

QUESTIONING THE PEREMPTORY STATUS OF THE PROHIBITION OF THE USE OF FORCE

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INTRODUCTION

It is incontrovertible that the prohibition of the unilateral use of force is a fundamental aspect of the United Nations (U.N.) era system for governing the relations between states.¹ Given this fact, the prohibition, as

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1. Thus Henkin states that the prohibition “is the principal norm of international law of [the twentieth] century.” Louis Henkin, *The Use of Force: Law and U.S. Policy*, in *RIGHT V. MIGHT: INTERNATIONAL LAW AND THE USE OF FORCE* 37, 38 (Louis Henkin et al. eds., 1991). As Kennedy has phrased it, “the system of the United Nations Charter was more than a political regime of collective security—an institutional framework for diplomatic management of conflict. It was also a new legal order that inaugurated a new law of war.” DAVID KENNEDY, *OF WAR AND LAW* 77 (2006). See also Christian M. Henderson, *The 2006 National Security*

set out most crucially in Article 2(4) of the U.N. Charter,² is often seen as the archetypal example of a *jus cogens* norm (a “peremptory norm” of general international law).³ Certainly, an overwhelming majority of scholars view the prohibition as having a peremptory character.⁴ Similarly, the International Law Commission (ILC) has taken this view⁵ and it is arguable that the International Court of Justice (ICJ) has also done so.⁶ Indeed, one judge of the ICJ stated in an individual opinion that “[t]he prohibition of the use of force. . . is *universally recognized* as a *jus cogens* principle, a peremptory norm from which no derogation is

Strategy of the United States: The Pre-Emptive Use of Force and the Persistent Advocate, 15 TUL. J. COMP. & INT’L L. 1, 9 (2007).

2. U.N. Charter art. 2, para. 4.

3. *Jus cogens* norms may be broadly defined as “fundamental legal norms from which no derogation is permitted.” Hilary Charlesworth & Christine Chinkin, *The Gender of Jus Cogens*, 15 HUM. RTS. Q. 63, 63 (1993).

4. Academic acceptance of this view is extremely widespread. Some examples include: JAMES CRAWFORD, *THE CREATION OF STATES IN INTERNATIONAL LAW* 146 (2d ed. 2006); YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENCE* 99–104 (4th ed. 2005); LAURI HANNIKAINEN, *PEREMPTORY NORMS (JUS COGENS) IN INTERNATIONAL LAW: HISTORICAL DEVELOPMENT, CRITERIA, PRESENT STATUS* 323, 356 (1988); MOHAMMAD TAGHI KAROUBI, *JUST OR UNJUST WAR?* 108–09 (2004); LINDSAY MOIR, *REAPPRAISING THE RESORT TO FORCE: INTERNATIONAL LAW, JUS AD BELLUM AND THE WAR ON TERROR* 9 (2010); ALEXANDER ORAKHELASHVILI, *PEREMPTORY NORMS IN INTERNATIONAL LAW* 50 (2006); IAN SINCLAIR, *THE VIENNA CONVENTION ON THE LAW OF TREATIES* 215–16, 222–23 (2d ed. 1984); NICHOLAS J. WHEELER, *SAVING STRANGERS: HUMANITARIAN INTERVENTION IN INTERNATIONAL SOCIETY* 44–45 (2000); Jonathan I. Charney, *Anticipatory Humanitarian Intervention in Kosovo*, 93 AM. J. INT’L L. 834, 837 (1999); Jochen A. Frowein, *Jus Cogens*, in MAX PLANCK ENCYCLOPAEDIA OF PUBLIC INTERNATIONAL LAW, ¶ 8 (Rüdiger Wolfrum ed., 2009), available at <http://www.mpepil.com> (search “Quick Search” for “*jus cogens*”; then follow “*Jus cogens*” hyperlink); Carin Kahgan, *Jus Cogens and the Inherent Right to Self-Defense*, 3 ILSA J. INT’L & COMP. L. 767, 777–81 (1997); Dino Kritsiotis, *Reappraising Policy Objections to Humanitarian Intervention*, 19 MICH. J. INT’L L. 1005, 1042–43 (1998); Karen Parker & Lyn Beth Neylon, *Jus Cogens: Compelling the Law of Human Rights*, 12 HASTINGS INT’L. & COMP. L. R. 411, 436–37 (1989); Natalino Ronzitti, *Use of Force, Jus Cogens and State Consent*, in THE CURRENT LEGAL REGULATION OF THE USE OF FORCE 147, 150 (A. Cassese ed., 1986); Oscar Schachter, *In Defense of International Rules on the Use of Force*, 53 U. OF CHI. L. REV. 113, 129 (1986); Michael N. Schmitt, *Computer Network Attack and the Use of Force in International Law: Thoughts on a Normative Framework*, 37 COLUM. J. TRANSNAT’L L. 885, 922 (1999); W Scholtz, *The Changing Rules of Jus ad Bellum: Conflicts in Kosovo, Iraq and Afghanistan*, 7 POTCHEFSTROOM ELECTRONIC L.J. 1, 8–10 (2004); Egon Schwelb, *Some Aspects of International Jus Cogens as Formulated by the International Law Commission*, 61 AM. J. INT’L L. 946, 952 (1967); Bruno Simma, *NATO, the UN and the Use of Force: Legal Aspects*, 10 EUR. J. INT’L L. 1, 3 (1999); Pamela J. Stephens, *A Categorical Approach to Human Rights Claims: Jus Cogens as a Limitation on Enforcement?*, 22 WIS. INT’L L.J. 245, 253–54 (2004); Alfred Verdross, *Jus Dispositivum and Jus Cogens in International Law*, 60 AM. J. INT’L L. 55, 60 (1966); Marjorie M. Whiteman, *Jus Cogens in International Law, with a Projected List*, 7 GA. J. INT’L & COMP. L. 609, 625 (1977). See also Henderson, *supra* note 1, at 9–10, 10 n.63 (citing support from various academics).

5. See *infra* notes 34–35 and accompanying text.

6. See *infra* notes 36–41 and accompanying text.

permitted.”⁷ This Article questions this widely held view: Is the prohibition of the use of force in fact a *jus cogens* norm?

It should be stressed at the outset that the position taken here is not necessarily that the prohibition is a norm that has failed to achieve peremptory status. Instead, it is argued that there are significant difficulties with such a conclusion and that, as a result, the widespread uncritical acceptance of the prohibition as a *jus cogens* norm is concerning. The aim of this Article is to test the prohibition against the criteria for the establishment of peremptory status, and to then critically examine the various problems that become apparent when one does so.

In simple terms, such problems can be condensed into two main issues. First, it may be argued that the inherent flexibility of, and uncertainty surrounding, the law on the use of force (the *jus ad bellum*) hinders any characterization of the prohibition of the use of force as a *jus cogens* norm. Given commonly agreed conceptual understandings of what *jus cogens* norms are, it is difficult to classify a norm that has a variety of associated rules and sources, debated exceptions, and uncertain scope as having a peremptory character. Indeed, it is questionable whether it is possible to frame a workable *jus cogens* norm that encompasses the prohibition of the use of force at all.

Secondly, it is unclear whether there is enough evidence to establish that the prohibition of the use of force is peremptory in nature. While this has been almost universally accepted by scholars and, indeed, has seemingly been affirmed by the ICJ, this Article takes the positivist position that *jus cogens* norms can only be created through the consent of *states*, as evidenced by their practice. That a claim as to peremptory status is advanced by writers, however frequently, is not enough to turn an “ordinary” norm of international law into a “supernorm” of *jus cogens*. Thus, it must be asked whether states in fact accept the prohibition of the use of force as a peremptory rule.

At this preliminary stage, it is necessary to clarify that this Article proceeds from the starting point that there does exist a category of “higher” norms within the international legal system. The desirability of peremptory norms, and, indeed, their very existence, has been questioned in the literature.⁸ However, it is not the aim here to debate the

7. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136, 254 (July 9) (Separate Opinion of Judge Elaraby) (emphasis added).

8. Various concerns over the desirability of *jus cogens* norms have been raised. Some writers have questioned the potentially negative impact of peremptory norms on the structure and functionality of the international legal system. See, e.g., Prosper Weil, *Towards Relative Normativity in International Law?*, 77 AM. J. INT’L L. 413 (1983) (arguing, *inter alia*, that an approach to international law based on the values of the “international community” is dangerous as this does not reflect the reality of power structures within international relations, and

existence of *jus cogens* norms per se. Without making a value judgment as to the *desirability* of peremptory norms, the view taken here is that there is enough evidence to suggest that states have accepted the general notion of *jus cogens* and that there exist at least some basic conceptual rules as to its content and operation.⁹

Scholars essentially fall into two broad camps on the issue of peremptory norms: those that debate the existence or functionality of *jus cogens* norms¹⁰ and those who conceptually accept such norms¹¹ and who, as a consequence, automatically accept the prohibition of the use of force as being one of their number.¹² Broadly speaking, the present writer falls into the second group of writers, who accept the existence of such norms in principle, yet do not necessarily subscribe to the seemingly

that the concept of a “relative normativity” of legal norms will act to dilute the rigor and certainty unpinning the law). Others have debated the clarity and legitimacy of such norms. *See, e.g.*, Arthur M. Weisburd, *The Emptiness of the Concept of Jus Cogens, as Illustrated by the War in Bosnia-Herzegovina*, 17 MICH. J. INT’L L. 1 (1995) (taking the view that the confusion between two theoretical approaches to the concept of *jus cogens*—one based on pure natural law notions of “value,” and one rooted in positivism—means that the concept is both unclear and legally illegitimate, and that its application can lead to contradictory results). The political motivations that underpin the concept of *jus cogens* have also been brought into question. *See, e.g.*, Robert P. Barnidge, Jr., *Questioning the Legitimacy of Jus Cogens in the Global Legal Order*, 38 ISR. Y.B. ON HUM. RTS. 199, 203–10 (2008) (arguing that “*jus cogens* can operate in a way in which the minority elite can control and monopolise the terms of legal debate”). More specifically, the political motivations and arbitrary selection that may be seen in the categorization by scholars of particular rules as being peremptory (or not) has been highlighted as another concern. *See, e.g.*, Charlesworth & Chinkin, *supra* note 3 (arguing that the development and content of *jus cogens* norms have exhibited a gender bias); Anthony D’Amato, *It’s a Bird, It’s a Plane, It’s Jus Cogens!*, 6 CONN. J. INT’L L. 1 (1990) (expressing concern at the propensity for scholars to view various rules of international law as being peremptory with little or no substantive basis, and the resulting “Pandora’s Box approach to supernorms”). Finally, a number of writers have questioned the very existence of *jus cogens* norms, with reference to positivist conceptions of how international law is formed and developed. *See, e.g.*, Gordon A. Christenson, *Jus Cogens: Guarding Interests Fundamental to International Society*, 28 VA. J. INT’L L. 585 (1988) (arguing, *inter alia*, that the concept of *jus cogens* does not correlate with a positivist system based on the will of sovereign states, and that peremptory norms are therefore, for the most part, merely aspirational); Michael J. Glennon, *Peremptory Nonsense*, in HUMAN RIGHTS, DEMOCRACY AND THE RULE OF LAW: LIBER AMICORUM LUZIUS WILDHABER 1265 (Stephan Breitenmoser et al. eds., 2007) (arguing that the “core methodology” behind the *jus cogens* concept—which attempts to mix natural law ideology with positivist underpinnings—is contradictory and incoherent).

9. For a summary of some of the supporting state practice, see HANNIKAINEN, *supra* note 4, 166–81; Kahgan, *supra* note 4, 773–75; Alexander Orakhelashvili, *Peremptory Norms and Reparation for Internationally Wrongful Acts*, 3 BALTIC Y.B. INT’L L. 19, 24 (2003).

10. Ulf Linderfalk, *The Effect of Jus Cogens Norms: Whoever Opened Pandora’s Box, Did You Ever Think About the Consequences?*, 18 EUR. J. INT’L L. 853, 855 (2007) (labeling this group as the “skeptics”).

11. *Id.* (labeling this group as the “affirmants”).

12. Thus, Ronzitti states that the prohibition of the use of force “is classified as a peremptory rule by all those who believe in the existence of *jus cogens*.” Ronzitti, *supra* note 4, at 150.

resultant conclusion that the prohibition of the use of force possesses peremptory status.

The aim in this Article is to test the claim that the prohibition of the use of force is a peremptory norm and to set out the problematic aspects of reaching a conclusion to that effect. Part I sets out the legal criteria for identifying a peremptory norm of international law. Part II then considers the majority view—prevalent in the literature and alluded to in the jurisprudence of the ICJ—that the prohibition of the use of force is a peremptory norm. The question of whether the prohibition is suitable, or even capable, of being viewed as a *jus cogens* norm is examined in Part III. This part focuses on the relationship between the prohibition of the use of force and the prohibition of the threat of force, the exceptions to the prohibition, and the inherent flexibility and continuing development of the *jus ad bellum*. All of these factors undermine a claim that the prohibition is peremptory. Finally, in Part IV, state practice is examined to ascertain the extent to which states have accepted the peremptory status of the prohibition. It is argued that while some states have certainly affirmed the view that the rule is a *jus cogens* norm, it is unclear whether this acceptance has been enough to, in fact, confer peremptory status on the prohibition.

I. IDENTIFYING A PEREMPTORY NORM

The most widely quoted definition of a *jus cogens* norm comes from Article 53 of the 1969 Vienna Convention on the Law of Treaties: “[A] peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”¹³

Of course, using Article 53 as a definition of *jus cogens* is not entirely satisfactory. The Article relates to conflicts between peremptory norms and *treaties*, not to *jus cogens* in the context of other legal sources, such as customary international law. Therefore it may be argued that it was not designed to act as a definition of the concept in general terms.¹⁴ Indeed, the Article is clear that the definition is given “[f]or the

13. Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331. Complementing Article 53 is Article 64 of the Convention, which states: “If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates.” *Id.* art. 64.

14. Erika de Wet, *The Prohibition of Torture as an International Norm of Jus Cogens and Its Implications for National and Customary Law*, 15 EUR. J. INT’L L. 97, 98–99 (2004).

purposes of the present Convention.”¹⁵ Moreover, as of November 2010, only 111 states are party to the Convention, a little over half of all U.N. member states.¹⁶ It is also noteworthy that of those, six states have made minor reservations of differing types with regard to Article 53, although none of these states exclude the Article’s applicability *per se*.¹⁷

Nonetheless, Article 53 offers a clear and legally posited starting point for the wider international legal concept of *jus cogens*. Importantly, it may be said that Article 53 now appears to have been accepted as the key source for the content of *jus cogens* norms in a general sense.¹⁸

Based on Article 53 and prevailing scholarly accounts of the character of peremptory norms, this Article proceeds on the basis that a *jus cogens* norm is one that:¹⁹

- (1) Has the status of a norm of general international law;
- (2) Is accepted and recognized by the international community of states as a whole;
- (3) Cannot be derogated from; and
- (4) Can only be modified by a new norm of the same status.

These criteria will be returned to at various points throughout this Article.

II. THE MAJORITY VIEW: THE PROHIBITION AS PEREMPTORY

Before embarking on a critique of the claim that the prohibition of the use of force is a *jus cogens* norm, it is worth setting out the majority position in a little more detail.

