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

James A. Green[*]

INTRODUCTION

It is incontrovertible that the prohibition of the unilateral use of force is a fundamental aspect of the United Nations (UN) era system for governing the relations between states.[1] Given this fact, the prohibition, as set out most crucially in Article 2(4) of the UN Charter,[2] is often seen as the archetypal example of a *jus cogens* norm (a

[*] University of Reading, UK. An important contribution was made to this article by Dino Kritsiotis, in that the initial idea underpinning it emerged from a conversation between him and the author which took place in a coffee shop in Ann Arbor, Michigan in the spring of 2005. The author would also like to acknowledge the extremely useful comments on earlier drafts kindly provided by Sandy Ghandhi, Robert P. Barnidge, Jr. and Lawrence McNamara. Finally, special thanks must go to Stephen Samuel for his invaluable research assistance.

[1] Thus Henkin states that the prohibition "is the principle norm of international law of this [i.e., last] 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 Strategy of the United States: The Pre-Emptive Use of Force and the Persistent Advocate*, 15 TULSA JOURNAL OF COMPARATIVE AND INTERNATIONAL LAW 1, 9 (2007-2008).

[2] Charter of the United Nations, Art. 2(4), Oct. 24, 1945, 1 UNTS XVI.

"peremptory norm" of general international law).[3] Certainly, an overwhelming majority of scholars view the prohibition as having a peremptory character.[4] Similarly, the

[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 HUMAN RIGHTS QUARTERLY 15, 15 (1993).

[4] Academic acceptance of this view is extremely widespread. Some examples include: ALEXANDER ORAKHELASHVILI, PEREMPTORY NORMS IN INTERNATIONAL LAW, 50 (2006); LAURI HANNIKAINEN, PEREMPTORY NORMS (JUS COGENS) IN INTERNATIONAL LAW: HISTORICAL DEVELOPMENT, CRITERIA, PRESENT STATUS, 323-356, particularly at 323 and 356 (1988); YORAM DINSTEIN, WAR, AGGRESSION AND SELF-DEFENSE, 99-104 (2005); LINDSAY MOIR, REAPPRASING THE RESORT TO FORCE: INTERNATIONAL LAW, JUS AD BELLUM AND THE WAR ON TERROR, 9 (2010); Oscar Schachter, *In Defense of International Rules on the Use of Force*, 53 UNIVERSITY OF CHICAGO LAW REVIEW 113, 129 (1986); JAMES CRAWFORD, THE CREATION OF STATES IN INTERNATIONAL LAW, 146 (2006); IAN SINCLAIR, THE VIENNA CONVENTION ON THE LAW OF TREATIES, 215-216 and 222-223 (1984); Bruno Simma, *NATO, the UN and the Use of Force: Legal Aspects*, 10 EUROPEAN JOURNAL OF INTERNATIONAL LAW 1, 3 (1999); Carin Kahgan, *Jus Cogens and the Inherent Right to Self-Defence*, 3 INTERNATIONAL LAW STUDENTS ASSOCIATION JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW 767, 777-781 (1996-1997); Jonathan I. Charney, *Anticipatory Humanitarian Intervention in Kosovo*, 93 AMERICAN JOURNAL OF INTERNATIONAL LAW 834, 837 (1999); Alfred Verdross, *Jus Dispositivum and Jus Cogens in International Law*, 60 AMERICAN JOURNAL OF INTERNATIONAL LAW 55, 60 (1966); Natalino Ronzitti, *Use of Force, Jus Cogens and State Consent*, *in* THE CURRENT LEGAL REGULATION OF THE USE OF FORCE 147, 150 (Antonio Cassese ed., 1986); Egon Schwelb, *Some Aspects of International Jus Cogens as Formulated by the International Law Commission*, 61 AMERICAN JOURNAL OF INTERNATIONAL LAW 946, 952 (1967); Majorie M. Whiteman, *Jus Cogens in International Law, with a Projected List*, 7 GEORGIA JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW 609, 625 (1977); Karen Parker & Lyn B. Neylon, *Jus Cogens: Compelling the Law of Human Rights*, 12 HASTINGS INTERNATIONAL AND COMPARATIVE LAW REVIEW 411, 436-437 (1988-1989); Pamela J. Stephens, *A Categorical Approach to Human Rights Claims: Jus Cogens as a Limitation on Enforcement*,

International Law Commission (ILC) has taken this view[5] 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 permitted".[7] This article questions this widely held view: is the prohibition of the use of force in fact a norm of *jus cogens*?

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

---

22 WISCONSIN INTERNATIONAL LAW JOURNAL 245, 253-254 (2004); Werner Scholtz, *The Changing Rules of Jus ad Bellum: Conflicts in Kosovo, Iraq and Afghanistan*, 2 POTCHEFSTROOM ELECTRONIC LAW JOURNAL 2, 8-10 (2004); Jochen A. Frowein, *Ius Cogens, in* MAX PLANCK ENCYCLOPAEDIA OF PUBLIC INTERNATIONAL LAW, at para. 8 (Rüdiger Wolfrum ed., 2009, online version, http://www.mpepil.com); NICHOLAS J. WHEELER, SAVING STRANGERS: HUMANITARIAN INTERVENTION IN INTERNATIONAL SOCIETY 45 (2000); Dino Kritsiotis, *Reappraising Policy Objections to Humanitarian Intervention*, 19 MICHIGAN JOURNAL OF INTERNATIONAL LAW 1005, 1043 (1997-1998); MOHAMMAD T. KAROUBI, JUST OR UNJUST WAR? 109 (2004); Michael N. Schmitt, *Computer Network Attack and the Use of Force in International Law: Thoughts on a Normative Framework*, 37 COLUMBIA JOURNAL OF TRANSNATIONAL LAW 885, 922 (1998-1999); and Henderson, *supra* note 1, 9-10.

[5] See notes 43-44 and accompanying text, *infra*.

[6] See notes 44-50 and accompanying text, *infra*.

[7] Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 ICJ REP. 136 (July 9) [hereinafter "Wall advisory opinion"]. See Separate Opinion of Judge Elaraby, at para. 3.1 (emphasis added).

concerning. The aim of this piece is 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 an 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. Whilst 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 norm 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. It is not the aim here to debate the existence of *jus cogens* norms per se. However, it is certainly worth noting that a number of writers have raised

concerns about the very existence of *jus cogens* norms, with reference to positivist conceptions as to how international law is formed and developed.[8] Similar points have also been made about the desirability of such norms. These concerns relate, for example, to the potentially negative impact of peremptory norms upon the structure and functionality of the international legal system,[9] the clarity and legitimacy of such norms,[10] the political motivations that underpin the very concept of *jus cogens*[11] and the political motivations and arbitrary selection that may be seen in the categorization by scholars of particular rules as being peremptory.[12] It must be acknowledged that such criticisms are valuable for any understanding of the international legal system. However, this article does not engage in the wider debates as to the existence of *jus cogens* norms. 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

---

[8] See, e.g., 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); and Gordon A. Christenson, *Jus Cogens: Guarding Interests Fundamental to International Society*, 28 VIRGINIA JOURNAL OF INTERNATIONAL LAW 585 (1987-1988).

[9] See, e.g., Prosper Weil. *Towards Relative Normativity in International Law?*, 77 AMERICAN JOURNAL OF INTERNATIONAL LAW 413 (1983).

[10] See, e.g., Arthur M. Weisburd, *The Emptiness of the Concept of Jus Cogens, as Illustrated by the War in Bosnia-Herzegovina*, 17 MICHIGAN JOURNAL OF INTERNATIONAL LAW 1 (1995-1996); and Glennon, *supra* note 8, in general, but particularly at 1266.

