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The Paradox of the Validity of Peremptory Norms in the Postmodern Sphere: Reconsidering the Dialectic of Natural Law and Positivism in the Formation of Fundamental Norms of International Law

Abbas. Barzegarzadeh[1*], Narjes. Roshan Servestani[2], Elaheh. Rezavandi[2], Farzaneh. Emadi[2]

[1] Department of Law, Bu.C., Islamic Azad University, Bushehr, Iran
[2] Department of International Law, Bu.C, Islamic Azad University, Bushehr, Iran

*** Corresponding author email address**: abbasbarzegar60@gmail.com

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Peremptory norms (jus cogens) in contemporary international law stand at the intersection of two fundamental questions: first, how can the superiority and non-derogable character of certain norms be explained within a legal system founded upon the sovereign equality of States; and second, how can the claim to the universality of these norms be substantiated without lapsing into abstract moralism or reductionist consensualism? Employing a descriptive-analytical method and drawing upon treaty instruments, the 2022 conclusions of the International Law Commission (ILC), the jurisprudence of the International Court of Justice (ICJ), and recent scholarly literature, the present study examines these two questions within an integrated analytical framework. The article proceeds from the premise that the validity of peremptory norms is neither merely the product of their moral value nor the result of a simple aggregation of State positions; rather, it emerges through a multilayered process in which fundamental normative content, the existence of a rule of general international law, the acceptance and recognition of its non-derogable character, institutional consolidation, and the possibility of critique and reassessment must be evaluated in relation to one another. To conceptualize this conclusion, the article proposes the notion of "constrained intersubjective validity." Testing this model against the ICJ's Advisory Opinion of 19 July 2024 concerning the Occupied Palestinian Territory demonstrates that, although recognition of the peremptory character of the right to self-determination in the context of foreign occupation is significant, it requires a precise distinction among the fundamental importance of the right, its status as a peremptory norm, and obligations erga omnes. The article concludes that the principal advantage of the proposed approach lies not in establishing an autonomous criterion in opposition to the ILC's criteria, but rather in enhancing the transparency and reconstructability of the reasoning process through which peremptory norms are identified.

Keywords: *peremptory norms; jus cogens; legal postmodernism; natural law; positivism; International Law Commission; International Court of Justice.*

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1. Introduction

The concept of peremptory norms constitutes one of the clearest manifestations of normative hierarchy entering a legal system that, in the classical account, is founded upon the sovereign equality of States and their consent. Article 53 of the Vienna Convention on the Law of Treaties provides that a treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law, while Article 64 provides that the emergence of a new peremptory norm renders any

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conflicting treaty void and terminates it. These two provisions raise a question that extends beyond the law of treaties: why, and on what basis, can certain rules override the contractual will of States? (Tladi, 2024)

In the classical literature, responses have oscillated between two poles. Approaches associated with natural law emphasize moral content and the fundamental values of the international community; by contrast, legal positivism seeks to link validity to identifiable sources, State practice, and legal acceptance. The difficulty arises from the fact that peremptory norms must simultaneously stand above State will and be identifiable through a legally demonstrable method. If moral value alone were sufficient, the boundary between aspiration and legal rule would become blurred; if State consent were the sole criterion, explaining normative superiority and non-derogability would become difficult.

The completion of the International Law Commission's work in 2022 marked a turning point in systematizing this debate. In its final conclusions, the Commission, while emphasizing the exceptional character of peremptory norms, formulated a methodology for their identification, the relevant forms of evidence, their legal consequences, and a non-exhaustive list of examples. The publication of subsequent analyses, including an assessment of the Commission's seventy-third session in the *American Journal of International Law*, demonstrates that the controversy has neither ended nor remained merely theoretical; rather, it concerns the quality of evidentiary support, the role of States, and the scope of legal consequences. (Murphy, 2023)

The significance of the issue increased with the International Court of Justice's Advisory Opinion of 19 July 2024 concerning the legal consequences arising from Israel's policies and practices in the Occupied Palestinian Territory. In that opinion, the Court treated the right to self-determination, within the context under consideration, as having a peremptory character. The 2025 literature addressing this aspect of the Advisory Opinion, including the analysis by Maurizio Arcari, demonstrates (Arcari, 2025) that even judicial recognition of a particular norm as peremptory may generate new questions regarding the consistency of judicial reasoning with the Commission's 2022 criteria. (Arcari, 2025)

The principal research question of the present study is how peremptory norms can possess legal validity under conditions in which claims of universality confront postmodern critiques of metanarratives, power, and the production of knowledge. The article hypothesizes that the validity of *jus cogens* should be understood as **constrained and intersubjective**: it derives neither exclusively from an a priori moral truth nor solely from the will of States, but rather from the interaction among fundamental value, legal recognition, institutional practice, the quality of evidence, and the possibility of critique and reassessment.

