

IDENTIFYING THE *JUS COGENS* NORM IN THE *JUS AD BELLUM*

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Abstract This article argues that if there is a *jus cogens* norm in the *jus ad bellum*, it must be the customary norm which prohibits non-consensual uses of force that are neither validly authorised under the UN Charter nor lawful exercises of self-defence. In doing so this article will clarify the method by which *jus cogens* norms should be identified, based on a correct understanding and application of what it means for a norm to be ‘accepted and recognized as a norm from which no derogation is permitted’. It is argued that all existing *jus cogens* norms must be norms of customary law, and that the uncertainty regarding the scope of the *jus cogens* norm prohibiting force results from uncertainty as to the structure of the underlying customary and treaty law norms in the *jus ad bellum*.

Keywords: public international law, *jus cogens*, peremptory norms, *jus ad bellum*, use of force.

While there is widespread agreement as to the existence of a *jus cogens* norm in the *jus ad bellum* which prohibits the use of force, opinions diverge as to the precise scope of that *jus cogens* norm. A narrow ban on aggression, Article 2(4) of the Charter, and even the *jus ad bellum* as a whole have all been suggested as candidates. So long as the *jus cogens* status of the prohibition is being referred to for purely rhetorical reasons, this uncertainty does not cause too many problems. However, if we want to consider the effects of the presence of a *jus cogens* norm, such as how it may impact the modification of the *jus ad bellum*, the scope of that *jus cogens* norm must be defined with more precision. This article will argue that if there is a *jus cogens* norm in the *jus ad bellum*, it must be the customary norm which prohibits non-consensual uses of force that are neither validly authorised under the UN Charter nor lawful exercises of self-defence.

This conclusion as to the scope of the *jus cogens* norm is not particularly controversial. However, in demonstrating how this conclusion is reached this

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article aims to do two things. First, it will clarify the method by which *jus cogens* norms should be identified in practice; a question which has not been addressed in detail in the literature to date. In particular, it will be argued that the conclusion above follows from the necessarily customary nature of *jus cogens* norms, as well as a correct understanding and application of what it means for a norm to be ‘accepted and recognized as a norm from which no derogation is permitted’. Second, this article will show that the lack of consensus as to the scope of the *jus cogens* norm prohibiting force results from uncertainty as to the structure of the underlying customary and treaty law norms that comprise the *jus ad bellum*. Yet once what it means for a norm to ‘permit no derogation’ has been clarified, the scope of the *jus cogens* norm in the *jus ad bellum* may be identified without the need to resolve these much more difficult questions of structure. Indeed, the conclusion above as to the scope of the *jus cogens* norm leaves open multiple possibilities as to how the customary and treaty norms setting out the prohibition and its apparent derogations may be analysed.

1. OBSTACLES TO IDENTIFYING THE *JUS COGENS* NORM IN THE *JUS AD BELLUM*

Referring to the extensive literature on the nature of *jus cogens* norms, Saul rightly observes that ‘[w]hat is striking ... is the general absence of detailed exploration of the methodological process that should be undertaken to determine whether or not a norm has *jus cogens* status’, with scholars instead focusing on justificatory theories for the concept of *jus cogens*.¹ Similarly, ‘[t]he most prominent approach to the identification of *jus cogens* norms that is found in judicial practice is to accord a norm the status without further explanation’.² The same can be said of the practice of States, which typically assert that a particular norm has *jus cogens* status without setting out any detailed reasoning as to how that particular norm has been identified as *jus cogens*.³ At most, such statements are accompanied by a vague reference to the importance of the norm, or to a previous judicial decision recognising the

¹ M Saul, ‘Identifying *Jus Cogens* Norms: The Interaction of Scholars and International Judges’ (2015) 5 *AsianJIL* 26, 41. Danilenko notes that a ‘preoccupation with broad natural and moral foundations of *jus cogens* may explain the clear disregard of fundamental questions of legal form’ in GM Danilenko, ‘International *Jus Cogens*: Issues of Law-Making’ (1991) 2 *EJIL* 42, 44.

² Saul (n 1) 43. For example, ‘the fact that a dispute relates to compliance with a norm having such a [*jus cogens*] character, which is assuredly the case with regard to the prohibition of genocide ...’; *Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v Rwanda), Jurisdiction and Admissibility, Judgment, (2006) ICJ Rep 6, para 64.

³ See eg intervention by Mexico, ‘the prohibition of crimes against humanity was a long-standing *jus cogens* norm ...’; UN GAOR, Sixth Committee, Summary Record of the 24th Meeting, UN Doc A/C.6/74/SR.25 (20 November 2019) para 11; intervention by United States of America, ‘Certainly, some of the items in the list were *jus cogens* norms, including most prominently the prohibition of genocide’; UN GAOR, Sixth Committee, Summary Record of the 24th Meeting, UN Doc A/C.6/74/SR.24 (11 November 2019) para 67.

norm as having *jus cogens* status.⁴ The International Law Commission (ILC) has also asserted in various outputs that a norm has *jus cogens* status without providing any detailed reasoning in support, most recently including in the annex to its draft conclusions on peremptory norms ‘a non-exhaustive list of norms previously referred to by the Commission as having peremptory character’.⁵

This article is therefore not concerned with adding to the scholarship justifying the existence of *jus cogens* norms in international law. Being based on fundamentally different views about the nature of law, it is not clear that the disagreements as to the nature and purpose of *jus cogens* norms can ever be resolved.⁶ Instead, using the *jus ad bellum* as an example, this article will set out a methodology for how *jus cogens* norms can be identified in practice. The analysis here is premised on the view that *jus cogens* norms are neither a form of natural law nor ‘international public order’ but like all international law norms arise from the consent and practice of States. A norm of international law—including a norm of *jus cogens*—is identified through the application of secondary rules of the international legal system (in the sense of rules governing law creation and modification, not in the sense of State responsibility).

In contemporary international law, the secondary rules governing the creation and effects of *jus cogens* norms derive from the Vienna Convention on the Law of Treaties (VCLT). Although there were occasional references to *jus cogens* in practice before 1969,⁷ it was the inclusion of the concept in the VCLT that solidified its existence in positive international law.⁸ As a matter of treaty law the VCLT is of course binding only on its parties, but Article 53

⁴ Saul (n 1) 39.

⁵ ILC, Text of the draft conclusions on peremptory norms of general international law (*jus cogens*), adopted by the Commission on first reading with commentaries, ‘Report of the International Law Commission on the work of its seventy-first session’ A/74/10 (2019) 141, draft conclusion 23, commentary para 2.

⁶ See generally U Linderfalk, *Understanding Jus Cogens in International Law and International Legal Discourse* (Edward Elgar 2020); A Hameed, ‘Unravelling the Mystery of *Jus Cogens* in International Law’ (2014) 84(1) BYBIL 52, 61. Any generalisation will obscure important differences between individual positions, but one can broadly divide those writing about *jus cogens* into two groups. On the one hand, those who view *jus cogens* norms as arising due to their content: for example, the moral importance of the values they protect, see M Janis, ‘The Nature of *Jus Cogens*’ (1987–88) 3 ConnJIntL 359; J Tasioulas, ‘In Defence of Relative Normativity: Communication Values and the Nicaragua Case’ (1996) 16 OJLS 85; ME O’Connell, *Jus Cogens: International Law’s Higher Ethical Norms* in DE Childress III (ed), *The Role of Ethics in International Law* (Cambridge University Press 2011). For a ‘public order’ view of *jus cogens*, see A Orakhelashvili, *Peremptory Norms in International Law* (Oxford University Press 2008) especially 30–1. On the other hand, those who consider the identification of a *jus cogens* norm to be independent of its content, and based rather on fulfilment of criteria established by the international legal system, see U Linderfalk, ‘The Emperor’s New Clothes – What If No *Jus Cogens* Claim Can Be Justified?’ (2020) 22 ICLR 139, 140–1.

⁷ For example, *Oscar Chinn Case*, PCIJ A/B No 63 (1934), Separate Opinion Schücking, 149; *Case No 10, United States v Krupp et al*, Military Tribunal III, Nürnberg, Germany, 15 ILR 620 (31 July 1948).

⁸ E De Wet, ‘The Prohibition of Torture as an International Norm of *Jus Cogens* and Its Implications for National and Customary Law’ (2004) 15 EJIL 97, 103.

is now widely accepted as providing the definition and criteria for identification of *jus cogens* norms beyond the VCLT and these may now be considered to be part of customary law.⁹ The language of Article 53 was adopted virtually unchanged by the ILC in 2019 as both the definition and criteria for identification of *jus cogens* norms in its draft conclusions on preemptory norms.¹⁰ Customary law thus provides two cumulative criteria for the identification of a norm as *jus cogens*:

- (a) it is a norm of general international law; and
- (b) it is accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted¹¹

The obstacles to identifying the precise scope of the *jus cogens* norm in the *jus ad bellum* make it a useful lens through which the identification of *jus cogens* norms via the application of these two criteria can be analysed. First, there is an evidential difficulty: while there is widespread acceptance that there is a *jus cogens* norm in the *jus ad bellum* that prohibits force, a variety of different *jus ad bellum* norms have been recognised as *jus cogens*—from the prohibition of aggression;¹² to the prohibition in Article 2(4) of the Charter; to ‘the law of the Charter concerning the prohibition of the use of force’¹³ which potentially includes not only Article 2(4) but the provisions of Chapter VII allowing for the authorisation of force; to the ‘general international law on unilateral use of force as a whole’, apparently including those norms regulating self-defence.¹⁴ In some cases the norm identified as *jus cogens* is a norm of treaty law, while in others it is unclear if the norm referred to is a norm of custom, treaty, both, or neither. For example, a norm in the *jus ad bellum* was recognised as *jus cogens* in the memorials of Iran in the case concerning *Oil Platforms* (the ‘obligation imposed on all Members under Article 2(4) of the Charter’),¹⁵ Spain in *Fisheries Jurisdiction* (*‘la norme impérative qui*

⁹ H Thirlway, *The Sources of International Law* (2nd edn, Oxford University Press 2019) 163; JA Green, ‘Questioning the *Jus Cogens* Status of the Prohibition of the Use of Force’ (2011) 32 *MichJIntL* 215, 220. See, for example, *Domingues v US*, Inter-American Commission on Human Rights, Case 12.285, Report No 62/02 (22 October 2002) 50; *Yusuf and Al Barakaat International Foundation v Council and Commission*, European Court of Justice, Case T-306/01, (2005) ECR II-3533, para 278; *Jones v Saudi Arabia* (2006) UKHL 26 [42] (Lord Hoffmann).