15. Vienna Convention on the Law of Treaties, *supra* note 13, art. 53.

16. U.N. Secretary-General, *Multilateral Treaties Deposited with the Secretary General*, ch. 23, § 1, available at <http://treaties.un.org/doc/Publication/MTDGS/Volume%20II/Chapter%20XXIII/XXIII-1.en.pdf>.

17. *See id.* These states are Belgium, Russia, Japan, The Netherlands, Sweden, and the United States (note that the United States is a signatory but not a party to the Vienna Convention).

18. HANNIKAINEN, *supra* note 4, at 3. This can be seen as comparable to the way in which Article 38(1) of the Statute of the International Court of Justice, Jun. 26, 1945, 33 U.N.T.S. 993 [hereinafter ICJ Statute], is now viewed as the starting point for identifying the sources of international law, irrespective of the fact that it was never intended to do anything other than to provide a reference point for the sources that the Court could apply. *See* David Kennedy, *The Sources of International Law*, 2 AM. U. J. INT’L L. & POL’Y 1, 2, 2 n.3, 3 (1987).

19. This breakdown of the criteria in Article 53 is adapted from the one used by Kahgan. Kahgan, *supra* note 4, at 775.

It is understandable that a plethora of commentators have perceived the prohibition as a peremptory norm,²⁰ if one subscribes to the view that the concept of a “higher” group of peremptory rules within international law is a desirable means of further limiting state behavior in certain “fundamental” areas. One of the underlying rationales for the entire *jus cogens* concept is the desire to impose some kind of fundamental standard of common values on state interaction and to strengthen the effectiveness of international law in certain areas of common concern.²¹ It is always worth remembering when considering the *jus ad bellum* that the use of military force usually involves the systematic killing of human beings, often on a vast scale. Forcible action is also obviously prone to causing regional and global instability and inherent damage to international peace, security, and order.²² Indeed, many writers have likened *jus cogens* norms to the historic value-based “natural law” approach to international legal theory,²³ and the modern *jus ad bellum* has many of its roots in the “just war” theory,²⁴ an approach to warfare that is clearly embedded in natural law thinking.²⁵ Thus, *jus cogens* and the *jus ad bellum* share common natural law underpinnings such that one might view them as a perfect conceptual fit.

In addition, the prohibition meets the first test for a *jus cogens* norm, in that it is a norm of general international law.²⁶ There is little doubt that since 1945 states have viewed the prohibition of the use of force as a cornerstone of the U.N. system and a crucial rule of international law.²⁷ Indeed, the prohibition is universal in scope. This is in part because it is

20. See *supra* note 4 and accompanying text.

21. See, e.g., Alexander Orakhelashvili, *The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions*, 16 EUR. J. INT’L L. 59, 62 (2005); Erika de Wet, *The International Constitutional Order*, 55 INT’L & COMP. L.Q. 51, 57–62 (2006); Lisa Yarwood, *Jus Cogens: Useful Tool or Passing Fancy—A Modest Attempt at Definition*, 38 BRACKTON L.J. 16, 26–27 (2006).

22. It is worth noting that the preamble to the U.N. Charter indicates that one of the fundamental aims of the organization is “to save succeeding generations from the scourge of war.” U.N. Charter pmb1.

23. See Mark W. Janis, *The Nature of Jus Cogens*, 3 CONN. J. INT’L L. 359, 361–63 (1988); Parker & Neylon, *supra* note 4, at 419–23.

24. See Joachim von Elbe, *The Evolution of the Concept of Just War in International Law*, 33 AM. J. INT’L L. 665 (1939). See also MICHAEL WALZER, *JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS* 21–22, 51–73 (3d ed. 2000).

25. D. W. BOWETT, *SELF-DEFENCE IN INTERNATIONAL LAW* 4–8 (1958) (noting the historical links between natural law and the right of self-defense in just war theory); Howard M. Hensel, *Theocentric Natural Law and Just War Doctrine*, in *THE LEGITIMATE USE OF MILITARY FORCE: THE JUST WAR TRADITION AND THE CUSTOMARY LAW OF ARMED CONFLICT* 5, 10–14 (Howard M. Hensel ed., 2008) (detailing the theocentric natural law basis for the use of force).

26. For the legal “tests” to determine the existence of a *jus cogens* norm, see *supra* note 19 and accompanying text.

27. See *supra* note 1.

present in the U.N. Charter,²⁸ to which almost all states are party,²⁹ but also because the prohibition is an accepted rule of customary international law.³⁰ Therefore, *all* states are bound by the general requirement not to use military force in their international relations. As such, it is relatively clear that the prohibition meets the first requirement for a *jus cogens* norm—it is a rule that can be identified as a “norm of general international law.”³¹

Given these factors—the “fundamental” nature of the prohibition, its natural law roots, its positivist pedigree of universal legal acceptance, and its undeniable applicability to all states—it is no surprise that the modern prohibition of forcible military action is generally viewed as an archetypal rule of *jus cogens*.³² Representing this majority view, Orakhelashvili has stated: “The prohibition of the use of force by States *undoubtedly* forms part of *jus cogens*.”³³

In 1966, for example, with regard to the drafting of the Vienna Convention on the Law of Treaties, the ILC stressed in its commentary to Article 50 (which ultimately became Article 53) that “the law of the Charter concerning the prohibition of the use of force in itself constitutes a conspicuous example of a rule in international law having the character of *jus cogens*.”³⁴ More recently, in the context of the draft articles on state responsibility, the Commission again noted in 2001 that “it is gen-

28. U.N. Charter art. 2, para. 4.

29. There are 192 member states of the U.N. (as of November 2010). For full list of member states, see Press Release, United Nations Member States, U.N. Press Release ORG/1469 (July 3, 2006), available at <http://www.un.org/News/Press/docs/2006/org1469.doc.htm> (U.N. member states are automatically “parties” to the U.N. Charter, as membership requires states to “accept the obligations contained in the present Charter,” U.N. Charter art. 4, para. 1). Scholars have viewed the near universal membership of the U.N. as evidence of the universal scope of the prohibition of the use of force. See, e.g., IAN BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 113 (1963); JAI N. SINGH, *USE OF FORCE UNDER INTERNATIONAL LAW* 210 (1984).

30. MYRA WILLIAMSON, *TERRORISM, WAR AND INTERNATIONAL LAW: THE LEGALITY OF THE USE OF FORCE AGAINST AFGHANISTAN IN 2001*, at 103 (2009); NATALINO RONZITTI, *RESCUING NATIONALS ABROAD THROUGH MILITARY COERCION AND INTERVENTION ON GROUNDS OF HUMANITY*, at XIII (1985); Michael Bothe, *Terrorism and the Legality of Pre-emptive Force*, 14 *EUR. J. INT’L L.* 227, 228 (2003); Hermann Mosler, *The International Society as a Legal Community*, 140 *RECUEIL DES COURS* 1, 283 (1974 IV).

31. Vienna Convention on the Law of Treaties, *supra* note 13, art. 53.

32. See examples cited *supra* note 4.

33. ORAKHELASHVILI, *supra* note 4, at 50 (emphasis added).

34. *Reports of the International Law Commission to the General Assembly*, 21 U.N. GAOR Supp. No. 9, pt. II, U.N. Doc. A/6309/Rev.1 (1966), reprinted in [1966] 2 *Y.B. Int’l L. Comm’n* 172, at 247, U.N. Doc. A/CN.4/SER.A/1966/Add.1. The ILC arguably reaffirmed this view when it proceeded to set out a list of example *jus cogens* norms that had been proposed by its members, of which the prohibition of the use of force was the first. However, the Commission did not explicitly endorse this list. See *id.* at 248.

erally agreed that the prohibition of aggression is to be regarded as peremptory.³⁵

The ICJ can also be said to have adopted this position.³⁶ In the 1986 *Nicaragua* case, one of the first decisions of the Court to examine *jus ad bellum* issues in any detail, the ICJ stated:

A further confirmation of the validity as customary international law of the principle of the prohibition of the use of force expressed in Article 2, paragraph 4, of the Charter of the United Nations may be found in the fact that it is frequently referred to in statements by State representatives as being not only a principle of customary international law but also a fundamental or cardinal principle of such law. The International Law Commission, in the course of its work on the codification of the law of treaties, expressed the view that “the law of the Charter concerning the prohibition of the use of force in itself constitutes a conspicuous example of a rule in international law having the character of *jus cogens*.”³⁷

It is the view of the present writer that the Court concluded here that the prohibition of the use of force was a peremptory norm, although it must be said that others have a different interpretation of this passage from the *Nicaragua* case.³⁸ As can be seen from the quoted passage, the

35. Rep. of the Int'l Law Comm'n, 53d Sess., Apr. 23–June 1, July 2–Aug. 10, 2001, at 283, U.N. Doc. A/56/10, GAOR, 56th Sess., Supp. No. 10 (2001).

36. Judgments of the World Court are only legally binding in the case at hand and on the parties to that case. See ICJ Statute, *supra* note 18, art. 59. However, the influence of a decision of the Court stretches well beyond the particular dispute in question, in terms of the wider perception of the judgment as constituting an authoritative interpretation of international law. See ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 202–04 (1994); Natalia Ochoa-Ruiz & Esther Salamanca-Aguado, *Exploring the Limits of International Law Relating to the Use of Force in Self-Defence*, 16 EUR. J. INT'L L. 499, 501 (2005).

37. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment on the Merits, 1986 I.C.J. 14, ¶ 190 (June 27) (citation omitted).

38. Some scholars have argued that the Court did not in fact reach this conclusion, but instead simply highlighted that the ILC had done so, to demonstrate that the prohibition was an aspect of customary international law. See, e.g., Dinah Shelton, *Righting Wrongs: Reparations in the Articles on State Responsibility*, 96 AM. J. INT'L L. 833, 843 (2002) (describing the decision as avoiding recognition of peremptory norms). The present writer does not find such a reading of the decision particularly persuasive; it is here argued that a better reading is that the Court took the view that the prohibition was peremptory (evidencing this by reference to the ILC's position) and used this fact to support the universal customary nature of the norm. ORAKHELASHVILI, *supra* note 4, at 42 n.38. Or, as Byers has phrased this, the view is taken here that the Court “quoted with approval” the position of the ILC. Michael Byers, *Conceptualising the Relationship Between Jus Cogens and Erga Omnes Rules*, 66 NORDIC J. INT'L L. 211, 215 (1997). Nonetheless, it is admittedly difficult to definitely conclude whether the majority of the Court did or did not affirm the peremptory status of the prohibition in the *Nicaragua* case.

ICJ at least referred to the view of the ILC that the prohibition was peremptory. Additionally, the Court went on to indicate that both Nicaragua and the United States appeared to take this position in their respective Memorial and Counter-Memorial.³⁹ Strengthening the view that the Court has interpreted the prohibition of the use of force as a peremptory norm are statements made to this effect by judges in their individual opinions attached to the *Nicaragua* case.⁴⁰ Indeed, although the Court has not, as a majority, affirmed this view since, a number of its judges have also pointed to the “supernorm” status of the prohibition in their individual opinions in other cases.⁴¹

While acceptance of the peremptory status of the prohibition is near universal, it is not entirely universal. There are, of course, the minority of writers who object to the notion of *jus cogens* norms per se. Such writers are unlikely to view the prohibition of the use of force as being peremptory, for obvious reasons.⁴² More importantly for the purposes of this Article, there are an even smaller number of writers who, while seeming to accept the general concept of *jus cogens* norms, have questioned the peremptory status of the prohibition.⁴³ The most notable

39. *Nicaragua v. United States*, 1986 I.C.J. ¶ 190. See Memorial of Nicaragua, *Nicaragua v. United States*, Merits, I.C.J. Pleadings, Vol. IV, ¶ 213 (Apr. 30, 1985); Counter-Memorial of the United States of America (Questions of Jurisdiction and Admissibility) *Nicaragua v. United States*, I.C.J. Pleadings, Vol. II, ¶ 314 (Aug. 17, 1984). However, it should be noted that Nicaragua’s position as to the peremptory status of the prohibition was not entirely explicit, although this is a reasonable inference from para. 213 of the Nicaraguan Memorial. See Memorial of Nicaragua, *Nicaragua v. United States*, I.C.J. Pleadings, Vol. IV, ¶ 213.

40. *Nicaragua v. United States*, 1986 I.C.J. at 153 (Separate Opinion of Judge Nagendra Singh); *id.* at 199–200 (Separate Opinion of Judge Sette-Camara).

41. See *Oil Platforms (Iran v. U.S.)*, Merits, 2003 I.C.J. 161, 329–30 (Nov. 6) (Separate Opinion of Judge Simma); *id.* at 260 (Separate Opinion of Judge Koojmans); *id.* at 291 (Dissenting Opinion of Judge Elaraby); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136, 254 (July 9) (Separate Opinion of Judge Elaraby).

42. See, e.g., MICHAEL J. GLENNON, *LIMITS OF LAW, PREROGATIVES OF POWER: INTERVENTIONISM AFTER KOSOVO* 40–42 (2001) (explicitly rejecting the peremptory status of the prohibition of the use of force based on skepticism of the validity of the entire *jus cogens* concept); Weisburd, *supra* note 8, at 22, 44–50 (questioning the peremptory status of the prohibition as part of a wider argument to the effect that the concept *jus cogens* is overly vague and thus both unclear and legally illegitimate); Barnidge, *supra* note 8, at 212 (referring alliteratively to “the *purportedly* peremptory prohibition on the use of force”) (emphasis added). Though it should be noted that elsewhere Barnidge seems to have at least tentatively accepted the peremptory status of the prohibition. See ROBERT P. BARNIDGE, JR., *NON-STATE ACTORS AND TERRORISM: APPLYING THE LAW OF STATE RESPONSIBILITY AND THE DUE DILIGENCE PRINCIPLE* 134 (2008).

43. Having said this, of the scholars who do appear to question the peremptory status of the prohibition, most only do so implicitly. See, e.g., TARCISIO GAZZINI, *THE CHANGING RULES ON THE USE OF FORCE IN INTERNATIONAL LAW* 88–89 (2005) (discussing the implications for the development of the *jus ad bellum* “if the general ban on the use of force . . . is considered as a peremptory norm”) (emphasis added). The obvious implication here is that Gazzini does not view such a conclusion as being self-evident. Others have explicitly ex-

example of this kind is a 2007 article by Ulf Linderfalk.⁴⁴ This paper importantly critiqued the claim that the prohibition is a norm of *jus cogens*.⁴⁵ However, even Linderfalk ultimately seemed willing to accept that “the least controversial example of all [*jus cogens* norms] is the principle of non-use of force . . . I will assume that the principle of non-use of force indeed to be a norm having a *jus cogens* character.”⁴⁶

III. THE SUITABILITY OF THE PROHIBITION AS A PEREMPTORY NORM

This Section questions whether the prohibition of the use of force is suitable, or indeed even capable, of being viewed as a *jus cogens* norm. The general position taken here is that the inherent uncertainty and flexibility of the prohibition would not seem to be compatible with the conception of peremptory norms as set out in the Vienna Convention on the Law of Treaties. A related issue is that it is very difficult to conclude exactly what the content of any avowed *jus cogens* norm would be.⁴⁷ Is the *jus cogens* norm in question Article 2(4) of the U.N. Charter, the prohibition of the use of force more specifically, the *jus ad bellum* in its entirety, or a different mixture of these possibilities?