The research employs a descriptive-analytical and normative methodology. Its primary materials include the 1969 Vienna Convention, the Commission's 2022 conclusions, official reports and documents, judgments and advisory opinions of the Court, and authoritative Persian- and English-language scholarly literature. Chronologically, recent literature through 2026 has been incorporated insofar as it is directly relevant to the identification, legal consequences, or theoretical foundations of peremptory norms. On the one hand, the article avoids artificially expanding its length through repetition; on the other hand, in order to approximate the standards of scholarly research articles, it develops the literature review, analysis of jurisprudence, critiques, and the proposed model as distinct components.

In terms of originality, the article distinguishes among three analytical levels that have sometimes been treated as intertwined in the literature: the **existence of a rule** in general international law, the **peremptory character** of that rule, and the **legal consequences** flowing from that character. This distinction has practical significance because establishing the existence of a fundamental prohibition does not, by itself, establish that it constitutes *jus cogens*, and establishing its *jus cogens* status does not necessarily generate every claimed legal consequence without an independent analysis. Accordingly, rather than adding a new source to the system of sources of international law, the model proposed in this article provides an evaluative framework for assessing the quality of existing legal reasoning.

2. Literature Review and the Position of the Issue in Contemporary Scholarship

2.1. From Classical Theory to Value Formalism

The literature on peremptory norms has, from its inception, been concerned with the foundations of legal obligation. Orakhelashvili analyzes peremptory norms in relation to the structure of international public order and their consequences beyond the law of treaties, whereas Kolb concentrates on the technical and systematic formulation of *jus cogens* and its consequences across different branches of international law. Bianchi further demonstrates that the language of *jus cogens* in the field of human rights has at times acquired a function extending beyond source-based legal reasoning, becoming an instrument for reinforcing the normative weight of particular claims. (Bianchi, 2008; Orakhelashvili, 2006)

Through the concept of value formalism, Kleinlein seeks to bring the two sides of the debate closer together: fundamental values require legal form and legal criteria in order to become legal rules, yet legal form itself is not devoid of value choices. This perspective is of central importance to the present article because it makes it possible to explain normative superiority without abandoning legal methodology. In other words, the issue is not one of choosing between value and source; rather, it is to design a relationship in which value justifies the claim to superiority while legal sources ensure demonstrability and applicability.

In more recent scholarship, Chas, in 2023, revisited Morgenthau's critique of legal positivism and thereby renewed attention to the tension among politics, justice, and ethics in international law. Although this discussion does not concern *jus cogens* exclusively, it is important for understanding the problem of validity: if positivism imagines itself to be detached from political and ethical contexts, it overlooks part of the reality through which norms are produced and applied; yet criticism of positivism should not lead to the abandonment of measurable legal criteria. (Chas, 2023)

Following the adoption of the ILC's 2022 conclusions, recent scholarship has noticeably shifted from purely conceptual debate toward evaluating the "practical operation" of peremptory norms. Ispolinov, writing in 2025, emphasizes the continuing uncertainty surrounding the origin of peremptory norms, the moment at which they crystallize, and the authority competent to declare their peremptory status, demonstrating that the incorporation of *jus cogens* into official instruments has not resolved all theoretical and practical controversies. By contrast, Tabanlı in 2025 regards the ILC conclusions as an important step toward systematizing the criteria for identification and legal consequences. The contrast between these two approaches is significant for the present article: the former exposes the practical limitations of the concept, whereas the latter highlights the value of methodological systematization. The model proposed here is situated between these positions and seeks to explain why the existence of formal criteria, without quality control over evidence and reasoning, is insufficient to eliminate ambiguity. (Ispolinov, 2025)

2.2. Persian-Language Scholarship and the Research Gap

Within Persian-language scholarship, a substantial proportion of studies on peremptory norms has focused on their examples, legal effects, and relationship with human rights, public order, arbitration, and environmental protection. The 2023 study by Sobhaninia, Abdollahi, and Pourhashemi on identifying peremptory norms in light of the possible emergence of such norms in international environmental law exemplifies the movement of the debate from classical examples toward emerging fields. Likewise, a study published in spring 2026 on the criteria for identifying peremptory norms directly centers on the Commission's 2022 conclusions and emphasizes persistent ambiguities concerning definition and identification. (Mojtahedzadeh, 2026)

In 2025, studies were also published on peremptory norms and the application of the rule of law to the Security Council, as well as on the peremptory and *erga omnes* character of fundamental human rights. These works demonstrate that Persian-language scholarship has moved beyond purely definitional discussions and increasingly addresses institutional and human-rights consequences. Nevertheless, the systematic connection among the philosophical foundations of validity, postmodern critique, the Commission's identification methodology, and judicial developments since 2024 has not yet been developed sufficiently.

