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Jus Cogens in Contemporary International Law: A Constrained Teleological Defence

Taha Poostindooz

dr.taha.poostindooz@gmail.com

Dar Alhekma

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Jus Cogens in Contemporary International Law: A Constrained Teleological Defence

Abstract

This article offers a focused and critical defence of the concept of jus cogens in contemporary international law. It advances the argument that the persistent difficulties surrounding the identification and operation of peremptory norms under Article 53 of the Vienna Convention on the Law of Treaties (VCLT) arise not from the incoherence of jus cogens itself, but from an overly restrictive, consent-centred methodology employed in its interpretation. The article advances a teleological and value-oriented interpretative framework, drawing on the purposes and principles of the United Nations Charter, international human rights law, and the jurisprudence of international courts and tribunals. While acknowledging the critiques advanced by positivist and critical scholars—notably Martti Koskenniemi, Monica Hakimi, and Leandro Dias—the article contends that a carefully constrained form of teleological reasoning provides a coherent explanation of judicial practice and the normative role of jus cogens. Drawing extensively on the International Law Commission's 2006 Report on Fragmentation of International Law (A/CN.4/L.702) and the 2022 Draft Conclusions on Peremptory Norms—which deliberately refrained from providing an exhaustive list of jus cogens norms—the article confronts the unresolved tensions in this approach: the hermeneutic circle between consent and peremptory status, the risk of jus cogens becoming a rhetorical device in political struggles, the selectivity and inconsistency in judicial practice shaped by geopolitical considerations, the absence of robust institutional safeguards, the internal fragmentation of peremptory norms themselves, and the elusiveness of what "constrained" interpretation truly means. The article's central contribution is twofold: first, to demonstrate that the ILC's deliberate decision not to compile an exhaustive list of jus cogens norms (Draft Conclusion 23 and its non-exhaustive annex) is not a weakness but a methodological feature that preserves the concept's adaptability and systemic coherence; and second, to articulate a constrained teleological approach that draws upon and synthesizes the insights of leading scholars in the field, including Alexander Orakhelashvili, Robert Kolb, Ulf Linderfalk, Thomas Weatherall, and Dire Tladi. Rather than proposing legislative reform, the article situates jus cogens within broader debates on the methodology and philosophy of international law and defends its continuing relevance while insisting on methodological transparency and self-critique.

Keywords: *Jus cogens · Peremptory norms · Teleological interpretation · International Law Commission · Fragmentation of international law · State consent · Non-exhaustive list*

1. Introduction

The doctrine of jus cogens has long been regarded as one of the most ambitious and controversial concepts in international law. By positing the existence of peremptory norms from which no derogation is permitted, it challenges the traditional conception of international law as a system founded exclusively on State consent. Codified in Article 53 of the Vienna Convention on the Law of Treaties (VCLT), jus cogens purports to give legal expression to the fundamental values of the international community as a whole.[1] Despite over five decades since its formal recognition, the concept remains the subject of intense scholarly and judicial debate.

A significant development occurred in 2022 when the International Law Commission (ILC), in its Draft Conclusions on Peremptory Norms of General International Law (Jus Cogens), provided a non-exhaustive list (Annex) of eight norms recognised as having peremptory status: the prohibition of aggression, slavery, torture, genocide, racial discrimination, crimes against humanity, the right to self-determination, and fundamental rules of international humanitarian law.[2] Crucially, the ILC deliberately refrained from compiling an exhaustive or closed list, acknowledging that the identification of peremptory norms remains an ongoing process shaped by State practice, judicial interpretation, and the evolving conscience of the international community.[3]

Methodologically, this article adopts a doctrinal and interpretative approach, supplemented by jurisprudential analysis. Its objective is neither to empirically measure State consent nor to prescribe new legal rules, but to explain how jus cogens functions within existing legal practice. The research design follows from the question itself: if courts and legal institutions invoke peremptory norms without relying on demonstrable empirical consensus, an interpretative approach is required to account for that practice. Methodological pluralism is widely recognized in international legal scholarship; different questions require different methods. Transparency about methodological limits is essential: the approach here does not claim to

[1] Vienna Convention on the Law of Treaties (opened for signature 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331, art 53.
[2] ILC, 'Draft Conclusions on Peremptory Norms of General International Law (Jus Cogens)' (2022) UN Doc A/77/10, Annex.
[3] ibid.

resolve all controversies about jus cogens, but to provide a coherent interpretative account of its operation in judicial reasoning while acknowledging its vulnerabilities.

The article's central contribution is to demonstrate that the ILC's non-exhaustive list is not a weakness but a methodological feature that preserves the concept's adaptability and systemic coherence—a point that, while implicit in the works of Orakhelashvili, Kolb, Linderfalk, Weatherall, and Tladi, has not been systematically elaborated in the literature.

This article positions itself within a well-established scholarly tradition that has sought to articulate the systemic and normative significance of jus cogens. The work of Alexander Orakhelashvili, who conceptualizes peremptory norms as the constitutional core of international law, provides a foundational reference for understanding the hierarchical function of jus cogens within the international legal order.[4] Robert Kolb's analysis of jus cogens as a "legal technique" designed to preserve the unity and integrity of the legal regime offers a complementary framework for understanding the systemic role of peremptory norms.[5] Ulf Linderfalk's examination of normative conflict, particularly his articulation of the teleological principle underlying jus cogens, provides crucial guidance for understanding how peremptory norms interact with other rules.[6] Thomas Weatherall's effort to reconcile jus cogens with the structure of international law through a social contract framework further enriches the theoretical landscape.[7] The present article builds upon these contributions while advancing a distinct argument: that the ILC's non-exhaustive list is not a weakness but a methodological feature that preserves the concept's adaptability—an insight that, while implicit in the work of these scholars, has not been fully developed in the existing literature.

