



**Sixth Committee – Agenda item 77-I
Report of the International Law Commission
Peremptory norms of general international law (jus cogens)**

**Statement by the Federal Republic of Germany
25 October 2022**

Madam Chairwoman/Mr Chairman,

Germany would first and foremost like to express profound gratitude to Special Rapporteur Dire Tladi for his comprehensive and thorough fifth report on “Peremptory norms of general international law (jus cogens)” and for the dedication he has shown to this project. Germany deeply appreciates the work the ILC has done on this extremely pertinent topic and commends the Commission on having adopted these draft conclusions on second reading. The issue of jus cogens and the legal effects and consequences arising from such norms continue to be of preeminent significance to the international legal order.

Allow me to turn to some more specific aspects of the draft conclusions and the commentary thereto:

We wish to reiterate once again the point that the adoption of an enumerative list of specific jus cogens norms might lead to wrong conclusions and bears the risk of establishing a status quo that might impede the evolution of jus cogens in the future. The list has remained in the draft conclusions as they have been passed on second reading. We have previously taken positive note of the “without prejudice” clause in draft conclusion 23 and the emphasis made that the list is non-exhaustive; however, our concerns regarding the necessity and usefulness of such a list – which we had expressed on several previous occasions – remain. We believe that the commentary to conclusion 23, which states that the norms listed were not determined using the methods laid out in the present draft conclusions, does not add persuasive power to keeping the list in the

annex despite the concerns expressed by many States, but might have rather the opposite effect.

With regard to draft conclusion 2, we note that the text remains unchanged. While we take positive note of the fact that the commentary to conclusion 2 now includes a clarification that the characteristics of jus cogens norms outlined there are not intended as an additional criteria which impacts the definition of jus cogens, the language therein seems itself to be unclear. The clarification is immediately followed by a characterization of these elements as “context in the assessment of evidence”. The Commission holds that while these elements are not sufficient to identify a jus cogens norm, they do support an assumption to that end. Germany continues to be concerned that because of the specific reference to fundamental values of the international community in conclusion 2 and the ambiguity in the commentary the risk for misinterpretation still remains and has not been mitigated.

Regarding conclusion 16, Germany continues to share the concerns expressed by States that there is little state practice in support of this conclusion and that it might imply a risk of abuse by unilaterally disregarding binding Security Council decisions on its basis, which could undermine the authority of the Security Council acting under Chapter VII of the UN Charter and potentially jeopardize the overall effectiveness of Security Council action.

Last but not least, Germany as a staunch supporter of the work of the Commission would like to stress that especially in areas where there is a lack of practice a more careful and thorough consideration of States’ comments should be given as this might prove beneficial regarding the final outcome.

Germany would once again like to avail itself of the opportunity to commend the Special Rapporteur and the Commission for the outstanding work on this topic, which has now been completed.

Thank you.



**Sixth Committee – Agenda item 77-I
Report of the International Law Commission
Protection of the environment in relation to armed conflicts**

**Statement by the Federal Republic of Germany
25 October 2022**

The general outcome of the project:

1. Germany would like to express its sincere appreciation for the Commission's work on the complex issue of "protection of the environment in relation to armed conflict". We continue to support the important progress being made at the international level on this complex topic.
2. We commend the Commission for its work drafting the principles and commentary as they have now been adopted on second reading. In completing that work, the Commission has risen to the challenge of providing a comprehensive response to questions of the protection of the environment in armed conflict as they stem from numerous different legal regimes.
3. Germany appreciates the way in which the knowledgeable and nuanced reports of the two special rapporteurs have examined so comprehensively the numerous issues regarding this topic, such as the role of non-state actors, the extraction of raw materials in areas of armed conflict and the environmental impact of camps of displaced people. We have no doubt that this constitutes a highly valued contribution to addressing the impacts of modern day armed conflict on the environment.
4. We continue to appreciate the division of the draft principles into temporal phases, before, during and after an armed conflict. As noted, protecting the environment in times of armed conflict is a complex and interconnected task. Respectively, this approach allows for the review of different legal regimes, including international humanitarian law, the law of occupation, international environmental law and/or human rights law, as they become relevant during different phases of a conflict.
5. These draft principles are, to a large extent, not a codification of existing law, but aim to develop it further. The international community should promote legal development in this area in order to prevent future environmental disasters resulting from armed conflicts. We would once again like to express our appreciation of the Commission's transparent communication about its intention to further develop the law.