The principal gap addressed by the present research lies precisely at this intersection: the formulation of a model

capable of explaining both the claim to superiority and fundamentality, while remaining faithful to the positive criteria of international law and incorporating critiques concerning power, exclusion, and representation into the identification methodology. From this perspective, the article's contribution lies not in proposing a new list of peremptory norms but in reconstructing the logic of validity and the quality of reasoning required for attributing peremptory status.

3. Conceptual Framework and Theoretical Foundations

3.1. Concept, Elements, and Primary Consequences of Peremptory Norms

In its conventional meaning, a peremptory norm is a norm of general international law accepted and recognized by the international community of States as a whole as one from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character. This definition brings together three elements: membership in general international law, acceptance and recognition by the international community of States as a whole, and non-derogability.

Non-derogability does not merely express the intensity of legal obligation. Many rules are binding, yet parties to a treaty may establish a different arrangement in their relations inter se. In the case of *jus cogens*, however, the private or contractual will of States cannot displace the rule. For this reason, peremptory norms introduce the question of normative hierarchy and complicate the classical horizontal relationship among sources.

The consequences of peremptory norms are not limited to the invalidity of conflicting treaties. The Commission's 2022 conclusions highlight consequences concerning the interpretation and application of other rules, international responsibility arising from serious breaches, and the duties of States in relation to situations created by such breaches. Nevertheless, a distinction must be maintained among the peremptory norm itself, an obligation erga omnes, and a serious breach of an obligation arising under a peremptory norm. The overlap among these concepts should not lead to their conflation.

3.2. Natural Law: Value as the Source of Normative Superiority

The natural-law approach possesses an evident initial attraction: if certain values, such as the prohibitions of genocide, slavery, or torture, are fundamental to human dignity and the survival of the international community, it is plausible to regard their validity as independent of the case-specific consent of States. This approach explains why States cannot, by agreement, authorize torture or slavery and why certain norms must remain resistant to political will.

The difficulty lies in transforming this moral intuition into a legal criterion. Fundamental values are numerous, and disagreement exists regarding their scope and priority. If "moral importance" alone constitutes the criterion, any scholar or institution could characterize its preferred value as peremptory. Natural law may therefore explain why normative superiority is justified, but it requires a supplementary mechanism for establishing the existence of a specific legal rule.

3.3. Positivism: Identification as a Condition of Legal Validity

Positivism focuses on demonstrability. In international law, a claim concerning the existence of a rule must be supported by sources and evidence capable of legal evaluation. This methodological sensitivity is particularly important in the field of *jus cogens*, as it prevents moral language from replacing legal analysis. The Commission's 2022 conclusions reflect precisely this concern by distinguishing between evidence of the existence of a rule of general international law and evidence of the acceptance and recognition of its non-derogable character.

Nevertheless, consent-based positivism confronts a conceptual difficulty: if States constitute the ultimate source of all legal obligations, how can a rule possess superior and non-derogable force even against a dissenting State? The contemporary response generally moves away from the individual consent of each State and instead relies on recognition by the "international community of States as a whole." This shift strengthens the collective and structural dimension of the concept, while leaving open the question of the quality and degree of recognition required.

3.4. Legal Postmodernism and the Problem of Metanarratives

Legal postmodernism is sensitive to claims of universality, purportedly neutral language, and legitimating metanarratives. From a Lyotardian perspective, skepticism toward metanarratives directs attention to the plurality of narratives and mechanisms of legitimation; from a Foucauldian perspective, knowledge and power are inseparable; and in readings influenced by Derrida, legal concepts may be reconsidered in terms of binary oppositions, exclusions, and internal hierarchies.

Applying such an approach to *jus cogens* should not be mistaken for denying the prohibitions of genocide or torture. The postmodern question is primarily methodological: which institution designates a rule as peremptory? Which forms of evidence are emphasized and which are excluded? Whose voices—among States, societies, and groups—are heard in constructing the claim of an international community? Addressing these questions may make the claim to universality more rigorous rather than necessarily weakening it.

4. Legal Development and the Method of Identifying Peremptory Norms

4.1. The Vienna Convention and the Transition from Absolute Consent

Article 53 of the 1969 Vienna Convention constitutes the explicit consolidation of *jus cogens* within the law of treaties. Its significance lies not only in its definition; the provision recognizes that States' freedom to conclude treaties is subject to substantive limitations. Article 64 similarly recognizes the dynamism of the international legal system, as the emergence of a new peremptory norm may affect existing treaties. The Convention therefore acknowledges both hierarchy and the possibility of legal evolution.

Nevertheless, the Convention did not provide a list of peremptory norms or a detailed methodology for their identification. This silence subsequently led courts and scholars to employ the term *jus cogens* with varying degrees of certainty. One consequence was a gap between repeated characterization of a particular rule as peremptory in scholarly literature and the legal demonstration of its peremptory status—a gap that the Commission's project sought to reduce.