[11] See, e.g., Robert P. Barnidge, Jr., *Questioning the Legitimacy of Jus Cogens in the Global Legal Order*, 38 ISRAEL YEARBOOK OF HUMAN RIGHTS 199 (2008), particularly at 203-210.

[12] See, e.g., Anthony D'Amato, *It's a Bird, It's a Plane, It's Jus Cogens!*, 6 CONNECTICUT JOURNAL OF INTERNATIONAL LAW 1 (1990-1991); and Charlesworth & Chinkin, *supra* note 3.

general notion of *jus cogens* and that there exist at least some basic conceptual rules as to its content and operation.[13]

It would seem, then, that scholars fall into to two broad camps on the issue of peremptory norms: those that debate the existence or functionality of *jus cogens* norms per se[14] and those who conceptually accept such norms[15] and who, as a consequence, automatically accept the prohibition of the use of force as being one of their number.[16] Broadly speaking, the present writer falls into the second group of writers, who accept the existence of such norms in principle, yet does not necessarily subscribe to the seemingly resultant conclusion that the prohibition of the use of force possesses peremptory status.

I. IDENTIFYING A PEREMPTORY NORM

The aim in this paper 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. As noted, this analysis is based upon the assumption that such norms exist, as do certain criteria for identifying them.

---

[13] For a summary of some of the supporting state practice, see HANNIKAINEN, *supra* note 4, 166-181; Alexander Orakhelashvili, *Peremptory Norms and Reparation for Internationally Wrongful Acts*, 3 BALTIC YEARBOOK OF INTERNATIONAL LAW 19, 24 (2003); and Kahgan, *supra* note 4, 773-775.

[14] Linkderfalk labels this group as the "skeptics". Ulf Linderfalk, *The Effect of Jus Cogens Norms: Whoever Opened Pandora's Box, Did You Ever Think About the Consequences?*, 18 EUROPEAN JOURNAL OF INTERNATIONAL LAW 853, 855 (2007).

[15] *Id.*, Linkderfalk labels this group as the "affirmants".

[16] 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, 150.

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 treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, *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*.[17]

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; it may be argued that it was not designed to act as a definition for the concept per se.[18] Indeed, the Article is clear that the definition is given "[f]or the purposes of the present Convention".[19] Moreover, as of April 2010, only 111 states are party to the Convention, a little over half

[17] Vienna Convention on the Law of Treaties, Art. 53, May 23, 1969, 1155 UNTS 331 (emphasis added). Complementing Art. 53 is Art. 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."

[18] Erika de Wet, *The Prohibition of Torture as an International Norm of Jus Cogens and Its Implications for National and Customary Law*, 15 EUROPEAN JOURNAL OF INTERNATIONAL LAW 97, 98-99 (2004).

[19] Vienna Convention on the Law of Treaties, *supra* note 17, Art. 53.

of all UN member states.[20] 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.[21]

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 – in much the same way that Article 38(1) of the Statute of the ICJ[22] is now viewed as being the starting point for identifying the sources of international law, irrespective if 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*[23] – Article 53 now appears to have been accepted as the key source for the content of *jus cogens* norms in a general sense.[24]

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:[25]

(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;

---

[20] See UN Treaty Collection: Status of the Vienna Convention on the Law of Treaties, 1969, http://treaties.un.org/Pages/ViewDetailsIII.aspx?&src=TREATY&mtdsg_no=XXIII~1&chapter=23&Temp=mtdsg3&lang=en.

[21] *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 Convention).

[22] Statute of the International Court of Justice, Art. 38(1), Jun. 26, 1945, 33 UNTS 993.

[23] David Kennedy, *The Sources of International Law*, 2 AMERICAN UNIVERSITY JOURNAL OF INTERNATIONAL LAW AND POLICY 1, 2-3 (1987).

[24] HANNIKAINEN, *supra* note 4, 3.

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

(3) Cannot be derogated from; and

(4) Can only be modified by a new norm of the same status.

It will be important to keep these criteria in mind throughout the following analysis: they will be returned to at various points.

II. The Majority View: The Prohibition as Peremptory

Before embarking upon 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.

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, then the prohibition of the use of military force would seem to be exactly the sort of norm that would, or at least should, qualify. 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.[26]

Perhaps, then, it is understandable that the vast majority of commentators have perceived the prohibition as a peremptory norm. One of the underlying rationales for the entire *jus cogens* concept is the desire to impose some kind of fundamental standard of common values upon state interaction and to strengthen the effectiveness of international

[26] It is worth noting that the preamble to the UN Charter indicates that one of the fundamental aims of the organization is "to save succeeding generations from the scourge of war". Charter of the United Nations, *supra* note 2, preamble.

law in certain areas of common concern.[27] Indeed, many have likened *jus cogens* norms to the historic value-based "natural law" approach to international legal theory.[28] The modern *jus ad bellum* has many of its roots in the "just war" theory,[29] an approach to warfare that is clearly embedded in natural law thinking.[30] Thus, *jus cogens* and the *jus ad bellum* share common natural law underpinnings; one might view them as a perfect conceptual fit.

There is little doubt that since 1945 states have viewed the prohibition of the use of force as a cornerstone of the UN system and a crucial rule of international law.[31] Indeed, the prohibition is universal in scope. This is in part because it is present in the UN Charter,[32] to which almost all states are party,[33] but also because the prohibition is an

---

[27] See, e.g., Alexander Orakhelashvili, *The Impact of Peremptory Norms on the Interpretation and Application of United Nations Security Council Resolutions*, 16 EUROPEAN JOURNAL OF INTERNATIONAL LAW 59 (2005), at 62; Lisa Yarwood, *Jus Cogens: Useful Tool or Passing Fancy – A Modest Attempt at Definition*, 38 BRACTON LAW JOURNAL 16 (2006), particularly at 23; and Erika de Wet, *The International Constitutional Order*, 55 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 51 (2006), at 57-62.

[28] See Mark W. Janis, *The Nature of Jus Cogens*, 3 CONNECTICUT JOURNAL OF INTERNATIONAL LAW 359 (1987-1988), particularly at 361-363; and Parker & Neylon, *supra* note 4, at 419-423.

[29] See Joachim von Elbe, *The Evolution of the Concept of Just War in International Law*, 33 AMERICAN JOURNAL OF INTERNATIONAL LAW 665 (1939); and MICHAEL WALZER, JUST AND UNJUST WARS: A MORAL ARGUMENT WITH HISTORICAL ILLUSTRATIONS, particularly at 21-22 and 51-73 (2000).

[30] 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, particularly at 10-14 (Howard M. Hensel ed., 2008); and DEREK W. BOWETT, SELF-DEFENSE IN INTERNATIONAL LAW 4-8 (1958), specifically with regard to the right of self-defense.

[31] See note 1, *supra*.

[32] Charter of the United Nations, *supra* note 2, Art. 2(4).

accepted rule of customary international law.[34] Therefore, *all* states are bound by the general requirement not to use military force in their international relations. In other words, the prohibition of the use of force can be said to be a fundamental and universal rule. As such, it is relatively clear that the prohibition meets the first test for a *jus cogens* norm – it is a rule that can be identified as "a norm of general international law".[35]

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 vast majority of writers have concluded that the modern prohibition of the forcible military action is an archetypal rule of *jus cogens*.[36] Representing this majority view, Orakhelashvili has stated: "[t]he prohibition of the use of force by States *undoubtedly* forms part of *jus cogens*".[37]

However, it is worth noting that while the scholarly acceptance of this position is *near* universal, it is not entirely universal. Of course, there are the minority of writers who fall into the first group of scholars who object to the notion of *jus cogens* norms per

---

[33] IAN BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 113 (1963); and JAI N. SINGH, USE OF FORCE UNDER INTERNATIONAL LAW 210 (1984).

