Derogation and the scope of the *jus cogens* norm in the *jus ad bellum*

Katie Johnston

Balliol College

Submitted for the degree of Master of Philosophy in Law

September 2018

ABSTRACT

It is widely accepted that there is a *jus cogens* norm in the *jus ad bellum*. Yet uncertainty exists as to its scope, due to the existence of two exceptions to the prohibition on the use of force: self-defence and force authorised under the UN Charter. This dissertation aims to identify the *jus cogens* norm in the *jus ad bellum* by clarifying the meaning of 'derogation' in the context of *jus cogens* norms. In doing so, this dissertation addresses three questions: 1) what does it mean to say that a norm permits no derogation?; 2) do exceptions derogate from *jus cogens* norms?; and 3) how do the exceptions to the prohibition on the use of force affect the scope of the *jus cogens* norm in the *jus ad bellum*?

A *jus cogens* norm is identified as a norm of general international law 'accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted'. Yet scholars understand 'derogation' in different ways: a 'narrow' view understands derogations as attempts to contract out of the *jus cogens* norm *inter se*, while a 'broad' view understands derogations as any norm that makes conduct inconsistent with the *jus cogens* norm lawful. On the broad view, there can be no exceptions to *jus cogens* norms.

It is argued that to say a norm permits no derogation means that there can be no lawful conduct inconsistent with obligations arising under that norm. As a result, any apparent 'exceptions' to *jus cogens* norms must be limitations on the scope of that norm. Thus, neither force lawfully authorised under the Charter nor force lawfully used in self-defence is prohibited by the *jus cogens* norm in the *jus ad bellum*. Such uses of force are defined and regulated by non-*jus cogens* norms, which are recognised by the *jus cogens* norm without forming part of it.

Derogation and the scope of the *jus cogens* norm in the *jus ad bellum*

Table of Contents

Table of cases and other primary legal sources

ILC, 'Report of the International Law Commission on the work of its sixty-eighth session' 2 May–10 June and 4 July–12 August 2016 (2016) A/71/10	21
United Nations conference on the law of treaties : official records (New York 1969-70)	88
Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations, UNGA Res A/RES/42/22 (18 November 1987)	26
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)	27
ILC, 'Second report on State responsibility, by Mr James Crawford, Special Rapporteur' (17 March 1999) A/CN.4/498	35, 59, 62, 65, 69
ILC, 'Report of the Study Group of the International Law Commission finalized by Martti Koskenniemi, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law' (13 April 2006) A/CN.4/L.682	38, 41, 60, 77
UN Human Rights Committee 'General Comment No. 29: Article 4: Derogations during a State of Emergency' UN Doc CCPR/C/21/Rev.1/Add.11 (31 August 2001)	44
UNGA Res 34/65B (1979) 'Question of Palestine'	56
UNGA Resolution 33/28A (1978) 'Question of Palestine'	56
ILC, 'Report of the International Law Commission on the work of its fifty-first session (3 May - 23 July 1999)' A/54/10, Yearbook of the International Law Commission 1999, vol. II(2)	62
ILC, 'Report of the International Law Commission on the work of its fifty-second session (1 May - 9 June and 10 July - 18 August 2000)' A/55/10, Yearbook of the International Law Commission 2000, vol. II(2)	62
ILC, 'Fifth report on the content, forms and degrees of international responsibility (part two of the draft articles), by Mr Willem Riphagen, Special Rapporteur' A/CN.4/380 and Corr.1, Yearbook of the International Law Commission 1984, vol. II(1)	68
ILC, 'Third report on the content, forms and degrees of international responsibility by Mr Willem Riphagen, Special Rapporteur' A/CN.4/354 and Corr.1 and Add.1 & 2, Yearbook of the International Law Commission, 1982, vol. II(1)	68
ILC, 'Fourth report on State responsibility, by Mr Gaetano Arangio-Ruiz, Special Rapporteur' A/CN.4/444 and Add.1-3, Yearbook of the International Law Commission 1992, vol. II(1)	69
UNSC Res 678 (1990) 'Iraq-Kuwait'	92
UNSC Res 660 (1990) 'Iraq-Kuwait'	92

Introduction

It is widely accepted that there is a norm of *jus cogens* in the *jus ad bellum*. Yet uncertainty exists as to its scope. This *jus cogens* norm has been described, at one extreme, as a narrow ban on acts of aggression,[1] while at the other the entire *jus ad bellum* has been characterised as *jus cogens*.[2] A chief source of this uncertainty is the existence of two well-established exceptions to the prohibition on the use of force, which appear difficult to reconcile with the impermissibility of derogation from *jus cogens* norms. This has led some to question whether there can be a *jus cogens* norm in the *jus ad bellum* at all.[3] Others have been led to characterise only the prohibition on aggression as *jus cogens*. A 'large majority' would extend *jus cogens* status to the prohibition on force or even the Charter provisions on the use of force as a whole, including the self-defence exception in Article 51.[4]

Discussions of the *jus cogens* norm in the *jus ad bellum* have been complicated by unspoken assumptions about the meaning of two key concepts: derogations and exceptions. Although the concept of derogation is central to the identification of *jus cogens* norms, it is rarely defined by those writing about *jus cogens*. Two different approaches can be identified in the scholarship: a 'narrow' view, which understands derogations as attempts to contract out of the *jus cogens* norm *inter se*; and a majority

[1] International Law Commission 'Articles on the Responsibility of States for Internationally Wrongful Acts' Yearbook of the International Law Commission, 2001, vol II, Part Two, 85, Article 26, Commentary, para 5.
[2] Alexander Orakhelashvili, *Peremptory Norms in International Law* (OUP 2006), 51.
[3] James A Green 'Questioning the *Jus cogens* Status of the Prohibition of the Use of Force' (2011) 32 Mich J Int'l L 215, 258.
[4] Tom Ruys, *'Armed Attack' and Article 51 of the UN Charter* (CUP 2010), 26, citing to broader scholarship in fns 107, 108.

'broad' view, which understands derogation as any norm that makes conduct inconsistent with the *jus cogens* norm lawful.

This dissertation aims to answer three main questions: 1) what does it mean to say that a norm permits no derogation?; 2) do exceptions derogate from *jus cogens* norms?; and 3) how do the exceptions to the prohibition on the use of force affect the scope of the *jus cogens* norm in the *jus ad bellum*? I will argue that the exceptions to the use of force do indeed delimit the scope of the *jus cogens* norm, which prohibits uses of force that are neither lawfully authorised under the UN Charter nor lawful acts of self-defence. Part one traces the emergence of *jus cogens* norms in international law and sets out the criteria for their identification. Part two analyses the two alternative approaches to derogation and through an examination of State practice in the law of treaties and the law of State responsibility concludes that today derogation is understood in the broad sense of any norm that allows conduct inconsistent with the *jus cogens* norm. Part three analyses the nature of exceptions to a *jus cogens* norm in light of the meaning of derogation clarified in part two. It is argued that there can be no exceptions to a *jus cogens* norm and that where a *jus cogens* norm appears to be subject to exceptions these should be analysed as limitations on the scope of the *jus cogens* norm. Finally, a structure of the *jus cogens* norm in the *jus ad bellum* and its exceptions is proposed. Rather than being 'built in' to the *jus cogens* norm itself, it will be argued that the relationship between the prohibition on the use of force and its exceptions is more complex and that the exceptions determine the scope of the *jus cogens* norm without themselves forming part of that norm.

1. *Jus cogens* norms and how they are identified

This part will trace the emergence of a category of *jus cogens* norms in international law, the existence of which is now accepted even if their nature, content and effects remain contested. It will then analyse Article 53 of the 1969 Vienna Convention on the Law of Treaties, which was the result of attempts to reconcile differing views as to the nature of *jus cogens* norms through its definition and criteria for identification of *jus cogens* norms. Section 1C then applies these criteria for identification to the *jus ad bellum* and concludes that State practice creates uncertainty as to precisely which obligations in the *jus ad bellum* are accepted and recognised as permitting no derogation.

A. The emergence of *jus cogens* norms

The idea of rules from which no derogation is permitted was present already in Roman law.[5] In the seventeenth century natural law was presented by writers such as Grotius and Vattel as imposing limits on the conduct of States.[6] These rules of natural law possessed characteristics some or all of which are now advanced as belonging to *jus cogens* norms: they bound all States; States could not exclude their application by treaty; and they protected moral or humanitarian values. However, the extent to which the modern concept of *jus cogens* possesses any of these features is disputed. The rise of

[5] ILC, 'First report on jus cogens by Dire Tladi, Special Rapporteur' (8 March 2016) A/CN.4/693, 19; IM Sinclair, *The Vienna Convention on the Law of Treaties* (2nd edn Manchester 1984) 203.
[6] Emer de Vattel, *Le droit des gens ou les principes de la loi naturelle* (Carnegie 1916) 373; Lauri Hannikainen, *Peremptory norms (jus cogens) in international law* (Helsinki 1988), 30; Sinclair (n5) 204-5.

positivism in the eighteenth and nineteenth centuries saw natural law theories lose influence as emphasis shifted to State sovereignty and consent.[7] Arguments based on morality continued to exert an influence, for example, regarding the unacceptability of slavery and the slave trade, and the regulation of warfare.[8] However, other emerging rules were based rather on the common interest of States or the good functioning of the international legal order, such as the prohibition on piracy or the freedom of the high seas.[9]

Following the First World War, something more akin to the modern concept of *jus cogens* began to emerge, in particular the idea of substantive limitations on the ability of States to conclude treaties. In Article 20 of the Covenant of the League of Nations, Members accepted the Covenant as 'abrogating all obligations or understandings *inter se* which are inconsistent with the terms thereof' even if it did not abrogate inconsistent obligations entered into before becoming a member. In a first use of the terminology, this provision was described, *obiter*, by Judge Schücking in the *Oscar Chinn* case as 'a *jus cogens*.'[10] A further example of the recognition that what appears to be *jus cogens* can invalidate a treaty comes – again, only *obiter* – in the 1948 judgment of the US Military Tribunal in *US v Krupp*, where the Tribunal found that, although there was not enough evidence to establish the existence of the agreement between Germany and Vichy France, any such agreement to use French prisoners of war in German armament production

[7] Hannikainen (n6), 234-5; Arthur Nussbaum, *A Concise History of the Law of Nations* (New York 1962), 176-7, 182.
[8] For example, General Act of the Brussels Conference Relative to the African Slave Trade (2 July 1890), British and Foreign State Papers, vol. LXXXII, p. 55; Hannikainen (n6), 88.
[9] H Lauterpacht, 'Sovereignty Over Submarine Areas' [1950] 27 BYIL 376, 398; Hannikainen (n6), 35-6, 56.
[10] *Oscar Chinn Case*, PCIJ A/B No.63 (1934), Sep Op Schücking, 149.

would be 'manifestly *contra bonus mores* and hence void' under the law of nations.[11] While some writers in the inter-war period began to support the idea of rules that could limit the ability of States to conclude treaties, there was a diversity of views.[12] Soviet doctrine, without using the term *jus cogens*, accepted that conflict with basic principles of international law could lead to the illegality of treaties.[13] Nevertheless, by the end of World War Two there had still never been a concrete case involving *jus cogens* and any references by international judges had only been in separate or dissenting opinions.[14]

It was the development of the International Law Commission's Draft Articles on the Law of Treaties from 1950 and the overlapping discussions leading to the adoption of the Friendly Relations Declaration in 1970[15] that led to the concept of *jus cogens* becoming firmly embedded in positive international law.[16] From 1958 the Draft Articles included an explicit reference to *jus cogens*[17] and by 1963 agreement had been reached within the ILC on the text that would form the basis of Article 53 of the Vienna Convention on the Law of Treaties.[18] State practice in the Sixth Committee,[19] as well as the references

[11] *Case No. 10, United States v. Krupp et al*, Military Tribunal III, Nürnberg, Germany, 15 ILR 620, 31 July 1948.
[12] Alfred von Verdross 'Forbidden Treaties in International Law' [1937] 31 AJIL 4 571; Hannikainen (n6), 128-131.
[13] Levan Alexidze, 1981 Receuil des Cours 172, 229.
[14] ibid 228.
[15] 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) (Friendly Relations Declaration); Eric Suy 'Article 53, Convention de 1969' in Corten and Klein (eds), *Les Conventions de Vienne sur le droit des traités – Commentaire article par article* (Bruxelles 2006), 1906-7.
[16] cf Erika 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, arguing that 'the development of the concept only gained momentum after the adoption of the Vienna Convention in 1969'. However, this does not seem to be consistent with the extensive discussions in the ILC before 1969.
[17] ILC, 'Third Report on the Law of Treaties by Special Rapporteur Mr G G Fitzmaurice,' A/CN.4/115 and Corr.1, 1958, Draft Articles 16 and 17.
[18] Hannikainen (n6), 159.
[19] 1966 Report of the Sixth Committee (6 December 1966) A/6547, 36; 1967 Report of the Sixth Committee (11 December 1967) A/6955, 38.

to *jus cogens* norms in the VCLT,[20] confirm that by 1969 at the latest the existence of *jus cogens* norms was recognised by an overwhelming majority of States. Even those such as France, who opposed the inclusion of provisions on *jus cogens* norms in the VCLT, objected rather to the lack of certainty in determining their content than to the very existence of *jus cogens* norms.[21]

After a series of ambiguous references to the concept in passing[22] and in the opinions of individual judges,[23] the International Court of Justice has now accepted the existence of *jus cogens* norms and invoked them in a number of judgments and advisory opinions.[24] The concept has also been applied by national and regional courts. With the

[20] Vienna Convention on the Law of Treaties (1969) 1166 UNTS 331 (VCLT), Article 53, 64. As of 20 September 2018, there are 116 States Parties to the VCLT.

[21] In an article published subsequent to the Vienna Conference, the head of the French delegation explained that if *jus cogens* was limited to the examples given by the ILC, France would have no objection to seeing them recognised as imperative in the VCLT – their objection was to the uncertainty created by the Article 53 definition, which they feared would open the way to the creation of *jus cogens* norms binding on States that did not consent to them, by means of multilateral treaties and UNGA resolutions, Olivier Deleau 'Les positions françaises à la Conférence de Vienne sur le droit des traités' [1969] 15 Annuaire Français du Droit International 7, 16-17; the *amicus curiae* opinion provided by former ICJ President Guillaume to the French Conseil d'Etat in 2012 is ambiguous – it states at para 11 that France is a persistent objector to the rule in Article 53, but footnote 14 suggests Guillaume considers France as having rejected the concept of *jus cogens* itself, Gilbert Guillaume 'Avis d'amicus curiae (article R 625-3 du Code de justice administrative)' [2012] 1 Revue Française du Droit Administratif, 19. It is submitted that more weight should be given to the contemporary view expressed by the French delegation, rather than a retrospective characterisation of that view; see also UNGA, Sixth Committee (20th Session, 849th Meeting) para 21, Deleau, France; in the Sixth Committee, while there was disagreement about their definition and content, only Luxembourg contested the very existence of *jus cogens* norms; Tladi's First Report (n5), 41; Hannikainen (n6), 173; Alexidze (n13), 230-1; Maurizio Ragazzi, *The Concept of International Obligations Erga Omnes* (OUP 1997), 70.

[22] *North Sea Continental Shelf*, Judgment [1969] ICJ Reports 3, 72; *Militarv and Paramilitary Activities in and against Nicaragua* (Nicaragua v United States of America) Merits, Judgment, [1986] ICJ Reports 14, 190; *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, [1996] ICJ Reports 226, 83; *Arrest Warrant of 1 April 2000* (Democratic Republic of the Congo v Belgium), Judgment, [2002] ICJ Reports 3, 56.

[23] *Case concerning Right of Passage over Indian Territory*, Merits, Judgment of 12 April 1960 [1960] ICJ Reports 6, Diss Op Fernandes, 29; *South West Africa*, Second Phase, Judgment, [1966] ICJ Reports 6, Diss Op Tanaka, 298.

[24] *Armed Activities on the Territory of the Congo* (New Application: 2002) (Democratic Republic of the Congo v Rwanda), Jurisdiction and Admissibility, Judgment, [2006] ICJ Reports 6, 64; *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*, Advisory Opinion, [2010] ICJ Reports 403, 81; *Questions relating to the Obligation to Prosecute or Extradite* (Belgium v Senegal), Judgment, [2012] ICJ Reports 422, 99*; Jurisdictional Immunities of the State* (Germany v Italy), Judgment, [2012] ICJ Reports 99, 95.

exception of a few sceptics,[25] the majority of international law scholars have long accepted the existence of *jus cogens* norms.

i. The compromise in Article 53 VCLT

Views as to the nature of *jus cogens* and the criteria for their identification are closely linked, as the latter will flow from one's views on how *jus cogens* norms are created and the function they play in the international legal order.[26] However, while there may be widespread agreement as to the existence of *jus cogens* norms in international law, if one attempts to go beyond this and examine their nature, effects and content, the consensus quickly evaporates.[27]

The debate as to the nature of *jus cogens* can be divided between those who view *jus cogens* norms as arising primarily as a result of their content, and those who view *jus cogens* norms as arising from the consent of States.[28] Those who view *jus cogens* norms as arising due to their content may attribute this to their moral importance, adopting a

[25] Georg Schwarzenberger 'International *Jus Cogens*?' [1964-65] 43 Tex L Rev 455; Prosper Weil 'Towards Relative Normativity in International Law?' [1983] 77 AJIL 413, although Weil is more sceptical about the (in his view) negative consequences of the concept than its very existence; Gordon A Christenson '*Jus Cogens*: Guarding Interests Fundamental to International Society' [1988] 28 Va J Int'l L 585, 590; Serge Sur 'Elements de formation du droit international' in Jean Combacau and Serge Sur, *Droit International Public* (9th edn 2010 Montchrestien), 51-2; see generally Robert Kolb, *Théorie du Jus Cogens International* (Geneva 2001), 33 – 58.

[26] Tladi's First Report (n5), 12.

[27] Jerzy Sztucki, *Jus Cogens and the Vienna Convention on the Law of Treaties* (Springer 1974), 77: 'There are probably no two Authors who have made it the same way, and a more or less exhaustive collection of quotations would make a book.'

[28] Asif Hameed 'Unravelling the Mystery of *Jus Cogens* in International Law' [2014] 84 BYIL 1 52, 61.

natural law approach[29] or to the necessity of such norms for the operation of the international legal system (public order)[30] - or some combination of the two.

Natural law approaches are not limited to the question of the origins of *jus cogens*, nor to international law.[31] However, in this context such a view is difficult to sustain. The ICJ has implicitly ruled out a natural law approach to international law. Although not dealing with the issue of *jus cogens*,[32] the Court in the *South West Africa* cases held that as a court of law it 'can take account of moral principles only in so far as these are given a sufficient expression in legal form' and rejected the possibility of importing new legal incidents by deduction from a moral idea.[33] Humanitarian considerations do not 'in themselves amount to rules of law' and one should not confuse the 'moral ideal with the legal rules intended to give it effect.'[34]

[29] Mark Janis 'The Nature of *Jus Cogens*' [1987-88] 3 Conn J Int'l L 359; John Dugard, *Recognition and the United Nations* (1987 Grotius), 148-49; Diss Op Tanaka, *South West* Africa (n23), 298; John Tasioulas 'In Defence of Relative Normativity: Communication Values and the Nicaragua Case' [1996] 16 OJLS 85; Mary Ellen O'Connell '*Jus Cogens*: International Law's Higher Ethical Norms' in Donald Earl Childress III (ed), *The Role of Ethics in International Law* (CUP 2011).

[30] Orakhelashvili (n2), especially 30-1. Later he states that *jus cogens* is its own free-standing phenomenon, which does not necessarily require a return to natural law doctrine, 36-8.

[31] On natural law approaches to international law, Hilary Charlesworth and Christine Chinkin, *The boundaries of international law - A feminist analysis* (Manchester 2000), 25-6; on law generally, Brian Bix 'Natural Law: The Modern Tradition' in Jules Coleman and others (eds), *Oxford Handbook of Jurisprudence and Philosophy of Law* (OUP 2004), 61.

[32] Arguments based on *jus cogens* norms were not raised in either written or oral argument in the case. The term was mentioned in the rejoinders of Mr de Villiers and Dr VerLoren van Themaat on behalf of South Africa, but only in passing and their arguments focused rather on the criteria for creation of customary law, not on questions of *jus cogens*, Verbatim Record 1965/3, Minutes of the Public Hearings, Annexes to the Minutes, 7, 22.

[33] *South West Africa* (n23), 49, 54.

[34] ibid, 50, 52.

Nevertheless, natural law approaches to *jus cogens* persist.[35] The importance of Article 53 of the VCLT therefore lies in its encapsulation of an agreed set of criteria for identification of *jus cogens* norms that have been considered reconcilable with a range of views on the nature of *jus cogens*. Article 53 provides that, for the purposes of the Convention:

> […] a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

The words 'accepted and recognised' were a deliberate echo by the Drafting Committee of the descriptions of conventional and customary international law in Article 38(1) paragraphs (a) and (b) respectively of the ICJ Statute.[36] For those who view *jus cogens* norms as arising from consent, this phrasing is seen to exclude natural law considerations; the acceptance and recognition by States is constitutive of *jus cogens* norms. Thus the VCLT firmly tied *jus cogens* to the consent-based model of international law and rejected the natural law approach.[37] However, some hold the view that the text

[35] For example, *Belgium v Senegal* (n24), Sep Op Cançado Trindade, 102, 177; *Immunities* (n24), Diss Op Cançado Trindade, 35, 289; Thomas Weatherall, *Jus Cogens*: *International Law and Social Contract* (CUP 2017), 85; also the examples in n29.

[36] Charter of the United Nations and Statute of the International Court of Justice (signed 26 June 1945, entered into force 24 October 1945) 1 UNTS 16.

[37] The point is forcefully made by Christos L Rozakis, *The Concept of Jus Cogens in the Law of Treaties* (North Holland 1976), 74-6; Alonso Gómez-Robledo, 1981 Receuil des Cours 172, 109; Hannikainen (n6), 163; Alexidze (n13), 255; ILC, A/CN.4/SR.684 Summary record of the 684th meeting, Yearbook of the International Law Commission 1963, vol I, para 70, 76; Sixth Committee (18th session) 788th Meeting, para 22 (Yasseen, Iraq); see also Articles on State Responsibility (n1), Article 12, Commentary, para 7: 'Article 53 recognizes both that norms of a *jus cogens* character can be created and that the States have a special role

of Article 53 may be considered as simply setting out the criteria for identifying *jus cogens* norms which are created by other means, for example, due to their content.[38] In this way, the Article 53 definition allowed States and scholars to agree to disagree as to the difficult questions of the origin and nature of *jus cogens* norms.[39]

ii. The purpose of *jus cogens* norms

The price to be paid for this compromise was that the definition was provisional and incomplete[40] and 'more of a description than a definition'.[41] While the text of draft Article 50 and accompanying commentary had been agreed in the ILC as early as 1963, the Drafting Committee at the Vienna Conference were unable to propose a more specific

in this regard as *par excellence* the holders of normative authority on behalf of the international community.'

[38] Kirsten Schmalenbach 'Article 53' in Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (2nd edn Springer 2018), 18.