4.2. The International Law Commission's 2022 Conclusions

In 2022, after several years of work, the Commission adopted its final conclusions on the identification and legal consequences of peremptory norms. The structure of the conclusions begins with definition and nature, proceeds to the methodology and evidence relevant to identification, and subsequently addresses legal consequences. This structure is methodologically important because it transforms the claim of peremptory status from a matter of intuition into a multistage process of legal reasoning.

A fundamental point in the ILC conclusions is that the **identification of peremptory status is not identical to the creation of the underlying rule**. In Conclusion 4, the Commission links identification to the existence of a norm of general international law and to its acceptance and recognition as a norm from which no derogation is permitted. Conclusion 5 further provides that the underlying rule may be customary, treaty-based, or grounded in general principles of law, although custom remains the most common basis. Accordingly, analysis of *jus cogens* must begin with a preliminary question: what precisely is the relevant rule, and on what legal basis can its existence be established? Only then should it be asked what evidence establishes its non-derogable character. These two questions must not be merged. (Tladi, 2024)

At the first stage, it must be established that the relevant norm is a rule of general international law. In practice, customary international law occupies the principal position, although treaty rules may reflect or provide evidence of the existence of a general rule. At the second stage, evidence must demonstrate that the international community of States as a whole has accepted and recognized the norm as non-derogable. This stage requires more than simply establishing the existence of an ordinary rule of international law.

The Commission does not require unanimity among all States. The phrase "as a whole" is intended to balance universality with the possibility of limited opposition. Yet this flexibility simultaneously increases the burden on the legal reasoner: it must be explained what quantity and, more importantly, what quality of evidence is sufficient to cross the relevant threshold, and what weight should be attributed to existing objections. Murphy's 2023 analysis of the Commission's seventy-

third session underscores the significance of this final formulation and the controversies surrounding it.

The annex to the 2022 conclusions contains a non-exhaustive list of rules that the Commission had previously recognized as possessing peremptory status, including the prohibitions of aggression, genocide, crimes against humanity, the basic rules of international humanitarian law, racial discrimination and apartheid, slavery, and torture, as well as the right to self-determination. The non-exhaustive nature of the list preserves the possibility of legal development while simultaneously reinforcing the need for a rigorous identification methodology in relation to new claims.

4.3. Hierarchy of Evidence and the Quality of Identification

One of the major achievements of the Commission's project is the distinction between the sources of the underlying norm and the evidence used to identify its peremptory character. Resolutions of international organizations, judicial decisions, official positions of States, treaties, and scholarly writings may all play a role in the reasoning process; however, their evidentiary value is not identical, and none can be treated as conclusive merely because of its quantity or formal designation. Accordingly, **argumentative density**, as used in this article, does not mean the accumulation of citations, but rather the convergence of independent and heterogeneous forms of evidence toward a legal conclusion. This is especially important in relation to *jus cogens*, because the asserted consequence is stronger than that flowing from an ordinary rule and may affect the validity of treaties, State responsibility, and legal situations. It is for this reason that the ILC's 2022 conclusions emphasize evaluating evidence in terms of "acceptance and recognition by the international community of States as a whole."

At this point, the model proposed in the article introduces the concept of **argumentative density**. The stronger the normative claim, the more diverse, independent, and transparent the chain of evidence should be. Because of its far-reaching consequences, a peremptory norm must pass a more rigorous test than the mere establishment of a treaty obligation. Such rigor is necessary not to weaken fundamental values, but to prevent inflation in the concept of *jus cogens*.

Tabanlı's 2025 study of the Commission's conclusions likewise demonstrates that the 2022 instrument constitutes an important step toward clarifying the position of superior norms, although questions concerning their nature, content, and legal effect remain subject to analysis. In the 2025 literature, Ispolinov similarly emphasizes the continuing controversy concerning how peremptory norms emerge and which authority is competent to declare their status. (Ispolinov, 2025)

5. Contemporary Jurisprudence and the Practical Testing of the Criteria

5.1. . From Barcelona Traction to the Prohibition of Torture

Over time, the jurisprudence of the International Court of Justice has employed the language of obligations *erga omnes*, fundamental principles, and, in some instances, peremptory norms. The 1970 *Barcelona Traction* judgment prominently articulated the concept of obligations *erga omnes*. Although obligations *erga omnes* and *jus cogens* are not synonymous, the judgment contributed to the development of the language of the "interests of the international community as a whole." In subsequent cases, particularly those concerning genocide and the right to self-determination, the relationship between collective interests and fundamental norms became more pronounced.

