand delegation as the authority granted to third parties to “implement, interpret, and apply the rules; to resolve disputes; and (possibly) to make further rules.”¹⁷² This dimension is therefore concerned with the institutional machinery through which the rules are interpreted and applied. On this dimension, Articles 35(3) and 55(1) AP I sit

¹⁶⁵ THE FEDERAL MINISTRY OF DEFENCE OF THE FEDERAL REPUBLIC OF GERMANY (GERMANY), *Humanitäres Völkerrecht in bewaffneten Konflikten – Handbuch*, August 1992, DSK V207320067, ICRC Customary IHL Database, §§401 and 403; see also §1020 (naval warfare), <https://ihl-databases.icrc.org/en/customary-ihl/v2/rule45> (accessed on 7 June 2026).

¹⁶⁶ US DEPARTMENT OF THE AIR FORCE (UNITED STATES), *Air Force Pamphlet 110-34, Commander’s Handbook on the Law of Armed Conflict*, 25 July 1980, ICRC Customary IHL Database, §6-2(c), <https://ihl-databases.icrc.org/en/customary-ihl/v2/rule45> (accessed on 7 June 2026).

¹⁶⁷ CENTER FOR LAW AND MILITARY OPERATIONS AND INTERNATIONAL LAW DIVISION, UNITED STATES ARMY (UNITED STATES), *Operational Law Handbook*, 1993, JA 422, ICRC Customary IHL Database, Q-182, §(i), <https://ihl-databases.icrc.org/en/customary-ihl/v2/rule45> (accessed on 7 June 2026).

¹⁶⁸ ABBOTT K.W., KEOHANE R., MORAVCSIK A. et al., ‘The Concept of Legalization’, *International Organization* 2000/3, (401) 415, DOI: 10.1162/002081800551271.

¹⁶⁹ DIENELT A., *Armed Conflicts and the Environment*, Springer International Publishing, 2022, 45-46, DOI: 10.1007/978-3-030-99339-9.

¹⁷⁰ ABBOTT K.W., KEOHANE R., MORAVCSIK A. et al., ‘The Concept of Legalization’, *International Organization* 2000/3, (401) 414-415, DOI: 10.1162/002081800551271.

¹⁷¹ *Ibid.*

¹⁷² *Ibid.*, 401.

towards the lower end of the continuum. The provisions are not accompanied by a dedicated court or a specialized environmental compliance body to determine when the triple threshold has been crossed.

50. THE INTERNATIONAL HUMANITARIAN FACT-FINDING COMMISSION – The most direct form of delegation in AP I is the International Humanitarian Fact-Finding Commission (IHFFC), established under article 90 AP I. The IHFFC is competent to enquire into any facts alleged to be a grave breach as defined in the Protocol or other serious violation of the Protocol, and to restore respect for IHL.¹⁷³ This makes it the closest institutional mechanism within AP I through which alleged violations of Articles 35(3) and 55(1) AP I could be examined. Its delegation is however limited. The Commission has to be recognized by the High Contracting Parties before it can exercise its competences.¹⁷⁴ At present, only 78 states have made a comprehensive declaration under Article 90 AP I.¹⁷⁵ The IHFFC is also fact-finding rather than an adjudicatory body.¹⁷⁶ It establishes facts and through its good offices and recommendations, it may make proposals for restoring respect for international humanitarian law, but it does not render judgments and its findings remain confidential to the parties unless they agree otherwise.¹⁷⁷ The IHFFC therefore represents formal delegation under AP I, but is not placed very high on the dispute resolution continuum of delegation.

51. THE ICRC AS INTERPRETIVE AUTHORITY – Alongside the IHFFC, the ICRC plays an important role in the understanding, development and dissemination of knowledge of international humanitarian law applicable in armed conflicts.¹⁷⁸ The ICRC is directly recognized in AP I, and is an impartial, neutral and independent organization that acts as the guardian of IHL and employs field operations to help victims.¹⁷⁹ It exercises its role through,

¹⁷³ Art. 90(2)(c)(i) and 90(2)(c)(ii) AP I.

¹⁷⁴ Art. 90(2)(a) AP I.

¹⁷⁵ INTERNATIONAL HUMANITARIAN FACT-FINDING COMMISSION, *States Parties*, <https://www.ihffc.org/recognition/states-parties.html> (accessed on 7 June 2026).

¹⁷⁶ INTERNATIONAL HUMANITARIAN FACT-FINDING COMMISSION, *Competence of the International Humanitarian Fact-finding Commission*, IHFFC, 2005, <https://www.ihffc.org/media/pdf/en/competence.pdf> (accessed on 7 June 2026).

¹⁷⁷ INTERNATIONAL HUMANITARIAN FACT-FINDING COMMISSION, *Competence of the International Humanitarian Fact-finding Commission*, IHFFC, 2005, <https://www.ihffc.org/media/pdf/en/competence.pdf> (accessed on 7 June 2026).

¹⁷⁸ Art. 4.1(g) INTERNATIONAL COMMITTEE OF THE RED CROSS, Statutes of the International Committee of the Red Cross, 21 December 2017, A1703, https://www.icrc.org/sites/default/files/document/file_list/icrc-statutes-01-2018.pdf (accessed on 7 June 2026).

¹⁷⁹ Its role is for example recognized in Art. 81(1) and 97(1) AP I; GARCÍA PINTO F., 'The International Committee of the Red Cross and the International Criminal Court: Turning international humanitarian law into a two-headed snake?', *International review of the Red Cross* 2020/914, (745) 750, DOI: 10.1017/S1816383121000515.

among other things, its customary IHL Study and its Guidelines on the Protection of the Natural Environment in Armed Conflict.¹⁸⁰ This gives the ICRC considerable interpretive and norm-developing authority, but as it does not adjudicate disputes or issue binding interpretations, it does not amount to strong delegation in Abbott et al.'s sense.¹⁸¹

52. DOMESTIC IMPLEMENTATION AND DISSEMINATION – Implementation also occurs through states themselves. Article 83 AP I requires parties to disseminate the Geneva Conventions and Protocols as widely as possible and, in particular, to include the study thereof in their programs of military instruction.¹⁸² This could explain why the triple threshold appears in many military manuals.¹⁸³ As discussed in Section 2.4, however, these manuals often reproduce the treaty language without clarifying it or interpret it in divergent ways. They are therefore better understood as forms of state implementation than as delegation to an independent third party.¹⁸⁴

Additionally, the ICRC database indicates that multiple states have incorporated the triple threshold *verbatim* in national criminal legislation¹⁸⁵, including Australia¹⁸⁶, Azerbaijan¹⁸⁷,

¹⁸⁰ INTERNATIONAL COMMITTEE OF THE RED CROSS, *Guidelines on the Protection of the Natural Environment in Armed Conflict*, ICRC, 2020, https://www.icrc.org/sites/default/files/document_new/file_list/guidelines_on_the_protection_of_the_natural_environment_in_armed_conflict_advance-copy.pdf (accessed on 7 June 2026); HENCKAERTS J.-M. and DOSWALD-BECK L., *Customary International Humanitarian Law*, Cambridge University Press, 2005, 157, DOI: 10.1017/CBO9780511804700.

¹⁸¹ GARCÍA PINTO F., 'The International Committee of the Red Cross and the International Criminal Court: Turning international humanitarian law into a two-headed snake?', *International review of the Red Cross* 2020/914, (745) 751-752, DOI: 10.1017/S1816383121000515.

¹⁸² Art. 83 AP I.

¹⁸³ As discussed in Section 2.4.

¹⁸⁴ ABBOTT K.W., KEOHANE R., MORAVCSIK A. et al., 'The Concept of Legalization', *International Organization* 2000/3, (401) 415, DOI: 10.1162/002081800551271.

¹⁸⁵ INTERNATIONAL COMMITTEE OF THE RED CROSS, *ICRC Database, Customary IHL, Practice relating to Rule 45, Causing Serious Damage to the Natural Environment*, <https://ihl-databases.icrc.org/en/customary-ihl/v2/rule45> (accessed on 7 June 2026).

¹⁸⁶ Sch. 1, § 268.38(2), ICC (Consequential Amendments) Act (Australia), 2002, *ICRC Customary IHL Database*, <https://ihl-databases.icrc.org/en/customary-ihl/v2/rule45> (accessed on 7 June 2026).

¹⁸⁷ Art. 116.0.2, Criminal Code (Azerbaijan), 1999, *ICRC Customary IHL Database*, <https://ihl-databases.icrc.org/en/customary-ihl/v2/rule45> (accessed on 7 June 2026).

Belarus¹⁸⁸, Belgium¹⁸⁹, Burundi¹⁹⁰, Cambodia¹⁹¹, Colombia¹⁹², Côte d'Ivoire¹⁹³, Ethiopia¹⁹⁴, Georgia¹⁹⁵, Germany¹⁹⁶, Ireland¹⁹⁷, Mali¹⁹⁸, the Netherlands¹⁹⁹, Peru²⁰⁰, the Philippines²⁰¹, Republic of Korea²⁰², South Africa²⁰³ and Spain²⁰⁴. These provisions have, however, so far and according to the ICRC database, never been subject to national case law.²⁰⁵ Moreover, Articles 35(3) and 55(1) AP I are not designated as grave breaches under article 85 AP I, meaning that the grave breaches regime, which mandates that states search for, prosecute, or extradite perpetrators under universal jurisdiction, does not extend to them.²⁰⁶ Domestic implementation therefore creates limited decentralized enforcement and application, but not a centralized delegation under AP I itself.²⁰⁷

¹⁸⁸ Art. 136(2), Criminal Code (Belarus), 1999, *ICRC Customary IHL Database*, <https://ihl-databases.icrc.org/en/customary-ihl/v2/rule45> (accessed on 7 June 2026).

¹⁸⁹ Art. 136 *quater*, § 1(22) Penal Code (Belgium), 1867 (as amended on 5 August 2003), *ICRC Customary IHL Database*, <https://ihl-databases.icrc.org/en/customary-ihl/v2/rule45> (accessed on 7 June 2026); Art. 1 *ter*, § 1(12), Law relating to the Repression of Grave Breaches of International Humanitarian Law

¹⁹⁰ Art. 4(B)(d), Law on Genocide, Crimes against Humanity and War (Burundi), 2003, *ICRC Customary IHL Database*, <https://ihl-databases.icrc.org/en/customary-ihl/v2/rule45> (accessed on 7 June 2026).

¹⁹¹ Art. 194(7), Criminal Code (Cambodia), 2009, *ICRC Customary IHL Database*, <https://ihl-databases.icrc.org/en/customary-ihl/v2/rule45> (accessed on 7 June 2026).

¹⁹² Art. 164, Penal Code (Colombia), 2000, *ICRC Customary IHL Database*, <https://ihl-databases.icrc.org/en/customary-ihl/v2/rule45> (accessed on 7 June 2026).

¹⁹³ Art. 139, Penal Code (Côte d'Ivoire), 1981 as amended in 2015), *ICRC Customary IHL Database*, <https://ihl-databases.icrc.org/en/customary-ihl/v2/rule45> (accessed on 7 June 2026).

¹⁹⁴ Art. 270, Criminal Code (Ethiopia), 2004, *ICRC Customary IHL Database*, <https://ihl-databases.icrc.org/en/customary-ihl/v2/rule45> (accessed on 7 June 2026).

¹⁹⁵ Art. 413(d), Criminal Code (Georgia), 1999, *ICRC Customary IHL Database*, <https://ihl-databases.icrc.org/en/customary-ihl/v2/rule45> (accessed on 7 June 2026).

¹⁹⁶ Art. 1, § 12(3), Law Introducing the International Crimes Code, 2002, *ICRC Customary IHL Database*, <https://ihl-databases.icrc.org/en/customary-ihl/v2/rule45> (accessed on 7 June 2026).

¹⁹⁷ Section 4(1) and (4), Geneva Conventions Act (Ireland), 1962, *ICRC Customary IHL Database*, <https://ihl-databases.icrc.org/en/customary-ihl/v2/rule45> (accessed on 7 June 2026).

¹⁹⁸ Art. 31(4), Penal Code (Mali), *ICRC Customary IHL Database*, <https://ihl-databases.icrc.org/en/customary-ihl/v2/rule45> (accessed on 7 June 2026).

¹⁹⁹ Art. 5(5)(b), International Crimes Act (Netherlands), 2003, *ICRC Customary IHL Database*, <https://ihl-databases.icrc.org/en/customary-ihl/v2/rule45> (accessed on 7 June 2026).

²⁰⁰ Art. 101, Code of Military and Policy Justice (Peru), 2010, *ICRC Customary IHL Database*, <https://ihl-databases.icrc.org/en/customary-ihl/v2/rule45> (accessed on 7 June 2026).

²⁰¹ Section 4(c)(5), Act on Crimes Against International Humanitarian Law, Genocide, and Other Crimes Against Humanity (Philippines), 2009, *ICRC Customary IHL Database*, <https://ihl-databases.icrc.org/en/customary-ihl/v2/rule45> (accessed on 7 June 2026).

²⁰² Art. 13(3), ICC Act (Republic of Korea), 2007, *ICRC Customary IHL Database*, <https://ihl-databases.icrc.org/en/customary-ihl/v2/rule45> (accessed on 7 June 2026).

²⁰³ Schedule 1, Part 3, § (b)(iv), ICC Act (South Africa), 2002, *ICRC Customary IHL Database*, <https://ihl-databases.icrc.org/en/customary-ihl/v2/rule45> (accessed on 7 June 2026).

²⁰⁴ Art. 610, Penal Code (Spain), 1995 (as amended on 25 November 2003), *ICRC Customary IHL Database*, <https://ihl-databases.icrc.org/en/customary-ihl/v2/rule45> (accessed on 7 June 2026).

²⁰⁵ INTERNATIONAL COMMITTEE OF THE RED CROSS, *ICRC Database, Customary IHL, Practice relating to Rule 45, Causing Serious Damage to the Natural Environment*, <https://ihl-databases.icrc.org/en/customary-ihl/v2/rule45> (accessed on 7 June 2026).

