The Permanent Mission of the Federal Republic of Germany to the United Nations presents its compliments to Secretary-General of the United Nations and, with reference to Chapter III: E (§ 31 "Jus cogens") of the Report of the International Law Commission on its Sixty-seventh Session (2015) [United Nations document A/70/10], has the honour to submit the following information requested by the International Law Commission:

1.) Decisions of German Courts dealing with *ius cogens*

1. Federal Constitutional Court ("Bundesverfassungsgericht")

a. Federal Constitutional Court Order of 26 October 2004 – 2 BvR 1038/01

In 2004 the Court had to rule on constitutional complaints concerning the compatibility of expropriations within the Soviet occupation zone between 1945 and 1949 with public international law and the potential consequences of a breach of public international law for German constitutional law.

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2 The constitutional complaint ("Verfassungsbeschwerde") (cf. Article 93 (1) No. 4a Basic Law "Grundgesetz") is a remedy open to individuals and in a number of limited cases to legal persons claiming an infringement of constitutional rights by a German public authority or court.

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In its decision the Court also made some comments on the character and content of *ius cogens*:

"In Article 1.2 and Article 25 sentence 1 the [German] Basic Law ["Grundgesetz"],[…] also adopts the gradual recognition of the existence of mandatory provisions, that is, provisions that are in the individual case not open to disposition by the states (*ius cogens*). These are rules of law which are firmly rooted in the legal conviction of the community of states, which are indispensable to the existence of public international law, and the compliance with which all members of the community of states may require […]. This relates in particular to provisions on the international maintenance of peace, the right of self-determination, fundamental human rights and central norms for the protection of the environment […]. Such public international law may not be excluded by […] states either unilaterally or by agreement, but only altered by a later norm of general international law of the same legal nature […]."  

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The concept of peremptory rules of public international law has recently been confirmed and further developed in the articles of the International Law Commission (ILC) on the law of state responsibility […]. Article 40.2 of the ILC Articles on the responsibility of states contains the definition of a serious violation of *ius cogens* and obliges the community of states to cooperate in order to terminate the violation by use of the means of public international law. In addition, a duty is imposed on the states not to recognise a situation created in violation of *ius cogens*.

In the cases to be decided, there is no violation of this duty of respect by German state bodies. The expropriations were the responsibility of the Soviet occupying power (a). On German unification, the Federal Republic of Germany attained the sovereign competence to decide on the reversal of the measures on the basis of sovereign acts by occupying powers. Public international law does not require the Federal Republic of Germany to make restitution. Nor did it have a duty to attach the legal consequence of voidness to the expropriations. The Federal Republic of Germany had merely a duty of cooperation with regard to the consequences (b). It fulfilled this duty by bringing about German unification

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3 Order of the Second Senate, 26 October 2004, 2 BvR 955/00 2, BvR 1038/01, para 97. Translation according to http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2004/10/rs20041026_2bvr095500en.html (last visit 9 February 2016).
peacefully by way of negotiations. Only by doing this did it achieve the de facto possibility to correct the situation, which was determined by history. The Federal Republic of Germany was allowed to come to the conclusion that dealing cooperatively with German unification would be incompatible with treating the expropriations as void (c).”

Subsequently the court concluded:

“The Federal Republic of Germany is subject to no duty derived from public international law to make restitution to the persons affected by the expropriations. In connection with the Two-Plus-Four Talks, it impliedly and admissibly waived the right to any claims it had to damages under public international law (1). There are no rules of mandatory public international law preventing this (2).”

“In the case of a violation of peremptory norms of public international law by the Soviet occupying power, the Federal Republic of Germany was not obliged even under general public international law to attach the legal consequence of voidness to the expropriations.

At the date that was decisive for creating standards, the date of the expropriations, there was no general legal conviction that the protection of property of the state’s own citizens was part of universally applicable public international law in the sense of ius cogens.

Nor can it be established that at a later date a rule of peremptory public international law arose that excludes ex nunc the possibility of treating the existing situation as lawful (ius cogens superveniens). The institution of newly developed peremptory international law overtaking older law has been laid down […]. Under Article 53 of the Vienna Convention on the Law of Treaties, treaties that conflict with a peremptory norm of general international law are void.

Under Article 64 of the Convention, a treaty entered into earlier that to date has been unobjectionable becomes void if it is in conflict with a peremptory norm of general international law that comes into existence later.