The concerns raised in this Section stem from a number of features of the law on the use of force, namely: the conjoined relationship between the prohibitions of the use of force and the threat of force, the fact that the prohibition has universally accepted exceptions to it, and the fact that the *jus ad bellum* develops in a dynamic and flexible manner in practice. These will be examined in turn.

A. *The Problem of the Prohibition of the Threat of Force*

The prohibition of the use of force is enshrined in Article 2(4) of the U.N. Charter as follows: “All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or

pressed some uncertainty as to the peremptory status of the prohibition without then going on to discuss their apparent concerns. See, e.g., Andreas Laursen, *The Use of Force and (the State of) Necessity*, 37 VAND. J. TRANSNAT’L L. 485, 525 (2004) (“Indications are that today, all use of force is prohibited by a *jus cogens* norm, although this is not entirely clear.”). However, Laursen does not proceed to state *why* this is unclear.

44. Linderfalk, *supra* note 10.

45. Indeed, as one of the very few pieces of academic writing to consider some of the concerns raised herein, Linderfalk’s article, *id.*, will be crucial for later analysis, particularly in Part III.B, *infra*.

46. Linderfalk, *supra* note 10, at 859 (making the assumption that the prohibition is peremptory as the starting point for a thought experiment, on the basis that this is such a widely held view).

47. Weisburd makes this general point in passing. Weisburd, *supra* note 8, at 21–22.

political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.”⁴⁸

Of the numerous writers who have attested to the peremptory nature of the prohibition of the use of force, many have explicitly taken the view that Article 2(4) is, in itself, a *jus cogens* norm. For example, Oscar Schachter stated that: “[A]rticle 2(4) is the exemplary case of a peremptory norm.”⁴⁹ For those who view the prohibition as *jus cogens*, this might seem to be a logical position given that Article 2(4) is the principal source for that rule.⁵⁰

However, there are problems with this conclusion. Article 2(4) prohibits not only the use of force but also, in the same breath, the threat of force. It must therefore be asked whether the avowed *jus cogens* norm includes the threat of force *in addition to* its use.

Though this is not the place to examine the threat of force in international law in any detail,⁵¹ it is relatively uncontroversial to say that states have not seen the prohibition of the threat of force in the same light as its weightier counterpart, the prohibition of the use of force.⁵² Crucially, in state practice, threats of force frequently occur without censure or even comment.⁵³ In contrast to the legal prohibition of the use of force, which states inevitably reference and claim to adhere to even when breaching, states, for the most part, threaten to use force and are threatened with force without either party making any mention of the legal prohibition of such conduct in Article 2(4).⁵⁴ As such, it would seem reasonable to hold

48. U.N. Charter art. 2, para. 4.

49. Schachter, *supra* note 4, at 129.

50. *E.g.*, DINSTEIN, *supra* note 4, at 85 (“The pivot on which the present-day *jus ad bellum* hinges is Article 2(4) of the Charter.”).

51. There is comparatively little literature examining the prohibition of the threat of force, but some key texts include: NIKOLAS STÜRCHLER, *THE THREAT OF FORCE IN INTERNATIONAL LAW* (2007); Dino Kritsiotis, *Close Encounters of a Sovereign Kind*, 20 EUR. J. INT’L L. 299 (2009); Marco Roscini, *Threats of Armed Force and Contemporary International Law*, 54 NETH. INT’L L. R. 229 (2007); Romana Sadurska, *Threats of Force*, 82 AM. J. INT’L L. 239 (1988).

52. As has been stated, “[t]he world community is generally, and quite rightly, more concerned with the *use* of armed force. . . .” HILAIRE MCCOUBREY & NIGEL D. WHITE, *INTERNATIONAL LAW AND ARMED CONFLICT* 56 (1992) (emphasis added). *See also* Sadurska, *supra* note 51, at 248–60 (distinguishing the threat of force from the more serious use of force in terms of state practice and *opinio juris*); Kritsiotis, *supra* note 51, at 302 (providing examples of the utilization of threats of force in state practice).

53. *See* Sadurska, *supra* note 51, at 239–40, 257–60. However, for a contrary view, see Roscini, *supra* note 51, at 243–58.

54. Having said this, there are of course rare examples where states have explicitly argued that threats made against them have violated Article 2(4). For example, Iran made this claim with regard to alleged threats of force coming from the United States in 2006. Permanent Rep. of the Islamic Republic of Iran to the U.N., Letter dated Mar. 17, 2006 from the Permanent Rep. of Islamic Republic of Iran to the United Nations addressed to the Secretary-General, U.N. Doc. A/60/730 (Mar. 22, 2006). This example is highlighted by Kritsiotis, *supra*

that the prohibition is far from a fundamental one. There has been almost no customary international law development of the concept of the threat of force and, as such, it has little legal content beyond its cameo appearance in Article 2(4).⁵⁵

It would therefore be extremely difficult to conclude that the prohibition of the threat of force is a rule of *jus cogens*. If states are willing to allow the prohibition to be breached without legal comment, this hardly suggests that it is a rule that can be viewed as a “norm of general international law.”⁵⁶ Less still can it be seen as “a norm from which no derogation is permitted.”⁵⁷ As Weisburd points out, “[i]f states violate the norm, and other states seem able to live with the violations, is it hard to see how the norm could be characterized as vital.”⁵⁸ As such, the claim that Article 2(4) as a whole is a norm of *jus cogens* is a hard one to support.⁵⁹

Of course, it is not the case that all of those who have attested to the peremptory status of the prohibition of the use of force have equated this to ascribing peremptory status to Article 2(4) in its entirety.⁶⁰ Some writers have taken the more nuanced view that it is the prohibition of the use of force standing alone that has the character of *jus cogens*.⁶¹ This version of the claim that the prohibition is peremptory does not relate to Article 2(4) as such, other than to the extent that the Article is a source for the professed peremptory rule. Instead, the focus of the writers taking this approach is on the more specific rule that the

note 51, at 317–20, though it is worth noting that Kritsiotis also indicates that this response by Iran is unusual and indicates the general scarcity of state reference to international law (or Article 2(4) specifically) in the context of threats of force. *Id.* at 318.

55. Although, a study of the practice can admittedly lead to some tentative conclusions as to the possible customary international law content of the prohibition of the threat of force. See STÜRCHLER, *supra* note 51, at 92–126.

56. Vienna Convention on the Law of Treaties, *supra* note 13, art. 53.

57. *Id.*

58. A. MARK WEISBURD, *USE OF FORCE: THE PRACTICE OF STATES SINCE WORLD WAR II* 22 (1997). Weisburd makes this point generally, not specifically with regard to the prohibition of the threat of force.

59. Having said this, Stürchler makes this claim, and does so with specific reference to the prohibition of the threat of force, holding that “[i]t is . . . safe to conclude that article 2(4) of the UN Charter is *jus cogens* as a whole, without distinction to be made between the threat of force and the actual use of force.” STÜRCHLER, *supra* note 51, at 63. In the view of the present writer, this conclusion is incorrect, and it is notable that Stürchler goes on to say that “certainty about the formal status of the no-threat principle [as *jus cogens*] does not remove the uncertainty as to its content.” *Id.*

60. See, e.g., Parker & Neylon, *supra* note 4, at 436–37 (noting only the “international rule prohibiting the use of force” in Article 2(4) as a norm of *jus cogens* according to ICJ case law); Simma, *supra* note 4, at 3 (noting only “the prohibition enunciated in Article 2(4)” as a rule of *jus cogens*).

61. See sources cited *supra* note 60.

use of military force is prohibited; it is this rule alone that is viewed as being peremptory.⁶²

For the most part, those who adopt the view that the prohibition specifically is the *jus cogens* norm do not seem to make the distinction between the prohibition and Article 2(4) with any reference to the inherent difficulty in ascribing peremptory status to the prohibition of the threat of force. Of course, this rationale may be implicit. In any event, the view that it is the prohibition of the use of force alone that is *jus cogens*—rather than Article 2(4) as a whole—would seem preferable as it excludes the problematic issue of the threat of force, regardless of whether the writers taking this approach have acknowledged this.

Isolating the prohibition of the use of force as a peremptory norm, however, brings with it a different problem. The threat and use of force are inherently conjoined concepts as they currently exist in international law. Indeed, they are linked by more than simply the fact that they share lodgings in Article 2(4); the lawfulness of any threat of force is dependent upon the lawfulness of the use of force threatened.⁶³ The ICJ confirmed this in its *Legality of the Threat or Use of Nuclear Weapons* advisory opinion in 1996.⁶⁴ Indeed, in the *Nicaragua* case, the Court held that the prohibitions of the use and threat of force are, in legal terms, substantively equal.⁶⁵

If a breach of the two norms is substantively the same in law and if one is willing to accept that a use of force is a breach of a *jus cogens* norm, this would suggest that the prohibition of the threat of force must have the same status. It is somewhat difficult to divorce the threat of force from the use of force. Further, Article 2(4) is, as has already been noted, the principal source for the prohibition of the use of force.⁶⁶ To hold that some elements of that provision have a peremptory character but not all of them, particularly given that the ICJ has been clear that the two prohibitions must be taken together, would leave the *jus cogens* norm somewhat disjointed. Indeed, the content of the peremptory norm would not match the content of the provision of law from which it is said to be derived: Article 2(4).

Having said all of this, such a fissure in Article 2(4) is not in itself a bar to the peremptory status of the prohibition of the use of force. The presence of the prohibition of the threat of force may mean that Article

62. *See id.*

63. BROWNLEE, *supra* note 29, at 364; DINSTEIN, *supra* note 4, at 86.

64. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 22, ¶ 47 (July 8).

65. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment on the Merits, 1986 I.C.J. 14, ¶ 227 (June 27).

66. *See supra* note 50 and accompanying text.

2(4) cannot in its entirety form a *jus cogens* norm, but it does not prevent the prohibition of the use of force standing alone from meeting the criteria for a peremptory rule of international law. In spite of the ICJ's assertions to the contrary, it has already been argued here that the ban on the threat of force is not, in state practice, a norm of equal standing to the actual use of force.⁶⁷ Thus, while it may not be desirable—in terms of clarity—for a norm of *jus cogens* to derive from half of a legal provision, the separation of the threat and use of force would be far from a terminal blow to the peremptory status of the norm. Far more damaging is the fact that the prohibition of the use of force is a rule subject to exceptions. It is to this issue that the Article now turns.

B. *The Problem of the Exceptions to the Prohibition*

A *jus cogens* norm is one from which no derogation is permitted. Yet, in the case of the prohibition of the use of force, exceptions to the rule not only exist, but are built into the very nature of the U.N. system: “[T]he rule prohibiting force is not an *absolute* rule, against which all contrary actions can be judged. We are dealing here with a *general* rule—that is a rule that admits or is open to exceptions—which appear in the form of justifications for action.”⁶⁸

Article 51 of the U.N. Charter permits states to use force in self-defense “if an armed attack occurs against a Member of the United Nations” and Article 42 allows the U.N. Security Council to authorize the use of force if it feels that such authorization is necessary, having identified a “threat to the peace, breach of the peace, or act of aggression” under Article 39.⁶⁹ In either case—self-defense or collective security—the *prima facie* unlawfulness of the use of force is precluded.

Therefore, if one accepts the aforementioned criteria for establishing *jus cogens* norms, it would seem that the rule set out in Article 2(4) is not a peremptory norm of *jus cogens*. This remains true even if one takes the more nuanced approach of identifying the prohibition of the use of force as a stand alone norm divorced from the threat of force. Simply put, the prohibition of the use of force is a rule from which derogation is explicitly and uncontroversibly permitted. Thus, “the relevant *jus cogens* norm cannot possibly be identical with the principle of non-use of force as such. If it were, this would imply that whenever a state exercises a

67. See *supra* note 52 and accompanying text.

68. Dino Kritsiotis, *When States Use Armed Force*, in *THE POLITICS OF INTERNATIONAL LAW* 45, 49 (Christian Reus-Smit ed., 2004) (citations omitted).

69. See U.N. Charter arts. 39, 42, 51.

right of self-defense, it would in fact be unlawfully derogating from a norm of *jus cogens*.⁷⁰

To take a treaty-based example, if one were to take the view that the prohibition of the use of force is, even standing alone, a peremptory norm, then the North Atlantic Treaty would be instantly void. Article 5 of that Treaty obliges the parties to take “such action as it deems necessary, including the use of armed force” in response to an armed attack on one or more of their number.⁷¹ Thus, NATO would fall foul of Article 53 of the Vienna Convention on the Law of Treaties.⁷² Needless to say, treaties formalizing regional arrangements for the lawful exercise of the right of self-defense are not contrary to *jus cogens* in this way.

However, the fact that the prohibition of the use of force has agreed exceptions does not necessarily bar the norm from peremptory status as long as one is willing to see the rule in more expansive terms than it appears in Article 2(4). If the norm being discussed here were framed in a way as to additionally include the exceptions to the prohibition, then its peremptory character could be preserved. In other words, “[a] correct description of the norm would have to account for the fact that the principle of non-use of force does have exceptions.”⁷³

In his seminal book on peremptory norms, Alexander Orakhelashvili deals with this problem (without, admittedly, noting that any such problem exists) by concluding that “the *jus ad bellum* as a whole is peremptory.”⁷⁴ In other words, Orakhelashvili takes the view that it is not simply the prohibition of the use of force that is peremptory, but it is also all of the rules on the use of force under international law, including the rules governing self-defense and the rules on forcible action as authorized by the Security Council.

Although such an approach deals with the issue of the bothersome exceptions, the sweeping claim that the entirety of the *jus ad bellum* is peremptory is itself problematic. In part, this is because of the inter-

70. Linderfalk, *supra* note 10, at 860. Sinclair and Kritsiotis also note this point, yet ultimately appear to accept the peremptory character of the prohibition. See SINCLAIR, *supra* note 4, at 215–16, 222–23; Kritsiotis, *supra* note 4, at 1043.

71. North Atlantic Treaty art. 5, Apr. 4, 1949, 63 Stat. 2241, 34 U.N.T.S. 243. It has been considered with regard to the NATO action in Kosovo in 1999, which was undeniably a use of military force—indeed, one that would be difficult to see as an act of self-defense—whether “[a]ny treaty that provided the basis for NATO’s action would, under the doctrine [of *jus cogens*], be void *ab initio*.” Glennon, *supra* note 8, at 1271.

72. See Vienna Convention on the Law of Treaties, *supra* note 13, art. 53. See also *id.* art. 64 (stating that an existing treaty becomes void if a new conflicting *jus cogens* norm emerges). An Article 64 nullification would depend on whether the prohibition of the use of force was seen to have taken on a peremptory character before or after NATO came into existence.