²⁰⁶ Art. 85 AP I.

²⁰⁷ ABBOTT K.W., KEOHANE R., MORAVCSIK A. et al., 'The Concept of Legalization', *International Organization* 2000/3, (401) 416, DOI: 10.1162/002081800551271.

53. **INTERNATIONAL COURTS** – International courts can, in the legalization framework, constitute delegation where they are granted authority to interpret and apply the relevant rules, especially when individuals and private groups can initiate a legal proceeding.²⁰⁸ This is why the WTO, the European human rights convention and the ICC can score high on delegation.²⁰⁹ In relation to Articles 35(3) and 55(1) AP I, however, the existing international judicial engagement is more limited. The ICJ, ICTY Committee, and the Eritrea-Ethiopia Claims Commission, as discussed in the previous sections, have engaged with the threshold through their own jurisdictional bases, but AP I does not by itself designate them as the institutions charged with interpreting or applying Articles 35(3) and 55(1) AP I.²¹⁰ Their engagement therefore remains relevant for interpretation, but does not raise the delegation profile of the provisions in the same way as a compulsory dispute-settlement mechanism would. The ICC is different because the Rome Statute does contain a related environmental war crime in Article 8(2)(b)(iv), which mirrors the language of “widespread, long-term and severe” damage combined with a proportionality test absent from AP I. That, however, creates delegation under the Rome Statute, not under AP I.²¹¹

54. **DELEGATION: LOW** – Considered together, the delegation attached to Articles 35(3) and 55(1) AP I remains on the lower side of Abbott et al.’s delegation continuum.²¹² This placement is not unique to Articles 35(3) and 55(1) AP I, but reflects the broader institutional thinness of IHL, which generally lacks dedicated supervisory bodies of the kind from human rights law or international criminal law. The IHFFC provides a formal but weak and conditional fact-finding mechanism. The ICRC exercises an important interpretive role, but without binding power. Military manuals and domestic legislation create decentralized forms of implementation but they are largely state-dependent. International courts have engaged with the threshold only

²⁰⁸ ABBOTT K.W., KEOHANE R., MORAVCSIK A. et al., 'The Concept of Legalization', *International Organization* 2000/3, (401) 416, DOI: 10.1162/002081800551271.

²⁰⁹ ABBOTT K.W., KEOHANE R., MORAVCSIK A. et al., 'The Concept of Legalization', *International Organization* 2000/3, (401) 406, DOI: 10.1162/002081800551271.

²¹⁰ International Court of Justice 8 July 1996, 'Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion', *ICJ Reports* 1996, 226, <https://www.icj-cij.org/sites/default/files/case-related/95/095-19960708-ADV-01-00-EN.pdf> (accessed on 7 June 2026); International Criminal Tribunal for the former Yugoslavia (ICTY), 'Final Report to the Prosecutor by the Committee Established to Review the NATO Bombing Campaign Against the Federal Republic of Yugoslavia', 2000, §14-17, <https://www.icty.org/x/file/Press/nato061300.pdf> (accessed on 7 June 2026); Eritrea-Ethiopia Claims Commission 28 April 2004, 'Partial Award: Central Front: Ethiopia's Claim 2', *Reports of International Arbitral Awards* 2009, vol. XXVI, (155) 187, https://legal.un.org/riaa/cases/vol_XXVI/155-194.pdf (accessed on 7 June 2026).

²¹¹ Art. 8(2)(b)(iv) Rome Statute of 17 July 1998 of the International Criminal Court, *UNTS* vol. 2187, 3.

²¹² ABBOTT K.W., KEOHANE R., MORAVCSIK A. et al., 'The Concept of Legalization', *International Organization* 2000/3, (401) 416, DOI: 10.1162/002081800551271.

through their own jurisdictional bases and not through delegation by AP I itself. Therefore, there is no strong third party authority competent to interpret, apply and enforce the triple threshold. Delegation is therefore low.²¹³

SECTION 2.6 TYPE V PROFILE

55. TYPE V FORM – The analysis of the three dimensions produces a specific form of legalization. Articles 35(3) and 55(1) AP I score high on obligation, low on precision, and low on delegation (see Table 1). This combination corresponds to what Abbott et al. call a Type V legalization profile.²¹⁴ Examples Abbott et al. give for this type are the Vienna Ozone Convention²¹⁵ and the European Framework Convention on National Minorities²¹⁶, instruments that combine high obligations with imprecise language and a weak institutional enforcement framework.²¹⁷

56. SIGNIFICANCE OF TYPE V PROFILE – This Type V profile captures the form of the puzzle identified at the start of this chapter. Articles 35(3) and 55(1) AP I are formally binding, and their absolute formulation gives them a strong doctrinal appearance. However, triggering the threshold remains difficult, as it is imprecisely formulated and there are no strong mechanisms to clarify or apply the provisions. The legalization profile shows how the high obligation can coexist with the low precision and low delegation.

57. GOING FORWARD – The Type V profile can identify the form of Articles 35(3) and 55(1) AP I, but it cannot by itself explain their non-application or what function the provisions serve. Abbott et al. observe that arrangements like these are often used “in settings where norms are contested and concerns for sovereign autonomy are strong, making higher levels of obligation, precision, or delegation unacceptable.”²¹⁸ This observation is relevant to Articles 35(3) and 55(1) AP I, but the legalization framework remains primarily diagnostic. The next chapter

²¹³ ABBOTT K.W., KEOHANE R., MORAVCSIK A. et al., 'The Concept of Legalization', *International Organization* 2000/3, (401) 416, DOI: 10.1162/002081800551271.

²¹⁴ ABBOTT K.W., KEOHANE R., MORAVCSIK A. et al., 'The Concept of Legalization', *International Organization* 2000/3, (401) 406-407, DOI: 10.1162/002081800551271.

²¹⁵ Vienna Convention of 22 March 1985 for the Protection of the Ozone Layer, *UNTS* vol. 1513, 293.

²¹⁶ Framework Convention of 1 February 1995 for the Protection of National Minorities, *ETS* No. 157.

²¹⁷ ABBOTT K.W., KEOHANE R., MORAVCSIK A. et al., 'The Concept of Legalization', *International Organization* 2000/3, (401) 406, DOI: 10.1162/002081800551271.

²¹⁸ ABBOTT K.W., KEOHANE R., MORAVCSIK A. et al., 'The Concept of Legalization', *International Organization* 2000/3, (401) 407, DOI: 10.1162/002081800551271.

therefore turns to the symbolic legislation framework to examine whether the provisions and their non-application can be understood as a drafting failure or as part of the function they serve.

Table 1: The legalization profile of Articles 35(3) and 55(1) AP I

Dimension	Rating	Reason
Obligation	High	Binding treaty provision; formulated in obligatory and prohibitory terms; possible customary status
Precision	Low	Undefined, cumulative and contested threshold; low judicial clarification; differing state practice; non-binding ICRC clarification
Delegation	Low	No dedicated adjudicatory mechanism; IHFFC is weak; ICRC is interpretive but non-binding; external domestic and international enforcement
Result	Type V	Binding norm with unclear content and weak institutional application

CHAPTER 3 FUNCTION: SYMBOLIC LEGISLATION

SECTION 3.1 THE CONCEPT OF SYMBOLIC LEGISLATION

3.1.1 THEORETICAL FOUNDATIONS

58. **A NEGLECTED THEORETICAL QUESTION** – Chapter 2 identified the legalization profile of Articles 35(3) and 55(1) AP I as Type V: high obligation, low precision and low delegation. That finding describes the form of the provisions. It does not, however, explain the function of the provisions. This chapter addresses that question through the theory of symbolic legislation. Through the six criteria of symbolic legislation, as set out by Van Klink, this chapter asks whether the provisions perform a symbolic function, by recognizing environmental protection in armed conflict, without effectively constraining military conduct.

59. **THE SOCIAL FUNCTIONS OF LEGISLATION** – The starting point of the concept of symbolic legislation is that legislation can have other political and social goals than officially proclaimed.²¹⁹ A well-known example of the study of symbolic legislation is the work of the Norwegian sociologist of law Vilhelm Aubert, who analyzed the Norwegian 1948 Housemaid Law and observed that the law had not been intended to be effective.²²⁰ It had been enacted to recognize the rights of the housemaids, while leaving their position materially unchanged.²²¹ His insights gave rise to the study of symbolic legislation: “If a certain category of roles is needed in a social system, it may be created in fantasy, and for widely divergent reasons. Even the law may participate in this. Law may on occasion move in the sphere of symbolism and magic rather than in the everyday sphere of practical solutions to practical problems.”²²²

60. **TWO CONCEPTS OF SYMBOLIC LEGISLATION** – Van Klink distinguishes between two concepts of symbolic legislation.²²³ This chapter takes the critical-sociological concept as its

²¹⁹ VAN KLINK B., 'Symbolic Legislation: An Essentially Political Concept' in VAN KLINK B., VAN BEERS B. and POORT L. (eds.), *Symbolic Legislation Theory and Developments in Biolaw*, Springer International Publishing, 2016, (19) 19, DOI: 10.1007/978-3-319-33365-6_2.

²²⁰ VAN KLINK B., 'Symbolic Legislation: An Essentially Political Concept' in VAN KLINK B., VAN BEERS B. and POORT L. (eds.), *Symbolic Legislation Theory and Developments in Biolaw*, Springer International Publishing, 2016, (19) 19, DOI: 10.1007/978-3-319-33365-6_2.

²²¹ AUBERT V., 'Some Social Functions of Legislation', *Acta Sociologica* 1967/1, (97) 113, DOI: 10.1177/000169936701000107.

²²² AUBERT V., 'Some Social Functions of Legislation', *Acta Sociologica* 1967/1, (97) 115, DOI: 10.1177/000169936701000107.

²²³ In his book, Van Klink brings together perspectives from symbolic legislation theory on the one hand, and from biolaw and bioethics on the other hand. The criteria he identifies in the second chapter of his book, however, are applicable beyond the field of biolaw alone; VAN KLINK B., 'Symbolic Legislation: An Essentially Political

starting point. This is the more established meaning in legal sociology, where symbolic legislation is associated with weak enforcement, and with power-maintaining and status-quo-preserving functions.²²⁴ The more positive concept, which understands symbolic legislation as a communicative framework, is more suitable for open and aspirational norms that are deliberately left to be developed through interpretation and interaction.²²⁵ Chapter 2, however, pointed to a different configuration: Articles 35(3) and 55(1) AP I combine high obligation with low precision and low delegation. Their indeterminacy is therefore not accompanied by a strong institutional framework or broader interpretative community capable of specifying the norm.²²⁶ The criteria of the critical-sociological concept are thus the more appropriate starting point for explaining the legal form adopted in 1977. The subsequent analysis will test whether the text, structure and drafting history of the provisions support that reading.

3.1.2 ANALYTICAL FRAMEWORK: CRITERIA AND TYPES

61. CRITERIA FOR IDENTIFYING SYMBOLIC LEGISLATION – Within the critical-sociological tradition, Van Klink identifies six criteria for determining whether a particular instance of legislation is symbolic.²²⁷ These criteria are divided into semantic and pragmatic criteria. The semantic criteria concern the textual qualities of the legal text itself. They include *discrepancy*, where substantive rules are not backed up by sufficient enforcement mechanisms; *obscurity*, where the text is difficult to understand for its addressees, and legal and political actors; and *vagueness*, where the rules can be interpreted in multiple ways. The pragmatic criteria concern the context in which the legislative process took place. They include the presence of a *crisis* situation that creates pressure for immediate governmental action; a *conflict of interest* between two or more groups during the legislative process; and the *politization* or the framing of the resulting rule by one group as a moral victory over the other group and a confirmation of its

Concept' in VAN KLINK B., VAN BEERS B. and POORT L. (eds.), *Symbolic Legislation Theory and Developments in Biolaw*, Springer International Publishing, 2016, (19) 21, DOI: 10.1007/978-3-319-33365-6_2.

²²⁴ VAN KLINK B., 'Symbolic Legislation: An Essentially Political Concept' in VAN KLINK B., VAN BEERS B. and POORT L. (eds.), *Symbolic Legislation Theory and Developments in Biolaw*, Springer International Publishing, 2016, (19) 19 and 33, DOI: 10.1007/978-3-319-33365-6_2.

²²⁵ VAN KLINK B., 'Symbolic Legislation: An Essentially Political Concept' in VAN KLINK B., VAN BEERS B. and POORT L. (eds.), *Symbolic Legislation Theory and Developments in Biolaw*, Springer International Publishing, 2016, (19) 24-30, DOI: 10.1007/978-3-319-33365-6_2.

²²⁶ VAN KLINK B., 'Symbolic Legislation: An Essentially Political Concept' in VAN KLINK B., VAN BEERS B. and POORT L. (eds.), *Symbolic Legislation Theory and Developments in Biolaw*, Springer International Publishing, 2016, (19) 25, DOI: 10.1007/978-3-319-33365-6_2.

²²⁷ VAN KLINK B., 'Symbolic Legislation: An Essentially Political Concept' in VAN KLINK B., VAN BEERS B. and POORT L. (eds.), *Symbolic Legislation Theory and Developments in Biolaw*, Springer International Publishing, 2016, (19) 22, DOI: 10.1007/978-3-319-33365-6_2.

values.²²⁸ Van Klink suggests that where two or more criteria are present, there is a reason for treating the legislation as serving symbolic rather than instrumental goals.²²⁹ However, this dissertation argues that the threshold of two criteria is rather low for assigning a symbolic function to a norm, and would more confidently treat the provisions as symbolic legislation if more than two criteria are met. The analysis distinguishes between criteria that are strongly engaged, that apply only in a more limited sense, or that are not engaged.

