Questioning the Peremptory Status of the Prohibition of the Use of Force

James A. Green

University of Reading

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INTRODUCTION

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

* 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 principal norm of international law of [the twentieth] century.” Louis Henkin, The Use of Force: Law and U.S. Policy, in Right v. Might: International Law and the Use of Force 37, 38 (Louis Henkin et al. eds., 1991). As Kennedy has phrased it, “the system of the United Nations Charter was more than a political regime of collective security—an institutional framework for diplomatic management of conflict. It was also a new legal order that inaugurated a new law of war.” David Kennedy, Of War and Law 77 (2006). See also Christian M. Henderson, The 2006 National Security
set out most crucially in Article 2(4) of the U.N. Charter, is often seen as the archetypal example of a \textit{jus cogens} norm (a "peremptory norm" of general international law). Certainly, an overwhelming majority of scholars view the prohibition as having a peremptory character. Similarly, the International Law Commission (ILC) has taken this view and it is arguable that the International Court of Justice (ICJ) has also done so. Indeed, one judge of the ICJ stated in an individual opinion that "[t]he prohibition of the use of force... is \textit{universally recognized} as a \textit{jus cogens} principle, a peremptory norm from which no derogation is possible." Hilary Charlesworth and Christine Chinkin, \textit{The Gender of Jus Cogens}, 15 HUM. RTS. Q. 63, 63 (1993).


5. \textit{See infra} notes 34–35 and accompanying text.

6. \textit{See infra} notes 36–41 and accompanying text.
permitted.” This Article questions this widely held view: Is the prohibition of the use of force in fact a *jus cogens* norm?

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

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

Secondly, it is unclear whether there is enough evidence to establish that the prohibition of the use of force is peremptory in nature. While this has been almost universally accepted by scholars and, indeed, has seemingly been affirmed by the ICJ, this Article takes the positivist position that *jus cogens* norms can only be created through the consent of states, as evidenced by their practice. That a claim as to peremptory status is advanced by writers, however frequently, is not enough to turn an “ordinary” norm of international law 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. The desirability of peremptory norms, and, indeed, their very existence, has been questioned in the literature. However, it is not the aim here to debate the
existence of *jus cogens* norms per se. Without making a value judgment as to the desirability of peremptory norms, the view taken here is that there is enough evidence to suggest that states have accepted the general notion of *jus cogens* and that there exist at least some basic conceptual rules as to its content and operation.9

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

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


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

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

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

### I. Identifying a Peremptory Norm

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

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

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purposes of the present Convention." Moreover, as of November 2010, only 111 states are party to the Convention, a little over half of all U.N. member states. 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.

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

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:

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

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

## II. THE MAJORITY VIEW: THE PROHIBITION AS PEREMPTORY

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

17. *See id.* These states are Belgium, Russia, Japan, The Netherlands, Sweden, and the United States (note that the United States is a signatory but not a party to the Vienna Convention).
18. Hannikainen, *supra* note 4, at 3. This can be seen as comparable to the way in which Article 38(1) of the Statute of the International Court of Justice, Jun. 26, 1945, 33 U.N.T.S. 993 [hereinafter ICJ Statute], is now viewed as the starting point for identifying the sources of international law, irrespective of the fact that it was never intended to do anything other than to provide a reference point for the sources that the Court could apply. *See* David Kennedy, *The Sources of International Law*, 2 *Am. U. J. Int'l L. & Pol'y* 1, 2, 2 n.3, 3 (1987).
19. This breakdown of the criteria in Article 53 is adapted from the one used by Kahgan. Kahgan, *supra* note 4, at 775.
It is understandable that a plethora of commentators have perceived the prohibition as a peremptory norm, if one subscribes to the view that the concept of a "higher" group of peremptory rules within international law is a desirable means of further limiting state behavior in certain "fundamental" areas. One of the underlying rationales for the entire *jus cogens* concept is the desire to impose some kind of fundamental standard of common values on state interaction and to strengthen the effectiveness of international law in certain areas of common concern. 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. Indeed, many writers have likened *jus cogens* norms to the historic value-based "natural law" approach to international legal theory, and the modern *jus ad bellum* has many of its roots in the "just war" theory, an approach to warfare that is clearly embedded in natural law thinking. Thus, *jus cogens* and the *jus ad bellum* share common natural law underpinnings such that one might view them as a perfect conceptual fit.

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

20. See supra note 4 and accompanying text.
22. It is worth noting that the preamble to the U.N. Charter indicates that one of the fundamental aims of the organization is "to save succeeding generations from the scourge of war." U.N. Charter pmbl.
26. For the legal "tests" to determine the existence of a *jus cogens* norm, see supra note 19 and accompanying text.
27. See supra note 1.
present in the U.N. Charter, to which almost all states are party, but also because the prohibition is an accepted rule of customary international law. Therefore, all states are bound by the general requirement not to use military force in their international relations. As such, it is relatively clear that the prohibition meets the first requirement for a *jus cogens* norm—it is a rule that can be identified as a "norm of general international law."