73. Linderfalk, *supra* note 10, at 860.

74. ORAKHELASHVILI, *supra* note 4, at 51.

twined nature of the legal rules governing the use of force.⁷⁵ The *jus ad bellum* is made up of a large number of rules, which interrelate with each other to varying degrees. It would seem impossible to conclude that a single norm could be articulated to cover every element of the law on the use of force. A better interpretation of this claim, then, might be that the *jus ad bellum* represents a collection of interrelated peremptory norms. This would amount to a “*jus cogens* network” of norms, all of which would act, together, to “trump” lesser areas of international law.⁷⁶

Adopting either approach, there remains a further issue, which is essentially the same problem that was encountered earlier with regard to the threat of force. The numerous rules that make up the *jus ad bellum* possess different functions and varying levels of obligation. For many of these rules, it would be extremely difficult to make a case for peremptory status. If certain rules of the *jus ad bellum* cannot be seen as meeting the criteria for *jus cogens* norms, then the body of law as a whole (taken either as a single norm or as a group of norms) cannot be seen as peremptory. Thus, Orakhelashvili’s claim as to the holistic peremptory status of the *jus ad bellum* is a difficult one to support.

For example, consider the requirement that states report any actions taken in self-defense to the Security Council.⁷⁷ This requirement is contained in Article 51 of the U.N. Charter⁷⁸ and is clearly a rule of the *jus ad bellum*. However, it is also uncontroversial that the reporting requirement is not mandatory in the sense that a failure to report is not determinative as to the unlawfulness of a self-defense action.⁷⁹ To put

75. Making a similar point, Barnidge has stated (although admittedly not specifically in relation to the law on the use of force): “When can it be said . . . that a norm exists, as distinct and independent from similar norms?” Barnidge, *supra* note 8, at 202.

76. See Kahgan, *supra* note 4, at 794 (alluding to “a regime concerning the use of armed force in interstate relations from which states are not free to derogate”) (emphasis added). However, having concluded that the right of self-defense is peremptory, Kahgan seems unsure whether this should be viewed as part of a composite *jus cogens* norm, or a separate and independent peremptory rule under this broader *jus cogens* regime. See *id.* at 791.

77. Glennon uses a different example to make a similar point. Instead of the reporting requirement related to self-defense, he considers the powers of the Security Council under the Charter: “Why should the Charter’s limits on the right of the Security Council to use force—set out in Articles 2(7) and 39—not also be seen as *jus cogens*, since those provisions are, after all, part of the same regime for the centralization of power that subsumes Article 2(4)?” GLENNON, *supra* note 42, at 42.

78. U.N. Charter art. 51.

79. See *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Judgment on the Merits, 1986 I.C.J. 14, ¶ 200 (June 27) (noting that reporting to the Security Council is not a condition of lawfulness in the context of a purely customary international law claim of self-defense). With regard to self-defense claims made under the U.N. Charter, the Court did indicate that “it is to be expected that the conditions of the Charter should be respected.” *Id.* However, the use of the word “should” by the Court in this context suggests that even with regard to self-defense claims under the Charter, it is not the case that the reporting requirement *must* be respected. See also Don W. Greig, *Self-Defence and the Security*

this differently, a failure to report may be indicative of an unlawful use of force, but it certainly does not confirm one. It would be nonsensical to argue that such a rule is one that cannot be derogated from when it is generally accepted that it can be without any meaningful legal consequence. Similarly, this writer is comfortable in making the assumption that it would be difficult to find even one state that would hold that the “reporting requirement” is a peremptory rule, let alone enough states to equate to “the international community . . . as a whole.”⁸⁰ Thus, as Christenson correctly and categorically states: “[T]he requirement to report immediately to the Security Council any use of force in self-defense is *not* part of the customary norm of *jus cogens*.”⁸¹

Dismissing the view that the entirety of the *jus ad bellum* may be seen as peremptory, then, it is necessary to turn to the similar, but more palatable, solution that has been advanced by a relatively small number of scholars. This solution is to broadly define the *jus cogens* norm to encompass the exceptions to the prohibition, without going so far as incorporating the entire law on the use of force.⁸² In other words, the *jus cogens* norm could be framed to include the “fundamental” rules of self-defense and Security Council authorized action, but not the “non-fundamental” *jus ad bellum* rules that are clearly not peremptory, such as the reporting requirement.

Council: What Does Article 51 Require?, 40 INT'L & COMP. L.Q. 366, 387–88 (1991) (taking a purposive approach to the reporting requirement, and referencing the position taken by the ICJ in *Nicaragua*, in the wider context of an examination of the relationship between the Security Council and Article 51).

80. Vienna Convention on the Law of Treaties, *supra* note 13, art. 53.

81. Gordon A. Christenson, *The World Court and Jus Cogens*, 81 AM. J. INT'L L. 93, 99 (1987) (emphasis added).

82. Writers adopt this approach in different ways. See HANNIKAINEN, *supra* note 4, 329–33, 340–49 (distinguishing a peremptory prohibition of “aggressive” force from lawful uses of force, which he sees as not being covered by the *jus cogens* rule); BRIAN D. LEPARD, CUSTOMARY INTERNATIONAL LAW: A NEW THEORY WITH PRACTICAL APPLICATIONS 7, 38 (2010) (stating that it is only the prohibition of “the nondefensive use of force by one state against another” that is peremptory in character); Davis Brown, *Use of Force Against Terrorism After September 11th: State Responsibility, Self-Defense and Other Responses*, 11 CARDOZO J. INT'L & COMP. L. 1, 19 n. 85 (2003) (arguing that self-defense is a *jus cogens* norm); Kahgan, *supra* note 4, at 791 (arguing that the right of self-defense is part of the peremptory rule or even perhaps an additional peremptory rule); Linderfalk, *supra* note 10, at 860 (arguing that aspects of the exceptions to the prohibition must be included in the peremptory norm); Ronzitti, *supra* note 4, at 150 (taking the view that the peremptory norm does not directly correspond to the prohibition as contained in Article 2(4) but is instead a peremptory prohibition of *unlawful* uses of force. In particular, he argues that the peremptory norm does not cover force used with the consent of the state in which it is deployed). For a contrary view, see DINSTEIN, *supra* note 4, at 181 (arguing that it is, at best, extremely unclear whether self-defense can be considered *jus cogens*).

However, once one begins to attempt to frame such a norm, it quickly becomes apparent that this process is far from easy. Taking a simple approach, one could hold that it is a norm of *jus cogens* that:

The use of armed force directed against the territorial integrity or political independence of any state or which is in any other manner inconsistent with the purposes of the U.N. is prohibited other than when it is employed in conformity with Article 51 of the U.N. Charter or when lawfully authorized by the Security Council under Article 42 of the U.N. Charter.⁸³

Such a formulation is far from satisfactory. This is because, for example, self-defense is governed by the rules of necessity and proportionality. Despite near-universal acceptance of this fact,⁸⁴ these criteria do not appear in Article 51 at all. Instead, they derive from customary international law.⁸⁵ In contrast, the “non-fundamental” norm of reporting actions to the Security Council is found in Article 51, as has been noted.

Again, a problem of “selection” is encountered when an attempt is made to form a *jus cogens* norm in this context. To put this differently, it has been argued above that a “pure,” streamlined norm here will not suffice; the prohibition in itself cannot be peremptory, as it is subject to exceptions. Equally, it is impossible to take the approach of throwing any and all associated rules into the supernorm mixture; to do so would mean elevating the threat of force or the reporting requirement or any number of other minor or procedural rules to fundamental peremptory status.

Thus, the nature of *jus cogens*, when combined with the nature of the *jus ad bellum*, means that one is forced to “cherry pick” certain rules or criteria to compile a workable norm. It is not adequate to simply refer to the relevant provisions of the U.N. Charter, given that a number of the crucial rules come from customary international law.

83. In attempting to produce a definition of the purported *jus cogens* norm concerning the use of force, this Article adopts a similar approach to that taken by Linderfalk to highlight the problem raised in this Section. He too produced a number of possible definitions of the norm, although those used in this Article differ in a number of respects from those that he employs. See Linderfalk, *supra* note 10, at 860, 865, 867.

84. See STANIMIR A. ALEXANDROV, SELF-DEFENSE AGAINST THE USE OF FORCE IN INTERNATIONAL LAW 19–27 (1996); JUDITH GARDAM, NECESSITY, PROPORTIONALITY AND THE USE OF FORCE BY STATES 6, 10–11 (2004); Oscar Schachter, Implementing Limitations on the Use of Force: The Doctrine of Proportionality and Necessity: Remarks, in 86 AM. SOC’Y INT’L L. PROC. 39, 39 (1992).

85. On the customary nature and origins of the criteria of necessity and proportionality, see James A. Green, *Docking the Caroline: Understanding the Relevance of the Formula in Contemporary Customary International Law Concerning Self-Defense*, 14 CARDOZO J. INT’L & COMP. L. 429 (2006).

Ultimately, to provide a sufficiently detailed rule, it is necessary to articulate a norm so lengthy that it is unwieldy to the point of losing worth. Take, for example:

The use of armed force directed against the territorial integrity or political independence of any state or which is in any other manner inconsistent with the purposes of the U.N. is prohibited other than when it is employed in a necessary and proportional manner in response to an armed attack by another state against a member of the U.N. or when authorized by the Security Council under Article 42 of the U.N. Charter, following a threat to the peace and breach of the peace or an act of aggression as determined by the Security Council.⁸⁶

A norm of this kind is obviously unclear by simple virtue of its length and the number of clauses and sub-clauses that form it. These difficulties are compounded when it is considered that there is no single source for such a norm. Instead it is compiled by reference to Article 2(4), Article 51, Article 42, Article 39, and, of course, customary international law. The lack of clarity here is surely undesirable for a “fundamental” peremptory norm.

These already rather murky waters are muddied still further when one considers that the rules of the *jus ad bellum*, particularly those that make up the right of self-defense, are notoriously debated and unclear in themselves. Take, for example, the criteria of necessity and proportionality. These requirements are almost universally accepted in terms of their legal validity.⁸⁷ Thus, a plausible case could be made for their peremptory status. Certainly, the right of self-defense cannot be peremptory if these criteria are not, as they form its core. Yet despite their universal acceptance, necessity and proportionality remain poorly defined criteria, the content of which may be most favorably described as extremely flexible.⁸⁸ States are prone to repeatedly debating what is necessary or proportional in any given case, with only extreme examples of unnecessary action or disproportionality giving rise to any firm consensus.⁸⁹

86. See *supra* note 83.

87. See *supra* note 84 and accompanying text.

88. JAMES A. GREEN, *THE INTERNATIONAL COURT OF JUSTICE AND SELF-DEFENCE IN INTERNATIONAL LAW* 106–07 (2009).

89. A representative example of the common practice in this context is the South African interventions in Zambia, Zimbabwe, and Botswana in 1986. Here, states disagreed over whether the attacks were “necessary” under the circumstances, but it was generally agreed that this was the legal test. South Africa viewed the attacks as necessary on the basis that it had repeatedly warned the states in question that they would be attacked if they continued to aid African National Congress insurgents. See U.N. SCOR, 2684th mtg. at 22, U.N. Doc. S/PV.2684 (May 22, 1986). In contrast, certain other states felt the attacks were unnecessary

Perhaps even more problematically, there are entire areas of the *jus ad bellum* that are fiercely contested by states. Take, for example, the avowed rights of anticipatory and pre-emptive self-defense.⁹⁰ Some states have consistently argued that there exists a right to use force in self-defense even before the occurrence of an armed attack, if such an attack is imminent (anticipatory self-defense).⁹¹ Other states have hotly disputed this claim.⁹² To this can be added the fact that it has also been argued—most notably by the United States—that military action may be taken even before the potential attack can be identified as being imminent (pre-emptive self-defense).⁹³ There is no consensus among states or writers as to the legal validity of these possible manifestations of self-defense. As such, any definition of a *jus cogens* norm concerning

given that negotiations for a peaceful resolution were ongoing within the Commonwealth Group. *See, e.g.*, U.N. SCOR, 2685th mtg. at 4–6, U.N. Doc. S/PV.2685 (May 23, 1986) (documenting Australia expressing particular disapproval of South Africa's actions). A more recent example, concerning proportionality, is the Israeli action directed at Hezbollah, in Lebanon, in 2006. This action was seen by some states as disproportional. *See, e.g.*, U.N. SCOR, 5493d mtg. at 2, U.N. Doc. S/PV.5493 (Resumption 1) (July 21, 2006) (documenting the Russian Federation asserting that “the scale of the use of force” by Israel has gone “far beyond a counterterrorist operation”). Israel, unsurprisingly, did not view it this way. *See Responding to Hizbullah Attacks from Lebanon: Issues of Proportionality*, ISR. MINISTRY OF FOREIGN AFF.(July 25, 2006), <http://www.mfa.gov.il/MFA/Government/Law/Legal+Issues+and+Rulings/Responding+to+Hizbullah+attacks+from+Lebanon+Issues+of+proportionality+ July+2006.htm>. Again, then, there was agreement over the applicability of the proportionality criterion, but a disagreement as to its application to the facts.

90. The term “anticipatory self-defense” is used here to refer to military action taken in response to an imminent threat, while “pre-emptive self-defense” is used to denote action taken in response to a perceived threat that is not imminent. However, it is important to note that the terminology with regard to the concept of self-defense in response to a threat—imminent or non-imminent—is inconsistent in the wider literature: the terms used here are merely those preferred by the present author. In any event, the example of “anticipatory self-defense” is also used by Linderfalk to illustrate the problem of ascribing peremptory status to *jus ad bellum* rules. Linderfalk, *supra* note 10, at 861. For a useful overview of the main arguments concerning anticipatory and pre-emptive self-defense, see JACKSON NYAMUYA MAOGOTO, *BATTLING TERRORISM: LEGAL PERSPECTIVES ON THE USE OF FORCE AND THE WAR ON TERROR* 111–49 (2005).

91. For example, this claim has been made by Israel, Pakistan, and the United Kingdom, amongst other states. *See, e.g.*, U.N. SCOR, 2288th mtg. at 8, U.N. Doc. S/PV.2288 (June 19, 1981) (Israel); U.N. SCOR, 464th mtg. at 25, U.N. Doc. S/PV.464 (Feb. 8, 1950) (Pakistan); U.N. SCOR, 464th mtg. at 6, U.N. Doc. S/PV.831 (July 17, 1958) (U.K.).

92. Take, for example, the state response to Israel's claim that it was acting in anticipatory self-defense against the Iraqi Osiraq reactor in 1981, where twenty-five individual states addressed letters of condemnation regarding the attack to the President of the Security Council. *See* U.N. Docs. S/14512—S/14560 (June 9–19, 1981).