[39] See A/CN.4/SR.685 Summary record of the 685th meeting, Yearbook of the International Law Commission 1963, vol I, para 4 (Rosenne), para 28 (Tunkin), noting the disagreement about the philosophical basis for *jus cogens* and international law generally. Nevertheless, the majority of participants in the ILC discussions and the Vienna Conference took a positivist view. Only the Austrian delegate to the Sixth Committee explicitly stated that *jus cogens* was a form of natural law: UNGA Sixth Committee (18th Session) A/C.6/SR.789, Summary Record, 789th Meeting, para 4 (Verosta, Austria); Bruno Simma, 250 Receuil des Cours 1994, 287; cf Cançado Trindade, *International Law for Humankind: Towards a New Jus Gentium* (2014 Brill), 147-150.

[40] ILC 'Second Report of the Special Rapporteur, Sir Humphrey Waldock' A/CN.4/156 and Add 1-3 (15th session of the ILC (1963)), Article 13, Commentary para 2; ILC, 'Report of the International Law Commission on the work of its fifteenth session' (6 May to 12 July 1963) A/5509 (A/18/9) paras 9–17, Article 37, Commentary para 2; Gros, Yasseen, A/CN.4/SR.684 Summary record of the 684th meeting, Yearbook of the International Law Commission 1963, vol I, para 69, 77-78 - Rosenne argued that objective criteria for the identification of *jus cogens* norms could be found, but this view was not shared by other members; Waldock, A/CN.4/SR.705 Summary record of the 705th meeting, Yearbook of the International Law Commission 1963, vol I, para 55; cf Verdross, ibid, para 56; responses of Portugal, Cyprus, Indonesia, Comments by Governments on parts I, II and III of the Draft Articles on the Law of Treaties drawn up by the Commission at its fourteenth, fifteenth and sixteenth sessions, A/CN.4/182, Corr.1, Corr.2, Add.1, Add.2/Rev.1 and Add.3; Sixth Committee, 785th Meeting, para 9 (Indonesia); Sixth Committee, 786th Meeting, para 4 (UK); Sixth Committee, 851st Meeting, paras 30 (Bartos), 40 (Ago); Karl Zemanek 'How to identify peremptory norms of international law' in Pierre-Marie Dupuy (ed) *Essays in honour of Christian Tomuschat* (2006 NP Engel), 1105.

[41] Waldock, A/CN.4/SR.683, Summary record of the 683rd meeting, Yearbook of the International Law Commission 1963, Vol I, para 25.

definition of *jus cogens* norms due to an inability to reach agreement.[42] The definition is circular, as *jus cogens* norms are defined by their effects (non-derogability and modification by a norm of the same character) and no information is given as to which norms, with which qualities, should be accepted or recognised as having those effects.[43] As a result, the definition is silent as to the function a category of non-derogable norms is intended to fulfil in the international legal system.

However, even if one rejects the natural law approach, there must be a reason why States have created a category of *jus cogens* norms in international law. There are reasons why some norms and not others have been accepted and recognised as having that status, even if they do not form part of the criteria for identification. As Giorgio Gaja argues, the very existence of such a category of norms implies that there is a general interest in international society that they should be respected.[44] The purpose of *jus cogens* norms has therefore been presumed to be 'to protect the international community from all acts contrary to peremptory norms.'[45]

As to which norms tend to be recognised as having *jus cogens* status, the ILC's Special Rapporteur for its ongoing study of peremptory norms concluded, based on

[42] Richard D Kearney and Robert E Dalton 'The Treaty on Treaties' [1970] 64 AJIL 495, 536; Hannikainen (n6), 161; the ILC commentary also notes that it was decided not even to include examples to indicate the 'general nature and scope' of the rule, and instead to 'leave the full content of this rule to be worked out in State practice and in the jurisprudence of international tribunals' ILC, 'Draft Articles on the Law of Treaties with commentaries' Yearbook of the International Law Commission, 1966, Vol II, 248.
[43] Georges Abi-Saab 'Introduction' *The Concept of Jus Cogens in International Law, Lagonissi Conference: Papers and Proceedings, vol. II* (Carnegie 1967), 13; Gómez-Robledo (n37), 105, 111; Kolb (n25), p.59-168, para. 36; Ruys (n4), 25; Daniel Costelloe, *Legal Consequences of Jus cogens Norms in International Law* (CUP 2017), 15; Tladi's First Report (n5), 12.
[44] Giorgio Gaja, 1981 Receuil des Cours 172, 297.
[45] Hannikainen (n6), 7; Rozakis (n37), 11.

statements by States, international and domestic judicial decisions, and 'countless separate and dissenting opinions and scholarly writings,' that it is clear that *jus cogens* norms 'reflect and protect fundamental values of the international community' and that 'this notion has never been seriously questioned'.[46] Thus, despite being given an expression in legal form in the VCLT, Article 53 has retained characteristics of the morality and idealistic expressions which lay behind it.[47] Many ILC members shared the Special Rapporteur's view as to the significance of fundamental values and there was support for the view that they were a 'unique feature' of *jus cogens* norms in international law.[48]

However, this feature of *jus cogens* norms has been kept distinct from the criteria for their identification. As at the Vienna Conference, in the ILC's 2017 discussions there was a reluctance to make any reference to the substantive content of *jus cogens* norms in the draft conclusions, particularly in relation to their definition or identification. There were differing views among States in the Sixth Committee as to whether protecting fundamental values (as well as universality and hierarchical superiority) should be included as criteria for identification of *jus cogens* norms.[49] Ultimately, there was a considerable reluctance to do anything that might be seen as modifying the Article 53 definition. As a result, the draft conclusions agreed on by the ILC Drafting Committee essentially restated Article 53 as the 'definition' of a *jus cogens* norm in conclusion 3 and the criteria for identification of a *jus cogens* norm in conclusion 4, while elements related

[46] ILC, 'Second report on *jus cogens* by Dire Tladi, Special Rapporteur' (16 March 2017) A/CN.4/706, 20-21.
[47] Paul Reuter, *La Convention de Vienne du 29 mai 1969 sur le droit des traités* (Paris 1970).
[48] ILC, 'Report of the Sixty-ninth session' (1 May-2 June and 3 July-4 August 2017) A/72/10, para 168; but some ILC members expressed concern about the concept of fundamental values, noting that 'international law was grounded in a multiplicity of value systems and that there were, in principle, no uniform values in the international community'.
[49] ibid 'Topical summary of the discussion held in the Sixth Committee of the General Assembly during its seventy-second session, prepared by the Secretariat' paras 50-52.

to the quality of the norm were included in a separate conclusion 2 on the 'general nature' of *jus cogens* norms.[50]

B. Criteria for identification of *jus cogens* norms

Article 53 of the VCLT is now widely referred to as providing both a definition and the criteria for identification of *jus cogens* norms.[51] From Article 53 we can identify two necessary elements for the identification of a norm as *jus cogens*. First, it must be a norm of general international law. Second, it must be accepted and recognised by the international community of States as a whole as non-derogable.[52] These two elements align with the approach of the current ILC Special Rapporteur on *jus cogens* who, in his second report, also takes a two-step approach.[53]

i. A norm of general international law

The first element makes clear that *jus cogens* norms do not constitute a separate source of international law norms; they must arise from an existing norm, which is then elevated to *jus cogens* status.[54] In practice, there are no examples of a *jus cogens* norm

[50] ibid 'Interim report by the Chairman of the Drafting Committee'.
[51] For example, *Domingues v US*, Inter-American Commission on Human Rights, Case 12.285, Report No 62/02 (22 October 2002), 45; *Yusuf and Al Barakaat International Foundation v Council and Commission*, European Court of Justice, Case T-306/01, [2005] ECR II-3533, 277-8; *Jones v Saudi Arabia* [2006] UKHL 26, [2007] 1 AC 270, [42] (Lord Hoffmann); *Armed Activities* (n24), 124; Ulf Linderfalk 'The Source of *Jus Cogens* Obligations – How Legal Positivism Copes with Peremptory International Law' [2013] Nordic Journal of International Law 82 369–389, 373.
[52] The reference to modification by another *jus cogens* norm does not appear to form part of the test for identification, Rozakis (n37), 45-6.
[53] Tladi's Second Report (n46), 39-40.
[54] cf those who take a content-based approach, such as Orakhelashvili, who considers the possibility of *jus cogens* emerging as an autonomous source of international law (n2), 108-111; also Janis (n29), 363.

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 genocide,[55] torture,[56] and the use of force[57] emerged as customary rules before or at least simultaneously with their recognition as *jus cogens* norms.

The prevailing view holds that 'general international law' refers to rules of general customary international law only.[58] The use of both the terms 'general' and 'as a whole' in Article 53 has been interpreted as requiring that the scope of application of the underlying norm of customary international law must be universal, while the acceptance of the norm as *jus cogens* by the international community of States need not be universal. A 'very large majority' of States will suffice and no one State could have a veto.[59] Article

However, this appears to be a minority view, in addition to being inconsistent with the classic statement of the sources of international law in Article 38(1) ICJ Statute (n36).

[55] As early as 1951 the prohibition was recognised by the ICJ as custom, *Reservations to the Convention of Genocide, Advisory Opinion*, [1951] ICJ Reports 19, 23. The prohibition of genocide was recognised as 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 Reports 325, Sep Op Lauterpacht, 100.

[56] The prohibition of torture was recognised by the ICJ as a norm of *jus cogens* in 2012 in *Belgium v Senegal* (n24), 99. It had been recognised as custom and *jus cogens* by the ICTY Appeal Chamber in 2000, *Prosecutor v Furundžija* (IT-95-17/1), Appeals Chamber Judgment (21 July 2000), 111.

[57] The prohibition of the use of force may be an example of a customary rule crystallising and immediately acquiring *jus cogens* status. By 1966 at the latest, one can see from the discussions in the Sixth Committee regarding the draft Friendly Relations Declaration, and in the text of the Declaration as adopted, that the prohibition on the use of force was considered a free-standing norm of customary law, independent of the Charter, 1966 Report of the Sixth Committee, 6 December 1966, A/6547, paragraph 36; 1967 Report of the Sixth Committee, 11 December 1967, A/6955, para 38; Friendly Relations Declaration (n15), para 1, 3. In the same year, the ILC famously listed it as a 'conspicuous example' of a norm of *jus cogens*, Draft Articles on the Law of Treaties (n42), 247.

[58] Ian Brownlie, *Principles of Public International Law* (7th edn OUP 2008), 510; Hannikainen (n6), 225; André de Hoogh '*Jus Cogens* and the Use of Armed Force' in Mark Weller (ed) *Oxford Handbook of the Use of Force in International Law* (OUP 2015), 1163; Linderfalk (n51), 379. A minority of scholars take the view that this could potentially also include multilateral treaties that are universal, Alexidze (n13), 255-6; Yoram Dinstein, *War, Aggression and Self-Defense* (6th edn CUP 2017), 109; or even a combination of different sources, K Wolfke '*Jus Cogens* in International Law (Regulation and Prospects)' [1974] 6 Polish YB Int'l L 145, 154-5.

[59] 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,

53 therefore contains both consensualist and non-consensualist elements: *jus cogens* norms bind individual States irrespective of their consent, but what those norms are is determined by consent,[60] which is expressed by a new actor in international law: the 'international community of States as a whole'.[61]

Reference to the universality of *jus cogens* norms is frequently found in practice.[62] Gaja argues that the VCLT's conception of *jus cogens* norms as universal seems 'unjustifiably restricted'[63] due to its exclusion of the possibility of norms that are *jus cogens* within a restricted group of States, such as those of the Council of Europe.[64] ILC Members have also been unwilling to exclude definitively the possibility of regional *jus cogens* in their recent discussions of the topic.[65] Indeed, unless one is basing one's theory of *jus cogens* on morality or international public order the need for universality is unclear. However, given that the prohibition on the use of force undoubtedly exists as a general rule of customary international law binding on all States, these questions need not be

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 Hanikkainen (n6), 210**.** Support for this view is widespread in doctrine, see Alexidze (n13), 247; Dinstein (n58), 109; Gaja (n44), 283; Gennady M Danilenko 'International *Jus Cogens*: Issues of Law-Making' [1991] 2 EJIL 42, 55.

[60] Martti Koskenniemi, *From apology to utopia: the structure of international legal argument* (CUP 2005), 324; Hilary Charlesworth and Christine Chinkin 'The Gender of *Jus Cogens*' [1993] 15 Hum Rts Q 63.

[61] Christian Tomuschat, 1993 Receuil des Cours 241, 222-7.

[62] For example *US v Matta-Ballesteros*, United States Court of Appeals, 9th Circuit, [1995] 71 F3d 754, 764 n 4, para 5.

[63] Gaja (n44), 284; ILC, 'Report of the International Law Commission on the work of its sixty-eighth session' (2016) A/71/10, 120.

[64] As suggested by Kolb (n25), Section II, paras 51, 121; see also Suy (n15), 1911. The possibility of regional *jus cogens* norms in the inter-American system is also suggested by the Commission's judgment in *Domingues v US* (n51), 75.

[65] Report of the International Law Commission on the work of its sixty-ninth session (n48), 166, 177, 179.

resolved here.[66] Whatever their *rationae personae* scope, obligations arising under a *jus cogens* norm will be owed *erga omnes*.[67]

ii. Accepted and recognised by the international community of States as a whole

With regard to the second element, it may be seen as an enhanced form of *opinio juris.*[68] Hannikainen describes Article 53 as thus creating a requirement of double consent: the consent required to create the underlying norm of general international law plus the additional consent required to identify a norm as *jus cogens*. To be identified as a norm of *jus cogens*, the relevant norm of general international law must be 'accepted and recognised' by the international community of States as a whole as a norm from which no derogation is permitted. This part of the definition is circular, as *jus cogens* norms are defined by their effects rather than their particular qualities.[69] That is, *jus cogens* norms are those accepted and recognised by the international community of States as a whole **as *jus cogens***. Thus, in practice, statements by States that a norm is '*jus cogens*' or 'peremptory' are frequently taken as evidence that a norm is accepted and recognised as non-derogable for the purposes of fulfilling this criterion for identification, without any explicit reference being made to derogation.

---

[66] *Nicaragua* (n22), 188.
[67] Giorgio Gaja, 'Obligations *Erga Omnes'* in Joseph H Weiler and others (eds), *International crimes of state: a Critical Analysis of the ILC's Draft Article 19 on State Responsibility* (Florence 1984), 158.
[68] Maarten Bos, *A Methodology of International Law* (North-Holland 1984), 246; Hannikainen (n6), 12; Olivier Corten 'Breach and Evolution of Customary International Law on the Use of Force' in Enzo Cannizzaro and Paolo Palchetti (eds), *Customary International Law on the Use of Force: A Methodological Approach* (Martinus Nijhoff 2005), 139.
[69] Abi-Saab (n43), 13; Gómez-Robledo (n37), 111; Kolb (n25), 59-168, para 36; Ruys (n4), 25; Costelloe (n43), 15; Tladi's First Report (n5), 12.

The ICJ has provided little guidance on the identification of *jus cogens* norms.[70] In its *Nuclear Weapons* advisory opinion the Court declined to pronounce on the *jus cogens* status of rules of humanitarian law.[71] The Court merely stated that *jus cogens* is defined in Article 53 VCLT. The ICJ's reference to 'intransgressible principles of international customary law,' although cited by the European Court of Justice in relation to identification of *jus cogens*,[72] comes several paragraphs before the Court's sole reference to *jus cogens*, and is disconnected from the discussion of that issue.[73] In the case of *Armed Activities on the Territory of the Congo* the Court simply stated that the prohibition of genocide is 'assuredly' a norm of *jus cogens*.[74] In *Jurisdictional Immunities of the State*, the Court was content to assume that the relevant rules of the law of armed conflict are *jus cogens*.[75]

In *Questions relating to the Obligation to Prosecute or Extradite*, the Court went into more detail in identifying the prohibition of torture as a norm of *jus cogens*, yet it is unclear whether the evidence referred to by the Court is meant to demonstrate the norm's customary or *jus cogens* status or both. The Court referred to the widespread practice and *opinio juris* of States, as evidenced by the prohibition's appearance in numerous international instruments of universal application, in the domestic law of 'virtually all' States, and the fact that violations are regularly denounced in national and

[70] Zemanek (n40), 1106-7.
[71] *Nuclear Weapons* (n22), 83.
[72] See *Yusuf* (n51), 282.
[73] *Nuclear Weapons* (n22), 79; Zemanek (n40), 1112.
[74] *Armed Activities* (n24), 64.
[75] *Immunities* (n24), 92.

international fora.[76] The consideration of the instruments and legislation seems to evidence widespread and virtually uniform practice, and the denunciation of violations to evidence the *opinio juris* of States; that is, the elements of custom. It is therefore unclear on what basis the Court reached its conclusion as to the norm's *jus cogens* status.[77] In his analysis of this paragraph the ILC Special Rapporteur on peremptory norms concludes that it appears 'that the Court views these [treaties, resolutions and legislation] as relevant materials for the establishment of acceptance and recognition of non-derogability'.[78] This must be true, as the Court ultimately identified the norm as *jus cogens*; what remains unclear is the Court's understanding of the meaning of non-derogability, and how these materials provided evidence that the norm possessed this quality.

C. Applying the criteria to the *jus ad bellum*

As noted at the outset, it is widely accepted that there exists a *jus* cogens norm in the *jus ad bellum*. There is no doubt as to the fulfilment of the first criterion: existence of an underlying norm of general international law which could then be elevated to *jus cogens* status through the acceptance and recognition of its non-derogability by the international community of States as a whole. The prohibition on the use of force clearly exists as a norm of general international law, even if this is understood as referring only to universal customary norms.

[76] *Belgium v Senegal* (n24), 99.
[77] See Stefan Talmon 'Determining Customary International Law: The ICJ's Methodology between Induction, Deduction and Assertion' [2015] EJIL 26 417, 439.
[78] Tladi's Second Report (n46), 81.

As a norm of treaty law, Article 2(4) of the UN Charter is binding on all UN members. While this includes the vast majority of States it is not fully universal.[79] However, by 1966 at the latest the discussions in the Sixth Committee regarding the draft Friendly Relations Declaration, and the text of the Declaration as adopted, demonstrate 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.[80] The prohibition's customary status was later confirmed by the ICJ in *Military and Paramilitary Activities in and against Nicaragua*.[81]

Regarding the second element, international practice contains frequent explicit references by States to the prohibition's *jus cogens* status, as well as statements of the ILC, individual opinions of ICJ judges, and scholarly writings. However, the widely varying terms in which States and individual judges describe this norm make it difficult to identify precisely which obligation is being referred to as *jus cogens*.

In this dissertation, 'norm' will be used to refer to a general and abstract rule of law that makes a given course of conduct obligatory, permissible, or impermissible.[82] Such norms may generate 'obligations' for those States that are bound by them; an obligation refers to the specific conduct that is legally required or prohibited for a particular State.[83]

[79] 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.
[80] 1966 Report of the Sixth Committee A/6547, para 36; 1967 Report of the Sixth Committee A/6955, para 38; Friendly Relations Declaration (n15), para 1, 3.
[81] *Nicaragua* (n22), 188.
[82] See Valentin Jeutner, *Irresolvable Norm Conflicts in International Law* (OUP 2017), 22.
[83] See Hans Kelsen's distinction between general hypothetical norms and individual categorical norms, *General Theory of Norms* (Clarendon 1991), 50.

Thus the prohibition on torture, a *jus cogens* norm, imposes an obligation on States not to engage in acts of torture. Norms may generate more than one obligation: Article 2(4) of the UN Charter, a norm of treaty law, generates an obligation for UN Members to refrain from the use of force, and an obligation to refrain from the threat of force. Norms may also generate corollary obligations, for example, to criminalise, investigate, prosecute or punish violations of the norm. However, not all obligations generated by a norm need be non-derogable, and norms may be 'partially peremptory.'[84] Thus when we speak of determining the scope of a *jus cogens* norm we are really determining which obligations under a norm are non-derogable. Any purported derogations from that obligation will be void.[85]

States have frequently recognised the existence of a *jus cogens* norm in the *jus ad bellum*. As set out in detail by Olivier 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.[86] Similarly, the discussions leading to the ILC's draft Articles on the Law of Treaties, which occurred over the same period, show that the principle set out in Article 2(4) was accepted as *jus cogens*.[87] 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

[84] GI Tunkin, 1975 Receuil des Cours 146, 98; Hannikainen (n6), 261.
[85] Cf the analysis of Gaja (n67), 159, that where an obligation is *jus cogens* it will be accompanied by an *additional obligation* for those bound by the norm not to derogate from their obligations under the norm. This view is not adopted here.
[86] For example, 1966 Report of the Sixth Committee, A/6547, 118, para 36; 1967 Report of the Sixth Committee, A/6955, 191, para 37; Olivier Corten, *Le droit contre la guerre* (Paris 2008), 300.
[87] ILC, Draft Articles on the Law of Treaties (1966), 247; Corten, ibid, 297-8.

a norm of *jus cogens*.[88] Discussions leading to the adoption of Resolution 42/22 in 1987, the Declaration on the Enhancement of the Effectiveness of the Principle of Refraining from the Threat or Use of Force in International Relations,[89] demonstrated agreement among States as to the *jus cogens* nature of a norm in the *jus ad bellum*, but in this case the principle in Article 2(4).[90] The prohibition on the use of force was also recognised as a *jus cogens* norm in the 1987 US Restatement.[91] However, the variety of terms used leaves it unclear which obligation(s) are being recognised as non-derogable.

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'),[92] Spain in *Fisheries Jurisdiction* ('la norme impérative qui interdit l'usage et la menace du recours à la force'),[93] Yugoslavia in the *Legality of the Use of Force* cases ('the obligation not to resort to the use of force against another State'),[94] and in oral submissions by Canada in *Fisheries Jurisdiction* ('the Charter's prohibition of

[88] For example, UN Conference on the Law of Treaties, First Session, 52nd Meeting of the Committee of the Whole, para 19 (Evrigenis, Greece), para 29 (Mwendwa, Kenya), para 53 (Sinclair, UK); 55th Meeting of the Committee of the Whole, para 36 (Fleischauer, Federal Republic of Germany), 56th Meeting of the Committee of the Whole, para 6 (Makarevich, Ukrainian Soviet Socialist Republic), para 37 (Dons, Norway); 19th Plenary Meeting, Ecuador, Italy, Byelorussian Soviet Socialist Republic.
[89] UNGA Res A/RES/42/22 (18 November 1987).
[90] 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 (n86), 301-306.
[91] American Law Institute, 'US Restatement, Third, of the Foreign Relations Law of the United States' (1987) Sources of International Law, Commentary, para k.
[92] *Oil Platforms* (Iran v United States of America), Memorial of Iran (8 June 1993), para 4.05.
[93] Spain referred to the prohibition on both the threat and use of force, i.e. Article 2(4) UNC, *Fisheries Jurisdiction* (Spain v Canada), Jurisdiction of the Court, Memorial of Spain, para 4.
[94] *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.

the use of force - Article 2, paragraph 4 - is a peremptory norm').[95] Again, the precise obligation identified as *jus cogens* varies.

