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Membership in an Exclusive Club: International Humanitarian Law Rules as Peremptory International Law Norms

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MEMBERSHIP IN AN EXCLUSIVE CLUB: INTERNATIONAL HUMANITARIAN LAW RULES AS PEREMPTORY INTERNATIONAL LAW NORMS

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Abstract

This paper entertains the somewhat scattered debate as to whether international humanitarian law ("IHL") rules could, and should, be considered peremptory norms of international law. For some time, the "basic rules of IHL" have been found to constitute peremptory norms of international law, with scant identification of those rules. Through a doctrinal analysis, this paper argues that, so long as they meet the Vienna Convention on the Law of Treaties' criteria, IHL rules should be treated as peremptory norms, creating erga omnes obligations for third States. Further, in theory, while the third State (external) obligation to "ensure respect" in IHL may be considered equivalent to, and even supplemented by, the rules on State responsibility, the scope of the latter may offer a stronger device for international law compliance and enforcement vis-a-vis third States and Parties. A convergent approach is suggested between Common Article 1 of the four Geneva Conventions ("to respect and ensure respect") and the rules on States responsibility to strengthen the legal basis for third State and Party action, both individually and collectively, against IHL violations.

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I. Introduction

Are there international humanitarian law ("IHL") rules that would qualify as peremptory norms of international law? If so, would it matter? International lawyers and jurists *love* (or *hate*) peremptory norms. It is an exclusive club with limited membership, and practitioners and scholars alike have argued over what rules constitute peremptory norms. Generally speaking, the doctrine teaches us that peremptory norms sit at the top of international law's hierarchy. This exclusive club rarely accepts new members. More recently, to the joy of peremptory norm lovers, the United Nations ("UN") International Law Commission ("ILC") flirted with this question. ILC member Dire Tladi took on the role of "Special Rapporteur" covering the topic of "peremptory norms of general international law (*jus cogens*)."[1] As discussed below, in the later stages of his work, Tladi put together an illustrative list of peremptory norms and, within that list, included the oft-used terminology "basic rules of international humanitarian law." Unfortunately, that was the extent of the study, with little interactive discussion. Of course, the topic—as intriguing as it may be—was inconsequential to Tladi's overall work. Nonetheless, in light of Tladi's inclusion, this contribution builds upon previous discussions (in practice, jurisprudence, and scholarship) and explores the extent to which IHL rules could be treated as peremptory norms and why it matters.

In "Human Rights and the Magic of Jus Cogens," Andrea Bianchi concludes that "the future of *jus cogens* is primarily in their hands" – they being the "magicians."[2] Unless we believe in fantasy, magicians are not really magicians; they are, more appropriately, illusionists. One may argue that one of international law's greatest illusions was the advent of peremptory norms; another may argue that the illusion is cloaking their existence. Regardless, international law's evolution has resulted in several determinations for blanket prohibitions on slavery, forcible acquisition of territory, and racial discrimination and apartheid, among others. Law is a construct – a language of rules, application, and interpretation. Regardless of the legal culture or system – poof! Rules, standards, factors, tests, and so on can appear; some over time, others almost instantaneously and out of nowhere.

This paper, then, will attempt to make magic with two areas of law: the rules on State responsibility, based largely on the UN ILC-compiled *Articles on the*

[1] The term—peremptory norm—has been used synonymously, or interchangeably, with the term *jus cogens*.

[2] Andrea Bianchi, *Human Rights and the Magic of* Jus Cogens, 19 EUR. J. INT'L L. 491, 508 (2008).

Responsibility of States for Internationally Wrongful Acts ("ARSIWA"),[3] and IHL, also referred to as the "law of armed conflict" or the "laws of war."[4] In reviewing these two areas of law, this contribution argues in favor of the identification of IHL rules as peremptory norms of international law, creating *erga omnes* obligations for third States. It does not engage in a debate as to the existence of peremptory norms – generally, that would be a futile exercise.[5] While international lawyers and jurists disagree on which norms are peremptory, their existence is treaty-inscribed and rooted in State practice, of which States are cognizant. This paper attempts to "deconstruct" the definition and criteria of peremptory norms, then "reconstruct" that process with IHL rules. It would not be feasible within the margins of this paper to engage in a stocktaking exercise of *all* IHL rules, although attention should be given to those that are both conventional and customary in nature.[6] However, it adopts a nuanced approach, building largely upon determinations (and subsequent ambiguities) from the International Court of Justice ("ICJ") and the ILC, as well as the academic discourse.

