

Interactive session/ILC Special rapporteurs and the Sixth Committee
28 October 2020

Remarks by Marja Lehto

Thank you Mr Chair,

And good afternoon from Helsinki to all the participants of this virtual meeting. Thank you also for the opportunity to say a few words of the topic ‘Protection of the environment in relation to armed conflicts’.

I don’t think there is a need to explain where we stand right now with regard to the topic. It was just last year that the whole set of draft principles was debated in the Sixth Committee, after having been adopted in first reading in 2019. The period for submitting written comments is still ongoing, with the deadline for comments having been postponed to June 2021.

What I thought could be useful in this situation is, first, to give a brief overview of recent developments that are of relevance to the topic. Thereafter, as Mr Tladi did with regard to the topic of *Jus cogens*, I would like to raise an issue that, in light of the comments made in last year’s debate, may benefit from some clarification.

1. Recent developments

- UNSC open debate

Regarding recent developments, I would like to highlight the open virtual debate of the UN Security Council that was held on 17 September. The event, entitled “Maintenance of international peace and security: Humanitarian Effects of Environmental Degradation and Peace and Security”, was chaired by the Minister of Foreign Affairs of Niger.

The debate focused, *inter alia*, on how current climate mechanisms, international law and policies could be further adapted and implemented to better contribute to the protection of the environment and natural resources in order to prevent armed conflict, including conflict relapse, and to ensure the sustainability of post-conflict peace.

This was the third time in row that an open Security Council debate was organized on conflicts and the environment. A further event was organized in the General Assembly during the UN High Level Week in September.

All these events, as well as the active participation of States in them is a testimony of the importance and topicality of the issue of protection of the environment in and in relation to armed conflicts, and of the commitment of States to find ways to address it.

- New case law and other developments

There has also been new case law at the national and regional levels addressing various issues relevant to the topic. For instance, the Inter-American Court of Human Rights issued in February a landmark judgment in which it analyzed the rights to a healthy environment, adequate food, water and cultural identity. The Court also ordered specific measures of reparation for the restitution of those rights, including actions for access to water and food, for the recovery of forest resources and for the recovery of indigenous culture.

(This was the case of *Indigenous Communities of the Lhaka Honhat Association (Our Land) v. Argentina* (2020)).

Regarding the issues of corporate due diligence and corporate liability, there has also been new case law, for instance on the question of establishing *de facto* control over a subsidiary, and what providing an effective forum means, both questions of relevance to the draft principles.

I should also mention in this regard the negotiations on the “Legally Binding Instrument to regulate, under international human rights law, the activities of transnational corporations and other business enterprises” that are ongoing in the working group established under the Human Rights Council. The Second Revised Draft issued in July includes a number of references to the protection of the environment as well as to armed conflicts.

The Commission of the European Union has furthermore made clear its commitment to legislate mandatory human rights and environmental obligations for companies domicile in the EU area.

While these are ongoing developments of which no more can be said for the time being, they, too, are a sign of the importance attached to the environmental responsibilities of corporations.

- The updated ICRC Guidelines

By far the most important recent development has been the publication by the International Committee of the Red Cross of the updated iteration of the Guidelines on the Protection of the Natural Environment in Armed Conflict.

As you may know, the new ICRC Guidelines have the same background as the Commission's topic on the Protection of the environment in relation to armed conflicts.

In 2009, a report of the UN Environment Programme recommended that the ICRC should update its 1994 Guidelines and that the ILC should include a corresponding new topic on its agenda. More specifically, the Commission was asked to examine the existing international law for protecting the environment during armed conflict and recommend how it could be clarified, codified and expanded.¹

Now that both projects have borne fruit – even though the draft principles are still work in progress until the second reading – I would like to say a few words of what they have in common and how they differ from each other.

Both documents share the same fundamental aim of clarifying the international law applicable to the protection of the environment and to the remediation of conflict-related environmental harm.

¹ UNEP, 'Protecting the Environment During Armed Conflict: An Inventory and Analysis of International Law' (2009), available at https://wedocs.unep.org/bitstream/handle/20.500.11822/7813/-/Protecting%20the%20Environment%20During%20Armed%20Conflict_An%20Inventory%20and%20Analysis%20of%20International%20Law-2009891.pdf?sequence=3&%3BisAllowed= (last visited 8 February 2020).

The first difference is that, like the original 1994 version, the new ICRC Guidelines deal with situations of armed conflict whereas the ILC topic, as you know, also covers pre- and post-conflict phases.

Second, the focus of the ICRC Guidelines is on international humanitarian law (in addition, they also include a number of rules related to specific weapons).

The Guidelines are a major work that systematically goes through the relevant IHL rules and reveals the capacity of many provisions primarily crafted for the protection of civilians to also provide general or indirect protection to the environment.

The focus on IHL does not mean that the ICRC would see it as the only body of international law applicable to armed conflicts.