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

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

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32. See examples cited supra note 4.
33. ORAKHELASHVILI, supra note 4, at 50 (emphasis added).
34. Reports of the International Law Commission to the General Assembly, 21 U.N. GAOR Supp. No. 9, pt. II, U.N. Doc. A/6309/Rev.1 (1966), reprinted in [1966] 2 Y.B. Int’l L. Comm’n 172, at 247, U.N. Doc. A/CN.4/SER.A/1966/Add.1. The ILC arguably reaffirmed this view when it proceeded to set out a list of example *jus cogens* norms that had been proposed by its members, of which the prohibition of the use of force was the first. However, the Commission did not explicitly endorse this list. See id. at 248.
erally agreed that the prohibition of aggression is to be regarded as per-emptory.\textsuperscript{35}

The ICJ can also be said to have adopted this position.\textsuperscript{36} In the 1986 Nicaragua case, one of the first decisions of the Court to examine \textit{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 \textit{jus cogens}."\textsuperscript{37}

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

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\textsuperscript{36} Judgments of the World Court are only legally binding in the case at hand and on the parties to that case. See ICJ Statute, supra note 18, art. 59. However, the influence of a decision of the Court stretches well beyond the particular dispute in question, in terms of the wider perception of the judgment as constituting an authoritative interpretation of international law. See Rosalyn Higgins, Problems and Process: International Law and How We Use It 202–04 (1994); Natalia Ochoa-Ruiz & Esther Salamanca-Aguado, Exploring the Limits of International Law Relating to the Use of Force in Self-Defence, 16 Eur. J. Int'l L. 499, 501 (2005).

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

\textsuperscript{38} Some scholars have argued that the Court did not in fact reach this conclusion, but instead simply highlighted that the ILC had done so, to demonstrate that the prohibition was an aspect of customary international law. See, e.g., Dinah Shelton, Righting Wrongs: Reparations in the Articles on State Responsibility, 96 Am. J. Int'l L. 833, 843 (2002) (describing the decision as avoiding recognition of peremptory norms). The present writer does not find such a reading of the decision particularly persuasive; it is here argued that a better reading is that the Court took the view that the prohibition was peremptory (evidencing this by reference to the ILC's position) and used this fact to support the universal customary nature of the norm. Orakhelashvili, supra note 4, at 42 n.38. Or, as Byers has phrased this, the view is taken here that the Court "quoted with approval" the position of the ILC. Michael Byers, Conceptualising the Relationship Between Jus Cogens and Erga Omnes Rules, 66 Nordic J. Int'l L. 211, 215 (1997). Nonetheless, it is admittedly difficult to definitely conclude whether the majority of the Court did or did not affirm the peremptory status of the prohibition in the Nicaragua case.
\end{footnotesize}
ICJ at least referred to the view of the ILC that the prohibition was peremptory. Additionally, the Court went on to indicate that both Nicaragua and the United States appeared to take this position in their respective Memorial and Counter-Memorial. Strengthening the view that the Court has interpreted the prohibition of the use of force as a peremptory norm are statements made to this effect by judges in their individual opinions attached to the Nicaragua case. Indeed, although the Court has not, as a majority, affirmed this view since, a number of its judges have also pointed to the “supernorm” status of the prohibition in their individual opinions in other cases.

While acceptance of the peremptory status of the prohibition is near universal, it is not entirely universal. There are, of course, the minority of writers who object to the notion of jus cogens norms per se. Such writers are unlikely to view the prohibition of the use of force as being peremptory, for obvious reasons.

More importantly for the purposes of this Article, there are an even smaller number of writers who, while seeming to accept the general concept of jus cogens norms, have questioned the peremptory status of the prohibition. The most notable


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

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

42. See, e.g., Michael J. Glennon, Limits of Law, Prerogatives of Power: Interventionism After Kosovo 40–42 (2001) (explicitly rejecting the peremptory status of the prohibition of the use of force based on skepticism of the validity of the entire jus cogens concept); Weisburd, supra note 8, at 22, 44–50 (questioning the peremptory status of the prohibition as part of a wider argument to the effect that the concept jus cogens is overly vague and thus both unclear and legally illegitimate); Barnidge, supra note 8, at 212 (referring alliteratively to “the purportedly peremptory prohibition on the use of force”) (emphasis added). Though it should be noted that elsewhere Barnidge seems to have at least tentatively accepted the peremptory status of the prohibition. See Robert P. Barnidge, Jr., Non-State Actors and Terrorism: Applying the Law of State Responsibility and the Due Diligence Principle 134 (2008).

43. Having said this, of the scholars who do appear to question the peremptory status of the prohibition, most only do so implicitly. See, e.g., Tarcisio Gazzini, The Changing Rules on the Use of Force in International Law 88–89 (2005) (discussing the implications for the development of the jus ad bellum “if the general ban on the use of force . . . is considered as a peremptory norm”) (emphasis added). The obvious implication here is that Gazzini does not view such a conclusion as being self-evident. Others have explicitly ex-
example of this kind is a 2007 article by Ulf Linderfalk.44 This paper importantly critiqued the claim that the prohibition is a norm of *jus cogens*.45 However, even Linderfalk ultimately seemed willing to accept that “the least controversial example of all *jus cogens norms* is the principle of non-use of force . . . I will assume that the principle of non-use of force indeed to be a norm having a *jus cogens* character.”46

### III. The Suitability of the Prohibition as a Peremptory Norm

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

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

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

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

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

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

47. Weisburd makes this general point in passing. Weisburd, *supra* note 8, at 21–22.
political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.\footnote{48}