¹⁰ ILC Draft Conclusions on *jus cogens* (n 5), draft conclusions 2 and 4.

¹¹ Although the ILC includes ‘and which can be modified only by a subsequent norm of general international law having the same character’ in (b), the reference to modification is not generally considered to form part of the test for identification; CL Rozakis, *The Concept of Jus Cogens in the Law of Treaties* (North Holland 1976) 45–6.

¹² ILC Draft Conclusions (n 5), draft conclusion 23, Annex, (a).

¹³ ILC, ‘Draft Articles on the Law of Treaties with Commentaries’ Yearbook of the International Law Commission, 1966, vol II, 187, draft Article 50, commentary para 1.

¹⁴ *Case Concerning Oil Platforms (Islamic Republic of Iran v United States of America)*, Judgment, (2003) ICJ Rep 161, Separate Opinion Simma, para 9, although in the subsequent paragraph it seems he is referring only to the prohibition on the threat or use of force as *jus cogens*.

¹⁵ *Oil Platforms*, Memorial of Iran (8 June 1993) para 4.05.

interdit l'usage et la menace du recours à la force'),¹⁶ Nicaragua in *Military and Paramilitary Activities in and against Nicaragua* ('Article 2(4) of the United Nations Charter ... has come to be recognized as *jus cogens*'),¹⁷ Yugoslavia in the *Legality of the Use of Force* cases ('the obligation not to resort to the use of force against another State'),¹⁸ and in oral submissions by Canada in *Fisheries Jurisdiction* ('the Charter's prohibition of the use of force – Article 2, paragraph 4 – is a peremptory norm').¹⁹ Part of the problem seems to be that often the *jus cogens* status of the *jus ad bellum* norm is not doing any work: the references to its *jus cogens* status seem to be purely rhetorical, to emphasise the importance of the norm. As a result, it is possible to get away with a certain amount of vagueness as to the source or scope of that *jus cogens* norm. Thus, while there is widespread agreement that a *jus cogens* norm prohibiting the use of force exists, once one goes beyond the most superficial analysis it can be seen that the precise contours of that norm are unclear.

This uncertainty, it is submitted, flows from the complex and contested nature of the *jus ad bellum* framework itself. It is difficult to identify the contours of the *jus cogens* prohibition on force in part because it is difficult to identify the contours of the prohibition on force in customary and treaty law. Other widely recognised *jus cogens* norms are relatively straightforward prohibitions of a particular conduct. While there may be uncertainty at the boundaries as to what behaviour qualifies as torture or genocide, the structure of the prohibited norm is clear and once behaviour comes within its scope it is prohibited absolutely, with no exceptions. Moreover, since neither the Convention Against Torture nor the Convention on the Prevention and Punishment of the Crime of Genocide actually contains a norm prohibiting torture or genocide—rather they contain ancillary obligations to prevent, punish and criminalise that conduct—it is clear that the prohibitive norms being recognised as *jus cogens* must be the general customary norms prohibiting torture and genocide.²⁰ By contrast, even before we begin to consider the existence of a *jus cogens* norm, the underlying structure of the *jus ad bellum* is already uncertain: are the customary and Charter prohibitions

¹⁶ *Fisheries Jurisdiction* (Spain v Canada), Jurisdiction of the Court, Memorial of Spain (28 September 1995) para 4.

¹⁷ *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v United States of America), Memorial of Nicaragua (Merits) (30 April 1985) para 213.

¹⁸ *Legality of Use of Force* (Serbia and Montenegro v United Kingdom), Preliminary Objections, Memorial of the Federal Republic of Yugoslavia (5 January 2000) para 2.1.1.

¹⁹ *Fisheries Jurisdiction*, Public Hearing of 17 June 1998, 10am, Submissions of Mr Hankey, Deputy Agent for Canada, para 14.

²⁰ Although in its memorial Rwanda noted 'that the norms codified in the substantive provisions of the [Genocide] Convention have the status of *jus cogens*', Memorial of Rwanda, *Armed Activities*, para 3.17 (emphasis added), in its judgment the Court states rather that it is 'assuredly the case' that the 'prohibition on genocide' is of *jus cogens* character; *Armed Activities* (n 2) para 64.

of force identical and if not in what ways do they diverge? Is consent part of the definition of unlawful force or is it somehow operating as a defence?

Further confusion is created by the fact that the structures of norms that appear to be subject to exceptions, like the prohibition on force, can be analysed in different ways, which in turn may impact the identification of any *jus cogens* norm. The term ‘exception’ may be used to refer both to conduct that is simply outside the scope of a particular norm, or it may refer to a separate norm which operates alongside the primary norm to modify its application and, for example, render conduct that would otherwise be unlawful under the primary norm lawful.²¹ (For clarity, ‘exception’ will here be used only to refer to this second meaning, of an exception as a separate norm; conduct that is outside the scope of a norm is not referred to as an exception.) Thus, does force used in self-defence fall outside the scope of the customary prohibition, or is it a *prima facie* violation of that norm that is justified by the exception provided by a separate customary right of self-defence? Does the UN Charter act as *lex specialis* to the customary prohibition on force, thereby providing an exception to that customary norm, or does force authorised under Chapter VII somehow fall outside the scope of that prohibition? In any case, how are these apparent derogations to the prohibition—self-defence, collective security, and consent—to be reconciled with the existence of a non-derogable norm prohibiting force?

As will be shown below, the acceptance that a *jus cogens* norm prohibiting force exists in the *jus ad bellum* can help answer some of these structural questions, or at least limit some of the possible options for how the prohibition and apparent exceptions are analysed. However, for now the point is that, even were the international community as a whole explicitly and unambiguously to state that the ‘prohibition on the use of force’ is *jus cogens*, we could not straightforwardly identify the scope of that *jus cogens* norm. A more fine-grained approach is needed.

²¹ The nature of legal exceptions is the subject of debate in the context of domestic law, in particular criminal law. On one view, an exception refers simply to conduct that falls outside the scope of a norm and is merely a linguistic construct—there is no difference between the exception, which sets out certain limits of the norm, and the norm itself. See G Williams ‘The Logic of Exceptions’ (1988) 47 CLJ 261, 278; R Dworkin, *Taking Rights Seriously* (Bloomsbury 2013) 41; RM Hare, ‘Principles’ (1972–73) 73 Proceedings of the Aristotelian Society 1, 6. Another view considers exceptions as separate norms external to the primary norm. For a very brief moment, even if only a sliver of time, the primary norm is applicable to the case which is then excepted by the separate norm creating the exception. See C Finkelstein ‘When the Rule Swallows the Exception’ in L Meyer (ed), *Rules and Reasoning* (Hart 1999) and M Carpentier, *Norme et Exception – Essai sur la défaisabilité en droit* (LGDJ 2014) 17. However, it is not necessary to analyse all apparent ‘exceptions’ using the same approach. Based on the context, nature and content of the particular norms in question, some exceptions may be better analysed as negative conditions of the primary norm, and others as a separate norm.

II. A NORM OF GENERAL INTERNATIONAL LAW

The language of Article 53 makes clear that *jus cogens* norms do not constitute a separate source of international law; they arise from an existing norm of 'general international law' which is then recognised as having *jus cogens* status.²² In practice, there are no examples of a *jus cogens* norm being recognised without or before the norm has an independent existence as a norm of positive international law. For example, although it is difficult to identify precise dates for the emergence of rules of custom or *jus cogens*, it is clear that the rules prohibiting genocide²³ and torture²⁴ emerged as customary norms before or at least simultaneously with their recognition as *jus cogens* norms. Therefore, to identify a *jus cogens* norm in the *jus ad bellum* it is first necessary to identify an existing norm of general international law on which it could plausibly be based.

Yet none of the sources of international law can easily be reconciled with the characteristics to be displayed by *jus cogens* norms. As Danilenko observes, the international community has recognised the existence of *jus cogens*, but without taking account of the fact that 'in international law there is a glaring gap between the requirements of the idea of *jus cogens* and the possibilities of the existing law-making processes'.²⁵ It will be argued here that, while in principle a universally ratified treaty could constitute a 'general norm of international law' which could be recognised as having *jus cogens* status, in practice all *jus cogens* norms currently in existence must be norms of customary law.

General principles of law, the source listed in Article 38(1)(c) of the ICJ Statute, do not seem promising as a source of *jus cogens* norms, limited as they are to legal principles common to domestic legal systems, and which do not contain equivalents of, for example, the prohibition on (inter-State) force.²⁶ Some scholars take the view that 'general international law' could include multilateral treaties.²⁷ However, treaty-based *jus cogens* is difficult to

²² See Danilenko (n 1) 49. cf Orakhelashvili, who considers the possibility of *jus cogens* as an autonomous source of international law (n 6) 108–11; also Janis (n 6) 363. However, this appears to be a minority view, in addition to being inconsistent with the classic statement of the sources of international law in art 38(1) ICJ Statute.

²³ As early as 1951 the prohibition was recognised by the ICJ as custom; *Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion (1951) ICJ Rep 19, 23. The prohibition of genocide was stated to be a norm of *jus cogens* by Judge *ad hoc* Lauterpacht in 1993; *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Provisional Measures, Order of 13 September 1993, (1993) ICJ Rep 325, Separate Opinion Lauterpacht, para 100.

²⁴ The prohibition on torture was recognised by the ICJ as a norm of *jus cogens* in 2012 in *Questions Relating to the Obligation to Prosecute or Extradite* (Belgium v Senegal) Judgment (2012) ICJ Rep 422, 99. It had been recognised as custom by the ICTY Appeal Chamber in 2000, *Prosecutor v Furundžija* (IT-95-17/1), Appeals Chamber Judgment (21 July 2000) para 111.

²⁵ Danilenko (n 1) 47.

²⁶ Thirlway (n 9) 185–6.

