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The Compelling Law of Jus Cogens and Exceptions to Peremptory Norms

To Derogue or Not to Derogue, That Is the Question!

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1 Introduction

The concept of *jus cogens* was introduced into positive international law by Article 53 of the Vienna Convention on the Law of Treaties (VCLT), stipulating that a treaty is void if it conflicts with a peremptory norm of general international law. Under the VCLT, a peremptory norm must be accepted and recognized by the international community as a norm from which no derogation is permitted. Although the concept seems by now to have been positively embraced even by the International Court of Justice (ICJ), its appearance has given rise to a spirited debate regarding many of its constitutive elements, legal consequences and implications.

One of the more thorny issues raised concerns the specification that a peremptory norm is one ‘from which no derogation is permitted’. In view of the concept’s attribute of non-derogability, the problematic of exceptions to peremptory norms has been examined within the literature primarily with a view to establishing the compatibility of exceptions to the peremptory norm prohibiting the use of force (or alternatively that prohibiting aggression).

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1 See art 53 of the Vienna Convention on the Law of Treaties 1969 (VCLT) (adopted 23 May 1969; in force 27 January 1980) 1155 UNTS 331; see also arts 64 (emergence of a new peremptory norm), 71 (legal consequences), and 66(a) in conjunction with art 65 (dispute settlement).


3 In his reports, Tladi speaks of non-derogability being the (primary) consequence of the peremptory character of a norm: see Dire Tladi, ‘First Report on Jus Cogens’ (8 March 2016) A/CN.4/693, 7 [12], 38 [62], and [64]; and Dire Tladi, ‘Second Report on Jus Cogens’ (16 March 2017) A/CN.4/706, 19 [38], 32–33 [64], 36–37 [73].

However, the question of the compatibility with and hence (im)permissibility of exceptions may come up, in different guise, with respect to other accepted or asserted peremptory norms. This may be due, to an extent, to the fact that an exception to a (general) rule can be framed and formulated in different manners. Moreover, various issues may come up in view of the generality with which a norm is formulated, or the absolute character with which it may be endowed. Finally, whether an act or conduct conflicts with a peremptory norm may impact upon our perception whether an exception is permissible.

In order to structure the analysis, this contribution will proceed to discuss first some of the meanings attributed to the words derogation and exception (section 2). It will then proceed to consider whether an exception excludes the applicability of a general norm, and assess the validity of a proposition to this effect with respect to the main exceptions to the prohibition of the use of force as a _jus cogens_ norm (section 3). This will be followed by some thoughts on circumstances precluding wrongfulness as exceptions that may justify or excuse certain conduct, and special attention will be paid to Article 26 of the Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA),\(^5\) which prevents the preclusion of wrongfulness of conduct 'not in conformity with an obligation arising under a peremptory norm.' In this context, the character of (specific) circumstances precluding wrongfulness—as inherent exception, excuse, or justification—will be investigated (section 4). Finally, section 5 will return to the issue of derogation.

### 2 Prologue: Derogation and Exception

A discussion of exceptions to peremptory norms requires, first of all, attention being paid to the interpretation of Article 53 of the VCLT, which stipulates:

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

As such, establishing the meaning of this provision requires the application of the rules of interpretation as embodied in Articles 31 and 32 of the VCLT.

A useful starting point of any inquiry may be recourse to a dictionary. In the online Oxford dictionaries, insofar as relevant, the word 'derogation' is explained as 'an exemption from or relaxation of a rule of law.'\(^6\) The verb ‘to derogate from’ is indicated to involve ‘to detract from’

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or ‘deviate from (a set of rules or agreed form of behaviour).’

An ‘exception’ is said to mean ‘a person or thing that is excluded from a general statement or does not follow a rule.’

The preposition ‘except’ entails ‘not including; other than’; when taking the form of conjunction it will be ‘used before a statement that forms an exception to one just made’; and the verb is used so as to ‘specify as excluded from a category or group’.

Taking all these meanings then in broad stride, a certain overlap does appear to exist between the possible meanings of the words derogation and exception. That particular overlap allows for an intriguing exploration of the concept of *jus cogens* as embodied in Article 53 of the VCLT, which makes reference to peremptory norms of general international law. *Jus cogens* rules are said to be, according to Article 53, norms ‘from which no derogation is permitted’; hence their designation as ‘peremptory norms’ and the appellation as *jus cogens*. The word ‘peremptory’ is indicated to mean, in the dictionaries, ‘insisting on immediate attention or obedience, especially in a brusquely imperious way’ and also, in law, as ‘not open to appeal or challenge’ or ‘final.’

*Jus cogens*, the heading of Article 53 of the VCLT, is defined as ‘the principles which form the norms of international law that cannot be set aside’, coming from the Latin signifying ‘compelling law’.

When considering the meaning of derogation, the International Law Commission (ILC) in drawing up the provision on *jus cogens* appears to have had in mind the idea of exemption from a rule of law, as it asserted that the perspective that ‘… there is no rule of international law from which States cannot at their own free will contract out has become increasingly difficult to sustain …’

It concluded this initial claim by saying that ‘… to-day there are certain rules from which States are not competent to derogate at all by a treaty arrangement, and which may be changed only by a rule having the same character.’ At times, authors indicate that *jus cogens* sets a limit to the existing freedom of states to contract out of rules of (conventional and customary) international law, and this has been argued to extend from conventional rules to (local, special, or general) rules of customary international law. It may be noted that the freedom of states to displace rules of international law operates in both directions of the two most important primary sources of international law: most commonly, rules of customary international law are substituted by treaties; rather more rarely, a treaty rule will be replaced by a rule of customary international law.

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7 ibid.
8 ibid.
9 ibid.
10 ibid https://en.oxforddictionaries.com/definition/peremptory.
12 ILC, Commentary to art 50 (renumbered 53) VCLT, 248 [1] (and also [2]).
13 ibid.
14 See in this respect Helmersen (n 4) 170, pointing to VCLT art 30 as evidence of the possibility of contracting out of treaties; Robert Kolb, ‘Observation sur l’évolution du concept de *jus cogens*’ (2009) 113 Revue Générale de Droit International Public 837, 845 and 846–48; and de Hoogh, ‘*Jus Cogens* and the Use of Armed Force’ (n 4) 1170.
15 Prosecutor v Anton Furundžija (Judgment) ICTY-95-17/1-T (10 December 1998) [153] (see also [144]). Also Malcolm N Shaw, *International Law* (7th edn, OUP 2014) 89, indicating that derogation is barred for local or special custom.
16 Occasionally the existence of such freedom is disputed and presumed absent unless stipulated by positive law: see Kammerhofer, *Uncertainty in International Law: A Kelsenian perspective* (Routledge 2011) 177–78 (also 135–37 and 154).
17 Consider the recognition of the existence of an exclusive economic zone (EEZ), without supporting argument, by the ICJ even before the United Nations Convention on the Law of the Sea (UNCLOS) had entered into force, thus displacing certain rules concerning the high seas by those of the EEZ: *Continental Shelf (Tunisia v Libyan Arab Jamahiriya)* [1982] ICJ Rep 18, 73–74 [100].
Sometimes the basis for this freedom is sought in conflict solving maxims such as *lex specialis derogat legi generali*. Yet while such a maxim may provide a solution as to which rule to apply; taking account of concrete circumstances and better reflecting the intent of the parties concerned, it does not provide a rationale as to why states ought to be left with such freedom in the first place. That rationale may be found in the axiomatic sovereignty of states, providing political communities with independence of decision-making. This is consolidated by the fact that there is, in consequence, largely identity between states possessing the authority of law-making, both at the national and international level, and states as subjects of law being bound by the binding rules resulting therefrom. Indeed, as that much maligned dictum of the Permanent Court of International Justice in *Lotus* aptly articulates: ‘[t]he rules of law binding upon states therefore emanate from their own free will ...’ That free will, apparently, also entitles states to substitute an existing rule with another, preferred rule. Although not commented upon much, a derogation would most likely be applied only inter se in the mutual relations of the states concerned. Indeed, this could hardly be otherwise in view of their sovereignty, which entails the denial of any higher authority; the consequential equality of states produces the legal incapacity to make decisions or rules binding other states (*par in parem non habet imperium*). As much is, of course, demonstrated by the rules of the Vienna Convention concretizing the *pacta tertiis nec nocent nec prosunt* principle.

One particular emanation of a potential overlap between the concepts of derogation and exception is the peremptory prohibition of the use of armed force in international relations, which admits of at least the exception of self-defence and arguably others too (e.g., humanitarian intervention, the protection of nationals). This raises the question as to how the exception of self-defence, and other potential exceptions, may be reconciled with the claim that the prohibition of the use of force constitutes a peremptory norm and thus does not admit any derogation. Different legal devices have been suggested to explain (away) the real or apparent contradictions between the peremptory prohibition and its (accepted or purported) exceptions: a restrictive interpretation of the word ‘derogation’ (see section 5 below); a restrictive interpretation of the peremptory prohibition itself (see section 4 below); and the proposition that exceptions limit the scope of applicability of a general rule, to which we turn next.