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

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

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

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  \item \footnote{48} U.N. Charter art. 2, para. 4.
  \item \footnote{49} Schachter, \textit{supra} note 4, at 129.
  \item \footnote{50} \textit{E.g.}, \textit{Dinstein}, \textit{supra} note 4, at 85 ("The pivot on which the present-day \textit{jus ad bellum} hinges is Article 2(4) of the Charter.").
  \item \footnote{52} As has been stated, "[t]he world community is generally, and quite rightly, more concerned with the \textit{use} of armed force..." \textit{Hilaire McCoubrey & Nigel D. White, International Law and Armed Conflict} 56 (1992) (emphasis added). \textit{See also} Sadurska, \textit{supra} note 51, at 248–60 (distinguishing the threat of force from the more serious use of force in terms of state practice and \textit{opinio juris}); Kritsiotis, \textit{supra} note 51, at 302 (providing examples of the utilization of threats of force in state practice).
  \item \footnote{53} \textit{See} Sadurska, \textit{supra} note 51, at 239–40, 257–60. However, for a contrary view, see Roscini, \textit{supra} note 51, at 243–58.
  \item \footnote{54} Having said this, there are of course rare examples where states have explicitly argued that threats made against them have violated Article 2(4). For example, Iran made this claim with regard to alleged threats of force coming from the United States in 2006. Permanent Rep. of the Islamic Republic of Iran to the U.N., Letter dated Mar. 17, 2006 from the Permanent Rep. of Islamic Republic of Iran to the United Nations addressed to the Secretary-General, U.N. Doc. A/60/730 (Mar. 22, 2006). This example is highlighted by Kritsiotis, \textit{supra}
that the prohibition is far from a fundamental one. There has been almost
no customary international law development of the concept of the threat
of force and, as such, it has little legal content beyond its cameo appear-
ance in Article 2(4).55

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

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

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55. Although, a study of the practice can admittedly lead to some tentative conclusions
as to the possible customary international law content of the prohibition of the threat of force.


57. Id.

58. A. Mark Weisburd, Use of Force: The Practice of States Since World War
II 22 (1997). Weisburd makes this point generally, not specifically with regard to the prohibi-
tion of the threat of force.

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

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

61. See sources cited supra note 60.
use of military force is prohibited; it is this rule alone that is viewed as being peremptory.\(^{62}\)

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

Isolating the prohibition of the use of force as a peremptory norm, however, brings with it a different problem. The threat and use of force are inherently conjoined concepts as they currently exist in international law. Indeed, they are linked by more than simply the fact that they share lodgings in Article 2(4); the lawfulness of any threat of force is dependent upon the lawfulness of the use of force threatened.\(^{63}\) The ICJ confirmed this in its \textit{Legality of the Threat or Use of Nuclear Weapons} advisory opinion in 1996.\(^{64}\) Indeed, in the \textit{Nicaragua} case, the Court held that the prohibitions of the use and threat of force are, in legal terms, substantively equal.\(^{65}\)

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

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

\(^{62}\) See \textit{id}.

\(^{63}\) \textit{Brownlie, supra} note 29, at 364; \textit{Dinstein, supra} note 4, at 86.

\(^{64}\) \textit{Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 22, § 47} (July 8).


\(^{66}\) See \textit{supra} note 50 and accompanying text.
2(4) cannot in its entirety form a *jus cogens* norm, but it does not prevent the prohibition of the use of force standing alone from meeting the criteria for a peremptory rule of international law. In spite of the ICJ's assertions to the contrary, it has already been argued here that the ban on the threat of force is not, in state practice, a norm of equal standing to the actual use of force.\(^67\) Thus, while it may not be desirable—in terms of clarity—for a norm of *jus cogens* to derive from half of a legal provision, the separation of the threat and use of force would be far from a terminal blow to the peremptory status of the norm. Far more damaging is the fact that the prohibition of the use of force is a rule subject to exceptions. It is to this issue that the Article now turns.

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

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

Article 51 of the U.N. Charter permits states to use force in self-defense “if an armed attack occurs against a Member of the United Nations” and Article 42 allows the U.N. Security Council to authorize the use of force if it feels that such authorization is necessary, having identified a “threat to the peace, breach of the peace, or act of aggression” under Article 39.\(^69\) In either case—self-defense or collective security—the prima facie unlawfulness of the use of force is precluded.

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

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67. *See supra* note 52 and accompanying text.
right of self-defense, it would in fact be unlawfully derogating from a norm of *jus cogens*.

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

However, the fact that the prohibition of the use of force has agreed exceptions does not necessarily bar the norm from peremptory status as long as one is willing to see the rule in more expansive terms than it appears in Article 2(4). If the norm being discussed here were framed in a way as to additionally include the exceptions to the prohibition, then its peremptory character could be preserved. In other words, "[a] correct description of the norm would have to account for the fact that the principle of non-use of force does have exceptions." 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." In other words, Orakhelashvili takes the view that it is not simply the prohibition of the use of force that is peremptory, but it is also all of the rules on the use of force under international law, including the rules governing self-defense and the rules on forcible action as authorized by the Security Council.

