



**State comments due at the end of June 2021 on International Law
Commission’s draft principles on the “protection of the environment in
relation to armed conflict” and draft conclusions on “peremptory norms of
general international law (*jus cogens*)”**

At its 65th session, in 2013, the International Law Commission (ILC) included the topic of the “protection of the environment in relation to armed conflict” in its programmeⁱ and at its 67th session, in 2015, it included the topic of *jus cogens* (later changed to “peremptory norms of general international law (*jus cogens*)” in 2017).

Since then, the ILC has held four sessions between 2015-2019,ⁱⁱ during which it worked on draft principles on the protection of the environment in relation to armed conflict (**Draft Principles PERAC**)ⁱⁱⁱ as well as draft conclusions that would, amongst other aspects, establish a non-exhaustive illustrative list of “peremptory norms of general international law (*jus cogens*)” (**Draft Conclusions PN**).^{iv} At its 71st session in 2019, the ILC proposed the Draft Conclusions PN and Draft Principles PERAC to the Drafting Committee, which were both provisionally adopted on first reading by the Commission.^v

As part of the latest stage of the ongoing process, the ILC has called on States to make comments and observations on the Draft Conclusions PN and Draft Principles PERAC. The original deadline of 1 December 2020 was extended to **30 June 2021**, given the COVID-19 pandemic. After this stage, the ILC will have a final second reading upon which the instruments are likely to be adopted by the Commission. This call for comments to the ILC and the upcoming oral comments in the Sixth Committee of the General Assembly in 2021 represent the last formal opportunities to shape the instruments. **It is therefore critical that States engage with this process before the upcoming deadline.**

Whilst the stakes for States and small / developing States (SDS) in particular are very high, participation among SDS has been low. When oral comments have been made by SDS in the Sixth Committee of the General Assembly, they have generally been limited and / or of a general nature. Regarding the Draft Principles PERAC, there were ten submissions by a total of nine States between the 68th and 73rd session of the ILC^{vi}. Only three of these States were SDS; no States from Africa or the Caribbean were among these. In relation to the Draft Conclusions PN, between the 68th and 73rd sessions of the ILC, only nine written submissions were made, by a total of six countries.^{vii} Among these, only two were developing States and none of these were African, Asian-Pacific or Caribbean States.

This memorandum will provide a summary of the core concerns that were raised in relation to the Draft Principles PERAC. It will also highlight the topics of the Draft Conclusions PN and the ways in which these might affect SDS’s interests, which make it crucial to engage with them at this stage.



Key concerns over the Draft Principles PERAC

During the discussions at the Sixth Committee of the General Assembly, some States voiced concerns that the Draft Principles PERAC should not use mandatory language.^{viii} Presently, the Draft Principles PERAC switch between prescriptive principles and recommendations, indicated by the use of the words “shall” and “should” respectively. It was also expressed that it was not clear whether the principles were meant to be binding or recommendatory and that the line between the two should be clarified further.^{ix}

Another concern was the scope of the Draft Principles PERAC, which presently aims to cover the protection of the environment before, during and after an armed conflict (draft principle 1). Some States stated that the Draft Principles PERAC should focus solely on the phase during armed conflict, as opposed to before and after the conflict, in order to not overload the task of the ILC^x and avoid restating established principles of international humanitarian and environmental law.^{xi}

It was noted that the protection of the environment during armed conflict is mentioned in multiple international instruments^{xii} and that efforts should be made to avoid duplicating existing regimes in the Draft Principles PERAC.^{xiii}

Key Stakes and Issues in the Draft Conclusions PN

The Draft Conclusions PN include several key issues that will affect the interests of SDS. These issues, and why it is crucial to engage with them, are outlined below. It is important that SDS engage with the potential legal consequences that flow from this work on peremptory norms, including with respect to voiding certain treaties; special rules on State responsibility for violations of peremptory norms; and even special rules applicable to the United Nations Security Council. States will also need to address the proposed list of peremptory norms, which has proven to be contentious in debates, as the reasons for including some norms and excluding others may be unclear. If adopted upon the second reading, it would be the first list of its kind to illustrate which international law norms are peremptory.