### 3 The Scope of Applicability of Rules: The Prohibition of the Use of Force and Its Exceptions

Nevertheless, there is a further need to clarify the exact meaning of the words ‘derogation’ and ‘exception’ in law; put differently, what exactly differentiates, from a legal perspective, a derogation from an exception. In this respect, Helmersen claims that an exception ‘can be defined as “a special situation excluded from the coverage of an otherwise applicable rule”’.

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19 ILC, ‘Conclusions of the Study Group on the Fragmentation of International Law’ (n 18) 409, point 9.


22 VCLT arts 34–37.
Next, he advances the proposition that: ‘Exceptions limit the scope of rules. This means that an apparent derogation that is covered by an exception is not a derogation, since it regulates something that is outside the scope of the rule.’ However, he also quoted the definition of ‘derogation’ in the Random House Webster’s Dictionary in Law, by J. Clapp, as ‘limitations on the scope of something.’ In a way, a derogation is therefore also a kind of exception. Continuing his discussion, he then observes:

Exceptions can be distinguished from derogations by their level of generality. An exception is at the same level of generality as the rules that it modifies … The application of a derogation, on the other hand, will be limited to some of the parties that are bound by the rule in question; a ‘derogation’ between all parties should rather be considered an exception.

Considering his reference to parties, one may assume that he is considering exceptions under a treaty, although his observations suggest all exceptions are removed from the scope of a rule; with respect to *jus cogens* he accordingly posits that exceptions to peremptory norms are not derogations, since one need not derogate from something outside the scope of the rule. In essence then, Helmersen denies the applicability of a rule in case of exceptions.

His position involves the distinction, commented upon by Hage, Waltermann, and Arosemena, between applicability and application: certain facts must fall within the scope of the rule in order for it to be applicable, and only an applicable rule is one that may be applied to the facts. As Hage, Waltermann, and Arosemena submit, the applicability of rules depends on scope conditions, which ordinarily are (an internal) part of the rule but may also be externally imposed (conditions related to personal, spatial, and temporal jurisdiction). If the fulfilment of a scope condition is lacking, the rule is not applicable to the facts at hand.

Helmersen’s construction then is to see various kinds of circumstances—self-defence, consent, force used under UNCLOS provisions, humanitarian intervention—as exceptions that limit the scope of the prohibition of the use of force. Any of these circumstances, if present, would cause the prohibition to lack applicability. However, Helmersen’s theoretical construct appears belaboured, if only because it starts from an assumption, a premise, that needs to be proven: that the exception limits the scope of the general rule, which consequently lacks applicability. Only if the validity of this premise can be ascertained by reference to the content of positive international law would the validity of the conclusion follow that an exception does not, indeed cannot, constitute a derogation.

The question may then be raised whether the Charter or customary international law qualify exceptions to the rule prohibiting states to have recourse to armed force as (negative) scope conditions whose fulfilment or non-fulfilment either affirms or excludes the applicability of the (general) rule. As a matter of interpretation, both from the viewpoint of the Charter and the construction of customary international law, this may be doubtful.

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23 Helmersen (n 4) 176.
24 ibid 175, continuing with the observation that ‘[i]n the context of international law, derogations are specific acts or rules that diverge from and supplant the content of a more general rule. This is done by treaty or by consent.’
25 ibid 175–76.
26 ibid 176.
27 Jaap Hage, Antonio Waltermann, and Gustavo Arosemena, ch 2 in this volume, 18–9.
28 ibid—18, 22, and 29; see also discussion by Duarte d’Almeida, ‘Defences in the Law of State Responsibility, A View from Jurisprudence’, ch 10 in this volume, 181.
29 Helmersen (n 4) respectively at 176–77, 177–78, 178–80, and 182. He also argues (at 180) that art 42 of the Charter requires further explanation as a possible exception to the customary prohibition of the use of force and (at 180–82) that various treaties providing for rights of intervention for the future have disputed validity.
Turning to the wording of Article 2(4) of the Charter, one may note that it stipulates that: ‘All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.’

Even though attempts have been made to argue that the prohibition is not all-encompassing, authors have *grosso modo* maintained that states are generally prohibited from using force in their international relations. The ICJ has had the opportunity to shed light on the interpretation of the prohibition of the use of force, but it has generally refrained from a close reading of Article 2(4) of the Charter. Coming somewhat near, the Court observed in the case brought by the Congo (DRC) against Uganda that the latter had violated the sovereignty of the DRC and its territorial integrity, and went on to describe Uganda’s military intervention as a grave violation of Article 2(4) of the Charter. As there were no indications that Uganda was actually attempting to appropriate Congolese territory, the Court’s pronouncement could be taken to support an interpretation equating ‘territorial integrity’ to ‘territorial inviolability’.

Although, as a matter of interpretation, this is far from persuasive, the phrase ‘inconsistent with the purposes of the United Nations’ cuts off any argument intended to limit the scope of the prohibition. Indeed, the US position during the San Francisco Conference, responding to the amendment that brought ‘territorial integrity and political independence’ into Article 2(4), observed that the intention of the original text had been to ‘state in the broadest terms an absolute all-inclusive prohibition’ and added that the phrase ‘in any other manner’ was ‘designed to insure that there should be no loopholes’. The reason why any possible loopholes are fully closed is that the primary purpose of the United Nations is the maintenance of international peace and security. As such, any cross-border use of armed force, in and of itself, already results in a failure to maintain international peace and security and will therefore be inconsistent with that purpose. The fact that the use of force may be pursued to further the cause of human rights, and could and would therefore be consistent with the UN’s

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32 Article 2(4) of the Charter appears to have some inherent limitation in that members are required to refrain from the threat or use of force ‘in their international relations’ only and, as such, does not cover the use of force in a domestic context. The use of force in a domestic setting is, however, not an exception, because the rule as formulated simply does not cover such use of force in the first place. As Helmersen (n 4) 176, observes: ‘All legal rules have a (more or less clearly) defined scope. There will necessarily be much that is not covered by a given rule.’ See further Albrecht Randelzhofer and Oliver Dörr, ‘Article 2(4)’ in Bruno Simma and others (eds), *The Charter of the United Nations: A Commentary*, vol I (2nd edn, OUP 2012) 132, 200, 208 [14], and 208–18 [15]–[43].
33 Nicaragua (n 2) 99–101 [188]–[190], referencing art 2(4) and determining the existence of the corresponding rule of customary international law; *Oil Platforms (Islamic Republic of Iran v United States of America)* [2003] ICJ Rep 161, 199 [78], concluding that the US had used armed force not qualifying as acts of self-defence (noting earlier (at 189 [57]) that the burden was on the US to show that it was the victim of an armed attack ‘so as to justify it using armed force in self-defence’); *Armed Activities (Congo v Uganda)* (n 2) 223–27 [148–65].
34 *Armed Activities (Congo v Uganda)* (n 2) 223 [148–65].
36 United Nations Conference on International Organization (UNCIO) vol VI, 335. The originally proposed formulation of art 2(4) was: ‘Members shall refrain from the threat or use of force inconsistent with the Purposes of the United Nations.’ Randelzhofer and Dörr, ‘Article 2(4)’ (n 32) 216 [38].
37 Charter of the United Nations (n 30) art 1(1). Randelzhofer and Dörr, ‘Article 2(4)’ (n 32) 216 [38].
38 See de Hoogh, *Obligations Erga Omnes and International Crimes* (n 35) 290–91. But see below on consent.
purpose to promote and encourage ‘respect for human rights and fundamental freedoms’, will not negate its fundamental inconsistency with the UN’s primary purpose to maintain international peace and security.

For various reasons, therefore, the language of Article 2(4) of the Charter is broadly interpreted as establishing a general rule prohibiting states from using of force against other states, and the ICJ has held the prohibition to be embodied in customary international law. This general rule is applicable to any member that uses armed force across a border with another state: considering its language, no general or specific exceptions are carved out from the scope of the prohibition. However, if the general rule is applicable and prohibits any cross-border use of armed force, this raises the question in what manner to qualify recourse to armed force by states under the headings of self-defence, military action by the Security Council, and the use of armed force under its authority.

In this respect, one may wonder whether the language of other relevant provisions of the Charter (Articles 51 and 42), or the Council’s practice on authorizations, would dictate a different conclusion in that force re-sorted to were to exclude the applicability of the prohibition.

Starting with self-defence, Article 51 of the Charter specifies, in relevant part, that ‘Nothing in the present Charter shall impair the inherent right of individual or collective self-defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security ...’

