



AUSTRALIA



AUSTRALIAN MISSION TO THE UNITED NATIONS

E-mail australia@un.int

150 East 42nd Street, New York NY 10017-5612 Ph 212 - 351 6600 Fax 212 - 351 6610 www.AustraliaUN.org

Report of the International Law Commission on the Work of its Sixty-Ninth Session, Cluster III (Agenda Item 81)

Sixth Committee

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Statement by Dr Carrie McDougall, Legal Adviser

(Check against delivery)

Mr Chair

We thank you for the opportunity to make comments today on the ILC's work on peremptory norms of international law.

Australia welcomes consideration of proposed draft conclusions 4 – 9 on the identification of peremptory norms (*jus cogens*), and accompanying commentaries, in Chapter VIII of the Report. Australia expresses its deep appreciation to the Special Rapporteur Dire Tladi for his extensive work on this topic, which seeks to provide practical guidance to States in determining the existence and content of norms that qualify as *jus cogens* under customary international law. Australia also welcomes the interim report of the Chairman of the Drafting Committee, delivered on 26 July 2017 during the ILC's 69th session, reporting on the Drafting Committee's progress to date.

Australia considers that the draft conclusions provide a useful framework to assist the identification of peremptory norms of international law and their content. The practical approach of the conclusions is necessary to reflect the

dynamic nature of the formation, development, acceptance and recognition of *jus cogens* by States under general international law.

Australia supports in principle the requirement of evidence underpinning whether a norm is accepted and recognised as *jus cogens*. We note this requirement is included in, for example, draft conclusion 6(2), and previously in draft conclusions 8(2) and 9. However, we agree that there may be methodological shortfalls with this approach. This is especially the case if only limited international practice exists to draw on to identify the degree of acceptance and recognition of a specific norm by States.

Given the relative uncertainty regarding whether a particular norm has risen to the level of *jus cogens*, we also query whether inclusion of an illustrative list of such peremptory norms would be of additional benefit to this body of work. In particular, we query whether consensus could be reached on such a list. It may also undermine the objectives sought to be achieved by this work, being clarity around, and agreement on, the criteria to be applied in identifying peremptory norms. Against this background, Australia recommends a cautious approach be taken should a decision be made to develop a list of *jus cogens* norms.

We commend the progress made to date by the Special Rapporteur and the Drafting Committee and recognise there is further work to be done. Given the significant consequences for States of the Commission's work on this matter, we encourage close and careful consideration of the issues and look forward to future developments on the framework in due course.