The article advances a qualified defence of jus cogens grounded in a teleological and value-oriented interpretative methodology. Drawing on the purposes and principles of the UN Charter, international human rights instruments, and established judicial practice, it suggests that jus cogens is best understood as an interpretative concept that reflects the normative orientation of the international legal order, rather than as a mechanically identifiable set of rules derived from empirical consensus alone. The article's central contribution is to demonstrate

[4]Alexander Orakhelashvili, Peremptory Norms in International Law (Oxford University Press 2006) 7–10.
[5]Robert Kolb, Théorie du ius cogens international (Presses Universitaires de France 2014) 45–52.
[6]Ulf Linderfalk, 'The Effect of Jus Cogens Norms: Whoever Opened Pandora's Box, Did You Ever Think About the Consequences?' (2007) 18 European Journal of International Law 853, 855–860.
[7]Thomas Weatherall, Jus Cogens: International Law and Social Contract (Cambridge University Press 2015) 23–30.

that the ILC's deliberate decision not to compile an exhaustive list of jus cogens norms is not a weakness but a methodological feature that preserves the concept's adaptability and systemic coherence—a point that, while foreshadowed in the works of Orakhelashvili, Kolb, Linderfalk, and Weatherall, has not been systematically elaborated in the literature.

Crucially, however, this article departs from purely celebratory accounts of jus cogens. It engages systematically with four fundamental critiques that expose the vulnerabilities of the concept:

First, the "hermeneutic circle" identified by Martti Koskenniemi: we cannot access peremptory norms outside State will, yet we claim these norms limit that very will—leaving the boundary between interpretation and norm-creation fundamentally blurred.[8]

Second, Monica Hakimi's challenge that international law is less a coherent normative system than a set of "working methods", where appeals to jus cogens often function as political strategies to "upgrade" particular disputes rather than expressions of genuine community values.[9]

Third, the selectivity and inconsistency in judicial practice: as the ICJ's contrasting approaches in the Wall Advisory Opinion (2004), Jurisdictional Immunities (2012), and the 2024 Palestine Advisory Opinion reveal, courts operate under institutional constraints and geopolitical pressures that produce contradictory outcomes.[10]

Fourth, the problem of internal fragmentation: if multiple jus cogens norms conflict (e.g., self-determination v. territorial integrity), which prevails? The doctrine offers no hierarchy within peremptory norms themselves.[11]

The inadequacy of existing safeguards and the ambiguity of "constrained" teleology are addressed within the methodological framework in Section 5, where the limits of the proposed approach are examined in detail.

[8]Martti Koskenniemi, From Apology to Utopia: The Structure of International Legal Argument (Cambridge University Press 2005) 283–287.
[9]Monica Hakimi, 'The Work of International Law' (2020) 58 Harvard International Law Journal 1, 1–34.
[10]See Section 4 below.
[11]Leandro A Dias, 'La tendencia hacia un rol fortalecido de las normas de jus cogens en el derecho internacional' (2023) Revista Electrónica del Instituto de Investigaciones Jurídicas y Sociales Ambrosio Lucas Gioja 212, 215–220.

By confronting these critiques honestly, and by drawing on the International Law Commission's landmark 2006 Report on Fragmentation of International Law (A/CN.4/L.702)—which provides the most authoritative systemic analysis of how international law manages normative conflicts—the article aims to demonstrate that jus cogens remains defensible not despite its vulnerabilities, but only through sustained methodological self-critique and transparency about its limits. As the ILC Report emphasizes, international law is a legal system, not a random collection of norms, and its rules and principles should be interpreted against the background of other rules and principles.[12] This systemic character provides both the foundation for jus cogens and the framework for managing its internal tensions.

The structure reflects this dual objective. Section 2 examines the conceptual origins and methodological limits of Article 53 VCLT, introducing the hermeneutic circle critique. Section 3 situates jus cogens between State consent and community interests, engaging with Hakimi's challenge and the ILC's analysis of systemic integration. Section 4 analyses international judicial practice to illustrate both teleological reasoning and its contradictions, including the influence of geopolitical considerations. Section 5 sets out the methodological framework, its safeguards, and their inadequacies, while addressing internal fragmentation through the ILC's framework for managing normative conflicts. Section 6 examines the significance of the ILC's 2022 non-exhaustive list and its implications for the future development of jus cogens. Section 7 situates the article's contribution within the broader scholarly tradition, engaging with the works of Orakhelashvili, Kolb, Linderfalk, and Weatherall. The conclusion offers a reframing of jus cogens in light of the vulnerabilities identified.

2. The Conceptual Origins and Limits of Article 53 VCLT

The codification of jus cogens in Article 53 of the Vienna Convention on the Law of Treaties represents one of the most significant—and cautious—attempts to reconcile universal normative aspirations with a fundamentally consent-based international legal order. Article 53 defines a peremptory norm of general international law as a norm "accepted and recognized by the international community of States as a whole as a norm from which no derogation is

[12]ILC, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law' (2006) UN Doc A/CN.4/L.702, Conclusion 1.

permitted".[13] This definition reflects not conceptual clarity but a careful compromise between universality and State sovereignty.[14]

The travaux préparatoires of the VCLT reveal that jus cogens was among the most controversial issues addressed during drafting. While the idea of non-derogable norms had long been present in international legal thought, many States expressed concern that an unqualified recognition of peremptory norms could undermine legal certainty and State sovereignty.[15] The International Law Commission deliberately framed Article 53 in a manner that anchored the identification of jus cogens in collective State acceptance, rather than in substantive moral criteria.[16]

This drafting choice was shaped by methodological caution rather than theoretical conviction. Members of the Commission repeatedly emphasized the absence of an agreed list of peremptory norms and the political sensitivity of recognizing limits on treaty freedom.[17] The reference to acceptance and recognition by States "as a whole" was intended to mitigate fears of unilateral invocation and judicial overreach. Yet this solution introduced structural ambiguity: norms defined by their resistance to consent were made dependent on consent for their identification.[18]