The opening words of this provision might be read to imply that the presence of a situation of self-defence allows one simply to ignore the prohibition contained in Article 2(4) in respect of the state invoking self-defence. However, one may note that Article 2(4) of the Charter does not exempt the use of force in self-defence from its scope, even if Article 51 does start by saying that ‘[n]othing in the present Charter shall impair the right to self-defence. In a rather similar vein, Article XX of the General Agreement on Tariffs and Trade, dealing with ‘general exceptions’ to the trade in goods, provides that ‘[n]othing in this Agreement shall be construed to prevent the adoption or enforcement ... of measures’ for certain purposes. Textually then, these formulations do not testify to the inclusion of the exception within the rule itself; indeed, such exceptions apply in relation to the rules covered, but not per se as an

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39 Charter of the United Nations (n 30) art 1(3). Note the argument by Koh, (n 31), who observes that ‘[l]ike other originalist/textualist interpretations, the absolutist position does not acknowledge that the U.N. has multiple purposes —including protecting human rights, promoting regional security, and ending the scourge of war— instead flattening those purposes to one goal: the protection of sovereignty’ and that ‘... the use of force in carefully limited circumstances can protect human rights without undermining the general prohibition against force’.
40 Nicaragua (n 2) 99–102 [188–92].
41 In an earlier contribution, I suggested a distinction between specific exceptions and general exceptions. The difference between the two would be that the former operate exclusively in relation to the prohibition of the use of force, whereas the latter may be invoked with respect to any rule imposing an obligation. See de Hoogh, ‘Jus Cogens and the Use of Armed Force’ (n 4) 1165–75.
42 As the ILC has ruled out necessity precluding the wrongfulness of the use of force, this circumstance will not be discussed further, but see text below relating to nn 105 to 110.
44 Charter of the United Nations (n 30) art 51 (emphasis added).
45 Otherwise, in support, one could further point to the qualification of the right of self-defence as ‘inherent’, often considered suggestive of some pre-positive natural law origin. In Nicaragua (n 2) 102–103 [193], the Court rather interpreted the word inherent to be indicative of its customary international law origin.
integral part restricting their substantive scope; in other words, they appear to be superimposed upon them.

Some support for the view that self-defence is excluded from the scope of the prohibition may be seen in the Court’s observation in the *Nicaragua* case that:

> If a State acts in a way prima facie incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State’s conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule.\(^{47}\)

The reference to ‘exceptions or justifications contained within the rule itself’ is interesting, since it might be taken to show a disposition by the Court to see exceptions as part and parcel of the rule. Yet, as we shall see below (section 4), this pronouncement, taken acontextually, would misrepresent its approach to general rules and exceptions within the judgment at large. Be that as it may, it has been claimed by the ILC that:\(^{48}\)

> Article 51 of the Charter of the United Nations preserves a State’s ‘inherent right’ of self-defence in the face of an armed attack and forms part of the definition of the obligation to refrain from the threat or use of force laid down in Article 2, paragraph 4. Thus, a State exercising its inherent right of self-defence as referred to in Article 51 of the Charter is not, even potentially, in breach of Article 2, paragraph 4.

One might argue in corroboration of this view the Court’s reversal, without further explanation, of the order in which the prohibition and self-defence are examined in *Armed Activities*. In that case, the Court first scrutinized whether Uganda’s invocation of the right of self-defence was warranted in light of the conditions set for the exercise of that right, before coming to the conclusion that Uganda’s military intervention in the DRC constituted a grave violation of Article 2(4).\(^{49}\) The explanation given by judge Tomka\(^{50}\) for this reversal—quoting the text of Article 51—is that ‘a lawful exercise of the right to self-defence cannot constitute the breach of any relevant article of the Charter’, and he then contends:\(^{51}\)

> The prohibition on the use of force cannot be read without having regard to the Charter provisions on self-defence. The provisions on self-defence, in fact, delineate the scope of rules prohibiting the use of force. If a measure in question constitutes a lawful measure of self-defence, it necessarily falls outside the ambit of the prohibition. In other words, the prohibition of the use of force is not applicable to the use of force in lawfully exercised self-defence.

\(^{47}\) *Nicaragua* (n 2) 98 [186].


\(^{49}\) *Armed Activities (Congo v Uganda)* (n 2) 227 [165].

\(^{50}\) See e.g. Verhoeven (n 48) 265–66 [281], considering for this reason also the right of self-defence to be part of *jus cogens*.

\(^{51}\) *Armed Activities (Congo v Uganda)* (n 2) (Separate Opinion of Judge Tomka) 351, 354–55 [10]–[11].
Although the reasoning is appealing, these observations miss the mark in several important and rather crucial respects.

First, Judge Tomka, in making his argument on the applicability of the prohibition limits this position to ‘lawful’ measures of self-defence and ‘lawfully’ exercised self-defence. Although he does not further specify how to establish such lawfulness, this presupposes that where the measures concerned cannot be labelled as ‘lawful’ self-defence they would fall within the scope of the prohibition. One may presume that such will be the case if, for instance, a claim of self-defence would not be predicated upon an armed attack and possibly also if the measures concerned would fail to comply with conditions set for the exercise of the right of self-defence, such as the tests of necessity and/or proportionality.\(^\text{52}\)

Secondly, the exercise of the right of self-defence relies on the precondition of an armed attack—a\emph{ conditio sine qua non}—whose existence needs to be ascertained for any recourse to armed force to be lawful in the first place. Until and unless the existence of an armed attack is established, recourse to force by a state must be presumed to fall within the scope of the prohibition of the use of force in Article 2(4) and customary international law. In view of the horizontal structure prevalent within international relations, with each state determining for itself its legal position vis-à-vis other states,\(^\text{53}\) and in the absence of an authoritative decision of (primarily) the Security Council, rebuttal of that presumption may be demanding at worst, challenging on the whole, and facile in exceptional cases at best.

Thirdly, an armed attack must involve, of necessity, a use of force unlawful under Article 2(4) and/or customary international law.\(^\text{54}\) This constraint is necessary in order to prevent the logical regression of a state being able to invoke self-defence against an otherwise lawful recourse to armed force by another state. If an armed attack as\emph{ conditio sine qua non}, the\emph{ prima causa} of self-defence, could involve a lawful use of armed force, there would be no prospect to judge either party’s recourse to armed force as unlawful; hence, this would lead to an impasse and the consequent inability to rule on all kinds of related matters. This argument also explains the difficulty of fitting the armed activities of non-state actors within the concept of armed attack, since (most) non-state actors are not bound under international law by the rules banning the use of force in international relations.\(^\text{55}\) This, in turn, has led to many difficulties in establishing the standard by which to judge whether the armed activities of non-state actors may be equated to an armed attack by a state, whether through attribution, substantial involvement, due diligence, unable, or unwilling tests (or none of those).\(^\text{56}\)

Fourthly and finally, the precondition of armed attack is itself obscured by cloudy ambiguities that make its utility in determining the lawfulness of a claim of self-defence tenuous or even precarious. Leaving aside such claims as to the availability under international law of self-defence for preventive, pre-emptive, anticipatory, or interceptive purposes, the use of different terms in the Charter—force, armed attack, breach of the peace, and act of aggression—has led many to consider the concept of armed attack to require the unlawful use of force to reach a certain threshold of severity.\(^\text{57}\)

\(^{52}\) Two conditions fulfilment of which has been held to be required under customary international law: Nicaragua (n 2) 103 [194], and further 122–23 [237].
\(^{53}\) Case Concerning the Air Service Agreement of 27 March 1946 between the United States and France (Arbitral Award) (2006) 28 RIAA 417, 443 [81], sometimes referred to as the principle of auto-interpretation or auto-determination.
\(^{54}\) See André de Hoogh, ‘Restrictivist Reasoning on the \emph{Ratione Personae} Dimension of Armed Attacks’ (2016) 29 Leiden Journal of International Law 19, 22.
\(^{55}\) Ibid 22–23.
\(^{56}\) Ibid 25–33.
In *Nicaragua*, the Court spoke of less grave and most grave uses of force, the latter constituting an armed attack, and later specified that the armed activities of non-state actors ought to be of a scale and effect similar to an armed attack engaged in by regular armed forces rather than a frontier incident. Although the Court has been less forthright in upholding the gravity requirement in later cases, considering (without much conviction) the possibility of the mining of a single military vessel or a number of incidents spread out over time to amount to an armed attack, the uncertainties in this respect militate against viewing the exception of self-defence as excluding the applicability of the prohibition. Indeed, the reference to self-defence is quite often accompanied by the depiction of 'justification' or 'justified' (see section 4 below). However, if the prohibition of the use of force were not to be applicable in the first place, no justification would be required in any event.

Turning to the Security Council, Article 42 of the Charter provides for the legal power of the Council to initiate military action. However, it ought to be noted that this provision provides for action by the Security Council rather than the member states. The initial thought behind this power was that the member states would make armed forces, matériel and all kinds of assistance available to the Council (Articles 43 and 45), and that the Council would direct military action through the Military Staff Committee (Articles 46-47 and 45). A determination of the actor involved—the Security Council or the member(s)—is critical, as the prohibition contained in Article 2(4) is addressed to the members. The prohibition is therefore not applicable to military action by and under control of the Council. In essence, the Security Council has exercised this power by the creation of UN peacekeeping forces with peace enforcement mandates.