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

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

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

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

74. ORAKHELASHVILI, *supra* note 4, at 51.
twined nature of the legal rules governing the use of force.\textsuperscript{75} The \textit{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 \textit{jus ad bellum} represents a collection of interrelated peremptory norms. This would amount to a \textit{"jus cogens network"} of norms, all of which would act, together, to "trump" lesser areas of international law.\textsuperscript{76}

Adopting either approach, there remains a further issue, which is essentially the same problem that was encountered earlier with regard to the threat of force. The numerous rules that make up the \textit{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 \textit{jus ad bellum} cannot be seen as meeting the criteria for \textit{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 \textit{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.\textsuperscript{77} This requirement is contained in Article 51 of the U.N. Charter\textsuperscript{78} and is clearly a rule of the \textit{jus ad bellum}. However, it is also uncontroversial that the reporting requirement is not mandatory in the sense that a failure to report is not determinative as to the unlawfulness of a self-defense action.\textsuperscript{79} To put

\begin{itemize}
\item \textsuperscript{75} Making a similar point, Barnidge has stated (although admittedly not specifically in relation to the law on the use of force): "When can it be said . . . that a norm exists, as distinct and independent from similar norms?" Barnidge, \textit{supra} note 8, at 202.
\item \textsuperscript{76} See Kahgan, \textit{supra} note 4, at 794 (alluding to "a regime concerning the use of armed force in interstate relations from which states are not free to derogate") (emphasis added). However, having concluded that the right of self-defense is peremptory, Kahgan seems unsure whether this should be viewed as part of a composite \textit{jus cogens} norm, or a separate and independent peremptory rule under this broader \textit{jus cogens} regime. See \textit{id.} at 791.
\item \textsuperscript{77} Glennon uses a different example to make a similar point. Instead of the reporting requirement related to self-defense, he considers the powers of the Security Council under the Charter: "Why should the Charter's limits on the right of the Security Council to use force—set out in Articles 2(7) and 39—not also be seen as \textit{jus cogens}, since those provisions are, after all, part of the same regime for the centralization of power that subsumes Article 2(4)?" \textit{GLENNON, supra} note 42, at 42.
\item \textsuperscript{78} U.N. Charter art. 51.
\item \textsuperscript{79} See \textit{Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)}, Judgment on the Merits, 1986 I.C.J. 14, ¶ 200 (June 27) (noting that reporting to the Security Council is not a condition of lawfulness in the context of a purely customary international law claim of self-defense). With regard to self-defense claims made under the U.N. Charter, the Court did indicate that "it is to be expected that the conditions of the Charter should be respected." \textit{id.} However, the use of the word "should" by the Court in this context suggests that even with regard to self-defense claims under the Charter, it is not the case that the reporting requirement must be respected. \textit{See also} Don W. Greig, \textit{Self-Defence and the Security
this differently, a failure to report may be indicative of an unlawful use of force, but it certainly does not confirm one. It would be nonsensical to argue that such a rule is one that cannot be derogated from when it is generally accepted that it can be without any meaningful legal consequence. Similarly, this writer is comfortable in making the assumption that it would be difficult to find even one state that would hold that the "reporting requirement" is a peremptory rule, let alone enough states to equate to "the international community...as a whole." Thus, as Christenson correctly and categorically states: "[T]he requirement to report immediately to the Security Council any use of force in self-defense is not part of the customary norm of jus cogens."

Dismissing the view that the entirety of the jus ad bellum may be seen as peremptory, then, it is necessary to turn to the similar, but more palatable, solution that has been advanced by a relatively small number of scholars. This solution is to broadly define the jus cogens norm to encompass the exceptions to the prohibition, without going so far as incorporating the entire law on the use of force. 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.

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

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

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

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

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

83. In attempting to produce a definition of the purported *jus cogens* norm concerning the use of force, this Article adopts a similar approach to that taken by Linderfalk to highlight the problem raised in this Section. He too produced a number of possible definitions of the norm, although those used in this Article differ in a number of respects from those that he employs. See Linderfalk, supra note 10, at 860, 865, 867.
85. On the customary nature and origins of the criteria of necessity and proportionality, see James A. Green, Docking the Caroline: Understanding the Relevance of the Formula in Contemporary Customary International Law Concerning Self-Defense, 14 CARDOZO J. INT'L & COMP. L. 429 (2006).
Ultimately, to provide a sufficiently detailed rule, it is necessary to articulate a norm so lengthy that it is unwieldy to the point of losing worth. Take, for example:

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

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

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

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86. See supra note 83.
87. See supra note 84 and accompanying text.
89. A representative example of the common practice in this context is the South African interventions in Zambia, Zimbabwe, and Botswana in 1986. Here, states disagreed over whether the attacks were "necessary" under the circumstances, but it was generally agreed that this was the legal test. South Africa viewed the attacks as necessary on the basis that it had repeatedly warned the states in question that they would be attacked if they continued to aid African National Congress insurgents. See U.N. SCOR, 2684th mtg. at 22, U.N. Doc. S/PV.2684 (May 22, 1986). In contrast, certain other states felt the attacks were unnecessary.
Perhaps even more problematically, there are entire areas of the *jus ad bellum* that are fiercely contested by states. Take, for example, the avowed rights of anticipatory and pre-emptive self-defense. Some states have consistently argued that there exists a right to use force in self-defense even before the occurrence of an armed attack, if such an attack is imminent (anticipatory self-defense). Other states have hotly disputed this claim. 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). There is no consensus among states or writers as to the legal validity of these possible manifestations of self-defense. As such, any definition of a *jus cogens* norm concerning

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

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


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

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

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

Self-defense in response to a mere threat of force—either imminent or potential—is just one such example of controversy within the law governing self-defense. There are others. 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.”