²⁷ L Alexidze, 'Legal Nature of *Jus Cogens* in Contemporary International Law' (1981) 172 *Recueil des Cours* 224, 255–6; Y Dinstein, *War, Aggression and Self-Defense* (6th edn, Cambridge University Press 2017) 109; or even a combination of different sources, K Wolfke

reconcile with the universality of *jus cogens* norms.²⁸ For a State that is not party to the relevant treaty, it is unclear what would be the source of the legally binding norm which has *jus cogens* status. *Jus cogens* status makes a norm that is already legally binding non-derogable, it is not a source of law in itself. Yet if *jus cogens* norms are universal, either the *jus cogens* norm must somehow itself constitute a source of law for that non-party State, a view precluded by the language of Article 53 and typically only held by those who take a natural law approach to *jus cogens*, or the treaty norm is somehow binding on a third party as a result of its *jus cogens* status, contrary to the *pacta tertiis* principle and the principle of consent which underpins treaty law.

This highlights the more fundamental problem with *jus cogens* treaty norms. *Jus cogens* norms are now accepted as having certain features that limit the role of State consent: for example, a State will be bound by a *jus cogens* norm even where it has not accepted and recognised the norm as having that status, and the persistent objector rule does not apply to *jus cogens* norms.²⁹ For *jus cogens* norms then to be drawn from that source of international law which is unquestionably rooted in the consent of each party to the creation of each obligation by which they are bound³⁰ seems difficult to sustain. The consensual nature of treaty norms shapes virtually every aspect of how treaties are created, interpreted and modified. A *jus cogens* treaty norm which somehow bound a third party—or prevented a party from availing of a denunciation or amendment provision to which they consented at the time they became a party to the treaty, without such a change being effected by consensual means of treaty amendment or interpretation—would so distort the essential nature of treaty norms as consensually agreed obligations that it is difficult to see how such a norm could still sensibly be called a treaty norm. As Judge Dugard has observed, ‘the concept [of *jus cogens*] is not to be used as an instrument to overthrow accepted doctrines of international law’, such as the principle of consent to jurisdiction—it seems this should be the case *a fortiori* for the foundational principle of consent to treaty obligations.³¹

‘*Jus Cogens* in International Law (Regulation and Prospects)’ (1974) 6 PolishYBIntL 145, 154–5; A Verdross, ‘*Jus Dispositivum* and *Jus Cogens* in International Law’ (1966) 60 AJIL 55, 61.

²⁸ In its draft conclusions the ILC describes *jus cogens* norms as ‘universally applicable’, ILC, Draft conclusions on *jus cogens* (n 5), draft conclusion 3. Gaja has argued that the conception of *jus cogens* norms as universal seems ‘unjustifiably restricted’ due to its exclusion of the possibility of norms that are *jus cogens* within a restricted group of States, such as the Council of Europe; G Gaja, ‘*Jus Cogens* beyond the Vienna Convention’ (1981) 172 Recueil des Cours 275, 284. While there is nothing in principle to prevent a concept of regional *jus cogens* emerging, in practice the universality of *jus cogens* norms is now widely accepted and frequently acknowledged, and all those norms most commonly stated to be *jus cogens* are norms of general application. For example, *US v Matta-Ballesteros*, United States Court of Appeals, 9th Circuit, (1995) 71 F3d 754, 764 fn 5.

²⁹ ILC, Draft Conclusions on *Jus Cogens* (n 5), draft conclusions 7(2) and 14(3).

³⁰ Thirlway (n 9) 37; ‘It is well established that in its treaty relations a State cannot be bound without its consent’; *Reservations to the Convention on Genocide* (n 23) 21.

³¹ Separate Opinion Dugard, *Armed Activities* (n 2) para 6.

It is possible to imagine a universal treaty whose provisions were drafted (or interpreted) so as to create the effects of *jus cogens* and which could potentially constitute a treaty-based norm of *jus cogens*. In the same way as Article 103 of the UN Charter provides that its norms will prevail over conflicting treaty norms, a treaty could provide for conflicting treaties to be treated as invalid, which would be given effect among its parties. Similarly, subsequent practice or agreement of the parties could reinterpret the treaty so that the denunciation clauses were considered obsolete and any amendment clauses could be reinterpreted to meet the Article 53 test for identification of *jus cogens*. In such a case one could perhaps interpret this as acceptance and recognition that the treaty norm no longer permitted any derogation and—since for a universal treaty this would necessarily embrace the international community as a whole—had become *jus cogens*. The universality and non-consensual characteristics of *jus cogens* norms could thus potentially be created through ordinary operations of treaty law which respect the principle of consent of the parties. However, for now this remains purely hypothetical. Until such a treaty emerges, *jus cogens* treaty norms remain either impossible or, even if possible in principle, not currently existing in practice. Even the UN Charter falls short of universal ratification³² and multilateral treaties rarely even attract ratifications from ‘the international community of States as a whole’.³³

In the 1966 commentary to its draft articles on the law of treaties, the ILC stated that ‘a modification of a rule of *jus cogens* would today most probably be effected through a general multilateral treaty’.³⁴ However, this does not necessarily mean that the treaty norm itself would be *jus cogens*. Rather, the widespread agreement on the importance of the norm that would be required for the conclusion of such a treaty would likely lead to the rapid emergence of a parallel customary norm, accompanied by the acceptance and recognition of the international community as a whole required to give it *jus cogens* status. This new customary *jus cogens* norm would then replace the old customary *jus cogens* norm. In practice, therefore, the inability of treaty norms alone to act as the source of *jus cogens* norms may be of little impact, as any treaty norm which enjoys the widespread support that would be necessary for identification as a *jus cogens* norm will likely also come to

³² The Holy See and the State of Palestine are non-member State permanent observers to the UN. Kosovo and Taiwan are non-Members as their statehood remains contested. Switzerland remained a non-Member until 2002.

³³ Danilenko (n 1) 63. The 1949 Geneva Conventions and the Convention on the Rights of the Child, both very widely ratified, are two exceptions. However, all contain denunciation clauses, and the provisions of the latter are not among those norms most commonly referred to as having *jus cogens* status; see, for example ILC, Draft Conclusions on *jus cogens* (n 5), draft conclusion 23, Annex. While the ‘basic rules of international humanitarian law’ are sometimes referred to as norms of *jus cogens*, the continued opposition of some States to the prohibition on belligerent reprisals casts doubt on such claims; see D Akande and S Shah ‘Immunities of State Officials, International Crimes, and Foreign Domestic Courts’ (2011) 21(4) EJIL 815, 833–4.

³⁴ ILC Draft Articles on the Law of Treaties (n 13), draft Article 50, commentary para 4.

exist as a norm of customary international law. Indeed, this seems the best explanation of the effect of Article 2(4) of the UN Charter on custom after 1945.

In its 2019 draft conclusions on *jus cogens* the ILC stated that '[c]ustomary international law is the most common basis for peremptory norms of general international law (*jus cogens*)' but that '[t]reaty provisions and general principles of law may also serve as bases for peremptory norms of general international law (*jus cogens*)'.³⁵ However, the commentary to the conclusion reveals a greater scepticism about treaty norms acting as a source of *jus cogens* norms, suggesting that where this does occur it is only through the impact that a treaty may have on customary law, as described above:

The role of treaties as an exceptional basis for peremptory norms of general international law (*jus cogens*) may be understood as a consequence of the relationship between treaty rules and customary international law as described by the International Court of Justice in [the] North Sea Continental Shelf cases. In that case, the Court observed that a treaty rule can codify (or be declaratory of) an existing general rule of international law, or the conclusion of a treaty rule can help crystallize an emerging general rule of international law, or that a treaty rule can, after adoption, come to reflect a general rule on the basis of subsequent practice.³⁶

To the extent that this does represent a change in the ILC's position since 1966, this may simply reflect the fact that treaty law has in practice not served as a source of *jus cogens* norms.³⁷ It is difficult to think of any suggested *jus cogens* norms which exist only in treaty form and cannot also be said to exist in customary law.

The prevailing view holds that 'general international law' in Article 53 refers to general customary international law.³⁸ It is true that a customary *jus cogens* norm would also not behave in exactly the same way as a regular customary norm, in terms of its modification and the inapplicability of the *lex specialis* doctrine, for example. However, the non-consensual effects of *jus cogens* norms are easier to reconcile with custom as a source, where it is already a

³⁵ ILC, Draft Conclusions on *jus cogens* (n 5), draft conclusion 5.

³⁶ ILC, Draft conclusions on *jus cogens* (n 5), draft conclusion 5, commentary para 9. The commentary to draft conclusion 13 (Absence of effect of reservations to treaties on peremptory norms of general international law (*jus cogens*)) also seems to assume that the treaty norm is not itself the source of the *jus cogens* norm: 'while the reservation may well affect the treaty rule and the application of the treaty rule, the norm, as a peremptory norm of general international law (*jus cogens*), will not be affected', para 2.

³⁷ As the Commission said in 1966, it would 'leave the full content of this rule [draft Article 50] to be worked out in State practice and in the jurisprudence of international tribunals', ILC, Draft articles on the law of treaties (n 13), draft Article 50, commentary para 3.

³⁸ I Brownlie, *Principles of Public International Law* (7th edn, Oxford University Press 2008) 510; L Hannikainen, *Peremptory Norms (Jus Cogens) in International Law* (Helsinki 1988) 225; A de Hoogh 'Jus Cogens and the Use of Armed Force' in M Weller (ed), *Oxford Handbook of the Use of Force in International Law* (Oxford University Press 2015) 1163; U Linderfalk, 'The Source of Jus Cogens Obligations – How Legal Positivism Copes with Peremptory International Law' (2013) 82 NordicJIntL 369, 379.

more diluted consent to the customary process generally (rather than each customary norm) that is involved.³⁹ Whether or not they consent to the particular norm or participate in the practice that underlies it, States in practice will be presumed to be bound by a valid customary norm. Only in the eventuality that they can prove they meet the stringent requirements to be a persistent objector can a State claim the norm is not opposable to them, but effective claims of this kind are rare.⁴⁰ For a customary norm to be a *jus cogens* norm—which removes the possibility to persistently object to or contract out of the norm—is thus more a difference in degree than in kind. By participating in the international legal system as States, States consent to the possibility that they may be bound by particular *jus cogens* customary norms to which they have not consented and from which they will not be able to derogate.⁴¹

Returning to the *jus ad bellum*, we can therefore conclude as a first step that if there is a norm prohibiting force which has *jus cogens* status it must be based on the customary prohibition on force, not Article 2(4) of the UN Charter. While the Charter's membership includes the overwhelming majority of States it is not universal, and as a result none of the treaty norms contained in the Charter can form the source for a *jus cogens* norm. By 1970 at the latest, however, the discussions in the Sixth Committee regarding the draft Friendly Relations Declaration and the text of the Declaration as adopted demonstrated that the prohibition on the use of force was considered a free-standing norm of customary law, independent of the Charter, that bound all States regardless of whether they are UN members.⁴² The prohibition's customary status was later confirmed by the ICJ in *Military and Paramilitary Activities in and against Nicaragua*.⁴³ It is this customary norm prohibiting force that must be the source of any *jus cogens* norm in the *jus ad bellum*.