However, to the extent that the Security Council were to take military action against a non-member state, the equivalent rules of customary international law would be applicable. As the prohibition of the use of armed force is also embodied in customary international law, the United Nations and its organs must be considered equally bound. This is so since states in creating an international organization cannot derogate from rules of customary international law in relation to non-members. The provision of Article 2(6), evidencing the UN's universal vocation to ensure international peace and security even in respect of non-members, cannot be read to give the Security Council legal powers of decision-making going beyond what may be justified under customary international law.

*References and general notes:*

58 *Nicaragua* (n 2) 101 [191].
59 ibid 103–104 [195].
60 *Oil Platforms* (n 33) 195–96 [72]; *Armed Activities (Congo v Uganda)* (n 2) 219–20 [131]–[135] and 222–23 [144]–[146].
61 For early example see SC Resolution 161, S/RES/169 (1961) [4]; for a more recent example see SC Resolution 2098, S/RES/2098 (2013) [12]. Arguably, although more likely an example of UN coordination of action in collective self-defence, the action in Korea could be seen as an exercise of military enforcement powers: see SC Resolutions 82–85, S/RES/82, S/RES/83, S/RES/84, S/RES/85 (1950).
62 *Nicaragua* (n 2) 99–101 [188]–[190].
64 Generally, Talmon (n 63) 265–66 [39–43].
65 In support, ibid 263 [35].
66 In support, Linderfalk, 'The Effect of Jus Cogens Norms' (n 4) 863–64; and Talmon (n 63) 265–66 [41] and n 93, although his contribution as a whole goes against the grain of the argument here.
However, the situation is markedly different when member states, whether acting directly or through (regional) organizations, have recourse to armed force after being authorized to this effect by the Security Council. In such a case, armed action is neither under the control of the Security Council, notwithstanding its option to cancel the authorization (subject to the veto), nor can it be said to be undertaken by the Council.\textsuperscript{67} Furthermore, the Council’s authorization is normally granted for specific purpose(s), however wide-ranging such may be, and this suggests that action going beyond such purpose(s) would still be covered by the prohibition.\textsuperscript{68} More specifically, in the absence of a legal basis for military action accepted under international law, authorization by the Security Council is required precisely because in its absence the armed activities concerned would violate the prohibition. Hence, an authorization by the Council provides a justification under international law to engage in action ordinarily covered by the prohibition on the use of armed force.

In conclusion, exceptions to a general rule do not per se exclude the applicability of that general rule. Furthermore, an inquiry into the specific exceptions to the prohibition of the use of armed force as accepted under international law also does not show this to be the case. Armed action by and under control of the Security Council comes closest in that the prohibition of the use of armed force as laid down in the Charter is not applicable in such a case. However, this is not because such action constitutes an exception excluded from the scope of the prohibition, but because the prohibition is applicable only to UN members and not to the United Nations as such. In other words, the general rule contains a scope limitation \textit{ratione personae}. Bringing the discussion back to \textit{jus cogens}, if exceptions do not limit the scope of applicability of the general rule prohibiting the use of armed force, then these may (possibly) amount to derogation from the peremptory prohibition.

\section{4 Circumstances Precluding Wrongfulness and Justifications: Peremptory Norms and Exceptions}

Whether circumstances precluding wrongfulness have a bearing upon the applicability of the rules affected upon their invocation is open to debate. The ILC, in its Articles on the Responsibility of States, made a choice to consider various circumstances to preclude the wrongfulness of certain conduct upon the legal construction that the circumstances concerned rendered an obligation, either temporarily or definitively, inoperative.\textsuperscript{69} To put this in a logical chain: no obligation (suspended)—no breach (possible)—no internationally wrongful act—no responsibility. In all of this, no reference is made to a denial of the applicability of relevant rules of international law, other than to note that the circumstances ‘do not annul or terminate the obligation’, but instead ‘provide a justification or excuse for

\textsuperscript{67} Contrary, \textit{Behrami and Behrami v France, and Saramati v France, Germany and Norway} (ECHR) Grand Chamber, Decision as to Admissibility of Application nos 71412/01 and 78166/01 (2 May 2007) [132–41], in which the Court held that the Security Council retained ultimate authority and control and that the conduct concerned was therefore attributable to the UN.


\textsuperscript{69} See Sandra Szurek, ‘The Notion of Circumstances Precluding Wrongfulness’ in James Crawford, Alain Pellet, and Simon Olleson (eds), \textit{The Law of International Responsibility} (OUP 2010) 427, 434 (footnote omitted), who observes at 435: ‘It has not been claimed that the rule or obligation effectively disappears, even temporarily . . . even in the case of force majeure.’ She continues: ‘Rather the notion of circumstance precluding wrongfulness is concerned with situations in which the obligation is continuing but responsibility cannot be invoked where certain circumstances exist.’
non-performance while the circumstance in question subsists.\textsuperscript{70} The ILC considered that the circumstances have no relevance to ‘the constituent requirements of the obligation’ but operate in a way similar to ‘defences or excuses in internal legal systems’.\textsuperscript{71}

In a more theoretical fashion, taking examples from criminal law as a starting point, Duarte d’Almeida asserts a distinction between $P$-facts and $D$-facts, whereby the former indicates facts that need to be present for a decision on the merits to be correct, whereas the latter concerns facts that need to be absent for such a decision to be correct.\textsuperscript{72} The actual presence of $D$-facts, however, signifies the availability of a defence and hence the possibility of justification or excuse.\textsuperscript{73} Refining his reasoning, he further specifies that $P$-facts may involve the necessity of proving that something is absent, a negative constituent element then, for example having to prove absence of consent in order to establish rape.\textsuperscript{74} Transposing his reasoning to the law of state responsibility, he discusses whether circumstances precluding wrongfulness should not be seen as negative elements of the primary rules rather than acting as secondary rules in the nature of defences, eventually coming to the conclusion that they can be, indeed are, both.\textsuperscript{75}

In this context, he deplores the absence in international law of the notion of offence or prima facie wrong.\textsuperscript{76} Furthermore, he asserts a distinction among the possible defences between justifications and excuses, whereby the former appear both as negative qualifications of obligations (under primary rules) and as secondary rules, whereas the latter only come into play as secondary rules.\textsuperscript{77} Regarding justifications he argues that, if present, the conduct concerned is permissible, whereas Paddeu observes that as a justification is based on ‘a permission of the legal order to engage in certain conduct’, this ‘leads to the conclusion that the conduct is lawful’.\textsuperscript{78} To say that the conduct concerned is permissible or lawful is perhaps a bridge too far; after all, there is a difference between, on the one hand, a (primary) permissive rule laying down a right to engage in conduct rendering it lawful per se and, on the other hand, a (secondary) permissive rule granting a right to engage in conduct that is otherwise prohibited. As such, rather than qualifying such conduct as permissible or lawful, it would be preferable to call such conduct, considering the circumstances ruling at the time, justifiable or justified.

Although the Articles on the Responsibility of States do not as such enunciate the notion of a prima facie wrong, there are at least some indications that suggest that this is implied.

\textsuperscript{70} Commentary to ch V of Pt 1, ILC Report 2001, 71 [2], adding that they function ‘as a shield rather than a sword’.

\textsuperscript{71} ibid 71 [7].

\textsuperscript{72} Duarte d’Almeida, Defences in the Law of State Responsibility, A View from Jurisprudence, ch 10 in this volume, 180.

\textsuperscript{73} ibid 184.

\textsuperscript{74} ibid 180–1.

\textsuperscript{75} ibid 194–7.

\textsuperscript{76} ibid 190–3, at the end pointing to the notion of Tatbestand in German criminal law theory or tipo in Portuguese, Spanish, or Italian criminal law theory. In a similar vein, see Paddeu, ‘Clarifying the Concept of Circumstances Precluding Wrongfulness (Justifications) in International Law’, ch 11 in this volume, 208–9.


\textsuperscript{78} ibid 195; see Paddeu, ‘Clarifying the Concept of Circumstances Precluding Wrongfulness (Justifications) in International Law’, ch 11 in this volume, 211. Earlier on, Duarte d’Almeida explained the difference between justification and excuse in criminal law as meaning that a justification renders the conduct permissible, whereas an excuse concerns impermissible conduct by a person considered not culpable (184–6); for Paddeu, 211 (see also text up to n 55), ‘[a]n excuse, instead, does not constitute a permission to engage in certain conduct and, for this reason, it does not affect the illegality of conduct; the excuse serves only to exclude the consequences that follow from that illegality for the defendant.’
In its commentaries, the ILC regularly refers to conduct that would 'otherwise' be unlawful or internationally wrongful, or not in conformity with an international obligation. This allows for the inference that when a circumstance precluding wrongfulness is present and invoked the requirements to conclude to the existence of an internationally wrongful act laid down in Article 2 of the ARSIWA could be, or indeed are, in fact met. From a logical perspective then, the ILC's construction of the constituent elements embodied in Article 2 of the ARSIWA being determinative of an internationally wrongful act without cross-reference to the circumstances precluding wrongfulness is flawed. For purposes of Article 2, the absence of any circumstance precluding wrongfulness should then have been included as a constituent element of an internationally wrongful act (in effect, a negative P-fact in Duarte d'Almeida's construction).