The jurisprudence of the ICJ itself does not provide any clarity as to the scope of the norm that has attained *jus cogens* status and indeed the ICJ has not explicitly recognised any *jus ad bellum* norm as *jus cogens*, despite recognising other norms as possessing that status. In *Nicaragua*, the Court famously observed that the International Law Commission 'expressed the view that "the law of the Charter concerning the prohibition of the use of force in itself constitutes a conspicuous example of a rule in international law having the character of *jus cogens*."'[96] Some have taken the view that by 'quoting with approval' the ILC report the Court itself recognised the prohibition of the use of force as *jus cogens*.[97] This also appears to be the view of President Singh in his Separate Opinion in the same case.[98] However, in the context of the judgment the Court is clear that it is reporting these views to support its conclusion that the prohibition is custom. That is, as evidence that the first element of the test for identifying *jus cogens* norms is met – existence as a norm of general international law – without necessarily adopting the conclusion as to identification as *jus cogens*. Furthermore, given the carefully negotiated nature of ICJ judgments, it is likely that such ambiguous phrasing was chosen deliberately.[99] In any case, the language used by the ILC and quoted by the ICJ

[95] *Fisheries Jurisdiction,* Public Hearing of 17 June 1998, 10am, Submissions of Mr Hankey, Deputy Agent for Canada, 14.
[96] *Nicaragua* (n22), 190.
[97] Green (n3), 223.
[98] However, the explicit recognition in the Separate Opinion compared with the language used in the judgment suggests precisely that the Court was not able to share this view, *Nicaragua* (n22), Sep Op Singh, 153.
[99] Compare with the clear language in *Belgium v Senegal* (n24), 99: 'In the Court's opinion, the prohibition of torture is part of customary international law and it has become a peremptory norm (*jus cogens*).'

provides little guidance as to the obligation potentially recognised as *jus cogens*. 'The law of the Charter concerning the prohibition of the use of force' is broad enough to encompass the obligations to refrain from the use or threat of force, as well as Article 51 and even Chapter VII which allows for the authorisation of force by the Security Council.

A further ambiguous reference is found in the advisory opinion on the *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo*. Addressing the arguments of participants invoking Security Council resolutions that had condemned other past declarations of independence, the Court held that the illegality attached to those declarations of independence stemmed 'from the fact that they were, or would have been, connected with the unlawful use of force or other egregious violations of norms of general international law, in particular those of a peremptory character (*jus cogens*)'.[100] Of the four Security Council resolutions cited, two concerned situations of unlawful use of force (Northern Cyprus and Republica Srpska), while the other two concerned Southern Rhodesia. It therefore may be the case that 'of a peremptory character' is referring to the right of self-determination and the prohibition of racial discrimination, which are also widely recognised as *jus cogens* norms, rather than the unlawful use of force.

While the majority judgments have been hesitant, numerous judges in their individual opinions have stated that the *jus ad bellum* contains a norm of *jus cogens*. However, they also use a variety of terms to describe the obligation, providing conflicting

[100] *Kosovo* (n24), 81.

views as to its scope. In addition to President Singh, in *Nicaragua* Judge Sette-Camara stated that the non-use of force could be recognised as a peremptory rule of customary international law.[101] In *Oil Platforms*, Judge Kooijmans stated that 'the prohibition of force is considered to have a peremptory character'[102] and Judge Rigaux also recognised the prohibition as a peremptory norm.[103] In his opinion in the same case Judge Simma appears to recognise that the whole of the 'general international law on unilateral use of force' as *jus cogens*, including the right of self-defence,[104] although later it seems he is only referring to the prohibition on the threat or use of force as *jus cogens*.[105] Finally, in his Separate Opinion in *Oil Platforms* Judge Elaraby states that 'the principle of the prohibition of the use of force in international relations as enshrined in Article 2, paragraph 4 […] reflects a rule of *jus cogens* from which no derogation is permitted'.[106]

Thus, the widespread agreement as to the existence of a *jus cogens* norm in the *jus ad bellum* conceals two significant problems. First, if a *jus cogens* norm does exist, there is considerable uncertainty about the precise obligation(s) arising under any such norm and its relation to the exceptions. At one extreme, references to the prohibition on the unlawful use of force as *jus cogens* suggest that the *jus cogens* norm is only the obligation to refrain from uses of force which are not lawful self-defence or authorised by

[101] *Nicaragua* (n22), Sep Op Sette-Camara, 199.
[102] *Case Concerning Oil Platforms (Islamic Republic of Iran v. United States of America*), Judgment, [2003] ICJ Reports 161, Sep Op Kooijmans, 46.
[103] *Oil Platforms*, ibid, Sep Op Rigaux, 12, 17-19.
[104] *Oil Platforms*, ibid, Sep Op Simma, 9.
[105] ibid, 10.
[106] *Oil Platforms*, ibid, Sep Op Elaraby, 291; Elaraby again recognised its *jus cogens* status in his Dissenting Opinion in the *Wall* Advisory Opinion: 'The prohibition of the use of force, as enshrined in Article 2, paragraph 4, of the Charter […] is universally recognized as a *jus cogens* principle, a peremptory norm from which no derogation is permitted,' *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, [2004] ICJ Reports 136, Diss Op Elaraby, 254.

the Security Council. At the other, references to the law of the Charter suggest that the exceptions of self-defence and Security Council authorisation under Chapter VII are also part of the *jus cogens* norm, as well as the prohibition on the threat of force. Second, the recognition of the prohibition on the use of force as a norm of *jus cogens* from which no derogation is permitted appears difficult to reconcile with the existence of two established exceptions to that prohibition, permitting the use of force in self-defence or when authorised by the Security Council. If derogation from the prohibition is unquestionably permitted, so the argument goes, then it cannot be a norm of *jus cogens*.[107]

These objections may be explained in a number of ways. First, that there really is no *jus cogens* norm and when States refer to a norm in the *jus ad bellum* as *jus cogens* they are not recognising the norm as non-derogable, but simply using the language of *jus cogens* to emphasise the importance of the norm for the international legal (and political) order. However, given that the existence of *jus cogens* norms is now well-established in international law, as well as legal effects flowing from those norms, it is unlikely that States would throw the term around for merely rhetorical purposes.

The preferable view is that in making such statements States are indeed recognising a norm in the *jus ad bellum* as non-derogable, but inconsistent use of terminology makes it difficult to identify the extent of the consensus as to the scope of the non-derogable norm. This uncertainty can be clarified. In cases where the norm

[107] Green (n3).

referred to is clear, such as the prohibition on genocide, it may be sufficient to take recognition 'as *jus cogens'* as shorthand for acceptance and recognition that a norm is non-derogable. However, in this case, to clarify the uncertainty surrounding the scope of the *jus cogens* norm in the *jus ad bellum* it is necessary to look beyond such statements and directly apply the criterion on which *jus cogens* status is based: acceptance and recognition that the norm permits no derogation. It is only to the extent that the prohibition on force is accepted and recognised by the international community of States as a whole as permitting no derogation that it may be identified as a *jus cogens* norm. To identify the norm that is actually accepted and recognised as permitting no derogation, the first step must therefore be to determine the meaning of 'derogation'. The objection that the existence of exceptions prevents the prohibition on the use of force being a *jus cogens* norm rests on the premise that exceptions constitute derogations. However, this premise should not be assumed.

2. The meaning of derogation

The concept of derogation forms the 'keystone' of the Article 53 definition of *jus cogens*.[108] Yet despite this central role 'derogation' is the subject of terminological confusion.[109] Much like 'peremptory' it is a term frequently employed but rarely analysed in detail, with different authors using it in their own sense.[110] This part will distinguish derogation from a number of related concepts before analysing two alternative understandings of 'derogation' in the context of *jus cogens* norms. It will then clarify the meaning of derogation as it is understood in practice today, showing that although the law of treaties cannot provide a conclusive answer as to the meaning of derogation, an analysis of the law of State responsibility demonstrates that a 'derogation' is understood as any norm which purports to make conduct inconsistent with the *jus cogens* norm lawful.

A. Two approaches to derogation

On closer examination we see that in the context of *jus cogens* norms two principal meanings are given to the term derogation. First, there is a narrower view under which derogation is understood as the setting aside of a more general rule by a more specific one among a more restricted set of parties. On this narrow view, 'contracting out' of a *jus*

[108] Kolb (n25), Titre I, section II, para 38.
[109] Robert Kolb 'Des problèmes conceptuels, systématiques et terminologiques en droit international public' [2001] 56 Zeitschrift für öffentliches Recht 501, 505.
[110] For example, two recent articles analysing the *jus cogens* prohibition derive (different) definitions of derogation from dictionaries: Sondre Torp Helmerson 'The Prohibition of the Use of Force as *Jus Cogens*: Explaining Apparent Derogations' [2014] 61 Netherlands International Law Review 167, 175; Patrick Butchard 'Back to San Francisco: Explaining the Inherent Contradictions of Article 2(4) of the UN Charter' [2018] JCSL 1, 11.

cogens norm is prohibited. Second, there is a broader view which understands derogation in the context of *jus cogens* as referring to any lawful non-compliance with the obligation(s) under the *jus cogens* norm. In the context of the *jus ad bellum*, the approach taken is significant as under the narrow view a generally-available exception would not amount to a derogation from a norm and a norm subject to exceptions could still be qualified as non-derogable. However, under the broad view such an exception would be an impermissible derogation. Therefore, under the broad view it is not possible for there to be exceptions to *jus cogens* norms.[111]

i. Derogation distinguished from other concepts

Before further analysis of the two alternative views of derogation, derogation must be distinguished from a number of similar but distinct concepts. Derogation from a norm is not to be confused with violation of a norm and neither of the prevailing views understands violation as a synonym for derogation. Violation is factual conduct that is not in compliance with an obligation of a party that is bound by a norm,[112] whereas derogation concerns legal or normative acts.[113] As normative acts, derogations can only be made by actors with the power to create new international legal norms.

[111] Throughout, 'exception' is used to refer to universal exceptions of the form '…except in this *kind* of situation X,' rather than singular exceptions '…except in this situation X.' Singular exceptions are violations of rules, Donald Evans 'Paul Ramsey on Exceptionless Rules' [1971] 16 American Journal of Jurisprudence 184.

[112] Article 12, Articles on State Responsibility (n1); Sztucki (n27), 68; Yoram Dinstein, 2007 Receuil des Cours 322, 400; Orakhelashvili (n2), 73; Zemanek (n40), 1116 'sanctioning a factual violation is not the primary aim of the concept…'; cf Weatherall (n35), 88. Although as Orakhelashvili points out, 'the issue of the validity of individual breaches of *jus cogens* will inevitably run into that of an attempted normative change,' 'Changing *jus cogens* through state practice?' in Weller (n58), 167.

[113] Kolb (n25), Section II, Chapitre I, 47-8; for a definition of normative activity see Pierre Durand 'La coexistence entre la Convention européenne des droits de l'homme et les autres normes produites au sein

It is a characteristic of any legally binding norm, regardless of whether it is *jus cogens*, that it does not permit its own violation.[114] A State party to a bilateral treaty in force or subject to a rule of customary international law must comply with its obligations under that norm precisely because of its binding nature. Likewise, as general norms of international law *jus cogens* norms will not permit their own violation.[115] In determining the meaning of derogation we are therefore concerned with identifying an additional quality of *jus cogens* norms: that they permit no derogation. In addition to creating an obligation to comply with the substantive obligation(s) under the norm (for example, the obligation to refrain from torture), any attempted derogation from obligations arising under a *jus cogens* norm will have as its main consequence the nullity of the purported derogation – the removal of the derogation's normative force.[116] It is the acceptance and recognition that a norm has this additional quality of non-derogability that identifies it as a norm of *jus cogens*. Whether or not derogation would have the further consequence of responsibility for the state(s) purporting to derogate would depend on what derogation means and on the particular way in which a State sought to derogate from the norm.

The impermissibility of derogation from *jus cogens* norms must also be distinguished from the hierarchical superiority of *jus cogens* norms in relation to other norms of international law. Non-derogability is sometimes described as underlying the

---

du Conseil de l'Europe' in Melis Aras, Yannick Ganne et al (eds), *La coexistence des droits* (Mare & Martin 2018), 221. The question to be clarified is *which* normative acts constitute derogations.

[114] Abi-Saab (n43), 10; Dinstein (n58), 400. Assessing whether a violation of a given norm has occurred will involve a complex assessment of other rules that affect the application of the norm concerned. A State which has acted in a manner *prima facie* inconsistent with its obligation under a norm may not be acting in violation if that conduct constitutes, for example, a valid countermeasure.

[115] Costelloe (n43), 224-5.

[116] Rozakis (n37), 11.

hierarchical superiority of *jus cogens* norms,[117] and both concern normative acts, rather than factual conduct. However, the two concepts can be distinguished. Whereas non-derogability is a criterion for the identification of *jus cogens* norms, hierarchical superiority is only an effect of those norms so identified,[118] and whereas a purported derogation from a *jus cogens* norm will be void, hierarchy concerns rather the priority that is given to different norms and the obligations under them.[119] Priority may be given to an obligation under a *jus cogens* norm where the application of an otherwise innocuous norm produces a conflict with *jus cogens* in a particular situation, but the hierarchically inferior norm will continue to be valid.[120] For example, Article 53 VCLT, which is generally accepted as preventing derogation from *jus cogens* norms, provides that treaties that conflict with *jus cogens* norms will be void. Yet in other cases a non-*jus cogens* norm which is inconsistent with a *jus cogens* norm will only 'give way' before the hierarchically superior *jus cogens* norm, which will prevail over it in a particular situation.[121] The validity of the inconsistent non-*jus cogens* rule is never called into question.

A final distinction must be drawn between derogation from a *jus cogens* norm and its modification.[122] *Jus cogens* norms are not immutable and may be changed, as reflected

[117] ILC, 'Second report on State responsibility, by Mr James Crawford, Special Rapporteur' (17 March 1999) A/CN.4/498, 313.
[118] Tladi's Second Report (n46), 31.
[119] Zemanek (n40), 1116; Simma (n39), 287-8. Not all hierarchical norms are *jus cogens*, a notable example being Article 103 UNC, Sztucki (n27), 97.
[120] Erika de Wet, *The Chapter VII Powers of the United Nations Security Council* (Hart 2004), 188.
[121] *Immunities* (n24), 92, although in that case the ICJ found there was no inconsistency between the parts of the law of armed conflict that were assumed to be *jus cogens* and the rules of State immunity; the distinction is also drawn by the Trial Chamber in *Furundzija*. Whereas treaties and custom providing for acts of torture would be 'null and void *ab initio*', in relation to national legislation a court would rather be asked to 'disregard the legal value of the national authorising act' (n56), 155; Articles on State Responsibility (n1), Article 26, Commentary, para 3.
[122] cf Sztucki who considers, based on Article 41 VCLT, that derogation is a sub-category of modification *inter partes* (n27), 174.

in Article 53 VCLT, which provides that a *jus cogens* norm may (only) be modified 'by a subsequent norm of general international law having the same character.' That is, it is permissible for the international community of States as a whole to recognise as *jus cogens* a norm inconsistent with an existing *jus cogens* norm and this will not amount to an impermissible derogation but rather a valid modification or replacement of the existing norm.[123] However, to do so the new norm must itself satisfy the criteria for the identification of *jus cogens* norms and be accepted and recognised by the international community of States as a whole as a norm from which no derogation is permitted.

ii. The narrow view: derogation as contracting out *inter se*

Turning now to the narrow approach to derogation, on this view derogations are 'specific acts or rules that diverge from and supplant the content of a more general rule'.[124] It is the attempt to 'legitimize acts contrary to *jus cogens* on an *inter se* basis'[125] and leads to the fragmentation of a legal regime into legal relationships of a more specific scope *rationae personae*.[126] This view understands the additional obligation not to derogate that is imposed on States bound by the *jus cogens* norm to be an obligation not to exclude the *jus cogens* norm from their legal relations among a more restricted group of parties *inter se*. Thus, whereas most general international law can be derogated from between particular parties,[127] 'the main legal effect of peremptory norms is consequently

[123] Ragazzi (n21), 59; Dinstein (n117), 259-60.
[124] Helmerson (n110), 175.
[125] Sztucki (n27), 68; Orakhelashvili (n2), 73.
[126] Kolb (n25), Titre I, section I, 56.
[127] *North Sea* (n22), 72.

to sterilise the operation of the *lex specialis* principle'[128] and so protect the norm which has that status from fragmentation or bilateralisation.[129] So understood, the purpose of the prohibition of derogation is to preserve the integrity of the norm by ensuring that parties cannot exclude themselves from its scope by setting it aside in their relations *inter se*.[130]

As noted in part one, the concept of *jus cogens* originates in Roman law, which divided all legal rules into two main categories: *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.[131] The ordinary meaning of the French legal term *dérogation* also refers to the exclusion of the common law (here not being used in the sense of judge-made law but of generally applicable law) in a specific case. This is the case particularly in matters of agreements, where *dérogation* refers to a provision by which the parties exclude the application of a law that is neither *impératif* (this term is used as a translation for 'peremptory' in the French version of the VCLT) nor a rule of public order.[132] Both these

[128] Robert Kolb, *The law of treaties: an introduction* (2016 Elgar), 105; see also Zemanek's criticism of Kolb's thesis (n40), 1109-12; Orakhelashvili (n112), 172, rejecting an African *lex specialis* in the *jus ad bellum*.
[129] Kolb (n25), Titre I, section I, 13.
[130] Egon Schwelb 'Some Aspects of International *Jus Cogens* as Formulated by the International Law Commission' [1967] 61 AJIL 946, 959; Alexidze (n13), 255: 'All these rules can be derogated from, that is substituted by other rules of conduct established on a consensual basis by contracting States and reducing or abrogating the above-mentioned rules only in regard to the mutual relations of those States'; Rozakis (n37), 2-3, 22; cf Koskenniemi who considers that *lex specialis* does not exclude application of the general norm, which continues to apply in the background and provide interpretative guidance for the special norm, ILC, 'Report of the Study Group of the International Law Commission finalized by Martti Koskenniemi, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law' (13 April 2006) A/CN.4/L.682 ('Fragmentation Report'), 102.
[131] Alexidze (n13), 233.
[132] Dalloz, *Lexique des termes juridiques* 2015-16.

meanings accord more closely with an understanding of derogation as the setting aside of an otherwise applicable general rule among a more restricted group of parties.

In addition to Article 53, there is only one other use of the term 'derogation' in the VCLT, in Article 41.[133] That article specifies when two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty 'as between themselves alone'. There are only two such situations: where the treaty so provides, and where the modification in question is not prohibited by the treaty and it 'does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole'. Again, we see that derogation refers to the use of a special agreement to set aside a more general rule (in this case a multilateral treaty rule rather than a *jus cogens* norm) in the parties' relations *inter se*.

The narrow view is not to be confused with the position that *jus cogens* norms have no effects outside of the law of treaties. Derogations understood in the narrow sense are not limited to bilateral or multilateral treaties that attempt to exclude the *jus cogens* norm, as provided for by Articles 53 and 64 VCLT, but also include any special legal regime among a restricted set of parties that conflicts with a more general *jus cogens* norm.[134] Regional custom that conflicts with a *jus cogens* norm would also constitute a derogation, as it purports to create a more restricted legal regime.[135] For some writers, unilateral acts

[133] The French version of Article 41 also uses the equivalent verb '*se déroger*'.
[134] cf Anne Lagerwall 'Article 64' in Olivier Corten and Pierre Klein (eds), *Les Conventions de Vienne sur le droit des traités, Commentaire article par article* (Bruxelles 2006), 2317-8
[135] Rozakis (n37), 22; Kolb (n25), Titre I, section II, 51; that regional/bilateral custom operates as *lex specialis* to general custom was recognised by the ICJ in the *Case concerning Right of Passage over Indian Territory* (n23), 44.

will be derogations to the extent that they have normative force, for example, reservations that conflict with a *jus cogens* norm.[136] They attempt to create a legal regime of a more limited scope that is inconsistent with the *jus cogens* norm. Significantly, on the narrow view an exception with the same *rationae personae* scope as the norm itself would not constitute a derogation and a norm that is subject to exceptions may still be non-derogable.

The narrow view of derogation therefore gives a more limited role to *jus cogens* norms. Rather than protecting the fundamental values of the international community by preventing acts contrary to them, non-derogability is simply a legal technique for preserving the integrity of a norm.[137] The prohibition of narrow derogation ensures that for those States bound by the *jus cogens* norm, in relation to conduct it regulates it must be the governing norm. The voidness of impermissible derogations is perfectly suited to fulfil this more limited purpose as it will render any competing norm a nullity.

iii. The broad view: derogation as lawful non-compliance

However, today writers tend not to understand derogation in this narrow sense.[138] An alternative, broader view emphasises instead the absoluteness of any substantive obligation created by the norm: a *jus cogens* norm is one that must always be complied

[136] Kolb (n25), Titre I, section II, 44, 47; cf Rozakis (n37), 18-9.
[137] Kolb argues that treating certain norms as hierarchically superior or giving additional protection to fundamental values is closer to ideas of *ordre public* than *jus cogens* (n25), Conclusion Générale, 5.
[138] De Hoogh (n58), 1172.

with, in any circumstances.[139] Whereas conduct inconsistent with a State's obligations under a non-*jus cogens* norm may ultimately be found not to be unlawful because, for example, it falls within an exception or was due to a state of necessity, conduct inconsistent with an obligation under a *jus cogens* norm must always be unlawful. For example, circumstances precluding wrongfulness are not applicable to obligations under *jus cogens* norms. Obligations under *jus cogens* norms can never be defeated by other considerations or the operation of other legal rules.[140] Thus, States bound by that norm must disregard not only all non-legal but also any legal reasons for non-compliance with their obligation(s) under it.[141]

On a broad view, derogation therefore encompasses much more than mere *inter se* treaties and special custom: it would include any rules allowing lawful behaviour inconsistent with a party's obligations under a *jus cogens* norm. It 'covers comprehensively all grounds for acting contrary to [obligations arising under] peremptory norms and all acts conflicting with [obligations arising under] peremptory norms'.[142] On this view, since exceptions allow for lawful behaviour inconsistent with an obligation under a norm, they will constitute derogations.

---

[139] Gerald Fitzmaurice, 1957 Receuil des Cours 92, 120, 125; Hannikainen (n6), 6-7, 132, 144-5; Dinstein (n58), 111-113; Ulf Linderfalk 'The Effect of *Jus Cogens* Norms: Whoever Opened Pandora's Box, Did You Ever Think About the Consequences?' [2008] 18 EJIL 5 860; Green (n3), 229; Charles Leben 'Obligations Relating to the Use of Force and Arising from Peremptory Norms of International Law' in James Crawford, Alain Pellet, and others (eds), *The Law of International Responsibility* (OUP 2010), 1199; Hameed (n28), 70.

[140] That is, failure to fulfil an obligation under a *jus cogens* norm will always be a violation 'all things considered' John Gardner, *Offences and Defences* (OUP 2007), 77-9.

[141] In Raz's terminology *jus cogens* norms would be mandatory norms which have exclusionary force. They provide a reason to perform the required act and exclude reliance on **all** reasons not to perform the required act. Non-*jus cogens* legal norms are still mandatory norms in that they exclude contrary reasons for acting, but non-*jus cogens* norms can allow for justificatory defences by selectively 'unexcluding' some otherwise excluded reasons. However, for *jus cogens* norms, on the broad view, all contrary reasons are excluded, see Gardner, ibid, 147-8, citing Joseph Raz, *Practical Reasons and Norms* (2nd edn OUP 1990), 191.