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

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

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

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94. See supra note 83.
95. For example, Corten uses the concept of “humanitarian intervention” to briefly illustrate this point, as well as referring to anticipatory self-defense. Olivier Corten, The Controversies Over the Customary Prohibition on the Use of Force: A Methodological Debate, 16 EUR. J. INT’L L. 803, 819 (2005).
97. Kahgan, supra note 4, at 798. Kahgan nonetheless is ultimately clear that she views both the prohibition of the use of force and the right of self-defense as peremptory in nature. Id. at 825–27.
(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.\(^9\) This was noted, for example, with regard to the criteria of necessity and proportionality in the context of self-defense.\(^10\) 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.”\(^11\) In other words, the system as it stands allows for the legal elasticity required to adapt to the changing world of security threats and forcible action.

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.\(^12\) Currently, under customary international law, the position is probably still that an armed attack must emanate from a state, at least to some degree.\(^13\) 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.

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100. See supra note 88 and accompanying text.


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

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

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

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

However, the kind of consensus necessary to constitute a peremptory norm is difficult to reach even for more established (not to mention clearer) legal rules.\textsuperscript{108} Moreover, any instance where a state took forcible action in response, for example, to a non-state terrorist attack at the current time would necessarily constitute a breach of the existing \textit{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

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


\textsuperscript{107} See Byers, supra note 105, at 407–09.

\textsuperscript{108} As Rozakis rightly states, the criteria for the formation or moderation of \textit{jus cogens} norms as set out in Article 53 of the Vienna Convention on the Law of Treaties "are quite severe." CHRISTOS L. ROZAKIS, \textit{THE CONCEPT OF JUS COGENS IN THE LAW OF TREATIES} 15 (1976). Rozakis goes on to examine these criteria in some detail. \textit{Id.} at 52–84. Compare, for example, the uncertainty over the peremptory status of the prohibition of genocide (or at least certain aspects of that prohibition). David Lisson, Note, \textit{Defining National Group in the Genocide Convention: A Case Study of Timor-Leste}, 60 STANFORD L. REV. 1459, 1463 (2008).
customary international law, it is equally not the case that states have viewed recent forcible responses against non-state actors as being a breach of a *jus cogens* norm. Indeed, there has been an increasing amount of support for such actions.\textsuperscript{109}

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

\textsuperscript{109} For example, the majority of states accepted Operation Enduring Freedom in 2001, in spite of the fact that the action was taken in response to an attack perpetrated by a non-state terrorist group. For detailed lists of the states that condoned the intervention expressly and/or offered support, see David J. Gerleman et al., Cong. Research Serv., RL 31152, Operation Enduring Freedom: Foreign Pledges of Military & Intelligence Support (2001), available at http://fpc.state.gov/documents/organization/6207.pdf; House of Commons Library (U.K.), Research Paper 01/81, Operation Enduring Freedom and the Conflict in Afghanistan: An Update 31 (2001) available at http://www.parliament.uk/commons/lib/research/wp2001/wp01-081.pdf.


\textsuperscript{112} See, e.g., Scott J. Shackelford, Note, From Nuclear War to Net War: Analogizing Cyber Attacks in International Law, 27 Berkeley J. Int’l L. 192, 237 (2009). Although Shackelford does go on to say that if the cyber-attack in question could be viewed as being comparable to a physical military attack in terms of causing damage to life and property (presumably, for example, by launching a state’s own missiles against it), this would constitute armed force in breach of Article 2(4) and would thus potentially trigger Article 51. Id. at 237–39.
cyber-attacks (do, or should) fall within the prohibition in Article 2(4). These authors argue that such attacks are—given modern reliance on technology for national defense systems—potentially as damaging to a state’s national security as a military attack and thus should be included.\(^\text{113}\)

Notably, those writers who take the latter view have already begun to assert the peremptory status of the “prohibition of cyber-attacks” as a component of a larger peremptory norm prohibiting the use of force.\(^\text{114}\)

Again, it can be seen that there is not yet a consensus among states that the notion of cyber-attacks is prohibited at all by the *jus ad bellum*, let alone the kind of agreement necessary to confer peremptory status. Indeed, there is still relatively little state practice relating to the issue at all.\(^\text{115}\) As such, the traditional position—that “force” means “armed force”—must still be a correct expression of the *jus cogens* norm here (if, of course, one accepts the peremptory character of the prohibition at all).

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

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


\(^{114}\) See, e.g., Schmitt, supra note 4, at 922.

\(^{115}\) Id. at 921.