Accordingly, what is important is not so much the obligations to which the occupying power was subject in the period from 1945 to 1949 as the obligations

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5 Ibid. para 110.
to which the Federal Republic of Germany was subject when it entered into the Unification Treaty. Universal public international law has not contained and does not contain a guarantee of the property of a state's own citizens as a protective standard for human rights. It is true that in the year 1948, in Article 17.2 of the Universal Declaration of Human Rights, the General Assembly of the United Nations (Resolution 217 A (III) of the General Assembly of 10 December 1948, [...] laid down that "no-one" may be "arbitrarily deprived of his or her property", but the Universal Declaration is not binding public international law. By reason of differences of opinion between West and East, property was also not mentioned in the International Covenant on Civil and Political Rights of 19 December 1966. In view of this hesitation on the part of the international community to enter into a binding agreement, there can be no question of a customary norm of the legal protection of property as a human right applying worldwide, that is, in favour not only of the citizens of foreign states, but also of a state's own citizens. The significance of property for the dignity and the freedom of humanity – as part of the minimum protection of human rights – was recognised only later; the process of discussion on the level of public international law has not been completed even today.

c) Modern public international law is characterised by a continuous increase in the severity of the legal consequences which it attaches to the violation of particular central norms; [...] states are increasingly subjected to a duty to terminate and remove grave violations of peremptory international law. Article 53.1 of the Vienna Convention on the Law of Treaties provides that treaties that, at the time of their conclusion, conflict with existing international law are void. In its Articles on the law of state responsibility, the International Law Commission has now also formulated clear rules for the legal consequences of a state's violation of peremptory international-law duties that apply to that state. Thus, under Article 26 of the ILC Articles, the general grounds of justification of a violation of public international law under Articles 20-25 do not apply to a violation of a peremptory norm. The consent of the injured state does not justify the violation of a peremptory norm of public international law. The same applies to necessity (Article 25) and force majeure (Article 23). Even when a state takes countermeasures that for all intents and purposes are justified
against the violation of public international law of another state (Article 22), it may not violate peremptory law. The ILC Articles contain a Chapter III, dealing separately with a duty to act on the part of third [...] states (Articles 40 et seq.), but this treats only serious violations of peremptory international law. A breach is serious if it is gross or systematic in nature (Article 40.2). [...] States must cooperate in order to bring an end to any such breach (Article 41.1). In addition, no state may recognise as lawful a situation created by such a breach or render aid or assistance in maintaining it (Article 41.2).

However, these provisions do not give rise to the legal consequence that the expropriations on the basis of sovereign acts by occupying powers – assuming they violated mandatory international law – are to be treated as void. Instead, the legal consequence of voidness is laid down only to the extent that duties under treaties are directed precisely to performance that is prohibited by a peremptory norm. Apart from this, however, and all the more so if a factually established situation and differing political interests are involved, the states have merely a duty to cooperate with regard to the consequences. Behind this duty of cooperation is the consideration that it is urgently necessary to create a situation that, while safeguarding the interests on both sides, does actually mitigate the breach of peremptory law as far as possible.

There is no conflict here with the fact that [...] states, under public international law, may also have a duty not to recognise particular factual developments that have occurred in breach of fundamental principles of the international order. Thus, the Friendly Relations Declaration of the General Assembly of the United Nations of 24 October 1970, which has been recognised by the International Court of Justice as a condensed version of applicable customary public international law states that no acquisition of territory by force may be treated as legal by the community of states. The report of the International Court of Justice on the situation of Namibia contains a very similar assessment. In this report, the International Court of Justice came to the conclusion that the rule of Namibia by the state of South Africa had become illegal by reason of the effective termination of the mandate under which South Africa had been entrusted with responsibility for former German South West Africa by the League of Nations. In view of the occupation of the country, which was now
unlawful, all states in the world had an obligation to regard the action of South Africa for or in relation to Namibia as invalid to the extent that such non-recognition was not contrary to the vital interests of the inhabitants of Namibia. In this case too, however, the main emphasis was on the termination or removal of the situation. In consequence, the community of states also cooperated with South Africa when the occupation of Namibia came to an end.”


In 2000 the Federal Constitutional Court had to rule on a constitutional complaint regarding the conviction of a Bosnian Serb by a German court for crimes of genocide committed in Bosnia and Herzegovina. In its decision the Court also elaborated on questions of interpretation regarding Articles II and VI of the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948 (Genocide Convention).