In *Questions relating to the Obligation to Prosecute or Extradite (Belgium v. Senegal)* in 2012, the Court stated that the prohibition of torture forms part of customary international law and has become a peremptory norm. The significance of this statement lies in the Court's attribution of peremptory status to a specific human-rights prohibition, thereby making more explicit the relationship among fundamental value, custom, and hierarchical status.

5.2. Advisory Opinion of 19 July 2024 and the Right to Self-Determination

The 2024 Advisory Opinion concerning the Occupied Palestinian Territory is of particular importance from the perspective of *jus cogens*. In examining the legal consequences of prolonged occupation, annexation, and restrictions imposed upon the Palestinian people, the Court emphasized the right to self-determination and recognized its peremptory status within its reasoning. This development is consistent with the Commission's 2022 non-exhaustive list, but its particular significance

lies in its judicial character and in the Court's independent mode of reasoning.

From the perspective of the model advanced in this article, the 2024 Advisory Opinion provides an appropriate case for assessing **constrained intersubjective validity**. On the one hand, the right to self-determination is supported by the Charter of the United Nations, the human rights covenants, numerous resolutions, and judicial practice; on the other hand, attributing peremptory status requires demonstrating that the international community of States as a whole has accepted and recognized not merely the right itself but its non-derogable character. This distinction lies at the center of recent critiques.

In his article published in the *Polish Yearbook of International Law* on the 2024 Advisory Opinion, Arcari asks whether the Court's formulation is fully consistent with the foundational criteria articulated in the Commission's 2022 conclusions and whether confining the peremptory character of the right to self-determination to certain situations of occupation and annexation remains compatible with the unitary and universal nature of peremptory norms. The significance of this critique lies in separating acceptance of the ultimate conclusion from evaluation of the reasoning used to reach it: even if the right to self-determination is regarded as peremptory, the quality of the reasoning process remains open to scrutiny.

Analytically, the significance of the 2024 Advisory Opinion lies in the Court's statement, in paragraph 233, that the right to self-determination in situations of foreign occupation, such as the one before it, possesses a peremptory character. This statement should not immediately be transformed into the proposition that every manifestation or every violation of the right to self-determination possesses the same status regardless of context. Arcari relies precisely on this contextual limitation in raising the issue of the scope of *jus cogens*. Accordingly, the value of the Advisory Opinion for the present model operates at two levels: on the one hand, it provides an important judicial consolidation of peremptory status in a specific context; on the other hand, the limitations inherent in the Court's formulation demonstrate that the **scope of the rule must be analyzed separately from the existence of its peremptory status**. Judge Tladi's declaration, by referring to the Court's historically cautious approach to expressly employing the term *jus cogens*, likewise highlights the significance of judicial modes of formulation. (Pezzano, 2026; Tladi, 2025)

5.3. Implications of Developments from 2024 to 2026 for the Theory of Identification

Developments since 2024 indicate that the central question surrounding *jus cogens* has gradually shifted from "Do such norms exist?" to "How should their particular content, scope, and consequences be determined?" Ispolinov in 2025 continues to emphasize the concept's practical ambiguities; Tladi in 2025 examines the relationship between *jus cogens* and reparations, demonstrating that the connection between normative superiority and remedies still requires independent analysis; and Pezzano in 2026, through an examination of the ICJ's advisory opinions concerning the Wall, Chagos, and Palestine, focuses on the risk of conflating *jus cogens* with obligations *erga omnes*. This development in the literature demonstrates that identifying a rule as peremptory should not mark the end of the analysis; rather, it must be clarified precisely which legal consequence is justified by that status and from which legal basis that consequence derives.

The same orientation is evident in the 2026 Persian-language study on criteria for identifying peremptory norms: its focus lies on ambiguities of definition and identification and on evaluating the Commission's 2022 conclusions. By contrast, the 2025 studies concerning fundamental human rights demonstrate that peremptory status continues to be analyzed in conjunction with non-suspendability, universality, and the protection of human dignity. This body of scholarship may be enriched by the Commission's two-stage methodology so as to establish a clearer distinction between the fundamental character of a right and proof of its *jus cogens* status.

6. The Paradox of Validity Through the Lens of Postmodernism and Feminist Critique

6.1. Does the Critique of Metanarratives Render the Universality of Peremptory Norms Impossible?

At first glance, postmodernism and *jus cogens* appear to move in opposite directions: the former is skeptical of universal claims and grand narratives, whereas the latter expressly claims the existence of rules binding upon all

States and admitting no derogation. Yet this conflict becomes definitive only if universality is understood as a truth existing outside every historical and argumentative process. If universality is instead treated as a legal claim that must be supported by evidence, participation, and public reasoning, postmodern critique can perform a corrective function.

