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International ius cogens in National Law

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A. International *ius cogens* and Domestic Analogies

1 The → *Vienna Convention on the Law of Treaties (1969)* ('VCLT') consecrated the international *ius cogens* in its Articles 53 and 64. Yet half a century later, the definition, foundations, and functions of this concept are still open to debate. International *ius cogens*' core ideas are reminiscent of well-established domestic concepts of imperative law (*ius publicum*) and → *ordre public (public policy)* (Alexidze 233; Kolb (2015) 1). Like the imperative rules of domestic legal orders, international *ius cogens* cannot be derogated from. And like public order, it designates a special set of norms protecting the essential values of the community (compare Hoffmeister and Kleinlein; Gebauer). However, *ius cogens* differs significantly from its domestic cognates. It differs from *ius publicum* on more than one account. In a vertical legal order like the national one, the *ius publicum* is the product of the will of a superior authority. There is nothing alike in the international legal system, where states are equal and no superior authority can assert jurisdiction over them. Moreover, in domestic law, the liberty of contract is subject to public law as a matter of principle. By contrast, on the international level, the principle of sovereign liberty is an essential foundation of treaty law, operating in favour of states' freedom to create by consent whatever obligations they deem appropriate. *Ius cogens* appears thus as an exceptional limit. International *ius cogens* also differs significantly from the domestic *ordre public*, which deploys its effects in private international law, as a limit to the application of foreign law or to the recognition of foreign judicial decisions (→ *application of international law in domestic legal systems*). International *ius cogens* is essentially a public law concept, instituting a hierarchy of norms (→ *theories concerning the hierarchy of norms*) in an otherwise horizontal legal system, erecting a limit to the autonomy of consent, laying the ground for an aggravated regime of responsibility for internationally wrongful acts and so on. *Ordre public's* and *ius cogens'* functions are thus fundamentally different.

2 On the international plane, these domestic analogies served as a springboard to emancipate international *ius cogens* from its natural law origins (→ *natural law theories and constitutionalism*), with an aim to bringing it within the realm of positive law (→ *theory of positive law*) (UN ILC 'First Report on *ius cogens* by Dire Tladi, Special Rapporteur' paras 18–27; Gomez Robledo 17–36). However, this emancipation did not lead to the recognition of *ius cogens* as a new formal source of international law, alongside → *treaties*, → *customary international law*, → *general principles of law*, and resolutions of international organizations. On the international legal plane, the nature of *ius cogens* remains therefore debated: for some, the concept covers a set of substantial rules reflecting basic values (UN ILC 'First Report on *ius cogens* by Dire Tladi, Special Rapporteur' paras 18–27 with references) or merely 'a legal technique which attaches to a series of norms to confer on them a particular resistance to derogation' (Kolb (2013) 3). These fluctuating conceptions make difficult to ascertain the place of international *ius cogens* in the national legal orders.

B. Recognition of International *ius cogens* in National Law

1. Importance of Domestic Jurisprudence in the Absence of Express Constitutional Recognition

3 Being a new and uncertain concept of international law, *ius cogens* is generally not expressly mentioned in national constitutions. The only notable exception comes from the Swiss Constitution, whose Articles 139(3), 193(4), and 194(2) refer to 'mandatory provisions of international law' (*les règles impératives du droit international; die zwingenden Bestimmungen des Völkerrechts*) (Federal Constitution of the Swiss Confederation: April 18, 1999 (as Amended to March 15, 2012) (Switz)). The absence of express recognition has not been an obstacle to its adoption by domestic judges elsewhere. Some scarce references appear in 1970–90 in domestic case law (in particular from the United States ('US')), but the year 2000 marked a turn, due to important developments in

→ *international criminal law* (in 1998, the adoption of the Rome Statute of the International Criminal Court ('ICC') and a specific recognition of the → *prohibition of torture* as an *ius cogens* rule by the International Criminal Tribunal for the former Yugoslavia in *Furundžija* (1998) (ICTY)). At present, there are several hundred domestic decisions from diverse legal traditions, referring to *ius cogens* or to peremptory rules of international law. This contrasts with the still prudent use of *ius cogens* in international jurisprudence. In states like France, where political authorities still question, if not the existence of *ius cogens* as a concept, at least its nature and content, domestic judges nonetheless make reference to it (compare with Conseil d'Etat, Opinion of 21 February 2003 (Fr) (not published); and *Réunion Aérienne v Socialist People's Libyan Arab Jamahiriya* (2011) (Fr)). This emancipation from the position of political authorities attests to the universality and general acceptance of this concept.