This contribution tackles two general questions. *Firstly,* can IHL rules be considered peremptory norms? The conclusion is yes or, at least, that many should be. *Secondly,* is there a utility to identifying IHL norms as also constituting peremptory norms?[7] In theory, while the third State (external) obligation to "ensure respect" in IHL may be considered equivalent to, and even supplemented by, the rules on State responsibility, the scope of the latter may offer a stronger device for international law compliance and enforcement vis-à-vis third States and Parties.

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[3] *See* Draft Articles on Responsibility of States for Internationally Wrongful Acts, *in* Report of the International Law Commission on the Work of Its Fifty-Third Session, U.N. GAOR, 56th Sess., Supp. No. 10 at 43, U.N. Doc. A/56/10 (2001) [hereinafter ARSIWA].

[4] This author is of the opinion that the broad concept of the "laws of war" is too general a term and may, in fact, include not only the *jus in bello*, but also the *jus ad bellum*. As such, this article will refer to "IHL." *See generally, Jus ad Bellum and Jus in Bello*, ICRC (Oct. 29, 2010), https://www.icrc.org/en/document/jus-ad-bellum-jus-in-bello.

[5] *See* Eric Suy, *Volume II, Part V: Invalidity, Termination and Suspension of the Operation of Treaties, s.2 Invalidity of Treaties, Art.53 1969 Vienna Convention*, in VIENNA CONVENTIONS ON THE LAW OF TREATIES 1226, paras. 4-5 (Olivier Corten & Pierre Klein eds., 2011) ("Although some held that the principle was 'too little developed to be able to be included into the codification of the treaties'. . .the majority were of the view that it should be incorporated within the Convention. Few believed that it amounted to codification of an established principle. . .. Forty years later, this difference of views has largely dissipated, and the international community now accepts that the rule on the voidance of a treaty where it conflicts with a peremptory rule of law forms part of substantive law."); *see also* Bianchi, *supra* note 2, at 505 ("Frontal attacks on *jus cogens* remain sporadic and their proponents often fail to make a convincing case against it.").

[6] *See generally Rules*, ICRC, IHL DATABASES, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul [hereinafter ICRC Customary IHL]; *see Rule 139: Respect for International Humanitarian Law*, ICRC, IHL DATABASES, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule139; *Rule 144: Ensuring Respect for International Humanitarian Law Erga Omnes*, ICRC, IHL DATABASES [hereinafter ICRC, Customary IHL, Erga Omnes], https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule144.

[7] *See* Anthony D'Amato, *It's a Bird, It's a Plane, It's Jus Cogens!*, 6 CONN. J. INT'L L. 1, at 1 (1990) (noting where Amato asks "(1) What is the utility of a norm of *jus cogens* (apart from its rhetorical value as a sort of exclamation point)? (2) How does a purported norm of *jus cogens* arise? (3) Once one arises, how can international law change it or get rid of it?").

Section II seeks to deconstruct peremptory norms of international law. *Firstly,* it covers the definition of peremptory norms. *Secondly,* it breaks down the criteria for identifying peremptory norms based on that definition. *Thirdly,* it provides an overview of the determinations made by international bodies on peremptory norms, including the extent of their analysis of the definition and criteria. This sub-section will also refer to those determinations made specifically on IHL rules as peremptory norms. Section III attempts to reconstruct peremptory norms with IHL rules. In order to guide the analysis, it entertains the (primarily academic) discourse on IHL rules as peremptory norms. It then generally applies the definition from the Vienna Convention on the Law of Treaties ("VCLT") and criteria to IHL rules. It analyzes IHL rules as peremptory norms, through various authorities, and gives a general overview of how conventional rules that enjoy customary status seem to satisfy the definition and criteria through the reconstruction process. Finally, Section IV discusses the identification of IHL rules as peremptory norms and its legal consequences for third States, *i.e.* the "added value" of finding that these IHL rules possess peremptory norm status.