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

[35] Vienna Convention on the Law of Treaties, *supra* note 17, Art. 53.

[36] See note 4, *supra*.

[37] ORAKHELASHVILI, *supra* note 4, 50.

se. Such writers are unlikely to view the prohibition of the use of force as being peremptory, for obvious reasons.[38] More importantly for the purposes of this article, there are an even smaller number of writers who, whilst seeming to accept the general concept of *jus cogens* norms, have questioned the peremptory status of the prohibition.[39] The most notable example of this kind is a 2007 article by Ulf Linderfalk.[40] This paper importantly critiqued the claim that the prohibition is a norm of *jus cogens*. Indeed, as one of the very few pieces of academic writing to consider some of the concerns raised herein, that article will be crucial for later analysis, particularly in section III.B., below.

---

[38] See, e.g., MICHAEL J. GLENNON, LIMITS OF LAW, PREROGATIVES OF POWER: INTERVENTIONISM AFTER KOSOVO 40-42 (2001); Weisburd, *supra* note 10, particularly at 22 and 44-50; and Barnidge, who alliteratively refers to "the *purportedly* peremptory prohibition on the use of force". Barnidge, *supra* note 11, at 212 (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).

[39] 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., Gazzini, who discusses 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) TARCISIO GAZZINI, THE CHANGING RULES ON THE USE OF FORCE IN INTERNATIONAL LAW 89 (2005). The obvious implication here is that Gazzini does not view such a conclusion as being self-evident. Others have explicitly expressed some uncertainty as to the peremptory status of the prohibition without then going on to discuss their apparent concerns. Take, for example, Laursen, who states: "[i]ndications are that today, all use of force is prohibited by a *jus cogens* norm, although this is not entirely clear." Andreas Laursen, *The Use of Force and (the State of) Necessity*, 37 VANDERBILT JOURNAL OF TRANSNATIONAL LAW 485, 525 (2004). However, Laursen does not proceed to state *why* this is unclear.

[40] Linderfalk, *supra* note 14.

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".[41]

In 1966, 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*".[42] More recently, in the context of the draft articles on state responsibility, the Commission again noted in 2001 that "it is generally accepted that the prohibition of aggression is to be regarded as peremptory".[43]

It is argued here that the ICJ has also adopted this position. Of course, the judgments of the World Court are only legally binding in the case at hand and upon the parties to that case.[44] 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

[41] *Id*. at 859.

[42] UN Doc. A/6309/Rev.1, *Yearbook of the International Law Commission*, 1966, II, 247. The ILC reaffirmed this view when it proceeded to set out a list of example *jus cogens* norms, of which the prohibition of the use of force was the first, at 248.

[43] UN Doc. A/56/10, *Report of the International Law Commission on the Work of its Fifty-Third Session*, 2001, 112.

[44] Statute of the International Court of Justice, *supra* note 22, Art. 59.

judgment as constituting an authoritative interpretation of international law.[45] It is therefore noteworthy that 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*".[46]

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.[47] As can be seen from

---

[45] See ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 202-204 (1994); and Natalia Ochoa-Ruiz & Esther Salamanca-Aguado, *Exploring the Limits of International Law Relating to the Use of Force in Self-Defence*, 16 EUROPEAN JOURNAL OF INTERNATIONAL LAW 499, 501 (2005).

[46] Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v. United States of America), Merits, 1986 ICJ REP. 14 (June 27), para. 190 [hereinafter "Nicaragua case"].

[47] 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

the quoted passage, the ICJ certainly at least referred to the view of the ILC that the prohibition was peremptory. Additionally, the Court went on to point out that both Nicaragua and the United States took this position in their respective Memorial and Counter-Memorial.[48] Strengthening the view that the Court has interpreted the prohibition of the use of force as a peremptory norm were statements made to this effect by judges in their individual opinions attached to the Nicaragua case.[49] Indeed, although the Court has not, as a majority, affirmed this view since, a number of its judges have

---

international law. See, e.g., Dinah Shelton, *Righting Wrongs: Reparations in the Articles on State Responsibility*, 96 AMERICAN JOURNAL OF INTERNATIONAL LAW 833, at 843 (2002). The present writer does not find such a reading of the decision particularly persuasive, however: it is here argued that a better reading is that 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, see ORAKHELASHVILI, *supra* note 4, 42. 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 JOURNAL OF INTERNATIONAL LAW 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.

[48] Nicaragua case, *supra* note 46, para. 190. See Memorial of Nicaragua, Merits [1985] ICJ PLEAD. VOL. IV, para. 231; and Counter-Memorial of the United States of America, Questions of Jurisdiction and Admissibility [1984] ICJ PLEAD. VOL. II, para. 314. 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. 231 of the Nicaraguan Memorial.

[49] Nicaragua case, *supra* note 46, Separate Opinion of Judge Nagendra Singh, at 153; and Separate Opinion of Judge Sette-Camara, at 199-200.

also pointed to the "supernorm" status of the prohibition in their individual opinions in other cases.[50]

All of the above demonstrates the widespread acceptance of the view that the prohibition is a norm of *jus cogens*. The following sections critique this claim.

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 in this context.[51] Is the *jus cogens* norm in question here Article 2(4) of the UN 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: 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.

---

[50] See Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America), Merits, 2003 ICJ Rep. 161 (Nov. 6), see Separate Opinion of Judge Simma, at para. 9; Separate Opinion of Judge Koojmans, at para. 46; and Dissenting Opinion of Judge Elaraby, at para. 1.1 [hereinafter "Oil Platforms case"]; and Wall advisory opinion, *supra* note 7, Separate Opinion of Judge Elaraby, at para. 3.1.

[51] Weisburd makes this general point in passing, *supra* note 10, 22.

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 UN Charter, as follows:

> All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.[52]

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: "Article 2(4) is the exemplary case of a peremptory norm."[53] For those who view the prohibition as *jus cogens*, this might seem to be a logical position given that Article 2(4) is the key source for the rule.[54] 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.

This is not the place to examine the threat of force in international law in any detail.[55] It is relatively uncontroversial to say, however, that states have not seen the

---

[52] Charter of the United Nations, *supra* note 2, Art. 2(4).

[53] Schachter, *supra* note 4, at 129.

[54] As Dinstein states: "the pivot on which the present-day *jus ad bellum* hinges is Article 2(4) of the Charter". DINSTEIN, *supra* note 4, 85.

[55] There is comparatively little literature examining the prohibition of the threat of force, but some key texts include: Romana Sadurska, *Threats of Force*, 82 AMERICAN JOURNAL OF INTERNATIONAL LAW 239 (1988); NIKOLAS STÜRCHLER, THE THREAT OF FORCE IN INTERNATIONAL LAW (2007); Marco Roscini,

prohibition of the threat of force in the same light as its weightier counterpart, the prohibition of the use of force.[56] Crucially, in state practice, threats of force frequently occur without censure or even comment.[57] In contrast to the legal prohibition of the use of force, which states inevitably reference and claim to adhere to even when breaching it, 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).[58] As such, it would seem reasonable to hold that the prohibition is far from a fundamental one. There is has been almost no customary international law development of the concept of

---

Threats of Armed Force and Contemporary International Law, 54 NETHERLANDS INTERNATIONAL LAW REVIEW 229 (2007); and Dino Kritsiotis, *Close Encounters of a Sovereign Kind*, 20 EUROPEAN JOURNAL OF INTERNATIONAL LAW 299 (2009).

[56] 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 *Id*., Sadurska, in general, but particularly 248-260; and *Id.*, Kritsiotis, at 302.