III. ACCEPTED AND RECOGNISED BY THE INTERNATIONAL COMMUNITY AS A WHOLE AS A NORM FROM WHICH NO DEROGATION IS PERMITTED

The second criterion for the identification of *jus cogens* norms is sometimes described as an enhanced form of *opinio juris*.⁴⁴ This is perhaps a useful analogy to the extent that both involve the acceptance by States that a norm has a particular legal effect—binding as law in the case of ordinary custom,

³⁹ M Byers, 'Conceptualising the Relationship between *Jus Cogens* and *Erga Omnes* Rules' (1997) 66 *Nordic JIntlL* 211, 228.

⁴⁰ P Dumberry, 'Incoherent and Ineffective: The Concept of Persistent Objector Revisited' (2010) 59 *ICLQ* 779, 794.

⁴² Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Between States in Accordance with the Charter of the United Nations, A/2625 (XXV) (24 October 1970) paras 1, 3.

⁴³ *Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v United States of America), Merits, Judgment, (1986) ICJ Rep 14, 188.

⁴⁴ For example, M Bos, *A Methodology of International Law* (North Holland 1984) 246.

impermissibility of derogation for *jus cogens*—and that this acceptance also constitutes that norm as custom or *jus cogens* respectively. However, describing the second criterion as a form of *opinio juris* also risks confusion. Regardless of the source of the general norm of international law which forms the basis for the substantive *jus cogens* norm, the secondary norms that regulate the identification and effects of *jus cogens* norms must be norms of customary international law.⁴⁵ The same is true of treaty law: the secondary norms that govern the identification, interpretation and effects of treaty norms are norms of customary law (albeit codified in the VCLT for those States that are party). However, identification of a new *jus cogens* norm does not involve the creation of a new norm (or norms) of customary law which create its *jus cogens* effects.⁴⁶ Each *jus cogens* norm is not accompanied by its own bundle of customary norms which, for example, void any treaties conflicting with that particular norm. Rather, the identification of a new *jus cogens* norm involves the application of secondary customary norms governing the creation of *jus cogens* norms. Those customary norms provide that a norm of general international law is identified as *jus cogens* when it is ‘accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted’ and create certain effects for norms so identified. Acceptance and recognition are thus not a form of *opinio juris* required for the establishment of a new norm of custom, but simply an element that fulfils the requirements of those secondary norms, in order for them to identify a norm as *jus cogens*.

The acceptance and recognition of a norm as *jus cogens* by the ‘international community of States as a whole’ need not be universal: a ‘very large majority’ of States will suffice and no one State could have a veto.⁴⁷ This tells us who needs to do the accepting and recognising; however, the more complicated question is *what* it is that needs to be accepted and recognised. The most common approach is to interpret ‘accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted’ as, in effect, ‘accepted and recognized by the international community of States as a whole as a *jus cogens* norm’.⁴⁸ This is exemplified by the ILC’s recent draft conclusions on *jus cogens*. While draft conclusion 4 (‘Criteria for the identification of a peremptory norm of general international law (*jus cogens*)’) simply repeats the language of Article 53, in the commentary the second criterion is described as follows: ‘the norm must be shown to be

⁴⁵ See Linderfalk (n 38) 378–9.

⁴⁶ cf Linderfalk (n 38) 382–3.

⁴⁷ This was the view of the Chair of the Drafting Committee at Vienna: ‘there was no question of requiring a rule to be accepted and recognised as *jus cogens* by all states. It would be enough that a very large majority did so; that would mean that if one state in isolation refused to accept the *jus cogens* character of a rule, or if that state was supported by a very small number of states, the acceptance and *jus cogens* character of the rule would not be affected’ quoted in Hannikainen (n 38) 210. Support for this view is widespread in doctrine, see Alexidze (n 27) 247; Dinstein (n 27) 109; Gaja (n 28) 283.

⁴⁸ For example, Green (n 9) 243.

accepted and recognized by the international community of States as a whole as having a peremptory character'.⁴⁹

It is precisely this interpretation of the second criterion for identification of *jus cogens* norms that has led to criticism of the Article 53 definition as circular or tautologous.⁵⁰ *Jus cogens* norms are those accepted and recognised as *jus cogens* norms.⁵¹ No information is given as to which norms, with which qualities, should be accepted or recognised as having those effects. One might expect draft conclusion 8, 'Evidence of acceptance and recognition', to break down the second criterion and elucidate what is meant by a derogation, or what it means for a norm to permit no derogation—after all, this is what needs to be accepted and recognised for it to be identified as a *jus cogens* norm. However, the views that need to be held are simply described as acceptance and recognition 'that the norm in question is one from which no derogation is permitted', 'of the non-derogability of such a norm' or 'that a norm has a peremptory character'.⁵² There is no analysis of what it means for a norm to permit no derogation or how this manifests in practice: it is simply a synonym for 'is *jus cogens*'.

One consequence of this approach is that in practice it limits evidence of acceptance and recognition to what States say they accept as non-derogable: to statements that a norm 'is *jus cogens*', 'is a peremptory norm' or 'is a norm from which no derogation is permitted'. We cannot look directly at which norms States are actually accepting and recognising as permitting no derogation as it is unclear what this entails. Here the analogy with *opinio juris* for custom is helpful: while *opinio juris* for custom can of course be found in explicit statements by States about the content of customary law, it can also be inferred from State conduct that treats the alleged customary norm as legally binding. Yet if 'permits no derogation' is simply understood to mean 'is *jus cogens*', with no independent content of its own, then we cannot know what conduct to look for from which we could infer acceptance and recognition that a norm permits no derogation.

The limitations of relying on statements that a norm 'is *jus cogens*' are well illustrated by the *jus ad bellum* where, as discussed above, the statements of

⁴⁹ ILC, Draft conclusions on *jus cogens* (n 5), draft conclusion 4, commentary para 6.

⁵⁰ G Abi-Saab, 'Introduction' *The Concept of Jus Cogens in International Law*, *Lagonissi Conference: Papers and Proceedings*, vol II (Carnegie 1967) 13; A Gómez-Robledo, 'Le *jus cogens* international : sa genèse, sa nature, ses fonctions' (1981) 172 *Recueil des Cours* 15, 112; T Ruys, 'Armed Attack' and Article 51 of the UN Charter (Cambridge University Press 2010) 25; D Costelloe, *Legal Consequences of Peremptory Norms in International Law* (Cambridge University Press 2017) 15; T Minagawa, 'Essentiality and Reality of International *Jus Cogens*' (1984) 2 *HitotsubashiJL&Pol* 1, 4; cf R Kolb, *Théorie du Jus Cogens International* (Geneva 2001), Titre I, section II, para 36.

⁵¹ As Schwelb wrote in 1967: '[Article 53] can be compared to a penal code which would provide that crimes shall be punished without saying which acts constitute crimes'; E Schwelb, 'Some Aspects of International *Jus Cogens* as Formulated by the International Law Commission' (1967) 61 *AJIL* 946, 964.

⁵² ILC, Draft conclusions on *jus cogens* (n 5), draft conclusion 8 and commentary.

States leave it unclear which precise norm is accepted and recognised as *jus cogens* by the international community as a whole. States have frequently recognised the existence of a *jus cogens* norm in the *jus ad bellum*. As set out in detail by Corten, during discussions in the Sixth Committee leading to the adoption of the Friendly Relations Declaration numerous States explicitly referred to the prohibition on the use of force as a *jus cogens* norm, while many others used more general language that nevertheless implies recognition of *jus cogens* status.⁵³ The discussions leading to the ILC's draft Articles on the Law of Treaties show that the principle set out in Article 2(4) was accepted as *jus cogens*.⁵⁴ The prohibition on the use of force was also recognised as *jus cogens* at the 1969 Vienna Conference, when it was the most frequently cited example of a norm of *jus cogens*.⁵⁵ Discussions leading to the adoption of the Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations,⁵⁶ also demonstrated agreement among States as to the *jus cogens* nature of a norm in the *jus ad bellum*.⁵⁷ Corten shows convincingly that it is not merely the prohibition on aggression that States recognise as *jus cogens*, but the 'prohibition on force'.⁵⁸ However, even so, the contours of the norm being recognised as non-derogable remain unclear—does 'force' refer only to non-consensual force? Is force in self-defence excluded from the prohibition's scope?

So, while statements are a valid way of identifying acceptance and recognition of a norm as *jus cogens*, in this case considering statements by States explicitly accepting and recognising a *jus ad bellum* norm 'as *jus cogens*' does not really advance us very far beyond our starting point. From the statements it is at least clear that support for the existence of a *jus cogens* norm that prohibits force is very widespread and that we can proceed on the assumption that a *jus cogens* norm prohibiting force does indeed exist in the *jus ad bellum*. Having analysed the first criterion for identification of *jus cogens* norms, we also know that any references to Article 2(4) of the Charter as *jus cogens* must be understood as referring to the parallel customary norm that prohibits the use of force, not the treaty norm itself. However, to identify precisely the scope of the customary norm in the *jus ad bellum* that is *jus cogens*—the prohibition on force, the prohibition plus the exceptions, or the prohibition on

⁵³ For example, 1966 Report of the Sixth Committee, A/6547, 118, para 36; 1967 Report of the Sixth Committee, A/6955, 191, para 37; O Corten, *Le droit contre la guerre* (Pedone 2008) 300.

⁵⁴ Corten (n 53) 297–8.