\(^{116}\) Lepard has, for example, contended that it may be important from an ethical point of view that the law on the use of force is able to develop, and seems to suggest that the restriction on the alteration of the *jus ad bellum* that would stem from peremptory status is therefore undesirable. LEPARD, supra note 82, at 260. Indeed, Lepard takes the view that the problem of the potential stagnation of *jus cogens* norms more generally means that “it does not seem necessary to recognize” the requirement in Article 53 of the Vienna Convention on the Law of Treaties that a *jus cogens* norm can only be altered by “a subsequent norm of general international law having the same character.” Id. at 259–60. Yet—however much this may solve the problem of the restricted development of the *jus ad bellum*—there is no legal justification for ignoring the requirement that *jus cogens* norms can only be altered by other *jus cogens* norms; this would amount to an unwarranted unilateral alteration of the way in which peremptory rules are created. For more general discussion on the need for the continued development of the *jus ad bellum*, see Christine Gray, *International Law and the Use of
tests for the establishment of a *jus cogens* norm are considered to have been met for a composite selection of key *jus ad bellum* rules, then whatever norm is framed would become static. The only way to alter it would be to go through the process of establishing the criteria for peremptory status again. This is a notably difficult process, particularly when it is considered that any changes or new rules are likely to be struck down in the developmental stage as being contrary to the existing *jus cogens* norm.117

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

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

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

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

118. See, e.g., BROWNLIE, supra note 29, at 398-401 (applying such arguments to the specific claim that an objective definition of "war" would be desirable). See generally, Henkin, supra note 1, at 58-60 (discussing actions and justifications posed by the United States that express a relaxation of normative prohibitions).
A. The General Lack of Reference to State Practice in the Literature

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

However—irrespective of whether one takes the view that the Court did or did not hold that the prohibition was *jus cogens*—it is clear that the ICJ in the *Nicaragua* case presented little evidence that would support the peremptory character of the prohibition of the use of force. The Court’s only explicit reference to “state practice” was to point to the fact that the United States and Nicaragua had both adopted it in their pleadings. The only other source the Court referred to was to quote directly the position taken by the ILC in 1966. When this trail is followed to the ILC commentary on the draft articles that formed the basis for the Vienna Convention on the Law of Treaties, it becomes apparent that the

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

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

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

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

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

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

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

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

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

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

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

A close reading of Article 53 reveals that this is not enough. The issue is whether the norm is accepted and recognized by the community as a whole as a *peremptory norm*. Under the positivist conception of *jus*...
cogens, there is a two-stage process of *opinio juris* at work.\textsuperscript{132} The first stage is the usual test of whether states accept the rule as being a binding one. Stage two is whether they accept that binding rule as being of a norm of *jus cogens*.\textsuperscript{133} Thus, Hannikainen correctly holds that the prohibition of the use of force is universally accepted as a rule of international law, but then incorrectly assumes that this is enough to conclude that it has been accepted as a peremptory rule.\textsuperscript{134}

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

\begin{itemize}
\item \textsuperscript{132} It is worth noting here that the present writer takes the view that a rule that forms the basis of a norm of *jus cogens* can derive from any source of law—for example, treaty law or customary international law—but that the process that turns the rule from an “ordinary” norm to a peremptory one is a process of customary international law formation, or at least something broadly akin to that process. In other words, a treaty-based rule may itself be the source of a norm of *jus cogens*, but it is the near-universal agreement by states that *the rule is peremptory* (acceptance that resembles the concept of *opinio juris*) that makes it so. Further consideration of this issue goes beyond the scope of this Article, but for a more detailed discussion of the “sources” of *jus cogens* norms, see Byers, *supra* note 38, at 220–29.
\item \textsuperscript{133} Linderfalk, *supra* note 10, at 862.
\item \textsuperscript{134} Hannikainen, *supra* note 4, at 323–33.
\item \textsuperscript{137} Rafael Nieto-Navia, *International Peremptory Norms (Jus Cogens) and International Humanitarian Law*, in *MAN’S INHUMANITY TO MAN: ESSAYS ON INTERNATIONAL LAW IN HONOUR OF ANTONIO CASSESE* 595, 612 (Lal C. Vohrah et al. eds., 2003).
\end{itemize}
C. A Brief Survey of State Acceptance of the Prohibition as Peremptory in Practice

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

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

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138. Kahgan, supra note 4, at 779.

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

140. States suggested possible examples of *jus cogens* norms throughout the debates at the U.N. Conference on the Law of Treaties, particularly in the context of the discussion of Article 50 (which later became Article 53) of the treaty. See id. at 154 (Bolivia); id. at 258–59 (Holy See); id. at 265 (Ethiopia); id. at 271 (Peru); id. at 273, 320 (Ecuador); id. at 275–76 (The Netherlands); id. at 282 (Hungary); id. at 294 (the Soviet Union); id. at 295 (Greece); id. at 295 (Iraq); id. at 296 (Kenya); id. at 297 (Cuba); id. at 297 (Lebanon); id. at 298 (Nigeria); id. at 299 (Chile); id. at 300 (Sierra Leone); id. at 301 (Ghana); id. at 302 (Colombia); id. at 303 (Uruguay); id. at 306 (Cyprus); id. at 307 (the Byelorussian Soviet Socialist Republic); id. at 312 (Romania); id. at 313 (Bulgaria); id. at 318 (Czechoslovakia); id. at 318 (Federal
more notable statistic, however, is that these states represented just under fourteen percent of the total number of states with delegations at the conference (103). 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. In these debates, a small number of states certainly took the view that the prohibition was a \textit{jus cogens} norm. Venezuela thus stated that the rules on non-use of force and the peaceful settlement of disputes were "authentic examples of \textit{jus cogens}.", Iraq and Ethiopia were also explicit in taking this position.