[57] See Sadurska, *supra* note 55, 239-240 and 257-260. However, for a contrary view, see Roscini, *supra* note 55, at 243-258.

[58] 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, see UN Doc. A/60/730-S/2006/178. This example is highlighted by Kritsiotis, *supra* note 55, 317-320, 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, particularly at 318.

the threat of force and, as such, it has little legal content beyond its cameo appearance in Article 2(4).[59]

It would therefore be extremely difficult to conclude that the prohibition of the threat of force is, or should be seen as, a rule of *jus cogens*. If states are willing for 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".[60] Less still can it be seen as "a norm from which no derogation is permitted".[61] 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."[62] As such, the claim that Article 2(4) *as a whole* is a norm of *jus cogens* is a hard one to support.[63]

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

---

[59] 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 55, particularly at 92-126.

[60] Vienna Convention on the Law of Treaties, *supra* note 17, Art. 53.

[61] *Id*.

[62] ARTHUR M. 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.

[63] 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 55, 62-62, quoted 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," at 63.

status to Article 2(4) in its entirety. Many 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*. Here, the claim does not relate to Article 2(4) as such, other than to the extent that the Article is a source for the prohibition, which is but one aspect of it. Instead, the focus is on the more specific rule that the use of military force is prohibited; it is this rule that is viewed as being peremptory.[64]

For the most part, those who adopt this latter formulation of the *jus cogens* norm do not seem to make this distinction – between Article 2(4) as a whole and the prohibition of the use of force as an element of it – 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, this would seem to be a preferable conclusion, as it excludes the problematic issue of the threat of force, whether the writers taking this approach have acknowledged this or not.

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.[65] The ICJ confirmed this in its Legality of the Threat or Use of Nuclear Weapons advisory opinion in 1996.[66] Indeed,

---

[64] See, e.g., Simma, *supra* note 4, at 3; and Parker & Neylon, *supra* note 4, at 436-437.

[65] BROWNLIE, *supra* note 33, 364; and DINSTEIN, *supra* note 4, 86.

[66] Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 ICJ REP. 22 (July 8) at para. 47.

in the Nicaragua case, the Court held that the prohibitions of the use and threat of force are, in legal terms, substantively equal.[67]

If a breach of the two norms is substantively legally equal 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. Article 2(4) is, as has already been noted, the key source for the prohibition of the use of force.[68] 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. 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 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.[69] Thus, whilst 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

[67] Nicaragua case, *supra* note 46, at para. 227.

[68] See note 54 and accompanying text, *supra*.

[69] See note 56 and accompanying text, *supra*.

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 this 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 UN system: "the 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."[70] Article 51 of the UN 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 UN 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.[71] In either case – self-defense or collective security – the prima facie unlawfulness of the use of force is precluded.

Therefore, if one accepts the 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 standalone 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

[70] Dino Kritsiotis, *When States Use Armed Force, in* THE POLITICS OF INTERNATIONAL LAW 45, 49 (Christian Reus-Smit ed., 2004) (emphasis in original, references omitted).

[71] See Charter of the United Nations, *supra* note 2, Arts. 51, 42 and 39 respectively.

uncontrovertibly 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 right of self-defense, it would in fact be unlawfully derogating from a norm of *jus cogens*."[72]

To take a treaty-based example, if one were to take the view that the prohibition of the use of force was, standing alone, a peremptory norm, then the North Atlantic Treaty would be instantly void, given that 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.[73] In other words, NATO would fall foul of Article 53 of the Vienna Convention on the Law of Treaties.[74] 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.

The fact that the prohibition of the use of force has agreed exceptions does not necessarily bar the norm from peremptory status, however, as long as one is willing to

---

[72] Linderfalk, *supra* note 14, 860. Sinclair and Kritsiotis also note this point, yet ultimately appear to accept the peremptory character of the prohibition. See respectively SINCLAIR, *supra* note 4, 215-216 and 222-223; and Kritsiotis, *supra* note 4, 1043.

[73] North Atlantic Treaty, Art. 5, Apr. 4, 1949, 34 UNTS 243. It has been argued 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 – that "[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, 1271.

[74] See Vienna Convention on the Law of Treaties, *supra* note 17, Art. 53. Or perhaps Art. 64, which holds that an existing treaty becomes void if a new conflicting *jus cogens* norm emerges. This would depend on when the prohibition of the use of force was seen to have taken on a peremptory character: before or after NATO came into existence.

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 its exceptions."[75]

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".[76] 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 the rules governing self-defense, the rules on forcible action as authorized by the Security Council – indeed, all of the rules on the use of force under international law.

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 intertwined nature of the rules of the *jus ad bellum*.[77] Is one to assume here that Orakhelashvili is talking about a single all encompassing *jus cogens* rule? 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

[75] Linderfalk, *supra* note 14, 860.

[76] ORAKHELASHVILI, *supra* note 4, at 51.

[77] Making a similar point, Barnidge has stated (although admittedly not specifically in relation to the law on the use of force): "[w]hen can it be said…that a norm exists as distinct and independent from similar norms?" Barnidge, *supra* note 11, at 202.

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.[78]

Adopting either approach, there remains a further issue, which is essentially the same problem that was encountered above 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.[79] This requirement is contained in Article 51 of the Charter.[80] It 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

[78] See Kahgan, *supra* note 4, at 794, who speaks of "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, she 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 791.

[79] Glennon uses a different example to make a similar point. Instead of the reporting requirement in 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 38, 42.

[80] Charter of the United Nations, *supra* note 2, Art. 51.

determinative as to the unlawfulness of a self-defense action.[81] To put this differently, a failure to report may be indicative of an unlawful use of force, but it certainly does not confirm one. 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 would be nonsensical. 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" was a peremptory rule, let alone enough states to equate to "the international community...as a whole".[82] Thus as Christenson correctly and categorically states: "the 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*".[83]

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.[84] This is to broadly define

---

[81] See Don W. Greig, *Self-Defence and the Security Council: What Does Article 51 Require?*, 40 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 366, 387-388 (1991); WILLIAMSON, *supra* note 34, 113; and Nicaragua case, *supra* note 46, para. 200.

[82] Vienna Convention on the Law of Treaties, *supra* note 17, Art. 53.

[83] Gordon A. Christenson, *The World Court and Jus Cogens*, 81 AMERICAN JOURNAL OF INTERNATIONAL LAW 93, 99 (1987) (emphasis added).

[84] Writers adopt this approach in different ways: see Linderfalk, *supra* note 14, in general, but particularly at 860 (arguing that aspects of the exceptions to the prohibition must be included in the peremptory norm); BRIAN D. LEPARD, CUSTOMARY INTERNATIONAL LAW: A NEW THEORY WITH PRACTICAL APPLICATIONS 7 and 38 (2010) (who states that it is only the prohibition of "the nondefensive use of force by one state against another" that is peremptory in character); HANNIKAINEN, *supra* note 4, 323-356, particularly at 329-333 and 340-349 (similarly distinguishing a peremptory prohibition of "aggressive" force from lawful uses

the *jus cogens* norm in question to encompass the exceptions to the prohibition, without going so far as incorporating the entire law on the use of force. 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. 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 UN is prohibited other than when it is employed in conformity with Article 51 of the UN Charter or when lawfully authorized by the Security Council under Article 42 of the UN Charter.*[85]

---

of force, which he sees as not being covered by the *jus cogens* rule); Ronzitti, *supra* note 4, in general, but particularly 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); Kahgan, *supra* note 4, in general, but particularly at 791 (arguing that the right of self-defense is part of the peremptory rule or even perhaps an additional peremptory rule); and Davis Brown, *Use of Force against Terrorism after September 11th: State Responsibility, Self-Defense and Other Responses*, 11 CARDOZO JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW 1, 19 (2003-2004) (also arguing that self-defense is *jus cogens*). For a contrary view, that it is at best extremely unclear whether self-defense can be considered *jus cogens*, see DINSTEIN, *supra*, note 4, 181.