Postmodernism reminds us that terms such as the "international community," "fundamental value," and "conscience of humanity" themselves require analysis. Who speaks on behalf of the international community? In practice, do the positions of powerful States and those of States of the Global South carry equal weight? Does the absence of written documentation from certain regions signify an absence of acceptance, or does it instead reflect inequalities in knowledge production and access to legal institutions? These questions do not eliminate the legal criterion; rather, they improve the quality of its application.

6.2. Power, Institutions, and the Production of Legal Knowledge

The identification of peremptory norms does not occur in a vacuum. The International Law Commission, the Court, the General Assembly, States, universities, and academic journals all participate in producing and consolidating legal language. Power in this context is not merely direct political power; the power to determine agendas, select authoritative sources, gain access to dominant academic languages, and transform experience into legal documentation is also significant.

From this perspective, transparency in the identification methodology constitutes both an epistemological and an institutional requirement. Every claim of *jus cogens* should demonstrate which sources were examined, what objections existed, and why certain forms of evidence were considered stronger than others. Such an approach is compatible with the positivist concern for demonstrability while simultaneously responding to the postmodern critique of choices being concealed behind ostensibly neutral language.

6.3. Feminist Critique and the Problem of Representation

Feminist critiques of international law have demonstrated that apparently general rules may marginalize specifically gendered experiences. Charlesworth and Chinkin were among the early scholars to reconsider the structures of international law through the lens of exclusion and marginalization of women's experiences. In the field of *jus cogens*, Yahyaoui Krivenko, through an analysis of the Court's jurisprudence using feminist legal methodologies, has highlighted the gap between the expansion of feminist scholarship and the extent of its reception by international institutions. (Yahyaoui Krivenko, 2017)

This critique has two implications for peremptory norms. First, a list of examples should not be treated as natural and self-evident merely because it has been historically repeated. Second, a claim to universality should be assessed in terms of the actual effects of a norm on different groups and their capacity to participate in the production of legal argument. For example, debates concerning gender discrimination and gender-based violence illustrate that the normative force of a prohibition and the establishment of its peremptory status constitute related but distinct questions.

Accordingly, feminist critique, rather than necessarily relativizing peremptory norms, can enrich the criteria for their identification by requiring consideration of the geographical breadth of evidence, sensitivity to victims' experiences, attention to structural silences, and avoidance of equating the "absence of a recorded voice" with an "absence of acceptance." Alongside established legal criteria, these elements enhance the quality of legal reasoning.

7. The Relationship Between Peremptory Norms and Adjacent Concepts

7.1. Peremptory Norms and Obligations Erga Omnes

Obligations *erga omnes* and peremptory norms overlap significantly, but they are not conceptually identical in function. *Erga omnes* concerns the nature of the relationship between an obligation and the international community, together with the existence of a shared legal interest; *jus cogens* concerns normative rank and the non-derogable character of a rule. The 1970 *Barcelona Traction* judgment prominently introduced the concept of obligations *erga omnes* into the Court's jurisprudence, whereas Article 53 of the Vienna Convention and, subsequently, the ILC conclusions formulated the issue of *jus cogens* in a different framework. This distinction has assumed greater importance in recent scholarship.

Pezzano in 2026 demonstrates that, in certain advisory opinions, consequences associated with breaches of peremptory norms have been expressed through the language of obligations *erga omnes*, potentially generating ambiguity regarding the attribution of legal consequences. The present article therefore proposes that, in every case, the status of the rule should first be determined, followed by the type of obligation and, finally, the specific legal consequence claimed. (Pezzano, 2026)

This distinction is also important in terms of legal consequences. The *erga omnes* character of an obligation concerns legal interest and the entitlement to invoke responsibility, whereas peremptory status may affect the validity of treaties, interpretation, responsibility, and the legality of legal situations. Maintaining precision in this distinction prevents conceptual inflation.

7.2. Peremptory Norms and International Public Policy

The term international public policy carries different meanings in different fields. In public international law, *jus cogens* is sometimes described as constituting the core of the public order of the international community; in private international law and arbitration, public policy may refer to barriers to recognition or enforcement and to overriding mandatory rules. The 2025 study by Golshani and Hosseini Modarres on overriding mandatory rules in private international law exemplifies the development of this literature in Iran. (Golshani & Hosseini Modarres, 2025)

To avoid conflation, the level of analysis must be specified. A peremptory norm of general international law within the meaning of Article 53 is a specific concept governed by distinctive criteria of identification, whereas domestic mandatory rules or overriding mandatory rules in private international law do not necessarily possess the same status or legal consequences. Shared use of the term "mandatory" should not create a false assumption of substantive identity.