The following issues are just some of the currently contested issues at stake:

1. *Recognition by States:* The Draft Conclusions PN state that the acceptance and recognition “by a very large majority of States” is sufficient to identify a peremptory norm (draft conclusion 7). This wording does not specify at which point exactly this threshold is met. This was a cause of concern for some States, who asked for further clarification or rephrasing.^{xiv} It is also worth noting that the wording is at odds with the requirement under the Vienna Convention of the Law of Treaties, which provides that a norm must



be “accepted and recognised by the international community of States as a whole”.^{xv}

2. *Evidence of acceptance and recognition:* The Draft Conclusions PN include a non-exhaustive list of ways, which might provide evidence that a norm of general international law is accepted and recognised by the international community of States as peremptory (draft conclusion 8). This list includes resolutions adopted by an international organisation or at an intergovernmental conference. It has been questioned whether this threshold is too low and should be raised, given the seriousness of the consequences of jus cogens.^{xvi}
3. *“Serious breach” of a peremptory norm:* It is stated that States shall not recognise as lawful, nor render aid or assistance to maintaining a “serious breach” of a peremptory norm (draft conclusion 19(2)). Breaches will be considered “serious” where they involve “a gross or systematic failure by the responsible State to fulfil that obligation.”^{xvii} This wording brings the draft conclusion in line with the Articles on State Responsibility.^{xviii} However, the inclusion of the word “serious” remains contentious, on the basis that it might send a signal that it could be lawful to recognise a non-serious breach.^{xix}
4. *Dispute settlement procedures:* The Draft Conclusions PN recommended dispute settlement procedures for when a State invokes a peremptory norm as a ground for the invalidity or termination of a rule under international law (draft conclusion 21). States can submit the matter to the International Court of Justice and there has been some discussion on the effect that such a decision would have – namely, on whether it would automatically terminate the conflicting treaty or whether it would be merely declaratory.^{xx} There have also been questions on whether to include the draft conclusion in its entirety, as States are free to choose a form of dispute settlement and there is no hierarchy between the different methods *per se*.^{xxi}
5. *United Nations Security Council Resolutions:* Resolutions by international organisations, that would ordinarily have a binding effect, do not create obligations if they conflict with a peremptory norm (draft conclusion 16). In a prior draft by the Special Rapporteur, Security Council resolutions had been explicitly mentioned as falling under this category, whereas these were omitted in the latest Draft Conclusions PN.^{xxii} The ILC explicitly highlighted the superiority of peremptory norms over Security Council resolutions in the accompanying commentary.^{xxiii} The latter normally prevail over other rules of international law under Article 103 of the Charter of the United Nations and a clarification on the interplay between such resolutions and peremptory norms was welcome by many States.^{xxiv} There were some calls to exclude Security Council resolutions from this list, on the basis that the stringent procedural requirements for them to pass would make it inconceivable for them to conflict with a peremptory norm.^{xxv}
6. *Non-exhaustive list:* The annex to the Draft Conclusions PN includes a non-exhaustive list of norms, which have been referred to as peremptory by the ILC in the past.^{xxvi} The list does not encompass all such norms^{xxvii} and a



particular question is why some have been left out of the list.^{xxviii} Some States criticised the list as being problematic on the basis that its substance is extremely vague, amongst other reasons.^{xxix} Another question is whether such a list is compatible with the nature of the Draft Conclusions PN as a whole. The Draft Conclusions PN are meant to be “methodological in nature and do not attempt to address the content of individual peremptory norms”.^{xxx} Therefore, the non-exhaustive list of eight peremptory norms has been included in the annex and not the main body of the text of the Draft Conclusions PN.^{xxxi} However, the question remains open whether the annex exceeds the scope of the Draft Conclusions PN, because the mention of specific peremptory norms detracts from the methodology for identifying peremptory norms^{xxxii} and moves towards the development of primary rules.^{xxxiii}

How IILA Can Support SDS

With very limited time before these deadlines, IILA can assist SDS by conducting training to facilitate a deeper understanding of these topics and issues as well as supporting your engagement with the next steps in this process, both in terms of potential written observations to the ILC and, subsequently oral comments in the Sixth (Legal) Committee.

Should you require any further details or assistance on this matter, please do not hesitate to write to us at info@independentILA.org.

ii <https://legal.un.org/ilc/status.shtml>; Commentary to the Draft Principles PERAC, p. 209, para 1, available at <https://legal.un.org/ilc/reports/2019/english/chp6.pdf>

ii https://legal.un.org/ilc/summaries/1_14.shtml.

iii Draft Principles PERAC, available at <https://documents-dds-ny.un.org/doc/UNDOC/LTD/G19/153/11/PDF/G1915311.pdf?OpenElement>.

iv Draft Conclusions PN, available at: <https://documents-dds-ny.un.org/doc/UNDOC/LTD/G19/147/22/PDF/G1914722.pdf?OpenElement>.

v https://legal.un.org/ilc/guide/1_14.shtml#govcoms

vi The Czech Republic, Lebanon, Micronesia (Federated States of), the Netherlands, Paraguay, Slovenia, Spain, Switzerland and the United Kingdom of Great Britain and Northern Ireland.