[85] 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.

Such a formulation is far from satisfactory. This is because, for example, self-defense is governed by the rules of necessity and proportionality. There is near-universal acceptance of this fact,[86] and yet these criteria do not appear in Article 51 at all. Instead, they derive from customary international law.[87] Conversely, of course, 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.

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 14, at 860, 865 and 867.

[86] See JUDITH G. GARDAM, NECESSITY, PROPORTIONALITY AND THE USE OF FORCE BY STATES 6, 11 (2004); Oscar Schachter, *Implementing Limitations on the Use of Force: The Doctrine of Proportionality and Necessity: Remarks*, 86 AMERICAN SOCIETY OF INTERNATIONAL LAW PROCEEDINGS 39 (1992); and STANIMIR A. ALEXANDROV, SELF-DEFENSE AGAINST THE USE OF FORCE IN INTERNATIONAL LAW 20 (1996).

[87] 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 JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW 429 (2006).

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 UN Charter, given that a number of the crucial rules come from customary international law. 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 UN 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 UN or when authorized by the Security Council under Article 42 of the UN Charter, following a threat to the peace and breach of the peace or an act of aggression as determined by the Security Council.*[88]

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 this 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-

[88] See note 85, *supra*.

defense, are notoriously debated and unclear in themselves. Take, for example, the criteria of necessity and proportionality. These requirements are universally accepted in terms of their legal validity; 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.[89] 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.

Perhaps even more problematically, there are entire areas of the *jus ad bellum* that are fiercely contested by states. For example, it is here useful briefly to consider 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-

[89] JAMES A. GREEN, THE INTERNATIONAL COURT OF JUSTICE AND SELF-DEFENCE IN INTERNATIONAL LAW 106-107 (2009).

[90] The term "anticipatory self-defense" is used here to refer to military action taken in response to an *imminent* threat, whilst "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 to illustrate the problem of ascribing peremptory status to *jus ad bellum* rules by Linderfalk, *supra* note 14, at 861. See JACKSON N. MAOGOTO, BATTLING TERRORISM: LEGAL PERSPECTIVES ON THE USE OF FORCE AND THE WAR ON TERROR 111-149 (2005), for a useful overview of the main arguments concerning anticipatory and pre-emptive self-defense.

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 amongst 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 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 UN, 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]

---

[91] For example, this claim has been made by Israel (see, e.g., UN Doc. S/PV.2288, 32); Pakistan (see, e.g., UN Doc. S/PV.464, 1-26, particularly at 25); and the United Kingdom (see, e.g., UN Doc. S/PV.831, 12-15), amongst other states.

[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 UN Docs. S/14531 – S/14560.

[93] A concept most notably articulated by the United States in 2002, see, e.g., The National Security Strategy of the United States of America, September 2002, 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 JOURNAL OF INTERNATIONAL LAW 437; and Henderson, *supra* note 1.

[94] See note 85, *supra*.

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 actions: 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: "[g]iven 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*

[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 EUROPEAN JOURNAL OF INTERNATIONAL LAW 803, 819 (2005).

[96] Vienna Convention on the Law of Treaties, *supra* note 17, Art. 53.

[97] Kahgan, *supra* note 4, 798 (emphasis in original). Kahgan nonetheless is ultimately very clear that she views both the prohibition of the use of force and the right of self-defense as peremptory in nature.

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 (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

[98] Vienna Convention on the Law of Treaties, *supra* note 17, Art. 53.

[99] MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT 592-594 (2005).

[100] See note 89 and accompanying text, *supra*.

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

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] Thus, keen-eyed readers will have noted that the proposed definition of the peremptory norm above included the phrase "*...in response to an armed attack by another state*".[105] 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 towards allowing

[102] As Koskenniemi has put this: "[i]t 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 (emphasis in original). Here Koskenniemi references a number of flexible legal concepts that it would be undesirable to define too rigidly, including the concept of self-defense.

[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 14, at 862-863.

[104] See, e.g., Ian Scobbie, *Words My Mother Never Taught Me: In Defense of the International Court*, 99 AMERICAN JOURNAL OF INTERNATIONAL LAW 76, 80-81 (2005); and GAZZINI, *supra* note 39, 184-191. See also the position seemingly taken by the ICJ in the Wall advisory opinion, *supra* note 7, para. 139; and Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda), Merits, 2005 ICJ Rep. 116 (Dec. 19), para. 146.

[105] See note 88 and accompanying text, *supra*.

responses in self-defense against non-state actors.[106] Equally, despite the contentions of some writers,[107] 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.[108]

As with the example of the reporting requirement considered above, it would thus be hard to say that this adaptation of the law governing self-defense was peremptory at the current time, in this case 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, 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

---

[106] See Michael Byers, *Terrorism, the Use of Force and International Law After 11 September*, 51 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 401, 407-409 (2002).

[107] 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 JOURNAL OF INTERNATIONAL LAW 183 (2010); Kimberley N. Trapp, *Back to Basics: Necessity, Proportionality and the Right of Self-Defence Against Non-State Terrorist Actors*, 56 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 141, especially 147-155 (2007); and Thomas M. Franck, *Terrorism and the Right of Self-Defense*, 95 AMERICAN JOURNAL OF INTERNATIONAL LAW 839, 840 (2001).

[108] See Byers, *supra* note 106, 407-409.

becoming peremptory in the future. This would require any such legal development to be accepted by the community as a whole as being peremptory; such acceptance would lead 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.[109] Moreover, any instance where a state took forcible action in response, say, 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 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.[110]

---

[109] 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 at 52-84. *Cf*, for example, the uncertainty over the peremptory status of the prohibition of genocide (or at least certain aspects of that prohibition), see David Lisson, *Defining National Group in the Genocide Convention: A Case Study of Timor-Leste*, 60 STANFORD LAW REVIEW 1459, 1463 (2007-2008).

[110] Take, for example, the acceptance by the majority of states of 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 Congressional Report Service, *Operation Enduring Freedom: Foreign Pledges of Military & Intelligence Support*, http://fpc.state.gov/documents/organization/6207.pdf (2001); and House of Commons Research Paper, *Operation Enduring Freedom and the Conflict in Afghanistan: An Update*, http://www.parliament.uk/commons/lib/research/rp2001/rp01-081.pdf, at 31 (2001).

It is worth here noting another example to highlight that the concern as to the development of the *jus ad bellum* relates not just to the exception of self-defense. 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.[111] Yet, at the current time, there is 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.[112] However, debate is ongoing as to whether a cyber-attack is similarly beyond the scope of the prohibition. Some writers take this view, on the basis that the rule as it stands prohibits *armed* force only: cyber-attacks have more in common with economic attacks as they are not "physically" or "kinetically" manifested in the same

---

[111] See Ewen MacAskill, *New Cyber Security Chief Warns of Internet Attacks*, The Guardian, 15 April 2010, http://www.guardian.co.uk/world/2010/apr/15/cyber-security-chief-keith-alexander; and *Age of Cyber Warfare is "Dawning"*, BBC News, 17 November 2009, http://news.bbc.co.uk/1/hi/technology/8363175.stm. In particular, cyber-warfare is something that 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 the Report of the Independent International Fact-Finding Mission on the Conflict in Georgia, 30 December 2009, http://www.ceiig.ch/Report.html, Volume II, 217-219. 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, 17 May 2007, http://www.guardian.co.uk/world/2007/may/17/topstories3.russia.