7.3. Peremptory Norms and International Responsibility

A breach of a peremptory norm, where the conditions established under the law of State responsibility are satisfied, may produce consequences extending beyond the bilateral relationship between the injured State and the responsible State. Articles 40 and 41 of the Articles on Responsibility of States for Internationally Wrongful Acts establish obligations in relation to serious breaches of obligations arising under peremptory norms, including cooperation to bring the unlawful situation to an end, non-recognition of situations created by the breach, and refraining from rendering aid or assistance in maintaining such situations. The ILC's 2022 conclusions further clarify this relationship within the structure of *jus cogens*. Nevertheless, Tladi in 2025 demonstrates that the connection between *jus cogens* and reparations remains contested with regard to both its legal basis and the scope of its consequences. Accordingly, three stages must be distinguished: the existence of a peremptory norm, the occurrence of a breach, and satisfaction of the conditions for a serious breach. Each stage requires independent reasoning, and all consequences of responsibility cannot be inferred merely by invoking the label *jus cogens*. (Tladi, 2025)

Nevertheless, the existence of a peremptory norm, the occurrence of a violation, and the establishment of a serious breach must remain distinct. Not every violation of a peremptory norm is necessarily of the same gravity or produces the same collective consequences. A precise analysis of the elements of responsibility prevents the language of *jus cogens* from replacing an actual examination of facts and attribution.

8. The Proposed Model: Constrained Intersubjective Validity

8.1. Four Components of Validity

On the basis of the preceding analysis, the validity of peremptory norms may be constructed around four components. The first is **fundamental normative content**: the norm must protect interests of particular importance to the structure of the international community or to fundamental human dignity. This component explains why normative superiority is claimed, but it is not, by itself, legally sufficient.

The second component is **positive recognition**: the existence of the rule in general international law, together with acceptance and recognition of its non-derogable character, must be demonstrated through valid evidence. The third component is **institutional consolidation**: the practice of courts, the Commission, international organizations, and State responses may

contribute to the coherence and applicability of the rule. The fourth component is **susceptibility to critique and reassessment**: the reasoning must be transparent, must not conceal opposition, and must remain open to correction in light of new evidence.

These four components operate cumulatively. Value without recognition leads to moralism; recognition without value reduces normative superiority to a mechanical counting of positions; institutional authority without critique may naturalize its own choices; and critique without legal criteria may result in unrestricted relativism. Constrained intersubjective validity seeks to control these four risks simultaneously.

8.2. A Proposed Practical Test for Research and Adjudication

In order to attribute peremptory status to a norm, the underlying rule must first be established by recognized methods of general international law. Second, independent evidence concerning the acceptance and recognition of its **non-derogable character** must be collected. Third, the geographical breadth and diversity of the evidence must be assessed so that a limited number of repeatedly expressed positions are not substituted for the international community of States as a whole. Fourth, judicial decisions and institutional instruments should be evaluated not as automatic creators of the rule but in light of the quality of their reasoning and the sources upon which they rely.

For practical application, the model can be operationalized through an evaluative matrix: the first column identifies the rule and its legal basis; the second records evidence of acceptance and recognition of its non-derogable character; the third assesses the geographical, institutional, and temporal diversity of that evidence; the fourth identifies contrary evidence and areas of ambiguity; and the fifth independently tests the specific legal consequence inferred from peremptory status. Such a method allows disagreements to become visible at the precise point at which they arise, rather than being concealed within a general conclusion. This feature makes the model more suitable for both academic research and judicial analysis. (International Law, 2022)

Fifth, contrary positions and ambiguities must be expressly reported. Sixth, the legal consequences claimed should be analyzed in proportion to the degree of certainty with which peremptory status has been established. Seventh, the researcher must distinguish between the descriptive proposition that "this norm has been characterized in the sources in this manner" and the normative proposition that "this norm should be recognized as peremptory." This distinction is particularly important in emerging areas such as environmental protection, gender discrimination, and technology.

Methodologically, such a test is consistent with the orientation of the Commission's 2022 conclusions, but adds two critical dimensions: assessing the representativeness of evidence and exposing institutional choices. These two dimensions constitute the article's response to postmodern critique: instead of abandoning legal criteria, the very process through which those criteria are produced and applied is made subject to accountability.

8.3. Advantages and Limitations of the Model

The first advantage of the model is that it avoids two extremes: transforming *jus cogens* into a moral label for every desirable value and reducing it to ordinary custom under a different name. Its second advantage is compatibility with the evolutionary character of international law, since it understands identification as a historical process constrained by evidence. Its third advantage is the creation of a common language between doctrinal analysis and theoretical critique.

The model's limitation is that it does not provide a numerical formula for determining the sufficiency of recognition. This limitation is partly inherent in international law, because the expression "international community of States as a whole" itself requires qualitative assessment. Accordingly, rather than claiming to solve the problem completely, the model provides criteria for making legal determinations more transparent and more susceptible to critical evaluation.