93. A concept articulated by the United States in 2002. *See* THE WHITE HOUSE, *THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA* (2002), available at <http://www.whitehouse.gov/nsc/nss.pdf>. For discussion, see Christine Gray, *The US National Security Strategy and the New “Bush Doctrine” on Pre-Emptive Self-Defense*, 1 CHINESE J. OF INT'L L. 437, 440–43 (2002); Henderson, *supra* note 1.

the prohibition of the use of force would have to include a phrase along the lines of:

... in response to an armed attack by another state against a member of the U.N., or possibly a potential armed attack, if imminent, or possibly any potential armed attack, even if not imminent (it all depends on your reading of Article 51 and its interpretation, as one perceives it, in customary international law)
 . . .⁹⁴

Self-defense in response to a mere threat of force—either imminent or potential—is just one such example of controversy within the law governing self-defense. There are others.⁹⁵ The fundamental question here, then, is: Can a *jus cogens* norm exist when its scope and the parameters for its application are so debated? The flexible, and in some cases fervently contested, rules on the use of force hardly sit well with the notion of “a norm accepted and recognized by the international community of States as a whole.”⁹⁶

Again, this is not to say that it is *impossible* to devise a *jus cogens* norm that equates to the prohibition of the use of force as it appears—exceptions and all—in current international law. However, it must be acknowledged that any such norm would necessarily be rather lengthy in its formulation, would derive from a number of sources, and would, to put it in the best light, be prone to some internal contradictions and debated elements. “Given the extent and virulence of the debate on such issues as the meaning of Article 2(4) and that of the terms *armed attack* and the *inherent right of self-defense* in article 51 of the United Nations Charter, significant questions of interpretation remain.”⁹⁷

C. *The Problem of the Development of the Law on the Use of Force*

Article 53 of the Vienna Convention on the Law of Treaties makes it clear that once a norm takes on the character of *jus cogens*, it can only be altered by “a subsequent norm of general international law having the same character.”⁹⁸ If it is assumed that the prohibition of the use of force

94. See *supra* note 83.

95. For example, Corten uses the concept of “humanitarian intervention” to briefly illustrate this point, as well as referring to anticipatory self-defense. Olivier Corten, *The Controversies Over the Customary Prohibition on the Use of Force: A Methodological Debate*, 16 EUR. J. INT’L L. 803, 819 (2005).

96. Vienna Convention on the Law of Treaties, *supra* note 13, art. 53.

97. Kahgan, *supra* note 4, at 798. Kahgan nonetheless is ultimately clear that she views both the prohibition of the use of force and the right of self-defense as peremptory in nature. *Id.* at 825–27.

98. Vienna Convention on the Law of Treaties, *supra* note 13, art. 53.

(plus its exceptions) has been established as a peremptory norm, then the rules of the *jus ad bellum*—or at least those of its rules that had been selected to form the peremptory norm—would be forever frozen in time, unless they were to be altered by a change that was also agreed as peremptory by the community as a whole.

It is submitted here that such a stifling restriction on the development of the *jus ad bellum* would not concord with the reality of the law on the use of force. The rules of the *jus ad bellum*, particularly the exceptions to the general prohibition, are notoriously flexible.⁹⁹ This was noted, for example, with regard to the criteria of necessity and proportionality in the context of self-defense.¹⁰⁰ Moreover, the rules of the *jus ad bellum* are flexible *because states like it that way*. As Cassese has stated, the use of military force and issues of national security “are areas where states, both great and middle-sized, deliberately leave law in a condition of inexactitude and uncertainty, if not ambiguity, making it easier for them to protect their own interests.”¹⁰¹ In other words, the system as it stands allows for the legal elasticity required to adapt to the changing world of security threats and forcible action.¹⁰²

A useful example is the issue of whether an “armed attack” for the purposes of self-defense must be attributable to a state, or whether it is lawful to respond to attacks by non-state actors.¹⁰³ Currently, under customary international law, the position is probably still that an armed attack must emanate from a state, at least to some degree.¹⁰⁴ However, in recent years, changes in state practice have suggested that there may be the beginnings of a paradigm shift in the customary international law

99. MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT 592–94 (2005).

100. See *supra* note 88 and accompanying text.

101. ANTONIO CASSESE, VIOLENCE AND LAW IN THE MODERN AGE 39 (Stephen J.K. Greensleaves trans., Princeton Univ. Press 1988).

102. As Koskenniemi has put this: “It is not that definitions would be impossible—they are *undesirable* in view of the complexity of the international social world.” KOSKENNIEMI, *supra* note 99, at 594. Here, Koskenniemi references a number of flexible legal concepts that it would be undesirable to define too rigidly, including the concept of self-defense. See *id.*

103. This example is briefly raised by Linderfalk in the context of the peremptory status of the prohibition of the use of force; however, he does not use this example in the same way, or draw the same conclusions with regard to it, as does the present author. See Linderfalk, *supra* note 10, at 862–63.

104. See, e.g., GAZZINI, *supra* note 43, 184–91; Ian Scobbie, *Words My Mother Never Taught Me: In Defense of the International Court*, 99 AM. J. INT’L L. 76, 80–81 (2005). See also *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136, ¶ 139 (July 9) (seeming to hold a similar position regarding “armed attack” under U.N. Charter art. 51); *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, Merits, 2005 I.C.J. 116, ¶ 146 (Dec. 19) (noting that Uganda’s claim of self-defense was against armed attacks not attributable to the Democratic Republic of the Congo).

toward allowing forcible actions taken in self-defense against non-state actors.¹⁰⁵ Equally, despite the contentions of some writers,¹⁰⁶ it would seem unlikely that the practice has yet been sufficiently widespread or uniform to constitute a new customary international law rule to this effect.¹⁰⁷

It would thus be hard to say that this adaptation of the law governing self-defense is peremptory at the current time, because there is not yet even enough state agreement to be able to conclusively hold that it represents a clear “ordinary” customary rule. Yet, unlike the reporting requirement previously discussed, this is not merely a procedural rule. The question of which actors can commit an armed attack strikes at the very fundamentals of the right of self-defense. If one accepts self-defense as part of the *jus cogens* rule, then one must also accept its current form as the basis for the peremptory norm. As the law currently stands, this includes the rule that force cannot be used in response to an attack orchestrated by non-state actors without a degree of state involvement. Of course, there is nothing to stop the arguably emerging rule that self-defense can be taken against non-state actors from becoming peremptory in the future. This would require any such legal development to be accepted by the community as a whole as being peremptory, leading to an alteration of the existing norm.

However, the kind of consensus necessary to constitute a peremptory norm is difficult to reach even for more established (not to mention clearer) legal rules.¹⁰⁸ Moreover, any instance where a state took forcible action in response, for example, to a non-state terrorist attack at the current time would necessarily constitute a breach of the existing *jus cogens* norm. Although there does not seem to be enough state practice as yet to confirm that self-defense may be taken against non-state actors under

105. See Michael Byers, *Terrorism, the Use of Force and International Law After 11 September*, 51 INT'L & COMP. L.Q. 401, 407–09 (2002).

106. See, e.g., Raphaël van Steenberghe, *Self-Defence in Response to Attacks by Non-State Actors in the Light of Recent State Practice* 23 LEIDEN J. OF INT'L L. 183 (2010); Kimberley N. Trapp, *Back to Basics: Necessity, Proportionality and the Right of Self-Defence Against Non-State Terrorist Actors*, 56 INT'L & COMP. L.Q. 141, 147–55 (2007). See also Thomas M. Franck, *Terrorism and the Right of Self-Defense*, 95 AM. J. INT'L L. 839, 840 (2001) (arguing that the Charter does not limit the inherent right of self-defense to attacks by state actors).

107. See Byers, *supra* note 105, at 407–09.

108. As Rozakis rightly states, the criteria for the formation or moderation of *jus cogens* norms as set out in Article 53 of the Vienna Convention on the Law of Treaties “are quite severe.” CHRISTOS L. ROZAKIS, *THE CONCEPT OF JUS COGENS IN THE LAW OF TREATIES* 15 (1976). Rozakis goes on to examine these criteria in some detail. *Id.* at 52–84. Compare, for example, the uncertainty over the peremptory status of the prohibition of genocide (or at least certain aspects of that prohibition). David Lisson, Note, *Defining National Group in the Genocide Convention: A Case Study of Timor-Leste*, 60 STANFORD L. REV. 1459, 1463 (2008).

customary international law, it is equally not the case that states have viewed recent forcible responses against non-state actors as being a breach of a *jus cogens* norm. Indeed, there has been an increasing amount of support for such actions.¹⁰⁹

The concern as to the development of the *jus ad bellum* relates not only to the exception of self-defense, but to other crucial areas of the law on the use of force as well. Consider the concept of what may be called a “cyber-attack”: a technological attack on a state’s computer networks. Such attacks are now becoming an increasing feature of inter-state relations.¹¹⁰ Yet, there is currently no consensus as to whether cyber-attacks are, or should be, considered a use of “force” as prohibited by Article 2(4). It has long been relatively clear that uses of “economic” or “political” force are not covered by that provision.¹¹¹ However, debate is ongoing as to whether a cyber-attack is similarly beyond the scope of the prohibition. Some writers take the view that cyber-attacks should not be considered as being covered by the prohibition of the use of force on the basis that the rule as it stands prohibits *armed* force only. As cyber-attacks have more in common with economic attacks in that they are not “physically” or “kinetically” manifested in the same way as military action, they should not be included.¹¹² Others take the contrary position that

109. For example, the majority of states accepted Operation Enduring Freedom in 2001, in spite of the fact that the action was taken in response to an attack perpetrated by a non-state terrorist group. For detailed lists of the states that condoned the intervention expressly and/or offered support, see DAVID J. GERLEMAN ET AL., CONG. RESEARCH SERV., RL 31152, OPERATION ENDURING FREEDOM: FOREIGN PLEDGES OF MILITARY & INTELLIGENCE SUPPORT (2001), available at <http://fpc.state.gov/documents/organization/6207.pdf>; HOUSE OF COMMONS LIBRARY (U.K.), RESEARCH PAPER 01/81, OPERATION *Enduring Freedom* AND THE CONFLICT IN AFGHANISTAN: AN UPDATE 31 (2001) available at <http://www.parliament.uk/commons/lib/research/rp2001/rp01-081.pdf>.

110. See Ewen MacAskill, *New Cyber Security Chief Warns of Internet Attacks*, THE GUARDIAN (U.K.), Apr. 15, 2010, at 28; *Age of Cyber Warfare is “Dawning”*, BBC NEWS, Nov. 17, 2009, <http://news.bbc.co.uk/1/hi/technology/8363175.stm>. In particular, cyberwarfare is becoming a notable aspect of international relations in former Soviet regions. Thus, it was an important feature of the August 2008 armed conflict between Russia and Georgia. See 2 INDEPENDENT INTERNATIONAL FACT-FINDING MISSION ON THE CONFLICT IN GEORGIA 217–19 (2009), available at <http://www.ceiig.ch/Report.html>. There were also notable attacks on the technological infrastructure of Estonia in May 2007, which were allegedly attributable to Russia. See Ian Traynor, *Russia Accused of Unleashing Cyberwar to Disable Estonia*, THE GUARDIAN (U.K.), May 17, 2007, at 1.

111. See Tom J. Farer, *Political and Economic Coercion in Contemporary International Law*, 79 AM. J. INT’L L. 405, 408–10 (1985).

112. See, e.g., Scott J. Shackelford, Note, *From Nuclear War to Net War: Analogizing Cyber Attacks in International Law*, 27 BERKELEY J. INT’L L. 192, 237 (2009). Although Shackelford does go on to say that if the cyber-attack in question could be viewed as being comparable to a physical military attack in terms of causing damage to life and property (presumably, for example, by launching a state’s own missiles against it), this would constitute armed force in breach of Article 2(4) and would thus potentially trigger Article 51. *Id.* at 237–39.

cyber-attacks (do, or should) fall within the prohibition in Article 2(4). These authors argue that such attacks are—given modern reliance on technology for national defense systems—potentially as damaging to a state's national security as a military attack and thus should be included.¹¹³

Notably, those writers who take the latter view have already begun to assert the peremptory status of the “prohibition of cyber-attacks” as a component of a larger peremptory norm prohibiting the use of force.¹¹⁴ Again, it can be seen that there is not yet a consensus among states that the notion of cyber-attacks is prohibited *at all* by the *jus ad bellum*, let alone the kind of agreement necessary to confer peremptory status. Indeed, there is still relatively little state practice relating to the issue at all.¹¹⁵ As such, the traditional position—that “force” means “armed force”—must still be a correct expression of the *jus cogens* norm here (if, of course, one accepts the peremptory character of the prohibition at all).

It may well be that a new interpretation of the meaning of “force” will evolve in the future to take into account the growing threat of cyber-warfare. Such a change would not require any alteration of Article 2(4), of course, just a reinterpretation of its terminology in customary international law, based on state practice and *opinio juris* in the usual way. However, a change to the meaning of “force” would require a near-universal state acceptance of the altered content of the *jus cogens* norm.

Irrespective of the merits of the particular rules taken as examples here, one can make a strong argument that the rules of the *jus ad bellum* should be free to develop to deal with our changing world, given that this area of the law relates to the national security of states and, crucially, to the security of the people who live in them.¹¹⁶ However, once the arduous

113. See, e.g., Todd A. Morth, Note, *Considering Our Position: Viewing Information Warfare as a Use of Force Prohibited by Article 2(4) of the U.N. Charter*, 30 CASE W. RES. J. INT'L L. 567 (1998).

114. See, e.g., Schmitt, *supra* note 4, at 922.

115. *Id.* at 921.

116. Lepard has, for example, contended that it may be important from an ethical point of view that the law on the use of force is able to develop, and seems to suggest that the restriction on the alteration of the *jus ad bellum* that would stem from peremptory status is therefore undesirable. LEPARD, *supra* note 82, at 260. Indeed, Lepard takes the view that the problem of the potential stagnation of *jus cogens* norms more generally means that “it does not seem necessary to recognize” the requirement in Article 53 of the Vienna Convention on the Law of Treaties that a *jus cogens* norm can only be altered by “a subsequent norm of general international law having the same character.” *Id.* at 259–60. Yet—however much this may solve the problem of the restricted development of the *jus ad bellum*—there is no legal justification for ignoring the requirement that *jus cogens* norms can only be altered by other *jus cogens* norms; this would amount to an unwarranted unilateral alteration of the way in which peremptory rules are created. For more general discussion on the need for the continued development of the *jus ad bellum*, see CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF

tests for the establishment of a *jus cogens* norm are considered to have been met for a composite selection of key *jus ad bellum* rules, then whatever norm is framed would become static. The only way to alter it would be to go through the process of establishing the criteria for peremptory status again. This is a notably difficult process, particularly when it is considered that any changes or new rules are likely to be struck down in the developmental stage as being contrary to the existing *jus cogens* norm.¹¹⁷

Again, the aim here is not to make value judgments as to how flexible the law on the use of force *should* be; a counter argument to the need for development and adaptability in the *jus ad bellum* can, of course, be credibly framed, such as in terms of the need for objectivity, certainty, and consistency in the context of the legal regulation of military action.¹¹⁸ Leaving such arguments aside, the crucial point here is that the static nature of the modern *jus ad bellum*—something that would logically flow from an application of the *jus cogens* conceptual framework to the law on the use of force—simply does not reflect the reality of the development of this area of the law in current practice.

IV. THE ACCEPTANCE OF THE PROHIBITION AS A PEREMPTORY NORM BY STATES

Even if one takes the view that it is possible to frame a suitable norm that could take account of the exceptions to the prohibition of the use of force and the complexity and uncertainty of the *jus ad bellum*, an additional hurdle must be cleared before the peremptory status of any such norm can be established. This is the question of whether the rule has, in fact, been accepted as *jus cogens* by states at all.

FORCE 4 (3d ed. 2008) (pointing out that many scholars “argue that international law [on the use of force] is evolving to meet new threats, and welcome the changes they identify in the law”).

117. DINSTEN, *supra* note 4, at 102–04; Scholtz, *supra* note 4, at 10–11 (making this point with regard to the possible customary development of humanitarian intervention as an additional exception to the prohibition of the use of force); Glennon, *supra* note 8, at 1269 (pushing this argument somewhat further by taking the view that the doctrine of *jus cogens* illogically requires that any potential changes to existing *jus cogens* norms will necessarily always be struck down by the current version of the peremptory norm).