6. Germany continues to consider the distinction between those principles that are a reflection of established international law and those that constitute *lege ferenda* to be of high importance. We take positive note of the Commission's efforts to that end, specifically in the commentaries. At the same time, we deem it important that this distinction form an unambiguous part of the principles themselves. Furthermore, Germany still believes that the missing distinction between rules applicable to international and/or non-international armed conflict poses a further challenge and calls for a differentiated analysis.

On the content of the draft principles in detail:

7. We welcome the inclusion of the preamble as suggested by the Special Rapporteur in her latest report. It provides an appropriate setting for the draft principles and will be helpful to provide necessary context for how they are to be read.

8. We commend the Commission for including a reference to situations of occupation in Draft Principle 1. The responsibility of an occupying force to take into account aspects of environmental protection in its administration of the occupied territory is of high relevance to this topic. Germany appreciates that by including it in the draft principle on the scope of application, the Commission has underlined that responsibility which had already been reflected in earlier drafts of the text.

9. Whereas Germany supports the addition in Principle 5 of a specific rule with regard to a group of especially vulnerable persons in political terms, nevertheless it sees potential legal and operational challenges when emphasizing a specific and privileged protection among protected persons in particular in times of active hostilities.

10. We take note of the inclusion in Draft Principle 13 para. 2, which concerns the protection of the environment against widespread long term and severe damage and establishes a prohibition of methods and means of warfare that are intended, or may be expected, to cause such damage to the environment. With regard to this draft principle, Germany again considers it to be of paramount importance, that the Commission clearly makes a distinction between *de lege lata* and *de lege ferenda*.

11. Regarding Draft Principle 15, Germany takes note that this principle has been removed to address concerns of overlap or even redundancy with Draft Principle 14. We appreciate in this context that, while the principle itself has been deleted, the relevant aspects have been included in the revised commentary to Draft Principle 14. Germany considers this solution favorable and conducive to the clarity of the text, particularly with a view to strengthening Draft Principle 14.

12. Germany would once again like to avail itself of the opportunity to express its appreciation for Draft Principle 12, which refers to the Martens clause. We continue to consider it to be important to confirm the existence of rules on the protection of the environment in times of armed conflict that transcend explicit treaty provisions. While we take positive note of the elaboration in the commentary, which lays out the

relationship between the environment and the health of human beings, great care needs to be taken when introducing the concept of “humanity” to the topic of protecting the environment. As such, Germany appreciates both the relevance of the interconnectedness of these elements, and the fact that the reference to “principles of humanity” constitute an integral part of the Martens clause. Nevertheless, Germany continues to see the risk that the inclusion of the term “principles of humanity” may blur the distinction between the concepts of humanity and of nature. As we have stated before, it may be useful to clarify that the inclusion of the principle of humanity shall not lead to a humanization of the concept of “nature”, but also cover cases where the destruction of the environment endangers vital human needs.

13. Germany supports, as we have stated before, that Draft Principles 13 and 15 imply an intrinsic value of the natural environment in and of itself, recognizing that attacks against the environment are prohibited unless it has become a military objective, as are reprisals against the environment. We welcome that the commentary now references Art. 35 para 3 of Additional Protocol I as basis for this prohibition. This concurs with our view, as we had previously pointed out. At the same time, Germany continues to maintain that this is without prejudice to recognizing an intrinsic value of the environment or nature in legal regimes other than IHL.

14. Regarding Draft Principles 4 and 18, Germany remains supportive of the call to establish protected areas. We concur with the view of the Commission that a multilateral treaty on the designation of protected areas would be necessary to have binding effect on all parties under international law. To that end, Germany suggests, as we have done before, that such a treaty be modeled on the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict.

15. Lastly, with regard to para. 1 of Draft Principle 27 we continue to maintain our reservations that this could be read as entailing an obligation to act in any case where remnants of war are identified, including in the territorial sea and, with respect to warships and other state-owned vessels, even outside territorial waters. It remains of concern to Germany that this places an inappropriate burden on many States. Germany maintains the recommendation to reword Draft Principle 27 in order to make it clear that an obligation to act only arises after an environmental impact assessment has concluded that action is viable, necessary and appropriate in order to minimize environmental harm. Germany notes that, following our previous statements to that end, the text remains unchanged.

16. Finally, Germany would once again like to commend the Commission and the Special Rapporteurs for their pertinent and diligent work on a topic, which we believe will remain of high relevance to the international community. We thank them for their outstanding work.