62. RELATION WITH THE LEGALIZATION ANALYSIS – This dissertation argues that the semantic criteria are related to the dimensions of legalization in Chapter 2. For example, the precision dimension of a norm, or the extent to which a rule defines the conduct it requires with sufficient clarity, can affect how a norm is assessed under the vagueness criterion, which concerns the rule's openness to multiple interpretations.²³⁰ As the terms are not synonyms, the vagueness criterion still requires a separate assessment in this chapter. Similarly, the criterion of discrepancy, which asks whether that institutional weakness stands in tension with the apparent strength of the rule, can be related to the tension between the dimensions of obligation and delegation.²³¹ Chapter 4 takes up this relationship by further developing the connection between the legal form identified in Chapter 2 and the symbolic function identified in this chapter.

²²⁸ VAN KLINK B., 'Symbolic Legislation: An Essentially Political Concept' in VAN KLINK B., VAN BEERS B. and POORT L. (eds.), *Symbolic Legislation Theory and Developments in Biolaw*, Springer International Publishing, 2016, (19) 22, DOI: 10.1007/978-3-319-33365-6_2; Because this chapter applies Van Klink's six criteria throughout in order to assess whether the two environmental provisions of Additional Protocol I can be understood as symbolic legislation, it is useful to quote Van Klink's own formulation of those criteria: "In order to determine whether a particular instance of legislation is symbolic, several criteria are used, taken either from the textual qualities of the law at hand (semantic criteria) or the context in which the legislative process takes place (pragmatic criteria). Semantic criteria are: in a symbolic law, the substantive provisions are not backed up with provisions to enforce them and this discrepancy cannot be justified on rational grounds (criterion of discrepancy); the text of the law is incomprehensible for the citizens who have to comply with it as well as for the legal and political actors who have to apply it (criterion of obscurity); and the rules of which the law consist can be interpreted in various ways (criterion of vagueness). Pragmatic criteria are: in the legislative process two or more groups with conflicting or incompatible interests are fighting each other (criterion of conflict of interest); one of the groups involved considers the enactment of the law as a moral victory over the other group (or groups) and a confirmation of its values (criterion of politisation); and society is in a state of emergency that calls for immediate governmental action (crisis criterion). If two or more of these criteria are met, it is likely that the law in question serves symbolic rather than instrumental goals."

²²⁹ This also means that the argument does not depend on proving that every criterion of symbolic legislation is equally present. VAN KLINK B., 'Symbolic Legislation: An Essentially Political Concept' in VAN KLINK B., VAN BEERS B. and POORT L. (eds.), *Symbolic Legislation Theory and Developments in Biolaw*, Springer International Publishing, 2016, (19) 22, DOI: 10.1007/978-3-319-33365-6_2.

²³⁰ ABBOTT K.W., KEOHANE R., MORAVCSIK A. et al., 'The Concept of Legalization', *International Organization* 2000/3, (401) 401, DOI: 10.1162/002081800551271.

²³¹ ABBOTT K.W., KEOHANE R., MORAVCSIK A. et al., 'The Concept of Legalization', *International Organization* 2000/3, (401) 401, DOI: 10.1162/002081800551271; VAN KLINK B., 'Symbolic Legislation: An Essentially Political Concept' in VAN KLINK B., VAN BEERS B. and POORT L. (eds.), *Symbolic Legislation Theory and Developments in Biolaw*, Springer International Publishing, 2016, (19) 22, DOI: 10.1007/978-3-319-33365-6_2.

Moreover, the pragmatic criteria are independent criteria drawn from the negotiation record, and engage less with the identified legalization profile.

63. THREE TYPES OF SYMBOLIC LEGISLATION – Van Klink distinguishes three types of symbolic legislation in the critical-sociological tradition, each corresponding to a different effect that the legislation is designed to produce.²³² *Status legislation* aims to improve the prestige of a particular group. It has an expressive function to confirm the values that are essential for those involved in the legislative process. *Illusionary legislation* creates the appearance that a crisis situation is being addressed or that a threat to society is averted, without the substantive measures to do so. It functions as a demonstration of governmental power, or to attract votes during an election campaign. *Compromise legislation* reconciles antagonistic groups by means of a formula that allows each to claim victory while leaving the underlying conflict unresolved.²³³ These types are not mutually exclusive, since a rule may contain elements of more than one type.²³⁴ Section 3.4 assesses whether, and to what extent, Articles 35(3) and 55(1) AP I can be understood through these types.

64. STRUCTURE OF THE CHAPTER – The remainder of this chapter applies the symbolic legislation framework to Articles 35(3) and 55(1) AP I. Section 3.2 examines the semantic criteria of discrepancy, obscurity, and vagueness. Section 3.3 turns to the pragmatic criteria of crisis, conflict of interest and politization, by looking at the negotiation record of the 1974-1977 Diplomatic Conference and the declassified state-position papers from that period. Following this, Section 3.4 characterizes the rule across Van Klink's three types, assessing whether, and to what extent, the triple threshold can be understood as compromise, illusionary and status legislation. Finally, Section 3.5 synthesizes the diagnosis, and uses that diagnosis to help explain the non-application.

²³² VAN KLINK B., 'Symbolic Legislation: An Essentially Political Concept' in VAN KLINK B., VAN BEERS B. and POORT L. (eds.), *Symbolic Legislation Theory and Developments in Biolaw*, Springer International Publishing, 2016, (19) 23, DOI: 10.1007/978-3-319-33365-6_2.

²³³ AUBERT V., 'Some Social Functions of Legislation', *Acta Sociologica* 1967/1, (97) 110, DOI: 10.1177/000169936701000107.

²³⁴ VAN KLINK B., 'Symbolic Legislation: An Essentially Political Concept' in VAN KLINK B., VAN BEERS B. and POORT L. (eds.), *Symbolic Legislation Theory and Developments in Biolaw*, Springer International Publishing, 2016, (19) 33, DOI: 10.1007/978-3-319-33365-6_2.

SECTION 3.2 SEMANTIC ANALYSIS OF THE THRESHOLD

3.2.1 THE CRITERION OF DISCREPANCY

65. **TWO STRUCTURAL FEATURES IN TENSION** – Van Klink’s discrepancy criterion concerns situations where the substantive provisions are not supported by adequate provisions to secure their enforcement and where this discrepancy cannot be justified on rational grounds.²³⁵ In the case of Articles 35(3) and 55(1) AP I, this criterion is strongly engaged because the provisions combine a strong substantive prohibition with weak institutional support. The legalization analysis of Chapter 2 showed that the provisions sit high on the obligation dimension, as they are binding treaty provisions, which are formulated in prohibitory terms.²³⁶ The delegation analysis, by contrast, showed that no strong third-party authority has been granted competence to interpret, apply and enforce the triple threshold. The discrepancy therefore lies not in weak enforcement as such, but in the contrast between the strongly formulated substantive provisions and the weakness of the institutional architecture around them.

66. **ABSOLUTE PROHIBITION, WEAK ENFORCEMENT ARCHITECTURE** – This contrast is sharpened by the absolute character of Articles 35(3) and 55(1) AP I. Subject to the qualifications discussed in Section 2.3, the provisions are absolute in the sense that, once the threshold is triggered, no ordinary military-necessity or proportionality exception applies.²³⁷ Yet this strong protection on the substantive level is not matched by a corresponding enforcement architecture. As discussed, Articles 35(3) and 55(1) AP I are not listed among the grave breaches of AP I in Article 85 AP I.²³⁸ Nor is there a dedicated monitoring body, reporting mechanism, or adjudicatory forum that is charged with clarifying and applying the threshold. As discussed in Chapter 2, the IHFFC offers only a conditional fact-finding mechanism, the ICRC has an important but non-binding interpretative role, and international courts have only

²³⁵ VAN KLINK B., 'Symbolic Legislation: An Essentially Political Concept' in VAN KLINK B., VAN BEERS B. and POORT L. (eds.), *Symbolic Legislation Theory and Developments in Biolaw*, Springer International Publishing, 2016, (19) 22, DOI: 10.1007/978-3-319-33365-6_2.

²³⁶ As discussed in Section 2.3.

²³⁷ ARGREN R., 'The obligation to prevent environmental harm in relation to armed conflict', *International review of the Red Cross* 2023/924, (1208) 1213, DOI: 10.1017/S1816383123000231; FLECK D. (ed.), *The handbook of international humanitarian law Oxford handbooks*, Oxford University Press, 2021, 346, DOI: 10.1093/law/9780198847960.003.0010; PAYNE C.R., 'Protection of the Natural Environment' in SAUL B. and AKANDE D. (eds.), *The Oxford Guide to International Humanitarian Law*, Oxford University Press, 2020, (205) 218, DOI: 10.1093/law/9780198855309.003.0009; DIENELT A., *Armed Conflicts and the Environment*, Springer International Publishing, 2022, 45, DOI: 10.1007/978-3-030-99339-9.

²³⁸ Art. 85 AP I.

engaged with the threshold through other jurisdictional bases.²³⁹ The legal form thus allows environmental protection to be recognized at a high normative level while leaving the operation of the rule underdeveloped. The discrepancy criterion is therefore strongly engaged.

3.2.2 THE CRITERION OF OBSCURITY

67. **OBSCURITY CRITERION NOT SATISFIED** – Van Klink’s criterion of obscurity requires that the text of a law is “incomprehensible for the citizens who have to comply with it as well as for the legal and political actors who have to apply it”.²⁴⁰ On that definition, Articles 35(3) and 55(1) AP I do not satisfy the criterion. The provisions are not incomprehensible at the level of language or basic legal structure. The prohibition is grammatically clear, the protected object is identified, and the cumulative structure of the threshold is straightforward. The difficulty for actors who have to comply with or apply the rule is that it does not provide sufficient guidance or clarity on how to interpret the threshold, not that it is obscure. That issue, however, is better analyzed under the criterion of vagueness in the next subsection.

3.2.3 THE CRITERION OF VAGUENESS

68. **THREE UNDEFINED CRITERIA** – Van Klink’s criterion of vagueness concerns rules that “can be interpreted in various ways.”²⁴¹ Articles 35(3) and 55(1) AP I engage this criterion because the operative terms of the triple threshold remain open to multiple interpretations. As the precision discussion in Chapter 2 showed, the terms “widespread”, “long-term” and “severe” remain insufficiently determinate: they are not defined in AP I, have not been authoritatively clarified by courts, and have also not acquired a settled operational meaning in state practice.²⁴² These findings show that the terms can be interpreted in different ways, which brings them within the vagueness criterion.

69. **VAGUENESS AND APPLICATION** – Room for interpretation as such is not necessarily problematic. In this case, however, vagueness affects the conditions under which the rules become applicable. This has led to multiple criticisms among legal scholars. Okowa has argued

²³⁹ As discussed in Section 2.5.

²⁴⁰ VAN KLINK B., 'Symbolic Legislation: An Essentially Political Concept' in VAN KLINK B., VAN BEERS B. and POORT L. (eds.), *Symbolic Legislation Theory and Developments in Biolaw*, Springer International Publishing, 2016, (19) 22, DOI: 10.1007/978-3-319-33365-6_2.

²⁴¹ VAN KLINK B., 'Symbolic Legislation: An Essentially Political Concept' in VAN KLINK B., VAN BEERS B. and POORT L. (eds.), *Symbolic Legislation Theory and Developments in Biolaw*, Springer International Publishing, 2016, (19) 22, DOI: 10.1007/978-3-319-33365-6_2.

²⁴² As discussed in Section 2.4.

that this imprecision grants states a wide margin of appreciation that renders the threshold practically irrelevant.²⁴³ Minkova has further argued that such ambiguity creates loopholes within a patchwork of insufficient norms, allowing states to characterize damage as falling below the threshold.²⁴⁴ Henckaerts has similarly observed that this vagueness makes the rule less useful in practice.²⁴⁵ Droege and Tougas likewise noted that the threshold is high yet imprecise, with the geographical requirement being particularly unsatisfactory.²⁴⁶

70. THE CUMULATIVE EFFECT OF VAGUENESS – The significance of this vagueness is enlarged through the cumulative structure of the threshold. Each criterion, taken separately, is open to readings that may either include or exclude a given case of environmental damage. Uncertainty about one criterion of the triple threshold can prevent a finding that it has been crossed. The vagueness therefore affects the trigger to an otherwise strong prohibition. In that sense, the criterion is strongly engaged, while still operating in combination with the discrepancy and pragmatic criteria instead of proving the symbolic character of the provisions on its own.

SECTION 3.3 PRAGMATIC ANALYSIS OF THE THRESHOLD

3.3.1 THE CRISIS CRITERION

71. LEGAL GAP BEFORE API – Van Klink’s crisis criterion concerns situations when legislation is enacted in response to a state of emergency that calls for immediate governmental action.²⁴⁷ Before the adoption of Additional Protocol I in 1977, international humanitarian law did not contain an explicit rule protecting the environment as such in armed conflict.²⁴⁸ The 1907 Hague Regulations offered limited protection through rules on enemy property, poison and the necessities of war.²⁴⁹ Moreover, although customary international humanitarian law was still in

²⁴³ OKOWA P., 'Environmental justice in situations of armed conflict' in EBBESSON J. and OKOWA P. (eds.), *Environmental Law and Justice in Context*, Cambridge University Press, 2009, (231) 240, DOI: 10.1017/CBO9780511576027.013.

²⁴⁴ MINKOVA L.G., 'The Fifth International Crime: Reflections on the Definition of “Ecocide”', *Journal of genocide research* 2023/1, (61) 67, DOI: 10.1080/14623528.2021.1964688.

²⁴⁵ HENCKAERTS J.-M., 'Towards Better Protection for the Environment in Armed Conflict: Recent Developments in International Humanitarian Law', *Review of European Community & international environmental law* 2000/1, (13) 14, DOI: 10.1111/1467-9388.00228.

²⁴⁶ DROEGE C. and TOUGAS M.-L., 'The Protection of the Natural Environment in Armed Conflict - Existing Rules and Need for Further Legal Protection', *Nordic Journal of International Law* 2013/1, (21) 33, DOI: 10.1163/15718107-08201003.