In contrast, the United States took the opposite view, holding that although these rules were highly desirable and would contribute to "a better and more tolerant world," this did not mean they were \textit{jus cogens}. Hungary also explicitly argued against the peremptory status of the rule. Similarly, though less explicitly, The Netherlands suggested that the rules contained in the declaration (which include the prohibition of the use of force) had not been accepted as \textit{jus cogens} norms, or, at least, that the draft declaration itself was not representative of peremptory norms. The views of these states here are particularly notable, as they represent an extremely rare, and 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 U.N. Charter, which was initially put forward by the Soviet Union in 1976. 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. However, as only summaries of these debates were ever published, it is difficult to know the number of states that explicitly held this view. Admittedly, the summaries at times indicate that some states referred to the prohibition as *jus cogens*, but exactly how many states held that the prohibition itself was peremptory is unclear.

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

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

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154. Id. at 13.

155. Id. at 31.


157. Id. at 60.

158. Id. at 55.
basis for working out... universally binding, *jus cogens* rules.\textsuperscript{159} The implication here is that Hungary did not view the prohibition, at least as it stood at the time, as being peremptory.\textsuperscript{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.\textsuperscript{161} One may also point to the fact that, of the seventeen principles devised by the Committee’s working group in 1980 to clarify the prohibition of the use of force and its content, only one stated that the rule was peremptory.\textsuperscript{162}

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

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


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

\textsuperscript{161} Special Comm. on Non-Use of Force, supra note 153, at 10.

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


\textsuperscript{166} See Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment on the Merits, 1986 I.C.J. 14, ¶¶ 205, 247 (June 27) (“The element of coercion, which defines, and indeed forms the very essence of, prohibited intervention, is particularly
Another useful example is the debates in the Sixth Committee of the General Assembly in 1987 regarding the framing of the Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations. Here, Greece was very clear that it saw the prohibition as a peremptory norm. Indeed, it was concerned that the draft declaration did not make this explicit. 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. Admittedly, unlike in the debates on the Friendly Relations Declaration, states here did not explicitly reject the peremptory status of the prohibition; but it still may be seen as significant that only one state was willing to affirm it, given that the entire debate again concerned the status of the rule and its further codification. Moreover, despite Greece's concerns, the Declaration on Threat or Use of Force that was finally adopted by the General Assembly ultimately made no mention of the peremptory character of the rule that it was clarifying. 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.

Like Kahgan and Hannikainen, Orakhelashvili also takes the rare step of referring to state practice in support of the claim that a use of force is contrary to *jus cogens*. For example, he points to the fact that Cyprus argued before the Security Council in 1964 that the Treaty of Guarantee between Cyprus, Greece, the United Kingdom, and Turkey was contrary to *jus cogens* and thus void. This was on the basis that
Article IV of that Treaty arguably gave Turkey the right to militarily intervene in Cyprus.\textsuperscript{175} However, as Orakhelashvili notes,\textsuperscript{176} the discussion in the Security Council concerned the question of whether the Treaty violated the rules of the \textit{jus ad bellum}, and not whether the prohibition of the use of force should be considered \textit{jus cogens}.\textsuperscript{177}

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

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

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

\begin{itemize}
\item[175.] U.N. SCOR, \textit{supra} note 174, at 16–17.
\item[176.] See ORAKHELASHVILI, \textit{supra} note 4, at 158–59.
\item[180.] See sources cited \textit{supra} note 179.
\item[181.] See, for example, the positions of the United States, U.N. SCOR, 19th Sess. 1096th mtg., \textit{supra} note 179, at 13–17, and the United Kingdom, U.N. SCOR, 1098th mtg., \textit{supra} note 174, at 10–14.
\end{itemize}
a statement to this effect by Japan with regard to the Falklands/Malvinas conflict in 1982. Here, the Japanese representative in the Security Council accused Argentina of violating a *jus cogens* norm by using force in attempting to reclaim the islands.\(^{183}\) Another more recent example is India’s reference in 1999 to the peremptory status of the prohibition in the context of discussions in the Security Council on the issue of children in armed conflict.\(^{184}\) However, these two examples are notable because they appear anomalous when compared to common practice. They are exceptions to a general trend and are relevant because of their scarcity.

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

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

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\(^{185}\) *See*, e.g., Ronzitti, *supra* note 4, at 150; Schachter, *supra* note 4, at 129.


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

\(^{188}\) *See* *supra* note 39 and accompanying text. Again, it should be noted that Nicaragua’s position as to the peremptory status of the prohibition in its Memorial was not entirely explicit, although this could be inferred from para. 231 of the Nicaraguan Memorial. Iran took this view more explicitly in its written pleadings in the Oil Platforms case, Memorial of the Islamic Republic of Iran, Case Concerning Oil Platforms (Iran v. U.S.), 2001 I.C.J. Pleadings Vol. 14, ¶¶ 4.05–4.06 (June 8, 1993).

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

However, the test for a *jus cogens* norm is more exacting than that for the formation of "ordinary" customary international law.\textsuperscript{191} It would seem reasonable to conclude that, with regard to the conferring of peremptory status, the view advanced by the United States is far from weighty enough to "tip the balance" toward a conclusion that the community as a whole has taken any such position, unless there already exists a large majority of states holding the same view. For example, Orakhelashvili has highlighted that the United States argued that a 1978 treaty between the Soviet Union and Afghanistan\textsuperscript{192} might be void for conflicting with *jus cogens*, on the basis that Article 4 of the Treaty potentially provided for the use of force.\textsuperscript{193} This was indeed the position that the United States took,\textsuperscript{194} but it is perhaps more notable that no other state appeared to take this view regarding the Treaty, or seemed willing to support such a position.\textsuperscript{195}

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

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

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

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


\textsuperscript{193.} ORAKHELASHVILI, supra note 4, at 161–62.