118. See, e.g., BROWNLIE, *supra* note 29, at 398–401 (applying such arguments to the specific claim that an objective definition of “war” would be desirable). See generally, Henkin, *supra* note 1, at 58–60 (discussing actions and justifications posed by the United States that express a relaxation of normative prohibitions).

A. *The General Lack of Reference to State Practice in the Literature*

The majority of writers who have concluded that the prohibition of the use of force possesses the character of a *jus cogens* norm have not supported such assertions with reference to state practice.¹¹⁹ Instead, when this claim has been evidenced at all, it is usually through citation of the avowed acceptance of this position by the ICJ in the *Nicaragua* case.¹²⁰ As was discussed earlier, it is not entirely clear whether the ICJ did, in fact, accept that the prohibition was *jus cogens* (although it is the present author's reading of the decision that the Court did take this view, albeit somewhat ambiguously).¹²¹ Assuming that the ICJ has affirmed the peremptory status of the prohibition, such endorsement from the "principal judicial organ of the United Nations"¹²² would lend a good deal of weight to the conclusion that the norm is a peremptory one.¹²³

However—irrespective of whether one takes the view that the Court did or did not hold that the prohibition was *jus cogens*—it is clear that the ICJ in the *Nicaragua* case presented little evidence that would support the peremptory character of the prohibition of the use of force. The Court's only explicit reference to "state practice" was to point to the fact that the United States and Nicaragua had both adopted it in their pleadings.¹²⁴ The only other source the Court referred to was to quote directly the position taken by the ILC in 1966.¹²⁵ When this trail is followed to the ILC commentary on the draft articles that formed the basis for the Vienna Convention on the Law of Treaties, it becomes apparent that the

119. See, e.g., DINSTEIN, *supra* note 4, at 99–104; MOIR, *supra* note 4, at 9; WHEELER, *supra* note 4, at 45; Charney, *supra* note 4, at 837; Kritsiotis, *supra* note 4, at 1042–43; Parker & Neylon, *supra* note 4, 436–37; Schmitt, *supra* note 4, at 922; Scholtz, *supra* note 4, at 8; Simma, *supra* note 4, at 3; Stephens, *supra* note 4, at 253–54; Verdross, *supra* note 4, at 60; Whiteman, *supra* note 4, at 625.

120. See, e.g., DINSTEIN, *supra* note 4, at 99–104; WHEELER, *supra* note 4, at 45; Kritsiotis, *supra* note 4, at 1042–43; Parker & Neylon, *supra* note 4, 436–37; Schmitt, *supra* note 4, at 922.

121. See *supra* notes 36–41 and accompanying text.

122. As the Court is labeled in the U.N. Charter and the Statute of the International Court of Justice. U.N. Charter art. 92; ICJ Statute, *supra* note 18, art. 1.

123. It has already been noted that the Court's decisions are extremely influential and are often seen as authoritative statements of international law. See *supra* note 36 and accompanying text.

124. Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment on the Merits, 1986 I.C.J. 14, ¶ 190 (June 27). In addition, the ICJ noted that prohibition of the use of force was "frequently referred to in statements by State representatives as being not only a principle of customary international law but also a *fundamental or cardinal principle* of such law." *Id.* (emphasis added). This could arguably be seen as another reference by the Court to acceptance of the peremptory status of the prohibition in state practice, though this cannot be said with certainty.

125. *Id.*

conclusion that the prohibition is a *jus cogens* norm was made by the Commission without offering any supporting evidence at all.¹²⁶ Moreover, in 2001, when the ILC again reaffirmed the peremptory status of the prohibition in the context of state responsibility, it merely supported its claim through references to its own stated position in 1966 and to the ICJ's apparent finding to that effect in the *Nicaragua* case.¹²⁷

This process of circular justification led D'Amato to conclude that the "only requirement" necessary for the ICJ to seemingly reach the conclusion that the use of force was a *jus cogens* norm in the *Nicaragua* case "was the garnering of a majority vote of the judges present at The Hague."¹²⁸ Without further investigation, it is, of course, impossible to tell whether D'Amato is correct here. Simply because the Court did not adequately support the view that the prohibition was peremptory does not mean that such a view is necessarily incorrect; a failure to produce sufficient evidence does not in itself confirm that there is none, although it is perhaps indicative of such a conclusion.

B. *The Nature of the State Practice Required for a Norm to Gain Peremptory Status*

The question, then, is whether such evidence exists. As a matter of law, it is of little consequence whether the ICJ, the ILC, or a plethora of other writers have concluded that the prohibition of the use of force is a *jus cogens* norm. Such evidence can only be found in the practice of states.

Returning to the criteria for the existence of a peremptory norm as derived from Article 53 of the Vienna Convention on the Law of Treaties, what matters is whether the norm is "accepted and recognized by the international community of States as a whole."¹²⁹ Indeed, the question is not merely whether the norm is accepted and recognized *as being a legal norm* by the whole community. The prohibition of the use of force would certainly meet such a test; it is universally accepted and universal in terms of its applicability to states.¹³⁰

A close reading of Article 53 reveals that this is not enough. The issue is whether the norm is accepted and recognized by the community as a whole *as a peremptory norm*.¹³¹ Under the positivist conception of *jus*

126. See Int'l Law Comm'n, *supra* note 34, at 247–48.

127. Int'l Law Comm'n, *supra* note 35, at 283.

128. D'Amato, *supra* note 8, at 3. See also Christenson, *supra* note 81.

129. Vienna Convention on the Law of Treaties, *supra* note 13, art. 53.

130. See *supra* notes 27–31 and accompanying text.

131. This can be seen from the fact that the Article requires that the "norm [is] accepted and recognized by the international community of States as a whole *as a norm from which no*

cogens, there is a two-stage process of *opinio juris* at work.¹³² The first stage is the usual test of whether states accept the rule as being a binding one. Stage two is whether they accept that binding rule as being of a norm of *jus cogens*.¹³³ Thus, Hannikainen correctly holds that the prohibition of the use of force is universally accepted as a rule of international law, but then incorrectly assumes that this is enough to conclude that it has been accepted as a peremptory rule.¹³⁴

Admittedly, it would seem apparent that acceptance and recognition by the “international community of States as a whole” does not necessitate *universal* acceptance and recognition by states as to the peremptory character of any given norm. As the chairman of the Drafting Committee of the Vienna Convention on the Law of Treaties made clear, it is enough for “a very large majority” of states to take such a position.¹³⁵ This may be somewhat conceptually dubious in a positivist system built on state consent, given that peremptory norms bind all and are non-derogable.¹³⁶ However, this is, for many, justified by the need to avoid a single state vetoing a peremptory norm accepted as such by all others.¹³⁷ In any event, for a *jus cogens* norm to form, there must be near universal acceptance that the norm is a peremptory one. It is questionable whether such a large majority has been achieved with regard to the prohibition of the use of force.

derogation is permitted.” Vienna Convention on the Law of Treaties, *supra* note 13, art. 53 (emphasis added).

132. It is worth noting here that the present writer takes the view that a rule that forms the basis of a norm of *jus cogens* can derive from any source of law—for example, treaty law or customary international law—but that the process that turns the rule from an “ordinary” norm to a peremptory one is a process of customary international law formation, or at least something broadly akin to that process. In other words, a treaty-based rule may itself be the source of a norm of *jus cogens*, but it is the near-universal agreement by states that the rule is *peremptory* (acceptance that resembles the concept of *opinio juris*) that makes it so. Further consideration of this issue goes beyond the scope of this Article, but for a more detailed discussion of the “sources” of *jus cogens* norms, see Byers, *supra* note 38, at 220–29.

133. Linderfalk, *supra* note 10, at 862.

134. HANNIKAINEN, *supra* note 4, at 323–33.

135. United Nations Conference on the Law of Treaties, Mar. 26–May 24, 1968, 80th Meeting of the Committee of the Whole, ¶ 12, U.N. Doc. A/CONF.39/C.1/SR.80 (May 21, 1968).

136. See HANNIKAINEN, *supra* note 4, at 49; Gennadii M. Danilenko, *International Jus Cogens: Issues of Law-Making*, 2 EUR. J. INT’L L. 42, 48–57 (1991); Glennon, *supra* note 8, at 1266, 1268.

137. Rafael Nieto-Navia, *International Peremptory Norms (Jus Cogens) and International Humanitarian Law*, in MAN’S INHUMANITY TO MAN: ESSAYS ON INTERNATIONAL LAW IN HONOUR OF ANTONIO CASSESE 595, 612 (Lal C. Vohrah et al. eds., 2003).

*C. A Brief Survey of State Acceptance of the Prohibition
as Peremptory in Practice*

The constraints of an article of this kind mean that, unfortunately, it is impossible to examine the positions taken by states as to the *jus cogens* nature of the prohibition of the use of force in any detail. Nonetheless, a few examples can be highlighted to demonstrate that a contention that states “as a whole” have accepted and recognized such a position—even reading that term to mean a “large majority”—is perhaps not self-evident and certainly requires further investigation. It may, at least, be said that in notable instances where states have had the opportunity to explicitly affirm the peremptory status of the prohibition, and might reasonably have been expected to do so, there has been a trend toward silence on the issue.

For example, Kahgan points to the fact that “[o]f the thirty-two states submitting examples of *jus cogens* [at the Conference on the Vienna Convention on the Law of Treaties], half declared that the prohibition on the use of force was clearly of such character.”¹³⁸ For Kahgan, the fact that half of the states that contributed to the debate on Article 53 (*née* 50) took this view confirms the status of the prohibition as *jus cogens*. Conversely, one might argue that the fact that the other half did not take this view is more telling. Half is self-evidently not a majority, let alone a significant enough majority to be considered the “whole” of the international community of states. When one examines the *travaux préparatoires* of the Convention, it is evident that fourteen states explicitly claimed that the prohibition was, or might have been, a *jus cogens* norm.¹³⁹ Kahgan’s claim is therefore essentially accurate, in that this is roughly half of the total number of states that put forward suggested peremptory norms at the conference (thirty-two).¹⁴⁰ A perhaps

138. Kahgan, *supra* note 4, at 779.

139. See United Nations Conference on the Law of Treaties, Vienna, Austria, 1st Sess., Mar. 26–May 24, 1968, *Summary Records of Meetings of the Committee of the Whole*, at 154, U.N. Doc. A/CONF.39/11 (1969) (Bolivia); *id.* at 273, 320 (Ecuador); *id.* at 275–76 (The Netherlands); *id.* at 282 (Hungary); *id.* at 295 (Greece); *id.* at 296 (Kenya); *id.* at 303 (Uruguay); *id.* at 306 (Cyprus); *id.* at 318 (Federal Republic of Germany); *id.* at 321 (Tanzania); *id.* at 322 (Ukraine); *id.* at 323 (Philippines); *id.* at 324 (Norway); *id.* at 326 (Malaysia).

140. States suggested possible examples of *jus cogens* norms throughout the debates at the U.N. Conference on the Law of Treaties, particularly in the context of the discussion of Article 50 (which later became Article 53) of the treaty. See *id.* at 154 (Bolivia); *id.* at 258–59 (Holy See); *id.* at 265 (Ethiopia); *id.* at 271 (Peru); *id.* at 273, 320 (Ecuador); *id.* at 275–76 (The Netherlands); *id.* at 282 (Hungary); *id.* at 294 (the Soviet Union); *id.* at 295 (Greece); *id.* at 295 (Iraq); *id.* at 296 (Kenya); *id.* at 297 (Cuba); *id.* at 297 (Lebanon); *id.* at 298 (Nigeria); *id.* at 299 (Chile); *id.* at 300 (Sierra Leone); *id.* at 301 (Ghana); *id.* at 302 (Colombia); *id.* at 303 (Uruguay); *id.* at 306 (Cyprus); *id.* at 307 (the Byelorussian Soviet Socialist Republic); *id.* at 312 (Romania); *id.* at 313 (Bulgaria); *id.* at 318 (Czechoslovakia); *id.* at 318 (Federal

more notable statistic, however, is that these states represented just under fourteen percent of the total number of states with delegations at the conference (103).¹⁴¹

A similar pattern may be seen in other comparable debates. One important example is the discussions in 1970 with regard to the drafting of the Declaration on the Principles of International Law Concerning Friendly Relations and Cooperation Among States.¹⁴² In these debates, a small number of states certainly took the view that the prohibition was a *jus cogens* norm. Venezuela thus stated that the rules on non-use of force and the peaceful settlement of disputes were “authentic examples of *jus cogens*.”¹⁴³ Iraq¹⁴⁴ and Ethiopia¹⁴⁵ were also explicit in taking this position.

In contrast, the United States took the opposite view, holding that although these rules were highly desirable and would contribute to “a better and more tolerant world,” this did not mean they were *jus cogens*.¹⁴⁶ Hungary also explicitly argued against the peremptory status of the rule.¹⁴⁷ Similarly, though less explicitly, The Netherlands suggested that the rules contained in the declaration (which include the prohibition of the use of force) had not been accepted as *jus cogens* norms, or, at least, that the draft declaration itself was not representative of peremptory norms.¹⁴⁸ The views of these states here are particularly notable, as they represent an extremely rare, and perhaps unique, example of states

Republic of Germany); *id.* at 319 (Ceylon); *id.* at 321 (Tanzania); *id.* at 322 (Ukraine); *id.* at 323 (Philippines); *id.* at 323 (Canada); *id.* at 324 (Norway); *id.* at 326 (Malaysia).

141. See *id.* at xiii–xxii (showing a full list of state delegations).

142. See Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, G.A. Res. 2625 (XXV), U.N. GAOR, 25th Sess., Supp. No. 28, U.N. Doc. A/8082, at 121–24 (Oct. 24, 1970).

143. Special Comm. on Principles of Int’l Law Concerning Friendly Rel. and Cooperation Among States, Rep., at 77, U.N. Doc. A/8018; GAOR, 25th Sess., Supp. No. 18 (1970) [hereinafter Rep. of the Special Comm.]. See also *id.* at 63 (containing the draft declaration).

144. See U.N. GAOR, 25th Sess., 1180th mtg. at 17, U.N. Doc. A/C.6/SR.1180 (Sept. 24, 1970); Rep. of the Special Comm., *supra* note 143, at 63.

145. See U.N. GAOR, 25th Sess., 1182nd mtg. at 31, U.N. Doc. A/C.6/SR.1182 and Corr.1 (Sept. 25, 1970); Rep. of the Special Comm., *supra* note 143, at 63.

146. Rep. of Special Comm., *supra* note 143, at 119. However, it is important to note that the United States has elsewhere, and more recently, taken the opposite view—that the prohibition is peremptory. See *infra* notes 185–195 and accompanying text.

147. See U.N. GAOR, 25th Sess., 1179th mtg. at 14, U.N. Doc. A/C.6/SR.1179 (Sept. 24, 1970); Rep. of the Special Comm., *supra* note 143, at 63. It should be noted that this would seem to be a reversal of the Hungarian position as expressed at the first session of the Conference on the Law of Treaties in 1968. See U.N. Doc. A/Conf.39/11, *supra* note 139, at 282.