²⁴⁷ VAN KLINK B., 'Symbolic Legislation: An Essentially Political Concept' in VAN KLINK B., VAN BEERS B. and POORT L. (eds.), *Symbolic Legislation Theory and Developments in Biolaw*, Springer International Publishing, 2016, (19) 22, DOI: 10.1007/978-3-319-33365-6_2.

²⁴⁸ DIENELT A., *Armed Conflicts and the Environment*, Springer International Publishing, 2022, 62-64, DOI: 10.1007/978-3-030-99339-9.

²⁴⁹ Art. 23 Hague Convention (IV) of 18 October 1907 respecting the Laws and Customs of War on Land and its annex, ICRC database, <https://ihl-databases.icrc.org/en/ihl-treaties/hague-conv-iv-1907> (accessed on 7 June

formation at the time AP I was negotiated, certain principles of customary international law offered some additional protection.²⁵⁰ For example, the prohibition of unnecessary suffering contributed to indirect protection against environmental damage as long as it harmed soldiers or civilians.²⁵¹ Additionally, the principles of proportionality and military necessity were related to environmental protection in armed conflict.²⁵² However, the legal framework at the beginning of the 1970s did not yet recognize environmental damage in armed conflict as an autonomous concern.

72. VIETNAM AS CATALYST – The Vietnam War changed the visibility and urgency of that gap. The use of herbicides during the Vietnam War from 1962 to 1971, including Agent Orange, made the environmental consequences of modern warfare visible.²⁵³ On an unprecedented scale, and as part of a military strategy, chemical defoliation damaged ecosystems, poisoned soil and water, and caused long-term health effects that affected civilians decades after the end

2026); BOTHE M., 'The Protection of the Environment in Times of Armed Conflict', *German yearbook of international law* 1991/1, (54) 55; DIENELT A., *Armed Conflicts and the Environment*, Springer International Publishing, 2022, 27 and 62, DOI: 10.1007/978-3-030-99339-9; DROEGE C. and GIORGOU E., 'How international humanitarian law develops', *International review of the Red Cross* 2022/920-921, (1798) 1803, DOI: 10.1017/S1816383122000893.

²⁵⁰ BOTHE M., 'Protection of the environment in relation to armed conflict—50 years of effort, and no end in sight', *Environment and Security* 2023/1-2, (24) 27, DOI: 10.1177/27538796231195601; PAYNE C.R., 'Protection of the Natural Environment' in SAUL B. and AKANDE D. (eds.), *The Oxford Guide to International Humanitarian Law*, Oxford University Press, 2020, (205) 214, DOI: 10.1093/law/9780198855309.003.0009.

²⁵¹ DROEGE C. and GIORGOU E., 'How international humanitarian law develops', *International review of the Red Cross* 2022/920-921, (1798) 1802, DOI: 10.1017/S1816383122000893.

²⁵² DIENELT A., *Armed Conflicts and the Environment*, Springer International Publishing, 2022, 24 and 69, DOI: 10.1007/978-3-030-99339-9; FLECK D. (ed.), *The handbook of international humanitarian law Oxford handbooks*, Oxford University Press, 2021, 342, DOI: 10.1093/law/9780198847960.003.0010; BOTHE M., 'Protection of the environment in relation to armed conflict—50 years of effort, and no end in sight', *Environment and Security* 2023/1-2, (24) 28, DOI: 10.1177/27538796231195601; KOPPE E.V., 'The Principle of Ambiguity and the Prohibition against Excessive Collateral Damage to the Environment during Armed Conflict', *Nordic Journal of International Law* 2013/1, (53) 59, DOI: 10.1163/15718107-08201004.

²⁵³ KOPPE E.V., 'The Principle of Ambiguity and the Prohibition against Excessive Collateral Damage to the Environment during Armed Conflict', *Nordic Journal of International Law* 2013/1, (53) 54, DOI: 10.1163/15718107-08201004; OKOWA P., 'Environmental justice in situations of armed conflict' in EBBESSON J. and OKOWA P. (eds.), *Environmental Law and Justice in Context*, Cambridge University Press, 2009, (231) 234, DOI: 10.1017/CBO9780511576027.013; SANDS P. and PEEL J., *Principles of International Environmental Law*, Cambridge University Press, 2012, 796, DOI: 10.1017/CBO9781139019842.

of the war.²⁵⁴ Bothe noted that scandalization of public opinion is a driving force for developing restraints on military force.²⁵⁵

73. NORMATIVE SHOCK AND LEGAL RESPONSE – These consequences of the Vietnam War became globally visible symbols of the environmental cost of armed conflicts, contributing to a broader environmental awakening in the late 1960s and 1970s around the world.²⁵⁶ This growing environmental movement is marked by events such as the first Earth Day in 1970 and the 1972 Stockholm Conference on the Human Environment, which placed environmental protection on the agenda of multilateral politics.²⁵⁷ Environmental consciousness, together with multiple grassroots organizations, was visibly growing.²⁵⁸ The 1974-1977 Diplomatic Conference convened at a moment when environmental concerns were emerging, while the ecological consequences of modern warfare became more visible, exposing a fundamental gap in IHL that had to be addressed in AP I.²⁵⁹

²⁵⁴ ARGREN R., 'The obligation to prevent environmental harm in relation to armed conflict', *International review of the Red Cross* 2023/924, (1208) 1214, DOI: 10.1017/S1816383123000231; BOTHE M., BRUCH C., DIAMOND J. et al., 'International law protecting the environment during armed conflict: gaps and opportunities', *International review of the Red Cross* 2010/879, (569) 572, DOI: 10.1017/S1816383110000597; BREITWIESER-FARIA Y., 'Environmental Protections During Armed Conflict as Supportive Mechanisms for the Prevention of Atrocity Crimes', *Journal of international humanitarian legal studies* 2024/11, (267) 275, DOI: 10.1163/18781527-bja10096; DROEGE C. and TOUGAS M.-L., 'The Protection of the Natural Environment in Armed Conflict - Existing Rules and Need for Further Legal Protection', *Nordic Journal of International Law* 2013/1, (21) 22, DOI: 10.1163/15718107-08201003.

²⁵⁵ BOTHE M., 'The Ethics, Principles and Objectives of Protection of the Environment in Times of Armed Conflict' in RAYFUSE R. (ed.), *War and the Environment*, Brill, 2014, (91) 94, DOI: 10.1163/9789004270657_006.

²⁵⁶ BOTHE M., 'The Ethics, Principles and Objectives of Protection of the Environment in Times of Armed Conflict' in RAYFUSE R. (ed.), *War and the Environment*, Brill, 2014, (91) 99-107, DOI: 10.1163/9789004270657_006; ROSS A.M., *The Politics of Environmental Education Centres: People, Power and Pedagogies*, Springer, 2025, 53-54, DOI: 10.1007/978-3-031-82567-5.

²⁵⁷ DROEGE C. and TOUGAS M.-L., 'The Protection of the Natural Environment in Armed Conflict - Existing Rules and Need for Further Legal Protection', *Nordic Journal of International Law* 2013/1, (21) 22, DOI: 10.1163/15718107-08201003; EGELSTON A.E., *Sustainable Development: A History*, Springer, 2013, 61, DOI: 10.1007/978-94-007-4878-1.

²⁵⁸ BOTHE M., 'The Ethics, Principles and Objectives of Protection of the Environment in Times of Armed Conflict' in RAYFUSE R. (ed.), *War and the Environment*, Brill, 2014, (91) 107, DOI: 10.1163/9789004270657_006; EGELSTON A.E., *Sustainable Development: A History*, Springer, 2013, 1-3, DOI: 10.1007/978-94-007-4878-1.

²⁵⁹ BOTHE M., BRUCH C., DIAMOND J. et al., 'International law protecting the environment during armed conflict: gaps and opportunities', *International review of the Red Cross* 2010/879, (569) 571, DOI: 10.1017/S1816383110000597; DROEGE C. and GIORGOU E., 'How international humanitarian law develops', *International review of the Red Cross* 2022/920-921, (1798) 1805, DOI: 10.1017/S1816383122000893; FLECK D. (ed.), *The handbook of international humanitarian law Oxford handbooks*, Oxford University Press, 2021, 339, DOI: 10.1093/law/9780198847960.003.0010; HENCKAERTS J.-M., 'History and Sources' in SAUL B. and AKANDE D. (eds.), *The Oxford Guide to International Humanitarian Law*, Oxford University Press, 2020, (1) 7, DOI: 10.1093/law/9780198855309.003.0001; KOPPE E.V., 'The Principle of Ambiguity and the Prohibition against Excessive Collateral Damage to the Environment during Armed Conflict', *Nordic Journal of International Law* 2013/1, (53) 54, DOI: 10.1163/15718107-08201004.

This becomes clear in statements by states during the first session of the Plenary Meetings. The delegate of Hungary stated that “the Conference must not forget the tragic experience of armed conflicts over the past twenty-five years, especially during the war against Vietnam” and stated that “the two protocols must strongly condemn economic and ecological warfare, and at the same time ensure the protection of the human environment.”²⁶⁰ The delegate of Sweden mentioned that “since 1945, some hundred internal or international armed conflicts had occurred, with characteristics unforeseen by the Geneva Conventions and by earlier legal instruments, such as total war, ecological and electronic warfare, and saturation bombing.”²⁶¹ Moreover, the delegate of Yugoslavia stated that “biological and ecological warfare, as developed more particularly in Vietnam, should be placed under the ban of the new body of international humanitarian law.”²⁶² Other statements also illustrate the growing call for provisions on environmental protection during the negotiations.²⁶³

74. CRISIS AND HIGH OBLIGATION – The crisis criterion is strongly engaged. It helps explain why environmental protection entered AP I in the form of binding treaty provisions. In the legalization language used in Chapter 2, the crisis context helps explain why the obligation dimension was so high. The environmental harm in Vietnam made explicit legal recognition difficult to avoid. However, a possible conflict of interest, as discussed in the next subsection, influenced the form of this obligation.

²⁶⁰ Summary record of the eleventh plenary meeting, DIPLOMATIC CONFERENCE ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS, 5 March 1974, CDDH/SR.11, §71-72, https://library.icrc.org/library/docs/CD/CD_1977_ACTES_ENG_05.pdf (accessed on 7 June 2026).

²⁶¹ Summary record of the fourteenth plenary meeting, DIPLOMATIC CONFERENCE ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS, 7 March 1974, CDDH/SR.14, §3, https://library.icrc.org/library/docs/CD/CD_1977_ACTES_ENG_05.pdf (accessed on 7 June 2026).

²⁶² Summary record of the eleventh plenary meeting, DIPLOMATIC CONFERENCE ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS, 5 March 1974, CDDH/SR.11, §22, https://library.icrc.org/library/docs/CD/CD_1977_ACTES_ENG_05.pdf (accessed on 7 June 2026).

²⁶³ Other statements during the first session for the discussion of environmental protection were made by the Soviet Union and Czechoslovakia: Summary record of the twelfth plenary meeting, DIPLOMATIC CONFERENCE ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS, 6 March 1974, CDDH/SR.12, §22, https://library.icrc.org/library/docs/CD/CD_1977_ACTES_ENG_05.pdf (accessed on 7 June 2026); Summary record of the thirteenth plenary meeting, DIPLOMATIC CONFERENCE ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS, 6 March 1974, CDDH/SR.13, §58, https://library.icrc.org/library/docs/CD/CD_1977_ACTES_ENG_05.pdf (accessed on 7 June 2026).

3.3.2 THE CRITERION OF CONFLICT OF INTEREST

75. CONFLICTING INTERESTS AT THE NEGOTIATION TABLE – Van Klink’s criterion of conflict of interest concerns legislative processes shaped by two or more groups with conflicting or incompatible interests.²⁶⁴ The 1974-1977 Diplomatic Conference engaged this criterion, with conflicts mainly on the formulation of the threshold. The crisis described above created the pressure to address environmental damage in AP I. At the same time, states were concerned that the provisions could impose excessive restrictions on military operations.²⁶⁵

76. BROADER ENVIRONMENTAL PROTECTION – The archival records of the negotiations show that broader ecological formulations of the environmental damage threshold were seriously put on the table. One amendment, submitted by Egypt, Australia, Czechoslovakia, Finland, German Democratic Republic, Hungary, Ireland, Norway, Yugoslavia and Sudan proposed to prohibit methods and means “which disturb or alter the ecological balance of the human environment.”²⁶⁶ Czechoslovakia, German Democratic Republic and Hungary proposed another amendment which stated that “it is forbidden to impair or destroy the natural environment as such by any means or methods whatsoever, since the maintenance of a balanced environment is essential for the survival of the civilian population.”²⁶⁷ Vietnam, later joined by Uganda, proposed language prohibiting methods and means of combat “which disrupt or destroy the natural conditions of the human environment.”²⁶⁸ These proposals show that several delegations sought a formulation broader than the final triple threshold.

²⁶⁴ VAN KLINK B., 'Symbolic Legislation: An Essentially Political Concept' in VAN KLINK B., VAN BEERS B. and POORT L. (eds.), *Symbolic Legislation Theory and Developments in Biolaw*, Springer International Publishing, 2016, (19) 22, DOI: 10.1007/978-3-319-33365-6_2.

²⁶⁵ BOTHE M., 'Protection of the environment in relation to armed conflict—50 years of effort, and no end in sight', *Environment and Security* 2023/1-2, (24) 27, DOI: 10.1177/27538796231195601; DROEGE C. and GIORGOU E., 'How international humanitarian law develops', *International review of the Red Cross* 2022/920-921, (1798) 1811, DOI: 10.1017/S1816383122000893; FALK R., 'The inadequacy of the existing legal approach to environmental protection in wartime' in AUSTIN J.E. and BRUCH C.E. (eds.), *The Environmental Consequences of War*, Cambridge University Press, 2000, (137) 145, DOI: 10.1017/CBO9780511522321.008.

²⁶⁶ Amendment of Arab republic of Egypt, Australia, Czechoslovakia, Finland, German democratic republic, Hungary, Ireland, Norway, Yugoslavia, Sudan to Article 33 of Draft Protocol I, DIPLOMATIC CONFERENCE ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS, 24 February 1975, CDDH/III/222, https://library.icrc.org/library/docs/CI/BAG152_142-00_005.pdf (accessed on 7 June 2026).