\textsuperscript{194.} Owen, supra note 189, ¶ 4.

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

\textsuperscript{196.} Part IV.C of this Article considers a number of examples of state practice in this context: the debates of 1968 at the United Nations Conference on the Law of Treaties, *see*
Moreover, it would also seem that states almost never explicitly deny the peremptory status of the prohibition (leaving aside the apparently anomalous occurrence of this during the debates over the Friendly Relations Declaration). Nonetheless, it would seem much more common for states to refrain from taking any position as to the peremptory status of the prohibition, than to affirm its *jus cogens* character. This is true even when presented with claims to this effect made by other states or when there was a clear and suitable opportunity to do so. This, it is argued, would appear to be the overall position even when the practice cited here is taken cumulatively.

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

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


198. This can be seen from the common view that states can only exempt themselves from emerging customary international law through persistent objection. *See*, e.g., Michael Akehurst, *Custom as a Source of International Law*, 47 BRIT. Y.B. INT’L L. 1, 23–27 (1974–1975); Maurice H. Mendelson, *The Formation of Customary Law*, 272 RECUEIL DE COURS 155, 227–44 (1998); Ted Stein, *The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law*, 26 HARV. INT’L L. J. 457 (1985). It should be noted that the present writer does not necessarily subscribe to the existence of the so-called "persistent objector rule" in international law and instead takes the skeptical view advanced by, for example, Jonathan I. Charney, *The Persistent Objector Rule and the Development of Customary International Law* 56 BRIT. Y.B. INT’L L. 1 (1985). However, such a critique is beyond the scope of this Article.
whether silence is enough to bestow supernorm status on a rule, given that agreement must be reached by the community of states as a whole, and given that once the rule is formed, states are essentially stuck with it.\footnote{199}{Most scholars would hold that the “persistent objector rule” cannot apply to \textit{jus cogens} norms. See, e.g., \textit{Lepard, supra} note 82, at 235–37, 250–52; \textit{Byers, supra} note 38, at 217, 223; Jonathan I. Chamey, \textit{Universal International Law}, 87 AM. J. INT’L L. 529, 541 (1993); Holning Lau, \textit{Rethinking the Persistent Objector Doctrine in International Human Rights Law}, 6 CHIC. J. INT’L L. 495, 495, 498 (2005); J. Brock McClane, \textit{How Late in the Emergence of a Norm of Customary International Law May a Persistent Objector Object?}, 13 ILSA J. INT’L L. 1, 25 (1989); Adam Steinfeld, \textit{Note, Nuclear Objections: The Persistent Objector and the Legality of the Use of Nuclear Weapons}, 62 BROOK. L.R. 1635, 1640 (1996). This position has also been taken by the Inter-American Commission on Human Rights. \textit{See Domingues v. United States, Case 12.285, Inter-Am. Comm’n H.R., Report No. 62/02, OEA/Ser.L/V/II.117, doc. 1, rev. 1, ¶ 49} (2002). Admittedly, the apparent fact that persistent objectors will nonetheless be bound by peremptory norms does not confirm that silence is inadequate to contribute to the formation of a rule of \textit{jus cogens}, but if states are unable to exempt themselves from a peremptory norm through objection, this would seem conceptually logical. For a contrary view, however, see Nieto-Navia, \textit{supra} note 137, at 612.}

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 \textit{jus cogens}, and the agreed importance of the prohibition in modern international law, any suggestion by a state that the rule is not \textit{jus cogens} could well be perceived as some kind of nefarious endorsement of international aggression. Yet, if the community of states as a whole has truly accepted the rule as 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 \textit{jus cogens} seems suspect and fragmented.”\footnote{200}{\textit{Christenson, supra} note 8, at 587.} 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, “suspect” or otherwise, to support this. Second, when one does begin to examine the practice, it would seem that there is enough evidence to at least suggest that state acceptance and recognition of the 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 the community of states as a whole is applied. Equally, a larger number of states seem un-
willing to affirm the peremptory nature of the rule, for whatever reason. The fact that endorsement of the peremptory status of the prohibition is sporadic in the small amount of practice herein examined indicates that there needs to be a more detailed review of the state practice on this issue. The aim of this Section has merely been to highlight that the pervading assumption that states have accepted the prohibition as *jus cogens* needs to be more rigorously tested. The only way to reach a firm conclusion on this question is through an extensive and systematic survey of state practice. Unfortunately, such a survey is beyond the scope of this Article.

**CONCLUSION**

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

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

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

Finally, it has been argued that the state practice in accepting the prohibition of the use of force as peremptory is perhaps not as clear as the majority of scholars assume, although it is acknowledged that the
brief study of the state practice conducted here does not establish a conclusive position on the issue.

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

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

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

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

201. DINSTEIN, supra note 4, at 100.
203. DINSTEIN, supra note 4, at 100-02.
204. See supra note 22 and accompanying text.
those that argue against the "relative normativity" 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 Article leaves it to the reader to take his or her own view as to the utility of its critique. Ultimately, this is because neither "desirability" nor "undesirability" have any legally constituting effect with regard to the creation of *jus cogens* norms. As Barnidge notes:

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

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

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