Although the notion of a prima facie wrong cannot be found in any explicit manner in the provisions of the Articles on the Responsibility of States, there are in fact a few telling examples to be found in case law. In Nicaragua, the Court, when discussing the methodology of establishing a rule of customary international law, mentioned that '[i]f a State acts in a way prima facie incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself,' this confirms the existence of the rule. With respect to certain acts (laying of mines in Nicaragua's internal and territorial waters; attacks on Nicaraguan ports, oil installations, and a naval base) attributable to the United States, the Court held: '[t]hese activities constitute infringements of the principle of the prohibition of the use of force, defined earlier, unless they are justified by circumstances which exclude their unlawfulness ... ' Considering especially the United States' support to the contras, in terms of training and arming, it then found with respect to the 'customary international law principle of non-use of force':

... that, subject to the question whether the action of the United States might be justified as an exercise of the right of self-defence, the United States has committed a prima facie violation of that principle by its assistance to the contras in Nicaragua, by 'organizing or encouraging the organization of irregular forces or armed bands ... for incursion into the territory of another State,' and 'participating in acts of civil strife ... in another State,' in the terms of General Assembly resolution 2625 (XXV).

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79 Commentary to art 2 ARSIWA, ILC Report 2001, 36 [11]; Commentary to ch V of Pt 1, ibid 71 [1]; Commentary to art 20 ARSIWA, ibid 72 [3] and 74 [10]; Commentary to art 22 ARSIWA, ibid 75 [2]; Commentary to art 23 ARSIWA, ibid 76 [1]; Commentary to art 24 ARSIWA, ibid 79 [5]; Commentary to art 27 ARSIWA, 8 ibid 6 [5]; Commentary to ch II of Pt Three, ibid 128 [1 and 3]; Commentary to art 49 ARSIWA, ibid 130 [6]. Gabčíkovo-Nagymaros Project (Hungary/Slovakia) [1997] ICJ Rep 7, 55 [80].

80 Indeed, the ILC's observation that circumstances precluding wrongfulness lack relevance for the constituent requirements of the obligation suggests as much: see Commentary to ch V of Pt 1, ILC Report 2001, 71 [7]. See further Paddeu, 'Clarifying the Concept of Circumstances Precluding Wrongfulness (Justifications) in International Law,' ch 11 in this volume, 207–209, but arguing that establishing the incompatibility of conduct with what is required by an obligation entails a factual determination and not per se also the legal qualification of breach or unlawfulness.

81 In the same manner, ibid 209.

82 The examples discussed in this section are from ICJ jurisprudence; for examples taken from other jurisdictions ibid 204.

83 Nicaragua (n 2) 98 [186] (emphasis added); in relation to non-intervention, ibid 108–109 [207].

84 ibid 118 [227].

85 Ibid 118–19 [228] (emphasis added). In relation to non-intervention see ibid 126 [246], where the Court mentions 'prima facie acts of intervention' that might be justified on some legal ground.
Indeed, as to the Nicaraguan complaints regarding the Treaty of Friendship, Commerce and Navigation, the Court first investigated whether the act complained of appeared to be well founded, before considering whether the security exception might justify those acts. The Court reverted to this matter in Oil Platforms, in discussing the order of investigation of questions of interpretation and application of the bilateral Treaty of Amity, Economic Relations, and Consular Rights. It referred back to Nicaragua and observed, not altogether accurately, that there it had first examined whether a prima facie breach of that treaty had been committed before turning to the question of whether exceptions under the treaty could be invoked to justify such conduct.

All in all, then, rather than regarding exceptions or circumstances precluding wrongfulness as substantive (ratione materiae) limitations to the scope of a general rule, this suggests that the conduct concerned should be understood to fall under the scope of two different rules both applicable in the circumstances at hand. As argued by Hage, Waltermann, and Arosemena, this implies that: ‘an exception to a rule in a case is defined as the situation in which a rule is applicable to, but nevertheless not applied to the case.’ Moreover, they point out that applicability must be determined, aside from possible territorial, temporal and personal limitations to the rule, by the case satisfying ‘the ordinary conditions of the rule.’

The ordinary conditions of the rule, in this instance the prohibition of the use of force, are that the conduct involves the use of armed force, taking place in the international relations of the state, and that it be against the territorial integrity or political independence of another state or inconsistent with the purposes of the UN. Self-defence would clearly fulfil the first two conditions, but the third requires further argument. Leaving aside whether to support a narrow or broad interpretation of ‘terrestrial integrity’ or ‘political independence’, one might be tempted to argue that self-defence is not inconsistent with the purpose ‘to maintain international peace and security’. As such, however, the legal construction would not be that the rule prohibiting force is not applicable, but that the conduct concerned would not involve a breach of obligation in the first place. As a result, the use of armed force as an exercise of the right of self-defence would not require justification in any way.

However, the ICJ case law on the use of force and self-defence simply does not testify to such a construction. Thus, the most directly relevant cases are replete with references to self-defence (potentially) justifying armed or military activities that would otherwise constitute a violation of the prohibition of the use of force. Returning to the subject of this contribution, this then suggests—that on the assumption that the prohibition of the use of force constitutes a peremptory norm—that peremptory norms allow for justification and hence that exceptions to rules of jus cogens may be admissible, notwithstanding their attribute of non-derogability.

87 In Nicaragua (n 2) 136 [272], 140 [280], the Court found that certain acts were in contradiction with the terms of the treaty, subject to the question of justification.
89 Oil Platforms (n 33) 179–80 [35] (see also 202–203 [88]), referring to Nicaragua (n 2) 140 [280] (where the Court does not, in actual fact, use the term ‘prima facie breach’).
90 Hage, Waltermann, and Arosemena, ch 2 in this volume, 34 and 18–9.
91 Ibid 18, 22.
92 Nicaragua (n 2) 118–21 [228–29 and 232–33], 128 [252], 141–42 [282] and 146 [292] (dictum no 2); Oil Platforms (n 33) 180–81 [37], 185–87 [48 and 51], 193–94 [67], 195–96 [72], and 198 [76]; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory [2004] ICJ Rep 136, 194 [139]; Armed Activities (Congo v Uganda) (n 2) 213 [106], 215 [108], 215 [112], and 269 [304].
But, taking a step back, the status of the prohibition of the use of force as a peremptory norm has been questioned, and obviously denial of that status would obviate the need to account for possible discrepancies between a peremptory prohibition and the existence of exceptions thereto. The assumption mentioned itself suffers from the fact that, over the years, the scope of the peremptory prohibition has alternatively been related to the use of force generally or to that of aggression in particular. Indeed, the ILC itself, in its commentary on *jus cogens* in its draft on the law of treaties, noted 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*.’ However, in its projects on the law of responsibility of states and of international organizations, the Commission consistently opted to make reference instead to the prohibition of aggression as a peremptory norm.

Now, if there really were no real difference in substance between the prohibition of the use of force and the prohibition of aggression, then all of the same complications would apply as discussed previously. Over and above these, however, one would also be confronted with the affirmation, in the Definition of Aggression adopted by the General Assembly, that: ‘[n]o consideration of whatever nature, whether political, economic, military or otherwise, may serve as a justification for aggression.’ By ruling out justifications, this assertion would also appear to exclude the possibility of exceptions to the prohibition of aggression. A contextual reading of the Definition allows one to wave away this suggestion, as one of its clauses saves cases where the use of force would be lawful under the Charter (Article 6) and aggression itself seems to be predominantly, if not exclusively (Article 1), defined by reference to first uses of force (Article 2).

Nevertheless, it does appear that the notion of aggression embodies something fundamentally different from the (mere) use of force. The Definition itself, in the preamble, makes mention that aggression is ‘the most serious and dangerous form of the illegal use of force’, and most of the examples set forth in Article 3 appear to imply a certain gravity and scale of the force resorted to. In a similar vein, when discussing ‘armed attack’ (in French: *agression armée*) and the sending of armed bands under Article 3(g) of the Definition in *Nicaragua*, the Court required their activities to be of a ‘scale and effects’ in order to be equated to an attack by regular armed forces. Finally, the amendments to the Rome Statute define an act of aggression as a manifest violation of the Charter by reason of its ‘character, gravity and scale’.

In this respect, one may note that the ILC has limited some of the legal consequences for breaches of peremptory norms to those which are ‘serious’. The Commission has specified that a serious breach entails ‘a gross or systematic failure’ to fulfil the obligation (Article...
In its commentary, the Commission referred to the scale or character of a breach, and observed that ‘a certain order of magnitude is necessary’. In referencing the gross and/or systematic character of the breach, the Commission stated that:

To be regarded as systematic, a violation would have to be carried out in an organized and deliberate way. In contrast, the term ‘gross’ refers to the intensity of the violation or its effects; it denotes violations of a flagrant nature, amounting to a direct and outright assault on the values protected by the rule. The terms are not of course mutually exclusive; serious breaches will usually be both systematic and gross. Factors which may establish the seriousness of a violation would include the intent to violate the norm; the scope and number of individual violations; and the gravity of their consequences for the victims. It must also be borne in mind that some of the peremptory norms in question, most notably the prohibitions of aggression and genocide, by their very nature require an intentional violation on a large scale.