²⁶⁷ Amendment of Czechoslovakia, German Democratic Republic, Hungary to Draft Protocol I, Article 48 bis (concluded), DIPLOMATIC CONFERENCE ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS, 19 March 1974, CDDH/III/64, 221, https://tile.loc.gov/storage-services/service/l1/lmlp/RC-records_Vol-3/RC-records_Vol-3.pdf (accessed on 7 June 2026).

²⁶⁸ Amendment of Democratic Republic of Viet-Nam to article 35 of draft Protocol I, DIPLOMATIC CONFERENCE ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS, 25 February 1975, CDDH/III/238,

77. **MILITARY CONCERNS** – The broader context of the negotiations reflected concern with military feasibility. Sir Kenneth Keith, a New Zealand diplomat who participated in the negotiations, later recalled that many delegates had direct war experience, including in Vietnam.²⁶⁹ Their priority was preventing human suffering and their own security, not safeguarding trees and rivers.²⁷⁰ Bothe, who also took part in the negotiations, similarly observed that “the military was flabbergasted by the thought of military activities being subject to environmental concerns and it resisted.” As the negotiations proceeded, any proposal that seemed to restrain military action was met with skepticism.²⁷¹ This retrospective assessment helps to explain why proposals that limited military operations were sensitive. Declassified United States files from August 1974 point in the same direction.²⁷² In an interagency meeting in the White House Situation Room, officials expressed uncertainty about restraints on environmental warfare, stating: “we have no idea of Soviet capabilities and intentions in this field. We just don't understand what their point is in wanting restraints on environmental warfare.”²⁷³ Environmental protection was thus being negotiated against the background of strategic uncertainty.

78. **GROUP BIOTOPE** – The formulation of environmental protection was further considered in the unofficial working group “Biotope”.²⁷⁴ Delegates from Australia, Czechoslovakia, Finland, German Democratic Republic, Hungary, Ireland, Spain, Sweden, the Netherlands and

https://library.icrc.org/library/docs/CI/BAG152_143-00_017.pdf (accessed on 7 June 2026); Addendum of Democratic Republic to CDDH/III/238, DIPLOMATIC CONFERENCE ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS, 28 February 1975, CDDH/III/238/Add.1, https://library.icrc.org/library/docs/CI/BAG152_143-00_016.pdf (accessed on 7 June 2026).

²⁶⁹ MCCORMACK T., 'Negotiating the Two Additional Protocols of 1977: Interview with the Right Honourable Sir Kenneth Keith' in LINTON S., MCCORMACK T. and SIVAKUMARAN S. (eds.), *Asia-Pacific Perspectives on International Humanitarian Law*, Cambridge University Press, 2019, (17) 19, DOI: 10.1017/9781108667203.002.

²⁷⁰ BOTHE M., BRUCH C., DIAMOND J. et al., 'International law protecting the environment during armed conflict: gaps and opportunities', *International review of the Red Cross* 2010/879, (569) 576, DOI: 10.1017/S1816383110000597.

²⁷¹ BOTHE M., 'Protection of the environment in relation to armed conflict—50 years of effort, and no end in sight', *Environment and Security* 2023/1-2, (24) 24, DOI: 10.1177/27538796231195601.

²⁷² Although this meeting was held in light of the ENMOD Convention negotiations on environmental warfare, a parallel can be drawn towards the negotiations for AP I that took place at the same time, because they both discuss military restraints because of environmental concerns.

²⁷³ Meeting Minutes, Possible International Restraints on Environmental Warfare, SENIOR REVIEW GROUP, August 1974, E_CLEF_01091_002, <https://ns.clements-papers.org/clementsns/pdf/35861> (accessed on 7 June 2026).

²⁷⁴ Report to the third committee on the work of the working group submitted by the rapporteur, DIPLOMATIC CONFERENCE ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS, 3 April 1975, CDDH/III/275, 2, https://library.icrc.org/library/docs/CI/BAG152_148-00_018.pdf (accessed on 7 June 2026).

Yugoslavia participated, together with representatives of the ICRC and UNEP.²⁷⁵ The group considered several texts and proposed the following formulation: "It is forbidden to employ methods and means of warfare which damage the environment in such a way that the stability of the ecosystem is disturbed."²⁷⁶ Although the recommended text did not get adopted, the rapporteur later stated that the proposals nevertheless provided "an extremely valuable point of departure for the further discussions of this subject in the Working Group."²⁷⁷

79. ECOSYSTEM STABILITY TO TRIPLE THRESHOLD – The later Working Group discussions show why the standard was eventually narrowed. The rapporteur recorded that "environmental change or disturbances of the ecosystem might be on a very low scale", and that "trees may be cut down or destroyed as the result of normal artillery fire."²⁷⁸ The final text transmitted to the conference for adoption no longer used the broader standard, which was rejected, but included the triple threshold of "widespread, long-term and severe damage".²⁷⁹ The ICRC commentary later observed that "the opinions expressed on this point by the United States and the Soviet Union are not unrelated to this result."²⁸⁰ The conflict of interest is visible in the current threshold, as environmental protection was accepted, but not in the broader terms proposed earlier by several delegations.

²⁷⁵ Report of the chairman of the group "Biotope", DIPLOMATIC CONFERENCE ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS, 11 March 1975, CDDH/III/GT/35, 1, https://library.icrc.org/library/docs/CI/BAG152_138-02_032.pdf (accessed on 7 June 2026).

²⁷⁶ Report of the chairman of the group "Biotope", DIPLOMATIC CONFERENCE ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS, 11 March 1975, CDDH/III/GT/35, 5-6, https://library.icrc.org/library/docs/CI/BAG152_138-02_032.pdf (accessed on 7 June 2026).

²⁷⁷ Report to the third committee on the work of the working group submitted by the rapporteur, DIPLOMATIC CONFERENCE ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS, 3 April 1975, CDDH/III/275, 2, https://library.icrc.org/library/docs/CI/BAG152_148-00_018.pdf (accessed on 7 June 2026).

²⁷⁸ Report to the third committee on the work of the working group submitted by the rapporteur, DIPLOMATIC CONFERENCE ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS, 3 April 1975, CDDH/III/275, 3, https://library.icrc.org/library/docs/CI/BAG152_148-00_018.pdf (accessed on 7 June 2026).

²⁷⁹ Summary record of the thirty-eighth meeting, DIPLOMATIC CONFERENCE ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS, 10 April 1975, CDDH/III/SR.38, 405, https://tile.loc.gov/storage-services/service/ll/lmlp/RC-records_Vol-14/RC-records_Vol-14.pdf (accessed on 7 June 2026); Article reviewed by the drafting committee and transmitted to the conference for adoption, 1 June 1977, CDDH/401/Prot.I/Art.48bis, https://library.icrc.org/library/docs/CI/BAG152_329-02_005.pdf (accessed on 7 June 2026).

²⁸⁰ INTERNATIONAL COMMITTEE OF THE RED CROSS, *Commentary of 1987 on Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I)*, 1 January 1987, ICRC Database, <https://ihl-databases.icrc.org/en/ihl-treaties/api-1977/article-35/commentary/1987> (accessed on 7 June 2026).

3.3.3 THE CRITERION OF POLITIZATION

80. **LIMITED POLITIZATION** – Van Klink’s criterion of politization concerns situations where the resulting legislation is treated by one of the groups involved as a moral victory and as a confirmation of its values.²⁸¹ This criterion is less clearly engaged than crisis and conflict of interest. The delegations that pushed for stronger environmental protection did not obtain the broader threshold they initially proposed. For that reason, the final text cannot simply be described as a victory for environmental interests. Still, the adoption of Articles 35(3) and 55(1) AP I had an expressive dimension, as the natural environment was for the first time explicitly recognized within IHL.²⁸² The absolute character of the prohibition could also be read as a victory for environmental interests, since no military-necessity or proportionality exception applies once the threshold is met.²⁸³

81. **RECOGNITION WITHOUT CLEAR VICTORY** – The United Kingdom defended the formulation of the threshold as striking the necessary balance between protecting the environment against deliberate and serious damage and avoiding criminalization of ordinary battlefield damage such as “a tank commander who flattened a clump of trees.”²⁸⁴ This shows that the final threshold could also be defended as an acceptable balance by delegations concerned with military practicality. As the negotiation records do not show a clear moral victory for one side of the negotiations, the politization criterion is only weakly engaged.

²⁸¹ VAN KLINK B., 'Symbolic Legislation: An Essentially Political Concept' in VAN KLINK B., VAN BEERS B. and POORT L. (eds.), *Symbolic Legislation Theory and Developments in Biolaw*, Springer International Publishing, 2016, (19) 22, DOI: 10.1007/978-3-319-33365-6_2.

²⁸² ARGREN R., 'The obligation to prevent environmental harm in relation to armed conflict', *International review of the Red Cross* 2023/924, (1208) 1214, DOI: 10.1017/S1816383123000231; BOTHE M., 'The Ethics, Principles and Objectives of Protection of the Environment in Times of Armed Conflict' in RAYFUSE R. (ed.), *War and the Environment*, Brill, 2014, (91) 107, DOI: 10.1163/9789004270657_006; COLAO G., 'Environmental Damages and Armed Conflict' in WESTRA L., BOSSELMANN K. and FERMEGLIA M. (eds.), *Ecological Integrity in Science and Law*, Springer International Publishing, 2020, (253) 253-264, DOI: 10.1007/978-3-030-46259-8_21; DIENELT A., *Armed Conflicts and the Environment*, Springer International Publishing, 2022, 44, DOI: 10.1007/978-3-030-99339-9; DROEGE C. and GIORGOU E., 'How international humanitarian law develops', *International review of the Red Cross* 2022/920-921, (1798) 1804, DOI: 10.1017/S1816383122000893; HULME K., *War Torn Environment: Interpreting the Legal Threshold*, Brill, 2004, 77, <https://brill.com/view/title/11197>; SANDS P. and PEEL J., *Principles of International Environmental Law*, Cambridge University Press, 2012, 795, DOI: 10.1017/CBO9781139019842.

²⁸³ HULME K., *War Torn Environment: Interpreting the Legal Threshold*, Brill, 2004, 77, <https://brill.com/view/title/11197>.

²⁸⁴ Summary record of the thirty-eighth meeting, DIPLOMATIC CONFERENCE ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS, 10 April 1975, CDDH/III/SR.38, 410, https://tile.loc.gov/storage-services/service/ll/llmlp/RC-records_Vol-14/RC-records_Vol-14.pdf (accessed on 7 June 2026).

SECTION 3.4 COMPROMISE, ILLUSIONARY AND STATUS LEGISLATION

82. **THREE TYPES** – As four out of six criteria are strongly engaged, this section discusses what type of symbolic legislation the provisions are. Van Klink’s framework distinguishes three types of symbolic legislation building on Kindermann: compromise, illusionary and status legislation.²⁸⁵ A single rule may perform more than one symbolic function. In the case of Articles 35(3) and 55(1) AP I, compromise legislation is the strongest category, although the provisions also contain elements of status and illusionary legislation.

83. **COMPROMISE** – Articles 35(3) and 55(1) AP I can convincingly be read as compromise legislation. As discussed above, the negotiation record shows a movement from broader ecological formulations, such as ecological balance and ecosystem stability, to the narrower cumulative threshold, as the result of conflicting interests. During the explanations of vote, the delegate of India stated that the committee had “made every effort to reconcile all points of view.”²⁸⁶ Explicit environmental protection could be accepted in a form that remained limited in its operational reach.²⁸⁷ Aubert’s Norwegian 1948 Housemaid Law performed a similar function by bridging progressive and conservative parliamentary factions.²⁸⁸ The compromise does not resolve the underlying conflict between environmental protection and military operational freedom, but produces a formula on which both sides could agree without resolving the underlying conflict.²⁸⁹

84. **ILLUSIONARY** – The provisions also function as illusionary legislation, as they create the impression that a crisis situation is under control without the substantive measures required to

²⁸⁵ VAN KLINK B., 'Symbolic Legislation: An Essentially Political Concept' in VAN KLINK B., VAN BEERS B. and POORT L. (eds.), *Symbolic Legislation Theory and Developments in Biolaw*, Springer International Publishing, 2016, (19) 23, DOI: 10.1007/978-3-319-33365-6_2.

²⁸⁶ Summary record of the thirty-eighth meeting, DIPLOMATIC CONFERENCE ON THE REAFFIRMATION AND DEVELOPMENT OF INTERNATIONAL HUMANITARIAN LAW APPLICABLE IN ARMED CONFLICTS, 10 April 1975, CDDH/III/SR.38, 413, https://tile.loc.gov/storage-services/service/l1/llmlp/RC-records_Vol-14/RC-records_Vol-14.pdf (accessed on 7 June 2026).

²⁸⁷ BREITWIESER-FARIA Y., 'Environmental Protections During Armed Conflict as Supportive Mechanisms for the Prevention of Atrocity Crimes', *Journal of international humanitarian legal studies* 2024/11, (267) 294, DOI: 10.1163/18781527-bja10096.

²⁸⁸ AUBERT V., 'Some Social Functions of Legislation', *Acta Sociologica* 1967/1, (97) 110, DOI: 10.1177/000169936701000107.

²⁸⁹ VAN KLINK B., 'Symbolic Legislation: An Essentially Political Concept' in VAN KLINK B., VAN BEERS B. and POORT L. (eds.), *Symbolic Legislation Theory and Developments in Biolaw*, Springer International Publishing, 2016, (19) 23, DOI: 10.1007/978-3-319-33365-6_2.

do so.²⁹⁰ As discussed in Subsection 3.3.1, the crisis was the post-Vietnam concern that the law of armed conflict did not have an explicit treatment of environmental damage. The response was a binding rule with an absolute character, which has seen five decades of non-application.²⁹¹ Bothe therefore states that he would call the norm “a defeat for the cause of the environment.”²⁹² The illusionary element lies mainly in the discrepancy between obligation and delegation.

