



Statement of the Republic of Estonia
77th Session of the United Nations General Assembly Sixth
Committee

Report of the International Law Commission

Cluster I - Chps: I, II, III, IV (Peremptory norms of general international law (*jus cogens*)), V (Protection of the environment in relation to armed conflicts) and X (Other Decisions)

26 October 2022

Mr/Mrs Chairperson,

Estonia would like to express its continuing appreciation for the work of the International Law Commission and wishes to thank all the members of the Commission for their contribution to the work of the Commission.

Mr/Mrs Chairperson,

First, I will turn to the topic of **peremptory norms of general international law (*jus cogens*)**. Estonia acknowledges the need for clarity about the concept of *jus cogens* and the difficulty this process presents. Therefore, we would like to convey our gratitude to the Special Rapporteur Dire Tladi, the Drafting Committee and the International Law Commission for their valuable work done on this complex topic.

We take note of that the Commission adopted, on second reading, the entire set of draft conclusions together with commentaries thereto and has decided to recommend the draft conclusions to the General Assembly.

Estonia welcomes the fifth report and agrees with most of the conclusions. We appreciate the efforts to harmonise the language of the conclusions with the language of the Vienna Convention on the Law of Treaties (1969). Nevertheless, we would like to make comments on some of the conclusions and explain our position.

Estonia has several times expressed its view that it is necessary to analyse how the concept of *jus cogens* affects the international organisations which can create obligations to states. We are pleased that the conclusions and the commentaries

address the effect of *jus cogens* norms on the obligations created by the acts of international organisations (conclusion 16).

The Commission has compiled a list of various forms of evidence which show acceptance and recognition of *jus cogens* norms (conclusion 8). Among others, we find “resolutions adopted by an international organization”. This implies that international organisations can autonomously decide about the acceptance and recognition of *jus cogens* norms. The underlying idea is that “the international community of States” accepts and recognises *jus cogens* norms. Therefore, the conclusion should reflect that what matters is the conduct of states in connection with the resolutions adopted by an international organisation.

Estonia agrees with the inclusion of the non-exhaustive list of *jus cogens* norms. A list of identified *jus cogens* norms brings clarity and has practical value. However, it is necessary to conduct a thorough analysis in case of each potential *jus cogens* norm before their inclusion in such a list. It is essential to identify *jus cogens* norms on the basis of a clear and strong consensus within the international community of states.

In the proposed list, there are examples which are obviously *jus cogens* norms such as the prohibition of aggression and the prohibition of torture. However, some examples are disputable. For instance, which basic rules of international humanitarian law qualify as *jus cogens* norms? Such open-ended description is problematic. Also, the right of self-determination is subject to continuing debates regarding its nature and scope in contemporary international law. Unless common understanding is reached, it is premature to include the right of self-determination as a *jus cogens* norm.

Estonia does not share the view expressed by some that the inclusion of the non-exhaustive list of *jus cogens* norms creates a barrier which makes it difficult for future *jus cogens* norms to emerge.

The conclusions prepared are aimed to provide guidance for determining the existence of *jus cogens* norms and their legal consequences. But some conclusions are framed in binding terms (for example, using the term “shall”) which is more appropriate for a draft article style document.

Estonia takes note that the conclusions and their commentaries are mainly based on academic writings and judicial decisions, and have limited references to state practice. As *jus cogens* norms are accepted and recognised by the international community of states, it is vital to identify relevant state practice and rely on it as

much as possible. Therefore, we would have found it useful for the Commission to include more state practice and expand the commentaries accordingly.

In conclusion, Estonia appreciates and supports the significant effort made to analyse the concept of *jus cogens* norms, and to develop coherent conclusions regarding the status and effect of *jus cogens* norms.

Mr/Mrs Chairperson,

On the topic of **protection of the environment in relation to armed conflicts**, Estonia shares the understanding that it is necessary to pay more attention to the protection of the environment in relations to armed conflicts, and to enhance such protection in order to prevent, mitigate and remediate harm to the environment. We would like to thank the Special Rapporteur Marja Lehto, the Drafting Committee and the International Law Commission for their work done on this important topic.

The Commission adopted, on second reading, the entire set of draft principles together with commentaries thereto and decided to recommend that to the General Assembly.

Estonia aligns itself with the statement made by the European Union.

Estonia agrees with the approach that the principles address the protection of the environment before, during and after armed conflicts. It is not enough if we take precautionary measures only during armed conflicts – we need to prepare ourselves already before and deal with the negative consequences to the environment after armed conflicts.

The Commission explains that the principles contain provisions of different normative value, including those that reflect customary international law, and those that contain recommendations for its progressive development. It is vital that the language of the principles reflects the current legal nature of each principle. We understand that the principles with the operating verb “shall” or “must” contain legal obligations, and the principles with the operating verb “should” indicate progressive recommendations. It is doubtful if some principles with the operating verb “shall” reflect a legal obligation under treaty or customary international law (for example, principle 7). Even though the purpose of these principles is commendable, their legal nature could be reconsidered.

Estonia welcomes that the Commission does not want to change the existing law of armed conflict but aims to supplement it with the principles. We see no harm

that the Commission decided to use the term “environment” instead of the term “natural environment” found in the law of armed conflict.

The Commission has decided that in the principles, there is no need, generally, to distinguish between international and non-international armed conflicts. Such approach is mostly appropriate. However, we should not forget that the treaty law applicable in non-international armed conflicts does not explicitly address the protection of the environment, and there are divergent views among states whether and to what extent does customary international law address this matter. Estonia suggests caution and that the commentaries could be expanded with the supporting state practice in non-international armed conflicts.

Estonia welcomes that the principles are not limited to states but address also the role of relevant international organisations and other actors in the protection of the environment.

In conclusion of this topic, Estonia extends once again its appreciation to the Rapporteur Marja Lehto, the Drafting Committee and the Commission for the work done on this essential topic in order to enhance the protection of the environment in armed conflicts.

Mr/Mrs Chairperson,

Turning now to the topic **other decisions**, we welcome the inclusion of new topics on the agenda of the ILC. We find it especially useful to include the topics “prevention and repression of piracy and armed robbery at sea” and “subsidiary means for the determination of rules of international law”, which would be of interest for practitioners as well as for domestic and international courts. We would like to commend as well the recommendation of the Working Group to the Commission to include on the long-term program of work the topic of non-legally binding international agreements, as this would be of particular interest for practitioners.

Thank you for your attention.