[142] Hannikainen (n6), 248.

This broad approach to derogation could also be understood as preventing the development of *lex specialis*, but in the sense of the substance governed by the provision, rather than the actors subject to its force.[143] However, whereas the relative generality or speciality of norms will usually be clear in the context of *lex specialis rationae personae,* as one can easily determine the number of parties subject to a norm, identifying a *lex specialis rationae materiae* in circumstances where the same number of parties are bound by both norms will require an analysis of the content of the obligations they generate, and the drawing of the difficult distinction between application of the general *jus cogens* norm to particular circumstances, and the creation of a *lex specialis*.[144]

The etymology of the word 'derogation' and the ordinary English meaning fit with this broad view of derogation. Derogation originates in the Latin '*derogare*,' meaning to take away or detract from. The Oxford English Dictionary defines 'derogate' and 'derogation' when used in a legal context as 'to repeal or abrogate in part; to destroy or impair the force and effect of; to lessen the extent or authority of' and 'the partial abrogation or repeal of a law, contract, treaty, legal right, etc.' respectively, citing sources that speak of derogation from the common law.[145] This is also the sense in which Kelsen understands derogation.[146] Both speak of a detraction from the substance of the subject of derogation, making it less than absolute, and there is nothing to suggest a concern with specificity or generality of scope *rationae personae*.

[143] Fragmentation Report (n130), 58.
[144] ibid, 116-8.
[145] *The Oxford English Dictionary* (2nd edn Clarendon 1989).
[146] Derogation is 'the repeal of the validity of an already valid norm by *another norm'* Kelsen (n83), chapter 27.

Therefore, unlike the narrow approach, the broad approach to derogation is consistent with the presumed purpose of *jus cogens* norms as protecting the fundamental values of the international community and preventing acts contrary to them. Ensuring any act inconsistent with obligations arising under a *jus cogens* norm will be unlawful will reduce the circumstances in which a State is permitted so to act and so may reduce incidences of inconsistent conduct. It may also exercise a deterrent effect on those considering acting contrary to their obligations under the *jus cogens* norm. Non-derogation also signals the fundamental importance of those values by recognising that they cannot be outweighed by any countervailing exception or defence. However, claims that *jus cogens* status ensures compliance with those obligations or prevents their violation should be treated with caution.[147]

B. Determining the meaning of derogation

Where a *jus cogens* norm appears to admit exceptions, the approach taken to derogation could therefore have a significant impact on the scope of the *jus cogens* norm. Taking a broad view of derogation, there can be no exceptions to *jus cogens* norms. Taking a narrow view of derogation, a norm subject to exceptions may still be *jus cogens* provided States are not permitted to contract out of that norm *inter se*. In order to determine the scope of the *jus cogens* norm in the *jus ad bellum* and the nature of the exceptions to that prohibition it is therefore necessary to clarify the correct meaning of derogation.

[147] Dinah Shelton 'Normative Hierarchy in International Law' [2006] 100 AJIL 291, 323, 304-5.

The following two sections will analyse the law of treaties and the law of State responsibility with a view to determining how the concept of derogation has been understood in practice. The law of treaties is pertinent because it was through the drafting of the VCLT that the concept of *jus cogens* became accepted in positive international law and its definition as norms 'from which no derogation is permitted' was developed. The effects of *jus cogens* norms in the law of State responsibility provide the strongest potential example of the impermissibility of derogation understood in the broad sense.

The term 'derogation' is frequently employed in international human rights law, where it refers to provisions in certain human rights treaties that permit States Parties to temporarily suspend or breach their obligations under the treaty in certain circumstances, such as war or public emergency.[148] However, one should be cautious in generalising between those rights which are non-derogable under human rights treaties and those which constitute norms of *jus cogens*.[149] As the Human Rights Committee observed in General Comment 29, while proclamation of a right as non-derogable may be partly in recognition of its peremptory nature, the two concepts are not identical. Not all those rights which are *jus cogens* are included in the list of non-derogable rights in Article 4 ICCPR, while a right may be recognised as non-derogable for reasons other than its *jus cogens* status.[150] The list of rights designated as non-derogable varies widely among the

[148] Rosalyn Higgins 'Derogations under Human Rights Treaties' [1977] 48 (1) BYIL 281, 281-2.
[149] William A Schabas, *The European Convention on Human Rights: A Commentary* (OUP 2015), 593.
[150] UN Human Rights Committee 'General Comment No 29: Article 4: Derogations during a State of Emergency' UN Doc CCPR/C/21/Rev.1/Add.11 (31 August 2001), 11.

four treaties that contain derogation clauses,[151] and some treaties classify as 'non-derogable' rights that have never been proposed as norms of *jus cogens*, such as the right to a name, or the prohibition on arbitrary exile.[152] Derogation in the context of human rights is therefore better seen as a separate concept specific to those treaty regimes, even if the drafting and interpretation of their provisions may be influenced by the *jus cogens* nature of some of the rights concerned.

ii. Derogation in the law of treaties

'Derogation' is a term in a treaty provision. However, in drafting the Article 53 definition States considered themselves to be codifying a definition of a concept that already had an independent existence in international law: *jus cogens* was not created by the VCLT itself.[153] It is the meaning of derogation as an element of this concept that needs to be determined, not merely the correct interpretation of Article 53. In the same way that the rules of international law governing the interpretation, termination and suspension of treaties are rules of customary law,[154] the concept of norms from which no derogation is permitted and the rules governing their identification must be creatures of customary law.[155] It is therefore the State practice and *opinio juris* of States with regard

[151] International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR); European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) ETS 5 (entered into force 3 September 1953) (ECHR); American Convention on Human Rights 1144 UNTS 123 (entered into force 18 July 1978) (ACHR); and the Arab Charter on Human Rights (adopted 23 May 2004). See Louise Doswald-Beck, *Human Rights in Times of Conflict and Terrorism* (OUP 2011), 80.

[152] Articles 18 and 27, ACHR, and Article 4, Arab Charter on Human Rights, respectively.

[153] Draft Articles on the Law of Treaties with commentaries, Article 50, Commentary para 1; cf Sur (n25), 51-52.

[154] *Gabcikovo-Nagymaros Project (Hungary/Slovakia*, Judgment, [1997] ICJ Reports 7, 46; *Kasikili/Sedudu Island (Botswana/Namibia)*, Judgment, [1999] ICJ Reports 1045, 18, 20.

[155] Linderfalk (n51).

to *jus cogens* norms that must be examined in order to determine the meaning of derogation. Reference to the *travaux préparatoires* of the VCLT is therefore not made under Article 32 VCLT for the purposes of interpretation of the treaty term 'derogation' in Article 53, but as evidence of the practice and *opinio juris* of States underlying the customary concept of *jus cogens*.

The drafting history of the VCLT includes not only the records of the 1968-69 Vienna Conference on the Law of Treaties, but also the work of the ILC and the Sixth Committee of the General Assembly, which had been discussing the codification and progressive development of the law of treaties since 1950. The practice of States during the drafting of Article 53 is valuable in determining the meaning of the customary concept, first, because the statements of States in the Sixth Committee and Vienna Conference were an attempt to define the concept of *jus cogens* norms and helped consolidate the existence of the concept in positive law. As confirmed by the ICJ, such statements constitute State practice.[156] The discussions of the jurists in the ILC may be relied on as a subsidiary source.[157] Second, the widespread adoption of Article 53 as the definition of *jus cogens* has shaped State practice in relation to *jus cogens* norms subsequent to 1969.

However, it is nevertheless necessary to note at the outset that the utility of the law of treaties in determining the meaning of derogation is limited by the context in which the discussions took place. Article 53 is found in a treaty on treaties, and its definition 'for

[156] *Immunities* (n24), 55.
[157] Statute of the International Court of Justice, Article 38(1)(d) (n36).

the purposes of the present convention' was developed in the context of inconsistent subsequent treaties. Virtually all contrary legal regimes created by a treaty would be *inter se* agreements of a narrower *rationae personae* scope than the universal *jus cogens* norms contemplated by the VCLT. With the exception of a hypothetical general multilateral treaty, all the treaties that could potentially be caught by Article 53 would be *inter se* agreements that would constitute derogations in the narrow sense. In drafting Article 53 it would therefore be natural to speak of derogation as 'contracting out' and there would be no reason to consider the implications of the broad view that went beyond the invalidation of *inter se* treaties of a more restricted *rationae personae* scope, as the VCLT dealt only with the effects of *jus cogens* norms in the law of treaties.[158] Indeed, the very idea that *jus cogens* norms could have effects outside the law of treaties remained controversial even after the adoption of the VCLT.[159]

Where *jus cogens* norms are not involved, States may use treaties to set aside rules of international law in their relations *inter se*.[160] For example, two States may agree by treaty that as between themselves they will consider their territorial waters to be 5 nautical miles. In such a situation the general customary international law rule requiring States to respect a territorial sea of 12 nautical miles would have been excluded from their *inter se* relations; it would no longer apply to those parties in their relations with each other. It is this excluding effect that Article 53 prevents where the general rule is a

[158] Costelloe (n43), 63.
[159] For example, Mexican delegate Gómez-Robledo's criticism of Special Rapporteur Ago for manifesting a 'broad application' of the concept of *jus cogens* by suggesting in his Eighth Report on State Responsibility that it was not possible to preclude wrongfulness by consenting to a violation of a *jus cogens* norm, UNGA (35th Session), Sixth Committee, Summary Record of the 48th Meeting, A/C.6/35/SR.48, 17.
[160] ILC, Fitzmaurice's Third Report (n17), 76.

rule of *jus cogens* by providing that the treaty attempting to exclude the general rule is void. If the treaty is between a more restricted number of parties than are bound by the excluded norm, then that norm's *rationae personae* scope is restricted. However, whether the treaty is of a narrower *rationae personae* scope than the excluded norm or of the same scope, it is purporting to establish a contrary legal regime with regard to the same subject matter regulated by the excluded norm. Where the norm excluded is a norm of *jus cogens*, the treaty would therefore constitute a derogation on either the broad or narrow view.

Therefore, even if the drafting of and practice under the VCLT did evidence an understanding of derogation as contracting out *inter* se, this would still not conclusively rule out the possibility that derogation has the broader meaning set out above. Outside of the context of the law of treaties, derogation may well have a broader meaning of any lawful inconsistent conduct, including but not limited to the narrow meaning of contracting out *inter se*. Narrow derogation would be the specific application of a broader principle.

a. The drafting history of the VCLT

Special Rapporteurs Lauterpacht and Fitzmaurice analysed the invalidity of treaties conflicting with *jus cogens* explicitly in terms of the dichotomy between *jus cogens* and *jus dispositivum* that is associated with the contracting out approach.[161] These

[161] ILC, 'Report on the Law of Treaties by Mr H Lauterpacht, Special Rapporteur' 1953 A/CN.4/63, Article 3, 15. Elsewhere Lauterpacht had written of the analogy between treaties and private law contracts, *Private Law Sources and Analogies of International Law* (London 1927), 166. Fitzmaurice speaks of 'those [rules]

early reports appear to assume that treaties that would be void under these draft articles would invariably be concluded by a group of States *inter se* and so of a narrower scope *rationae personae*.

Invalidity of treaties due to conflict with *jus cogens* was not addressed in the first report of Sir Humphrey Waldock, the subsequent Special Rapporteur, but was included in his second report, with some significant changes from Fitzmaurice's approach. Rather than being viewed as a question of the legality of the object of the treaty, the rule is now expressed in terms of derogation from non-derogable rules, with the term 'derogation' making its first appearance in the draft articles. A draft Article 1, 'Definitions', now included the following:

> "*Jus cogens*" means a peremptory norm of general international law from which no derogation is permitted except upon a ground specifically sanctioned by general international law, and which may be modified or annulled only by a subsequent norm of general international law.

In the commentary, Waldock notes that 'it seems advisable to qualify the phrase "from which no derogation is permitted" by reference to grounds "specifically sanctioned by international law", in order to allow for such possible grounds as legitimate self-

which are mandatory and imperative in any circumstances (*jus cogens*) and those (*jus dispositivum*) which merely furnish a rule for application in the absence of any other agreed regime, or, more correctly, those the variation or modification of which under an agreed regime is permissible,' Fitzmaurice's Third Report (n17), 76. Brierly, the first Special Rapporteur on the topic, did not deal in his report with the lawful subject matter of treaties.

defence'.[162] Waldock's belief that specific provision needed to be made for self-defence, as an exception to the prohibition of derogation, suggests that in his view such grounds would constitute a derogation from the *jus cogens* norm. That is, it reflects a broad understanding of derogation as covering any lawful inconsistent conduct, including exceptions.

However, that self-defence is recognised as a derogation that would nonetheless be permissible if sanctioned by 'general' international law does suggest a concern with scope of application, and a recognition that what is problematic is the setting aside of *jus cogens* rules by a more restricted group of parties *inter se*.[163] Similarly, in the same report draft Article 1 provides that *jus cogens* norms can be modified by 'a subsequent norm of general international law,'[164] not necessarily another peremptory norm, again demonstrating a concern with *rationae personae* scope that suggests a narrow understanding of derogation. In the ILC discussions of the report, Ago analysed this rule on the basis that 'there would be no derogation from a general rule by a particular rule**,** but rather a replacement of one general rule by another.' There are other suggestions in the second report that derogation is linked to limiting the *rationae personae* scope of the norm. In the commentary to draft Article 13 Waldock describes *jus cogens* norms as those 'from which individual States are not competent to derogate by treaties **between themselves**' and rejects the view that there is 'no rule from which States cannot at their

[162] Waldock's Second Report (n40), Article 1, Commentary, para 2.
[163] Ago, A/CN.4/SR.683, Summary record of the 683rd meeting, Yearbook of the International Law Commission 1963, Vol I, 78.
[164] From draft Article 13(4) it appears that this refers to a general multilateral treaty.

own free will contract out.'[165] This text was adopted unchanged in the subsequent ILC report.

However, this question of the exceptions to the prohibition on the use of force is never raised again in subsequent reports and the specific provision allowing for exceptions 'specifically sanctioned by general international law' disappears from all subsequent drafts of the articles without discussion. By Waldock's next report dealing with the subject, *jus cogens* norms 'can be modified only by a subsequent norm of general international law having the same character'. Taken together, these changes illustrate the abandonment of the idea that the general scope of a norm means it is permitted to derogate from or modify *jus cogens* norms.

In the debates in the ILC, Sixth Committee and Vienna Conference, some statements hint at a broad approach to derogation while others suggest a narrow approach. More often, it is unclear what view of derogation (if any) underlies the particular interventions of States or jurists.[166] This is due to the fact that in the ILC, while certain members explicitly advocated for an understanding of derogation as contracting out, the division of opinions was not between broad and narrow understandings of derogation, but rather between those who viewed derogation as contracting out and those who understood derogation as a synonym for violation. The meaning of the term

[165] Waldock's Second Report (n40), Article 13, Commentary, para 1 [emphasis added].

[166] For example, Blix, Swedish delegate in the Sixth Committee: 'The concept of peremptory norms, *jus cogens*, should be reserved for rules from which the international community could not allow any of its members to deviate, for example, the prohibition of the use of force,' Sixth Committee, Summary Record of the 844th Meeting, para 11. Deviation could plausibly interpreted here as meaning either lawful inconsistent conduct or contracting out.

'derogation' was first explicitly raised in the ILC by Ago, who objected to the inclusion in the article of the word 'infringement,' which suggested an unlawful act. In his view, 'there was no question of an unlawful act, […] it was a question of derogation from a rule from which no derogation was permitted, and such derogation rendered the treaty void.'[167]

On the other hand Yasseen, Chairman of the Drafting Committee, also objected to the use of the word derogation, but because he interpreted it as meaning 'violation', when the effect of *jus cogens* norms that he wished to capture in the drafting of the article was the inability to contract out.[168] In response, Tunkin and Waldock attempted to clarify the meaning of derogation, with both strongly of the view that derogation does refer to contracting out and could not be construed as meaning 'to violate'. This approach was followed by the Drafting Committee.[169]

While this debate is instructive in highlighting that non-derogability goes beyond the mere binding nature of the norm and that the meaning of 'derogation' was uncertain even during the drafting of the VCLT, it is limited in what it reveals about the participants' views of derogation. As noted above, in the context of subsequent conflicting treaties, they will virtually all be of a narrower scope *rationae personae* than the universal *jus cogens* norms foreseen in the VCLT. Given also that the importance of *rationae personae*

[167] Ago, A/CN.4/SR.684 Summary record of the 684th meeting, Yearbook of the International Law Commission 1963, vol I, 49.
[168] A/CN.4/SR.685 Summary record of the 685th meeting, Yearbook of the International Law Commission 1963, vol I, 63; the same view was shared by Bartos and Verdross, who argued that a State could never 'derogate' from a rule of international law and the point with *jus cogens* was that a State was not permitted to 'derogate by bilateral or multilateral treaties,' ibid, 73, 79.
[169] ibid, 76, 81; see also his comments at para 28. Subject to this and other minor issues that remained to be resolved by the Drafting Committee, Article 13 was adopted in principle by the ILC at the end of that meeting.

scope was not the focus of this discussion, only limited weight can be placed on references to derogation as contracting out.

In parallel with the ILC's work on the law of treaties, the Lagonissi conference brought together eminent jurists in April 1966 to discuss the concept of *jus cogens*. Crucially, unlike the ILC, Sixth Committee and Vienna discussions, the agenda in Lagonissi was not limited to *jus cogens* norms in the law of treaties, but was a general discussion of the concept in international law. Freed from this context, the conference discussions do suggest that derogation, while it includes contracting out *inter se*, was understood as extending to any contrary legal regime, even where it is not of a more limited scope *rationae personae*. As described by Georges Abi-Saab when summarising the conclusions of the conference, most participants were of the view that '*jus cogens* rules are those from which States cannot contract out, in other words, rules from which they cannot derogate by agreement **even in** their mutual *inter se* relations'.[170] This phrasing, suggesting contracting out *inter se* was only one manifestation of a broader concept of derogation, was included in the final commentary to the Articles on the Law of Treaties adopted by the ILC.[171]

This view also emerged from the Lagonissi discussions of the distinction between violation and derogation.[172] In his summary of the conference proceedings, Abi-Saab

[170] Abi-Saab (n43), 10 [emphasis added]; although writing 30 years later, Abi-Saab suggests that the development of the definition of *jus cogens* in the context of the law of treaties may have had a lasting impact on the concept 'The Uses of Article 19' [1999] 10 EJIL 2 339.
[171] Article 50, Commentary, para 6, 'The treaty is wholly void because its actual conclusion conflicts with a peremptory norm of general international law from which no States may derogate even by mutual consent.'
[172] The meaning of derogation as contracting out was supported most strongly by Tunkin, in terms virtually identical to his statements in the ILC.

rejects the 'confusion' created by those who considered that *jus cogens* norms permitted no 'violation',[173] explaining that it is rather the legal or binding character of a rule that is concerned when a legal norm – *jus cogens* or otherwise – is violated. In doing so, he sets out a broad conception of derogation: 'the test of a *jus cogens* rule is the legality of **establishing a contrary legal regime** and not the legality of violating it which is the test of legal rules at large'.[174] Unilateral acts are not invalid because derogation encompasses every act or norm contrary to the *jus cogens* norm, but because they 'can contribute to the establishment of a legal regime supplanting a pre-existing one. To that extent, they can be assimilated to treaties. This is why an act or omission which is contrary to a *jus cogens* rule is devoid of any legal effect.'[175] Again, this supports a broad understanding of derogation: there is no reference made to limiting the scope of the *jus cogens* norm *rationae personae*; it is the establishment of any contrary legal regime that is considered to be a derogation. Consequently, the invalidity of conflicting *inter se* treaties would only be one application of the rule that it is not permitted to establish any contrary legal regime to a *jus cogens* norm.

The distinction between violation and derogation, and between merely binding norms and those of *jus cogens*, was addressed again by Waldock in his subsequent report. Responding to the Netherlands government's comment that it was redundant to describe *jus cogens* as 'peremptory norms from which no derogation is permitted', Waldock observed that the Commission felt it necessary to maintain the wording as:

[173] Notably Ushakov: 'What mattered was the violation of these rules not the derogation from them. Such a violation could take place not only by a treaty but also by any act or omission.'
[174] Abi-Saab (n43) [emphasis added].
[175] ibid, 10-11.

> all general rules of international law have a certain peremptory character in the sense that they are obligatory for a State unless and until they have been set aside by another lawfully created norm derogating from them. 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.[176]

Waldock's statement again suggests that derogation is the creation of a contrary legal regime, with *inter se* agreement only one possible form that may take. Indeed, 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"'.[177]

In the final version adopted by the ILC at its 18th session, the language of 'contracting out' is retained in the commentary to draft Article 50, and is used interchangeably with 'derogation'. The question of the meaning of derogation did not arise again during discussions in the Sixth Committee, nor during the Vienna Conference itself. Taken as a whole, therefore, the *travaux* of Article 53 VCLT are inconclusive as to how derogation was understood by those who drafted and adopted the Article 53 definition of *jus cogens* norms. However, they certainly do not exclude a broad view of derogation, and some limited support can be found for that view.

[176] Waldock's Fifth Report, Observations and proposals of the Special Rapporteur, para 2 [emphasis added]. This view was explicitly supported by Castren, A/CN.4/SR.828 Summary record of the 828th meeting, Yearbook of the International Law Commission, 1966, vol I, 11.
[177] n21, 58.

b. Treaties conflicting with *jus cogens* norms

Article 53 VCLT contains two sentences. The second sentence contains a definition of *jus cogens* norms for the purposes of the VCLT. The first sentence sets out the rule that 'a treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm'. Such treaties are examples of impermissible derogations from *jus cogens* norms and can therefore constitute practice establishing the meaning of derogation from a *jus cogens* norm. While the rule in Article 53 VCLT has rarely been invoked in practice, where it has the treaty concerned has been of a more restricted scope *rationae personae* than the *jus cogens* norm with which it was alleged to conflict.[178]

However, the application of Article 53 in practice cannot provide a conclusive answer as to whether derogation has a broad or narrow meaning. As a subset of the cases that would constitute derogation under the broad view, examples of impermissible narrow derogations cannot tell us whether the broad or narrow view is correct. However,

[178] UNGA Res 34/65B (1979) 'declares that the Camp David accords [between Israel, Egypt and the US] and other agreements have no validity in so far as they purport to determine the future of the Palestinian people and of the Palestinian territories occupied by Israel since 1967' – in plenary discussion one delegate (Iraq) explicitly invoked articles 34, 43, 49, 52 and 53 of the VCLT, and many delegates referred also to the 'inalienable' rights of Palestinians, including their right to self-determination. However, a previous UNGA Res 33/28A (1978) had declared that the validity of agreements purporting to solve the Palestine question would have to be in the framework of the Charter and UN on the basis of the inalienable rights of the Palestinian people, providing a non-jus cogens basis for the finding of invalidity in the resolution; in the case concerning the delimitation of maritime boundary between Guinea-Bissau and Senegal, Guinea-Bissau argued that the 1960 treaty between the two States was void for conflict with *jus cogens*, Arbitral Award of 31 July 1989, RIAA Vol XX 119, 133; *Case of Aloeboetoe et al v Suriname*, Reparations and Costs, 10 September 1993, I/A Court HR, Series C No 15, 57; see also Gaja's discussion of the Treaty of Friendship between the Soviet Union and Iran of 26 February 1921 (n44), 282, 288; regarding the 1960 Treaty of Guarantee between Cyprus, Greece, Turkey and the UK, see Schwelb (n130), 952; Charlesworth and Chinkin (n60), 66; see also Weatherall's discussion of the Argentine Supreme Court case of *Washington Cabrera JE Comisión Técnica Mixta de Salto Grande*, where the Court found that a bilateral agreement which did not contain due process protections violated Article 53 VCLT (n35), 86-7.

conversely, one example of an impermissible broad derogation would be fatal for the narrow view. In order to determine whether the meaning of derogation in the context of *jus cogens* norms extends beyond attempts to contract out of that norm *inter se*, it is therefore necessary to consider examples that could only be considered as derogations under the broad view. For this, we must turn to the law of State responsibility.

ii. Derogation in the law of State responsibility

Under the broad view of derogation, conduct not in compliance with an obligation under a *jus cogens* norm can never be lawful. Under the narrow view the non-derogability of *jus cogens* norms only prohibits the development of any *lex specialis rationae personae*. Whereas the invalidity of conflicting treaties may be explained by either the broad or narrow understanding of derogation, the role of *jus cogens* norms in the law on State responsibility appears reconcilable only with the broad understanding of derogation.