4 The question then arises what the domestic legal foundations for the recognition and application of international *ius cogens* are. In principle, two parameters are important for defining the situation of international norms in the domestic legal orders. First, the monist or dualist tradition (→ *dualism / monism*) of a particular legal order determines whether an international norm is immediately applicable in the national legal system or whether it needs incorporation by domestic legislation. Second, domestic legal systems make a distinction between the formal sources of internal law, granting them a different status. Thus, in most of them, custom is of immediate application and no incorporation is required ('international law is part of the law of the land'). This is not necessarily the case of treaties. The prevailing view among internationalists is that *ius cogens* represents a particular category of custom, characterized by the reinforced *opinio iuris* according to which the norm is not only obligatory, but does not suffer any derogation. However, for the purposes of domestic application, *ius cogens* does not entirely share the status of custom. A few courts concluded to an automatic incorporation of *ius cogens* applying by analogy the status of international custom. For instance, the Court of Appeal for Ontario held that

customary rules of international law are directly incorporated into Canadian domestic law unless explicitly ousted by contrary legislation ... This is even more so where the obligation is a peremptory norm of customary international law, or *ius cogens* (*Bouzari v Islamic Republic of Iran* (2004) para. 65 (Can)).

5 Yet, the Court also noted that 'a peremptory norm of customary international law or rule of *ius cogens* is a higher form of customary law' (ibid, para. 86). In this respect, the Court dissociated the domestic status of *ius cogens* from the one of customary international law.

6 The reason for such dissociation is that each domestic legal system has its own hierarchy of norms, where the place of international law sources is also specified. In most of them, international custom rarely prevails over domestic legislation, whereas treaty law often enjoys a superior hierarchical status (Shelton 5-7). If *ius cogens* enjoyed the status recognized to international custom, this would lead to the absurd result that it would become inferior to treaties, which would be the very negation of one of the core-element of *ius cogens*—namely its superior legal status. No domestic decision has ever followed this path of argumentation. On the contrary, even if some of them held that *ius cogens* norms are of customary origin (Italy, South Africa, US), the concept was systematically invoked to highlight the superior legal status of the international rule at stake, prevailing over other international and domestic rules.

7 Among the few courts specifically addressing the question of domestic reception of *ius cogens*, many prefer to refer cumulatively to the constitutional norm of reception of general principles of law and to constitutional principles protecting human rights. For instance, the German Constitutional Court relied cumulatively on Article 1(2) of the Basic Law which recognizes inviolable and inalienable human rights and on Article 25(1) which provides that '[t]he general rules of international law shall be an integral part of federal law'. Combining the two, the Court concluded that 'the Basic Law also adopts the gradual recognition of the existence of mandatory provisions' (*East German Expropriation Case* (2004) para. 97 (Ger)). Similarly, the Supreme Court of Russia referred cumulatively to Article 15(4) ('[t]he universally-recognized norms of international law and international treaties and agreements of the Russian Federation shall be a component part of its legal system') and to Articles 17(1) and 18 which recognize 'the rights and liberties of man' to conclude that, for the purposes of Russian domestic system; '[t]he commonly recognized principles of the international law shall imply the basic imperative norms of the international law accepted and recognized by the international community of states as a whole, the deviation from which is inadmissible' (*On Application of Universally Recognized Principles and Norms of International Law and of International Treaties of the Russian Federation by Courts of General Jurisdiction* (2003) (Russ)). Overall, national jurisprudence recognizes the concept of *ius cogens*, even in the absence of an express constitutional consecration. At the same time, this recognition does not rely exclusively on the traditional forms of the *rappports de systèmes*, which pass through the domestic incorporation of formal → sources of international law, but also through the assimilation with substantive principles, protected by the constitutions (like the protection of basic human rights).