Of course, matters of gravity, scale, and effects only account for a difference in degree and not one in kind. The latter would have to be sought rather in the character of an act of aggression, which carries with it overtones of malevolence and malevolence. Aggression might be distinguished then by requiring the use of force concerned to be motivated by an animus aggressionis or otherwise being resorted to for unlawful and improper purposes. The early work of the ILC on ‘state of necessity’ as a circumstance precluding wrongfulness advanced the view that aggression constituted a qualified violation of the prohibition of the use of force. In its 1980 commentary, the Commission made reference to examples where necessity had been invoked to justify the annexation (in whole or in part) or occupation of the territory of another state, and qualified such actions as ‘an assault on the very existence of a State or on the integrity of its territory or the independent exercise of its sovereignty’.

The Commission, however, went considerably further in arguing that not all conduct infringing the territorial sovereignty of a state would constitute aggression or a breach of jus cogens, and claimed that such actions in the territory of another state:

…although they may sometimes be of a coercive nature, serve only limited intentions and purposes bearing no relation to the purposes characteristic of a true act of aggression. These would include, for instance, some incursions into foreign territory to forestall harmful operations by an armed group which was preparing to attack the territory of the State, or in pursuit of an armed band or gang of criminals who had crossed the frontier and perhaps had their base in that foreign territory, or to protect the lives of nationals or other persons

101 Commentary to ch Three of Pt Two ARSIWA, ILC Report 2001, 110 [1].
102 ibid Commentary to art 40 ARSIWA, 113 [8] (footnote omitted).
103 On animus aggressionis, in relation to individual responsibility, see Yoram Dinstein, War, Aggression and Self-Defence (5th edn, CUP 2012) 146.
104 Commentary to former art 33 ARSIWA, ILC Yearbook 1980, vol II (2) 42–43 [22].
105 ibid.
106 ibid.
107 ibid 43–44 [23].
attacked or detained by hostile forces or groups not under the authority and control of the State, or to eliminate or neutralize a source of troubles which threatened to occur or to spread across the frontier. The common feature of these cases is, first, the existence of grave and imminent danger to the State, to some of its nationals or simply to human beings—a danger of which the territory of the foreign State is either the theatre or the place of origin, and which the foreign State has a duty to avert by its own action, but which its unwillingness or inability to act allows to continue. Another common feature is the limited character of the actions in question, as regards both duration and the means employed, in keeping with their purpose, which is restricted to eliminating the perceived danger.

After these rather suggestive observations, the Commission then declined to take position on the question of whether the Charter implicitly excludes the invocation of necessity to all conduct inconsistent with the prohibition of the use of force.\textsuperscript{108}

Although the ILC back-pedalled on this particular point in its second reading and completion of the ARSIWA in 2001,\textsuperscript{109} a more general point may be made here regarding the nature of norms of \textit{jus cogens}. If the prohibition of aggression (with gravity and purpose requirements in order to determine its violation) constitutes a peremptory norm, rather than the prohibition of the use of force more generally, then the argument can be made that \textit{jus cogens} norms are absolute in character and do not permit invocation of any kind of justification (as is claimed for aggression).\textsuperscript{110} This legal construction would also take away much of the force of the argument by Leben that two types of peremptory norms exist: simple and reinforced.\textsuperscript{111} In his view, simple peremptory norms would not exclude sanctions imposed by a central authority, whereas reinforced peremptory norms would prohibit certain acts in all circumstances.\textsuperscript{112} If \textit{jus cogens} status is accorded to the prohibition of aggression, as discussed above, such a distinction would lack validity.

For certain other peremptory norms, this denial of possible justification, suggesting their absolute character, has been explicitly provided in a relevant treaty. One example is the prohibition

\textsuperscript{108} ibid 44–45 [24].

\textsuperscript{109} Commentary to art 25 ARSIWA, ILC Report 2001, 84 [21]; discussed earlier in de Hoogh, ‘\textit{Jus Cogens} and the Use of Armed Force’ (n 4) 1168–70.

\textsuperscript{110} See Alexander Orakhelashvili, \textit{Peremptory Norms in International Law} (OUP 2008) 67–72, arguing that peremptory norms are absolute and unconditional in character. Tladi, ‘First Report’ (n 3) 38 [63], observes that: ‘Firstly, \textit{jus cogens} norms are universally applicable. Secondly, \textit{jus cogens} norms are superior to other norms of international law. Finally, \textit{jus cogens} norms serve to protect the fundamental values of the international community…’. See also Tladi, ‘Second Report’ (n 3) 37–38 [74]. If peremptory norms are absolute in character, this might explain why the right to life is not generally mentioned in listings of peremptory norms, since the right to life appears subject to exceptions and justification in case of infringement. Nevertheless, recently Christof Heyns and Thomas Probert, ‘Securing the Right to Life: A Cornerstone of the Human Rights System’, \textit{EJILTalk!} (11 May 2016) https://www.ejiltalk.org/securing-the-right-to-life-a-cornerstone-of-the-human-rights-system/, claimed: ‘The right to life is a well-established and developed part of international law, in treaties, custom, and general principles, and, in its core elements, in the rules of \textit{jus cogens}.’ See further Paul Harpur, ‘The Evolving Nature of the Right To Life: The Impact of Positive Human Rights Obligations’ (2007) 9 \textit{University of Notre Dame Australia Law Review} 95, 106–110; and Kadelbach (n 48) 157, pointing to the case law of the Inter-American Court of Human Rights considering the right to life to be part of \textit{jus cogens}. Otherwise, although the right to life is listed as non–derogable in art 4 of the International Covenant on Civil and Political Rights (ICCPR) (adopted 16 December 1966, in force 23 March 1976) (1966) 999 UNTS 171, the ILC observed: ‘Nor would it be correct to say that a provision in a treaty possesses the character of \textit{jus cogens} merely because the parties have stipulated that no derogation from that provision is to be permitted, so that another treaty which conflicted with that provision would be void. Such a stipulation may be inserted in any treaty with respect to any subject matter for any reasons which may seem good to the parties.’ Commentary to art 50 (re-numbered 53) (n 12) 248 [2]. See further Verhoeven (n 48) 146–50 [161–62]; Thomas Kleinlein, ‘\textit{Jus Cogens} as the “Highest Law”? Peremptory Norms and Legal Hierarchies’ (2015) 46 \textit{Netherlands Yearbook of International Law} 173, 189–91; and Kimberley Trapp, Human Rights Exceptions; ch 17 in this volume, 312–321.

\textsuperscript{111} Leben (n 4) 1197, 1202.

\textsuperscript{112} ibid.
of torture, regarding which Article 2(2) of the Convention against Torture stipulates that: ‘no exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification of torture.’\textsuperscript{113} In a similar vein, the preamble of the Convention on the Elimination of Racial Discrimination states that its parties are: ‘[c]onvinced that any doctrine of superiority based on racial differentiation is scientifically false, morally condemnable, socially unjust and dangerous, and that there is no justification for racial discrimination, in theory or in practice, anywhere.’\textsuperscript{114}

More particularly, the ILC itself adopted Article 26 of the ARSIWA, in which it is stipulated that: ‘[n]othing in this chapter precludes the wrongfulness of any act of a State which is not in conformity with an obligation arising under a peremptory norm of general international law.’\textsuperscript{115} Only limited reference is made by the Commission to examples, one of which is that a counter-genocide cannot be justified as a countermeasure.\textsuperscript{116} No further argument is to be found in the commentary as to the relationship between self-defence and the peremptory norm prohibiting aggression.\textsuperscript{117}

The commentary does make reference to consent, indicating that one state cannot release another from obligations under peremptory norms, such as those related to genocide and torture.\textsuperscript{118} However, it continues to observe that consent may at times be relevant for the application of peremptory norms, noting that a state may validly consent to ‘a foreign military presence on its territory for a lawful purpose.’\textsuperscript{119} Indeed, the prohibitions of the use of armed force and of intervention do not appear to stand in the way of a state consenting to an actual use of force on its territory.\textsuperscript{120} Different legal constructions are possible to explain why consent to a ‘foreign military presence’ on a state’s territory, or even an actual use of force by a foreign state within such territory, would not present any difficulty with respect to the peremptory prohibition. One explanation would be, discussed above, that the peremptory prohibition concerns aggression rather than the use of armed force more generally.

A second explanation might be that consent does not operate as a circumstance precluding wrongfulness, but rather constitutes an inherent element of any primary rule (a negative P-fact, in Duarte d’Almeida’s perspective). Therefore, if consent is validly given, as Article 20 of the ARSIWA stipulates,\textsuperscript{121} the rule would not apply in the first place and no obligation exists that could be violated. Clearly, this construction might explain why a foreign military presence or even an actual use of armed force on a state’s territory would not fall


\textsuperscript{115} See also art 26 DARIO.

\textsuperscript{116} Commentary to art 26 ARSIWA (n 95) 85 [4].