There are three references to *jus cogens* norms in the Articles on State Responsibility adopted by the International Law Commission and taken note of by the General Assembly in 2001.[179] Although the articles contain elements of both codification and progressive development of international law, they are widely accepted as an

[179] Resolution A/RES/56/83 (12 December 2001), Annex.

authoritative statement of the law of State responsibility.[180] Article 26 provides that the six circumstances precluding wrongfulness set out in Chapter V of Part I of the Articles (consent, self-defence, countermeasures, *force majeure*, distress, and necessity) will not preclude the wrongfulness of any act of a State which is not in conformity with an obligation under a peremptory norm of general international law. Linked to this, Article 50 sets out a number of categories of obligations that are not affected by countermeasures; that is, the wrongfulness of measures taken in breach of those obligations will not be precluded even if they are claimed to constitute countermeasures. Those obligations include 'other obligations under peremptory norms of general international law'. Finally, Chapter III of Part II deals with the consequences of serious breaches of obligations under peremptory norms of international law.[181]

a. Operation of the rules concerning circumstances precluding wrongfulness

The exclusion of the ability to invoke circumstances precluding wrongfulness in relation to a breach of a *jus cogens* norm is a serious challenge to the narrow understanding of derogation as the creation of a *lex specialis rationae personae*. The generality of the rule in Article 26, which applies to all circumstances precluding

[180] For example, *Hulley Enterprises Limited (Cyprus) v Russian Federation*, UNCITRAL, PCA Case No AA 226, Final Award 18 July 2014, IIC 415 (2009), 113; *Rompetrol Group NV v Romania*, ICSID Case No ARB/06/3, Award, 6 May 2013, IIC 591 (2013), 189.

[181] However, Article 41 does not concern derogation from *jus cogens* norms. Rather, it creates additional obligations that arise for States when such a norm is violated. The obligation of States to cooperate to bring any such breach to an end through any lawful means (Article 41(1)) and the obligation not to render aid or assistance in maintaining that situation (Article 41(2)) address the factual conduct in violation of the norm. While the obligation not to recognize as lawful a situation created by a serious breach (Article 41(2)) does concern the normative act of recognition, failure to comply with this obligation does not lead to the invalidity of the act of recognition, which would be the case if it were an impermissible derogation.

wrongfulness and all *jus cogens* norms, suggests that the rule flows from common characteristics of both sets of rules. That is, the non-derogability of *jus cogens* norms and the character of the circumstances precluding wrongfulness as derogations. Indeed, in the commentary to Article 26 the rule is explained on precisely this basis.[182]

Article 26 is difficult to characterise as containing a rule that reflects the impermissibility of derogation understood in the narrow sense of a *lex specialis rationae personae* that excludes a norm from the parties' relations *inter se*. Like the Articles as a whole, the circumstances precluding wrongfulness are general in character. They are secondary rules of customary international law that preclude the wrongfulness of an act in response to the existence of the particular circumstance. These rules, with the exceptions discussed below, apply to any breach of any international legal obligation and may be invoked by any State towards any other State to which the obligation is owed.[183] Invocation of one of the circumstances precluding wrongfulness does not lead to the termination, or even temporary suspension, of the obligation owed by the invoking State to the injured State, which continues to govern their relations *inter se* and bind the invoking State vis-à-vis the injured State.[184] Nor does it alter that obligation so that the invoking State's behaviour is in accordance with its requirements.

[182] Articles on State Responsibility (n1), Article 26, Commentary, para 4.
[183] Articles on State Responsibility (n1), General Commentary, para 5 and Chapter V, Commentary, para 2; Crawford's Second Report (n117), para 314; cf Vaughan Lowe 'Precluding wrongfulness or responsibility: a plea for excuses' [1999] 10 EJIL 2 405.
[184] Articles on State Responsibility (n1), Chapter V, Commentary, para 2; Crawford's Second Report, paras 226-228; cf earlier views such as that expressed in relation to countermeasures in *Responsabilité de l'Allemagne à raison des dommages causés dans les colonies portugaises du sud de l'Afrique (sentence sur le principe de la responsabilité) (Portugal v Allemagne)*, Award of 31 July 1928, RIAA Vol II 1011-1033, 1026, 'Elle a pour effet de suspendre momentanément, dans les rapports des deux États, l'observation de telle ou telle règle du droit des gens.'

Rather, the rules 'authorise the temporary non-observance of the rule or non-performance of obligations'.[185] The ICJ has confirmed that for a State to invoke a circumstance precluding wrongfulness is rather to affirm that an obligation is binding upon it and that it has acted in a way that would but for the circumstance be unlawful.[186] As soon as the circumstance precluding wrongfulness no longer applies, the duty to comply with the dormant obligation revives.[187] The circumstances precluding wrongfulness erase the wrongfulness of what would otherwise, as a matter of the primary rules of international law, be an internationally wrongful act; they do not merely excuse wrongful conduct by suspending the secondary obligations that flow from responsibility.[188] The circumstances precluding wrongfulness should also be distinguished from elements of the primary rule which make conduct lawful in advance, so that the question of wrongfulness or responsibility never arises.[189]

---

[185] Sandra Szurek 'The Notion of Circumstances Precluding Wrongfulness' in Crawford and Pellet (n139).
[186] *Gabcikovo* (n154), 48.
[187] ibid, 101.
[188] Robert Kolb, *The International Law of State Responsibility* (Elgar 2017), 110. Given that wrongfulness entails responsibility, the latter cannot be precluded without the preclusion of wrongfulness. This possibility was dismissed by Special Rapporteur Ago: 'It must be constantly borne in mind that the basic principle of the draft is […] that every internationally wrongful act of a State entails the international responsibility of that State. If, therefore, in a given case, the presence of a particular circumstance were to have the consequence that an act of a State could not be characterized as internationally wrongful, that same presence would automatically have the consequence that no form of international responsibility could result from it. In other words, for the purposes of the draft, any circumstance precluding the wrongfulness of an act necessarily has the effect of also precluding responsibility. However, the converse does not apply with the same ineluctable logic.[…] Even in theory, we find it difficult to imagine that international law could adopt so strange an attitude, and one so contrary to its own spirit, as to characterize an act as internationally wrongful without attaching to it disadvantageous consequences for its author' Ago's Eighth Report, paras 51-5. See also James Crawford, *State responsibility: the general part* (CUP 2013) 50, 275. Cf Theodore Christakis, 'Les "circonstances excluant l'illicéité": une illusion optique?' in Oliver Corten and others (eds), *Droit du Pouvoir, Pouvoir du Droit: Mélanges offerts à Jean Salmon* (Brussels 2007), 240, 244, arguing that for certain circumstances, it is better to speak of circumstances 'qui peuvent atténuer (ou dans certains cas exclure) la responsabilité'; also Lowe (n184), making a normative argument that characterising all the circumstances as precluding wrongfulness prevents the development of a flexible case-by-case approach, by which some circumstances would operate as excuses to preclude responsibility alone.
[189] For example, the presence of consent, in addition to operating as a circumstance precluding wrongfulness in Article 20 ASR, may also be incorporated into certain primary rules themselves, for example, the prohibition on the use of force, with the result that the conduct is never wrongful as a matter of the primary rules. See Crawford (n188) 288; Christakis (n188) 244-52.

Alexander Orakhelashvili, who takes a narrow view of derogation, has attempted to reconcile the unavailability of countermeasures and other 'defences' with the narrow approach on the basis that the circumstances precluding wrongfulness treat the relevant norm as 'bilaterally disposable between the relevant States' and so exempt the bilateral relations from the ambit of the affected norm; that is, it creates a bilateral *lex specialis*.[190] Yet this is problematic for two reasons. First, in terms of the norm that is breached (in this context, the *jus cogens* norm) the ICJ has, as noted above, made clear that it continues to apply as between the invoking and injured States even when a circumstance precluding wrongfulness has been successfully invoked. Second, it cannot be the case that the invocation and application of a general rule in a bilateral dispute – in this case the secondary rule of the circumstance precluding wrongfulness - would amount to creating a *lex specialis* for the two parties.[191] If one party to a multilateral treaty invokes the responsibility of another party for failure to fulfil an obligation under the treaty in their *inter se* relations, that is not the creation of a *lex specialis* but the application of a general rule in a specific context.[192]

By contrast, the rule in Article 26 fits very well as an example of the impermissibility of derogation from *jus cogens* norms with derogation understood in the broad sense. The act is *prima facie* wrongful because it constitutes a breach of an

[190] Orakhelashvili (n2), 78.
[191] Koskenniemi considers that application of a general standard in a given circumstance does not constitute a general *lex specialis*, although the distinction may sometimes be difficult to draw, Fragmentation Report (n130), 88, 95.
[192] Kolb describes the distinction as between the general legal plane and the concrete legal plane (n188), 110.

international obligation of the State under a *jus cogens* norm. Although of the same scope *rationae personae* as a *jus cogens* norm of general international law, the secondary rules of the circumstances precluding wrongfulness would legitimize this conduct otherwise inconsistent with a *jus cogens* norm.[193] They would therefore constitute impermissible derogations.[194]

For Kolb, who takes a narrow approach to derogation, countermeasures may be restricted by considerations such as respect for humanitarian values or the prohibition on the use of force. However, on his view, given that countermeasures are lawful material acts inconsistent with a norm, rather than a normative act that could result in development of a *lex specialis rationae personae*, whether or not the norm in question is non-derogable is of no relevance.[195] Yet this again seems problematic. It is not the act in violation of the *jus cogens* norm (the alleged countermeasure) that constitutes the derogation, but the norm that makes it lawful. By providing that countermeasures may not be invoked in relation to *jus cogens* norms, Articles 26 and 50 are not saying that there can be no such material acts inconsistent with obligations under that norm – this is already provided for by the binding effect of the norm itself – but rather are providing that the secondary rule of countermeasures cannot operate to make those acts lawful.[196] Once again, the operation of the Articles accords with a broad understanding of

[193] This conclusion stands regardless of whether one takes the view that the circumstances precluding wrongfulness remove the wrongfulness of what would otherwise be a violation, or alternatively, that they prevent what is only a *prima facie* violation from being concluded, all things considered, to be a violation, as argued by Federica Paddeu, *Justification and Excuse in International Law* (CUP 2018) 108-10. In either case, the circumstances would operate to make lawful conduct that would otherwise be inconsistent with an obligation under a *jus cogens* norm.

[194] Circumstances precluding wrongfulness are characterised by Hannikainen as 'lawful derogations' (n6), 249.

[195] Kolb (n25), Titre I, Section II, para 49.

[196] Denis Alland 'The Definition of Countermeasures' in Crawford and Pellet (n139).

derogation. This conclusion is supported by the development of Article 26 and Article 50 over the 50 years of ILC work on State responsibility, which shows that both rules were explained on basis of the non-derogability of *jus cogens* norms.

b. Development of Article 26

Prior to the ILC's 53rd session in 2001, the final session before the adoption of the draft Articles, the invocation of a circumstance precluding wrongfulness to preclude the wrongfulness of breach of a *jus cogens* norm had only been excluded in relation to consent,[197] necessity,[198] and countermeasures.[199] There was no rule prohibiting invocation of all circumstances precluding wrongfulness in relation to *jus cogens* norms. However, even before its introduction the ILC's discussions demonstrate a broad understanding of derogation.

Special Rapporteur Ago's Eighth Report and its Addendum, which in 1979 and 1980 had introduced the first draft articles on circumstances precluding wrongfulness, excluded the possibility of invoking consent or necessity to preclude the wrongfulness of breach of a *jus cogens* norm. Ago included *jus cogens* among those norms for which necessity cannot be invoked as this is 'implicitly but inevitably indicated by the very nature

[197] See Crawford's Second Report (n117), para 232, quoting the draft Article 29 as adopted at first reading. Crawford proposed to delete the article from Chapter V as consent was better understood as a component of the relevant primary rules, but this suggestion was rejected by the ILC.
[198] ILC, 'Report of the International Law Commission on the work of its fifty-first session (3 May - 23 July 1999)' A/54/10, Yearbook of the International Law Commission 1999, vol II(2), fn 231.
[199] ILC, 'Report of the International Law Commission on the work of its fifty-second session (1 May - 9 June and 10 July - 18 August 2000)' A/55/10, Yearbook of the International Law Commission 2000, vol II(2), 300.

of the rule which is its source, by the purpose or aims of that rule, or by the circumstances in which it was formulated and adopted'.[200]

Although Ago's understanding of consent as a form of agreement would characterise it as an impermissible derogation from a *jus cogens* norm even under the narrow view,[201] his exclusion of necessity must be explained as based on the non-derogability of *jus cogens* norms, with derogation understood in the broad sense. Finding support in practice for the inability to invoke necessity to preclude the wrongfulness of an act of aggression due to its *jus cogens* status, Ago continues that this should logically extend to any other violation of an obligation arising out of a rule of *jus cogens.*[202] This conclusion was based on the argument that:

> it would be an absurd situation if the obligation prohibiting any use of force which constitutes aggression had the power, because of its peremptory nature, to render void any agreement to the contrary concluded between two States, so that prior consent by the State subjected to the use of force could not have the effect of constituting a ground, but that such an effect could be attributed to an assertion of necessity, even if genuine, by the State using force.[203]

[200] Ago's Eighth Report, Addendum, 57.
[201] Ago's Eighth Report, 57, 75; Summary record of the 1537th meeting, A/CN.4/SR.1537, Yearbook of the International Law Commission 1979, vol I, Ago, 36; this view was also shared by Natalino Ronzitti 'Use of Force, *jus cogens* and State Consent' in Antonio Cassesse (ed) *Current Legal Regulation of the Use of Force* (1986 Martinus Nijhoff).
[202] Ago's Eighth Report, Addendum, 79; the view was supported by other ILC Members, in particular Verosta, Ushakov and Schwebel, A/CN.4/SR.1540 Summary record of the 1540th meeting, Yearbook of the International Law Commission, vol I, 16, 19, 32 and A/CN.4/SR.1452 Summary record of the 1452nd meeting Extract from the Yearbook of the International Law Commission, vol I, 17-22.
[203] Ago's Eighth Report, Addendum, 55; the same argument is made by Gaja (n44), 295.

Ago considered the inclusion of this rule in the draft Articles to be progressive development in light of Article 53 VCLT, extending to the realm of state responsibility the rule by which agreements between States contracting out of *jus cogens* norms are void.[204] The invalidity of treaties conflicting with *jus cogens* norms must therefore be explained by a broader principle than the inability to contract out, which can be extrapolated outside of the law of treaties. Although the ILC did not explain the exclusion of *jus cogens* norms on the basis of their non-derogability, statements by State representatives that violations of *jus cogens* norms can never be justified suggest a broad understanding of derogation.[205]

The provision in the draft article on necessity (then draft Article 33) excluding its application to *jus cogens* norms received broad support from the majority of States who commented on the draft,[206] and the exclusion of necessity for *jus cogens* norms is now accepted in practice. In the *Gabcikovo-Nagymaros Project* case, the ICJ recognised the state of necessity as a ground recognized by customary international law.[207] The Court went on to recognise all the subsidiary elements set out in what was then draft Article 33 as reflecting customary law, with the exception of sub-paragraphs 2(a) and (b), which at that time explicitly excluded the invocation of necessity in relation to *jus cogens* norms or obligations laid down by a treaty which excludes the possibility of invoking the state of necessity.[208] Yet, it cannot be concluded from this that those provisions do not reflect

[204] Summary record of the 1537th meeting, A/CN.4/SR.1537, Yearbook of the International Law Commission 1979, vol I, Ago, 36.
[205] UNGA (35th Session) Sixth Committee, Summary Record of the 48th Meeting A/C.6/35/SR.48, Mexico, 18; ibid, Summary Record of the 489th Meeting A/C.6/35/SR.49, German Democratic Republic, 18.
[206] Hannikainen (n6), 256.
[207] *Gabcikovo* (n154), 51; cf Theodore Christakis 'Rapport Général' in Theodore Christakis and Karine Bannelier (eds) *La Nécessité en Droit International* (Pedone 2007), 41-2.
[208] *Gabcikovo* (n154), 52.

custom, since it was not argued that the obligations at issue in the case were norms of *jus cogens* nor that they excluded the possibility of invoking necessity.

Ago's 1979 and 1980 reports made no reference to *jus cogens* norms in their analysis of *force majeure* (which at that time also covered situations of distress), fortuitous event, or self-defence.[209] There was no discussion of *jus cogens* in relation to those circumstances precluding wrongfulness either at that session of the ILC or in the Sixth Committee of the General Assembly at the 35th Session, when those provisions were considered. The view that circumstances precluding wrongfulness other than consent, necessity and countermeasures may be able to be invoked in relation to breaches of *jus cogens* norms was also accepted in doctrine prior to the introduction of Article 26.[210]

However, by the time the final Articles were adopted opinion had shifted, and Article 26 provides that all circumstances precluding wrongfulness are excluded in relation to breaches of *jus cogens* norms. Article 26 was a relatively late addition to the draft Articles, and it was only in its final iteration in 2001 that it was transformed into a general prohibition on the invocation of all the circumstances precluding wrongfulness in relation to all *jus cogens* norms.[211] A new Article 29 *bis* was introduced into the draft in 1999 to provide a further circumstance precluding wrongfulness by which the wrongfulness of conduct is precluded if the conduct is required in the circumstances by a peremptory norm of general international law.[212] It was during the ILC's 53rd Session in

[209] Ago's Eighth Report, 100-153; Ago's Eighth Report, Addendum, 82-124.
[210] See Hannikainen in relation to *force majeure* and citing Fitzmaurice (n6), 251, and distress, 253.
[211] Maja Menard 'Compliance with Peremptory Norms' in Crawford and Pellet (n139).
[212] Crawford's Second Report (n117), 358.

2001, the final session at which the draft articles were discussed and which culminated in their adoption, that this draft article was radically transformed into what is now Article 26.

As the records of the Drafting Committee are not available and its report provides no details of their discussions on this issue,[213] the only explanation is that provided by its Chair, Peter Tomka, in his statement to the Plenary.[214] Despite the significant change to the rule, no explanation is provided of the reasoning that underlay it, nor of the Committee's 'lengthy debate on the merits'. Tomka notes that the 'alternative was to retain the existing case-by-case approach whereby the issue was expressly provided for in some, but not all, of the provisions in Chapter V as adopted last year'. He then goes on to remark that 'the intention of the Commission had been to enlarge the scope of peremptory norms, so that no deviation from the obligations imposed would be possible, even for *force majeure* or distress'.[215] The reference to the impossibility of deviation from obligations under a *jus cogens* norm suggests an understanding of the impermissibility of derogation understood in the broad sense.[216] The ILC did extend the case-by-case approach where *jus cogens* norms were excluded in relation to certain circumstances precluding wrongfulness to create the general rule in Article 26 applicable to all circumstances precluding wrongfulness. In doing so the ILC drew what it considered to be

[213] 53rd Session of the International Law Commission, Report of the Drafting Committee A/CN.4/L.602/Rev.1.
[214] 53rd Session of the International Law Commission, 2681st Meeting (29 May 2001), Statement of the Chairman of the Drafting Committee, Mr Peter Tomka.
[215] Not included in his prepared statement but recorded in the Summary Record of the meeting at which it was delivered, ibid, 101.
[216] Also Articles on State Responsibility (n1), Article 26, Commentary, para 5, 'circumstances precluding wrongfulness cannot justify or excuse a breach of a State's obligations under a peremptory rule of general international law […] One State cannot dispense another from the obligation to comply with a peremptory norm.'

a necessary implication of the impermissibility of (broad) derogation from *jus cogens* norms. This was emphasised in the commentary to the final Articles: it was desirable to make clear that 'the circumstances precluding wrongfulness in Chapter V of Part I do not authorize or excuse any derogation from a peremptory norm of general international law'.[217]

This conclusion, that the impermissibility of derogation from *jus cogens* norms must prevent invocation of any circumstance precluding wrongfulness in relation to their breach, has not been called into question by any clear indications to the contrary in practice, nor by the reactions of States to the Articles.[218] Indeed, the rule in Article 26 has been endorsed in practice. The arbitral tribunal in *CMS Gas v Argentina* implicitly recognised that necessity, the circumstance precluding wrongfulness being argued in that case, would not be available in relation to violation of a *jus cogens* norm, noting that such a situation would be 'governed by Article 26 of the Articles'.[219]

c. Countermeasures

[217] Articles on State Responsibility (n1), Article 26, Commentary para 4.
[218] The ICJ accepted the possibility to induce rules that are the necessary extension of an existing rule in *North Sea* (n22), 29-32; on the validity of induced rules in the absence of contrary practice see James Crawford 'International Law and Foreign Sovereigns: Distinguishing Immune Transactions' [1984] 54 (1) BYIL 75, 85-6; also Talmon (n77), 421. The legitimate induction of rules from other clearly established rules of international law must be distinguished from the kinds of arguments rejected by the ICJ in *Immunities* (n24), 95, and *Belgium v Senegal* (n24), 99-100, where it held that despite the fact that the prohibition of torture is part of customary international law and has become a peremptory norm, this did not automatically entail that the obligation to prosecute the alleged perpetrators of acts of torture existed outside the Convention. In those cases, the Court was being asked to deduce a novel effect from the *jus cogens* status of a norm, rather than draw the necessary conclusion of an existing rule; Costelloe (n43), 52, 185.
[219] *CMS Gas Transmission Co v Argentine Republic*, ICSID Case No ARB/01/08, Award of 12 May 2005, IIC 65 (2005), 14 ICSID Reports 152, 212, 325; see also *Bernhard von Pezold and others v Republic of Zimbabwe*, ICSID, Case No ARB/10/15, Award, 28 July 2015, IIC 1250 (2017), 657.