148. See U.N. GAOR, 25th Sess., 1183rd mtg. at 38, U.N. Doc. A/C.6/SR.1183 (Sept. 28, 1970).

explicitly rejecting the peremptory status of the prohibition, rather than merely choosing not to affirm it.

Another example of this kind can be seen in the debates over a proposal for a treaty on the use of force to supplement the U.N. Charter, which was initially put forward by the Soviet Union in 1976.¹⁴⁹ Hannikainen uses the discussions on this proposal in the Special Committee on Enhancing the Effectiveness of the Principle of Non-Use of Force in International Relations to support his claim that the prohibition is peremptory.¹⁵⁰ However, as only summaries of these debates were ever published, it is difficult to know the number of states that explicitly held this view.¹⁵¹ Admittedly, the summaries at times indicate that some states referred to the prohibition as *jus cogens*,¹⁵² but exactly how many states held that the prohibition itself was peremptory is unclear.

The summaries do indicate that Egypt,¹⁵³ Mongolia,¹⁵⁴ Poland,¹⁵⁵ Czechoslovakia,¹⁵⁶ and Cyprus¹⁵⁷ explicitly held the position that the prohibition was peremptory. Cuba also apparently stated that the prohibition was peremptory, but then tellingly went on to say that it was a rule that was poorly defined and not satisfactorily codified.¹⁵⁸ It is not clear from the summaries whether other states also held that the rule was peremptory. Nonetheless, it is evident that a few states did expressly take the position that the prohibition was *jus cogens*.

Having said this, it equally may be said that in these extensive discussions ranging over seven years and relating directly to the law on the use of force in a committee set up specifically to examine the prohibition, the summaries only confirm that a handful of states expressly affirmed its peremptory character. It is also worth noting that Hungary supported the proposed treaty on the basis that this “constituted a sound

149. See Minister for Foreign Affairs of the USSR, Letter dated Sept. 28, 1976 from the Minister for Foreign Affairs of the Union of Soviet Socialist Republics addressed to the Secretary-General, U.N. Doc. A/31/243 (Sept. 28, 1976) (setting out the draft of the proposed treaty).

150. HANNIKAINEN, *supra* note 4, at 324–25.

151. See generally Special Comm. on Enhancing the Effectiveness of the Principle of Non-Use of Force in Int'l Rel. [Special Comm. on Non-Use of Force], Repts., U.N. Docs. A/33/41-A/39/41; GAOR, 33d-39th Sess., Supp. No. 41 (1978–1984).

152. See, e.g., Special Comm. on Non-Use of Force, Rep., at 10, U.N. Doc. A/34/41; GAOR, 34th Sess., Supp. No. 41 (1979); Special Comm. on Non-Use of Force, Rep., ¶ 174, U.N. Doc. A/35/41; GAOR, 35th Sess., Supp. No. 41 (1980).

153. Special Comm. on Non-Use of Force, Rep., at 12, U.N. Doc. A/36/41; GAOR, 36th Sess., Supp. No. 41 (1981).

154. *Id.* at 13.

155. *Id.* at 31.

156. Special Comm. on Non-Use of Force, Rep., at 12, U.N. Doc. A/37/41; GAOR, 37th Sess., Supp. No. 41 (1982).

157. *Id.* at 60.

158. *Id.* at 55.

basis for *working out* . . . universally binding, *jus cogens* rules.”¹⁵⁹ The implication here is that Hungary did not view the prohibition, at least as it stood at the time, as being peremptory.¹⁶⁰ Spain additionally argued that a claim as to the peremptory character of the rule might be meaningless in the light of states’ violations of the prohibition in practice.¹⁶¹ One may also point to the fact that, of the seventeen principles devised by the Committee’s working group in 1980 to clarify the prohibition of the use of force and its content, only one stated that the rule was peremptory.¹⁶²

Ultimately, the Special Committee was only made up of thirty-five states.¹⁶³ Thus, even if one accepts Hannikainen’s conclusion that the summaries indicate an acceptance by the Committee of the peremptory status of the prohibition, it can be very credibly argued that the view of the Committee is not necessarily representative of the community of states as a whole. It might, of course, be indicative of such wider acceptance, but it would be hard to argue that it establishes this conclusively.

Moreover, in the parallel debates on the same agenda item in the Sixth Committee of the General Assembly, which is comprised of *all* U.N. member states and for which full plenary records are available, it is interesting that only five states explicitly held that the prohibition was peremptory.¹⁶⁴ It is also worth noting that, during the Sixth Committee debates, Mexico explicitly held that the principle of non-intervention was not a *jus cogens* norm.¹⁶⁵ Of course, this is not the same as a denial of the peremptory status of the prohibition of the use of force, but the prohibition is generally seen as an element of that principle, or certainly linked to it.¹⁶⁶

159. Special Comm. on Non-Use of Force, Rep., at 10, U.N. Doc. A/35/41; GAOR, 35th Sess., Supp. No. 41 (1980) (emphasis added).

160. Again, this would seem to be a reversal of the Hungarian position as expressed at the first session of the Conference on the Law of Treaties in 1968. See U.N. Doc. A/Conf.39/11, *supra* note 139, at 282.

161. Special Comm. on Non-Use of Force, *supra* note 153, at 10.

162. This was “Principle 7.” See Special Comm. on Non-Use of Force, *supra* note 159, at 47–50.

163. See G.A. Res. 32/150, at 214, U.N. Doc. A/RES/32/150 (Dec. 19, 1977) (setting up the Special Committee).

164. These were: Greece, Special Comm. on Non-Use of Force, Rep., Oct. 15, 1979, at 2, U.N. Doc. A/C.6/34/SR.17 (Oct. 18, 1979); Pakistan, Special Comm. on Non-Use of Force, Rep., Oct. 19, 1979, at 3, U.N. Doc. A/C.6/34/SR.22 (Oct. 29, 1979); Chile, *id.* at 12; Togo, Special Comm. on Non-Use of Force, Rep., Oct. 22, 1979, at 10, U.N. Doc. A/C.6/34/SR.23 (Oct. 26, 1979); Zaire, Special Comm. on Non-Use of Force, Rep., Oct. 29, 1980, ¶ 38, U.N. Doc. A/C.6/35/SR.32 (Nov. 10, 1980). In addition to these five states, Singapore implied that it also took this position, but it was not at all conclusive on this. See *id.* ¶ 43.

165. Special Comm. on Non-Use of Force, Rep., Oct. 24, 1980, ¶ 50, U.N. Doc. A/C.6/35/SR.29 (Oct. 31, 1980).

166. See *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, Judgment on the Merits, 1986 I.C.J. 14, ¶¶ 205, 247 (June 27) (“The element of coercion, which defines, and indeed forms the very essence of, prohibited intervention, is particularly

Another useful example is the debates in the Sixth Committee of the General Assembly in 1987 regarding the framing of the Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations.¹⁶⁷ Here, Greece was very clear that it saw the prohibition as a peremptory norm.¹⁶⁸ Indeed, it was concerned that the draft declaration did not make this explicit.¹⁶⁹ However, in extensive debates that directly concerned the status of the prohibition of the use of force, Greece was the only state to take this view.¹⁷⁰ Admittedly, unlike in the debates on the Friendly Relations Declaration, states here did not explicitly reject the peremptory status of the prohibition; but it still may be seen as significant that only one state was willing to affirm it, given that the entire debate again concerned the status of the rule and its further codification. Moreover, despite Greece's concerns, the Declaration on Threat or Use of Force that was finally adopted by the General Assembly ultimately made no mention of the peremptory character of the rule that it was clarifying.¹⁷¹ Even Hannikainen, who strongly supports the peremptory status of the prohibition, has commented that it was notable that the Declaration was silent on the issue.¹⁷²

Like Kahgan and Hannikainen, Orakhelashvili also takes the rare step of referring to state practice in support of the claim that a use of force is contrary to *jus cogens*. For example, he points to the fact that Cyprus argued before the Security Council in 1964 that the Treaty of Guarantee between Cyprus, Greece, the United Kingdom, and Turkey¹⁷³ was contrary to *jus cogens* and thus void.¹⁷⁴ This was on the basis that

obvious in the case of an intervention which uses force, either in the direct form of military action, or in the indirect form of support for subversive or terrorist armed activities within another State." The Court therefore saw a breach of the principle of non-intervention as inherent in an unlawful use of force, which indicates that an unlawful use of force is necessarily an unlawful intervention, and that the prohibition of the use of force is therefore something that falls within a wider prohibition of intervention). *See also* GREEN, *supra* note 88, at 31–33.

167. Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations, G.A. Res. 42/22, U.N. GAOR, 42d Sess. Supp. No. 22, at 287–89, U.N. Doc. A/RES/42/22 (Nov. 18, 1987).

168. Special Comm. on Non-Use of Force, Rep., Oct. 13, 1987, at 19–20, U.N. Doc. A/C.6/42/SR.21 (Oct. 23, 1987).

169. Special Comm. on Non-Use of Force, Rep., Oct. 13, 1987, at 7, U.N. Doc. A/C.6/42/SR.20 (Oct. 16, 1987).

170. *See generally* Special Comm. on Non-Use of Force, Repts., Oct. 8–13, 1987, U.N. Docs. A/C.6/42/SR.17-A/C.6/42/SR.22; GAOR, 42d Sess. (1987).

171. *See* Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations, *supra* note 167.

172. HANNIKAINEN, *supra* note 4, at 325.

173. Treaty of Guarantee, Cyprus-Greece-U.K.-Turk., Aug. 16, 1960, 382 U.N.T.S. 4.

174. ORAKHELASHVILI, *supra* note 4, at 157–61. For this claim by Cyprus, see U.N. SCOR, 19th Sess. 1098th mtg. at 16–17, U.N. Doc. S/PV.1098 (Feb. 27, 1964).

Article IV of that Treaty arguably gave Turkey the right to militarily intervene in Cyprus.¹⁷⁵ However, as Orakhelashvili notes,¹⁷⁶ the discussion in the Security Council concerned the question of whether the Treaty violated the rules of the *jus ad bellum*, and not whether the prohibition of the use of force should be considered *jus cogens*.¹⁷⁷

Thus, no state other than Cyprus took the view that the prohibition was peremptory, and the Security Council as a whole expressed no opinion on this aspect of Cyprus' argument.¹⁷⁸ It would seem odd that those states that supported Cyprus' general position that Article IV of the Treaty of Guarantee was unlawful (on the basis that it allowed for the use of force)¹⁷⁹ did not employ this "*jus cogens* argument." This would appear to have been an obvious position to take, given that this would indicate that the Treaty was void *ab initio*. Instead, these states opted simply to argue that the Treaty violated Article 2(4) in a more general sense.¹⁸⁰

Moreover, it is notable that some states expressed a degree of approval for the Treaty.¹⁸¹ The reasoning employed by these states was not entirely clear, although it must be admitted that this seemed to be on the basis that Article IV did not violate the prohibition at all, rather than because the prohibition was not peremptory.¹⁸² It is certainly true that no state explicitly claimed that the rule was not a *jus cogens* norm. Nonetheless, these debates in the Security Council again offered states a clear and obvious opportunity to affirm the peremptory status of the prohibition. Indeed, this issue was explicitly raised in the Security Council by one state and then studiously ignored by all others.

Taking Security Council debates more generally—which by their very nature relate to issues of the use of force—it is extremely rare for states to affirm the peremptory status of the prohibition. One example is

175. U.N. SCOR, *supra* note 174, at 16–17.

176. See ORAKHELASHVILI, *supra* note 4, at 158–59.

177. See generally, U.N. SCOR, 19th Sess. 1094th mtg.-1104th mtg., U.N. Docs. S/PV.1094—S/PV.1104 (Feb. 17–Mar. 17, 1964).

178. See S.C. Res. 186, U.N. SCOR, 19th Sess. U.N. Doc. S/5575 (Mar. 4, 1964); S.C. Res. 187, U.N. SCOR, 19th Sess. U.N. Doc. S/5603 (Mar. 13, 1964). Both emerged from the debates in the Security Council over the Cyprus issue at this time, but neither touched on the *jus cogens* question.

179. There were a number of states that took this view. See, for example, the positions adopted by the Soviet Union, U.N. SCOR, 19th Sess. 1096th mtg. at 3–12, U.N. Doc. S/PV.1096 (Feb. 19, 1964), and Czechoslovakia, U.N. SCOR, 19th Sess., 1097th mtg. at 10–15, U.N. Doc. S/PV.1097 (Feb. 25, 1964).

180. See sources cited *supra* note 179.

181. See, for example, the positions of the United States, U.N. SCOR, 19th Sess. 1096th mtg., *supra* note 179, at 13–17, and the United Kingdom, U.N. SCOR, 1098th mtg., *supra* note 174, at 10–14.

182. See, U.N. SCOR, 19th Sess., 1096th mtg., *supra* note 179, at 13–17; U.N. SCOR, 21st Sess., 1098th mtg., *supra* note 174, at 10–14.

a statement to this effect by Japan with regard to the Falklands/Malvinas conflict in 1982. Here, the Japanese representative in the Security Council accused Argentina of violating a *jus cogens* norm by using force in attempting to reclaim the islands.¹⁸³ Another more recent example is India's reference in 1999 to the peremptory status of the prohibition in the context of discussions in the Security Council on the issue of children in armed conflict.¹⁸⁴ However, these two examples are notable because they appear anomalous when compared to common practice. They are exceptions to a general trend and are relevant because of their scarcity.

Finally, of the few scholars that do cite state practice in support of the peremptory status of the prohibition, a number make much of the fact that the United States has taken this view.¹⁸⁵ This is sometimes evidenced by pointing to the expression of the view that the prohibition is *jus cogens* in the Restatement of Foreign Relations Law of the United States (Third).¹⁸⁶ Care should be taken here, however, as the "restatements of the law" treatises are prepared by an independent body, the American Law Institute, and thus, this document cannot be seen as constituting the practice of the United States.

Nonetheless, it is generally true that the United States has viewed the prohibition as a *jus cogens* norm.¹⁸⁷ As noted above, the United States, along with Nicaragua, saw the rule as peremptory during the *Nicaragua* case proceedings.¹⁸⁸ Indeed, the United States has explicitly taken this view elsewhere.¹⁸⁹ This is potentially very important, as the legal position of the United States is perhaps more telling at this point in history in the context of the formation of customary international law than the

183. U.N. SCOR, 37th Sess. 2350th mtg. at 6, U.N. Doc. S/PV.2350 (Apr. 3, 1982).

184. U.N. SCOR, 54th Sess., 4037th mtg. at 22, U.N. Doc. S/PV.4037 (Resumption 1) (Aug. 25, 1999).

185. See, e.g., Ronzitti, *supra* note 4, at 150; Schachter, *supra* note 4, at 129.

186. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 102 cmt. k (1987). See, e.g., Henderson, *supra* note 1, at 9–10, 10 n. 63; Stephens, *supra* note 4, at 254.

187. Having said this, the United States has not always taken this viewpoint, as is evidenced by its expressed position in 1970, in the context of the debates over the drafting of the Declaration on the Principles of International Law Concerning Friendly Relations and Cooperation Among States. See *supra* note 146 and accompanying text.