85. **STATUS** – Finally, the provisions also function as status legislation as they offer recognition for the environmental constituency. That recognition has had consequences, such as offering an anchor for the ICRC’s 2020 Guidelines on the Protection of the Natural Environment in Armed Conflict, the ILC’s PERAC Principles, and the broader claim that the environment is a protected interest in armed conflict. None of these subsequent developments would be the same without the textual anchor that AP I provides. This shows that, contrary to popular belief, symbolic legislation can have a function and does not simply equal ineffective legislation.²⁹³

SECTION 3.5 THE DIAGNOSIS

86. **DIAGNOSIS AS SYMBOLIC LEGISLATION** – This chapter has applied Van Klink’s framework to Articles 35(3) and 55(1) AP I. Four of the six criteria for identifying symbolic legislation in the critical-sociological sense are strongly engaged (see Table 2). The semantic criteria point in different directions. Discrepancy is present, because the provisions combine a strong substantive prohibition with weak enforcement architecture. Vagueness is also present, given the undefined and cumulative threshold which leaves room for multiple interpretations. The obscurity criterion, however, is not satisfied because the provisions are not incomprehensible. The pragmatic criteria are also unevenly engaged. Crisis and conflict of interest are both present as criteria. The Vietnam War and the environmental awakening help explain why explicit

²⁹⁰ VAN KLINK B., 'Symbolic Legislation: An Essentially Political Concept' in VAN KLINK B., VAN BEERS B. and POORT L. (eds.), *Symbolic Legislation Theory and Developments in Biolaw*, Springer International Publishing, 2016, (19) 23, DOI: 10.1007/978-3-319-33365-6_2.

²⁹¹ BOTHE M., 'The Ethics, Principles and Objectives of Protection of the Environment in Times of Armed Conflict' in RAYFUSE R. (ed.), *War and the Environment*, Brill, 2014, (91) 99, DOI: 10.1163/9789004270657_006; HULME K., *War Torn Environment: Interpreting the Legal Threshold*, Brill, 2004, 288-290, <https://brill.com/view/title/11197>; PAYNE C.R., 'Protection of the Natural Environment' in SAUL B. and AKANDE D. (eds.), *The Oxford Guide to International Humanitarian Law*, Oxford University Press, 2020, (205) 219, DOI: 10.1093/law/9780198855309.003.0009.

²⁹² BOTHE M., 'Protection of the environment in relation to armed conflict—50 years of effort, and no end in sight', *Environment and Security* 2023/1-2, (24) 26, DOI: 10.1177/27538796231195601.

²⁹³ VAN KLINK B., 'Symbolic Legislation: An Essentially Political Concept' in VAN KLINK B., VAN BEERS B. and POORT L. (eds.), *Symbolic Legislation Theory and Developments in Biolaw*, Springer International Publishing, 2016, (19) 23, DOI: 10.1007/978-3-319-33365-6_2.

environmental protection entered AP I, while the negotiation record shows how broader formulations were narrowed into the final triple threshold. Politization is only weakly present, since no side clearly celebrated the final text as a moral victory. By Van Klink's own threshold of two or more criteria, Articles 35(3) and 55(1) AP I can be categorized as symbolic legislation. The three types of symbolic legislation that Van Klink describes are activated. The provisions are a compromise between antagonistic camps, are illusionary in their claim to address a crisis situation, and are status-conferring for the environmental movement.

87. EXPLAINING THE NON-APPLICATION – This diagnosis helps explain the non-application, as described in Chapter 1, of Articles 35(3) and 55(1) AP I. If the provisions are understood as instrumental rules, aimed at enforcing the enacted rules of behavior, their non-application appears to be a failure. The symbolic function of the provisions reframes this view. Following this diagnosis, the non-application can be seen as consistent with the provisions' symbolic function. The provisions function as a compromise, create the illusionary impression that a crisis situation is under control without the substantive measures required to do so, and offer status or recognition to environmental protection in armed conflict. The provisions express the concern for environmental protection without translating that protection into an applicable constraint on military conduct. The framing of the non-application as a defect of a rule meant to operate has therefore somewhat missed the mark.

Table 2: Van Klink's criteria applied to Articles 35(3) and 55(1) AP I

Criterion	Weight	Main reason
Discrepancy	Strong	Strong rule, weak institutional architecture
Obscurity	Absent	Rule is not incomprehensible
Vagueness	Strong	Undefined cumulative threshold
Crisis	Strong	Vietnam and environmental awakening pushed explicit recognition
Conflict of interest	Strong	Environmental protection vs military actions
Politization	Weak	Expressive value, but no moral victory

CHAPTER 4 BEYOND FORM AND FUNCTION: REFORM

SECTION 4.1 RECOMMENDATION FOR THE REFORM DEBATE

88. **BEYOND FORM AND FUNCTION** – Chapter 2 described the legalization profile of Articles 35(3) and 55(1) AP I as Type V, combining high obligation, low precision and low delegation. Chapter 3 then diagnosed the provisions as symbolic legislation: they recognized the environmental concerns within IHL as a binding rule, without operationally constraining military conduct. This symbolic function also helps explain the non-application of the provisions. The analysis could stop there. However, as Van Klink observes, “in most cases no serious, practical or normative, alternative to the legislation dismissed as symbolic is offered. To be critical is one thing, but to make constructive suggestions for improving the current situation is something else.”²⁹⁴ This chapter therefore moves beyond the analysis of the form and function of the provisions, to see what this implies for the reform debate addressing their non-application, and what recommendations could follow.

89. **FORM SUSTAINS FUNCTION** – Chapter 3 already indicated a relation between the dimensions of the legalization framework and the semantic criteria of symbolic legislation. The two frameworks address the same provisions from different angles. The legalization framework gives the form of the provisions in terms of obligation, precision and delegation, while the symbolic legislation framework discusses what the provisions do in practice. The vagueness criterion of symbolic legislation corresponds to the low precision identified in Chapter 2, and the discrepancy criterion tracks the tension between the high obligation and the low delegation. The pragmatic criteria, in turn, explain how the form came to take the shape it did. The high obligation, negotiated in a crisis situation marked by a conflict of interests, was combined with an imprecise threshold and the absence of a dedicated enforcement venue. The Type V profile is thus the structural form through which the symbolic function operates. The dissertation therefore argues that the Type V legalization profile sustains the symbolic legislation function of Articles 35(3) and 55(1) AP I. The form sustains the function.

²⁹⁴ VAN KLINK B., 'Symbolic Legislation: An Essentially Political Concept' in VAN KLINK B., VAN BEERS B. and POORT L. (eds.), *Symbolic Legislation Theory and Developments in Biolaw*, Springer International Publishing, 2016, (19) 33, DOI: 10.1007/978-3-319-33365-6_2.

90. **LEGALIZATION AS DYNAMIC PHENOMENON** – Abbott et al. note that the legalization profile of a rule can be a dynamic phenomenon, observing increasing legalization across many issue areas.²⁹⁵ Their own example is the Ozone depletion regime, which began with the Vienna Ozone Convention, a binding agreement that was strong in obligation but weak in precision and delegation, and was subsequently augmented by the more elaborate Montreal Protocol and its implementation procedures.²⁹⁶ The changes increased precision by making the regime more detailed and elaborate, and in subsequent revisions the delegation dimension was addressed through a “system for implementation review” that includes a non-compliance procedure.²⁹⁷ The Type V combination of high obligation, low precision and low delegation that characterizes Articles 35(3) and 55(1) AP I could, on the same logic, be reconfigured.

91. **A FRAMEWORK RECOMMENDATION** – Insofar as the reform debate seeks to address the non-application of the provisions, it implicitly seeks to alter their symbolic function. The function of a norm, however, does not simply change by insisting that it has to change. Because the legalization profile sustains that function of the provisions, this dissertation argues that a reform proposal for the provisions should address the profile itself. More specifically, reform efforts that seek to address the persistent non-application of Articles 35(3) and 55(1) AP I should proceed on the premise that the provisions currently function as symbolic legislation, and that reform can be read as an intervention on the different dimensions of the legalization profile that sustains the symbolic function.

This recommendation operates at the framework level of the reform debate, not at the substantive level of identifying or evaluating which reform proposals should or can be adopted.²⁹⁸ Its aim is to offer a vocabulary through which different reform proposals can be related to one another and to the form and function they seek to reform.

92. **CAVEAT** – To say that addressing the symbolic function would require changes to the legalization profile is not the same as saying that a higher legalization profile would by itself guarantee effective environmental protection in armed conflict. Abbott et al. are explicit that

²⁹⁵ ABBOTT K.W., KEOHANE R., MORAVCSIK A. et al., 'The Concept of Legalization', *International Organization* 2000/3, (401) 408, DOI: 10.1162/002081800551271.

²⁹⁶ Montreal Protocol of 16 September 1987 on Substances that Deplete the Ozone Layer, *UNTS* vol. 1522, 3; ABBOTT K.W., KEOHANE R., MORAVCSIK A. et al., 'The Concept of Legalization', *International Organization* 2000/3, (401) 408, DOI: 10.1162/002081800551271.

²⁹⁷ ABBOTT K.W., KEOHANE R., MORAVCSIK A. et al., 'The Concept of Legalization', *International Organization* 2000/3, (401) 408, DOI: 10.1162/002081800551271.

²⁹⁸ KESTEMONT L., *Handbook on Legal Methodology: From Objective to Method*, Intersentia, 2018, 73.

they do not define legalization in terms of effect, meaning that a highly legalized rule might still be ineffective.²⁹⁹ This chapter therefore claims only that addressing the legalization dimensions of Articles 35(3) and 55(1) AP I is a necessary but not a sufficient condition for them to operate as genuine protection of the environment in armed conflict. Effectiveness also depends on political will, compliance and enforcement that lie beyond the scope of this analysis.

93. INTERVENTIONS ON THE LEGALIZATION DIMENSIONS – Proposals to reform the provisions, or alternative protection pathways, could address the obligation, precision, or delegation separately, or several dimensions simultaneously. The remainder of the chapter reads reform proposals, identified in a literature review, as interventions on these dimensions by way of illustration without claiming that this reading captures all reform proposals. Following the order used in Chapter 2, Section 4.2 discusses the pathways that would intervene on the obligation dimension. Section 4.3 turns to the pathways that target precision. Section 4.4 moves to the pathways that would develop delegation. Section 4.5 draws the findings together. As mentioned, the aim is not to exhaustively evaluate every possible pathway or to identify a single way forward, but to illustrate how different proposals relate to the legalization profile that sustains the symbolic function of the provisions. This way of reading the reform debate could open further avenues for future research.

SECTION 4.2 PATHWAYS ADDRESSING OBLIGATION

94. TREATY REFORM AND REPLACEMENT – An ambitious intervention on the obligation dimension is to amend or replace the text of the provisions, and so to create a renewed binding commitment. Hulme argues that, since the simplest route to effective environmental protection is through specific and direct measures, the simplest solution also appears to be to redraft the provisions so as to provide realistic environmental protection in armed conflict.³⁰⁰ Breitwieser-Faria calls for the negotiation of rules that address the effect that specific weapons may have on the natural environment, reasoning that as weapons become more sophisticated, so must the protection of the environment.³⁰¹ Falk goes further, calling for an international campaign and a global conference to draft a new convention with a dedicated regime of standards and

²⁹⁹ ABBOTT K.W., KEOHANE R., MORAVCSIK A. et al., 'The Concept of Legalization', *International Organization* 2000/3, (401) 402, DOI: 10.1162/002081800551271.

³⁰⁰ HULME K., *War Torn Environment: Interpreting the Legal Threshold*, Brill, 2004, 288, <https://brill.com/view/title/11197>.

³⁰¹ BREITWIESER-FARIA Y., 'Environmental Protections During Armed Conflict as Supportive Mechanisms for the Prevention of Atrocity Crimes', *Journal of international humanitarian legal studies* 2024/11, (267) 290, DOI: 10.1163/18781527-bja10096.

procedures for preventing and punishing environmental harm in war.³⁰² Such proposals depend, however, on a willingness to make new rules, and Bothe observes that our time is not a good time for treaty-making.³⁰³ When between 2015 and 2019 Switzerland and the ICRC jointly conducted an intergovernmental process aimed at improving compliance with IHL, they noted eventually that: “despite efforts undertaken by delegations, it became clear that, in the current international environment, the time was not ripe for reaching a consensual agreement among States on ways to strengthen respect for IHL within the intergovernmental process.”³⁰⁴ Droege and Giorgou even warn that a new treaty now might risk having a regressive effect.³⁰⁵ Read through the legalization profile, these proposals act in the first place on obligation, by creating new or renewed binding rules. A redrafted instrument could, of course, also change the precision dimension or develop delegation.

95. CUSTOMARY LAW AS OBLIGATION EXTENDER – Short of new treaty-making, the obligation dimension could also be extended by consolidating the customary status of the prohibition, which would bind states that are not parties to AP I. As Chapter 2 set out, that status remains contested.³⁰⁶ The ICRC Customary IHL Study records the prohibition as Rule 45 and maintains that the contrary practice of a few states, such as the US, France and the UK is insufficient to have prevented the emergence of the customary rule, a conclusion that those states reject.³⁰⁷ The ILC has likewise recognized that views on the customary status of both the duty of care and the prohibition still differ.³⁰⁸ Read through the legalization profile, the debate is in the first place about obligation: if the prohibition were uncontestably customary, the obligation dimension would extend to all states. It would not by itself clarify the terms, although a settled

³⁰² FALK R., 'The inadequacy of the existing legal approach to environmental protection in wartime' in AUSTIN J.E. and BRUCH C.E. (eds.), *The Environmental Consequences of War*, Cambridge University Press, 2000, (137) 154-155, DOI: 10.1017/CBO9780511522321.008.