The conclusion that the inability to invoke circumstances precluding wrongfulness is due to the non-derogability of *jus cogens* norms is supported by the corresponding treatment of countermeasures in the Articles. Unlike the other circumstances precluding wrongfulness, the rule allowing for lawful countermeasures is doubly excluded for *jus cogens* norms. In addition to falling under Article 26, Article 50(1) sets out four categories of obligations that may not be affected by countermeasures, including 'other obligations under peremptory norms of general international law'.

When first introduced by Ago, Article 30 on 'legitimate application of a sanction' contained no provision as to obligations that may not be affected by such measures, although the Special Rapporteur's report did consider that certain measures could not be considered 'legitimate' under international law.[220] It was the subsequent Special Rapporteur, Willem Riphagen, who included two substantive limitations on countermeasures in his draft Article 12, including obligations of any State under a peremptory norm of general international law.[221] This exclusion of *jus cogens* norms therefore pre-dated the development of the more general rule in Article 26. The rule in paragraph 12(b) is explained as a further application of the impermissibility of derogation from *jus cogens* norms set out in Article 53 VCLT and Riphagen refers to the inability to

[220] Ago's Eighth Report, 99.

[221] ILC, 'Fifth report on the content, forms and degrees of international responsibility (part two of the draft articles), by Mr Willem Riphagen, Special Rapporteur' A/CN.4/380 and Corr.1, Yearbook of the International Law Commission 1984, vol II(1); obligations relating to dispute settlement and diplomatic/consular agents are excluded from being affected by countermeasures on the basis of their role in resolving the underlying dispute, which is not relevant to *jus cogens* norms, so will not be considered here, see Federica Paddeu 'Countermeasures' Max Planck Encyclopaedia of Public International Law (2015), 21.

invoke necessity to justify breaches of a *jus cogens* norm,[222] suggesting that non-derogability underlies the exclusion of both rules.

In his fourth report, the subsequent Special Rapporteur, Gaetano Arangio-Ruiz, proposed a draft Article 11 on prohibited countermeasures that included provisions excluding conduct contrary to a peremptory norm of general international law.[223] His justifications for the addition were the implicit acceptance by the ILC in previous iterations of the draft articles that countermeasures must be 'legitimate' under international law and the inability to consent to breaches of *jus cogens* norms; that 'it would be illogical [...] at the same time [to] admit that the breach of an obligation imposed by a peremptory norm is justified only because another State had previously violated an international obligation';[224] and the large majority of States that adopted Articles 53 and 64 VCLT.[225] The exclusion of countermeasures affecting *jus cogens* norms was therefore based on an underlying reason that is common to the unavailability of necessity as a circumstance precluding wrongfulness and the VCLT provisions that lead to the voidness of treaties conflicting with *jus cogens* norms: the non-derogability of *jus cogens* norms.[226] This is confirmed by the report of the final Special Rapporteur, who observed that 'it is obvious that a peremptory norm, not subject to derogation as between two States even by treaty,

[222] ILC, 'Third report on the content, forms and degrees of international responsibility by Mr Willem Riphagen, Special Rapporteur' A/CN.4/354 and Corr1 and Add1 & 2, Yearbook of the International Law Commission, 1982, vol II(1), Article 4, Commentary para 2.
[223] ILC, 'Fourth report on State responsibility, by Mr Gaetano Arangio-Ruiz, Special Rapporteur' A/CN.4/444 and Add.1-3, Yearbook of the International Law Commission 1992, vol II(1), 96. Arangio-Ruiz's previous report had not excluded countermeasures for *jus cogens* norms.
[224] ibid, 119.
[225] ibid, 90.
[226] This view is also taken by Gaja (n44), 298.

cannot be derogated from by unilateral action in the form of countermeasures'.[227] Like the rule in Article 26, no practice has called in question the rule in Article 50(1)(d) and it has been implicitly recognised as forming part of customary international law.[228]

C. The meaning of derogation

The analysis of the law of treaties in section 2Bi did not show conclusively whether derogation should be understood in a broad or narrow sense. After analysing the law of State responsibility, however, we can now conclude that even if derogation was understood in a narrow sense when Article 53 was drafted, subsequent practice has given the concept a broader meaning. Section 2Bii showed that *jus cogens* norms prohibit general secondary rules of State responsibility that make conduct inconsistent with a State's obligations under a *jus cogens* norm lawful, even when they are not of a more restricted scope *rationae personae.* Moreover, it showed that this prohibition is explained by the non-derogability of *jus cogens* norms. As a result, derogation must be understood in the broad sense set out in section 2Aiii. This approach, which values absoluteness of compliance with the *jus cogens* norm, also fits better with the presumed purpose of *jus cogens* norms to prevent acts contrary to the fundamental values of the international community.

[227] Crawford's Third Report, 342; Leben (n146); Crawford appears to take a broad view of derogation, see Crawford's Second Report (n117), 313 and James Crawford, *Brownlie's Principles of Public International Law* (8th edn OUP 2012), 596.
[228] WTO, *Mexico — Tax Measures on Soft Drinks and Other Beverages*, Report of the Panel, 7 October 2005, WT/DS308/R, 5.54; *Corn Products International Inc v Mexico,* ICSID Case No ARB(AF)/04/01, Decision on Responsibility (15 January 2008), IIC 373 (2008), 145-149, 158.

Having established that derogation should be understood in a broad sense, it is important to note that 'the scope of *jus cogens* is not unlimited'.[229] In the *Immunities* judgment certain rules of the law of armed conflict were assumed by the Court to be rules of *jus cogens* and the Court analysed both the hierarchical effects of *jus cogens* norms and their non-derogability. First, the *jus cogens* rules did not 'prevail over' the customary rule of State immunity at issue in the case as there was no conflict or inconsistency between it and the *jus cogens* rule, which 'address different matters'.[230] If the *jus cogens* norm does not conflict with a rule granting immunity in a situation of potential violation of the *jus cogens* prohibition, then a *jus cogens* norm must not entail either an obligation for a forum State not to grant immunity in situations where it may have been violated, nor a broader obligation to ensure that the norm be enforced in all circumstances.[231]

Second, the Court's judgment further clarifies the prohibition on (broad) derogation. Even if there is no direct inconsistency between the *jus cogens* norm and the procedural rules, it could be argued that those procedural rules still derogate from the *jus cogens* norm as, by preventing its enforcement where it appears to have been violated, they result in conduct inconsistent with a State's obligations under the *jus cogens* norm in effect being treated as lawful. This argument was rejected by the Court, which clarified that 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*

[229] Dugard, Sep Op, *Armed Activities* (n24), 6.
[230] *Immunities* (n24), 93.
[231] See Dapo Akande and Sangeeta Shah 'Immunities of State Officials, International Crimes, and Foreign Domestic Courts' [2011] 21 EJIL 815, 834-7.

status'.[232] The Court thus made clear that in its view derogation is not concerned with whether or not conduct inconsistent with an obligation under a *jus cogens* norm is subject to the various consequences that should follow unlawful conduct: adjudication, enforcement, sanction.[233] Rules of admissibility and jurisdiction concern the ability to invoke the wrongdoing State's responsibility for the internationally wrongful act, not the lawfulness of the act.[234] That is, they can preclude the application in practice of the secondary rules of state responsibility, but in such cases they do not purport to make the conduct lawful. The Court does not give a positive example of what does constitute a derogation, but its reasoning implies that only a norm inconsistent with the *jus cogens* norm's qualification of conduct as lawful or unlawful would derogate from that *jus cogens* norm.[235]

[232] *Immunities* (n24), 95; also *Armed Activities* (n24), 64, 125, where the Court held that *jus cogens* status of a norm could not provide a basis for jurisdiction in a dispute about compliance with that norm.
[233] See Cançado Trindade's criticism, *Immunities* (n24), Diss Op, 295-7.
[234] Such rules regarding the *invocation* of responsibility should in turn be distinguished from those rules that *establish* that responsibility. That is, the secondary rules that cause the obligations of cessation, reparation etc. to arise as a result of the commission of an internationally wrongful act. However, since the latter set of rules does not relate to the lawfulness of conduct vis-à-vis the primary obligation, it follows from the Court's reasoning that a norm that prevented the establishment of responsibility following breach of an obligation under a *jus cogens* norm would also not amount to a derogation from that norm. While some have argued that at least some of the circumstances precluding wrongfulness are better understood in this manner (see Paddeu, n193, 128; Christakis n188) – as excuses rather than justifications - this was not the view that prevailed in the ILC. As Paddeu notes, the distinction between justification and excuse is 'not presently recognised in positive [international] law', (n193) 25.
[235] *Immunities* (n24), 95.

3. Explaining exceptions to *jus cogens* norms

The introduction to this dissertation posed three questions: 1) what does it mean to say that a norm permits no derogation?; 2) do exceptions derogate from *jus cogens* norms?; and 3) how do the exceptions to the prohibition on the use of force affect the scope of the *jus cogens* norm in the *jus ad bellum*? The analysis in part two has shown that to say that a *jus cogens* norm permits no derogation means that there can be no norm which purports to make conduct inconsistent with the *jus cogens* norm lawful. As a result an exception, which appears to make conduct inconsistent with a norm lawful, would constitute a derogation. There can therefore be no exceptions to *jus cogens* norms, as a norm that is subject to exceptions permits derogation. The customary prohibition on the use of force, the norm of general international law that must underlie any *jus cogens* norm in the *jus ad bellum*, is subject to two well-recognised exceptions that allow for lawful force in self-defence or when authorised by the Security Council. Thus, in order to answer the third question posed above, it is necessary to examine whether the existence of exceptions to the customary prohibition on the use of force means that it is not possible for that prohibition to be accepted and recognised as non-derogable.

This part begins by analysing two different ways of thinking about exceptions to legal rules: the 'incorporationist' approach, which views so-called exceptions as limitations on the scope of the primary rule itself, and an alternative approach which views exceptions as separate rules external to the primary rule. As there can be no lawful conduct inconsistent with a *jus cogens* norm, any apparent exception to a *jus cogens* norm must be analysed using the incorporationist approach, whereby excepted conduct always

falls outside the scope of the *jus cogens* norm. Drawing on scholarship on the specification of absolute rights, it will be argued that by using the apparent exceptions to identify the scope of the *jus cogens* norm it is possible to reconcile the existence of apparent exceptions with the non-derogability of a *jus cogens* norm. Excepted conduct that appears inconsistent with the *jus cogens* norm is in reality not regulated by the *jus cogens* norm and so there is no inconsistency. However, the analogy with rights theory is limited. Whereas over-specification of a right could ultimately undermine its absolute nature, it is possible for a *jus cogens* norm to be extremely narrow and still remain non-derogable, provided it meets the criteria in Article 53 VCLT. Finally, a possible objection to the broad approach to derogation, that is raised by the incorporationist approach to exceptions, is addressed.

A. Two approaches to exceptions

Despite scholars taking different approaches to derogation, this divergence of views has been obscured by a shared understanding of the nature of exceptions as defining the scope of the primary rule. This has led those who take a narrow approach to derogation and those who take a broad approach to derogation to reach the same conclusion about the scope of the *jus cogens* norm in the *jus ad bellum*. This understanding, sometimes referred to as the 'incorporationist' approach, holds that exceptions should be reduced to negative conditions for the application of the primary rule.[236] To speak of an apparent or so-called exception is merely to use a linguistic

[236] For example, Dinstein: the 'built-in Charter exceptions frame the scope of application of the rule, whereas derogations "clash" with it' (n58), 111; Dapo Akande and Antonios Tzanakopoulos 'The

construct – there is no difference between the exception, which sets out certain limits of the rule, and the rule itself.[237] We only speak of the rule creating an 'exception' because we are comparing it with some hypothetical more general rule which would include the excepted cases which fall outside the rule.[238] By treating so-called exceptions as limitations on the scope of the primary rule itself, a majority of writers have been able to reconcile the existence of two exceptions to the customary prohibition on the use of force with the existence of a *jus cogens* norm*,* concluding that the scope of the *jus cogens* norm in the *jus ad bellum* only extends to a prohibition on uses of force that do not fall under the exceptions of self-defence or Security Council authorisation.[239]

Although the narrow view of derogation would allow a norm that is subject to exceptions nonetheless to be considered non-derogable, as exceptions do not restrict the *rationae personae* scope of the norm, those writers who take a narrow approach to derogation have not taken this path. For Orakhelashvili and Kolb the exceptions to the prohibition on the use of force go to the substantive scope of application of the rule and are 'included within the content of the [*jus cogens*] norm itself'.[240] That is, they take the same incorporationist approach to exceptions as those who take a broad approach to derogation, even though that is not required by the narrow view. Similarly Corten, writing specifically on the *jus ad bellum*, takes a narrow view of derogation and considers that there is nothing to prevent the existence of a *jus cogens* norm made up of a prohibition

International Court of Justice and the Concept of Aggression' in Kreß and Barriga (eds), *The Crime of Aggression: A Commentary* (CUP 2017), 214 fn 3.

[237] Glanville Williams 'The Logic of Exceptions' (1988) 47 CLJ 261, 261-295; Ronald Dworkin, *Taking Rights Seriously* (London 1978), 25.

[238] RM Hare 'Principles' [1972-73] 73 Proceedings of the Aristotelian Society 1, 6.

[239] Ruys (n4), 26.

[240] Orakhelashvili (n2), 72-3; Robert Kolb, *Peremptory International Law Jus Cogens* (Hart 2015), 98-99.

with limited exceptions.[241] However, although he does not say so explicitly, for Corten too the exceptions delimit the scope of the *jus cogens* norm, which he appears to view as coextensive with the (identical) customary and treaty-based prohibitions on force that underlie it. In the case of an authorisation under Chapter VII of the Charter, the use of force is not contrary to Article 2(4).[242] Similarly, the right of self-defence is a 'constitutive element' of the *jus cogens* prohibition on the use of force.[243]

Yet the incorporationist approach is only one possible way of thinking about the nature of exceptions to legal rules. Exceptions in domestic law, often referred to interchangeably as 'defences',[244] have given rise to extensive debates about their nature. Exceptions may be conceptualised as part of the primary rule, as described above. However, another significant part of the doctrine considers exceptions as separate rules external to the primary rule. This approach captures something important about how we think about exceptions: as Luis Duarte D'Almeida writes, there is a difference between saying 'no I didn't do it' and 'yes I did it, but…'.[245] For Mathieu Carpentier too, what is important about exceptions is not that they are excluded from the scope of the rule, but rather that *prima facie* they fall within it. It is this which makes exceptions conceptually more complex than a mere exclusion from the scope of the rule. For a very brief moment, even if only a sliver of time, the rule was applicable to the case which was then

[241] Corten (n86), 296.
[242] ibid
[243] Corten, ibid, 609.
[244] Paddeu, (n 193) 16 fn 58.
[245] Claire Finkelstein 'When the rule swallows the exception' in Linda Meyer (ed), *Rules and Reasoning* (Hart 1999); and (although he describes his proof-based theory as taking neither the incorporationist nor the irreducibility approach) Luís Duarte D'Almeida, *Allowing for Exceptions: A Theory of Defences and Defeasibility in Law* (OUP 2015), 3-4.

excepted.[246] Viewing exceptions as separate from the primary rule is based on an acceptance that rules can conflict and that in a legal system the values that underlie different rules can conflict.[247] As expressed by Joseph Raz, 'cases are "simply" outside the scope of the rule if the main reasons that support the rule do not apply to such cases. Cases fall under an exception to the rule when some of the main reasons for the rule apply to them, but the "compromise reflected in the rule" deems other, conflicting reasons to prevail'.[248]

It is not necessary to analyse all legal 'exceptions' using the same approach. Some may be better analysed as negative conditions of the primary rule, whereas others may be more appropriately characterised as a separate rule. This must be determined based on the nature of the particular rules in question.[249] The next section will therefore consider how apparent exceptions to *jus cogens* norms should be analysed.

B. Exceptions to *jus cogens* norms

Under the broad approach to derogation, separate rules that made conduct inconsistent with the *jus cogens* norm lawful by way of an exception would clearly constitute impermissible derogations. The starting point in analysing the nature of exceptions to *jus cogens* norms must therefore be that if an apparent exception relates to a non-derogable *jus cogens* norm it should be analysed using an incorporationist

[246] Mathieu Carpentier, *Norme et Exception – Essai sur la défaisabilité en droit* (LGDJ 2014), 17
[247] Finkelstein (n245); HLA Hart, *The Concept of Law* (2nd edn Clarendon 1994), 128.
[248] Raz (n141), 187; Fragmentation Report (n130), 105.
[249] Carpentier (n246), 17.

approach, under which any so-called exceptions to *jus cogens* norms are rather limitations on the scope of the *jus cogens* norm.

In the context of rights, 'absoluteness' has been the subject of considerable analysis and debate, unlike the concept of non-derogability, and the literature on absolute rights is useful in illuminating the process by which non-derogable norms subject to apparent exceptions can be identified. The distinction between limitations on the scope of the norm and the non-derogability of whatever that norm is closely resembles that drawn by Mavronicola, writing in the context of the absolute right not to be tortured in Article 3 ECHR, between the 'applicability' of an absolute right and its 'specification'.[250] The applicability criterion – analogous to non-derogability in the context of *jus cogens* norms – concerns whether and when the standard can be displaced. For absolute rights, no considerations can displace them once they are found to apply. The specification criterion – the definition and delimitation of the standard – is therefore of central importance, as it 'sets the parameters of what is non-displaceable and unconditional'. This is analogous to the incorporationist approach to *jus cogens* norms: apparent exceptions, like the scope of the *jus cogens* norm generally, are a question of specification of the norm that once identified is non-derogable, which relates rather to the norm's applicability.

Applying the technique of 'specification' to *jus cogens* norms, any case which appears to constitute an exception, or any other kind of derogation, must be subsumed

[250] Natasa Mavronicola 'What is an 'absolute right'? Deciphering Absoluteness in the Context of Article 3 of the European Convention on Human Rights' [2012] 12 HRLR 4 723.

within the definition of the norm.[251] Thus, force used in self-defence must fall outside the scope of the *jus cogens* prohibition. Where a non-derogable norm appears to be subject to exceptions then either its scope is narrower than initially thought (that is, once all exceptions are accounted for), or it is not actually accepted and recognised as non-derogable.[252] Once the scope of the *jus cogens* norm has been identified, its non-derogability means that no behaviour inconsistent with it may be lawful unless and until the norm is modified.

This is at odds with how we typically think of *jus cogens* norms: first we identify the norm that has such a status, and then from that we deduce its effects when applied to different contexts. For example, if the prohibition on force is identified as *jus cogens*, then to the extent that X is a derogation it is not permissible. The incorporationist approach instead makes this a single inquiry:[253] the content of the *jus cogens* norm is identified based on when lawful conduct inconsistent with the underlying norm of general international law is or is not permitted. That is, which norm is accepted and recognised as permitting no derogation.

As Mavronicola points out, the applicability and specification of the right are not entirely independent, leading to the need to identify legitimate and illegitimate specifications of absolute rights.[254] Giving content to any norm will necessarily involve

[251] In the context of rights, described as 'full factual specification,' see Russ Schafer-Landau 'Specifying Absolute Rights' [1995] 37 Ariz Law Rev 209, 210.
[252] ibid, 225.
[253] John Oberdiek 'Specifying Rights Out of Necessity' [2008] 28 OJLS 1 127, 128, 136.
[254] Mavronicola (n250), 745-8.

specifying which cases fall under it and which cases fall outside it.[255] However, a specification of the supposedly absolute right that defined it in such a way that the exceptions and qualifications swallowed the rule, neglected the reasons the right was considered to be absolute in the first place, or escaped the applicability criterion through the backdoor (for example, by specifying that the right not to be tortured did not apply in a ticking time bomb scenario), would affect the applicability, and thus absoluteness, of the right.[256]

Hannikainen takes a similar view in the context of *jus cogens* norms. He writes that there could be norms that prohibit derogations only from the basic obligation they contain but permit derogations from the less important obligations. These norms could be considered peremptory 'to the extent that they prohibit derogation'.[257] He nevertheless thought that there is a limit on using 'permissible derogations' to define the extent to which a norm is *jus cogens*: it should not be possible to permit derogation from the basic obligation of the norm while simultaneously claiming that other obligations under that norm are non-derogable. As an example, Hannikainen rejects the argument that the security exception in Article 33(2) of the 1951 Convention Relating to the Status of Refugees does not deprive the non-refoulement principle of its peremptory character, asking 'if on the ground of their own security states are not prohibited from expelling or returning a refugee, what is left of the peremptory obligation?'.[258] Using the terminology above, Hannikainen is arguing that such a broad exception would undermine the norm's

[255] Hare (n238), 6.
[256] Mavronicola (n250), 745-8; see Alan Gewirth 'Are there any absolute rights?' [1981] 31 The Philosophical Quarterly 122 1, 5.
[257] Hannikainen (n6), 261.
[258] Convention relating to the Status of Refugees (adopted 28 July 1951) 189 UNTS 137.

applicability to the extent that it could no longer be considered non-derogable. This is analogous to the introduction of an illegitimate specification of a right that undermines its absolute applicability.

Yet provided that a new specification of an existing *jus cogens* norm is accepted and recognised as non-derogable by the international community of States as a whole, the norm so identified will be *jus cogens*, even if it is extremely narrow. In the context of rights, specification is a tool to explain the structure of rights whose content is identified by normative theories.[259] The process of specification could therefore produce a result that is inconsistent with a particular theory's conclusion as to which rights should be protected and which obligations should be absolute. However, in the context of *jus cogens*, specification is the means of identifying the content of the non-derogable norm, by taking account of any circumstances in which lawful behaviour inconsistent with the underlying norm of general international law is permitted, and the concept of specification itself does not tell us how many or what exceptions should be permitted.

Without including a content-based criterion for identification of *jus cogens* norms which sets out, for example, that *jus cogens* norms protect fundamental values – the approach that was rejected by States at the Vienna conference – the international community of States as a whole is free to specify the content of the non-derogable norm in such a way that it imposes no inconvenient restriction on the freedom of action of

[259] Schafer-Landau (n251), 215.

States bound by the *jus cogens* norm. This goes both for the modification of existing *jus cogens* norms and the creation of new *jus cogens* norms.[260]

As a result, the possibility of 'illegitimate specifications' of *jus cogens* norms simply does not arise. The Article 53 criteria for identification of *jus cogens* norms provide no guarantee against new specifications that may undermine the basic obligation of the *jus cogens* norm, save the need to secure the acceptance and recognition of the international community of States as a whole. This is not necessarily problematic. In many domestic systems the only protection from over-specification (or even abrogation) for entrenched rights is a more onerous process of change. The *jus cogens* status of a norm will prevent lawful conduct inconsistent with the fundamental value protected by the norm unless and until the *jus cogens* norm is validly modified and 'acceptance and recognition by the international community of States as a whole as non-derogable' is a very demanding threshold to meet. Individual States, or even groups of States that fall short of a 'very large majority' will not be able to modify the specification of an existing *jus cogens* norm and the non-derogability of the *jus cogens* norm will protect it from inconsistent norms that do not meet the requirements of the test for modifying a *jus cogens* norm.[261]

Nevertheless, there is therefore an obvious risk that a *jus cogens* norm could become so narrow or hollowed out by exceptions as to be virtually meaningless in

[260] As Chinkin notes in the context of human rights, rights preventing harms that occur exclusively or disproportionately to the marginalised, such as women or indigenous peoples, are less frequently said to have *jus cogens* status, Christine Chinkin '*Jus Cogens*, Article 103 of the UN Charter and Other Hierarchical Techniques of Conflict Solution' [2006] 17 Finnish YB Int'l L 63, 68-9. Equally, whatever the scope of the *jus cogens* norm in the *jus ad bellum*, it will reflect the political choices of States, Christian Tams and Antonios Tzanakopoulos 'Use of Force' in Jörg Kammerhofer and Jean D'Aspremont (eds), *International Legal Positivism in a Post-Modern World* (CUP 2014), 504.
[261] Dinstein (n58), 114.

practice.[262] If the criteria for identification in Article 53 VCLT are met then the norm will have *jus cogens* status, but the norm that is accepted and recognised as non-derogable may only be that which no one has any interest in derogating from anyway.