⁵⁵ For example, UN Conference on the Law of Treaties, First Session, 52nd Meeting of the Committee of the Whole, para 18 (Evrigenis, Greece) para 31 (Mwendwa, Kenya).

⁵⁶ UNGA Res A/RES/42/22 (18 November 1987).

⁵⁷ See the statements of different delegations reported in UNGA 'Report of the Special Committee on Enhancing the Effectiveness of the Principle of the Non-Use of Force in International Relations' A/36/41 (1981) paras 37, 45, 57, 70, 130, 216; Corten (n 53) 301–6.

⁵⁸ Corten (n 53) 295–303; also ST Helmerson 'The Prohibition of the Use of Force as *Jus Cogens*: Explaining Apparent Derogations' (2014) 61 NILR 167, 189.

non-consensual force only etc—a more fine-grained approach is necessary, which looks at the extent to which a norm is accepted and recognised as a norm ‘from which no derogation is permitted’.

A. No Derogation Is Possible

The first step must be to clarify what is meant by ‘derogation’ in this context. Despite forming the ‘keystone’ of the Article 53 definition of *jus cogens*,⁵⁹ ‘derogation’ is the subject of terminological confusion,⁶⁰ with different writers understanding the term differently.⁶¹

To say a norm is non-derogable must mean more than that it is legally binding, which is a characteristic of all customary norms. A derogation therefore cannot be the same as a breach of the customary norm. As Tomuschat writes:

Sometimes, one encounters an understanding to the effect that only rules of *jus cogens* are really endowed with juridically compulsory effect ... such an understanding of *jus cogens* rests on a grave misperception. Each and every rule of customary law is binding, and *jus cogens* as a higher-ranking group of legal rules comes into play only when the validity of a treaty is to be evaluated or when it has to be determined whether, by other means, a legal position can be created or maintained that is incompatible with such peremptory rules.⁶²

Derogation is thus not concerned with factual conduct that is not in compliance with an obligation of a party that is bound by a norm,⁶³ but rather with legal or normative acts.⁶⁴ As normative acts, derogations can only be made by actors with the power to create new international legal norms, whether individually, bilaterally or collectively.

Unsurprisingly given their focus, in the drafting of the VCLT and the ILC work that preceded it the only kind of ‘derogation’ from *jus cogens* contemplated was a bilateral or multilateral treaty by which two or more States attempt to ‘contract out’ of the conflicting *jus cogens* norm. Since *jus cogens* norms permit no derogation, Articles 53 and 64 VCLT provide that any such treaties will be void. This understanding of derogation corresponds

⁵⁹ Kolb (n 50), Titre I, section II, para 38.

⁶⁰ R Kolb ‘Des problèmes conceptuels, systématiques et terminologiques en droit international public’ (2001) 56 ZföR 501, 505.

⁶¹ For example, two recent articles analysing the *jus cogens* prohibition derive (different) definitions of derogation from dictionaries: Helmerson (n 58) 175; P Butchard ‘Back to San Francisco: Explaining the Inherent Contradictions of Article 2(4) of the UN Charter’ (2018) JCSL 229, 239.

⁶² C Tomuschat, ‘Obligations Arising for States without or against Their Will’ (1993) 241 Recueil des Cours 203, 276.

⁶³ J Sztucki, *Jus Cogens and the Vienna Convention on the Law of Treaties* (Springer 1974) 68; K Zemanek ‘How to Identify Peremptory Norms of International Law’ in P-M Dupuy (ed), *Essays in Honour of Christian Tomuschat* (2006 NP Engel) 1116: ‘sanctioning a factual violation is not the primary aim of the concept’.

⁶⁴ Kolb (n 50) Titre I, Section II, para 47.

to the origins of the term '*jus cogens*' in Roman law, which divided all legal rules into *jus cogens* and *jus dispositivum*. The division represented the limits of contractual freedom of parties. *Jus dispositivum* rules applied to the extent that parties had not departed from them in giving a different content to their contract *inter se*, whereas *jus cogens* rules excluded any such freedom of contract.⁶⁵

Some writers continue to take the view that 'the main legal effect of peremptory norms is consequently to sterilise the operation of the *lex specialis* principle'⁶⁶ and so protect the norm which has that status from fragmentation or bilateralisation.⁶⁷ Regional custom that conflicts with a *jus cogens* norm would also constitute a derogation on this view, as it purports to create a conflicting special legal regime among a more restricted set of parties.⁶⁸ However, even before the conclusion of the VCLT it was suggested that this might be just one application of a broader concept of derogation,⁶⁹ and today derogation is not understood in this narrow sense,⁷⁰ as can be seen in the closing phrase of the quotation from Tomuschat above. Since the conclusion of the VCLT, and in particular since the completion of the ILC's work on State responsibility in 2001, it is clear that the concept of derogation has come to be understood as including, but also going far beyond, the conclusion of conflicting treaties or emergence of special customary regimes. In particular, Article 26 of the ILC's Articles on the Responsibility of States for Internationally Wrongful Acts provides that the invocation of circumstances precluding wrongfulness is excluded in relation to breaches of all *jus cogens* norms.

Today it seems that to say a *jus cogens* norm permits no derogation is understood rather as meaning that '[i]rrespective of the situation, there will never be a legally valid reason to depart from a rule of *jus cogens*',⁷¹ with 'departing' understood as not performing the conduct (positive or negative) required by the customary norm which has *jus cogens* status. There may be

⁶⁵ Alexidze (n 27) 233.

⁶⁶ R Kolb, *The Law of Treaties: An Introduction* (2016 Elgar) 105; see also Zemanek's criticism of Kolb's thesis (n 63) 1109–12; A Orakhelashvili, 'Changing *Jus Cogens* through State Practice? The Case of the Prohibition of the Use of Force and Its Exceptions' in Weller (n 38) 157, 172, rejecting an African *lex specialis* in the *jus ad bellum*; Helmerson (n 58) 175–6.

⁶⁷ Kolb (n 50) Titre I, Section I, para 13.

⁶⁸ Rozakis (n 11) 22; Kolb (n 50) Titre I, section II, 51.

⁶⁹ For example, 'A general rule possesses a *jus cogens* character only when individual States are not permitted to derogate from the rule at all—not even by agreement in their mutual relations' ILC, Fifth Report on the Law of Treaties by Sir Humphrey Waldock, Special Rapporteur, Observations and proposals of the Special Rapporteur, A/CN.4/183 and Add.1-4, 24 (emphasis added). Ragazzi interprets the inclusion of 'even by' as showing that 'whereas the main focus in Article 53 is "derogation" in the strict sense, i.e. by treaty, the Commentary indicates a wider sense of the term "derogation"'; M Ragazzi, *The Concept of International Obligations Erga Omnes* (Oxford University Press 1997) 58.

⁷⁰ De Hoogh (n 38) 1172.

⁷¹ U Linderfalk, 'What Is So Special About *Jus Cogens*? – On the Difference between the Ordinary and the Peremptory International Law' (2012) 14 ICLR 3, 12; also, for example, Green (n 9) 229.

many legally valid reasons to depart from a regular customary norm: conduct may fall within an exception created by another customary norm; a treaty may act as *lex specialis*, excluding the customary norm from the relations of the parties; or the law of State responsibility may provide that although there is a breach of that customary norm it is not wrongful. It makes no difference whether the derogating norm purports to make the conduct lawful all things considered, justified, or merely excused. All these examples would constitute derogations from the *jus cogens* norm. What matters is whether the norm is purporting to provide a legally valid reason for ‘any act ... that is not in conformity with an obligation arising under a peremptory norm of general international law (*jus cogens*)’.⁷² For example, where the *jus cogens* norm is a prohibition, from the court’s reasoning in *Jurisdictional Immunities of the State* it seems that a derogating norm will be one that creates a ‘direct conflict’ with the *jus cogens* norm in relation to ‘whether or not the conduct in respect of which the proceedings are brought [that is, conduct accepted to be in breach of norms assumed to have *jus cogens* status] was lawful or unlawful’.⁷³

It is important to recall that it is not the act contrary to the *jus cogens* norm that constitutes the derogation—for example, the act that constitutes the countermeasure. As factual conduct that constitutes a breach of the *jus cogens* norm. The derogation would rather be the norm of general customary law that provides that the wrongfulness of that breach is precluded because it constitutes, for example, a countermeasure: that norm is purporting to provide a legally valid reason to depart from the conduct required by the *jus cogens* norm. As the generality of the customary norms of State responsibility demonstrates, derogations are not limited to conflicting *lex specialis*.⁷⁴ Of course, where the norm that is being breached is an ordinary customary norm, there is no problem in the customary law of State responsibility providing a legally valid reason to depart from it in certain circumstances by, for example, taking countermeasures. Customary and treaty norms constantly provide legally valid reasons to depart from the conduct prescribed by the other by creating exceptions or acting as *lex specialis*. It is this combination and interaction of different norms that determine the constellation of legal obligations applicable to a particular State. It is only for *jus cogens* norms that such derogations are not permitted.

While the language of Article 53 provides that no derogation is ‘permitted’ from a *jus cogens* norm, the second criterion is better expressed as providing that no derogation is ‘possible’. Attempting to derogate from a *jus cogens*

⁷² ILC, Draft conclusions on *jus cogens* (n 5), draft conclusion 18.

⁷³ *Jurisdictional Immunities of the State* (Germany v Italy), Judgment, (2012) ICJ Repts 99, para 93.

⁷⁴ See also *Prosecutor v Furundžija* (IT-95-17/1-T) (10 December 1998), Trial Judgment, para 153: ‘the principle at issue cannot be derogated from by States through international treaties or local or special customs or even general customary rules not endowed with the same normative force’.

norm is not prohibited and does not of itself lead to responsibility for the States concerned. Rather, a purported derogation to a *jus cogens* norm is invalid—it cannot operate in the manner intended. Such a purported derogation may lead to State responsibility—for example, if a State has acted contrary to their obligations under a customary *jus cogens* norm expecting to be able to rely on a treaty excluding its application—but this results from their breach of the customary *jus cogens* norm, not the fact of derogation itself.