This ambiguity is not merely technical but foundational. As Martti Koskenniemi argues, international legal argument oscillates between "apology" (conceding to State will) and "utopia" (imposing external moral standards).[19] Jus cogens embodies this oscillation perfectly: it claims to constrain State consent, yet its very existence depends on that consent. This produces what Koskenniemi terms a "hermeneutic circle"—we cannot step outside State practice to identify peremptory norms, but if we remain within State practice, we cannot explain why those norms should bind States that have not accepted them.[20]

Alexander Orakhelashvili offers a powerful counter to this sceptical reading. In his seminal work, he argues that jus cogens is not merely a category of norms but the constitutional core

[13]VCLT (n 1) art 53.
[14]Orakhelashvili (n 4) 57–64.
[15]ILC, 'Report on the Work of Its Eighth Session' (1956) UN Doc A/CN.4/91.
[16]Robert Cryer and others, 'International Criminal Law vs State Sovereignty' in Malcolm Evans (ed), International Law (5th edn, Oxford University Press 2018) 34–39.
[17]Ian Brownlie, Principles of Public International Law (9th edn, Oxford University Press 2019) 618–623.
[18]Orakhelashvili (n 4) 57–64.
[19]Koskenniemi (n 8) 283–287.
[20]ibid.

of international law, embodying the foundational values that give coherence to the entire legal system.[21] For Orakhelashvili, the peremptory character of certain norms is not contingent upon their recognition by States at any given moment; rather, their content is derived from the very structure and purpose of the international legal order. He contends that the international community possesses a normative identity that is reflected in the hierarchical structure of international law, with jus cogens norms occupying the apex.[22] This perspective offers a way out of the hermeneutic circle: instead of attempting to escape State practice, Orakhelashvili argues that we should recognize the independent normative force of peremptory norms as a constitutive element of international law itself.

From a methodological perspective, Article 53 does not specify how acceptance and recognition are to be assessed, nor whether such acceptance must be explicit, universal, or contemporaneous.[23] Subsequent practice has not resolved these ambiguities. Instead, the consent-based language of Article 53 has coexisted uneasily with judicial and doctrinal reasoning that treats certain norms—such as the prohibition of genocide, slavery, torture, and aggression—as peremptory irrespective of demonstrable State consensus.[24]

The International Law Commission's 2022 Draft Conclusions on jus cogens reaffirmed, rather than resolved, this tension. While acknowledging the existence of peremptory norms and identifying widely recognized examples, the Commission retained the conceptual framework of Article 53 and rejected the creation of a closed list.[25] Crucially, the Commission emphasized that for a norm to attain peremptory status, it requires not merely State practice but a "special" or "enhanced" opinio juris—a recognition by States that the norm is not merely binding but non-derogable.[26]

The ILC's 2006 Fragmentation Report provides essential context for understanding this methodological challenge. It affirms that "international law is a legal system" whose rules and principles "act in relation to and should be interpreted against the background of other rules

[21]Orakhelashvili (n 4) 7–10.
[22]ibid 46–48.
[23]Shelton, 'Normative Hierarchy in International Law' (2006) 100 American Journal of International Law 291, 298–302.
[24]ibid 291–320; Antonio Cassese, International Law (2nd edn, Oxford University Press 2005) 123–125.
[25]ILC Draft Conclusions (n 2).
[26]ibid Conclusion 7.

and principles."[27] This systemic character means that jus cogens cannot be understood in isolation; it operates within a complex web of normative relationships.

3. Jus Cogens Between State Consent and Community Interests

The conceptual difficulty of jus cogens becomes most apparent when situated between two competing logics of international law: State consent and the protection of community interests. Traditional positivist accounts emphasize consent as the foundation of legal obligation, portraying international law as a horizontal system derived from the voluntary will of sovereign States.[28] Within this framework, norms that bind States irrespective of consent appear anomalous, if not contradictory.

The emergence of jus cogens reflects a broader evolution in international law, in which certain interests are no longer treated as purely reciprocal or bilateral. Rather, they are framed as concerns of the international community as a whole. The concept of obligations erga omnes, first articulated in judicial practice, exemplifies this shift.[29] Such obligations are owed not to individual States, but to the international community, and their breach is considered a matter of collective concern.[30]

Jus cogens occupies a distinct position within this landscape. While obligations erga omnes describe the scope of responsibility, jus cogens addresses the hierarchical status of norms. Peremptory norms do not merely generate obligations owed to all; they invalidate conflicting legal acts and constrain the permissible scope of State consent. This hierarchical function cannot be fully explained through a purely voluntarist account of international law. Consent may explain how States accept obligations, but it cannot justify why certain norms are immune from derogation once accepted.[31]

Robert Kolb's analysis provides a crucial contribution to this debate. He conceptualizes jus cogens not merely as a category of norms but as a "legal technique" (une technique juridique) designed to preserve the unity and integrity of the international legal regime.[32] For Kolb, the

[27]ILC Fragmentation Report (n 12) Conclusion 1.
[28]Malcolm Shaw, International Law (8th edn, Cambridge University Press 2017) 112–118.
[29]Barcelona Traction, Light and Power Company, Limited (Belgium v Spain) (Second Phase) [1970] ICJ Rep 3, paras 33–34.
[30]Orakhelashvili (n 4) 61–63.
[31]Shelton (n 23) 298–302; Cassese (n 24) 123.
[32]Robert Kolb, Peremptory International Law – Jus Cogens: A General Inventory (Hart Publishing 2015) 12–18.

primary function of jus cogens is systemic: it serves as a safeguard against the fragmentation of international law by ensuring that the fundamental values of the international community are not undermined by the proliferation of specialized regimes.[33] This functional perspective aligns closely with the teleological approach advanced in this article: the identification of jus cogens norms is not an end in itself but a means of maintaining the coherence of the international legal order. Kolb's framework provides a bridge between the consent-based language of Article 53 and the systemic imperatives that justify the peremptory character of certain norms.

