



Statement
on behalf of the Republic of South Africa
by
Her Excellency Ms Mathu Joyini
Permanent Representative

**before the Sixth Committee of the 77th Session
of the United Nations General Assembly**

Under Cluster 1
***“Peremptory Norms of General International
Law (jus cogens); Protection of the
Environment in relation to Armed Conflicts and
Other Decisions)”***

New York, 26 October 2022

Chairperson

My delegation wishes to express our deepest appreciation to the Special Rapporteur, Mr Dire Tladi, and would like to congratulate him together with the members of the International Law Commission ("Commission") for their excellent work on this important topic "**Peremptory Norms of General International Law (*jus cogens*)**", and the adoption of the Draft Conclusions. We commend the Special Rapporteur on the diligent work in considering the comments and observations submitted by States.

Chairperson

Our government appreciate the opportunity to submit its comments and observations on the Commission's Draft Conclusions on identification and legal consequences of peremptory norms of general international law (*jus cogens*), together with the Commentaries including the annex which contains a non-exhaustive list of peremptory norms of general international law (*jus cogens*), adopted on the second reading by the Commission.

South Africa supports the Draft Conclusions and wishes to highlight that this statement must be read together with our previous comments and observations on the text of the Draft Conclusions.

Chairperson

South Africa is pleased that Draft Conclusion 2 was retained following our previous comment, which was incorporated in the Special Rapporteur's fifth report. We believe that describing the distinctive nature of these norms, will be a useful tool to better understanding of peremptory norms (*jus cogens*).

Chairperson

On the national level, our courts have relied on the same characteristics as adopted by the Commission in its Draft Conclusion 2, and in the decision of *Minister of Justice and Constitutional Development and Others v Southern African Litigation Centre and Others (2016)*, the Constitutional Court held that torture, the international crimes of piracy, slave-trading, war crimes, crimes against humanity, genocide and apartheid required states, even in the absence of binding international treaty law to suppress such conduct, because all states have an interest as they violate values that constitute the foundation of the world public order.

Chairperson

South Africa notes that paragraph 2 of Draft Conclusion 5 was retained in its previous form, in which treaty provisions are identified as basis for peremptory norms. Nonetheless, we remain unconvinced by the ambiguity of the Commission's treatment of treaty provisions as basis for *jus cogens*. We note the suggestion at various places in the commentary to suggest that treaty provisions can only form basis of *jus cogens* to the extent that such provisions reflect customary international law. Yet, we believe that this ought to be made clear in the text of the Draft Conclusions,

Chairperson

South Africa welcomes the inclusion of the phrase “and representative” under paragraph 2 of Draft Conclusion 7, which we generally believe that it will strengthen the understanding of the type of majority needed to qualify for the acceptance and recognition requirement.

Chairperson

South Africa supports the Draft Conclusion 16, and we are pleased with the position taken by the Commission in confirming that the resolutions, decisions, or other acts adopted by the United Nations Security Council (“UNSC”) under Chapter VII of the Charter of the United Nations are subject to peremptory norms of general international law (*jus cogens*).

We further share the view that the resolutions/decisions of the UNSC should have been explicitly mentioned in the text of the Draft Conclusion. However, the Draft Conclusion in its current form provides for a broader application of the resolutions, decisions or other acts of international organizations and their organs, which includes those adopted by the UNSC.

Chairperson

South Africa is encouraged by the further clarity provided on the Commentaries, in particular to paragraph (5), by the Commission in its attempt to elaborate and explain the procedure that States should follow as set out under Draft Conclusion 21, prior to adopting any measure of a belief that a binding UNSC resolution is in conflict with *jus cogens*.

Chairperson

At the outset, South Africa appreciates the use of the word “particular” which in itself emphasizes the Commission’s intention not to introduce an exclusive list of consequences, but to rather identify additional consequences which flows from breaches of *jus cogens* that meet the threshold under paragraph 3 of the Draft Conclusion 19, a fact which is also shared in paragraphs (17) – (18) of the Commentaries.

However, we believe that with the inclusion of the word “serious”, the Draft Conclusion still implies an existence of other or non-serious breaches of peremptory norms of general international law (*jus cogens*), taking into consideration paragraph (1) of the Commentaries, in which the Commission have expressly provided that Draft Conclusion 19 is not aimed at addressing consequences of breaches of peremptory norms that are not serious in nature.