II. Deconstructing Peremptory Norms

This section deconstructs peremptory norms by explaining their definition and criteria, followed by an overview of authoritative determinations made by international bodies on IHL rules as peremptory norms. This analysis will feed into the following section, reconstructing peremptory norms through IHL, *i.e.* applying the definition and criteria to IHL rules for the purpose of arguing in favor of their peremptory norm status.

A. The Definition of Peremptory Norms

Generally, there is virtual consensus that peremptory norms exist in international law (*i.e.*, not an illusion). These norms sit at the top of the international law hierarchy (of obligations and sources).[8] The definition of peremptory norms can be found in the VCLT.[9] VCLT article 53 provides that a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.[10]

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[8] There is quite a bit of literature on this debate, however beyond the scope of this paper. *See generally* PEREMPTORY NORMS OF GENERAL INTERNATIONAL LAW (JUS COGENS): DISQUISITIONS AND DISPUTATIONS (Dire Tladi ed., 2021).

[9] *See* Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter VCLT]; *see also* Rafael Nieto-Navia, *Are Those Norms Truly Peremptory? with Special Reference to Human Rights Law and International Humanitarian Law,* 2015 GLOB. COMM. Y.B. INT'L L. JUR. 48 (2016) [hereinafter Nieto-Navia (2016)]; *see generally* THOMAS WEATHERALL, JUS COGENS: INTERNATIONAL LAW AND SOCIAL CONTRACT (2015); DANIEL COSTELLOE, LEGAL CONSEQUENCES OF PEREMPTORY NORMS IN INTERNATIONAL LAW (2017); ALEXANDER ORAKHELASHVILI, PEREMPTORY NORMS OF INTERNATIONAL LAW (2008).

[10] VCLT, *supra* note 9, art. 53. For commentaries on VCLT, art. 53, *see* MARK E. VILLAGER, COMMENTARY ON THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES 661-78 (2009); Kirsten

The language was subject to little dispute.[11] VCLT article 64 stipulates that "[i]f a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates."[12] The language is dynamic, forecasting the "emergence" of norms that otherwise did not exist at the time of the VCLT's adoption, or in the future adoption of treaties. VCLT article 66, in turn, allows for dispute settlement vis-à-vis the ICJ, unless the parties agree to submit the dispute to arbitration.[13]

In the Oxford-published VCLT commentaries, Eric Suy accurately warns against confusing the terminology between *jus cogens* and *erga omnes*. Suy explains that "while their source is the same—notably peremptory norms—the effects are different."[14] Suy continues:

> A treaty that conflicts with *jus cogens* is void, whereas an act or action that breaches a peremptory norm establishing an *erga omnes* obligation invokes a special responsibility of the State. The distinction between *jus cogens* norms as peremptory norms of international law and *erga omnes* obligations, which are also mandatory norms, is the fact that *jus cogens* forms part of treaty law, whereas *erga omnes* obligations form part of the law on the responsibility of States for internationally wrongful acts. The latter involves a breach of a peremptory norms by an act or deed, not a conflict between a treaty and peremptory norm.[15]

As such, this contribution is particularly concerned with situations where an "act or deed" breaches a peremptory norm, triggering *erga omnes* obligations; *i.e.*, third State responsibility. Drawing from the ICJ, in *Barcelona Traction,* Jochen Frowein distinguishes between "'obligations of a State towards the international community as a whole' which are 'the concern of all States' and for whose protection all States have a 'legal interest'" and "those [obligations] existing vis-à-vis another State."[16] Capturing the essence of *erga omnes* obliga-

Schmalenbach, *Article 53: Treaties Conflicting with a Peremptory Norms of General International Law ("Jus Cogens")*, *in* VIENNA CONVENTION ON THE LAW OF TREATIES: A COMMENTARY 961-1020 (Oliver Dörr & Kirsten Schmalenbach eds., 2nd ed., 2018). This paper largely follows the Oxford-published commentaries, as below.