³⁰³ BOTHE M., 'Protection of the environment in relation to armed conflict—50 years of effort, and no end in sight', *Environment and Security* 2023/1-2, (24) 28, DOI: 10.1177/27538796231195601; HULME K., *War Torn Environment: Interpreting the Legal Threshold*, Brill, 2004, 288, <https://brill.com/view/title/11197>.

³⁰⁴ INTERNATIONAL COMMITTEE OF THE RED CROSS, Factual Report on the Proceedings of the Intergovernmental Process on Strengthening Respect for IHL, 15 February 2019, https://www.icrc.org/sites/default/files/document/file_list/respect_ihl_6th_formal_meeting_factual_report.pdf (accessed on 7 June 2026).

³⁰⁵ DROEGE C. and GIORGOU E., 'How international humanitarian law develops', *International review of the Red Cross* 2022/920-921, (1798) 1839, DOI: 10.1017/S1816383122000893.

³⁰⁶ VÖNEKY S., 'A New Shield for the Environment: Peacetime Treaties as Legal Restraints of Wartime Damage', *Review of European Community & international environmental law* 2000/1, (20) 21, DOI: 10.1111/1467-9388.00229.

³⁰⁷ HENCKAERTS J.-M. and DOSWALD-BECK L., *Customary International Humanitarian Law*, Cambridge University Press, 2005, 151-154, DOI: 10.1017/CBO9780511804700.

³⁰⁸ Report of the International Law Commission: seventy-third session (18 April-3 June and 4 July-5 August 2022), INTERNATIONAL LAW COMMISSION, 12 August 2022, A/77/10, 141, https://legal.un.org/ilc/reports/2022/english/a_77_10_advance.pdf (accessed on 7 June 2026).

customary understanding of the threshold, which currently does not exist, would also raise precision.

96. **MILITARY NECESSITY EXCEPTION** – A proposal in somewhat the opposite direction would be to limit the reach of the prohibition by admitting a military necessity exception. Hulme raises this possibility in combination with a lower threshold of harm, allowing military necessity to override the threshold in specific circumstances.³⁰⁹ As Dienelt notes, Article 35(3) AP I is unusual in not being constrained by proportionality, military necessity or other cardinal principles.³¹⁰ Read through the legalization profile, the unconditional character of the obligation sits at the top of Abbott et al.'s obligation continuum and admitting an exception would make the obligation conditional, thereby lowering it.³¹¹

SECTION 4.3 PATHWAYS ADDRESSING PRECISION

97. **DYNAMIC INTERPRETATION** – Multiple reform proposals are directed at the precision of the threshold, following the discussed critique of the threshold.³¹² A possible intervention advanced is to reinterpret the triple threshold in light of scientific developments and evolved opinion juris, without amending the text.³¹³ Bothe argues such dynamic interpretation of the provisions is both possible and even necessary.³¹⁴ Hulme suggests that, while states may lack the political will to renegotiate the treaty, they may be open to more flexible readings of the provisions than in 1977.³¹⁵ She therefore considers working with the existing formula the best

³⁰⁹ This lower threshold of harm would be a possible intervention on the precision dimension, discussed in Section 4.3, illustrating that a single proposal can intervene on more than one dimension at once; HULME K., *War Torn Environment: Interpreting the Legal Threshold*, Brill, 2004, 291, <https://brill.com/view/title/11197>.

³¹⁰ DIENELT A., *Armed Conflicts and the Environment*, Springer International Publishing, 2022, 45, DOI: 10.1007/978-3-030-99339-9.

³¹¹ ABBOTT K.W., KEOHANE R., MORAVCSIK A. et al., 'The Concept of Legalization', *International Organization* 2000/3, (401) 410, DOI: 10.1162/002081800551271.

³¹² DROEGE C. and TOUGAS M.-L., 'The Protection of the Natural Environment in Armed Conflict - Existing Rules and Need for Further Legal Protection', *Nordic Journal of International Law* 2013/1, (21) 32, DOI: 10.1163/15718107-08201003.

³¹³ BREITWIESER-FARIA Y., 'Environmental Protections During Armed Conflict as Supportive Mechanisms for the Prevention of Atrocity Crimes', *Journal of international humanitarian legal studies* 2024/11, (267) 290, DOI: 10.1163/18781527-bja10096; DAM-DE JONG D. and SJÖSTEDT B., 'Enhancing Environmental Protection in Relation to Armed Conflict: An Assessment of the ILC Draft Principles', *Loyola of Los Angeles International and Comparative Law Review* 2021/2, (129) 145; FLECK D., 'The Protection of the Environment in Armed Conflict: Legal Obligations in the Absence of Specific Rules', *Nordic Journal of International Law* 2013/1, (7) 7, DOI: 10.1163/15718107-08201002.

³¹⁴ BOTHE M., 'The Ethics, Principles and Objectives of Protection of the Environment in Times of Armed Conflict' in RAYFUSE R. (ed.), *War and the Environment*, Brill, 2014, (91) 106, DOI: 10.1163/9789004270657_006.

³¹⁵ HULME K., *War Torn Environment: Interpreting the Legal Threshold*, Brill, 2004, 295, <https://brill.com/view/title/11197>.

solution.³¹⁶ Article 31 VCLT opens up to this possibility, directing that a treaty must, among other things, be interpreted in light of its context, object and purpose.³¹⁷ Subsequent practice establishing the parties' agreement on its interpretation, and any relevant rules of international law also guides how a treaty should be interpreted.³¹⁸ Fleck observes an evolved *opinio juris*, but also a persisting prevailing general reluctance to accept specific ecological obligations in military operations.³¹⁹ So far, there is no established interpretation practice of the provisions, which blocks their evolutive interpretation.³²⁰ Read through the legalization profile, the reinterpretation proposals act on the precision dimension while leaving obligation and delegation untouched.

98. CLARIFICATION OF TERMINOLOGY – Other proposals call for clarification of the criteria directly, rather than reinterpreting the threshold as a whole. Dienelt argues that the imprecision could be resolved by clarifying the wording of “widespread”, “long-term” and “severe”.³²¹ Bothe treats such clarification as a precondition, stating that the rules “need at least some clarification and development”.³²² Droege and Tougas likewise call for the terms to be more clearly defined.³²³ In their proposals, they remain vague on how or from where this clarification should come, yet the targeted legalization dimension is clearly precision.

99. ICRC’S 2020 GUIDELINES – An already developed interpretive attempt is the ICRC’s 2020 Guidelines, discussed in Chapter 2. Although the ICRC presents the Guidelines as restatements of existing law rather than the creation of new rules, they read the three terms in light of the contemporary scientific knowledge about the effects of harm on the natural environment.³²⁴

³¹⁶ HULME K., *War Torn Environment: Interpreting the Legal Threshold*, Brill, 2004, 289-291, <https://brill.com/view/title/11197>.

³¹⁷ Art. 31.1 and 31.3 (b) and (c) Vienna Convention of 23 May 1969 on the Law of Treaties, *UNTS* vol. 1155, 331.

³¹⁸ Art. 31.1 and 31.3 (b) and (c) Vienna Convention of 23 May 1969 on the Law of Treaties, *UNTS* vol. 1155, 331.

³¹⁹ FLECK D., 'The Protection of the Environment in Armed Conflict: Legal Obligations in the Absence of Specific Rules', *Nordic Journal of International Law* 2013/1, (7) 7, DOI: 10.1163/15718107-08201002.

³²⁰ GARDINER R., *Treaty interpretation*, Oxford University Press, 2015, 275-275, DOI: 10.1093/law/9780199669233.001.0001.

³²¹ DIENELT A., *Armed Conflicts and the Environment*, Springer International Publishing, 2022, 114-115, DOI: 10.1007/978-3-030-99339-9.

³²² BOTHE M., 'The Protection of the Environment in Times of Armed Conflict', *German yearbook of international law* 1991/1, (54) 58.

³²³ DROEGE C. and TOUGAS M.-L., 'The Protection of the Natural Environment in Armed Conflict - Existing Rules and Need for Further Legal Protection', *Nordic Journal of International Law* 2013/1, (21) 33, DOI: 10.1163/15718107-08201003.

³²⁴ INTERNATIONAL COMMITTEE OF THE RED CROSS, *Guidelines on the Protection of the Natural Environment in Armed Conflict*, ICRC, 2020, 32,

Environmental monitoring has become more sophisticated and publicly visible than ever before, through satellite imagery and improved scientific reporting.³²⁵ Read through the legalization profile, the Guidelines act on precision, clarifying how the triple threshold might be understood without altering its wording or the institutional architecture around it.

100. ILC’S 2022 PERAC PRINCIPLES – In the same direction, the ILC’s 2022 Draft Principles on the Protection of the Environment in Relation to Armed Conflicts embed the AP I threshold in Principle 13, directing at an interpretation of damage in light of current scientific knowledge which also takes the “the possibility of affecting a fragile interdependent system of both living and non-living components” into account.³²⁶ Dam-de Jong and Sjöstedt noted that authors advocated for this interpretation when an earlier version of the draft principles did not provide any interpretative guidance with respect to the requisites of the threshold in its commentaries.³²⁷ As it does not redesign the threshold or seek to extend the treaty obligations to States not parties to Additional Protocol I, it develops the precision dimension of the threshold.³²⁸ That the ILC chose non-binding principles rather than a draft convention reflects the political constraints on the obligation dimension discussed in Section 4.2.

101. REFORMULATING THE CONJUNCTIVE FORMULA – Another kind of proposal redesigns the text rather than interpreting it. Hulme identifies four possible formulas to replace the conjunctive formula: a fully disjunctive formula, a requirement that only two out of three elements be met, the addition of a qualifying adjective like “significant”, and the addition of such an adjective combined with a military necessity exception.³²⁹ Each model targets the precision of the current threshold formula and would expand the scope of the prohibition by

https://www.icrc.org/sites/default/files/document_new/file_list/guidelines_on_the_protection_of_the_natural_environment_in_armed_conflict_advance-copy.pdf (accessed on 7 June 2026).

³²⁵ DROEGE C. and GIORGOU E., 'How international humanitarian law develops', *International review of the Red Cross* 2022/920-921, (1798) 1835, DOI: 10.1017/S1816383122000893.

³²⁶ Report of the International Law Commission: seventy-third session (18 April-3 June and 4 July-5 August 2022), INTERNATIONAL LAW COMMISSION, 12 August 2022, A/77/10, 142, https://legal.un.org/ilc/reports/2022/english/a_77_10_advance.pdf (accessed on 7 June 2026); PAYNE C.R., 'Protection of the Natural Environment' in SAUL B. and AKANDE D. (eds.), *The Oxford Guide to International Humanitarian Law*, Oxford University Press, 2020, (205) 205, DOI: 10.1093/law/9780198855309.003.0009.

³²⁷ DAM-DE JONG D. and SJÖSTEDT B., 'Enhancing Environmental Protection in Relation to Armed Conflict: An Assessment of the ILC Draft Principles', *Loyola of Los Angeles International and Comparative Law Review* 2021/2, (129) 145.

³²⁸ Report of the International Law Commission: seventy-third session (18 April-3 June and 4 July-5 August 2022), INTERNATIONAL LAW COMMISSION, 12 August 2022, A/77/10, 140, https://legal.un.org/ilc/reports/2022/english/a_77_10_advance.pdf (accessed on 7 June 2026).

³²⁹ HULME K., *War Torn Environment: Interpreting the Legal Threshold*, Brill, 2004, 291, <https://brill.com/view/title/11197>.

reducing the conjunctive bar.³³⁰ None of the four can be adopted by interpretation alone; each would therefore require a textual amendment of AP I or the recognition of a customary interpretation. In the same direction, Breitwieser-Faria argues for a lower threshold, prohibiting for example severe damage that is either widespread or long-term, which could capture a wider range of harm.³³¹ Hulme also advances a more novel model: a scoring system in which points are assigned to clearly defined categories of “widespread”, “long-term” and “severe” damage, with the threshold crossed at a total of twelve points and at least one in each category.³³² None of these precision redesigns can be achieved by interpretation alone, as they require a textual amendment, which therefore also depends on an obligation-dimension move discussed in Section 4.2.

SECTION 4.4 PATHWAYS ADDRESSING DELEGATION

102. **MAKING THE PROVISIONS A GRAVE BREACH** – A proposal that can be read as an intervention on the delegation dimension is to bring the threshold within the grave breaches regime. As Chapter 2 noted, Articles 35(3) and 55(1) AP I are not listed among the grave breaches in Article 85 AP I, so the principle of universal jurisdiction does not extend to them. Bothe argues that it would be appropriate to develop the provisions on grave breaches to reflect environmental concerns more clearly.³³³ Read through the legalization profile, designating the threshold as a grave breach would develop delegation within AP I’s existing enforcement architecture, by obliging states to enforce it in their own courts, while leaving the content of the threshold, and so the precision dimension, unchanged.³³⁴

103. **ECOCIDE AND THE ICC** – Another delegation-developing pathway points outside AP I, through international criminal law. The triple threshold of Articles 35(3) and 55(1) AP I has already been mirrored in Article 8(2)(b)(iv) of the Rome Statute, which criminalizes attacks expected to cause widespread, long-term and severe damage, which is clearly excessive in

³³⁰ ABBOTT K.W., KEOHANE R., MORAVCSIK A. et al., 'The Concept of Legalization', *International Organization* 2000/3, (401) 410, DOI: 10.1162/002081800551271.

³³¹ BREITWIESER-FARIA Y., 'Environmental Protections During Armed Conflict as Supportive Mechanisms for the Prevention of Atrocity Crimes', *Journal of international humanitarian legal studies* 2024/11, (267) 281, DOI: 10.1163/18781527-bja10096.

³³² HULME K., *War Torn Environment: Interpreting the Legal Threshold*, Brill, 2004, 296-297, <https://brill.com/view/title/11197>.

³³³ BOTHE M., 'The Protection of the Environment in Times of Armed Conflict', *German yearbook of international law* 1991/1, (54) 58.