Even as the meaning of derogation has expanded, it is important to note that ‘the scope of *jus cogens* is not unlimited’.⁷⁵ The ICJ’s recent jurisprudence has placed clear limits on the concept and confirmed that *jus cogens* ‘is not a trump card’ and *jus cogens* norms do not take precedence over all other norms.⁷⁶ In particular, the fact that a rule would ‘hinder the enforcement’ of the *jus cogens* norm is not enough for a rule to be disapplied.⁷⁷ Even where a dispute relates to compliance with a *jus cogens* norm, that ‘cannot of itself provide a basis for the jurisdiction of the Court’ where no basis for jurisdiction otherwise exists.⁷⁸ In *Immunities*, the ICJ clarified that:

A *jus cogens* rule is one from which no derogation is permitted but the rules which determine the scope and extent of jurisdiction and when that jurisdiction may be exercised do not derogate from those substantive rules which possess *jus cogens* status, nor is there anything inherent in the concept of *jus cogens* which would require their modification or would displace their application.⁷⁹

It is, of course, possible that a procedural norm, such as a norm conferring jurisdiction on a tribunal in relation to a particular norm, could itself have *jus cogens* status so that a norm purporting to provide a legal reason to depart from that procedural rule would constitute a derogation. However, otherwise ‘the application of a procedural rule does not amount to derogation from substantive rules of *jus cogens*’.⁸⁰

B. Accepted and Recognised

With an understanding of what it means for no derogation from a norm to be possible, we are now able to move beyond the statements of States and also use their conduct to infer which norm in the *jus ad bellum* is accepted and recognised by the international community as a whole as not possible to derogate from. In the same way that States can demonstrate *opinio juris* for custom by condemning breaches of that norm as unlawful or invoking the

⁷⁵ Separate Opinion Dugard, *Armed Activities* (n 2) para 6.

⁷⁶ J Vidmar, ‘Rethinking *jus cogens* after Germany v Italy: Back to Article 53?’ (2013) 60 NILR 1, 25.

⁷⁷ *Immunities* (n 73) para 95. cf Judge Cançado Trindade’s criticism, Dissenting Opinion, paras 295–297. ⁷⁸ *Armed Activities* (n 2) para 64. ⁷⁹ *Immunities* (n 73) para 95.

⁸⁰ S Talmon, ‘*Jus Cogens* after Germany v Italy: Substantive and Procedural Rules Distinguished’ (2012) LJIL 979, 986.

responsibility of another State, a State can also demonstrate its acceptance that a norm is non-derogable by treating as void purported derogations from that norm by other States, such as a bilateral treaty conflicting with a *jus cogens* norm. It may also be possible—in principle—to infer that a State accepts that derogation from a norm is not possible based on a State's (or States') own behaviour in not attempting to derogate from the norm. Although, as will be discussed below, this may prove more difficult in practice. Derogations are normative acts that purport to create a legally valid reason to depart from the *jus cogens* norm, that is, to perform the conduct prohibited by the customary norm in the case of a *jus cogens* prohibition.⁸¹ Thus, it could be possible for a State to demonstrate its acceptance and recognition that a norm permits no derogation through its behaviour as a *legislator* of international law: by not attempting to create norms that purport to provide legal reasons to depart from the *jus cogens* norm. This would obviously include not attempting to conclude treaties that conflict with the *jus cogens* norm as well as groups of States refraining from creating regional custom that conflicts with the *jus cogens* norm of general custom.

In addition, since a conflicting *lex specialis* is not the only sense in which derogation is now understood, another general customary norm—such as the rules on circumstances precluding wrongfulness—would derogate from a *jus cogens* norm if it purported to create a legally valid reason to depart from the conduct it requires. As a result, a norm of general customary law (A) which provides an exception or defence in relation to another general customary norm (B) will derogate from that norm. Where they have created an exception through the process of customary law States collectively demonstrate their acceptance that derogation from customary norm B is possible—there can be and are legally valid reasons to depart from the conduct it requires. Conversely, where States have created a customary norm C but not created any derogations from that norm, this could demonstrate their acceptance and recognition that derogation from that norm is not possible. As Byers writes: ‘[o]pinio juris, or something like *opinio juris*, appears to be at the root of the non-derogable character of *jus cogens* rules because States, quite simply, do not believe that it is possible to contract out of *jus cogens* rules’;⁸² to which we may add that States simply do not accept it is possible to create a customary norm derogating from that *jus cogens* norm. They ‘regard those rules as being so important to the international

⁸¹ See Memorial of the Federal Republic of Germany (12 June 2009), Written Proceedings, *Immunities*, para 86.

⁸² Although note that Byers sees the *jus cogens* status of a particular norm as being entirely the result of customary processes; Byers (n 39) 221. In the commentary to draft conclusion 10 the ILC observes: ‘The fact that treaties have rarely been invalidated on account of conflict with peremptory norms is, however, not because the rule in article 53 is not accepted by States, but simply because States do not generally enter into treaties that conflict with peremptory norms of general international law (*jus cogens*)’, ILC, Draft conclusions on *jus cogens* (n 5), draft conclusion 10, commentary para 1.

society of States, and to how that society has come to define itself, that they can conceive of no exceptions to them.⁸³

As a result, part of the difficulty in identifying the *jus cogens* norm in the *jus ad bellum* has been that States have explicitly accepted the prohibition on the use of force as *jus cogens* through their statements, while simultaneously accepting the existence of apparent derogations from that prohibition in the form of the two so-called ‘exceptions’ and the possibility that a State may validly consent to a use of force on its territory.⁸⁴ All of these examples appear to provide a legally valid reason for one State to use force against another. If such derogations from the prohibition on force are unquestionably possible, so the argument goes, then it cannot be a norm of *jus cogens*.⁸⁵

To avoid this conclusion that the prohibition on force cannot be *jus cogens*, writers sometimes go to the other extreme and suggest 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-defence and the rules on forcible action as authorized by the Security Council.’⁸⁶ On this view, identification of a norm as *jus cogens* would be like the touch of King Midas that causes *jus cogens* status to spread through every branch of the underlying customary norm and every other customary norm connected to that norm, making it non-derogable in every extremity. Yet, not only would such arguments result in a formulation of the *jus cogens* norm so lengthy and complicated as to be virtually unworkable,⁸⁷ but by deducing the scope of the *jus cogens* norm rather than inducing it from the acceptance and recognition of States, this approach would abandon the Article 53 criteria: a norm is only *jus cogens* if it is accepted and recognised as non-derogable.⁸⁸

In any case, it is not necessary to resort to such convoluted solutions to avoid the conclusion that the prohibition on force cannot be *jus cogens*. The problem with the argument that a general norm subject to apparent derogations cannot be non-derogable is that it assumes that the *jus cogens* norm must be coextensive with the general customary norm that underlies it; or put another way, that the underlying customary norm must be non-derogable in its entirety. On this view, the fact that any of the conduct prohibited by the general customary norm may—for example—be consented to means the norm cannot therefore have *jus cogens* status. It takes an ‘all or nothing’ approach to *jus cogens* status: the possibility of derogation in relation to some conduct that comes within the scope of that customary norm means the norm as a whole is not non-derogable and so not

⁸³ Byers (n 39) 221. ⁸⁴ Green (n 9) 229; Helmerson (n 58) 173. ⁸⁵ Green (n 9) 229.

⁸⁶ Green (n 9) 230, discussing Orakhelashvili.

⁸⁷ See U Linderfalk ‘The Effect of *Jus Cogens* Norms: Whoever Opened Pandora’s Box, Did You Ever Think About the Consequences?’ (2008) 18 EJIL 5 853, 867.

⁸⁸ There are other difficulties with a *jus cogens* norm that includes the right of self-defence and collective security structure, such as the imposition of a time limit on that right by art 51 of the Charter, and the existence of Chapter VII of the Charter in treaty law only; see Butchard (n 61) 241–4; also Green (n 9) 230–2.

jus cogens. However, there is no necessary shape that the *jus cogens* prohibition on force must conform to, and it need not be the same as the general customary norm on which it is based. All the possibility of consent tells us is that to the extent force may be consented to it is not prohibited by a norm with *jus cogens* status. The possibility of consent or other derogations does not mean that there can be no *jus cogens* prohibition on force; only that it must be narrower than one may initially think. A customary norm may be *jus cogens* in part—that is, to the extent that derogation is not possible—while other aspects of the customary norm will remain susceptible to derogation.⁸⁹ All that matters is that the norm to be given *jus cogens* status forms a coherent and intelligible norm in itself (eg non-consensual inter-State force is prohibited), and the fact that it forms part of, or falls within the scope of, a larger non-*jus cogens* customary norm (eg inter-State force is prohibited) is no obstacle. There can be a core, narrow *jus cogens* norm, surrounded by a penumbra of derogable customary law. In such cases, identifying the scope of the *jus cogens* norm becomes a question of identifying where the boundary between derogable and non-derogable customary law lies.

Most customary norms are subject to multiple derogations, both in the form of treaty law (for example, a treaty that acts as *lex specialis*) and also customary law (for example, another customary norm exists creating an exception to the norm). Customary norms which are not subject to any derogations will be rare, but it is precisely this failure to legislate exceptions and other derogations into existence through the ordinary customary or treaty law processes that may, in principle, provide evidence of the acceptance and recognition of States that such derogations from the norm are not possible.

However, there are difficulties in using the absence of derogations alone to identify the extent to which a norm is accepted and recognised as non-derogable. When evaluating whether a customary prohibition exists, a State's omission to perform a particular conduct is ambiguous because it may reflect an acceptance (*opinio juris*) that the conduct is prohibited by customary law, but equally it may result from the State's choice not to exercise a customary permission to perform the conduct.⁹⁰ In the same way, failure to create a derogation to a norm may reflect acceptance and recognition that derogation is not possible to this extent, but equally it may simply be that States have no interests in creating such a norm, and so a supporting practice has not developed. As a result, we cannot infer solely from the omission to create a derogation that a State considers the norm to be non-derogable to this extent. A further difficulty is presented by the higher quantitative threshold, which requires acceptance and recognition that the norm is non-derogable by the

⁸⁹ Green makes a similar argument but in relation to the treaty norm in art 2(4): its prohibition on force may be peremptory but not the prohibition on the threat of force (n 9) 228–9.

⁹⁰ *The Case of the SS Lotus* (1927) PCIJ Series A No 10, 28; *Colombian-Peruvian Asylum Case*, Judgment, 20 November 1950, ICJ Rep (1950) 266, 277.