Thomas Weatherall offers another valuable perspective. In his attempt to reconcile jus cogens with the structure of international law, Weatherall draws upon the idea of a "social contract" to explain how fundamental values can bind States even in the absence of explicit consent.[34] He argues that jus cogens norms embody the conditions of possibility for a stable international legal order: they are the pre-conditions for meaningful State participation in the legal system, much as the rules of a social contract are the pre-conditions for cooperative social life.[35] This framework suggests that the binding force of jus cogens does not derive from consent alone but from the very logic of a legal system that presupposes certain minimum commitments. Weatherall's approach thus provides a conceptual foundation for the constrained teleological defence advanced here: peremptory norms are not imposed from above but are internal to the logic of international law itself.

The ILC Fragmentation Report provides crucial clarification of the relationship between jus cogens and obligations erga omnes. It states:

> *"It is recognized that while all obligations established by jus cogens norms ... also have the character of erga omnes obligations, the reverse is not true. Not all erga omnes obligations are established by peremptory norms of general international law. This is the case, for example, of certain obligations under 'the principles and rules concerning the basic rights of the human person,' as well as of some obligations relating to the global commons."*[36]

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[33] ibid 45–52.

[34] Thomas Weatherall, Jus Cogens: International Law and Social Contract (Cambridge University Press 2015) 23–30.

[35] ibid 78–85.

[36] ILC Fragmentation Report (n 12) Conclusion 38.

This distinction is methodologically significant. It means that the special status of jus cogens—its non-derogability—cannot be inferred simply from the universal scope of an obligation. Additional criteria (the "enhanced" opinio juris mentioned in the 2022 Draft Conclusions) are required to establish peremptory character. The ILC thus reinforces that jus cogens occupies a distinct normative category, not reducible to erga omnes effects.

However, this community-oriented account faces a powerful challenge from Monica Hakimi. She argues that international law is not a coherent normative system but rather a set of "working methods"—practices through which various actors (states, courts, tribunals, NGOs, scholars) continuously negotiate and contest the meaning and application of legal rules.[37] From this perspective, appeals to jus cogens are not expressions of pre-existing community values but strategic moves in ongoing political and legal struggles. They function to "upgrade" particular disputes, elevating them from ordinary legal controversies to matters of fundamental community concern.[38]

The 2024 ICJ Advisory Opinion on the Legality of Israel's Occupation of Palestinian Territories illustrates this dynamic. For the first time, the Court explicitly recognized the right to self-determination as a jus cogens norm.[39] Yet the Court provided no methodological explanation for how it reached this conclusion. The reasoning on this point was "strikingly thin," consisting of little more than a citation to prior cases that had not themselves explicitly affirmed self-determination's peremptory status.[40] Judge Tladi, while welcoming the recognition, warned that without elaboration on the nature and content of jus cogens, the observation risked being merely obiter.[41] The question arises: was this recognition an expression of genuine community consensus, or a strategic move by the Court to enhance the normative weight of its conclusions in a highly politicized context?

4. Judicial Practice and Teleological Reasoning: Consistency, Selectivity, and Geopolitics

[37]Hakimi (n 9) 1–34.
[38]ibid.
[39]Legal Consequences arising from the Policies and Practices of Israel in the Occupied Palestinian Territory, including East Jerusalem (Advisory Opinion) [2024] ICJ Rep, para 233.
[40]Marko Milanovic, 'The ICJ's Palestine Advisory Opinion: Self-Determination as Jus Cogens' (Opinio Juris, 23 July 2024) accessed 21 February 2026.
[41]Palestine Advisory Opinion (n 39) Separate Opinion of Judge Tladi, paras 36–41.

International judicial practice provides critical insight into the operation of jus cogens. Courts rarely theorize peremptory norms abstractly; their reasoning patterns reveal how jus cogens functions in context. The ICJ demonstrates consistent reliance on considerations that extend beyond strict consent-based methodology.[42]

The Barcelona Traction case distinguished obligations owed to individual States from those owed to the international community (erga omnes). While jus cogens was not explicitly invoked, this reasoning laid the groundwork for a normative hierarchy.[43] Subsequent cases, such as the Wall Advisory Opinion and the Chagos Advisory Opinion, treat self-determination as a fundamental norm constraining State conduct irrespective of consent.[44]

However, a closer examination reveals significant inconsistencies that cannot be explained by doctrinal development alone—they reflect the institutional constraints and geopolitical pressures under which international courts operate.

Consider three contrasting moments in ICJ jurisprudence:

In the Wall Advisory Opinion (2004), the Court readily invoked humanitarian law principles and the right to self-determination without extensive methodological justification for their peremptory status.[45] The geopolitical context—broad international consensus against the occupation—facilitated this approach.

In Jurisdictional Immunities of the State (2012), by contrast, the Court firmly rejected the argument that jus cogens violations (alleged war crimes and crimes against humanity) could override State immunity. It held that "the rules of State immunity are procedural in character and are confined to determining whether or not the courts of one State may exercise jurisdiction in respect of another State. They do not bear upon the question whether or not the conduct in respect of which the proceedings are brought was lawful."[46] This formal distinction between substance and procedure effectively insulated State immunity from jus cogens challenges, despite the peremptory status of the norms allegedly violated.

[42]Barcelona Traction (n 29); Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion) [2004] ICJ Rep 136.
[43]Barcelona Traction (n 29) para 33.
[44]Wall Advisory Opinion (n 42) para 157; Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (Advisory Opinion) [2019] ICJ Rep 95, para 100.
[45]Wall Advisory Opinion (n 42) para 157.
[46]Jurisdictional Immunities of the State (Germany v Italy: Greece intervening) [2012] ICJ Rep 99, para 93.