[112] See Tom J. Farer, *Political and Economic Coercion in Contemporary International Law*, 79 AMERICAN JOURNAL OF INTERNATIONAL LAW 405 (1985).

way as military action.[113] Others take the contrary position that cyber-attacks (do, or should) fall within the prohibition in Article 2(4). This is on the basis 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.[114]

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.[115] Again, it can be seen that there is not yet a consensus amongst 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.[116] 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). Thus, as with the previous example of attacks by non-

---

[113] See, e.g., Scott J. Shackelford, *From Nuclear War to Net War: Analogizing Cyber Attacks in International Law*, 27 BERKELEY JOURNAL OF INTERNATIONAL LAW 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 Article 2(4) and would thus potentially trigger Article 51, at 237-239.

[114] See, e.g., Todd A. Morth, *Considering Our Position: Viewing Information Warfare as a Use of Force Prohibited by Article 2(4) of the U.N. Charter*, 30 CASE WESTERN RESERVE JOURNAL OF INTERNATIONAL LAW 567 (1998).

[115] See, e.g., Schmitt, *supra* note 4, at 922.

[116] *Id*., at 921.

state actors, note that the proposed expression of the peremptory norm above deliberately referred to "*armed force*".[117]

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" here *would* again 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 – self-defense against non-state actors and cyber-warfare as being contrary to the prohibition of the use of force – 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.[118] Once the arduous tests for the establishment of a *jus cogens* norm were

[117] See note 88 and accompanying text, *supra*.

[118] Lepard has for example contended that it is important from an *ethical* point of view that the law on the use of force is able to develop, and that the restriction on the alteration of the *jus ad bellum* that would stem from peremptory status is therefore undesirable. Moreover, Lepard goes on to argue that this problem 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". LEPARD, *supra* note 84, 259-260. 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. More generally on the need for the continued development of the *jus ad bellum*, see Gray, who

considered to have been met for a composite selection of key *jus ad bellum* rules, then whatever norm was 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.[119]

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.[120] Leaving such arguments aside, however, the crucial point here is that the static nature of the modern *jus ad bellum* – something which 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.

---

points 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". CHRISTINE GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 4 (2008).

[119] DINSTEIN, *supra* note 4, 102; Scholtz, *supra* note 4, at 11 (who makes this point with regard to the possible customary development of humanitarian intervention as an additional exception to the prohibition of the use of force); and Glennon, *supra* note 8, 1269 (who pushes this argument somewhat further; he takes 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).

[120] Brownlie, for example, applies such arguments to the specific claim that an objective definition of "war" would be desirable. BROWNLIE, *supra* note 33, 398. See more generally, Henkin, *supra* note 1, 58-60.

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.

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

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

[121] See, e.g., Parker & Neylon, *supra* note 4, 436-437; Kritsiotis, *supra* note 4, 1043; and Wheeler, *supra* note 4, 45.

[122] See notes 44-50 and accompanying text, *supra*.

[123] As the Court is labeled in the Charter of the United Nations, *supra* note 2, Art. 92; and the Statute of the International Court of Justice, *supra* note 22, Art. 1.

been noted that the Court's decisions are extremely influential and are often seen as authoritative statements of international law.[124]

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 ICJ in the Nicaragua case presented little evidence that would support the peremptory character of the prohibition of the use of force. It will be recalled that the Court's only reference to "state practice" here was to point to the fact that the United States and Nicaragua had both adopted it in their pleadings.[125] The only other source the Court referred to was to quote directly the position taken by the ILC in 1966.[126] 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 conclusion that the prohibition is a *jus cogens* norm was made by the Commission without any supporting evidence at all.[127] In 2001, when the ILC again reaffirmed the peremptory status of the prohibition in the context of state responsibility, it this time did support its claim. However, this support took the form of references to its own stated position in 1966 and to the ICJ's apparent finding to this effect in the Nicaragua case.[128]

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

---

[124] See note 45 and accompanying text, *supra*.

[125] Nicaragua case, *supra* note 46, para. 190.

[126] *Id*.

[127] UN Doc. A/6309/Rev.1, *supra* note 42, 247-248.

[128] UN Doc. A/56/10, *supra*, note 43, 112.

judges present at The Hague".[129] It is, of course, impossible to tell whether D'Amato is correct here without further investigation. Simply because the Court did not adequately support the view that the prohibition was peremptory does not mean that such a view – whether the Court took it or not – 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. If so, it can only be found in the practice of states. 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. 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".[130] Indeed, it is worth expanding on this: 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 has been already argued that it is universally accepted and is universal in terms of its applicability to states.[131] A closer reading of Article 53 reveals that this is not enough, however. The issue is whether the norm is accepted and recognized by the community as a whole *as a*

[129] D'Amato, *supra* note 12, at 3. See also Christenson, *supra* note 83.

[130] Vienna Convention on the Law of Treaties, *supra* note 17, Art. 53.

[131] See notes 31-35 and accompanying text, *supra*.

peremptory norm.[132] 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.[133] Under the positivist conception of *jus cogens*, there is a two-stage process of *opinio juris* at work.[134] The first stage is the usual test: do 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*.[135]

Admittedly, it would seem apparent that acceptance by the "international community of States as a whole" does not necessitate *universal* acceptance by states as to the peremptory character of any given norm. As the chairman of the Drafting Committee of the Vienna Convention made clear, it is enough for "a large majority" of states to take

---

[132] In 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 derogation is permitted*". Vienna Convention on the Law of Treaties, *supra* note 17, Art. 53 (emphasis added).

[133] HANNIKAINEN, *supra* note 4, 326-333.

[134] 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 paper, but for a more detailed discussion of the "sources" of *jus cogens* norms, see Byers, *supra* note 47, 220-229.

[135] Linderfalk, *supra* note 14, 862.

such a position.[136] This may be somewhat conceptually dubious in a positivist system built on state consent, given that peremptory norms bind all and are non-derogable.[137] However, this is, for many, justified by the need to avoid a single state vetoing a peremptory norm accepted as such by all others.[138]

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 here 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 towards silence on the issue.

---

[136] UN Doc. A/CONF.39/C.1/SR.80, *United Nations Conference on the Law of Treaties*, 80th Meeting of the Committee of the Whole, *Official Records of the United Nations Conference on the Law of Treaties, First Session (Summary Records of the Plenary Meetings and of the Meetings of the Committee of the Whole)* (1968), at 472.

[137] See Gennadiĭ M. Danilenko, *International Jus Cogens: Issues of Law-Making*, 2 EUROPEAN JOURNAL OF INTERNATIONAL LAW 42 (1991), in general, but particularly at 48-57; HANNIKAINEN, *supra* note 4, 49; and Glennon, *supra* note 8, particularly at 1266 and 1268.

[138] 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).

Although writers most commonly justify the claim that the prohibition is *jus cogens* by pointing to the Nicaragua case, it is true that a small number have supported this position by reference to state practice. 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 a character."[139] 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. Moreover, Kahgan does not engage with the *travaux préparatoires* of the Convention as such, but instead relies on a secondary account of the debates.[140] In fact, when one examines the *travaux préparatoires*, only ten states explicitly took the view that the prohibition was a *jus cogens* norm.[141] This figure is less than ten percent of the

[139] Kahgan, *supra* note 4, 778 (emphasis added).

[140] *Id*. Kahgan relies on the account of the conference debates put forward by Hannikainen, who similarly does not support this claim – that half of the states that put forward example *jus cogens* norms highlighted the prohibition of the use of force as one – with sufficient evidence from the *travaux préparatoires* itself. See HANNIKAINEN, *supra* note 4, 177.