9. Implications of the Research for the Future Development of Peremptory Norms

One of the most important implications of the present analysis is the need for caution in expanding the list of peremptory norms. Developments within the international community may create conditions for the emergence of new examples, but increasing the number

of such claims without a clear evidentiary standard risks diminishing the normative capital of the concept. The more *jus cogens* is employed as rhetorical language, the more difficult it becomes to distinguish peremptory norms from important but ordinary rules.

In the environmental field, Persian-language scholarship published in 2023 has raised the possibility of the emergence of peremptory norms. This discussion is theoretically significant because protection of the fundamental conditions of life may possess structural value; nevertheless, according to the proposed test, a distinction must be maintained between the moral necessity of environmental protection and the existence of sufficient evidence to recognize a specific prohibition or obligation as non-derogable.

In the field of human rights, circular reasoning must likewise be avoided. The fact that a right is fundamental, non-suspendable, or *erga omnes* may constitute important evidence, but it does not independently substitute for proving the criteria of *jus cogens*. Recent Persian-language studies on the peremptory character of fundamental human rights may move from conceptual equivalence toward greater analytical precision by incorporating source-based analysis and evidence of acceptance and recognition.

Finally, the role of the International Court of Justice will be decisive in the coming years. Each time the Court attributes peremptory status to a rule or employs that status to derive legal consequences, not only the conclusion but also the methodology of reasoning becomes important. Transparency regarding evidence of recognition may contribute to greater convergence between judicial practice and the Commission's framework while reducing doctrinal disagreement.

9.1. Critique and Limitations of the Proposed Model

The model of constrained intersubjective validity is not without limitations. First, the concept of representation within the international community lacks a fixed numerical or geographical criterion, and disagreement may arise regarding the weight of individual forms of evidence. Second, the role of judicial institutions and the ILC in producing legal language may itself be affected by structures of power; postmodern critique therefore remains relevant as an external check upon the methodology of identification. Third, the model cannot replace legal judgment regarding evidence; rather, it can only render the reasoning process more transparent. Fourth, there is a danger of **formal evidentiary accumulation**: increasing the number of documents does not necessarily strengthen the conclusion where those documents are not independent or merely repeat the same position. The model's advantage therefore lies in the quality of the relationship among different forms of evidence rather than in their quantity. (International Law, 2022; Yahyaoui Krivenko, 2017)

10. Conclusion

Peremptory norms cannot be understood merely as remnants of natural law within a positivist legal system, nor merely as a technique for invalidating treaties. Their position is distinctive precisely because a claim concerning fundamental value must be translated into legally demonstrable terms. An examination of Article 53 of the Vienna Convention, the ILC's 2022 conclusions, and the jurisprudence of the ICJ demonstrates that international law has accepted the existence of non-derogable norms, while continuing to make the identification of each particular norm and the determination of the scope of its consequences dependent upon legal reasoning and the evaluation of evidence.

The ILC's 2022 conclusions constitute the most important contemporary framework for systematizing this process. The Commission's two-stage criterion—the existence of a rule of general international law and its acceptance and recognition as a norm from which no derogation is permitted—should constitute the starting point of every analysis. The contribution of the present article does not stand in opposition to this framework; rather, by adding quality control of evidence, representativeness, institutional consolidation, and susceptibility to critique, it transforms that framework into a practical method for reconstructing legal reasoning.

The ICJ's Advisory Opinion of 19 July 2024 demonstrated that this methodology is also important in practice. Recognition of the peremptory character of the right to self-determination in the context of foreign occupation, on the one hand, indicates the strengthening of the judicial status of *jus cogens* and, on the other hand, because of the Court's context-specific formulation, highlights the necessity of determining the precise scope of the rule. The literature of 2025 and 2026 further

demonstrates that the relationship between *jus cogens* and obligations *erga omnes*, as well as between *jus cogens* and reparations, remains contested. Legal analysis should therefore not move directly from the attribution of peremptory status to every conceivable legal consequence.

Postmodern and feminist critiques, as employed in this article, have not been used to negate the universality of peremptory norms, but rather to test claims to universality. These critiques demonstrate that legal identification does not occur in a vacuum and that the selection of sources, institutional structures, and the ability of different groups to participate in the production of legal knowledge may affect the formulation of norms. From this perspective, constrained intersubjective validity represents an attempt to preserve the possibility of universal norms without treating the processes through which claims to universality are produced and consolidated as immune from critique.

From a practical standpoint, courts, States, and researchers should explicitly answer four questions in relation to every claim of *jus cogens*: What is the underlying rule, and how is its existence established? What independent evidence demonstrates its non-derogable character? What contrary positions and evidentiary limitations exist? And precisely what legal consequence is inferred from that status? Answering these four questions reduces the likelihood of conflating fundamental value, legal rule, peremptory status, and legal consequence, while enhancing the possibility of critically evaluating the resulting conclusion.

Authors' Contributions

Authors contributed equally to this article.

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