In its decision the Court stated:

“There are specific features applying to peremptory norms of public international law. International ius cogens cannot be derogated from. If such rules derive from a fundamental principle such as the prohibition of genocide, customary international law may be applied as far as the deviation is of limited nature, meaning it does not restrict the contractual obligations. The interdiction of genocide established by international treaty law and customary law is part of ius cogens. A peremptory norm of general international law is a norm accepted and recognised by the international community of States in its entirety and is recognised as a norm from which no derogation is permitted and which can only be modified by a subsequent rule of general international law having the same character. The International Court of Justice has held that the Genocide Convention has effect erga omnes. Norms that are part of ius cogens enjoy erga omnes effect.

The rule of international customary law put forward by the plaintiff could therefore only be material to the decision if it constituted merely a minor

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6 Ibid. para 115-123.
exception to Article VI of the Genocide Convention. In the case of the norm alleged to exist by the plaintiff this would not be the case. A ban on the universal administration of criminal justice would diametrically oppose the Federal Republic’s duties derived from the decisions based on Article 1 of the Genocide Convention.  

2. Federal Administrative Court ("Bundesverwaltungsgericht")

Federal Administrative Court Order of 21 June 2005 – 2 WD 12.04

In 2005 the Second Senate of the Federal Administrative Court had to rule on a judgment by the First Chamber of the German Armed Forces ("Bundeswehr") Disciplinary and Complaints Court North, in which a soldier had been demoted to the rank of captain.

In its decision the court stated:

“International ius cogens includes inter alia the international law prohibition of the use of force, as reflected in Article 2 (4) of the UN Charter, and the fundamental rules of the humanitarian law of armed conflicts.”

“Pursuant to Article 2 (4) of the UN Charter, “any” threat or use of military force against another state constitutes a breach of international law as a matter of principle. This strict prohibition of the use of force is, according to the case law

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8 Order of the Second Senate, 12. December 2000, 2 BvR 1290/99, para 17; this part only available in German http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2000/12/rk20001212_2bvr129099en.html (last visit 9 February 2016); original German wording:


Daher war die vom Beschwerdeführer behauptete völkerbewegungsrechtliche Norm vorliegend nur dann möglicherweise entscheidungserheblich, wenn sie gegenüber Art. VI Völkermordkonvention eine unwesentliche Abweichung darstellen würde. Dies wäre bei der vom Beschwerdeführer als existierend behaupteten Völkerbewegungsnorm nicht der Fall. Denn das Verbot der universalen Strafrechtspflege würde der Erfüllung der Verpflichtungen, die sich aus Art I Völkermordkonvention nach der Auslegung der angegriffenen Urteile für die Bundesrepublik ergeben, diametral entgegenstehen.”

9 Truppendienstgericht Nord.

10 BVerwG 2 WD 12.04, No. 41.2.6 (p. 35); Original German wording:

Bestandteil des „ius cogens“ sind u.a. das völkerrechtliche Gewaltverbot, das in Art. 2 Nr. 4 der UN-Charta seinen Niederschlag gefunden hat, und die grundlegenden Regeln des humanitären Kriegsvölkerrechts.
of the International Court of Justice [...] , likewise part of international customary law and is considered part of *ius cogens* [...] . It is mandatory for all states, regardless whether they are members of the United Nations or not."

**Annex**

**Index of Decisions of the German Federal Constitutional Court and the Federal Administrative Court dealing with the identification of rules of the *ius cogens***

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The Permanent Mission of the Federal Republic of Germany to the United Nations avails itself of this opportunity to renew to the Secretary-General of the United Nations the assurances of its highest consideration.

New York, 10 February 2016

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11 B'VerwG 2 WD 12.04, No. 4.1.4.1.1 (p. 72); Original German wording:

*Grundsätzlich ist nach Art. 2 Ziff. 4 UN-Charta „jede“ Androhung und Anwendung militärischer Gewalt gegen einen anderen Staat völkerrechtswidrig. Dieses strikte Gewaltverbot ist nach der Rechtsprechung des Internationalen Gerichtshofs [...] zugleich Bestandteil des völkerrechtlichen Gewohnheitsrechts und wird zum "ius cogens" gerechnet [...]. Es verpflichtet alle Staaten unmittelbar, und zwar unabhängig davon, ob sie Mitglied der Vereinten Nationen sind oder nicht.*