Chairperson

South Africa wishes to note the inclusion of examples of resolutions adopted by organs of international organizations which illustrated the duty to cooperate to end serious breach of obligations, which the Commission elected to include in the Commentaries, while others are recorded in the footnotes.

Chairperson

South Africa welcomes the further clarity provided by the Commission in its Commentaries on the list of peremptory norms, following the second reading of Draft Conclusion 23. We continue to support the contents of the Draft Conclusion, especially with the view adopted by the Commission, that the inclusion of a list on a without prejudice basis is not intended to exclude the existence at present of other norms that may have peremptory character, or the emergence and development of other norms in the future.

Chairperson

Let me now turn to **Protection of the Environment in relation to Armed Conflicts**. My delegation wishes to join the Commission, having adopted the draft principles on protection of the environment in relation to armed conflicts, in expressing to the Special Rapporteur, Ms Marja Lehto, its deep appreciation and warm congratulations for the outstanding contribution she has made to the preparation of the draft principles through her tireless efforts and devoted work, and for the results achieved in the elaboration of draft principles on protection of the environment in relation to armed conflicts. We also join the Commission in its deep appreciation for the valuable contribution of the previous Special Rapporteur, Ms Marie Jacobsson, to the work on the topic.

We make this statement at a time when armed conflict continues to have a devastating impact on the environment. Increasingly, armed conflicts cause environmental degradation with dire effects to the civilian population. There has been reports that the methods and means of warfare have caused widespread and severe damage to the environment; and this is not a new phenomenon. New means of warfare and the way they are employed pose new challenges to the environment protection. The use of nuclear and conventional weapons as well as other methods of mass destruction contribute to the destruction of the environment in war-torn societies.

Too often, water or land has been reported to have been polluted or contaminated, crops have been reported to have been damaged and soils have been poisoned in order to have military advantage. Consequently, this would lead to food insecurity, shortage of water and loss of biodiversity and the most vulnerable will be impacted. These calamities can last for years.

In this regard, my delegation would like to recall the Rio Declaration on Environment and Development, adopted by the United Nations Conference on Environment and Development in 1992 which recognises the effects of warfare on the environment. Recognising that warfare is destructive, the Declaration calls upon States to respect international law by protecting the environment in armed conflict and to cooperate in its further development.

Chairperson

We commend the International Law Commission (ILC) for developing legal framework aimed at enhancing protection of environment during and after armed conflict. Protection of environment by the parties in conflict is crucial in armed conflicts.

My delegation has considered the ILC proposed 28 draft principles including measures for prevention of environmental damage during armed conflicts and redress of the damages in the aftermath. These principles are important as they can strengthen the capacities of the international community to protect the environment in the context of armed conflicts.

In this regard, we welcome the inclusion of the Preamble which urges the member States to be 'conscious of the need to enhance the protection of the environment in relation to both international and non-international armed conflicts, including in situations of occupation'. We support principle 4 that States should designate, by agreement or otherwise, areas of environmental importance as protected zones in the event of an armed conflict, including where those areas are of cultural importance. While the principle applies to States only, it would have been valuable if the principles apply to all parties to the armed conflicts.

The impact to environment often begins long before war starts. The means used for training and testing in preparation for war often cause harm in the environment. Training and testing of weapons can create emissions, chemical and noise pollution. It can also disrupt landscapes. The disposal of these weapons through dumping is also a serious cause for concern. It is therefore imperative that these Principles are always applied by States, even in peace time.

We are encouraged to note that our request for inclusion of issues that are relevant to this work, namely, the impact of refugee flows and human displacement on environment is addressed in draft Principle 8. The massive movement of refugees and internally displaced persons does have negative impact on the environment. It is worth mentioning that African normative instruments in this area, such as the 2009 AU Convention for the Protection and Assistance of Internally Displaced Persons in Africa (Kampala Convention), proved to be relevant in draft Principle 8. We hope some of the relevant information in this Convention would be applied under this draft Principle 8.