2. Domestic Pronouncements on the Nature of *ius cogens*

8 Alongside the national sources of reception, domestic judges may also rely on the international foundations of *ius cogens*. Most of them refer to Article 53 of the VCLT, but this reference is of limited scope and is generally used as an example of the international recognition of *ius cogens* (*Yousuf v Samantar* (2012) (US); *Siderman de Blake v Argentina* (1992) (US); *Suresh v Canada* (2002) (Can); Decision C-291 (2007) (Colom)) alongside other sources like the International Law Commission ('ILC') Articles on State Responsibility (*East German Expropriation Case* (2004) (Ger); *A (Kahled Nezzar) v Office of the Attorney General* (2012) (Switz)), international jurisprudence (*Kaunda and Others v President of the Republic of South Africa and Others* (2004) (S Afr); *Siderman de Blake v Argentina* (1992) (US); Decision C-291 (2007) (Colom)), or even the doctrine of the most highly qualified internationalists (*A (Kahled Nezzar) v Office of the Attorney General* (2012) (Switz)). Some judges make further inquiries into the binding force of *ius cogens* and the nature of the concept. Thus, the *US Court of Appeals for the Ninth Circuit*, while accepting that '*ius cogens* is related to customary international law (the direct descendant of the law of nations)', also insisted on the differences separating them, in particular on the fact that state consent cannot be the source of such binding force:

[c]ustomary international law, like international law defined by treaties and other international agreements, rests on the consent of states ... [They] create norms known as *ius dispositivum* ... In contrast, *ius cogens* "embraces customary laws considered binding on all nations," ... and "is derived from values taken to be fundamental by the international community, rather than from the fortuitous or self-interested choices of nations," Whereas customary international law derives solely from the consent of states, the fundamental and universal norms constituting *ius cogens*

transcend such consent (*Siderman de Blake v Argentina* (1992) (US) quoting international doctrine).

9 In the same vein, the → *Constitutional Court of Colombia* (*Corte Constitucional de Colombia*) considered that state consent could not be a basis of the binding character of *ius cogens*, since the purpose of this normative category was precisely to transcend it:

[t]he norms of *ius cogens*, or peremptory norms of international law, are rules which, by their fundamental nature, hold a special hierarchical status within the body of rules of international law, and therefore cannot be ignored by states, thus limiting their freedom to conclude treaties and adopt unilateral acts (Decision C-291 (2007) para. 2.2.1 (Colom), author's translation).

10 Instead of rejecting the voluntarist approach, some courts adopt the objectivist view, according to which *ius cogens* reflects fundamental values of the international community. The → *Supreme Court of Argentina* (*Corte Suprema de Justicia de la Nación*) stated that the purpose of *ius cogens* was to 'protect states from agreements concluded against some values and general interests of the international community of states as a whole' (*Chile v Arancibia Clavel* (2004) (Arg)), while the High Court of Kenya referred to 'the international public order' (*Kenya Section of the International Commission of Jurists* (2011) (Kenya)). In the same vein, the German Constitutional Court held that '[t]hese 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' (*East German Expropriation Case, Mr von der M* (2004) para. 97 (Ger), emphasis added). In the absence of consensual criteria for determining the fundamental values of the international community, there is a risk however for domestic judges to vehiculate a subjective, unilateral view of when an international law norm reaches that status. As the → *Supreme Court of Canada* (*Cour suprême du Canada*) put it, '[p]eremptory norms develop over time and by general consensus of the international community. This is the difficulty in interpreting international law; it is often impossible to pinpoint when a norm is generally accepted and to identify who makes up the international community' (*Suresh v Canada* (2002) para. 61 (Can)). To minimize the risk of subjectivity, domestic judges might rely for that purpose on international law references, although, as will further be seen, this is not always their preferred method.