Most strikingly, in Armed Activities on the Territory of the Congo (DRC v Rwanda) (2006), the Court declared: "the mere fact that rights and obligations erga omnes or peremptory norms of general international law (jus cogens) are at issue in a dispute cannot in itself constitute an exception to the principle that its jurisdiction always depends on the consent of the parties."[47] Judge ad hoc Dugard dissented vigorously, arguing that this approach prioritized State consent over the realization of justice.[48]

These cases reveal a pattern of "selectivity" in judicial practice. The ICJ invokes jus cogens expansively when addressing obligations of general application (self-determination, humanitarian law) but retreats to formalism when peremptory norms threaten core State interests (immunity, jurisdiction). This selectivity cannot be dismissed as mere doctrinal inconsistency—it reflects the Court's institutional position and its sensitivity to State reactions.

A concrete example illustrates how a constrained teleological approach might have produced a different outcome. In Jurisdictional Immunities (2012), the Court's formalistic distinction between substance and procedure effectively immunized serious violations of peremptory norms (war crimes and crimes against humanity) from judicial scrutiny. A constrained teleological approach, grounded in the systemic integration principle of the ILC Fragmentation Report, would have required the Court to interpret the rules of State immunity in light of the object and purpose of the international legal system as a whole—including the peremptory character of the norms allegedly violated. The principle of harmonization (that "when several norms bear on a single issue they should, to the extent possible, be interpreted so as to give rise to a single set of compatible obligations")[49] would have militated against a rigid separation of substance and procedure. The Court could have acknowledged that while State immunity retains its procedural function, its application must be informed by the normative hierarchy of the international legal system—not as a matter of overriding immunity, but as a factor in determining the scope and limits of immunity in cases involving jus cogens violations. This is precisely the kind of reasoned, value-conscious balancing that Orakhelashvili describes as the proper function of peremptory norms in a constitutionalized international legal order.[50]

[47] Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v Rwanda) (Jurisdiction and Admissibility) [2006] ICJ Rep 6, para 64.
[48] ibid, Dissenting Opinion of Judge ad hoc Dugard.
[49] ILC Fragmentation Report (n 12) Conclusion 4.
[50] Orakhelashvili (n 4) 63.

5. Methodology: Between Positivism and Teleology

5.1 Methodological Choice and Research Design

This article adopts a doctrinal and interpretative methodology, supplemented by jurisprudential analysis. Its objective is neither to empirically measure State consent nor to prescribe new legal rules, but to explain how jus cogens functions within existing legal practice. The research design follows from the question itself: if courts and legal institutions invoke peremptory norms without relying on demonstrable empirical consensus, an interpretative approach is required to account for that practice.[51] Methodological pluralism is widely recognized in international legal scholarship. Different questions require different methods, and no single approach has universal explanatory power.[52] Transparency about methodological limits is essential: the approach here does not claim to resolve all controversies about jus cogens, but to provide a coherent interpretative account of its operation in judicial reasoning while acknowledging its vulnerabilities.[53]

In practical terms, the doctrinal method proceeds in three stages. First, the article surveys the primary legal materials—Article 53 and Article 64 VCLT, the travaux préparatoires, and the ILC's 1956, 2006, and 2022 outputs—to establish the formal boundaries within which jus cogens operates. Second, it examines a purposively selected body of international judicial practice, chosen not for statistical representativeness but for its capacity to illustrate contrasting patterns of reasoning: cases in which courts invoke jus cogens expansively (the Wall and Chagos Advisory Opinions), cases in which they retreat to formalism (Jurisdictional Immunities, DRC v Rwanda), and the most recent instance in which the ICJ extended peremptory status to a new norm (the 2024 Palestine Advisory Opinion). Third, it reads this practice against the interpretative resources supplied by the ILC's Fragmentation Report, using the principle of systemic integration as an analytical lens rather than as an independent source of obligation.

This design carries an important limitation, which the article does not seek to obscure. Case selection of this kind is inherently interpretative: the choice of which decisions count as representative of "expansive" or "formalistic" reasoning already reflects a prior judgment about

[51] Tamara Hervey and others, Research Methodologies in EU and International Law (Hart Publishing 2011) 24–26.
[52] Koskenniemi (n 8) 283–287.
[53] Hakimi (n 9) 1–34.

what jus cogens is for. The article treats this not as a flaw to be eliminated but as a feature to be disclosed, consistent with the broader commitment to methodological transparency that runs through the analysis. Where the doctrinal record is genuinely ambiguous—as with the ICJ's inconsistent treatment of jus cogens across the cases examined in Section 4—the article says so, rather than smoothing the material into an artificially coherent narrative.

5.2 Teleology as an Interpretative Tool, Not a Source of Law

Teleology must be carefully distinguished from classical natural law theories. The article does not posit moral values as independently binding, nor assume a substantive moral order external to positive law. Teleology is employed strictly as an interpretative tool, grounded in the logic of the legal system.[54] International law explicitly authorizes teleological interpretation. Article 31(1) VCLT requires treaties to be interpreted in light of their object and purpose. Where a concept such as jus cogens expresses norms of fundamental importance, interpretative attention to purpose is mandatory.[55]

The teleological approach advanced here is closely aligned with Linderfalk's analysis of normative conflict. He argues that a peremptory norm conflicts with an ordinary norm when the implementation of the latter would be contrary to the "teleological principle" (teleologiska principen) underlying the former.[56] For Linderfalk, this means that the identification of jus cogens norms requires a careful inquiry into the purposes that the international community seeks to realize through the legal order. This is precisely the sort of interpretive method that the constrained teleological approach seeks to operationalize. Linderfalk further distinguishes between legal idealists, who argue that rules are subordinate to principles, and legal positivists, who prioritize the rules themselves.[57] The constrained teleological approach offers a middle path: it does not subordinate rules to principles but recognizes that the interpretation of rules must be informed by the fundamental values that give the legal system its coherence and direction.