'international community as a whole'. Even if we can be sure that a State or States accept that a customary derogation from a norm is not possible, all that is required to prevent such a derogating customary norm being established is that those States are sufficient in number to prevent the emergence of a widespread and representative practice and *opinio juris* in support of the derogating norm. Without additional evidence in the form of statements, this will not be enough to establish the acceptance and recognition of the international community as a whole (a very large majority of States) that such a derogation is not possible.

Yet, the opposite deduction—using the existence of derogations to identify the extent to which derogation from the norm *is* possible—does not raise these evidential problems. Where there is a general customary norm that statements from the international community as a whole have identified as having *jus cogens* status, the precise scope of the *jus cogens* norm may thus be identified by starting from the general customary norm which is said to provide the source for the alleged *jus cogens* norm and taking account of all apparent derogations to that general norm in order to identify the precise contours of the norm that is accepted and recognised as non-derogable. Where there is—for example—an established customary derogation from a general norm it is clear that the widespread and representative practice and *opinio juris* required for the formation of that customary norm means it is impossible that the international community as a whole (a very large majority of States) holds the opposite view, that it is not possible to derogate from the norm to this extent. The scope of a *jus cogens* norm may thus be identified negatively, by looking at the structure of the general norm on which the *jus cogens* norm is said to be based and the circumstances in which there is or is not a legally valid reason to depart from the underlying customary norm.

This approach therefore deals with the 'exceptions' to the prohibition on force not by including them within the *jus cogens* norm, as in the expansive approach above, but by excluding them from its scope. The existence of apparent derogations to the prohibition on force is not an obstacle to its identification as *jus cogens*, but the key to that process. Starting with the customary prohibition on force as the underlying norm of general international law which has been explicitly recognised by States as *jus cogens* through their statements, we must then take account of all derogations to that general norm. To the extent that the norm is subject to derogation, it cannot be accepted and recognised as non-derogable by the international community as a whole, allowing us to identify, by a process of elimination, that part of the general norm from which derogation is accepted and recognised as not possible.

This approach may appear at odds with how we typically think of *jus cogens* norms operating: first a norm is identified as *jus cogens*, and from that status certain effects are deduced, such as the inability to derogate. This approach would turn this on its head. Yet, '[t]he "peremptory" character of a legal

norm in general international law is a conclusion, not a premise⁹¹ and if we accept that the elements from Article 53 correctly reflect the customary criteria for identifying a norm as *jus cogens* then it is the acceptance and recognition of non-derogability alone that can justify that conclusion.

The approach suggested above may also appear to render the concept of *jus cogens* rather empty. What is the point of *jus cogens* status if any derogations can simply be explained away as part of the definition of the scope of the norm? However, this is a necessary consequence of any approach to identification of *jus cogens* that accepts that the customary criteria for identification derived from Article 53 VCLT make acceptance and recognition that no derogation is permitted the key to identification of *jus cogens* norms. Unless one adopts a content-based criterion for identification of *jus cogens* norms which sets out, for example, that *jus cogens* norms must protect certain fundamental values—the approach rejected by States at the Vienna conference⁹²—the international community of States as a whole, provided it acts collectively, is free to allow any derogations to any norms they please and identify the content of the non-derogable norm in such a way that it imposes no meaningful restriction on the freedom of action of States. There is no necessary content for the norms that States recognise as non-derogable; indeed, there is no obligation for States to identify any *jus cogens* norms at all. The norms recognised as *jus cogens* may tend to be norms that States consider to be of fundamental importance or that carry particular moral weight, but this is not necessary for a norm to acquire *jus cogens* status.

Instead, the value of a norm's *jus cogens* status lies in its impact on modification of the non-derogable norm once identified. Just as in many domestic systems the only protection from abrogation for entrenched rights is a more onerous process of change, whatever the *jus cogens* norm is, no new derogation can be created until the *jus cogens* norm is validly modified through the acceptance and recognition of the new non-derogable norm by the international community of States as a whole. Until that occurs, individual States, or even groups of States that fall short of a 'very large majority' will neither be able to derogate from nor modify the contours of an existing *jus cogens* norm, for example by creating new derogations or altering its scope through the ordinary customary process.⁹³

III. THE STRUCTURE OF THE *JUS AD BELLUM*

Applying the methodology above to the *jus ad bellum*, we can conclude that the *jus cogens* norm in the *jus ad bellum* must be the customary norm which prohibits non-consensual force that does not fall within either of the two established so-called 'exceptions': authorisation under the UN Charter and self-defence. Starting from the general customary prohibition on force, an

⁹¹ Costelloe (n 50) 17.

⁹² Rozakis (n 11) 74–6.

⁹³ Dinstein (n 27) 114.

apparent derogation from that norm exists in the form of authorisation by the Security Council, acting under Chapter VII of the UN Charter. If such uses of force were prohibited by a *jus cogens* norm, the Charter would be purporting to provide a legally valid reason to depart from the *jus cogens* norm and, one would conclude, must be void through the operation of either the customary rule codified in Article 53 VCLT or, depending on the time at which the prohibition on force attained *jus cogens* status, the customary rule codified in Article 64 VCLT. Yet the UN Charter not only purports to provide a legally valid reason for using force in its text (as interpreted through subsequent practice)—authorisation under Chapter VII—but these provisions have been applied on multiple occasions without the validity of the Charter in whole or in part ever being called into question. The universal acceptance, including by the 193 UN member States, that it is possible for such a treaty to be valid means that the opposite view—that a norm prohibiting the use of force when authorised under the Charter is non-derogable—cannot be accepted and recognised by the international community as a whole. Such uses of force must fall outside the scope of the *jus cogens* prohibition on force. Moreover, they help define the scope of that *jus cogens* norm, by demonstrating the limits of the norm that can be accepted and recognised as non-derogable.

Turning to self-defence, it is not a treaty that constitutes the apparent derogation from the customary prohibition but the customary right of self-defence.⁹⁴ If force in self-defence were prohibited by the *jus cogens* prohibition on force, a customary right of self-defence would be a norm purporting to provide a legally valid reason to depart from that *jus cogens* norm. Either the customary norm of self-defence would be invalid or, more likely, like the right of self-help it would have disappeared from customary law as a prohibition on force in self-defence came to be identified as *jus cogens*.⁹⁵ Yet since the customary right of self-defence unquestionably exists,⁹⁶ we must conclude that the *jus cogens* prohibition on the use of force does not extend to a prohibition on force used in self-defence. The universal acceptance that the right of self-defence exists in customary law means the prohibition on the use of force cannot be accepted and recognised by the international community as a whole as non-derogable to the extent it includes force used in self-defence within its scope. Such uses of force must be outside the scope of the *jus cogens* prohibition.

Importantly, these conclusions are without prejudice to the analysis of the underlying structure of the customary and treaty norms in the *jus ad bellum*, which proves to be a much more complex question than the scope of the *jus cogens* norm. The definition of the *jus cogens* norm given above is

⁹⁴ The relationship between Article 51 of the Charter and customary law is complex and lies beyond the scope of this article. For present purposes what matters is that Article 51 acts as an exception to Article 2(4) of the Charter only, not the customary prohibition.

⁹⁵ *Corfu Channel*, Judgment of 9 April 1949, (1949) ICJ Rep 4, 35.

⁹⁶ *Nicaragua* (n 43) para 176.

compatible with more than one analysis of the structure of the *jus ad bellum*. For example, given that a State may consent to the use of force by another State and this will render that use of force lawful,⁹⁷ consensual force cannot be prohibited by a *jus cogens* norm. Of course, this does not tell us how consent to the use of force operates: consensual force may simply not constitute prohibited force for the purposes of the underlying customary prohibition on force,⁹⁸ so that in this regard the scope of the customary and *jus cogens* prohibitions are identical. Alternatively, both consensual and non-consensual uses of force may be prohibited by the customary norm, so consensual force is *prima facie* prohibited by the customary prohibition but consent acts as a circumstance precluding wrongfulness or defence for breaches of that prohibition.⁹⁹ Either way, with regard to the scope of the *jus cogens* norm their position is the same: it cannot prohibit consensual force. The general customary norm may be *jus cogens* in part or to a certain extent: just because conduct falls outside the scope of the *jus cogens* part of that prohibition does not mean it is not prohibited by the derogable customary norm. Put another way, if a particular type of conduct is regarded as being lawful ‘all things considered’ it cannot be prohibited by a *jus cogens* norm; but this does not tell us—nor do we need to know in order to identify the scope of the *jus cogens* norm—anything more about why that conduct is lawful ‘all things considered’. It could be perfectly legal *ab initio*, or *prima facie* unlawful but justified or excused.

Turning to the so-called ‘exceptions’ to the prohibition on the use of force, this conclusion as to the scope of the *jus cogens* norm also leaves open different possibilities as to the underlying structure of the UN collective security framework in customary and treaty law—and indeed whether it is truly an exception to the customary prohibition on force. Force authorised under the Charter may be prohibited by the customary prohibition on force, with the Charter acting as *lex specialis* among UN members. In this case, the Charter derogates from the customary prohibition on force. Alternatively, force authorised under the Charter may simply fall outside the scope of the prohibition on force which, for example, prohibits unilateral force only.¹⁰⁰ In this case, the Charter does not derogate from the customary prohibition, nor is it a true exception, as such uses of force are simply not prohibited by that

⁹⁷ Provided certain conditions are met, it is widely accepted that a State may lawfully take actions that would otherwise amount to a violation of the prohibition on force, such as sending troops onto another State’s territory, where the latter State has consented to that intervention. See, for example, International Law Association ‘Final Report on Aggression and the Use of Force’ (2018) 18–20. Although not stated explicitly, the Court’s judgment in *Armed Activities on the Territory of the Congo* (Democratic Republic of the Congo v Uganda) clearly accepts that consent may render a use of force lawful; Judgment (2005) ICJ Rep 168, para 149.

⁹⁸ Helmerson (n 58) 177–8; ILC, ‘Articles on the Responsibility of States for Internationally Wrongful Acts’ Yearbook of the International Law Commission (2001) vol II, Pt Two, art 26, commentary para 6.

⁹⁹ FI Paddeu, ‘Military Assistance on Request and General Reasons against Force: Consent as a Justification for the Use of Force’ (2020) JUFIL.