C. Definition of International *ius cogens* by Domestic Jurisprudence

1. Criteria and Methods for Establishing International *ius cogens*

11 The criteria of *ius cogens* are much debated on the international plane (UN ILC 'Second Report on *ius cogens* by Dire Tladi, Special Rapporteur'). One could hardly expect domestic judges, who come from different legal traditions, with different degrees of openness to international law, to provide a harmonized jurisprudence in this respect. Schematically, one may discern three attitudes when it comes to defining *ius cogens* and identifying the norms enjoying this quality. The argumentative way corresponds to the attitude of those domestic judges who draw the general criteria from Article 53 VCLT, in particular on the non-derogable characteristic, then attempt to apply them to particular norms. The adoptive method consists in relying on existing case law (both national and international) or even, at times, on the works of international jurists and deduce from these the existence of a particular *ius cogens* norm. Evidence of international practice and of universal recognition of the non-derogatory character being difficult to adduce, the demonstrative and adoptive methods are generally combined. Finally, there is the assertive way, consisting of

proclaiming the *ius cogens* status of some norms, without thorough inquiry into the underlying justifications.

12 A decision of the Constitutional Court of Colombia illustrates well the argumentative method, establishing that

the criteria for the recognition of a rule of international law as a rule of *ius cogens* are strict. According to article 53 of the 1969 Vienna Convention, such rules must not only meet the conditions for recognition as rules of international law in the first place, but also the additional requirements for recognition as mandatory or peremptory rules by the international community as a whole—the so-called “double recognition” process. These requirements require consensus of a majority of States, regardless of their cultural and ideological differences, on their peremptory nature (Decision C-291 (2007) para. 2.2.1 (Colom), translation by the author).

13 The Supreme Court of Canada looked for indicia of non-derogability and considered that the non-derogatory status of torture could be deduced from ‘the fact that such a principle is included in numerous multilateral instruments, that it does not form part of any known domestic administrative practice, and that it is considered by many academics to be an emerging, if not established peremptory norm, suggests that it cannot be easily derogated from’ (*Suresh v Canada* (2002) para. 65 (Can)).

14 The adoptive method is even more often present. When it comes to ascertaining the peremptory character of a particular norm, judges would refer to International Court of Justice (‘ICJ’) judgments (eg the *dicta* in *Barcelona Traction, Light and Power Co* (1970) (ICJ); the *Genocide Case (Bosnia and Herzegovina v Serbia)* (2007) (ICJ); but also *Corfu Channel* (1949) (ICJ); and *Military and Paramilitary Activity in and against Nicaragua* (1986) (ICJ); and of course *Jurisdictional Immunities* (2012) (ICJ)). In the conflict opposing the Italian courts to the ICJ on the question of state immunity in civil procedures for reparation of gross human rights violations, the former took the ICJ conclusions as an authoritative appreciation of the state of law and considered that they could not ‘interpret the imperative and non-derogable character of *ius cogens*, since the International Court of Justice has exclusive and absolute competence over the matter’ (*Simoncioni v Germany* (2014) (It)). One may find cross-references to decisions from other domestic legal orders. The High Court of Kenya referred to *Pinochet* (1999) (UK) and to *Eichmann* (1962) (Isr) to establish universal jurisdiction over international crimes constituting violations of *ius cogens* norms. The US Court of Appeals for the Fourth Circuit relied on the difference of jurisprudence among the Italian and British highest courts to reject the lifting of immunities in civil suits (in *Yousuf v Samantar* (2012) (US)).