\textsuperscript{117} If aggression were not to be qualified by gravity and purpose requirements, further argument would be necessary; however, even in such a case the ILC might cling to its view that action in self-defence ‘is not, even potentially, in breach of Article 2, paragraph 4’. Commentary to art 21 ARSIWA (n 48) 74 [1].

\textsuperscript{118} Commentary to art 26 ARSIWA (n 95) 85 [6].

\textsuperscript{119} ibid; see also Commentary to art 20 ARSIWA (n 79) 73–74 [9].

\textsuperscript{120} See James Crawford, ‘Second Report on State Responsibility’ (1999) 2(1) Yearbook of the International Law Commission 3, 63 [240(b)]; Affef Ben Mansour, ‘Circumstances Precluding Wrongfulness in the ILC Articles on State Responsibility: Consent’ in James Crawford, Alain Pellet, and Simon Olleson (eds), The Law of International Responsibility (OUP 2010) 439, 447, claiming that the practice related to consent suggests that the prohibition of the use of armed force is not peremptory in character; and Spiermann (n 4) 535. In Armed Activities (Congo v Uganda) (n 2) 196–97 [45–47], the Court found that consent had been given, but did not specifically examine its validity.

\textsuperscript{121} As Vaughan Lowe, ‘Precluding Wrongfulness or Responsibility: A Plea for Excuses’ (1999) 10 European Journal of International Law 405, 407 observes: ‘In a legal system based on consent, the binding force of a rule may be removed by the consent of the states concerned.’
foul of the peremptory prohibition. However, as Lowe has pointed out, this is based on the assumption that the law is a bilateral affair ‘of concern only to the state that is the actor, and the state that is, as it were, acted upon—the “victim” state’\textsuperscript{122} As such, this construction could certainly not apply to peremptory norms which are human rights based—such as the prohibitions of genocide, slavery, racial discrimination, and torture—since these rules do not generally operate in the bilateral relations of states (even if at times foreign nationals may be affected, eventually allowing for the exercise of the right of diplomatic protection).

Although the commentary of the ILC to Article 20 affirms that consent may be given in advance,\textsuperscript{123} issues arise with respect to intervention clauses in treaties.\textsuperscript{124} Although the claim has been made that provisions establishing powers of armed intervention for international organizations do not contravene Article 26 of the ARSIWA and would not result in a ‘coercive use of force’,\textsuperscript{125} this view has its difficulties. When consent is not provided in concrete circumstances, an armed intervention against a state might be resorted to without the agreement of its current government.\textsuperscript{126} Indeed, the underlying purpose and main interpretative element of the prohibition of Article 2(4) of the Charter, through its reference to the purposes of the United Nations, concern the maintenance of international peace and security; the use of armed force without the contemporary assent of a state’s government will invite (armed) opposition or even armed conflict and jeopardizes the achievement of this purpose.

A third explanation could be that when a state consents to the stationing of foreign troops in its territory, and in their use of force, this simply does not amount to a ‘breach’ of obligation under the prohibition of Article 2(4) of the Charter to begin with. Thus, as a use of force consented to by a state would neither be against the territorial integrity or political independence of that state, nor inconsistent with the UN’s purposes, it would not be, in the words of Article 12 of the ARSIWA, ‘not in conformity with what is required’ by the obligation concerned.\textsuperscript{127} Whether this argument pertains under customary international law may be open to doubt.

Before coming to a conclusion, it is to be noted that the circumstances precluding wrongfulness accepted under customary international law are general exceptions in that the preclusion of wrongfulness may, in principle, relate to any kind of conduct taking place in varied situations. This is different only for self-defence, which constitutes a specific exception, since that circumstance can only be invoked in response to qualified violations of the prohibition of the use of force and precludes the wrongfulness primarily of the use of armed force (rather than any other type of conduct).\textsuperscript{128}

The distinction between general and specific exceptions is relevant because of the requirement stipulated in Article 53 of the VCLT that peremptory norms may be modified only by a

\textsuperscript{122} ibid.
\textsuperscript{123} Commentary to art 20 ARSIWA (n 79) 73 [3].
\textsuperscript{125} Ademola Abass, ‘Consent Precluding International Responsibility: A Critical Analysis’ (2004) 53 The International and Comparative Law Quarterly 211, 223–24, claiming that a consensual use of force cannot pursue aggressive purposes (at 224) and that not every obligation under art 2(4) of the Charter is peremptory (at 225). See also Helmersen (n 4) 180–82, highlighting a distinction in this respect between permanent and ad hoc consent.
\textsuperscript{126} In this sense see Corten(n 4) 254–55. For an example see e.g. Antenor Hallo de Wolf, ‘Rattling Sabers to Save Democracy in The Gambia’ EJILTalk! (1 February 2017) https://www.ejiltalk.org/rattling-sabers-to-save-democracy-in-the-gambia/.
\textsuperscript{127} See de Hoogh, ‘The “Armed Activities” Case’ (n 35) 47–48.
\textsuperscript{128} The distinction between general and specific exceptions was suggested earlier by this author. See de Hoogh ‘Jus Cogens and the Use of Armed Force’ (n 4) 1165–70.
norm having the same character.\(^{129}\) As none of the circumstances precluding wrongfulness, with the possible exception of self-defence, has the status of *jus cogens*,\(^ {130}\) this may provide some explanation as to why the ILC introduced Article 26 of the ARSIWA in the first place. Modification of a peremptory norm would appear to be at hand especially if a new exception were to limit the applicability of a *jus cogens* rule or if a new justification or excuse to such a rule were to be accepted. However, it is hard to see in what manner legal rights or faculties, such as those entailed by the circumstances precluding wrongfulness, would obtain the status of *jus cogens*.\(^ {131}\) As the main attribute of a peremptory norm is its non-derogability, this sits uneasily with the generally optional character of invoking and/or exercising rights or faculties.

This section has found that generally accepted circumstances precluding wrongfulness may not be invoked when the conduct concerned amounts to a breach of obligation under a peremptory norm, and that it is a characteristic of norms of *jus cogens* that they do not admit of justification. This finding is predicated upon the premise that *jus cogens* status is reserved to the prohibition of aggression, rather than the prohibition of the use of force, since its breach presupposes a level of gravity and malevolent purpose. Other, human rights based, peremptory norms similarly do not admit of justification.

### 5 Epilogue: Back to Derogation

Most rules of international law are in the nature of *jus dispositivum*, meaning that they may be displaced by states acting in their relations inter se.\(^ {132}\) As recounted above (section 1), the possibility of derogating from existing rules of international law is often described as the option of contracting out from those rules. At times, the foundation for this option is said to be the maxim *lex specialis derogat legi generali*,\(^ {133}\) although improperly so since the choice of states to replace a rule will regularly not be motivated by having tailor-made, special rules for their particular situation. Instead, they may rather prefer to have a radically different rule or perhaps have no rule at all.\(^ {134}\)

To an extent this ties up with certain remarks by the ILC in its commentary on the provision that became Article 53, that peremptory norms block derogation 'even by agreement between particular States'.\(^ {135}\) Moreover, the Commission also considered that modification of a peremptory norm would most likely take place by 'general multilateral convention', subject to the condition that such a change could only take place by a later norm having peremptory character.\(^ {136}\) In the opinion of the Commission, such a general multilateral convention


\(^{130}\) This may be verified also by reference to the Articles on the Responsibility of States, since arts 23(2)(b), 25(2)(a), and 50 envisage the possibility of excluding the invocability of certain circumstances. On self-defence as *jus cogens* see n 49 above.

\(^{131}\) See Paddeu, ‘Clarifying the Concept of Circumstances Precluding Wrongfulness (Justifications) in International Law’, ch 11 in this volume, 206, who considers circumstances precluding wrongfulness to constitute ‘permissions of the legal order’.


\(^{133}\) See Report of the Study Group of the International Law Commission, ‘Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law’ A/CN.4/L.682 (13 April 2006) 44–46 [78]–[83]; Nicaragua (n 2) 137 [274]; and North Sea Continental Shelf (Federal Republic of Germany v Denmark; Federal Republic of Germany v Netherlands) (n 2) [72].

\(^{134}\) See de Hoogh, ‘Regionalism and the Unity of International Law from a Positivist Perspective’ (n 20) 58–9.

\(^{135}\) Commentary to art 50 (renumbered 53) (n 12) 248 [2 and 4].

\(^{136}\) ibid 248 [4].
would ‘fall outside the scope of the article’ (on \textit{jus cogens}).\textsuperscript{137} This then may be taken to support Helmersen’s claim that exceptions operate as between all parties rather than between only some of them.\textsuperscript{138} However, how is one to determine that a rule constitutes an exception, operating between all, rather than a prohibited derogation?