C. The role of contracting out

The conclusion that a *jus cogens* norm is identified by specifying the norm so as to exclude all apparent derogations raises a possible objection to the broad understanding of derogation. Taken to its extremes, it would appear to lead to the conclusion that at the core of virtually all norms of customary international law – going far beyond the usual list of *jus cogens* norms – there is a residual non-derogable norm which can be identified once all possible exceptions, qualifications and defences have been taken into account. For example, once one has accounted for all possible exceptions, qualifications and defences to the rule requiring States to respect the 12-mile territorial sea of other States – hot pursuit, distress, geographical specificities of the coastline etc. – one must be left with a narrow, highly specific norm which would apply in a very restricted set of circumstances. Is it correct to conclude that this norm, so defined, is non-derogable and thus *jus cogens*?

Yet even this residual norm could still be escaped by two (or more) States concluding an agreement entirely excluding the 12-mile rule from their *inter se* relations. The only customary norms for which this would not be possible would be those norms from which States were not permitted to contract out. This restriction, unlike the

[262] Mavronicola (n250), 740.

possibility to specify a norm so it includes all qualifications and exceptions, only applies to *jus cogens* norms. The only way for the two hypothetical States not to be bound by such a norm is through its abrogation or modification. Yet this appears to lead back to the conclusion that the identifying characteristic of *jus cogens* norms is indeed the inability to contract out of them – that is, non-derogability with derogation understood in the narrow sense, a view which had appeared to have been excluded by the analysis in part two.

However, for the narrow view to be correct, the impermissibility of contracting out would have to be not only necessary for a norm to be non-derogable, but also sufficient. Yet, as shown in relation to the law of State responsibility, the impermissibility of derogation from *jus cogens* norms also entails, for example, the inability to justify a violation of an obligation arising under such norms as a countermeasure. If violation of an obligation under a norm could constitute a lawful countermeasure, we could not describe that norm as non-derogable. This would be so even if States were not permitted to set aside the norm in their *inter se* relations. Therefore, it is not enough to show only that contracting out is not permitted: to identify a non-derogable norm one must show first that all exceptions, defences, qualifications, and any other apparent derogations have been accounted for and then, in addition, that the norm so specified cannot be contracted out of.

So even if inability to contract out is not sufficient to identify a norm as non-derogable, it may be this quality that distinguishes *jus cogens* norms from other customary norms which have simply been specified in such a way as to account for all other derogations. This conclusion accords with, and is strengthened by, a word in Article

53 that has been largely overlooked in comparison with its highly-scrutinised neighbours: 'permitted'. Peremptory norms are those norms from which no derogation is 'permitted,' not those norms from which there 'is' no derogation. The former entails normative force – something is or is not allowed – whereas the latter suggests mere description. If there 'is' no derogation then non-derogability is a conclusion not a prescription. The highly-specific 12-mile rule scenario set out above fits with such an approach – it is descriptively true that at the core of every norm, defined with sufficient specificity, there must be a norm which will still apply in certain situations even once all exceptions and qualifications are accounted for, unless the parties entirely exclude it from their relations. It is only when contracting out is recognised to be unavailable for certain norms, as it is for *jus cogens* norms, that there is an additional restriction on the freedom of States – only in this scenario is derogation not *permitted*, and this is only the case for *jus cogens* norms. This distinctiveness may well explain the continued attractiveness of the narrow view of derogation.

To conclude this part, if exceptions constitute derogations, as follows from the broad view, then to the extent that a norm is subject to exceptions it permits derogation. Therefore, it is not possible for there to be exceptions to a *jus cogens* norm. When we speak of exceptions to a *jus cogens* norm we are in reality speaking about conduct that is not regulated by the *jus cogens* norm. In this way, so-called exceptions identify the scope of a *jus cogens* norm, as they identify the extent to which the underlying norm of general international law permits lawful inconsistent conduct and so is not non-derogable. Only that norm which is not subject to exceptions, and does not permit any other derogation, is *jus cogens*. This analysis allows the existence of so-called exceptions to be reconciled

with a norm's *jus cogens* status. However, as a result the norm which is identified by the international community of States as a whole as non-derogable may be considerably narrower than the underlying norm of general international law.

4. The *jus cogens* norm in the *jus ad bellum*

Part three showed that since there can be no exceptions to a *jus cogens* norm, where a *jus cogens* norm appears to be subject to exceptions the so-called exceptions must be analysed as limitations on the scope of the *jus cogens* norm. This part will apply this conclusion to the *jus ad bellum* and the two exceptions to the customary prohibition on the use of force to propose a structure of the *jus cogens* norm in the *jus ad bellum*. The UN Charter provides for the lawful use of force when it is authorised under Chapter VII, and the right of self-defence provides for the lawful use of force where its conditions are met. If those uses of force were, even for a sliver of time, within the scope of the *jus cogens* prohibition on the use of force, the Charter provisions and the customary right of self-defence would constitute impermissible derogations. That this has never been seriously contended to be the case shows that any norm prohibiting such uses of force is not accepted and recognised as non-derogable. To the extent that a use of force falls within an exception to the prohibition on the use of force it does not, even initially, fall within the scope of the *jus cogens* norm.

A majority of writers have taken this to mean that the so-called exceptions are 'built into' and form a part of the *jus cogens* norm itself.[263] However, as has been rightly pointed out, this solution risks producing a *jus cogens* norm that is so complex and unwieldy as to be unworkable.[264] The ICJ's decision in *Nicaragua* was ambiguous with regard to the *jus cogens* status of the prohibition on force, but even so it is notable that

[263] Ruys (n4), 26.
[264] Green (n3); Linderfalk (n139).

the Court did not refer to the exceptions as even potentially enjoying such a status, despite the detailed discussion of their legal character.

Moreover, even a broad understanding of derogation does not require the rules defining the so-called exceptions to form part of the *jus cogens* norm. The apparent exceptions would indeed define the scope of the *jus cogens* norm if that norm included all those rules that permit force in self-defence or under the collective security system. However, the apparent exceptions would equally define the scope of the *jus cogens* norm if *jus cogens* status stops where the apparent exceptions begin: uses of force that fall within the apparent exceptions are not covered by the *jus cogens* prohibition, and those apparent exceptions are defined and regulated by other non-*jus cogens* norms. The remainder of this part will therefore argue that the apparent exceptions of lawful self-defence and force lawfully authorised under the Charter define the limits of the norm in the *jus ad bellum* that is *jus cogens* without also having *jus cogens* status, and while remaining separate norms of customary and conventional international law respectively.

A. Force lawfully authorised under the UN Charter

The apparent exception of force lawfully authorised under the Charter delimits the scope of the non-derogable prohibition on the use of force. Yet this cannot mean that the Charter provisions on collective security are themselves norms of *jus cogens*. As the ICJ confirmed in *Nicaragua*, unlike the right of self-defence the collective security provisions of the Charter which determine when force may lawfully be authorised do not exist in customary international law but only on the 'treaty-law plane' of the Charter, a

non-universal, conventional norm.[265] As noted in part one, the first criterion for identification of a *jus cogens* norm is the existence of a norm of general customary international law which can be elevated to *jus cogens* status. Yet here there is no such norm on which a *jus cogens* norm could be based.

The drafting history of the Charter demonstrates that Article 2(4) aimed to comprehensively prohibit uses of force other than those for the purposes of collective security.[266] Nor is there any practice to suggest that uses of force authorised under the Charter are even *prima facie* inconsistent with the customary prohibition on force.[267] The provisions of Chapter VII of the UN Charter, a non-universal treaty, therefore appear to determine both the scope of a universal customary norm and the *jus cogens* norm that is based upon it. Yet the UN Charter is obviously not binding on those States which are not a party to the treaty,[268] nor is it applicable as between Member and non-Member States,[269] and as recognised by the ICJ and in practice, non-Members are not bound by the Council's decisions.[270]

[265] *Nicaragua* (n22), 176, 188.
[266] UNCIO, Summary Report of the Seventh Meeting of Committee I/1, 16 May 1945, Vol 6, 304; cf Butchard (n110).
[267] Corten (n86), 609-10.
[268] VCLT, Article 34.
[269] In 1950, the Security Council recommended that Members provide forces to assist South Korea in repelling the attack of North Korea – both of which were at the time non-Members. This has been considered to be an example of enforcement under Article 42. However, some suggest that the facts, the reference to an 'armed attack' in Resolution 83 (1950), and the choice of the Council to 'recommend' rather than 'authorise' action by Members suggests that the legal basis for the use of force may rather be found in the customary right of collective self-defence, outside the Charter, Rosalyn Higgins, Philippa Webb, Dapo Akande, Sandesh Sivakumaran and James Sloan, *Oppenheim's International Law: United Nations* (OUP 2017), 26.100.
[270] *South West Africa* (n23), 126; as noted by Butchard, this is confirmed by the practice of non-Members such as Switzerland and the Federal Republic of Germany (n110), 15.

However, the UN has long been recognised as enjoying objective international legal personality, not just that recognised by its own Members.[271] This objective personality is an effect of customary international law, which ascribes certain effects to the characteristics of an international organisation.[272] In a legal system such as the international legal system, different legal norms can jointly regulate a situation and even affect the other norm's application while maintaining separate existences.[273] A customary norm can recognise the existence of a treaty regime and use it to determine the scope of obligations under the customary norm – even for non-parties to the treaty regime – without those rules themselves forming part of customary international law.[274] This extends to decisions made by bodies established under a treaty regime. For example, the customary international law freedom of fishing includes a concomitant duty to take conservation measures when fishing on the high seas.[275] What measures are necessary to fulfil this customary duty is determined, at least in part, by the conservation measures adopted by regional and subregional fisheries organisations and arrangements created pursuant to the UN Fish Stocks Agreement.[276] This is the case even where the fishing State

[271] *Reparation for injuries suffered in the service of the United Nations*, Advisory Opinion, [1949] ICJ Reports 174, 185; Francesco Salerno 'Treaties Establishing Objective Regimes' in Enzo Cannizzaro (ed), *The Law of Treaties Beyond the Vienna Convention* (OUP 2011), 241-2; Fernández de Casadevante Romani 'Objective Regime' MPEPIL (2015), 13.

[272] Dapo Akande 'International Organisations' in Malcolm Evans (ed) *International Law* (4th edn OUP 2014), 255.

[273] Joseph Raz 'Legal Principles and the Limits of Law' [1972] 81 Yale LJ 823, 831-2.

[274] In the *SS Wimbledon* case the Court recognised the 'objective and permanent' regime of the Kiel Canal under the Versailles Treaty, which affected Germany's obligations under the customary law of neutrality even in relation to Russia, a non-party to the treaty, Malgosia Fitzmaurice 'Third Parties and the Law of Treaties' [2002] Max Planck UNYB 6, 86.

[275] *Fisheries Jurisdiction Case* (Germany v Iceland), [1973] ICJ Rep 3, 64; *Fisheries Jurisdiction Case* (United Kingdom v Iceland), [1974] ICJ Rep 3.

[276] Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (adopted 4 August 1995) 2167 UNTS 3.

is not a party to the resulting regional or subregional agreement.[277] In the same way, the Charter provisions do not form part of the customary prohibition, but customary international law takes account of decisions validly made under the Charter in defining the obligation to refrain from force under the customary norm.[278] Non-members would not be bound to implement those decisions nor would they become bound by the Charter, but they could not deny the objective fact of their existence nor their effect on customary international law.

That the customary prohibition is linked to the Charter in this way follows from its origin in Article 2(4). However, far from being 'parallel' and 'separate' rules,[279] the two norms are intrinsically linked, with the customary norm depending on the Charter for the content of one of its exceptions. The exception of Security Council authorisation acts as a form of '*renvoi*' where customary international law refers to another source of law without it becoming incorporated into the customary and *jus cogens* norm. *Renvois* are typically discussed where a treaty contains a clause explicitly referring to custom,[280] but this is not always the case.[281] The mechanism is the same where custom refers to treaty:

[277] Simone Borg 'The Influence of International Case Law on Aspects of International Law Relating to the Conservation of Living Marine Resources beyond National Jurisdiction' [2012] 23 Yearbook of International Environmental Law 1 44, 52-4; it has also been argued that non-parties to UNCLOS may have legal obligations to recognise the recommendations and interpretations of the Commission on Limits of the Continental Shelf under Article 76, Ted L McDorman 'The Entry into Force of the 1982 LOS Convention and the Article 76 Outer Continental Shelf Regime' [1995] 10 International Journal of Marine and Coastal Law 2 165, 183-5.

[278] Validity may be considered a condition for a resolution to produce its intended effects, Giorgio Gaja 'Impact of Security Council Resolutions on State Responsibility' in Georg Nolte (ed), *Peace Through International Law: The Role of the International Law Commission* (Springer 2009), 59.

[279] *Nicaragua* (n22), 178.

[280] Dinstein (n112), 388.

[281] Various treaties, such as UNCLOS, include references to the UN Charter, other treaties and non-binding instruments, as well as custom, Duncan French 'Treaty interpretation and the incorporation of extraneous legal rules' [2005] 55 ICLQ 281, 294.

one norm contains a *renvoi* to an extrinsic norm which governs the situation jointly with the referring norm.

Where the referring norm is an unwritten rule of custom the *renvoi* obviously cannot be explicit about which norm is being referred to. However, practice since 1945 has shown that the *renvoi* from custom to the Charter refers not merely to the text of particular provisions of the Charter but to the overall conclusion as to whether the force is lawful under the Charter regime. UN practice concerning the authorisation of force has evolved since 1945: Article 42 of the Charter has been interpreted to allow authorisations of military action by member States rather than direct action by military contingents under Article 43,[282] and Article 27(3) of the Charter was reinterpreted to allow concurring votes to include voluntary abstentions.[283] As practice of the Security Council, this reinterpretation would not have been sufficient to meet the test to modify a *jus cogens* norm, if the procedural provisions of the collective security exception had also had *jus cogens* status. Yet decisions have been taken under Chapter VII with certain permanent Members abstaining which have always been treated as valid.[284] Lawfulness of force under the Charter is thus an ambulatory standard: whatever is lawful force under the

[282] Thomas M Franck, *Recourse to Force* (CUP 2002), 26; Tarcisio Gazzini, *The changing rules on the use of force in international law* (Manchester 2005), 35-6; for example, UNSC Res 678 (1990), para 2 authorised Member States to use 'all necessary means' to implement UNSC Res 660, which demanded that Iraq withdraw from Kuwait. For an argument that a the 'Uniting for Peace' resolution effected a similar change in allowing the General Assembly to recommend the use of force, see Andrew J Carswell 'Unblocking the UN Security Council: The Uniting for Peace Resolution' [2013] 18 JCSL 3 453, 461-7, but this appears unsupported in practice.

[283] *South West Africa* (n23), 22; Constantin A Stavropoulos 'The Practice of Voluntary Abstentions by Permanent Members of the Security Council Under Article 27, Paragraph 3, of the Charter of the United Nations' [1967] 61 AJIL 3 737, 741-2; Julian Arato 'Treaty Interpretation and Constitutional Transformation: Informal Change in International Organizations' [2013] 38 YJIL 289, 321.

[284] Stavropoulos, ibid, 750. The reinterpretation was questioned in the early stages but by 1949 had become accepted.

Charter at a given time is lawful under the customary prohibition on force.[285] Similarly for the *jus cogens* prohibition, the scope of which is defined by the apparent exception: the *jus cogens* norm prohibits force that is not lawful under the Charter. That norm remains unmodified, even if the extrinsic norm it refers to, the Charter regime, is modified.

B. Self-defence

As held by the ICJ in *Nicaragua*, the 'inherent right' of self-defence in Article 51 refers to a rule of customary international law.[286] The conditions for the exercise of that right – proportionality, necessity, and the definition of an 'armed attack' – exist only in custom, even if their content has certainly been influenced by the text of Article 51.[287] Article 51 supplements this right by adding a requirement to report measures taken in self-defence to the Security Council, but this constitutes a separate obligation for UN members that exists only in the treaty law of the Charter and does not determine the lawfulness of the self-defence measures themselves.[288]

The customary prohibition on force prohibits uses of force other than those for the purposes of collective security – that is, all unilateral force.[289] This applies equally to

[285] What is lawful under the Charter at a given time will of course depend on one's view of how the Charter can change, eg is it a 'living instrument', Nigel D White 'The Korean War' in Tom Ruys and Olivier Corten, *The Use of Force in International Law: A Case-based Approach* (OUP 2018), 32.
[286] *Nicaragua* (n22), 176; determining whether force is lawful under Article 2(4) will therefore require a traditional *renvoi* from the treaty to the customary rules of self-defence; cf Jörg Kammerhofer, 'The Resilience of the Restrictive Rules on Self-defence' in Weller (n58), 641.
[287] *Nuclear Weapons* (n22), 41; Gérard Cahin 'Droit de la Charte et coutume international' in Jean-Pierre Cot, Alain Pellet et Mathias Forteau (eds), *La Charte des Nations Unies: commentaire article par article* (Paris 2007); see James A Green, *The International Court of Justice and Self-defence in International Law* (OUP 2009), 130-32.
[288] *Nicaragua* (n22), 235
[289] See note 266.

force used unilaterally in self-defence. Unilateral force used in self-defence is *prima facie* contrary to that prohibition, but ultimately lawful.[290]

Although it has been argued that the right of self-defence has always been implicit in the prohibition on force, explicit recognition of the right of self-defence was added at a late stage in the drafting process and in the Charter forms a separate rule from the prohibition, set out in Article 51.[291] The right of self-defence recognises that other reasons – the need for States to protect their territory and their citizens – will outweigh the reason underlying the prohibition on unilateral force where a State is subject to an armed attack and the force in self-defence is necessary and proportionate.[292] By contrast, the main reason of preventing unilateral uses of force does not apply, even initially, to force lawfully authorised under the Charter. It would be even less relevant to force

[290] *Nicaragua* (n22), 228.

[291] The Summary Report of the Seventh Meeting of Committee I/1 on 16 May 1945 states 'that paragraph 4 should be reworded so as to provide that force should not be used by any member state except by direction of the world Organization' – no reference is made to the exception of self-defence. By 1 June, in the report of the Rapporteur of the drafting subcommittee I/1/A, 'it was clear to the subcommittee that the right of self-defense against aggression should not be impaired or diminished,' and by the eleventh meeting of Committee I/1, on 4 June, an explicit exception had been added for the right of self-defence, with the report stating: 'it should be made very clear in the Report to the Commission that this paragraph 4 did not contemplate any use of force, outside of action by the Organization, going beyond individual or collective self-defense.' By 14 June, the transcript of the second meeting of Commission III (Security Council) reveals that Committee III/IV (Regional Arrangements) had decided to insert a new paragraph in the text of the Dumbarton Oaks proposals, with an initial version of the text that went on to become Article 51: 'Nothing in this Charter impairs the inherent right of individual or collective self-defense if an armed attack occurs […].' Cf the view that the right to take action in self-defence is implicit in, and therefore not covered by, the prohibition of force, for example, DW Bowett, *Self-defence in International Law* (Manchester 1958) 184-6; Oliver Dörr and Albrecht Randelzhofer, 'Article 2(4)' in Bruno Simma and others (eds), *The Charter of the United Nations: A Commentary* (3rd edn, OUP 2012) 200, para 10, arguing that, although the right of self-defence was not expressly mentioned in the Kellogg-Briand treaty prohibiting war, it 'undoubtedly represented a tacit agreement between all parties'; Crawford (n188) 290.

[292] Raz (n141); as Carpentier writes, the exception is subsumable under the rule – the rule should be generalisable to all cases that share the same relevant feature (in this case, unilateral use of force) and so its application should allow us to provide a uniform verdict, guiding conduct and preventing and punishing non-conforming behaviour – the exception represents the failure of this generalisation as those cases possess an additional feature which is relevant for the application of the norm (response to an armed attack) (n246), 18-19.

employed directly by the Security Council pursuant to the agreements foreseen in Article 43 but never implemented, as it would have been envisaged at the time of the Charter's drafting.

For these reasons, the exception of self-defence is better analysed not as a limitation on the scope of the customary prohibition but as a separate rule: the inherent right which, in situations where its conditions are met, outweighs the customary prohibition on the unilateral use of force.[293] A use of force which meets the conditions for self-defence is *prima facie* inconsistent with the customary prohibition on the use of force. However, all things considered, the measure of self-defence is still at all times lawful; it never violates the prohibition, due to the operation of the exception.[294] As a result, in the regulation of self-defence we see a difference in scope between the customary and *jus cogens* prohibitions on force. The right of self-defence derogates from the customary prohibition on the use of force by making conduct that is inconsistent with that norm lawful. Therefore, while the customary rule prohibits all unilateral uses of force, including those in lawful self-defence which initially come within its scope, the *jus cogens* prohibition cannot extend so far. To the extent that it prohibits unilateral force in self-defence, the customary prohibition is not accepted and recognised as non-derogable and so the *jus cogens* prohibition does not cover uses of force in self-defence. While they are inconsistent with the customary prohibition, such uses of force are not, even for a sliver

[293] Raphael Van Steenberghe 'Le Pacte de Non-Aggression et de Defense Commune de l'Union Africaine: entre unilateralisme et responsabilite collective' [2009] 113 Revue Generale de Droit International Public 1 125, 145.

[294] Thus the *prima facie* inconsistency of self-defence with the customary prohibition does not prevent the preclusion of wrongfulness of measures of self-defence in relation to obligations other than the prohibition on the use of force, as stated in Article 21 ASR.

of time, contrary to the *jus cogens* norm. Only the obligation to refrain from force that does not fall within the apparent exceptions is non-derogable. The customary rules on whether a use of force is an act of lawful self-defence will therefore determine the scope of the *jus cogens* prohibition on force.

It has been suggested that the customary right of self-defence is itself a norm of *jus cogens*.[295] In this case there would be no derogation by the right of self-defence and the *jus cogens* norm in the *jus ad bellum* would be a composite norm, based on a combination of the customary prohibition on force and the customary right of self-defence. However, the right of self-defence is not typically referred to as a norm of *jus cogens*. Article 51 places a temporal restriction on the right for UN members, who may only exercise it until the Security Council has taken measures.[296] If the right of self-defence were *jus cogens*, any such restriction would be an impermissible derogation: it is providing for lawful conduct inconsistent with the norm.