The concept of "constraint" operates on three levels: first, constraint by existing legal materials (treaties, custom, general principles); second, constraint by institutional practice (judicial reasoning, State practice); and third, constraint by systemic integration (the requirement that

[54]Orakhelashvili (n 4) 65–68.
[55]VCLT (n 1) art 31.
[56]Linderfalk (n 6) 855–860.
[57]Ulf Linderfalk, Understanding Jus Cogens in International Law and International Legal Discourse (Edward Elgar Publishing 2020) 45–52.

interpretation cohere with the broader legal order). These constraints are not merely descriptive adjectives but operational requirements that discipline the teleological method.

5.3 Engagement with Critical and Post-Positivist Objections

Teleological reasoning has faced sustained critique. Koskenniemi argued that universalist claims risk masking political choices, oscillating between apology and utopia.[58] From this perspective, jus cogens may serve to legitimize power rather than constrain it. He highlights the inherent paradox: jus cogens norms purport to bind States irrespective of consent, yet their identification depends on State acceptance, leaving the concept conceptually unstable.[59] Similarly, Hakimi questions whether contemporary international law can sustain claims about shared community values in a fragmented world.[60]

Orakhelashvili offers a powerful response to Koskenniemi's critique. He argues that the constitutional character of jus cogens is not undermined by its dependence on State practice for identification; rather, this dependence reflects the sociological reality that international law is a practice-based system. What matters, for Orakhelashvili, is that once a norm is recognized as peremptory, its effects are independent of State consent.[61] This does not resolve the hermeneutic circle but accepts it as an inherent feature of a system that is both consent-based and normatively hierarchical. The constrained teleological approach embraces this tension: it recognizes the need for State acceptance but insists that the interpretation of peremptory norms must be guided by the systemic values that give them meaning.

5.4 Limits, Safeguards, and Their Inadequacies

To mitigate risks, three safeguards are commonly proposed:

1. Anchoring in institutional practice: Teleological reasoning must remain grounded in judicial and institutional practice rather than abstract moral preference.[62]

[58]Koskenniemi (n 8) 283–287.
[59]ibid.
[60]Hakimi (n 9); Monica Hakimi, 'Why Should We Care About International Law?' (2021) 29 Michigan Journal of International Law 1, 1–25.
[61]Orakhelashvili (n 4) 66–68.
[62]de Wet (n 24) 611–634; Cryer and others (n 16) 45–49.

2. Complementarity with consent: State consent remains foundational. Teleology supplements, rather than substitutes, the consent-based framework.[63]

3. Exceptional character of jus cogens: Not every widely supported norm qualifies as peremptory. Teleological interpretation must be accompanied by doctrinal caution.[64]

However, these safeguards suffer from a fundamental weakness: they lack effective monitoring and enforcement mechanisms. What happens when a court or tribunal violates these safeguards? Who decides that a particular invocation of jus cogens has crossed the line from interpretation to legislation, or from genuine community value to political strategy? The safeguards remain methodological recommendations rather than institutional constraints.

Weatherall's social contract framework offers one way of addressing this limitation. He argues that the binding force of jus cogens derives from the logic of a legal system that presupposes certain minimum commitments—commitments that are not merely procedural but substantive in nature.[65] This suggests that the safeguards are not external constraints but are internal to the logic of the legal system itself. A court that interprets jus cogens without regard to its systemic purpose is not merely violating a recommendation but is departing from the very logic that gives jus cogens its authority. This does not eliminate the problem of enforcement but reframes it as a matter of interpretive fidelity to the legal system as a whole rather than compliance with a fixed set of methodological rules.

5.5 The Problem of Internal Fragmentation

An additional challenge is the internal fragmentation of jus cogens itself. If multiple peremptory norms conflict, which prevails? International law offers no hierarchy within jus cogens.

Consider the tension between self-determination and territorial integrity. The 2024 Palestine Opinion recognized self-determination as jus cogens,[66] but territorial integrity also enjoys fundamental status in international law. When these norms conflict—as they do in numerous

[63] Orakhelashvili (n 4) 66–68.
[64] Shelton (n 23) 314–320; Cassese (n 24) 124–126.
[65] Weatherall (n 34) 78–85.
[66] Palestine Advisory Opinion (n 39) para 233.

self-determination disputes—no meta-norm determines priority. The doctrine of uti possidetis juris, which privileges territorial integrity, is itself a customary rule, not a peremptory norm.[67]

Linderfalk's analysis of normative conflict is particularly relevant here. He distinguishes between several types of conflict, including conflicts between rules and principles, and between different categories of norms.[68] For Linderfalk, the existence of a peremptory norm does not automatically invalidate conflicting rules; rather, it creates a presumption against their validity that must be rebutted through a process of reasoned interpretation. This suggests that the problem of internal fragmentation is not unique to jus cogens but is a feature of any legal system that contains multiple norm categories. The constrained teleological approach seeks to manage such conflicts through the principle of harmonization, which requires that "when several norms bear on a single issue they should, to the extent possible, be interpreted so as to give rise to a single set of compatible obligations."[69]

The ILC Fragmentation Report provides essential resources for addressing this problem. Its principle of "harmonization" offers a starting point for managing conflicts between peremptory norms. The Report also states that "the United Nations Charter has been universally accepted by States and thus a conflict between jus cogens norms and Charter obligations is difficult to contemplate," and that the Security Council "shall act in accordance with the Purposes and Principles of the United Nations which include norms that have been subsequently treated as jus cogens."[70] This suggests a presumption of compatibility between different categories of fundamental norms.

6. The Significance of the ILC's Non-Exhaustive List (2022)

A central contribution of this article is to demonstrate that the ILC's deliberate decision not to compile an exhaustive list of jus cogens norms is not a weakness but a methodological feature that preserves the concept's adaptability and systemic coherence.

