



Berlin, June 28, 2021

**Comments and observations by the Federal Republic of Germany
on the draft conclusions on peremptory norms of general international
law (*jus cogens*)**

Special Rapporteur: Dire Tladi

- 1 The Permanent Mission of Germany to the United Nations presents its compliments to the Secretary-General of the United Nations. With reference to the decision by the International Law Commission (hereinafter referred to as “ILC” or “the Commission”) taken at its 3504th meeting on August 7, 2019, Germany avails itself of the opportunity to submit the following comments and observations on the draft conclusions on peremptory norms of general international law (*jus cogens*), adopted by the Commission on first reading.

Introductory observations

- 2 Germany wishes to express appreciation for the work of the Special Rapporteur, Mr. Dire Tladi, and the Commission as a whole on this highly relevant topic and commends the Commission on having adopted the draft conclusions on first reading. The issue of legal effects and consequences arising from peremptory norms of international law (*jus cogens*) is of paramount importance to the overall architecture of the system of international law. In the following, Germany would limit itself to some of the key points regarding this topic.

- 3 Germany appreciates the comprehensive and thorough work by the Special Rapporteur as well as his thoughtful study on the criteria and formation of *jus cogens* in his reports. Yet, Germany still shares concerns expressed by other States with a view to an insufficiency of substantial state practice on the topic and therefore in principle favors a more conservative approach,. In this context, it is further submitted that the commentaries to the draft conclusions would benefit from a more detailed elaboration on specific examples of state practice, where relevant.

With respect to the distinction between the codification of existing law and its progressive development, Germany submits that further clarification would be helpful keeping in mind the potentially wide-ranging implications of the draft conclusions.

Specific comments on the draft conclusions

- 4 **Draft conclusion 3: General nature of peremptory norms of general international law (*jus cogens*)**

With regard to the current wording of draft conclusion 3, Germany sees the risk that the wording “reflect and protect fundamental values of the international community” could be interpreted as an additional criterion for determining whether a specific peremptory norm of *jus cogens* exists or not. To avoid a conflict with the definition of *jus cogens* in article 53 of

the Vienna Convention on the Law of Treaties, which contains no such reference to “fundamental values of the international community”, it is suggested to remove the reference in the draft conclusion and to elaborate on this feature in the commentary only.

5 Draft conclusion 5: Bases for peremptory norms of general international law (*jus cogens*)

Germany welcomes the general reasoning of draft conclusion 5 and concurs that customary international law – as opposed to treaty law or other sources – is the most common basis for peremptory norms of general international law (*jus cogens*). In particular, treaty provisions would only exceptionally serve as basis for peremptory norms of general international law if and when they reflect a codification of international customary law. As to the question whether general principles of law could serve as a basis for *jus cogens*, the Commission itself points out that there is little practice in this regard. Germany shares this assessment and suggests to include and elaborate further on this aspect in the commentary.

6 Draft conclusion 7: International community of States as a whole

Germany welcomes the clarification in draft conclusion 7 that it is the acceptance and recognition by the international community of *States* as a whole, which is relevant for the identification of peremptory norms, and that the positions of other actors may be relevant only for providing context or assessing the above mentioned acceptance and recognition, but cannot form part of such acceptance and recognition in and of themselves. Germany strongly supports this approach taken by the Commission, in conformity with its Conclusions on Identification of Customary International Law, especially in light of the serious implications of the consequences of a *jus cogens* norm. Therefore, highest standards have to be applied when identifying such norms. As to draft conclusion 7 no. 2, and the reference to “acceptance and recognition by a very large majority of States”, Germany suggests to further clarify on the interpretation of this criterion in the commentary. Germany submits that the term “very large majority” should be interpreted in line with the respective jurisprudence of the International Court of Justice as constituting an “overwhelming majority”.

7 Draft conclusion 8: Evidence of acceptance and recognition

Concerning draft conclusion 8, Germany would like to highlight the parallels with Conclusion 10 of the Conclusions on Identification of Customary International Law, which characterizes the “*conduct* in connection with resolutions adopted by an international organization or at an intergovernmental conference” as a form of evidence for *opinio juris*. In this regard, Germany suggests harmonizing draft conclusion 8 with the aforementioned work, as it is the conduct of states in connection with the adoption of such acts that constitute an important indicator of the acceptance and recognition of a norm of *jus cogens*.

8 Draft conclusion 9: Subsidiary means for the determination of the peremptory character of norms of general international law

As to draft conclusion 9 describing the role of the works of expert bodies established by States or international organizations as subsidiary means for determining *jus cogens*, Germany submits that a more differentiating approach seems preferable, taking into account the various existing expert bodies, their composition, mandate, acceptance by states or support in state practice of their work, etc. Moreover, Germany recommends aligning draft conclusion 9 and its commentary with the Commission’s Conclusions on Identification of Customary International Law. In the latter context, the Commission 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 seems advisable to adopt the same approach in the case at hand.

9 Draft conclusion 16: Obligations created by resolutions, decisions or other acts of international organizations conflicting with a peremptory norm of general international law (*jus cogens*)

As to draft conclusion 16 providing that resolutions, decisions or other acts of international organizations do not create obligations under international law if and to the extent that they conflict with a peremptory norm of *jus cogens*, Germany shares the concerns expressed by

States that there is little state practice in support of this conclusion. Furthermore, the draft conclusion in its current wording might imply a risk of abuse by unilaterally disregarding binding Security Council decisions on its basis. This could undermine the authority of the Security Council acting under Chapter VII of the UN Charter and potentially jeopardize the overall effectiveness of Security Council action. Germany submits that further elaboration on the relation between this draft principle and articles 103 and 25 of the UN Charter would be advisable.

10 Draft conclusion 21: Procedural requirements

Regarding draft conclusion 21, which sets out the procedure for the invocation of the invalidity or termination of a rule of international law by reason of being in conflict with *jus cogens*, Germany suggest to remove this conclusion. First, the Commission itself found that detailed dispute resolution provisions did not operate as a matter of customary international law, but were embedded in treaties and obliging parties only. Second, the commentary rightly points out that not every aspect of the detailed procedure set forth in the draft conclusion constitutes customary international law.

11 Draft conclusion 23: (Non-exhaustive list) and annex

Germany takes positive note of the “without prejudice”- clause in draft conclusion 23 and the non-exhaustive list of norms previously referred to by the Commission as having peremptory character. Concerns remain that the adoption of an enumerative list of specific *jus cogens* norms might lead to wrong conclusions and bears the risk of establishing a *status quo* that might impede the evolution of *jus cogens* in the future. Germany remains to be convinced of the added value of this draft conclusion. The Commission itself states in the commentary to draft conclusion 23 that the elaboration of a non-exhausting list fell beyond the scope of the exercise of elaborating draft conclusions on the identification and legal consequences of *jus cogens*. In addition, even an explicitly non-exhausting list implies the risk of being applied as exhaustive in practice or as a codification of existing *jus cogens* norms. Therefore, Germany believes that the list should be removed.

12 The Permanent Mission 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.