vii Austria, Germany, the Netherlands, Paraguay, Spain, Mexico. See the Analytical Guide on the ILC website available at: https://legal.un.org/ilc/guide/1_14.shtml.

viii Brazil, oral statement to the 74th session of the Sixth Committee of the General Assembly, p.1, available at https://www.un.org/en/ga/sixth/74/pdfs/statements/ilc/brazil_2.pdf; Slovakia, oral statement to the 74th session of the Sixth Committee of the General Assembly, p.2, available at https://www.un.org/en/ga/sixth/74/pdfs/statements/ilc/slovakia_2.pdf.

ix The Netherlands, oral statement to the 73rd session of the Sixth Committee of the General Assembly, p.1, available at https://legal.un.org/ilc/sessions/73/pdfs/english/poe_netherlands.pdf; The United States of America, oral statement to the 74th session of the Sixth Committee of the General Assembly, p.5, available at https://www.un.org/en/ga/sixth/74/pdfs/statements/ilc/us_1.pdf. See also Lebanon (calling for more prescriptive language to be used), oral statement to the 74th session of the Sixth Committee of the General Assembly, p.2, available at https://www.un.org/en/ga/sixth/74/pdfs/statements/ilc/lebanon_2.pdf.

x Japan, oral statement to the 74th session of the Sixth Committee of the General Assembly, p.1, available at https://www.un.org/en/ga/sixth/74/pdfs/statements/ilc/japan_2.pdf.



- xi Slovakia, oral statement to the 74th session of the Sixth Committee of the General Assembly, p.2, available at https://www.un.org/en/ga/sixth/74/pdfs/statements/ilc/slovakia_2.pdf.
- xii The Hague Regulations of 1907, the Geneva Convention relative to the Protection of Civilian Persons in Time of War, 1949 and Additional Protocol-I to the Geneva Conventions, 1977.
- xiii India, oral statement to the 74th session of the Sixth Committee of the General Assembly, p.5, available at https://www.un.org/en/ga/sixth/74/pdfs/statements/ilc/india_2.pdf; Bangladesh, oral statement to the 74th session of the Sixth Committee of the General Assembly, p.1, available at https://www.un.org/en/ga/sixth/74/pdfs/statements/ilc/bangladesh_2.pdf.
- xiv Comments made by several States in their oral statements to the 74th session of the Sixth Committee of the General Assembly: the Philippines (https://www.un.org/en/ga/sixth/74/pdfs/statements/ilc/philippines_1.pdf at p.2); Thailand (https://www.un.org/en/ga/sixth/74/pdfs/statements/ilc/thailand_1.pdf at p.3); Uzbekistan (https://www.un.org/en/ga/sixth/74/pdfs/statements/ilc/uzbekistan_1.pdf at p.2). For a proponent of the current wording, see the statement made by South Africa in the same session (https://www.un.org/en/ga/sixth/74/pdfs/statements/ilc/south_africa_1.pdf at p.8).
- xv Article 53 of the Vienna Convention on the Law of Treaties.
- xvi France, Summary record of the 23rd meeting during the 74th session of the Sixth Committee of the General Assembly, p.16, para 95, available at <https://undocs.org/en/A/C.6/74/SR.23>.
- xvii Draft Conclusion 19(3).
- xviii Article 41(2). For an example of an opinion favouring this approach, see summary of a statement by Professor Nolte in the 3417th meeting of the 70th session of the ILC (A/CN.4/SR.3417), p.13, and the statement by Mr Ruda Santolaria, p.16, available at https://legal.un.org/ilc/documentation/english/summary_records/a_cn4_sr3417.pdf.
- xix There was some debate on this in the ILC. For an argument proposing the inclusion of the word “serious”, see the summary of the statement made by Concepción Escobar Hernández in the 3421st meeting at the ILC’s 70th session, found in UN Doc. A/CN.4/SR.3421, at p.9, available at https://legal.un.org/ilc/documentation/english/summary_records/a_cn4_sr3421.pdf. For an argument in favour of omitting the word “serious”, see the summary of the statement made by the Special Rapporteur Dire Tladi in the 3425th meeting of the ILC’s 70th session, found in UN Doc. A/CN.4/SR.3425 at p.12, available at https://legal.un.org/ilc/documentation/english/summary_records/a_cn4_sr3425.pdf. See also, South Africa, oral statement to the 74th session of the Sixth Committee of the General Assembly, p.9, available at https://www.un.org/en/ga/sixth/74/pdfs/statements/ilc/south_africa_1.pdf.
- xx Report of the ILC 70th session (2018), chapter 8, p.231, para 123, available at <https://legal.un.org/ilc/reports/2018/english/chp8.pdf>.
- xxi Ibid., p.231, para 124.
- xxii Third Report by the Special Rapporteur Dire Tladi, p.67, draft conclusion 17, available at <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N18/039/64/PDF/N1803964.pdf?OpenElement>.
- xxiii Commentary to the Draft Conclusions PN, at p.189, para 4, available at <https://legal.un.org/ilc/reports/2019/english/chp5.pdf>.
- xxiv Iran (Islamic Republic of) written statement, p.3, available at https://www.un.org/en/ga/sixth/74/pdfs/statements/ilc/iran_1.pdf; South Africa, written statement, p.9, available at https://www.un.org/en/ga/sixth/74/pdfs/statements/ilc/south_africa_1.pdf; Brazil, written statement, p.4, available at https://www.un.org/en/ga/sixth/74/pdfs/statements/ilc/brazil_1.pdf;
- xxv China, written statement, p.4, available at https://www.un.org/en/ga/sixth/74/pdfs/statements/ilc/china_1e.pdf; Russian Federation, summary record of the 25th meeting of the 74th Session of the Sixth Committee, p.8, para 48, available at <https://undocs.org/en/A/C.6/74/SR.25>;
- xxvi Commentary to the Draft Conclusions PN, p.204, para 4, available at <https://legal.un.org/ilc/reports/2019/english/chp5.pdf>.
- xxvii Commentary to the Draft Conclusions PN, p.207, para 13, available at <https://legal.un.org/ilc/reports/2019/english/chp5.pdf>.