[141] United Nations Conference on the Law of Treaties, First Session, Vienna, 1968, Official Records, UN Doc. A/Conf.39/11, see the positions taken by Bolivia, at 154; Ecuador, at 273 and 320; The Netherlands, at 275-276; Hungary, at 282; Greece, at 295; Cyprus, at 306; Federal Republic of Germany, at 318; Ukraine, at 322-323; Norway, at 324; and Malaysia, at 326.

total number of states with delegations at the conference (103), and less than a third of those that contributed possible *jus cogens* norms (32).

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. Argentina thus stated that the rules on non-use of force and the peaceful settlement of disputes were "authentic examples of *jus cogens*".[143] Also explicit in taking this position were Iraq[144] and Ethiopia.[145]

Yet, in contrast, the United Arab Republic 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] as did India, with the latter suggesting that the rules contained in the declaration (which include the prohibition of the use of

---

[142] Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States in Accordance with the Charter of the United Nations 1970, GA Res. 2625, UN Doc. A/8082.

[143] Report of the Special Committee on Principles of International Law Concerning Friendly Relations and Cooperation among States, 1970, UN Doc. A/8018, at 77.

[144] GA, 6th Com., 1180th mtg, at 17.

[145] GA, 6th Com., 1182nd mtg, at 31.

[146] UN Doc. A/8018, *supra* note 143, at 119.

[147] GA, 6th Com., 1179th mtg, at 35. 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, *supra* note 141.

force) had not been accepted as *jus cogens* norms in state practice.[148] The views of these states here are particularly notable, as they represent an extremely rare – perhaps unique – example of states 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 UN 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 Cyprus[157] explicitly held this position. Cuba also apparently

[148] GA, 6th Com., 1183rd mtg, at 38. However, it is worth noting that India seems to have since changed its position, more recently attesting to the prohibition's peremptory nature, see note 183, *infra*.

[149] See the Letter from the Soviet Union to the Secretary General, 28 September 1976, which set out the draft of the proposed treaty, UN Doc. A/31/243.

[150] HANNIKAINEN, *supra* note 4, at 324-325.

[151] In general, see the reports of the Special Committee on Enhancing the Effectiveness of the Principle of Non-Use of Force in International Relations, 1978-1984, UN Docs. A/33/41 – A/39/41.

[152] See, e.g., UN Doc. A/34/41, at 10; and UN Doc. A/35/41, at 50.

[153] UN Doc. A/36/41, at 12.

[154] *Id*., at 14.

stated that the prohibition was peremptory, but it 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 extensive discussions that ranged over seven years and related directly to the law on the use of force in a Committee set up *specifically to examine the prohibition* – its content, nature and position in the international legal system – 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, as the summaries put it, "constituted a sound 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

---

[155] *Id*., at 31.

[156] UN Doc. A/37/41, at 12.

[157] *Id*., at 60.

[158] *Id*., at 55.

[159] UN Doc. A/35/41, at 10 (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 *supra* note 141.

[161] UN Doc. A/36/41, at 10.

Committee's working group in 1980 to clarify the prohibition of the use of force and its content, only one of these (Principle 7) stated that the rule was peremptory.[162]

Ultimately, the Special Committee was only made up of thirty-five states. As such, it can be very credibly argued that – even if one accepts Hannikainen's conclusion that the summaries indicate an acceptance by the Committee of the peremptory status of the prohibition – the view of the Committee is difficult to see as being 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, at least conclusively. Moreover, in the parallel debates on the same agenda item in the Sixth Committee of the General Assembly, which is comprised of *all* UN member states and for which full plenary records are available, it is interesting that only five states explicitly held that the prohibition was peremptory.[163] 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.[164] Of course, this is not the same as a denial of the peremptory status of the

[162] UN Doc. A/35/41, 47-50.

[163] These were Greece, UN Doc. A/C.6/34/SR.17, at 2; Pakistan, UN Doc. A/C.6/34/SR.22, at 3; Chile, UN Doc. A/C.6/34/SR.22, at 12; Togo, UN Doc. A/C.6/34/SR.23, at 10; and Zaire, UN Doc. A/C.6/35/SR.32, at 9. In addition to these five states, Singapore implied that it also took this position, but it was not at all conclusive on this, see UN Doc. A/C.6/35/SR.32, at 43.

[164] UN Doc. A/C.6/35/SR.29, at 11.

prohibition of the use of force, but the prohibition is generally seen as an element of that principle, or certainly linked to it.[165]

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[166] provide another useful example. Here, Greece was very clear that it saw the prohibition as a peremptory norm.[167] Indeed, it was concerned that the draft declaration did not make this explicit.[168] 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.[169] 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

[165] Nicaragua case, *supra* note 46, paras. 205 and 247, where the Court made it clear that it saw the prohibition of the use of force as falling within the wider principle of non-intervention. See also GREEN, *supra* note 89, 31-33.

[166] Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations 1987, GA Res. 42/22, UN Doc. A/RES/42/22.

[167] UN Doc. A/C.6/42/SR.21, at 19-20.

[168] UN Doc. A/C.6/42/SR.20, at 7.

[169] See generally UN Docs. A/C.6/42/SR.17 – A/C.6/42/SR.21.

that it was clarifying.[170] 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.[171]

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 and Greece, the United Kingdom and Turkey[172] was contrary to *jus cogens* and thus void.[173] This was on the basis that Article IV of that Treaty arguably gave Turkey the right to militarily intervene in Cyprus.[174] However, as Orakhelashvili notes,[175] 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*.[176]

Thus, no state other than Cyprus took the view that the prohibition was peremptory, and the Council as a whole expressed no opinion on this aspect of Cyprus'

---

[170] See note 166, *supra*.

[171] HANNIKAINEN, *supra* note 4, 325.

[172] Treaty of Guarantee between Cyprus and Greece, the United Kingdom and Turkey, Aug. 16, 1960, 382 UNTS 4.

[173] ORAKHELASHVILI, *supra* note 4, 157-161. For this claim by Cyprus, see UN Doc. S/PV.1098, at 16.

[174] UN Doc. S/PV.1098, at 16-17.

[175] ORAKHELASHVILI, *supra* note 4, 158-159.

[176] See generally UN Docs. S.PV/1094 – S.PV/1104.

argument.[177] It would seem odd that those states that *supported* Cyprus' general position that Article IV of the Guarantee Treaty was unlawful (on the basis that it allowed for the use of force)[178] did not employ this "*jus cogens* argument". This would appear to have been an obvious position to take – if the peremptory status of the prohibition is incontrovertible as we are led to believe – 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.[179] Moreover, it is notable that some states expressed a degree of approval for the Treaty.[180] 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.[181] It is certainly true that no state explicitly claimed that the rule *was not* a *jus cogens* norm. Nonetheless, the debates in the Security Council here again offered states a clear and obvious opportunity to affirm the peremptory status of the prohibition. Indeed, this issue was explicitly raised in the Council by one state and then was studiously ignored by all others.

---

[177] See SC Res. 186, 1964, UN Doc. S/5575; and SC Res. 187, 1964, UN Doc. S/5603, both of which emerged from the debates in the Security Council over the Cyprus issue at this time, but neither of which touched on the *jus cogens* question.

[178] There were a number of states that took this view, see, e.g., the positions adopted by the Soviet Union, UN Doc. S/PV.1096, 3-12, particularly at 9; and Czechoslovakia, UN Doc. S/PV.1097, 10-15.

[179] *Id*.

[180] See, e.g., the positions of the United States, UN Doc. S/PV.1096, 13-17; and the United Kingdom, UN Doc. S/PV.1098, 10-14.

[181] *Id*.