¹⁰⁰ See discussion by Helmerson (n 58) 182–6.

customary norm, even *prima facie*. Identifying the correct structure of the 'exception' lies beyond the scope of this article; the point here is simply that this does not need to be resolved in order for us to conclude that the scope of the *jus cogens* norm in the *jus ad bellum* must not extend to a prohibition on force authorised under the Charter. Either the Charter provides a legally valid reason to perform conduct prohibited by the customary prohibition on force, in which case that norm cannot be non-derogable to that extent; or such uses of force were never prohibited by the customary prohibition on force in the first place, in which case they could never fall within the scope of the *jus cogens* prohibition, which is based on that general norm.

Similarly, the conclusion above does not resolve the question of the structure of the right of self-defence as an apparent 'exception' to the customary prohibition on force, much less its relationship with Articles 51 and 2(4) of the Charter. Force used in self-defence may simply not qualify as prohibited force under customary law and so fall outside the scope of both the customary and *jus cogens* prohibitions.¹⁰¹ On the other hand, force used in self-defence may be a *prima facie* breach of the customary prohibition on force which is then made lawful by the operation of a separate customary norm that creates a right of self-defence. In the latter case, self-defence would be a true exception to the customary prohibition which would be *jus cogens* in part—to the extent that force is permitted in self-defence it is not non-derogable. In either case, the scope of the *jus cogens* prohibition on force will not extend to force used in self-defence.

In this way, the derogations from the customary prohibition on force identify which part of that norm is non-derogable. Once the meaning of derogation is clarified, it follows that any force that is regarded as lawful 'all things considered' cannot be prohibited by a *jus cogens* norm. Depending on the structure of the underlying norms, either the derogation defines the limits of the underlying customary prohibition on force itself, or it demarcates the boundary between that part of the customary prohibition that is derogable and that which is non-derogable. In either case, the apparent derogations are used to identify the scope of the *jus cogens* norm. However, what this reveals is that identifying the scope of the *jus cogens* norm in the *jus ad bellum* is relatively straightforward when compared with the more complex question of the structure of the underlying customary and treaty norms that make up the *jus ad bellum*.

Many authors have reached a similar conclusion as to the scope of the *jus cogens* prohibition on force while attempting to square the circle of a *jus cogens* norm that is subject to apparent derogations. For example, for Orakhelashvili and Kolb the so-called exceptions to the prohibition on the use of force go to the substantive scope of application of the rule and are

¹⁰¹ Butchard (n 61) 262–4; see also Helmerson (n 58) 176–7.

‘included within the content of the [*jus cogens*] norm itself’.¹⁰² However, few have considered how this interface between the non-derogable norm and the norms regulating uses of force that fall outside its scope operates. This raises the difficult question of the level of abstraction with which that boundary is defined, and in turn how the content of the *jus cogens* norm is defined.

That the derogations to the general customary norm are used to identify the scope of the *jus cogens* norm does not necessarily mean that the definition of the *jus cogens* norm must mirror in every detail the contours of those derogating norms. If that were the case, and if the extent to which force may lawfully be used in self-defence determines the limits of the *jus cogens* norm, then the requirements of necessity and proportionality, the definitions of armed attack and imminence, indeed every element of the right of self-defence, must be reflected in the definition of the *jus cogens* norm.¹⁰³ At its boundary with self-defence the *jus cogens* prohibition would be like a negative image of the customary right. The same would also apply to any other derogation which is being used to identify the scope of the non-derogable norm, such as authorisation of force under the Charter or consent.

Such an approach risks absurd consequences, as the definition of the *jus cogens* norm becomes so long and complex as to be unworkable.¹⁰⁴ Moreover, this does not really correspond with how we think about legal norms in practice. It seems implausible that the acceptance and recognition of States that a norm is non-derogable could extend to every detailed element of the customary prohibition on which it is based. What is more likely is that the *jus cogens* norm is defined at a higher level of abstraction and prohibits force that is not a lawful exercise of self-defence, however that is defined by the customary law of self-defence at a particular time. In this way, the scope of the *jus cogens* norm may be ambulatory: it tracks changes in the customary law of self-defence as it evolves. What matters is the conclusion as to lawfulness that is reached through the application of the body of law that regulates self-defence—or the law that governs the validity of consent to force, or the collective security provisions of the Charter.

This conclusion has interesting implications for the modification of *jus cogens* norms. Article 53 VCLT provides that a *jus cogens* norm ‘can be modified only by a subsequent norm of general international law having the same character’. While *jus cogens* norms are not immutable, they may only be modified through their replacement by another *jus cogens* norm in accordance with the process for the identification of *jus cogens* norms. That is, the two criteria must be fulfilled, including the acceptance and recognition

¹⁰² Orakhelashvili (n 6) 72; R Kolb, *Peremptory International Law Jus Cogens* (Hart 2015) 98–9. See also Dinstein: the ‘built-in Charter exceptions frame the scope of application of the rule, whereas derogations “clash” with it’ (n 27) 111; D Akande and A Tzanakopoulos ‘The International Court of Justice and the Concept of Aggression’ in C Kreß and S Barriga (eds), *The Crime of Aggression: A Commentary* (Cambridge University Press 2017) 214 fn 3; also, perhaps, Corten (n 53) 296, 609.

¹⁰³ See Green (n 9) 232–4.

¹⁰⁴ Green (n 9) 234.

of the new contours of the *jus cogens* norm by a very large majority of States. However, if the *jus cogens* norm only prohibits uses of force which are concluded to be unlawful through application of the customary right of self-defence, this suggests that there can be a certain amount of change to the customary norms comprising the right of self-defence without this amounting to a modification of the *jus cogens* norm, with the more demanding requirements that this entails.

An important constraint is placed on this flexibility by the scope of the *jus cogens* norm. If the change to customary law were so significant that it goes beyond modification of the *content* of self-defence and modifies the *jus cogens* norm itself that provides the outer boundaries of that ambulatory right, then the requirements for modification of a *jus cogens* norm would need to be fulfilled, not merely those of customary international law. For example, an attempt to transform self-defence into a broader doctrine of self-help or self-preservation. Thus, it is essential to identify with precision the scope of the norm accepted and recognised as *jus cogens*, as this will determine how much and what kinds of change may be tolerated before it amounts to a modification of the *jus cogens* norm.

Drawing these kinds of fine distinctions and determining the level of abstraction at which the *jus cogens* norm is identified and its limits expressed will require a detailed analysis of the acceptance and recognition of States, and to attempt to do so for the *jus cogens* norm in the *jus ad bellum* would require a much lengthier analysis than is possible here. In practice, the content of the *jus cogens* norm may most easily be determined by examining how modifications to that norm have occurred in practice, as we can see if we turn to the other so-called ‘exception’ to the prohibition on force. Since 1945, the original interpretation of the text of Article 27(3) of the UN Charter has been modified to allow force to be authorised by Security Council decisions adopted with the abstention of a permanent member. This modification of the collective security system resulted from the interpretation of the Charter through subsequent practice of its members, as codified in Article 31(3)(b) VCLT: that is, the presidential rulings and positions of Council members combined with the acquiescence of other parties to the Charter.¹⁰⁵ Although the practice was likely generally accepted by UN members long before it was confirmed by the Court’s 1971 advisory opinion, even by 1971 only 132 States were parties to the Charter—far from the ‘very large majority’, even of those States in existence at that time, which would be required to modify the *jus cogens* prohibition on force. This suggests that the limitation on the scope of the *jus cogens* norm constituted by collective security exists at a level of abstraction above the detailed procedural requirements for the functioning of the Security Council as set out in the text of

¹⁰⁵ *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, Advisory Opinion (21 June 1971), (1971) ICJ Rep 16, paras 21–22.

the Charter as drafted. That is, the *jus cogens* norm must have prohibited ‘force not validly authorized by the Security Council’ or perhaps ‘force not validly authorized under the Charter’, whatever that happens to be at the time, not ‘force not authorized by a decision of the Security Council made by an affirmative vote of nine members including the concurring votes of the permanent members’.¹⁰⁶ That specific change to the Security Council decision-making process must not have entailed a modification of the *jus cogens* norm.

In this way, an ‘ambulatory’ approach to defining the scope of the *jus cogens* norm can help account for the ‘notoriously flexible’ nature of the *jus ad bellum*, despite the presence of a *jus cogens* norm at its heart.¹⁰⁷ Not only that, but this may explain how the prohibition on the use of force can be identified as a *jus cogens* norm while key elements of the *jus ad bellum* remain uncertain and contested by States.¹⁰⁸ Green’s 2011 observation that the existence and scope of the alleged rights of anticipatory or pre-emptive self-defence are hotly debated by States is no less true today. It would indeed be difficult to frame a definition of a *jus cogens* norm that accounted for this uncertainty. However, if the definition of the *jus cogens* norm is only concerned with the conclusion as to the lawfulness of a use of force under the customary law of self-defence, not with the elements that establish that lawfulness, then this problem does not arise. The debate can continue at the level of custom while the *jus cogens* prohibition remains unchanged.¹⁰⁹

IV. CONCLUSION

This article has argued that the *jus cogens* norm in the *jus ad bellum* is the customary norm which prohibits non-consensual force that does not fall within either of the two apparent exceptions: authorisation under the UN Charter and self-defence. In doing so, it has been argued that in the absence of any universal treaties, all existing *jus cogens* norms must be norms of customary international law. For a norm to derogate from another norm means it purports to provide a legally valid reason to depart from that norm. Where a general customary norm is alleged to be *jus cogens* but its contours are unclear, the scope of the non-derogable norm may be identified by using any established derogations to that norm to infer to what extent the norm is accepted and recognised by the international community as a whole as non-derogable. Finally, the conclusion above as to the scope of the *jus cogens* norm in the *jus ad bellum* leaves open a range of explanations of the structure of the underlying customary and treaty law norms. The flexibility and uncertainty of the content of the apparent exceptions to the *jus cogens* prohibition on force suggest that they could be ambulatory—they track changes in customary and treaty law without the *jus cogens* norm itself being modified.

¹⁰⁶ See the different possibilities suggested by Helmerson (n 58) 182–6.

¹⁰⁷ Green (n 9) 237.

¹⁰⁸ Green (n 9) 234–6.

¹⁰⁹ cf Green (n 9) 241.