Practice also does not support the view that the right of self-defence is non-derogable.[297] Although commentators characterised the arms embargo imposed on Yugoslavia by Security Council Resolution 713 as in conflict with Bosnia's *jus cogens* right of self-defence,[298] Bosnia and Herzegovina's submissions in the case concerning the

[295] Craig Scott and others 'A Memorial for Bosnia: Framework of Legal Arguments Concerning the Lawfulness of the Maintenance of the United Nations Security Council's Arms Embargo on Bosnia and Herzegovina' [1994] 16 Mich J Int'l L 1 22, 57; Carin Kahgan '*Jus Cogens* and the Inherent Right to Self-Defence' [1997] 3 ILSA Journal of Int'l & Comparative Law 767, 891; De Hoogh (n58), 1172.
[296] Oscar Schachter 'Authorized Uses of Force by the United Nations and Regional Organizations' in Lori F Damrosch and David J Scheffer (eds), *Law and Force in the New International Order* (Westview 1991), 78-9; UNSC Res 678 may also have restricted the right of (collective) self-defence by introducing a compulsory waiting period, Erika de Wet 'The Gulf War' in Ruys and Corten (n285), 465.
[297] Paddeu (n193), 218.
[298] See note 295.

Application of the Convention on the Prevention and Punishment of the Crime of Genocide referred only to a conflict with the right of self-defence in Article 51 of the Charter and the *ultra vires* doctrine.[299] The practice of States also does not suggest that the embargo was considered an impermissible derogation from a *jus cogens* norm, even once its negative impact on Bosnia's ability to defend itself was revealed: despite criticism, the embargo was enforced.[300] The *jus cogens* prohibition on force and the customary right of self-defence are therefore not part of one composite *jus cogens* norm.[301]

The relationship is rather that of a *renvoi* from the *jus cogens* norm to custom. The *jus cogens* norm prohibits unilateral uses of force that do not meet the conditions of lawful self-defence. However, the right of self-defence and the conditions for its application are not *jus cogens*. As is the case for force lawfully authorised under the Charter, the *jus cogens* norm recognises only the conclusion reached through application of the customary law of self-defence – as shaped by the influence of Article 51 of the Charter – as to whether the force used is lawful.

It is possible for a *renvoi* to refer to a body of rules of customary international law. The mechanism is the same as that recognised by the ICJ in *Nuclear Weapons*, when the

[299] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide* (n55), para 2(o). The ICJ judgment did not address the question of conflict between a Security Council resolution and *jus cogens* and it considered that requested provisional measures directed to the question of self-defence were outside the scope of its jurisdiction under Article IX of the Genocide Convention, 41. Judge *ad hoc* Lauterpacht did consider the possibility of conflict between a Security Council resolution and a *jus cogens* norm, and thought that 'the relevance here of *jus cogens* should be drawn to the attention of the Security Council,' but referred only to the *jus cogens* prohibition on genocide and the resolution's contribution to genocidal activity, Sep Op Lauterpacht, 98-104.

[300] LA Times, 'US Will Honor Bosnia Arms Embargo', 13 November 1994, available at: http://articles.latimes.com/1994-11-13/news/mn-62279_1_arms-embargo (accessed 23 August 2018).

[301] Van Steenberghe (n293), 145.

Court held that what amounts to an arbitrary deprivation of life 'falls to be determined by the applicable *lex specialis*, namely, the law applicable in armed conflict.'[302] The treaty-based right to life looks to a separate set of norms, the customary and treaty-based law of armed conflict, to provide a conclusion that is relevant to the application of the treaty norm. If the requirements of the law of armed conflict are modified, we do not say that the right to life has changed, even if new kinds of conduct may now be considered lawful or unlawful under the ICCPR. Similarly, if the requirements of proportionality or necessity of force used in self-defence or the definition of armed attack are modified, this does not amount to a modification of the *jus cogens* norm prohibiting force. Such a change could be effected through the process for the modification of customary international law, without needing to meet the more demanding requirements for modification of a *jus cogens* norm.

To conclude this part, the norms that define and regulate the exceptions to the customary prohibition on force do not form part of the *jus cogens* norm but are recognised by it, and the conclusion as to lawfulness reached through the application of these norms will determine whether a particular use of force is a violation of the *jus cogens* norm. The *jus cogens* norm in the *jus ad bellum* prohibits force that is neither lawfully authorised under the Charter, nor a lawful exercise of the right of self-defence. Only a modification of that norm by, for example, creating a new exception such as a right of unilateral humanitarian intervention, would change the *jus cogens* norm and require the demanding test for modification of a *jus cogens* norm to be fulfilled.

[302] *Nuclear Weapons* (n22), 25. The Court referred to the conventional right to life in Article 6 ICCPR (n151) and the 'single complex system' of custom and treaties that makes up international humanitarian law, 41, 75.

Finally, although examples of treaties that conflict with norms of *jus cogens* are few, treaties have been alleged to be void for conflict with the prohibition on the use of force where they purport to authorise force by one or more States on the territory of another in circumstances other than lawful self-defence or authorisation under the Charter.[303] This confirms that the final necessary but insufficient element of non-derogability, the inability to contract out of the norm once all apparent derogations and exceptions have been accounted for, is present.

5. Conclusion

It is now possible to answer all three questions posed at the outset: 1) what does it mean to say that a norm permits no derogation?; 2) do exceptions derogate from *jus cogens* norms?; and 3) how do the exceptions to the prohibition on the use of force affect the scope of the *jus cogens* norm in the *jus ad bellum*? First, to say that a norm permits no derogation means that there can be no lawful conduct inconsistent with obligations arising under that norm. For States bound by a *jus cogens* norm they are not only obliged to comply with their obligations under that norm, but they are obliged to comply with them in all circumstances. A derogation is a norm that purports to make conduct inconsistent with a *jus cogens* norm lawful; any such norm will be void. Second, an exception, which makes conduct inconsistent with a norm lawful, would be a derogation from a *jus cogens* norm. As a result, it is not possible for there to be exceptions to *jus cogens* norms. Any apparent 'exceptions' must be limitations on the scope of the *jus*

[303] See n178 regarding the Treaty of Friendship between the Soviet Union and Iran of 26 February 1921 and the 1960 Treaty of Guarantee between Cyprus, Greece, Turkey and the UK.

cogens norm. Third, the exceptions to the prohibition on the use of force must therefore determine the scope of the *jus cogens* norm in the *jus ad bellum*. Although commonly referred to as exceptions, neither force lawfully authorised under the Charter nor force lawfully used in self-defence is prohibited by the *jus cogens* norm in the *jus ad bellum*. Such uses of force do not, even *prima facie*, fall within the scope of the *jus cogens* prohibition. Force used in lawful self-defence and force lawfully authorised under the Charter are defined and regulated by non-*jus cogens* norms, which are recognised by the *jus cogens* norm without forming part of it.

Bibliography

Georges Abi-Saab, *The Concept of Jus Cogens in International Law, Lagonissi Conference: Papers and Proceedings* (Carnegie 1967)
Georges Abi-Saab 'The Uses of Article 19' [1999] 10 EJIL 2 339
Dapo Akande and Sangeeta Shah 'Immunities of State Officials, International Crimes, and Foreign Domestic Courts' [2011] 21 EJIL 815
Dapo Akande 'International Organisations' in Malcolm Evans (ed) *International Law* (4th edition OUP 2014)
Dapo Akande and Antonios Tzanakopoulos 'The International Court of Justice and the Concept of Aggression' in Kreß and Barriga (eds), *The Crime of Aggression: A Commentary* (CUP 2017)
Levan Alexidze, 1981 Receuil des Cours 172
Denis Alland 'The Definition of Countermeasures' in James Crawford, Alain Pellet, Simon Olleson, Kate Parlett (eds), *The Law of International Responsibility* (OUP 2010)
American Law Institute, 'US Restatement, Third, of the Foreign Relations Law of the United States' (1987)
Julian Arato 'Treaty Interpretation and Constitutional Transformation: Informal Change in International Organizations' [2013] 38 YJIL 289
Brian Bix 'Natural Law: The Modern Tradition' in Jules Coleman, Kenneth Himma and Scott Shapiro (eds), *Oxford Handbook of Jurisprudence and Philosophy of Law* (OUP 2004)
Simone Borg 'The Influence of International Case Law on Aspects of International Law Relating to the Conservation of Living Marine Resources beyond National Jurisdiction' [2012] 23 Yearbook of International Environmental Law 1 44
Maarten Bos, *A Methodology of International Law* (North-Holland 1984)
Ian Brownlie, *Principles of Public International Law* (7th ed OUP 2008)
Patrick Butchard 'Back to San Francisco: Explaining the Inherent Contradictions of Article 2(4) of the UN Charter' [2018] JCSL 1
Gérard Cahin 'Droit de la Charte et coutume international' in Jean-Pierre Cot, Alain Pellet et Mathias Forteau (eds), *La Charte des Nations Unies: commentaire article par article* (Paris 2007)
Antônio Augusto Cançado Trindade, *International Law for Humankind: Towards a New Jus Gentium* (2014 Brill)
Mathieu Carpentier, *Norme et Exception – Essai sur la défaisabilité en droit* (LGDJ 2014)
Andrew J Carswell 'Unblocking the UN Security Council: The Uniting for Peace Resolution' [2013] 18 JCSL 3 453
Fernández de Casadevante Romani 'Objective Regime' in Max Planck Encyclopaedia of Public International Law (2015)
Hilary Charlesworth and Christine Chinkin, *The boundaries of international law - A feminist analysis* (Manchester 2000)
Hilary Charlesworth and Christine Chinkin 'The Gender of Jus Cogens' [1993] 15 Hum Rts Q 63
Christine Chinkin 'Jus Cogens, Article 103 of the UN Charter and Other Hierarchical Techniques of Conflict Solution' [2006] 17 Finnish YB Int'l L 63
Theodore Christakis 'Rapport Général' in Theodore Christakis and Karine Bannelier (eds) *La Nécessité en Droit International* (Pedone 2007)
Theodore Christakis 'Les "circonstances excluant l'illicéité": une illusion optique?' in Oliver Corten and others (eds), *Droit du Pouvoir, Pouvoir du Droit: Mélanges offerts à Jean Salmon* (Brussels 2007)
Gordon A Christenson 'Jus Cogens: Guarding Interests Fundamental to International Society' [1988] 28 Va J Int'l L 585
Olivier Corten, *Le droit contre la guerre* (Paris 2008)
Olivier Corten 'Breach and Evolution of Customary International Law on the Use of Force' in Enzo Cannizzaro and Paolo Palchetti (eds), *Customary International Law on the Use of Force: A Methodological Approach* (Martinus Nijhoff 2005)
Daniel Costelloe, *Legal Consequences of Jus cogens Norms in International Law* (CUP 2017)
James Crawford 'International Law and Foreign Sovereigns: Distinguishing Immune Transactions' [1984] 54 BYIL 1 75
James Crawford, *Brownlie's Principles of Public International Law* (8th ed OUP 2012)
James Crawford, *State responsibility: the general part* (CUP 2013)

Gennady M. Danilenko 'International Jus Cogens: Issues of Law-Making' [1991] 2 EJIL 42
André de Hoogh 'Jus Cogens and the Use of Armed Force' in Mark Weller (ed) *Oxford Handbook of the Use of Force in International Law* (OUP 2015)
Olivier Deleau 'Les positions françaises à la Conférence de Vienne sur le droit des traités' [1969] 15 Annuaire Français du Droit International 7
Erika 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
Erika de Wet 'The Gulf War' Tom Ruys and Olivier Corten, *The Use of Force in International Law: A Case-based Approach* (OUP 2018)
Yoram Dinstein, 2007 Receuil des Cours 322
Yoram Dinstein, *War, Aggression and Self-Defense* (6th ed CUP 2017)
Oliver Dörr and Albrecht Randelzhofer, 'Article 2(4)' in Bruno Simma and others (eds), *The Charter of the United Nations: A Commentary* (3rd edn, OUP 2012)
Louise Doswald-Beck, *Human Rights in Times of Conflict and Terrorism* (OUP 2011)
Luís Duarte D'Almeida, *Allowing for Exceptions: A Theory of Defences and Defeasibility in Law* (OUP 2015)
John Dugard, *Recognition and the United Nations* (1987 Grotius)
Pierre Durand 'La coexistence entre la Convention européenne des droits de l'homme et les autres normes produites au sein du Conseil de l'Europe' in Melis Aras, Yannick Ganne et al (eds), La coexistence des droits (Mare & Martin 2018)
Ronald Dworkin, *Taking Rights Seriously* (London 1978)
Donald Evans 'Paul Ramsey on Exceptionless Rules' [1971] 16 American Journal of Jurisprudence 184
Claire Finkelstein 'When the rule swallows the exception' in Linda Meyer (ed), *Rules and Reasoning* (Hart 1999)
Gerald Fitzmaurice, 1957 Receuil des Cours 92
Malgosia Fitzmaurice 'Third Parties and the Law of Treaties' Max Planck UNYB 6 (2002)
Thomas M. Franck, *Recourse to Force* (CUP 2002)
Duncan French 'Treaty interpretation and the incorporation of extraneous legal rules' [2005] 55 ICLQ 281
Giorgio Gaja, 1981 Receuil des Cours 172
Giorgio Gaja, 'Obligations *Erga Omnes'* in Joseph H Weiler et al (eds), *International crimes of state: a critical analysis of the ILC's Draft Article 19 on state responsibility* (Florence 1984)
Giorgio Gaja 'Impact of Security Council Resolutions on State Responsibility' in Georg Nolte (ed), *Peace Through International Law: The Role of the International Law Commission* (Springer 2009)
John Gardner, *Offences and Defences* (OUP 2007)
Tarcisio Gazzini, *The changing rules on the use of force in international law* (Manchester 2005)
Alan Gewirth 'Are there any absolute rights?' [1981] 31 The Philosophical Quarterly 122 1
Alonso Gómez-Robledo, 1981 Receuil des Cours 172
James A. Green, *The International Court of Justice and Self-defence in International Law* (OUP 2009)
James A. Green 'Questioning the Jus cogens Status of the Prohibition of the Use of Force' [2011] 32 Mich J Int'l L 215
Gilbert Guillaume 'Avis d'amicus curiae (article R. 625-3 du Code de justice administrative)' [2012] 1 Revue Française du Droit Administratif, 19
Asif Hameed 'Unravelling the Mystery of Jus Cogens in International Law' [2014] 84 BYIL 1 52
Lauri Hannikainen, *Peremptory norms (jus cogens) in international law* (Helsinki 1988)
RM Hare 'Principles' [1972-3] 73 Proceedings of the Aristotelian Society 1
HLA Hart, *The Concept of Law* (2nd ed Clarendon 1994)
Sondre Torp Helmerson 'The Prohibition of the Use of Force as Jus Cogens: Explaining Apparent Derogations' [2014] 61 Netherlands International Law Review 167
Rosalyn Higgins 'Derogations under Human Rights Treaties' [1977] 48 BYIL 1 281
Rosalyn Higgins, Philippa Webb, Dapo Akande, Sandesh Sivakumaran and James Sloan, *Oppenheim's International Law: United Nations* (OUP 2017)
Mark Janis 'The Nature of Jus Cogens' [1987-8] 3 Conn J Int'l L 359
Valentin Jeutner, *Irresolvable Norm Conflicts in International Law* (OUP 2017)
Carin Kahgan 'Jus Cogens and the Inherent Right to Self-Defence' [1997] 3 ILSA Journal of Int'l & Comparative Law 767

Jörg Kammerhofer, 'The Resilience of the Restrictive Rules on Self-defence' in Weller (ed) *Oxford Handbook of the Use of Force in International Law* (OUP 2015)
Richard D Kearney and Robert E Dalton 'The Treaty on Treaties' [1970] 64 AJIL 495
Hans Kelson, *General Theory of Norms* (Clarendon 1991)
Robert Kolb 'Des problèmes conceptuels, systématiques et terminologiques en droit international public' [2001] 56 Zeitschrift für öffentliches Recht 501
Robert Kolb, *Théorie du Jus Cogens International* (Geneva 2015)
Robert Kolb, *Peremptory International Law Jus Cogens* (Hart 2015)
Robert Kolb, *The law of treaties: an introduction* (2016 Elgar)
Robert Kolb, *The International Law of State Responsibility* (Elgar 2017)
Martti Koskenniemi, *From apology to utopia: the structure of international legal argument* (CUP 2005)
Anne Lagerwall 'Article 64' in Olivier Corten and Pierre Klein (eds), *Les Conventions de Vienne sur le droit des traités, Commentaire article par article* (Bruxelles 2006)
H. Lauterpacht, *Private Law Sources and Analogies of International Law* (London 1927)
H. Lauterpacht, 'Sovereignty Over Submarine Areas' [1950] 27 BYIL 376
Charles Leben 'Obligations Relating to the Use of Force and Arising from Peremptory Norms of International Law' in James Crawford, Alain Pellet, Simon Olleson, Kate Parlett (eds), *The Law of International Responsibility* (OUP 2010)
Ulf Linderfalk 'The Effect of Jus Cogens Norms: Whoever Opened Pandora's Box, Did You Ever Think About the Consequences?' [2008] 18 EJIL 5 860
Ulf Linderfalk 'The Source of Jus Cogens Obligations – How Legal Positivism Copes with Peremptory International Law' [2013] Nordic Journal of International Law 82 369–389
Vaughan Lowe 'Precluding wrongfulness or responsibility: a plea for excuses' [1999] 10 EJIL 2 405
Natasa Mavronicola 'What is an 'absolute right'? Deciphering Absoluteness in the Context of Article 3 of the European Convention on Human Rights' [2012] 12 HRLR 4 723
Ted L McDorman 'The Entry into Force of the 1982 LOS Convention and the Article 76 Outer Continental Shelf Regime' [1995] 10 International Journal of Marine and Coastal Law 2 165
Maja Menard 'Compliance with Peremptory Norms' in James Crawford, Alain Pellet, Simon Olleson, Kate Parlett (eds), *The Law of International Responsibility* (OUP 2010)
Arthur Nussbaum, *A Concise History of the Law of Nations* (New York 1962)
John Oberdiek 'Specifying Rights Out of Necessity' [2008] 28 OJLS 1 127
Mary Ellen O'Connell 'Jus Cogens: International Law's Higher Ethical Norms' in Donald Earl Childress III (ed), *The Role of Ethics in International Law* (CUP 2011)
Alexander Orakhelashvili, *Peremptory Norms in International Law* (OUP 2006)
Alexander Orakhelashvili, 'Changing *jus cogens* through state practice?' in Weller (ed) *Oxford Handbook of the Use of Force in International Law* (OUP 2015)
Federica Paddeu, *Justification and Excuse in International Law* (CUP 2018)
Maurizio Ragazzi, *The Concept of International Obligations Erga Omnes* (OUP 1997)
Joseph Raz 'Legal Principles and the Limits of Law' [1972] 81 Yale LJ 823
Joseph Raz, *Practical Reasons and Norms* (2nd ed OUP 1990)
Paul Reuter, *La Convention de Vienne du 29 mai 1969 sur le droit des traités* (Paris 1970)
Natalino Ronzitti 'Use of Force, jus cogens and State Consent' in Antonio Cassesse (ed) *Current Legal Regulation of the Use of Force* (1986 Martinus Nijhoff)
Christos L Rozakis, *The Concept of Jus Cogens in the Law of Treaties* (North Holland 1976)
Tom Ruys, *'Armed Attack' and Article 51 of the UN Charter* (CUP 2010)
Francesco Salerno 'Treaties Establishing Objective Regimes' in Enzo Cannizzaro (ed), *The Law of Treaties Beyond the Vienna Convention* (OUP 2011)
William A. Schabas, *The European Convention on Human Rights: A Commentary* (OUP 2015)
Oscar Schachter 'Authorized Uses of Force by the United Nations and Regional Organizations' in Lori F Damrosch and David J Scheffer (eds), *Law and Force in the New International Order* (Westview 1991)
Russ Schafer-Landau 'Specifying Absolute Rights' [1995] 37 Ariz Law Rev 209
Kirsten Schmalenbach 'Article 53' in Oliver Dörr and Kirsten Schmalenbach (eds), *Vienna Convention on the Law of Treaties: A Commentary* (2nd ed Springer 2018)
Georg Schwarzenberger, 'International Jus Cogens?' [1964-5] 43 Tex L Rev 455
Egon Schwelb 'Some Aspects of International Jus Cogens as Formulated by the International Law Commission' [1967] 61 AJIL 946

Craig Scott et al 'A Memorial for Bosnia: Framework of Legal Arguments Concerning the Lawfulness of the Maintenance of the United Nations Security Council's Arms Embargo on Bosnia and Herzegovina' [1994] 16 Mich J Int'l L 1 22
Dinah Shelton 'Normative Hierarchy in International Law' [2006] 100 AJIL 291
Bruno Simma, 250 Receuil des Cours 1994
IM Sinclair, *The Vienna Convention on the Law of Treaties* (2nd Edition Manchester 1984)
Constantin A Stavropoulos 'The Practice of Voluntary Abstentions by Permanent Members of the Security Council Under Article 27, Paragraph 3, of the Charter of the United Nations' [1967] 61 AJIL 3 737
Serge Sur 'Elements de formation du droit international' in Jean Combacau and Serge Sur, *Droit International Public* (9th edition 2010 Montchrestien)
Eric Suy 'Article 53, Convention de 1969' in Corten and Klein (eds.), *Les Conventions de Vienne sur le droit des traités – Commentaire article par article* (Bruxelles 2006)
Jerzy Sztucki, *Jus Cogens and the Vienna Convention on the Law of Treaties* (Springer 1974)
Sandra Szurek 'The Notion of Circumstances Precluding Wrongfulness' in James Crawford, Alain Pellet, Simon Olleson, Kate Parlett (eds), *The Law of International Responsibility* (OUP 2010)
Stefan Talmon 'Determining Customary International Law: The ICJ's Methodology between Induction, Deduction and Assertion' [2015] EJIL 26 417
Christian Tams and Antonios Tzanakopoulos 'Use of Force' in Jörg Kammerhofer and Jean D'Aspremont (eds), *International Legal Positivism in a Post-Modern World* (CUP 2014)
John Tasioulas 'In Defence of Relative Normativity: Communication Values and the Nicaragua Case' [1996] 16 OJLS 85
Christian Tomuschat, 1993 Receuil des Cours 241
GI Tunkin, 1975 Receuil des Cours 146
Raphael Van Steenberghe 'Le Pacte de Non-Aggression et de Defense Commune de l'Union Africaine: entre unilateralisme et responsabilite collective' [2009] 113 Revue Generale de Droit International Public 1 125
Emer de Vattel, *Le droit des gens ou les principes de la loi naturelle* (Carnegie 1916)
Alfred von Verdross 'Forbidden Treaties in International Law' [1937] 31 AJIL 4 571
Thomas Weatherall, *Jus Cogens: International Law and Social Contract* (CUP 2017)
Prosper Weil 'Towards Relative Normativity in International Law?' [1983] 77 AJIL 413
Nigel D White 'The Korean War' in Tom Ruys and Olivier Corten, *The Use of Force in International Law: A Case-based Approach* (OUP 2018)
Glanville Williams 'The Logic of Exceptions' [1988] CLJ 47(2)
K Wolfke 'Jus Cogens in International Law (Regulation and Prospects)' [1974] 6 Polish YB Int'l L 145
Karl Zemanek 'How to identify peremptory norms of international law' in Pierre-Marie Dupuy (ed) *Essays in honour of Christian Tomuschat* (2006 NP Engel)