[11] With the exception of France, who "saw the sanctity of treaty obligations threatened by recognition of [*jus cogens*]." Jochen A. Frowein, *Ius Cogens*, *in* MAX PLANCK ENCYCS. PUB. INT'L L., ¶ 2 (2013) [hereinafter Frowein Jus Cogens]. As noted by the VCLT ILC commentaries, "only one [government] questioned the existence of rules of *jus cogens* in the international law of to-day."; *see Draft Articles on the Law of Treaties with Commentaries 1966, in* Documents of the Second Part of the Seventeenth Session and of the Eighteenth Session Including the Reports of the Commission to the General Assembly, Y.B. Int'l L. Comm'n, 1966 Vol. II, U.N. Doc. A/CN.4/SER.A/1966/Add.1, at 247 [hereinafter VCLT ILC Commentaries]. However, Suy notes "both the unreserved support for the concept of jus cogens among 'socialist' States and the reluctance of 'western and other' States to accept this notion in the absence of any guarantee of an objective evaluation." Suy, *supra* note 5, at 1221, ¶ 2.

[12] VCLT, *supra* note 9, at art. 64.

[13] *Id.* at art. 66. This mechanism has never been employed, and the identification of peremptory norms has largely been left to judicial—and to a lesser extent, State—discretion.

[14] Suy, *supra* note 5, at 1228, ¶ 13.

[15] Suy, *supra* note 5, at 1228-29, ¶ 13.

[16] Jochen Frowein, *Obligations Erga Omnes*, *in* MAX PLANCK ENCYCS. PUB. INT'L L., ¶ 1 (2008), [hereinafter Frowein Erga Omnes] (citing Barcelona Traction, Light and Power Company, Limited (New

tions, Frowein explains that although *jus cogens* and obligations *erga omnes* have different legal consequences, they are related to each other in important aspects. A rule from which no derogation is permitted because of its fundamental nature will normally be one in whose performance all States seem to have a legal interest.[17]

The ARSIWA appropriately relies on the VCLT's definition of peremptory norms.[18] Interestingly, Suy notes that the ARSIWA does not include the term *jus cogens*: "[this] omission is no mere coincidence and implies that the expression should, in the ILC's view, be reserved for conflicts between treaties and peremptory norms of general international law,"[19] while adding that in the ARSIWA, the ILC "equates peremptory norms of general international law with *erga omnes* obligations for the purposes of [State responsibility]."[20]

The ARSIWA is a non-binding legal document, although it largely covers binding legal sources drawn from conventional and customary international law. It is particularly concerned with *erga omnes* obligations since it deals with the legal framework of State responsibility rather than treaty conflicts.[21] This contribution will thus stick with the term "peremptory norms" and in the context of State responsibility—hence, where peremptory norms create *erga omnes* obligations. For IHL purposes, this contribution does not assess conflicts between IHL treaties and peremptory norms; rather, it discusses violations of IHL rules for the purposes of ascertaining State responsibility. Subsequently, it seeks to address the added value of identifying IHL rules as peremptory norms.

B. The Criteria of Peremptory Norms

Breaking down the VCLT definition, the criteria for identifying peremptory norms are that it is: (a) a norm accepted and recognized by the international community of States as a whole; (b) a norm from which no derogation is permitted; *and* (c) a norm which can be modified only by a subsequent norm of general international law having the same character.[22] Guidance for identifying peremp-

Application: 1962) (Belg. v. Spain) Second Phase, Judgment, 1970 I.C.J. 3, ¶ 33 (Feb. 5) [hereinafter ICJ Barcelona Traction]).

[17] Frowein Erga Omnes, *supra* note 16, at ¶ 3.

[18] *See, e.g.*, Draft Articles on Responsibility of States for Internationally Wrongful Acts, with commentaries, [2001] Y.B. Int'l L. Comm. Vol. II, Part Two, U.N. Doc. A/56/10, at 56, 84-85, 111-13 [hereinafter ARSIWA ILC Commentaries]; *see also* Suy, *supra* note 5, at 1233, ¶ 25.