15 The assertive method may be illustrated by the *Kadi* decision of the Court of First Instance of the European Union, which drew the quick conclusion that all ‘fundamental rights of human persons [are] covered by *ius cogens*’ (*Kadi* (2005) paras 238, 282). Another form of assertive method is the one adopted by the US courts in their landmark cases *Siderman de Blake v Argentina* (1992) (US) and *Princz v Federal Republic of Germany* (1994) (US), which, after quoting and briefly analysing Article 53 VCLT, overwhelmingly relied on US sources (either previous decisions or the Restatement (Third) of Foreign Relations Law as an authoritative codification of international law) to assert the peremptory character of norms like the prohibition of torture, → *genocide*, and → *crimes against*

humanity. Their conclusions are certainly right, but this line of argumentation is inappropriate to establish the existence of an *international ius cogens* norm.

2. Examples of *ius cogens* Norms

16 Domestic courts declare quite often that certain international norms enjoy *ius cogens* status. Whether they are also ready to draw consequences *sub iudice* from these declarations is another question, which will be addressed in the next section. This being said, their pronouncement rarely concern norms other than universal standards protecting human rights. One contrary example may be found in decisions of the Russian Constitutional Court who considered that '[t]he universally recognized principles of international law [which, in the Court's terminology, are synonymous with *ius cogens*] include, *inter alia*, the principle of universal respect for human rights and the principle of fulfilment of international obligations in good faith' (Ruling No. 5 (2003) (Russ)). However, it is hard to see how the principle of *pacta sunt servanda* could qualify as *ius cogens* norm. The Constitutional Court of Russia clearly holds an extensive view of *ius cogens* norms, including among them the principles protecting sovereign equality of states (Judgment 12-P/2016 (2016) (Russ)).

17 Other courts are more cautious in asserting the *ius cogens* status of particular norms. Relying on pronouncements by international courts, most of them include in this category fundamental human rights, in particular those which are declared to be non-derogable even in times of emergency or war (→ *types and effects of emergency*). Some decisions establish thus a clear correlation between non-derogable human rights and *ius cogens* norms: '[it] is important to bear in mind that an important indication of the imperative or *ius cogens* nature of a given rule of international law is provided by the fact that the rule enshrines human rights guarantees that are not derogable during states of emergency' (Decision C-291 (2007) (Colom), author's translation).

18 Therefore, numerous decisions characterizing the prohibition of torture as *ius cogens* relied on its non-derogable character (eg Supreme Court of Canada, referring to Articles 2(2), 3, and 16 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ('CAT') and Article 33 of the Refugee Convention held that 'the clear prohibitions on torture in the CAT [were not] intended to be derogable' (*Suresh v Canada* (2002) (Can)); see also Corte di cassazione, Decision 6 No. 46634 *Franco Reverberi* (12 November 2014) (It); *Siderman de Blake v Argentina* (1992) (US); *Bouzari v Islamic Republic of Iran* (2004) (Can); *Suresh v Canada* (2002) (Can); *Pinochet* (1999) (UK)). The same can be said about the prohibition of genocide, of → *war crimes*, and of crimes against humanity (*Sarei v Rio Tinto* (2007) (US); *Kenya Section of the International Commission of Jurists* (2011) (Kenya)). Seeking to dissipate the confusion resulting from past cases, the Colombian Constitutional Court noted that only the essential principles of humanitarian law are *ius cogens* and it identified three of them: '(i) the principle of distinction between civilians and combatants, (ii) the principle of precaution, and (iii) the principle regarding humane treatment and respect for basic guarantees and safeguards to which civilians and persons uninvolved in the conflict are entitled' (Decision C-291 (2007) (Colom)). By contrast, derogable human rights such as the → *right to property* (*East German Expropriation Case, Mr von der M* (2004) (Ger)) and the right to an effective remedy protected by Articles 6 and 13 → *European Convention for the Protection of Human Rights and Fundamental Freedoms* (1950) and Article 14 of the → *International Covenant on Civil and Political Rights* (1966) do not enter the category of norms of *ius cogens* (*Al Dulimi* (2008) para. 8.4 (Switz)).

D. Functions of International *ius cogens*

19 On the international level, the main function of *ius cogens* identified in Articles 53 and 64 VCLT is to invalidate treaties violating peremptory norms. But *ius cogens* now deploys effects also in the field of → *state responsibility*, which provides for an aggravated regime of responsibility in case of serious breaches of obligations under peremptory norms (Arts 40, 41 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts (2001)). These functions are however marginal in domestic jurisprudence, whose main concern is to draw consequences in the field of judicial guarantees for the protection of fundamental human rights.