188. See *supra* note 39 and accompanying text. Again, it should be noted that Nicaragua's position as to the peremptory status of the prohibition in its Memorial was not entirely explicit, although this could be inferred from para. 231 of the Nicaraguan Memorial. Iran took this view more explicitly in its written pleadings in the Oil Platforms case, Memorial of the Islamic Republic of Iran, Case Concerning Oil Platforms (Iran v. U.S.), 2001 I.C.J. Pleadings Vol. I 4, ¶¶ 4.05–4.06 (June 8, 1993).

189. See, e.g., Memorandum from R.B. Owen, Legal Adviser of the State Dep't to Warren Christopher, Acting Sec'y of State (Dec. 29, 1979), *quoted in* Marian N. Leich, *Contemporary Practice of the United States Relating to International Law*, 74 AM. J. INT'L L. 418, 418–20 (1980).

positions taken by other states, particularly with regard to the *jus ad bellum*.¹⁹⁰

However, the test for a *jus cogens* norm is more exacting than that for the formation of “ordinary” customary international law.¹⁹¹ It would seem reasonable to conclude that, with regard to the conferring of peremptory status, the view advanced by the United States is far from weighty enough to “tip the balance” toward a conclusion that the community as a whole has taken any such position, unless there already exists a large majority of states holding the same view. For example, Orakhelashvili has highlighted that the United States argued that a 1978 treaty between the Soviet Union and Afghanistan¹⁹² might be void for conflicting with *jus cogens*, on the basis that Article 4 of the Treaty potentially provided for the use of force.¹⁹³ This was indeed the position that the United States took,¹⁹⁴ but it is perhaps more notable that no other state appeared to take this view regarding the Treaty, or seemed willing to support such a position.¹⁹⁵

D. *The Implications of the Sporadic State Acceptance of the Prohibition as Peremptory*

This brief foray into the state practice is not even close to being sufficient to conclusively demonstrate that the prohibition of the use of force has failed to achieve peremptory status by virtue of a lack of state acceptance. Indeed, there are some clear examples of states explicitly adhering to this view. While the majority of states refrained from affirming the peremptory status of the prohibition in the debates highlighted, in most cases, at least some states did expressly hold this view. As such, one may point to a cumulative effect of acceptance across these examples.¹⁹⁶

190. The position of the United States is in particular important in the context of the customary development of the *jus ad bellum*, because it is one of the few states that is capable of using military force on any significant scale. See James A. Green, *Fluctuating Evidentiary Standards for Self-Defence in the International Court of Justice*, 58 INT. & COMP. L.Q. 163, 174–75 (2009); Mary E. O’Connell, *Evidence of Terror*, 7 J. CONFLICT & SEC. L. 19, 25 (2002).

191. See *supra* note 108, and accompanying text. See also *supra* note 132 (explaining the similarities between the process of the formation of *jus cogens* norms and customary international law).

192. Afghanistan and Union of Soviet Socialist Republics Treaty of Friendship, Good-Neighborliness and Cooperation, Afg.-U.S.S.R., Dec. 5, 1978, 1145 U.N.T.S. 17976.

193. ORAKHELASHVILI, *supra* note 4, at 161–62.

194. Owen, *supra* note 189, ¶ 4.

195. Moreover, a reading of the Treaty would suggest that it was not a breach of the prohibition of the use of force in any event. See Afg.-U.S.S.R. Treaty, *supra* note 192.

196. Part IV.C of this Article considers a number of examples of state practice in this context: the debates of 1968 at the United Nations Conference on the Law of Treaties, see

Moreover, it would also seem that states almost never explicitly *deny* the peremptory status of the prohibition (leaving aside the apparently anomalous occurrence of this during the debates over the Friendly Relations Declaration). Nonetheless, it would seem much more common for states to refrain from taking any position as to the peremptory status of the prohibition, than to affirm its *jus cogens* character. This is true even when presented with claims to this effect made by other states or when there was a clear and suitable opportunity to do so. This, it is argued, would appear to be the overall position even when the practice cited here is taken cumulatively.

Of course, these examples of equivocal silence may be explained away on the basis that states have tended to see the peremptory status of the prohibition as self-evident. Alternatively, in some instances, a failure to affirm the peremptory status of the prohibition may have been because it was politically imprudent in the particular circumstances to do so. One could easily envisage this possibility with regard to the Cyprus/Turkey dispute over the Treaty of Guarantee, for example.¹⁹⁷ It must be admitted that silence is not the same thing as explicit rejection, but then neither is it the same as affirmation. The silence of the majority is usually seen as being enough for the constitution of new rules of customary international law. Indeed, silence is interpreted as acquiescence for the purposes of “ordinary” customary law making.¹⁹⁸ However, it may be questioned

supra notes 138–141 and accompanying text, the debates in various forums concerning the 1970 Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations, *see supra* notes 142–148 and accompanying text, the debates between 1976 and 1983, in various forums, regarding the Soviet proposal for a supplementary treaty on the use of force, *see supra* notes 149–166 and accompanying text, the 1987 debates in Sixth Committee of the U.N. General Assembly regarding the framing of the Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations, *see supra* notes 167–172 and accompanying text, the debates in the U.N. Security Council, both generally and specifically with regard to the 1964 dispute over the 1960 Cyprus/Turkey Treaty of Guarantee, *see supra* notes 173–184 and accompanying text, and the practice of the United States, in general but particularly with regard to the 1978 treaty between the Soviet Union and Afghanistan, *see supra* notes 185–195 and accompanying text.

197. *See supra* notes 173–182 and accompanying text.

198. This can be seen from the common view that states can only exempt themselves from emerging customary international law through persistent objection. *See, e.g.*, Michael Akehurst, *Custom as a Source of International Law*, 47 BRIT. Y.B. INT'L L. 1, 23–27 (1974–1975); Maurice H. Mendelson, *The Formation of Customary Law*, 272 RECUEIL DE COURS 155, 227–44 (1998); Ted Stein, *The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law*, 26 HARV. INT'L L. J. 457 (1985). It should be noted that the present writer does not necessarily subscribe to the existence of the so-called “persistent objector rule” in international law and instead takes the skeptical view advanced by, for example, Jonathan I. Charney, *The Persistent Objector Rule and the Development of Customary International Law* 56 BRIT. Y.B. INT'L L. 1 (1985). However, such a critique is beyond the scope of this Article.

whether silence is enough to bestow supernorm status on a rule, given that agreement must be reached by the community of states as a whole, and given that once the rule is formed, states are essentially stuck with it.¹⁹⁹

Taking a contrary view, one could argue that the fact that states do not explicitly reject the preemptory status of the prohibition can be explained on the basis that it would be politically unwise for them to do so. Given the value-based rhetoric surrounding *jus cogens*, and the agreed importance of the prohibition in modern international law, any suggestion by a state that the rule is not *jus cogens* could well be perceived as some kind of nefarious endorsement of international aggression. Yet, if the community of states as a whole has truly accepted the rule as preemptory, one might expect such acceptance to be explicit in a more widespread manner than this brief survey indicates.

Christenson has made the point, with regard to the claims put forward by scholars that any particular rule of international law is a preemptory norm, that the “[s]tate practice cited in support of overriding norms of *jus cogens* seems suspect and fragmented.”²⁰⁰ Two points can be made here. First, writers claiming the preemptory status of the prohibition of the use of force do not tend to cite *any* state practice, “suspect” or otherwise, to support this. Second, when one does begin to examine the practice, it would seem that there is enough evidence to at least suggest that state acceptance and recognition of the preemptory status of the prohibition of the use of force may be “fragmented.”

Some states are, or have been, explicit that they see the prohibition of the use of force as being preemptory. There may perhaps be enough practice of this kind to support such a view, depending on how strictly the requirement of acceptance and recognition by the community of states as a whole is applied. Equally, a larger number of states seem un-

199. Most scholars would hold that the “persistent objector rule” cannot apply to *jus cogens* norms. See, e.g., LEPARD, *supra* note 82, at 235–37, 250–52; Byers, *supra* note 38, at 217, 223; Jonathan I. Charney, *Universal International Law*, 87 AM. J. INT’L L. 529, 541 (1993); Holning Lau, *Rethinking the Persistent Objector Doctrine in International Human Rights Law*, 6 CHIC. J. INT’L L. 495, 495, 498 (2005); J. Brock McClane, *How Late in the Emergence of a Norm of Customary International Law May a Persistent Objector Object?*, 13 ILSA J. INT’L L. 1, 25 (1989); Adam Steinfeld, Note, *Nuclear Objections: The Persistent Objector and the Legality of the Use of Nuclear Weapons*, 62 BROOK. L.R. 1635, 1640 (1996). This position has also been taken by the Inter-American Commission on Human Rights. See *Domingues v. United States*, Case 12.285, Inter-Am. Comm’n H.R., Report No. 62/02, OEA/Ser.L./V./II.117, doc. 1, rev. 1, ¶ 49 (2002). Admittedly, the apparent fact that persistent objectors will nonetheless be bound by preemptory norms does not confirm that silence is inadequate to contribute to the formation of a rule of *jus cogens*, but if states are unable to exempt themselves from a preemptory norm through objection, this would seem conceptually logical. For a contrary view, however, see Nieto-Navia, *supra* note 137, at 612.

200. Christenson, *supra* note 8, at 587.

willing to affirm the peremptory nature of the rule, for whatever reason. The fact that endorsement of the peremptory status of the prohibition is sporadic in the small amount of practice herein examined indicates that there needs to be a more detailed review of the state practice on this issue. The aim of this Section has merely been to highlight that the pervading assumption that states have accepted the prohibition as *jus cogens* needs to be more rigorously tested. The only way to reach a firm conclusion on this question is through an extensive and systematic survey of state practice. Unfortunately, such a survey is beyond the scope of this Article.

CONCLUSION

This Article has set out a number of problems with the conclusion, uncritically reached by so many, that the prohibition of the use of force is a *jus cogens* norm. It was first argued that the conjoined nature of the prohibition of the use of force with the prohibition of the threat of force in Article 2(4) leads to difficulties, given that the ban on the threat of force is clearly not peremptory in character.

A more fundamental issue was then examined, that of the exceptions to the general prohibition. Given that these exceptions are universally accepted, it is impossible to conclude that the prohibition is, in itself, peremptory. Thus, if one is to hold that the prohibition is *jus cogens*, a suitable norm must be constructed to take into account the right of self-defense and Security Council authorized collective security actions. Yet any attempt to formulate such a norm is problematic given that certain aspects of the *jus ad bellum* are clearly not peremptory, while other rules must be for the norm to function. As such, the selection of rules for the norm is a difficult process, and the number of interrelated rules involved makes any norm constructed overly long and unclear. Adding to this lack of clarity is the fact that many of the rules that must necessarily form part of the peremptory norm are themselves uncertain in terms of content or scope.

This Article then highlighted that the restrictive nature of the *jus cogens* framework does not seem to fit with the reality of the development of the law on the use of force. Examples of current arguable shifts in customary international law—self-defense against non-state actors and cyber-attacks—were used to demonstrate the problem of a “frozen” *jus ad bellum*.

Finally, it has been argued that the state practice in accepting the prohibition of the use of force as peremptory is perhaps not as clear as the majority of scholars assume, although it is acknowledged that the

brief study of the state practice conducted here does not establish a conclusive position on the issue.

Now, one might reasonably ask: Why does all this matter? The concerns expressed here could well be regarded as boiling down to a single issue of semantics. If the prohibition of the use of force is accepted by all states *prima facie*, and applies universally, what difference does it make whether the norm is labeled “*jus cogens*” or not? It is unlawful to use force if the peremptory character of the rule is accepted, but then, it is also unlawful if it is not.²⁰¹

It is worth keeping in mind that the importance of the peremptory status (or lack thereof) of any given rule can be overstated. Nonetheless, a *jus cogens* norm potentially has an additional “compliance pull”²⁰² to it. The widespread acceptance of the *jus cogens* concept means that states are more likely to take special note of peremptory norms and will potentially comply with them more often than with other rules. More practically, a *jus cogens* rule does not merely find contrary practice unlawful, it voids the formation of new contrary norms (take, as an example in this context, “pacts of aggression” of the sort once common) *ab initio*.²⁰³ Of course, again, whether these implications of peremptory status are seen as “good” depends on one’s views as to the desirability and functionality of the *jus cogens* project in international law.

It is, however, enough to say that if one takes the view that *jus cogens* plays, or can play, a positive role in securing world order—strengthening and protecting fundamental values, as well as restraining unchecked power—then it is surely desirable that any purported *jus cogens* norms are clear, identifiable, and properly constituted. If one subscribes to the desirability of value-based “supernorms” in the international system, then the prohibition of the use of force would surely be a norm that one would want to ascribe such a character to given that the use of military force invariably involves death and destruction—a factor one should never lose sight of.²⁰⁴ The problems highlighted in this Article have implications for the legitimacy of that rule, and thus its compliance pull, at least in a relative sense when it is found to be in opposition to other, potentially less “fundamental,” norms.

Conversely, if one takes the view that *jus cogens* norms represent a creeping imposition of a particular value-set and an unwarranted and dangerous erosion of state sovereignty, it is equally desirable that the peremptory status of the prohibition be properly tested and critiqued. For

201. DINSTEIN, *supra* note 4, at 100.

202. On the concept of a norm’s “compliance pull,” see generally THOMAS M. FRANCK, *THE POWER OF LEGITIMACY AMONG NATIONS* (1990).

203. DINSTEIN, *supra* note 4, at 100–02.

204. See *supra* note 22 and accompanying text.

those that argue against the “relative normativity”²⁰⁵ of rules within the international legal system, the analysis of the peremptory status of the prohibition of the use of force herein may usefully highlight more pervasive problems inherent in the *jus cogens* concept.

Thus, this Article leaves it to the reader to take his or her own view as to the utility of its critique. Ultimately, this is because neither “desirability” nor “undesirability” have any legally constituting effect with regard to the creation of *jus cogens* norms. As Barnidge notes:

Law does not spring into being, in a binding sense, simply because one can argue *ad nauseam* as to the particular norm’s purported value, moral and ethical pedigree, or public policy purchase. Article 53’s test for a *jus cogens* norm is explicit . . . No mention is made, nor is a requirement set, as to such a norm’s fidelity to one’s own sense of values, morality and ethics, and public policy, whatever those may be.²⁰⁶

For all of *jus cogens*’ natural law gloss, the concept remains grounded in positivist international law.²⁰⁷ Indeed, it must remain so if it is to have any credibility or weight in a system that, for better or worse, remains primarily premised on state consent. For a norm to be seen as a rule of *jus cogens*, it must meet certain positivist criteria. Without entirely excluding the possibility that the prohibition of the use of force is a peremptory norm, this Article has aimed to highlight that the rule’s *jus cogens* status—when tested against these criteria—is extremely problematic. At the very least, it must be said that the widespread uncritical acceptance of the prohibition’s peremptory nature is concerning, particularly as the norm being discussed here is one that forms a cornerstone of the modern international legal system.

The peremptory status of the prohibition of the use of force requires extensive further investigation. The problems raised in this Article must be examined in more detail—and ultimately overcome—if the norm is to be properly considered a peremptory one.

205. This phrase was famously adopted by Weil, *supra* note 8.

206. Barnidge, *supra* note 8, at 205.

207. Nieto-Navia, *supra* note 137, at 602.