In order to justify the admissibility of exceptions to peremptory norms, perhaps something else, some kind of addition, needs to be read into the concept of derogation as embodied in Article 53 of the VCLT. Conceivably, an additional criterion might come to the rescue, namely whether the purported exception relates to an existing state of affairs, and hence would constitute a \textit{mala fide} contracting out rather than instituting a new exception intended for future use and unrelated, as of yet, to any concrete circumstances. The point, then, would not be plain and simple that peremptory norms impose a restriction on the legal capacity of states to substitute an existing rule by a new one limited to a particular circle of states. Instead, rules of \textit{jus cogens} would (only) bar states from legalizing conduct that would otherwise constitute an actual or intended violation of international law under a pre-existing rule of customary international law.

Of course, the Vienna Convention envisages this as a matter of (attempt at) derogation in treaty form, and specifies that the ensuing legal consequence—the treaty will be, or becomes, void—only occurs when a ‘conflict’ exists between the treaty and the peremptory norm concerned.\textsuperscript{139} This feature then, that derogation encompasses not merely the displacement of a rule but also an attempted legalization of concrete conduct, may further explain, a fortiori, the limitation imposed in Article 26 of the ARSIWA that the wrongfulness of conduct will not be precluded if it is not in compliance with an obligation under a peremptory norm. The ILC’s commentary to an extent provides evidence of this when it clarifies that circumstances precluding wrongfulness ‘do not authorize or excuse derogations from a peremptory norm’.\textsuperscript{140} This suggests that, ordinarily, a circumstance precluding wrongfulness as an exception generally available to justify or excuse otherwise wrongful conduct would constitute a ‘derogation’ from a peremptory norm. As such, an exception generally available to states could only truly escape a charge of derogation if, as in Helmersen’s construction, it were to limit the scope of applicability of the peremptory prohibition and the conduct covered under that exception would therefore fall outside that scope. Existing specific exceptions to the prohibition of the use of force, such as the right of self-defence and military action authorized by the Security Council, seem to avoid qualification as derogation.

New specific exceptions, whether to the prohibition of the use of force or other peremptory prohibitions, face difficult hurdles. First, under customary international law, states would have to act in violation of the peremptory prohibition concerned in order to generate

\begin{itemize}
\item \textsuperscript{137} ibid. Tladi, ‘First Report’ (n 3) 28 [55], takes this observation regarding multilateral treaties to indicate that multilateral treaties are excluded as a basis for \textit{jus cogens} rules, since those must be norms of ‘general international law’. An alternative reading here could be that such a multilateral treaty, intent upon modifying an existing \textit{jus cogens} norm, would not fall foul of that norm. As such, the new multilateral treaty would not fall within the scope of the article, as ordinarily it would have to conflict with an existing peremptory norm.
\item \textsuperscript{138} Helmersen (n 4) 175–76, but note that he also observes that ‘… derogations are specific acts or rules that diverge from and supplant the content of a more general rule. This is done by treaty or by consent.’ See further Kleinlein (n 110) 191–93.
\item \textsuperscript{140} Commentary to art 26 ARSIWA (n 95) 85 [4].
\end{itemize}
state practice forming the nucleus of a possible new exception. For rules in the nature of *jus dispositivum* this is a process that is perfectly possible, for as the Court observed in *Nicaragua* ‘reliance on a novel right or unprecedented exception to the principle’ of non-intervention could lead to a change in customary international law ‘if shared in principle by other States’. However, such examples of state practice would violate existing rules and one should probably expect an overall negative response by other states when peremptory prohibitions are at stake.

Secondly, since exceptions may be regarded as derogations, this would entail that the exception must have *jus cogens* status in view of the requirement stipulated in Article 53 of the VCLT that a peremptory norm may only be modified by another norm having the same character. This is, as recounted above, a rather difficult legal construction, considering that exceptions tend to offer rights or faculties to engage in certain conduct and it remains unclear how such a right or faculty would constitute compelling law or not admit of derogation.

Even though at times the right of self-defence is considered to also constitute a *jus cogens* rule in order to account for a possible derogation from the prohibition of the use of force, other legal constructions appear more convincing, such as considering the peremptory prohibition to relate to aggression rather than the use of force generally. This then leaves, as the ILC suggested, possible modification by introducing an exception to a peremptory norm by way of general multilateral convention; of course, in such a case, the grant of *jus cogens* status for a new exception to an existing peremptory norm would have to be in explicit terms.

### 5.1 Concluding observations

The current contribution has explored the extent to which peremptory norms may be subjected to exceptions, considering that Article 53 of the VCLT stipulates that peremptory norms do not permit of derogation. Prime among the discussion has been the prohibition of the use of force in international relations, since that prohibition admits certain accepted exceptions—in particular, self-defence, Security Council authorization, and consent. Different legal constructions may be entertained to explain the exceptions of the right of

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141 *Nicaragua* (n 2) 108–109 [207]. The Court also observed, 98 [186], that ‘[i]f a State acts in a way prima facie incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State’s conduct is in fact justifiable on that basis, the significance of that attitude is to confirm rather than to weaken the rule.’

142 Compare the observation by Orakhelashvili, *Changing Jus Cogens through State Practice* (n 4) 174–75, that ‘[c]laims in favour of extra-Charter exceptions have always been incoherent to constitute valid state practice for purposes of custom-creation, and has fallen short of commanding he support of states to produce an amending peremptory norm under Article 53 VCLT. All this practice has been fragmented and not general, or inconsistent in relation to the same state, same incident, or as between multiple states; or it has consolidated within a group of states but has been rebutted by the rest of the community of states.’ See also Linderfalk, ‘The Effect of *Jus Cogens* Norms’ (n 4) 862–63 and 864–67; and Cezary Mik, ‘*Jus Cogens* in Contemporary International Law’ (2013) 33 *Polish Yearbook of International Law* 27, 42–45.

143 Kleinlein (n 110) 192, pertinently observes in this respect (footnotes omitted): ‘In order to establish a genuine conflict and a substantial hierarchy between *jus cogens* and state immunity, a peremptory norm would need to create a positive obligation, for instance, to put torturers on trial or to compensate torture victims. However, this would need to be demonstrated. It should not be taken for granted that *jus cogens* demands ‘affirmative action’. Even if positive obligations to enforce the prohibition existed, it could be questioned whether they share the peremptory status. Rather, the peremptory character may be limited to the so-called negative obligations of states.’ See also Cathryn Costello and Michelle Foster, *Non-Refoulement as Custom and *Jus Cogens*? Putting the Prohibition to the Test* (2015) 46 *Netherlands Yearbook of International Law* 273, 322–23.

144 Orakhelashvili, *Changing Jus Cogens through State Practice* (n 4) 165. See further discussion by Green, ‘Questioning the Peremptory Status of the Prohibition of the Use of Force’ (n 4) 229–36.
self-defence, recourse to force pursuant to an authorization by the Security Council or pursuant to consent of the territorial state in terms of their compatibility with the peremptory prohibition of the use of force.

One particular legal construction is to see exceptions as limiting the scope of applicability of the general rule, which would therefore mean that conduct covered by an exception is consequently removed from that scope and for that reason does not constitute derogation from an existing peremptory norm. Although the construction is logically coherent, an interpretation and analysis of positive international law regarding the regulation of the use of armed force does not (fully) support it. As such, it does not provide an adequate explanation as to the legal admissibility of exceptions to peremptory prohibitions.

Alternatively, the exceptions to the prohibitions of the use of force could be explained by instead considering only part of that prohibition to have obtained *jus cogens* status. In this respect, it has been noted that although ILC in its commentary on the law of treaties referred to the prohibition of the use of force, later on in its commentaries on the law of responsibility it has consistently referenced the prohibition of aggression. Thus, if aggression were to be seen and interpreted more narrowly than the use of armed force generally, for instance by imposing gravity and purpose requirements, this could be taken to support the proposition that *jus cogens* prohibitions are absolute in character and do not permit of exceptions. Existing exceptions would then be considered not to fall foul of the peremptory prohibition, since conduct covered by such exceptions could not be qualified as aggression.

Setting aside the problematic of self-defence, other circumstances precluding wrongfulness are considered as exceptions generally available in relation to conduct that would otherwise have to be qualified as internationally wrongful. The ILC has specified in Article 26 of the ARSIWA that such circumstances do not preclude the wrongfulness of conduct that is not in conformity with a peremptory norm. Its commentary to that provision suggests that invoking a circumstance precluding wrongfulness in relation to conduct covered by a *jus cogens* rule does amount to derogation (excepting consent in relation to the prohibition of the use of force).

A final, viable legal construction could be to interpret the word derogation restrictively, not merely to bar displacement between particular states of a peremptory norm by another rule. Instead, derogation would occur only if this substitution were to result from a desire and intention to legalize unlawful conduct already underway or contemplated for the near future. However, introducing new exceptions to peremptory norms through the process of customary international law will come up against two important hurdles. First, states would have to engage in practice in violation of the peremptory prohibition concerned and such practice is unlikely to meet with favourable responses from other states. Secondly, a new exception, as a modification of an existing peremptory norm, would have to be accorded *jus cogens* status itself. To overcome such formidable hurdles, one would almost inevitably have to have recourse, as the ILC suggested, to the process of drafting a multilateral treaty open to all states. A tall order indeed, both politically and legally.