1. *Ius cogens* and Domestic Criminal Jurisdiction

20 As a corollary of the *ius cogens* character of the prohibition of genocide, of crimes against humanity, and of torture, some courts asserted a duty to prosecute international crimes (see Weatherall 303–8). Yet, international *ius cogens* did not prove a too-powerful tool in the fight against impunity. Indeed, when it comes to prosecuting a state's own nationals, the domestic judges will generally rely on criminal law provisions defining those international crimes and providing for their regime. When it comes to judging persons who are not a state's nationals and when the crimes had taken place abroad, thus asserting a form of universal jurisdiction, specific developments of international criminal law and the adoption of the ICC Statute provide a firmer foundation than the uncertain *ius cogens*.

21 The concept may nonetheless remain domestically relevant in the areas not covered by this body of law—either for prosecuting crimes which are not embodied in the Rome Statute (*Réunion Aérienne v Socialist People's Libyan Arab Jamahiriya* (2011) (Fr), in relation to → *terrorism*). It was equally invoked to extend to corporations the principle of universal jurisdiction in civil claims for gross human rights violations, under the → *United States Alien Tort Statute* (*Sarei v Rio Tinto* (2007) (US)).

2. *Ius cogens* and Immunities

22 → *Immunity* constitutes however an important obstacle when it comes to prosecuting foreign officials and providing remedies for gross human rights violations. Unsurprisingly, many of the domestic decisions deal with the question of *ius cogens* as a possible obstacle to immunities. The overall picture is however blurred. A distinction should be drawn between immunities in criminal proceedings and in civil proceedings.

(a) Immunities in Criminal Proceedings

23 There is no unanimous view, even among judges from the same legal order, that violations of *ius cogens* norms limit a state's official right to invoke immunities *in limine litis*. The US case law is illustrative of these fluctuations. As stated by the US Court of Appeals for the Fourth Circuit,

American courts have generally followed the foregoing trend, concluding that *ius cogens* violations are not legitimate official acts and therefore do not merit foreign official immunity but still recognizing that head-of-state immunity, based on status, is of an absolute nature and applies even against *ius cogens* claims (*Yousuf v Samantar* (2012) (US), citing in support *Sarei v Rio Tinto* (2007) (US); *Siderman de Blake v Argentina* (1992) (US); *Enahoro v Abubakar* (2005) (US)).

24 At the opposite end, other courts of appeal consider that accusations of war crimes do not automatically lead to the lifting of immunity (cf. *Matar v Dichter* (2009) (US) and *Devi v Rajapaksa* (2012) (US) deferring to executive's suggestion that head-of-state immunity be allowed for individual accused of international crimes; *Belhas v Ya'alon* (2008) (US), granting immunities to a retired head of Israeli army intelligence).

25 After an in-depth analysis of developments in international law (conventions, ILC codification, domestic jurisprudence), the Swiss Federal Criminal Court detected a trend in the law of nations in favour of rejecting immunities claims in case of violations of *ius cogens* norms (including for the heads of state). However, it also acknowledged that this evolution has not necessarily crystallized into a customary rule:

it is undeniable that there is an explicit trend at the international level to restrict the immunity of (former) Heads of State vis-à-vis crimes contrary to rules of *ius cogens* ... This trend in international law is also reflected at the national level, where a similar evolution to put an end to impunity for the most serious crimes can be observed ... [Considering the ILC's work on the immunity of State officials] what emerges from the report is the Commission's caution in carefully addressing the issue of immunity in order to achieve an acceptable balance between the need to ensure the stability of international relations and the need to avoid impunity of the perpetrators of serious crimes under international law (*A (Kahled Nezzar) v Office of the Attorney General* (2012) (Switz), a case for torture brought against the former defence minister of Algeria; the Court finally rejected the claim to immunity on the basis of a teleological interpretation of domestic legislation).