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 would be a statement to this effect by Japan with regard to the Falklands/Malvinas conflict in 1982. Here, the Japanese representative in the Council accused Argentina of violating a *jus cogens* norm by using force in attempting to reclaim the islands.[182] Another more recent example is India's reference in 1999 to the peremptory status of the prohibition in the context of discussions in the Council on the issue of children in armed conflict.[183] 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, it is worth noting that, 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.[184] 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).[185] Care should be taken here: the "restatements of the law" treatises are prepared by an independent body, the American

[182] UN Doc. S/PV. 2350, at 6.

[183] UN Doc. S/PV. 4037 (Resumption 1), at 22. This would appear to be a reversal of the position taken by India in the debates on the Friendly Relations Declaration, see note 148, *supra*.

[184] See, e.g., Schachter, *supra* note 4, at 129; and Ronzitti, *supra* note 4, 150.

[185] *Restatement of the Law (Third): The Foreign Relations Law of the United States, Volume I*, American Law Institute (St Paul, American Law Institute Publishers, 1987), section 102, comment k, 28. See, e.g., Stephens, *supra* note 4, at 254; and Henderson, *supra* note 1, at 10.

Law Institute, and thus this document cannot be seen as constituting the practice of the United States.

This minor point aside, there is nonetheless no question that the United States does view the prohibition as a *jus cogens* norm. As was noted above, the United States, along with Nicaragua, saw the rule as peremptory during the Nicaragua case proceedings.[186] Indeed, the United States has explicitly taken this view elsewhere.[187] 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 positions taken by other states, particularly with regard to the *jus ad bellum*.[188]

[186] See note 48 and accompanying text, *supra*. 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, see Memorial of the Islamic Republic of Iran, Merits [1993] ICJ Plead. Vol. I, at paras. 4 and 4.05-4.06. 231.

[187] See, e.g., Memorandum of R.B. Owen, Legal Adviser of the State Department, quoted in Marian N. Leich, *Contemporary Practice of the United States Relating to International Law*, 74 AMERICAN JOURNAL OF INTERNATIONAL LAW 418, 418-420 (1980).

[188] Given that the United States is one of the few states that is capable of using military force on any significant scale, see Mary E. O'Connell, *Evidence of Terror*, 7 JOURNAL OF CONFLICT AND SECURITY LAW 19, 25 (2002); and James A. Green, *Fluctuating Evidentiary Standards for Self-Defence in the International Court of Justice*, 58 INTERNATIONAL AND COMPARATIVE LAW QUARTERLY 163, 174 (2009).

However, the test for a *jus cogens* norm is more exacting than that for the formation of "ordinary" customary international law.[189] 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" towards 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 Afghanistan[190] might be void for conflicting with *jus cogens*, on the basis that Article 4 of the Treaty potentially provided for the use of force.[191] This was indeed the position that the United States took,[192] but – in the view of the present writer – it is again perhaps more notable that no other states appeared to take this view regarding the Treaty, or seemed willing to support this position.[193]

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

[189] See note 109, *supra*. See also note 134, *supra*, on the similarities between the process of the formation of *jus cogens* norms and customary international law.

[190] Afghanistan and Union of Soviet Socialist Republics Treaty of Friendship, Good-Neighborliness and Cooperation, Dec. 5, 1978, 1145 UNTS 17976.

[191] ORAKHELASHVILI, *supra* note 4, 161-162.

[192] Memorandum quoted by Leich, *supra* note 187, at 419.

[193] 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.

examples of states explicitly adhering to this view. Whilst 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.

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 – than states affirming the *jus cogens* character of the prohibition – for them to refrain from taking *any position* as to its peremptory status, 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. 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: silence is interpreted as

acquiescence for the purposes of "ordinary" customary law making.[194] However, it may be questioned whether silence is enough to bestow supernorm status upon 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.[195]

---

[194] 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., Ted Stein, *The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law*, 26 HARVARD INTERNATIONAL LAW JOURNAL 457 (1985); Maurice H. Mendelson, *The Formation of Customary Law*, 272 RECUEIL DE COURS 155, 227-244 (1998); and Michael Akehurst, *Custom as a Source of Law*, 47 BRITISH YEARBOOK OF INTERNATIONAL LAW 1, 23-27 (1974-1975). 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, e.g., Jonathan I. Charney, *The Persistent Objector Rule and the Development of Customary International Law* 56 BRITISH YEARBOOK OF INTERNATIONAL LAW 1 (1985). However, this is not the place to explore this issue further.

[195] Most scholars would hold that the "persistent objector rule" cannot apply to *jus cogens* norms. See, e.g., Holning Lau, *Rethinking the Persistent Objector Doctrine in International Human Rights Law*, 6 CHINESE JOURNAL OF INTERNATIONAL LAW 495, at 495 and 498 (2005-2006); J. Brock McClane, *How Late in the Emergence of a Norm of Customary International Law May a Persistent Objector Object?* 13 INTERNATIONAL LAW STUDENTS ASSOCIATION JOURNAL OF INTERNATIONAL LAW 1, 25 (1989); Adam Steinfeld, *Nuclear Objections: The Persistent Objector and the Legality of the Use of Nuclear Weapons*, 62 BROOKLYN LAW REVIEW 1635, 1640 (1996); Jonathan I. Charney, *Universal International Law*, 87 AMERICAN JOURNAL OF INTERNATIONAL LAW 529, 541 (1993); LEPARD, *supra* note 84, 235-237 and 250-252; and Byers, *supra* note 47, at 217 and 223. This position has also been taken by the Inter-American Commission on Human Rights, see Domingues v. United States, Merits, 2002 INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, Report No. 62/02, Case 12.285 (22 October), in particular at para. 49. Admittedly, the apparent fact that persistent objectors will nonetheless be bound by peremptory norms does not *confirm* that silence is inadequate to contribute to the formation of a rule of *jus cogens*, but if states are

Taking a contrary view, one could argue that the fact that states do not explicitly reject the peremptory 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 was 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 have truly accepted the rule as peremptory, 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 peremptory norm, that the "[s]tate practice cited in support of overriding norms of *jus cogens* seems suspect and fragmented."[196] Two points can be made here. First, writers claiming the peremptory status of the prohibition of the use of force do not tend to cite *any* state practice to support this, "suspect" or otherwise. Secondly, 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 peremptory 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 peremptory. 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

---

unable to exempt themselves from a peremptory norm through objection, this would seem conceptually logical. For a contrary view, however, see Nieto-Navia, *supra* note 138, 612.

[196] Christenson, *supra* note 8, 587.

the community of states as a whole is applied. Equally, a larger number of states seem unwilling 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 paper 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, whilst 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.[197]

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"[198] to it. The widespread acceptance of the *jus cogens*

[197] DINSTEIN, *supra* note 4, 100.

[198] On the concept of a norm's "compliance pull" see generally THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS (1990).

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*.[199] 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 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. As already noted, the use of military force invariably involves death and destruction; a factor one should never lose sight of.[200] 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

[199] DINSTEIN, *supra* note 4, 100-102.

[200] See note 26 and accompanying text, *supra*.

properly tested and critiqued. For those that argue against the "relative normativity"[201] 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 pervading problems inherent in the *jus cogens* concept.

Thus, this paper 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.[202]

For all of *jus cogens*' natural law gloss, the concept remains grounded in positivist international law.[203] Indeed, it must remain so, if it is to have any credibility or purchase in a system that, for better or worse, remains primarily premised upon 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

[201] To employ a phrase famously adopted by Weil, *supra* note 9.

[202] Barnidge, *supra* note 11, at 205.

[203] Nieto-Navia, *supra* note 138, 602.

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.