In draft Principle 10, the words 'appropriate measures' in this context was broad and ambiguous. The word 'appropriate' can mean different things to different people. We therefore appreciate the definition in the Commentary which is understood to mean 'appropriate measures, such as legislative, administrative and judicial' that States can take.

We support draft Principle 13 read with draft Principle 14 which provides that the use of methods and means of warfare that are intended, or may be expected, to cause widespread, long-term and severe damage to the environment is prohibited and that the principles and rules on distinction, proportionality and precautions shall be applied to the environment. The principles are in line with the rules of war contained in the Geneva Convention that sets out what can and cannot be done during armed conflict. In this regard, my delegation regrets that the Commission did not attempt to define the concepts 'widespread, long-term and severe' in draft Principle 13. It should be noted that these concepts are not defined in Additional Protocol I of the Geneva Convention. However, the Additional Protocol I provides clarity on how these concepts should be understood.

Chairperson

South Africa attaches great importance on measures and actions aimed at removing hindrances to the full realisation of the right of self-determination of peoples living under colonial and foreign occupation. One of the essential conditions of such full realisation is the protection of the environment for the benefit of peoples living under occupation.

There have been instances where the Occupying power have caused serious damage to agricultural areas or water resources as well as exploiting natural resources of the Occupied territory. There has also been reports of waste dumping by the Occupying power to the Occupied territory. In some countries, these acts have been committed without liability. It is for this reason that my delegation appreciates the three principles (i.e. 19; 20; & 21) contained under Part Four of the report on the protection of the environment in situations of Occupation. The Occupying power are urged to be mindful of these Principles and respect and protect the environment of the Occupied territory.

Chairperson

We would like to acknowledge the crucial role of the Geneva Conventions and its Protocols for setting out the rules aimed at protecting the environment in situations of armed conflict. We further note that some of the draft Principles in this agenda item got the inspiration from the Geneva Conventions. We commend the close coordination between the ILC and relevant institutions such as the ICRC, on these issues.

Finally, South Africa wishes to reiterate our support for the work of the Commission, in particular its contribution to the progressive development of international law and its codification.

In conclusion Chairperson

We now turn to **Other Decisions:**

Chairperson

The South African delegation commends the Commission's decision to add the following three new topics to its program of work:

- Prevention and repression of piracy and armed robbery at sea (Special Rapporteur Mr. Yacouba Cissé, Côte d'Ivoire);
- Subsidiary means for the determination of rules of international law (Special Rapporteur, Mr. Charles Chernor Jalloh, Sierra Leone); and
- Settlement of international disputes to which international organizations are parties (Special Rapporteur, Mr. August Reinisch, Austria).

Chairperson

The South African delegation is delighted and consider it very important that this is the first time that the Commission has appointed two African members as Special Rapporteurs at the same time, while a third African member, Professor Dire Tladi, has concluded a very important topic on jus cogen as Special Rapporteur. He is currently the Chair of the Commission. All this says a lot about the caliber of African members of the Commission. It is a good starting point for the Commission on the path towards equity in the distribution of Special Rapporteurs.

Chairperson

Non-legally binding international agreements: South Africa supports the decision of the Commission to include the topic of non-legally binding international agreements on its long-term programme of work". There is a growing trend and practice of entering into non-legally binding international agreements by States. It is against this background that we are of the view that this topic should be considered for possible further study by the Commission.

Chairperson

Outgoing and incoming members: We highly appreciate the contribution made the 18 members who are serving their last term this year, with their mandate expiring at the end of 2022, to the work of the Commission. In the same vein, we welcome the 18 new members who will be joining the Commission for the January 2023 to December 2027 period. We congratulate them on their election.

Chairperson

Visa issues: There are concerns about the handling of visas by the States hosting the Commission. It has been flagged that it was more cumbersome and time consuming for members from certain global south countries to obtain visas in comparison to their Western counterparts. It has also been flagged that members from Africa, Asia and Latin America have been issued visas of shorter duration than counterparts from elsewhere. The timely issuance of visas for all members, without distinction, is vital for the members to do their work and a properly functioning of the Commission and is consistent with the obligations of the host country under the agreement with the United Nations. We call upon the Commissions host countries to see to it that these issues are addressed.

I thank you for your attention.