(b) Immunities in Civil Proceedings

26 While some national courts pierced the veil of official-acts immunity to hear civil claims against foreign officials alleging *ius cogens* violations, most of the times the *ius cogens* exception was rejected in the civil context (*inter alia*, *Jones v Ministry of Interior of the Kingdom of Saudi Arabia* (2006) (UK); *Yousuf v Samantar* (2012) (US); *Bouzari v Islamic Republic of Iran* (2004) (Can)). Similarly, domestic courts also rejected it in civil proceedings against foreign states (*Siderman de Blake v Argentina* (1992) (US), rejecting an exception to state immunity for acts of torture; *Princz v Federal Republic of Germany* (1994) (US), no exception to immunities for forced labour in Nazi camps; *Hwang Geum Joo et al. v Japan* (2003) (US), holding Japan's immunities in the case of 'comfort women'; *Distomo* (2003) (Ger)). Only the Italian (in *Ferrini v Germany* (2004) (It)) and the Greek courts (in *Distomo Massacre* (2004) (Greece)) held an opposite position, which the ICJ ultimately declared to be in violation of international law (*Jurisdictional Immunities* (2012) (ICJ)).

27 Overall, claims of violations of *ius cogens* are not sufficient to create a judicial remedy or right of action, unless some other rule of domestic or international law drew particular consequences from it. While it is certain that the fundamental values protected by *ius cogens* informed developments in the field of procedural law, the judicial guarantees for protecting these values still need to be established by specific rules. Neither the domestic judge nor the international judge for that purpose could fill in the legal lacunae, particularly when there appears to be no international consensus on this point.

3. Invalidating Effect of International *ius cogens*

28 As stated in Articles 53 and 64 VCLT, the main function of *ius cogens* in international law is to invalidate international acts incompatible with it. There is virtually no domestic case where the invalidity of a treaty was sought on this basis. Concerning acts of international organizations, the Court of First Instance of the European Union boldly held that it was

empowered to check, indirectly, the lawfulness of the resolutions of the Security Council ... with regard to *ius cogens*, understood as a body of higher rules of public international law binding on all subjects of international law, including the bodies of the United Nations, and from which no derogation is possible. (Case T-315/01 (2005) (CFI), para. 5)

29 Its position was widely criticized and the European Court of Justice annulled it, on grounds that it was not for the European Community judicature to review the lawfulness of resolutions adopted by an international body, even if that review were to be limited to examination of the compatibility of that instrument with *ius cogens* (*Kadi and Al Barakaat International Foundation* (2008) ss 281–87).

30 Equally unconvincing is the opinion of the Constitutional Court of Russia, which after defining the principles protecting sovereign equality of states as being *ius cogens* norms, used them to invalidate in the domestic legal order the domestic implementation of judgments of the European Court of Human Rights:

[i]f the European Court of Human Rights ... gives to a notion used in the Convention a meaning other than the ordinary one or carries out interpretation contrary to the object and purpose of the Convention, the state, in respect of which the judgment has been passed on this case, has the right to refuse to execute it as it goes beyond the obligations, voluntarily taken by this state upon itself when ratifying the Convention ... [This interpretation] was carried out in violation of the general rule of interpretation of treaties, the meaning of this provision will diverge from imperative norms of customary international law (*ius cogens*), to which without doubts the principle of sovereign equality and respect for rights inherent in sovereignty and the principle of non-interference with internal affairs of states belong (Venice Commission, Opinion No. 832/2015).

31 Overall, domestic judges prove open to the use of international *ius cogens*. Yet, the uncertainties that surround it in international law (as to the nature, definition, and especially its functions) are also present in domestic jurisprudence. Despite these shifting grounds, there is no doubt that, through these massive references and cross-references, domestic jurisprudence takes part in the development of international *ius cogens*. The best example of an international effect of domestic jurisprudence comes from the fact that the ILC itself, in its work on *ius cogens*, relies extensively upon domestic decisions.

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