- xxviii Summary of statement made by Mr Rajput during the 3461st meeting of the 71st session of the ILC (A/CN.4/SR.3461), p.14, available at https://legal.un.org/ilc/documentation/english/summary_records/a_cn4_sr3461.pdf; China, Austria, Nicaragua, Romania, Summary record of the 23rd meeting during the 74th session of the Sixth Committee of the General Assembly, p.10, para 55 (China) and p.12, para 66, (Austria), p.12, para 71 (Nicaragua), p.14, para 79 (Romania), available at <https://undocs.org/en/A/C.6/74/SR.23>; Portugal, Switzerland, Summary record of the 25th meeting during the 74th session of the Sixth Committee of the General Assembly, p.10, para 63 (Portugal) and p.11, para 65 (Switzerland), available at <https://undocs.org/en/A/C.6/74/SR.25>; Viet Nam, oral statement to the 74th session of the Sixth Committee of the General Assembly, p.3, available at https://www.un.org/en/ga/sixth/74/pdfs/statements/ilc/viet_nam_1.pdf.
- xxix China and Austria, Summary record of the 23rd meeting during the 74th session of the Sixth Committee of the General Assembly, p.10, para 55 (China) and p.12, para 6, (Austria), available at <https://undocs.org/en/A/C.6/74/SR.23>; India, oral statement to the 74th session of the Sixth Committee of the General Assembly, p.3, available at https://www.un.org/en/ga/sixth/74/pdfs/statements/ilc/india_1.pdf; Czech Republic, oral statement to the 74th session of the Sixth Committee of the General Assembly, p.3, available at https://www.un.org/en/ga/sixth/74/pdfs/statements/ilc/czech_republic_1.pdf.
- xxx Commentary to the Draft Conclusions PN, p.204, para 1, available at <https://legal.un.org/ilc/reports/2019/english/chp5.pdf>.
- xxxi Commentary to the Draft Conclusions PN, p.204, para 2, available at <https://legal.un.org/ilc/reports/2019/english/chp5.pdf>.
- xxxii Summary of the statement by Professor Nolte at the 3461st meeting of the 71st session of the ILC (A/CN.4/SR.3461), p.5, available at https://legal.un.org/ilc/documentation/english/summary_records/a_cn4_sr3461.pdf; Nicaragua, Summary record of the 23rd meeting during the 74th session of the Sixth Committee of the General Assembly, para 71, p.12, available at <https://undocs.org/en/A/C.6/74/SR.23>.
- xxxiii China, Summary record of the 23rd meeting during the 74th session of the Sixth Committee of the General Assembly, p.10, para 55, available at <https://undocs.org/en/A/C.6/74/SR.23>. Slovenia, Summary record of the 25th meeting during the 74th session of the Sixth Committee of the General Assembly, pp 8-9, paras 51-52, available at <https://undocs.org/en/A/C.6/74/SR.25>.