The Guidelines refer in this regard to the ILC work on both the “Effects of Armed Conflicts on Treaties” and on “Protection of the Environment in Relation to Armed Conflicts”.

The ICRC thus points out that (para. 26): “The outbreak of an international or non-international armed conflict does not in and of itself terminate or suspend the application of rules of international law (whether treaty or customary) protecting the natural environment in peacetime, either between States party to the conflict or between a State party to the conflict and one that is not.”

Most importantly, the Guidelines explain that “other rules within different branches of international law may, depending on the context, and in whole or in part, complement or inform the IHL rules.” Examples mentioned in this context include rules of international environmental law, international human rights law, the law of the sea and international criminal law.

It is further pointed out that a comprehensive analysis of the interplay between these bodies of law and IHL is beyond the scope of the Guidelines. A reference is made in this regard to the current ILC work, in which this question is “considered in greater detail”.

A third difference is that the ICRC Guidelines are presented as (para. 12) “a restatement of law as it stands, in the eyes of the ICRC” while the ILC work obviously, in accordance with the Commission’s mandate, consists of progressive development and codification of international law.

In addition to “rules” which reflect existing obligations under international law, the ICRC Guidelines also include a few “recommendations” to States.

Having pointed out the differences between the ICRC Guidelines and the ILC draft principles I should add that they also cover some common ground, in particular regarding armed conflicts and situations of occupation.

While only a few of the Commission’s 28 draft principles have clear equivalents in the ICRC’s 32 rules, Parts III and IV of the draft principles are generally consistent with the ICRC Guidelines. The clear counterparts are related, for instance, to the Martens Clause with respect to the protection of the natural environment (Rule 16, DP 12), the prohibition of pillage, including pillage of property constituting part of the natural environment (Rule 14, DP 18), and to the military or other hostile use of environmental modification techniques (Rule 3 b, DP 19).

The main conclusion regarding the two documents is that they very usefully complement each other and are mutually supportive.

- IAC/NIAC

Moving now to the last part of my presentation, I would like to underline that I am looking forward to receiving written comments by the end of June 2021 – or any time earlier when it may be convenient to you.

In recent months, I have carefully reread the statements made in the Sixth Committee last year.

On this basis – time allowing – I would still highlight one issue that was raised in several statements. It is about the general application of the draft principles in both international armed conflicts and non-international armed conflicts. This feature of the set of draft principles has been both welcomed and criticized.

What does it mean that “the draft principles have been prepared on the general understanding that they would normally apply to both international and non-international armed conflicts.”

Looking at the set of draft principles, it is clear that this question does not have the same importance with regard to all Parts.

The preventive measures to be taken before an armed conflict, or the measures to be taken in post-conflict situations *inter alia* to share and grant access to information, to conduct post-conflict environmental assessments and take remedial measures, or to provide relief and assistance are not dependent on the type of conflict.

The principles of State responsibility are the same.

The potential environmental impacts of human displacement are the same – and are often felt outside the theatre of war.

The question of differentiation mainly arises regarding the “during” phase, the time of armed conflict and it could therefore be useful to take a closer look at these draft principles.

Regarding Part IV, draft principles 20 – 22 relative to situations of occupation are only applicable in international armed conflicts. Well-grounded pleas have been made in favour of applying the same legal principles to situations in which an armed group controls a certain territory but that is an emerging issue that cannot, in the absence of related practice, be taken into account in the Commission’s work.

Part III, the Principles applicable during armed conflict are obviously a case in point and I would like to make a few remarks in that regard.

First, it is true that humanitarian treaty law covers international and non-international armed conflicts very differently.

Second, many rules of customary international humanitarian law apply in both types of conflicts.

There has been growing agreement that acts prohibited in international conflicts should not be tolerated in non-international armed conflicts.

Not distinguishing between international and non-international conflicts, or seeking, in one way or other, to harmonize the legal regimes, has been a general trend in the field of the law of armed conflict.

Third, not all gaps in the legal regime of non-international armed conflicts have been filled by customary law, and even the ICRC Customary humanitarian Law Study of 2005 put forward many rules as being only “arguably” applicable in NIACs.

This was notably the case of the rules based on articles 35(3) and 55 of Additional Protocol I regarding the natural environment.

Fourth, and finally, most of the provisions in Part III are based on rules that State practice clearly establishes as rules of customary international law in both international armed conflicts and non-international armed conflicts. Examples include the principles and rules of distinction, proportionality, military necessity and precautions in attack, as well as definitions of civilian objects and military objectives, and the general principles on the conduct of hostilities.

As I said earlier, the draft principles in Part III are generally consistent with the ICRC Guidelines, which have been put forward as a restatement of law. Where they differ, the difference can be explained by the broader mandate of the Commission.

I thank you for your kind attention and stand ready to respond to any questions you may have at the end of this session.