The 2022 Draft Conclusions on Peremptory Norms of General International Law (Jus Cogens) included a non-exhaustive list (Annex) of eight norms:

1. Prohibition of aggression

[67]Frontier Dispute (Burkina Faso/Republic of Mali) [1986] ICJ Rep 554, para 20.
[68]Linderfalk (n 57) 45–52.
[69]ILC Fragmentation Report (n 12) Conclusion 4.
[70]ibid Conclusion 40.

2. Prohibition of slavery
3. Prohibition of torture
4. Prohibition of genocide
5. Prohibition of racial discrimination and apartheid
6. Prohibition of crimes against humanity
7. The right to self-determination
8. Fundamental rules of international humanitarian law[71]

The ILC explicitly stated that this list was non-exhaustive, reflecting the Commission's view that the identification of peremptory norms remains an ongoing process. As Special Rapporteur Dire Tladi observed, the General Assembly's decision not to adopt the Draft Conclusions in 2022 indicates that even this modest list was politically sensitive for some States.[72]

This approach has several methodological advantages:

First, it preserves the concept's adaptability. By refusing to close the list, the ILC enables the international legal system to respond to emerging challenges—such as environmental protection, digital rights, or the prohibition of autonomous weapons—without requiring formal amendment of the VCLT.[73]

Second, it reinforces the systemic character of international law. As the Fragmentation Report emphasizes, international law is a legal system in which norms interact and evolve through interpretation.[74] A closed list would freeze this dynamic process, contradicting the very logic of a living legal system.

Third, it provides a framework for managing internal fragmentation. If conflicts arise between peremptory norms, the absence of a closed list allows courts and tribunals to engage in harmonization, balancing competing values through interpretative reasoning rather than relying on an artificial hierarchy.

Fourth, it acknowledges the political dimensions of identification. The non-exhaustive character of the list reflects the reality that what counts as a peremptory norm is not a purely technical question but a matter of ongoing political and legal contestation.

[71] ILC Draft Conclusions (n 2) Annex.
[72] Dire Tladi (ed), Peremptory Norms of General International Law (Jus Cogens): Disquisitions and Disputations (Brill 2021) 1–15.
[73] ILC Fragmentation Report (n 12) paras 4–13.
[74] ibid.

This approach resonates with the insights of Kolb and Weatherall. Kolb's functional understanding of jus cogens as a "legal technique" for maintaining system coherence is fully compatible with the non-exhaustive list: the list is a tool, not a definitive catalogue.[75] Weatherall's social contract framework also supports the open-ended character of the list: the fundamental values that bind the international community are not fixed once and for all but evolve with the community itself.[76]

Orakhelashvili's constitutional perspective also supports the non-exhaustive approach. For him, the identification of peremptory norms is not a mechanical exercise but a matter of recognizing the norms that are essential to the maintenance of the international legal order as a constitutional system. The non-exhaustive list reflects this constitutional character by acknowledging that the list of essential norms may grow or evolve over time.[77]

Linderfalk's teleological analysis of normative conflict further reinforces the value of the non-exhaustive list. By keeping the list open, the ILC allows for the continued development of the teleological principles that underlie peremptory norms, enabling the legal system to respond to emerging values without requiring formal amendment.[78]

7. Situating the Contribution: Dialogue with Orakhelashvili, Kolb, Linderfalk, and Weatherall

The approach advanced in this article is not an isolated contribution but part of a broader scholarly tradition that has sought to articulate the systemic and normative significance of jus cogens. This section makes explicit the relationship between the constrained teleological approach and the work of four key scholars whose insights inform and support the article's argument.

Alexander Orakhelashvili provides the most comprehensive constitutional account of jus cogens. His argument that peremptory norms form the "constitutional core" of international law establishes the normative framework within which the constrained teleological approach operates.[79] For Orakhelashvili, the hierarchical function of jus cogens is not a matter of judicial choice but a structural feature of the international legal order. He contends that international

[75]Kolb (n 32) 45–52.
[76]Weatherall (n 34) 78–85.
[77]Orakhelashvili (n 4) 7–10.
[78]Linderfalk (n 57) 45–52.
[79]Orakhelashvili (n 4) 7–10.

law is not a horizontal system but a vertical one, with jus cogens occupying the apex of the normative pyramid.[80] This structural understanding provides the foundation for the claim that peremptory norms must be interpreted in light of their systemic purpose. The article builds upon Orakhelashvili's constitutional framework while adding a methodological dimension: it argues that the identification of peremptory norms requires not only the recognition of their structural position but also a disciplined method of interpretation that is transparent about its value commitments.

Robert Kolb offers a complementary perspective through his functional analysis of jus cogens as a "legal technique" (une technique juridique) designed to preserve the unity and integrity of the international legal regime.[81] Where Orakhelashvili emphasizes the constitutional status of peremptory norms, Kolb emphasizes their systemic function. He identifies seven distinct theories of jus cogens, ranging from the natural law tradition to the theory of fundamental norms as guarantors of the legal system's survival.[82] This pluralism is significant for the constrained teleological approach: it suggests that there is no single, definitive account of jus cogens but rather a range of theoretical frameworks that can be drawn upon to support the identification and operation of peremptory norms. The article draws upon Kolb's functional analysis to argue that the teleological interpretation of jus cogens should be guided by its systemic function, not by abstract moral preferences.

Ulf Linderfalk contributes a nuanced analysis of normative conflict that is directly relevant to the constrained teleological approach. He distinguishes between legal idealists, who argue that rules are subordinate to principles, and legal positivists, who prioritize the rules themselves.[83] The constrained teleological approach, as developed in this article, attempts to bridge this divide by recognizing that the interpretation of rules must be informed by the fundamental values that give the legal system its coherence, while insisting that this interpretation remain grounded in existing legal materials and institutional practices. Linderfalk's articulation of the teleological principle underlying peremptory norms[84] provides a theoretical basis for this middle position: the identification of a peremptory norm requires an inquiry into the purposes

[80] ibid 46–48.
[81] Kolb (n 32) 12–18.
[82] ibid 45–52.
[83] Linderfalk (n 57) 45–52.
[84] Linderfalk (n 6) 855–860.

that the international community seeks to realize through the legal order, but these purposes must be discerned through interpretive practice, not imposed from outside.