[19] Suy, *supra* note 5, at 1232-33, ¶ 25. This is a particular point to which this author agrees, yet this seems to be a recurring confusion, within both practice and scholarship (including some of those cited within this piece).

[20] *Id.*

[21] *See id.*; *see also* ARSIWA ILC Commentaries, *supra* note 18, at 110-16.

[22] *See* Rafael Nieto-Navia, *International Peremptory Norms (Jus Cogens) and International Humanitarian Law*, *in* MAN'S INHUMANITY TO MAN, ESSAYS OF INTERNATIONAL LAW IN HONOUR OF ANTONIO CASSESE 610-12 (Lal Chand Vohrah et al. eds., 2003) [hereinafter Nieto-Navia (2003)] (Nieto-Navia breaks down the first of these as follows: "A) The norm must be a norm of general international law;" and "B) The norm must be "accepted and recognized by the international community of States as a whole."). However, *see also* VCLT, *supra* note 9, art. 64; Anne Lagerwall, *Volume II, Part V Invalidity, Termination and Suspension of the Operation of Treaties, s.4 Procedure, Art. 64 1969 Vienna Convention*, *in* THE VIENNA CONVENTIONS ON THE LAW OF TREATIES 1463, ¶ 14 (Olivier Corten & Pierre Klein

tory norms can be drawn from the findings of judicial and other international bodies on the matter, rather than engaging in an academic exercise altogether (although this is covered in the next sub-section). While the trend is progressively changing, the ICJ (and other international bodies) has traditionally dealt with the topic with a ten-foot pole. This seems to demonstrate an unwarranted culture of caution that has inhibited international law's progressive development and codification. Moreover, international bodies—and especially the ICJ—have exercised restraint from any sophisticated legal analysis on the identification of peremptory norms.

The first part is identifying the norm, which would be derived best from treaty or custom, the latter requiring two elements: state practice and *opinio juris* (*i.e.*, recognition/acceptance that there is a legal obligation vis-à-vis that specific norm/rule).[23] As such, for the ILC, the determinative element of a peremptory norm is that it is "accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted."[24] During the discussions, the Chairman of the VCLT Drafting Committee explained that a "very large majority" of States accepting and recognizing the norm as peremptory was sufficient.[25] However, there have been no actual comprehensive stocktaking exercises performed by States collectively in identifying peremptory norms.[26] In many ways, the bulk of the work has been left to the discretion of international bodies and how they perceive State *acceptance* and *recognition*.

State practice need not be uniform, but rather consistent with the particular rule.[27] This does not necessarily mean that States have refrained from violating peremptory norms in one way or another. Many States still engage in the practice of torture, and there are several contemporary instances of the forcible acquisition of territory, for example. Challenging this "quasi-universal" acceptance would be in the "firm opposition of several States to the recognition of the peremptory character of a norm would preclude it from acquiring this character."[28] The reality is that it would be difficult to argue that one State's historical opposition (if it existed) to the prohibitions on torture or forcible acquisition of territory

eds., 2011) (in the leadup to the VCLT discussions, "States pointed out, particularly, the lack of precise criteria to define a norm of jus cogens and the inadequacy of the settlement procedure to resolve interpretation issues concerning Article 64.").

[23] *See* North Sea Continental Shelf (Germ. v. Neth.), 1968 I.C.J. 3, ¶ 77 (Feb. 20). The ICRC study naturally follows this approach, against the backdrop of international treaty law's impact; *see Introduction: Assessment of Customary International Law*, ICRC, https://www.icrc.org/customary-ihl/eng/docs/v1_rul_in_asofcuin (last visited May 19, 2023).

[24] *See* Lagerwall, *supra* note 22, at 1467, ¶ 23. The ILC explains that "it is sufficient to use the phrase 'international community as a whole', rather than 'international community of States as a whole." *See* ARSIWA ILC Commentaries, *supra* note 18, at 84 (as used in ICJ Barcelona Traction).