³³⁴ ABBOTT K.W., KEOHANE R., MORAVCSIK A. et al., 'The Concept of Legalization', *International Organization* 2000/3, (401) 416, DOI: 10.1162/002081800551271.

relation to the concrete and direct overall military advantage anticipated, as a war crime and a serious violation of the laws and customs applicable in international armed conflict.³³⁵ These mirrored terms give the International Criminal Court jurisdiction over damage that meets the threshold and passes the proportionality test.³³⁶ To date, however, the article has never been the basis of a case before the ICC, a reminder that a forum on paper does not guarantee one in use.³³⁷ Further-reaching proposals seek to establish “ecocide” as a fifth international crime, which would also criminalize conduct in peacetime.³³⁸ The 2021 Independent Expert Panel convened by the Stop Ecocide Foundation proposes to define ecocide as the “unlawful or wanton acts committed with knowledge that there is a substantial likelihood of severe and either widespread or long-term damage to the environment being caused by those acts.”³³⁹ Read through the legalization profile, this pathway develops delegation by opening a forum at the international criminal level, and in addition reformulates precision by replacing the full conjunction and clarifying the understandings of the threshold’s terms.³⁴⁰

SECTION 4.5 READING THE REFORM DEBATE

104. PROPOSALS AS INTERVENTIONS ON THE PROFILE – This chapter has read different reform efforts as interventions on the obligation, precision and delegation dimensions of the legalization profile of Articles 35(3) and 55(1) AP I. Doing so illustrates the framework

³³⁵ Art. 8(2)(b)(iv) Rome Statute of 17 July 1998 of the International Criminal Court, *UNTS* vol. 2187, 3.

³³⁶ Art. 8(1) Rome Statute of 17 July 1998 of the International Criminal Court, *UNTS* vol. 2187, 3; BREITWIESER-FARIA Y., 'Environmental Protections During Armed Conflict as Supportive Mechanisms for the Prevention of Atrocity Crimes', *Journal of international humanitarian legal studies* 2024/11, (267) 292, DOI: 10.1163/18781527-bja10096.

³³⁷ International Criminal Court, 'Cases database', <https://www.icc-cpi.int/cases> (accessed on 7 June 2026).

³³⁸ FALK R., 'The inadequacy of the existing legal approach to environmental protection in wartime' in AUSTIN J.E. and BRUCH C.E. (eds.), *The Environmental Consequences of War*, Cambridge University Press, 2000, (137) 155, DOI: 10.1017/CBO9780511522321.008; BREITWIESER-FARIA Y., 'Environmental Protections During Armed Conflict as Supportive Mechanisms for the Prevention of Atrocity Crimes', *Journal of international humanitarian legal studies* 2024/11, (267) 293, DOI: 10.1163/18781527-bja10096.

³³⁹ MINKOVA L.G., 'The Fifth International Crime: Reflections on the Definition of “Ecocide”', *Journal of genocide research* 2023/1, (61) 62, DOI: 10.1080/14623528.2021.1964688; STOP ECOCIDE FOUNDATION, *Independent Expert Panel for the Legal Definition of Ecocide: commentary and core text*, 2021, 5, <https://www.stopecocide.earth/legal-definition> (accessed on 7 June 2026).

³⁴⁰ In their proposed Article 8 ter Rome Statute, the panel includes the following definitions: a. “Wanton” means with reckless disregard for damage which would be clearly excessive in relation to the social and economic benefits anticipated; b. “Severe” means damage which involves very serious adverse changes, disruption or harm to any element of the environment, including grave impacts on human life or natural, cultural or economic resources; c. “Widespread” means damage which extends beyond a limited geographic area, crosses state boundaries, or is suffered by an entire ecosystem or species or a large number of human beings; d. “Long-term” means damage which is irreversible or which cannot be redressed through natural recovery within a reasonable period of time; e. “Environment” means the earth, its biosphere, cryosphere, lithosphere, hydrosphere and atmosphere, as well as outer space; STOP ECOCIDE FOUNDATION, *Independent Expert Panel for the Legal Definition of Ecocide: commentary and core text*, 2021, 5, <https://www.stopecocide.earth/legal-definition> (accessed on 7 June 2026).

recommendation, it offers a vocabulary that locates each proposal on the profile and makes it possible to relate the proposals to one another. The reading also shows that proposals can engage more than one dimension at once. The ecocide pathway develops delegation, for example, while also interacting with the precision dimension, and the proposals that redesign the threshold act on precision, but can also be enacted through an obligation-level amendment.

105. POTENTIAL ASYMMETRY OF THE DEBATE – At first sight, this illustrative reading suggests that more proposals try to intervene on the precision dimension than on the delegation dimension. Knowing how the whole reform debate is clustered could indicate where potential reform pathways might be further developed. However, as the previous sections are illustrative, a strong claim on the wider reform debate cannot be made on the present analysis. It is therefore offered as a hypothesis which could be tested with a fuller classification of the reform debate across the three dimensions.

106. THE INTERACTION OF THE DIMENSIONS – The relationship among the dimensions allows for a further observation. A clearer threshold still requires a forum to apply it, a new forum still needs a determinate standard, and adjusting the obligation alone does not change precision or delegation. A reform acting on a single dimension of the profile therefore leaves the others in place. This suggests that addressing the non-application of Articles 35(3) and 55(1) AP I through a single-dimension reform might not suffice. Which configuration of the dimensions would be required to address the form that sustains the symbolic function, and whether such a configuration is politically attainable, falls outside the scope of this dissertation.

107. OPENING RESEARCH AVENUES – This reading of the reform debate thus opens possible research avenues, taken up in Chapter 5. A fuller classification of reform proposals along the dimensions of the legalization profile could map which dimensions the reform debate has and has not developed. Additionally, further research could examine how recent developments, such as the ILC's PERAC Principles or the proposed definition of ecocide would shift the dimensions. Furthermore, the exact profile required to address the symbolic function, which is sustained by the current form, would have to be examined. Similarly, the political will needed to achieve such shifts, and how such political will might be built, can be studied, since even a well-designed intervention on the provisions' profile depends on states to adopt it. These questions build on what this chapter initially recommended: that the non-application of Articles 35(3) and 55(1) AP I is best approached by recognizing that the provisions function as symbolic legislation, and by reading reform as an intervention on the legalization profile that sustains it.

CHAPTER 5 CONCLUSION

SECTION 5.1 SUMMARY OF THE ARGUMENT

108. **THE PUZZLE AND APPROACH** – Chapter 1 set out a puzzle. Articles 35(3) and 55(1) AP I prohibit, in binding and absolute terms, methods or means of warfare that cause widespread, long-term and severe damage to the natural environment. Yet in almost five decades, despite multiple instances of serious environmental damage in armed conflict, no authoritative finding has been made that this triple threshold has been crossed, prompting criticism in legal scholarship. This dissertation asked how its non-application should be understood in light of the form and function of the provisions. It used two frameworks that, to the author's knowledge, had not previously been applied to these provisions: the legalization framework of Abbott et al. and the symbolic legislation framework of Van Klink. Doing so, the dissertation moved from form, to function, to reform.

109. **FORM** – Chapter 2 classified the form of the provisions, namely their legalization profile, along Abbott et al.'s three dimensions. Obligation is high: the provisions are binding on the 175 States parties to AP I, are formulated in prohibitory and absolute terms, and may also reflect customary international law. Precision is low: the three cumulative terms are not defined in AP I or in its negotiation records, the courts that referred to the threshold did not clarify it, and military manuals either repeat the formula or depart from it. Delegation is also low: AP I does not attach a dedicated court or compliance body to the threshold, the IHFFC is conditional and only fact-finding, the ICRC interprets but does not bind, and the courts that engaged the threshold have done so on their own jurisdictional bases. The provisions therefore have a Type V profile: high obligation, low precision and low delegation.

110. **FUNCTION** – Chapter 3 asked what the function of the provisions is, using Van Klink's six criteria of symbolic legislation. Four are strongly engaged. Discrepancy and vagueness engage, on the semantic side, with tensions already present in the legalization profile: a strong prohibition with a weak enforcement architecture, and an undefined threshold open to several interpretations. On the pragmatic side, crisis and conflict of interest appear strongly engaged: the post-Vietnam environmental awakening pushed for explicit recognition in IHL, while a concern for military freedom changed the broader ecological formulations into the final triple threshold. Because the provisions are not incomprehensible, the criterion of obscurity is not met. The politization criterion is only weakly engaged, because no side clearly treated the text

as a victory. As more than two criteria are met, the provisions function in Van Klink's terms as symbolic legislation, working as compromise, illusionary, and status legislation at once. This helps explain the non-application of the provisions. They are not failed instrumental rules, but recognize environmental protection without turning it into a real constraint on military conduct.

111. **REFORM** – Chapter 4 brought the two frameworks together. As the Type V profile is the form through which the symbolic function works, the dissertation argued that the form sustains the function. Reform that aims to address the non-application must therefore recognize its symbolic function and act on the legalization dimensions that sustain it. As Abbott et al. note, those dimensions can shift. Chapter 4 made this framework recommendation about the reform debate as a whole, instead of a choice between or evaluation of the proposals. It read proposals illustratively as interventions on obligation (treaty reform, customary consolidation, military-necessity exception), on precision (dynamic interpretation, clarifying the three terms, the ICRC Guidelines and PERAC principles, redesigning the formula) and on delegation (a grave-breach classification, and the route through the Rome Statute and the proposed ecocide crime). Acting on the profile is necessary but not sufficient to address the non-application: effective protection also needs political will to change the dimensions, and compliance after those dimensions would have changed.

SECTION 5.2 CONTRIBUTION TO SCHOLARSHIP

112. **A FORM FOR THE PROVISIONS** – This dissertation makes four contributions to legal scholarship. The first is to read and classify the legal form of Articles 35(3) and 55(1) AP I as a Type V legalization profile. It makes visible how a binding prohibition, and therefore high obligation, coexists with low precision and low delegation.

113. **AN EXPLANATION FOR THE NON-APPLICATION** – The second contribution is to help explain the non-application of the provisions through their function as symbolic legislation, rather than a drafting failure alone. It grounds that explanation in the text, structure and negotiation history of the provisions, including the records of the 1974-1977 Diplomatic Conference.

114. **A WAY OF READING THE REFORM DEBATE** – The third contribution is to offer a certain way of reading the reform debate. As the form sustains the symbolic function, reform proposals should be read as interventions on the obligation, precision and delegation dimensions. This gives a vocabulary that relates proposals to one another and to the form they try to change.

115. LINKING THE TWO FRAMEWORKS – The fourth contribution underlies the previous three. The dissertation does not apply the frameworks of legalization and symbolic legislation side by side, but links them. The semantic criteria of symbolic legislation engage with the legalization dimensions, and the pragmatic criteria help explain why the provisions arose in that form. The resulting movement from form, to function, to reform is offered as a structure that could also be applied to other norms of international law.

SECTION 5.3 FURTHER RESEARCH AVENUES

116. CLASSIFYING THE WHOLE REFORM DEBATE – The analysis opens several avenues for further research. A first avenue is to turn the illustrative reading of reform proposals in Chapter 4 into a full classification of the reform debate across the three dimensions. The hypothesis that more proposals target precision than delegation could be tested, and a further mapping could show where the contemporary debate is concentrated and where opportunities exist to develop it further.

117. RECOMMENDATORY AND EVALUATIVE RESEARCH – A second avenue moves beyond the scope of this dissertation by asking evaluative, comparative, or recommendatory questions that follow from the findings. Future research could ask which configuration of the three dimensions would be needed to move the provisions away from their symbolic function. The three dimensions also provide a basis for comparing proposals more systematically. Moreover, it could evaluate proposals and recent developments, such as the PERAC principles and the proposed crime of ecocide, against that benchmark.

118. THE POLITICAL WILL FOR REFORM – A third avenue concerns the politics required for reform. To change the dimensions of the legalization profile to move the provisions beyond their symbolic function also requires political will. Whether such will is present, and how it could be built is a separate question that this form-and-function analysis does not reach.

119. TESTING AND EXTENDING THE FRAMEWORKS – A fourth avenue is to test and extend the application of the two frameworks. The frameworks of legalization and symbolic legislation could be applied again to Articles 35(3) and 55(1) AP I, by others and against further sources, to check the diagnosis offered here. Additionally, they could be applied together to other norms in national and international law that currently face non-application. Applied together, these frameworks could provide the vocabulary to better understand the form and the function of those norms.

SECTION 5.4 CLOSING REFLECTION

120. **A CLOSING REFLECTION** – This dissertation opened with Bothe’s remark that a tension persists between the military interest of winning a war and the environmental interest in preserving the planet for future generations.³⁴¹ Articles 35(3) and 55(1) AP I captured that tension rather than mediating it. The understanding of the form and function of the provisions, provided in this dissertation, could open pathways for reform efforts aimed at changing that balance, so that future generations inherit more than a symbolic norm.

³⁴¹ BOTHE M., 'Protection of the environment in relation to armed conflict—50 years of effort, and no end in sight', *Environment and Security* 2023/1-2, (24) 24, DOI: 10.1177/27538796231195601.

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- **Take a scientific and critical attitude** when interacting with GenAI and interpreting its output. Don't become emotionally connected to AI tools.
- As a student you are responsible to comply with **Article 84 of the exam regulations:** your report or thesis should reflect your own knowledge. Be aware that plagiarism rules also apply to the use of AI-tools.
 - **Exam regulations Article 84:** "Every conduct individual students display with which they (partially) inhibit or attempt to inhibit a correct judgement of their own knowledge, understanding and/or skills or those of other students, is considered an irregularity which may result in a suitable penalty. A special type of irregularity is plagiarism, i.e. copying the work (ideas, texts, structures, designs, images, plans, codes , ...) of others or prior personal work in an exact or slightly modified way without adequately acknowledging the sources. Every possession of prohibited resources during an examination (see article 65) is considered an irregularity."
- **KU Leuven guidelines on citing and referencing Generative AI tools, and other information:**
<https://www.kuleuven.be/english/education/student/educational-tools/generative-artificial-intelligence>