

Peremptory norms of general international law (Jus cogens)**Special Rapporteur: Dire Tladi (ZAF)**

Madam Chairwoman/Mr Chairman,

As this is the first time Germany is commenting on the project, please permit initially some more general comments. I would like to start by congratulating Special Rapporteur Dire Tladi on his appointment and his impressive second report on “Peremptory norms of general international law (Jus cogens)”. While we share the concerns expressed by other States with a view to the lack of real State practice on the topic and therefore generally favour a cautious approach, we appreciate the effort the Special Rapporteur has invested into the report as well as his thoughtful study of existing State practice on the criteria and formation of *Jus cogens* in his second report.

Now, allow me to make some more specific remarks on the draft conclusions proposed by the Special Rapporteur that have been provisionally adopted by the Drafting Committee:

- First, Germany agrees with the general reasoning of **draft conclusion 5**: it primarily must be customary international law – and not treaty law or other sources – that qualifies as general international law and thus forms the basis for *Jus cogens*. In particular and as stated by the Special Rapporteur in his report, treaty rules only exceptionally reflect peremptory norms of general international law. This, in our opinion, is not yet sufficiently conveyed in the draft conclusion provisionally adopted by the Drafting Committee and therefore should be clarified in the wording of the conclusion or in the accompanying commentary.
- Second, turning to the other criterion for *Jus cogens*: the acceptance and recognition by the international community of States as a whole that a norm is non-derogable. Here, we advise extreme caution with a view to the serious implications of the consequences of a *Jus cogens* norm. Therefore, highest standards have to be applied when identifying such norms. In this regard, Germany welcomes the newly introduced specification in **draft conclusion 7** that “acceptance and recognition by a very large majority of States is required for the identification of a norm as a peremptory norm of general international law”. However, this expression still leaves too much scope for

interpretation. Further clarification in the commentary is advisable. In this context, we also wish to reiterate comments that Germany made during the discussion of the Commission's work on the "Identification of customary international law" in the Sixth Committee. What was true regarding that project is all the more true regarding the ILC's work on *Jus cogens*: the absence of a specific reaction by States to the proclamation of a *Jus cogens* norm by others should only indicate the acceptance of a norm if circumstances in the given case called for a reaction.

- Third, as for the question whether **regional *Jus cogens*** should be mentioned in the draft conclusions, we agree with those who see the challenges in accepting the existence of such a concept in international law. However, Germany does not deem it necessary for the Commission to deal with regional *Jus cogens* at this stage as part of this project.

- Fourth, while we are aware of the fact that the Drafting Committee has not yet had the opportunity to discuss it, allow me to make a brief comment on **draft conclusion 9** as proposed by the Special Rapporteur. Germany attaches great importance to the Commission's contribution to the determination and progressive development of international law and values the outstanding quality of its work. Nevertheless, the explicit mention of the Commission's work in draft conclusion 9 on the evidence of acceptance and recognition appears questionable. It is also in contrast to the conclusions on the Commission's work on the topic of "Identification of customary international law". There, the Commission refrained from mentioning its work in the conclusions and only referred to it in the commentary. In particular, it explained that the weight to be given to its determinations depended "on various factors, including sources relied upon by the Commission, the stage reached in its work and above all upon States' reception of its output". It is our view that the same approach should be taken in the present case.

- Finally, Germany does not consider it necessary for the ILC to undertake the enormously difficult task of adopting an **enumerative list of norms** that have acquired *Jus cogens* status. Even if such a list was only illustrative, it might lead to wrong conclusions being drawn and bears the risk of establishing a *status quo* that might impede the evolution of *Jus cogens* in the future.

Madam Chairwoman/Mr Chairman,

Germany will follow this project closely. We have already provided information to the Commission on relevant national practice with regard to *Jus cogens* and we would like to encourage other States to do so as well.

Thank you.