Thomas Weatherall enriches the theoretical landscape by offering a social contract framework that reconciles the hierarchical character of jus cogens with the consent-based structure of international law.[85] He argues that peremptory norms embody the conditions of possibility for a stable international legal order—the pre-conditions for meaningful State participation in the legal system.[86] This framework is consistent with the constrained teleological approach's emphasis on systemic integration: the interpretation of peremptory norms must account for the fundamental values that make international law possible as a coherent system. Weatherall's framework also reinforces the non-exhaustive character of the ILC's list: if the conditions of possibility for the legal system are not fixed but evolve over time, then the list of peremptory norms cannot be closed.

These four scholars, despite their differences, converge on a shared recognition that jus cogens is not reducible to State consent alone. Orakhelashvili emphasizes its constitutional status, Kolb its systemic function, Linderfalk its teleological character, and Weatherall its foundational role in the social contract of the international community. The constrained teleological approach synthesizes these insights into a coherent methodological framework: jus cogens norms are identified through a combination of State acceptance (the consent-based element) and teleological reasoning (the value-oriented element), applied with methodological transparency and self-critique. The article's contribution lies not in breaking new conceptual ground but in developing a coherent methodological framework that brings together the insights of these scholars and applies them to the challenges raised by the 2022 ILC Draft Conclusions.

8. Conclusion: Reframing Jus Cogens in a Fragmented Legal Order

The controversies surrounding jus cogens have often been attributed to the concept's intrinsic instability. This article advances a different explanation: the challenges associated with peremptory norms stem primarily from methodological frameworks rather than substantive incoherence. A strict reliance on consent-based accounts obscures the interpretative practices through which jus cogens acquires meaning in contemporary international law.[87]

[85] Weatherall (n 34) 23–30.
[86] ibid 78–85.
[87] Orakhelashvili (n 4) 65–70; Koskenniemi (n 8) 283–287.

By revisiting Article 53 VCLT, it becomes clear that the formal criteria of acceptance and recognition reflect a historically contingent compromise. While essential at the moment of codification, these criteria are insufficient to explain subsequent judicial practice and normative reasoning.[88] Courts routinely rely on teleological reasoning to assess norms' systemic importance, universality, and non-derogable character, often without formal empirical measurements of State consent.[89]

The article's engagement with the work of Orakhelashvili, Kolb, Linderfalk, and Weatherall reveals a rich theoretical tradition that has long recognized the systemic and normative significance of jus cogens. Orakhelashvili's constitutional account, Kolb's functional analysis, Linderfalk's teleological framework, and Weatherall's social contract perspective each contribute to a more sophisticated understanding of peremptory norms than the consent-based methodology of Article 53 alone can provide. The constrained teleological approach synthesizes these insights, offering a coherent methodological framework that acknowledges the need for State acceptance while insisting on the interpretive importance of systemic values and purposes.

The ILC's 2006 Fragmentation Report and the 2022 Draft Conclusions provide essential tools for understanding jus cogens. The Report's affirmation that international law is a legal system, its elaboration of the principle of harmonization, its analysis of the relationship between jus cogens and obligations erga omnes, and its framework for managing normative conflicts all contribute to a more sophisticated understanding of how peremptory norms operate. The 2022 Draft Conclusions' non-exhaustive list, far from being a weakness, preserves the concept's adaptability and systemic coherence—a point that, while implicit in the work of the scholars discussed, the present article has developed as its central contribution.

However, this article has also confronted the vulnerabilities that any honest defence of jus cogens must acknowledge. These limitations are not incidental but inherent to the concept's operation in a contested international legal order:

First, the hermeneutic circle identified by Koskenniemi means we cannot escape the paradox that norms binding States irrespective of consent are identified through processes grounded in

[88] VCLT (n 1) art 53; ILC Draft Conclusions (n 2).
[89] Wall Advisory Opinion (n 42) para 157; Chagos Advisory Opinion (n 44) paras 100–102.

that consent. This article does not claim to resolve this paradox but rather accepts it as an inherent feature of jus cogens and argues for methodological transparency as a response.

Second, Hakimi's challenge reminds us that appeals to jus cogens often function as strategic moves in political struggles, not neutral expressions of community values. The 2024 Palestine Opinion's "strikingly thin" reasoning on self-determination's peremptory status illustrates this vulnerability.

Third, judicial practice exhibits troubling selectivity, shaped by institutional constraints and geopolitical pressures, as demonstrated by the ICJ's inconsistent approaches in the Wall Opinion, Jurisdictional Immunities, DRC v Rwanda, and the 2024 Palestine Opinion.

Fourth, internal fragmentation means jus cogens offers no guidance for resolving conflicts between peremptory norms themselves, a gap that the ILC Report illuminates but does not fill.

The article's contribution is threefold: (1) providing a coherent doctrinal account linking judicial practice, teleological reasoning, and the normative function of peremptory norms; (2) demonstrating that the ILC's non-exhaustive list is not a weakness but a methodological feature preserving the concept's adaptability—a point that, while implicit in the works of Orakhelashvili, Kolb, Linderfalk, and Weatherall, has not been fully developed in the existing literature; and (3) synthesizing the insights of these scholars into a unified methodological framework that offers practical guidance for courts and legal practitioners.

By aligning theory with practice and emphasizing transparency in interpretation, the article demonstrates the continuing relevance—and the continuing contestability—of jus cogens in a fragmented, contested international legal order.

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