[25] Suy, *supra* note 5, at 1227, ¶ 9; *see also* Lagerwall, *supra* note 22, at 1470-71, ¶ 31.

[26] Even where certain treaties specifically interact with peremptory norms—such as the prohibitions on torture (Convention against Torture) or the forcible acquisition of territory (UN Charter)—they are not identified as peremptory norms *per se*.

[27] *See* THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW 61 (1991) [hereinafter Meron (1991)] (citing Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1984 I.C.J. 14, 98, ¶ 186 (June 27) [hereinafter ICJ Nicaragua]).

[28] Lagerwall, *supra* note 22, at 1472, ¶¶ 33-34.

would undermine their status as peremptory norms. Similarly, while IHL rules are occasionally violated, there is generally no opposition to, and no possibility of derogation from, the obligations drawn from IHL rules which enjoy customary status. Perhaps different *interpretations* of the rule, but not *opposition* to the rule altogether.

In order to assess the status of a norm as peremptory, Anne Lagerwall draws inferences from the terminology of ICJ Statute article 38[29] in interpreting VCLT article 53 ("accepted" and "recognized").[30] She adds that "consensualism" is informative in meeting the "accepted and recognized" standard, by way of either treaty or custom:

> treaty and custom are those that rely most explicitly on consensualism in their development process: by way of the consent to be bound to certain norms, in the case of a treaty, and through the adoption of a constant practice conveying the recognition of the compulsory character of certain norms, in the case of customary law.[31]

Rafael Nieto-Navia more expansively advances that peremptory norms may be derived not only from treaties and custom, but from general principles of international law.[32] The same logic may also be applied to the works of "high qualified publicists,"[33] although with lesser weight. This is keeping in mind that publicists are arguably most dynamic and productive in peremptory norm discussions.

As for the impossibility of derogation, both treaty and customary law present their own sets of difficulties. On the one hand, for custom, Lagerwall presents two challenges. Firstly, unlike ordinary custom, *opinion juris* vis-à-vis peremptory norms requires that States "not only have the conviction that they are bound by a rule, but also that the rule is one from which no derogation is possible."[34] Secondly, there is difficulty in establishing the precise moment in time *when* the norm came into being.[35] On the other hand, treaties come with their own set of challenges. Here, the treaties should be joined by virtually *all* States.[36] Further, "the treaty must convey the belief of States that the norms it embodies are not subject to any type of derogation."[37] Some prominent examples of peremptory norms featured in treaties either explicitly or implicitly stipulate non-dero-

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[29] *See* Statute of the International Court of Justice, art. 38.

[30] Lagerwall, *supra* note 22, at 1468, ¶ 26; *see also* Nieto-Navia (2003), *supra* note 22, at 612-13.

[31] Lagerwall, *supra* note 22, at 1468, ¶ 26.

[32] Nieto-Navia (2003), *supra* note 22, at 612-13; *see generally* M. Cherif Bassiouni, *A Functional Approach to "General Principles of International Law,"* 11 MICH. J. INT'L L. 768 (1990).

[33] *See generally* Sir Michael Wood, *Teachings of the Most Highly Qualified Publicists (Art. 38(1) ICJ Statute), in* MAX PLANCK ENCYCS. PUB. INT'L L. (2017).

[34] Lagerwall, *supra* note 22, at 1468, ¶ 27 ("Only a perfectly consistent and unambiguous practice, including precedents in which States have condemned derogations to the rule, could help to establish such conviction (internal citation omitted). Such practice is rare.").

[35] *See id.*

[36] *See id.* at 1468, ¶ 28.

[37] *Id.* (As Lagerwall explains, this can be found by analyzing the convention's terms, its preparatory works, State declarations, and reservations.)

gability. For example, the International Covenant on Civil and Political Rights ("ICCPR") clearly stipulates the non-derogability of the prohibition against torture.[38] Generally, treaties are not so explicit.

Ideally, in order to meet the criteria, it is best to "combine different sources together in order to establish the peremptory character of those norms, as well as the time at which they emerged."[39] One such example used by Lagerwall is the prohibition on racial discrimination, based on its development vis-à-vis the UN Charter, the International Convention on the Elimination of Racial Discrimination, and several United Nations General Assembly resolutions.[40] Lagerwall suggests that the preferable means of identifying peremptory norms are where treaties actually codify customary norms.[41] Yet it should be noted that the process may involve the opposite (for example, the prohibition on genocide). Together, Lagerwall explains that there should be "double consent" in that States "must have both recognized the norm as legally binding and considered it a norm from which no derogation is permitted."[42]

In sum, it is established that the norm should be derived from treaty or custom, from which no derogation is permitted.[43] This would work best where there is consensualism *and* double consent; ideally, although not necessarily, drawn from treaty *and* custom. Such determinations have been left to international bodies and, for the most part, following this formula.

C. Determinations on Peremptory Norms, Including International Humanitarian Law Rules

Several international bodies have made determinations on peremptory norms, including references to IHL rules (although usually vague). For the most part, the ICJ has exercised restraint when dealing with peremptory norms. The ILC, however, has been most active in advancing the analysis, particularly through its commentaries. Illustrative lists have been largely avoided and, where peremptory norms have been identified, it has not necessarily entertained a rigorous application of the definition and criteria. As mentioned, while States were hesitant about the inclusion of an illustrative list during the drafting of the VCLT,[44] the ILC inserted a few ideas into the commentaries.[45] The ILC would later expand these ideas in their ARSIWA commentaries.

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[38] *See* G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights, at art. 4(2) (Dec. 16, 1966). It does not, however, identify it as a peremptory norm, of course.

[39] Lagerwall, *supra* note 22, at 1469, ¶ 30.

[40] *See id.*

[41] *See id.*

[42] Lagerwall, *supra* note 22, at 1467, ¶ 24.

[43] *See* Nieto-Navia (2016), *supra* note 9, at 52-54 (referring to treaties, custom, and general principles).

[44] Suy, *supra* note 5, at 1228, ¶ 11-12 (finding Suy's limited scope of peremptory norms includes "the prohibition of the use of force, slavery, genocide, piracy, unequal treaties, interference in internal affairs, or the obligation to settle disputes peacefully.").

[45] *See* VCLT ILC Commentaries, *supra* note 11, at 248 ("Examples suggested included (a) a treaty contemplating an unlawful use of force contrary to the principles of the Charter, (b) a treaty contemplat-

With respect to the ICJ, Bianchi opines that the Court "was never fond of *jus cogens* – admittedly not a legal category of its own creation" and that this "is further attested to by the Court's alternative use of the notion of obligations *erga omnes*."[46] ICJ references to peremptory norms are scant. Yet, perhaps it is not that the ICJ was never fond of the term altogether. Rather, it seems that the ICJ has restrained itself from concretely identifying peremptory norms, not unlike the views—particularly by States—against formulating illustrative lists in ILC contexts. Additionally, by referring to *erga omnes* rather than *jus cogens,* it is more plausibly employing the legal terminology indispensable to the rules on State responsibility; *i.e.*, peremptory norms creating *erga omnes* obligations.

The large part of those rules that have been designated as peremptory norms are human rights-based.[47] In *Barcelona Traction,* the ICJ made its first determinations on *erga omnes*, including the prohibitions against aggression, genocide, and "principles and rules concerning the basic rights of the human persons" which includes protection from slavery and racial discrimination.[48] Some two and a half decades later, the ICJ explained that "the rights and obligations enshrined by the [Genocide] Convention are. . .*erga omnes*."[49] In *East Timor,* the ICJ adds the right to self-determination as having an *erga omnes* character.[50] In the *Wall* advisory opinion, the ICJ reiterates the right to self-determination's *erga omnes* character, with the addition of ambiguous IHL rules.[51] In the *Wall,* the ICJ attempted to remedy the inarticulate language of its *Nuclear Weapons* advisory opinion by clarifying that the IHL rules alluded to in *Nuclear Weapons* "incorporate obligations which are essentially of an *erga omnes* character."[52] In *Nuclear Weapons,* the ICJ's inarticulate language was as follows:

> It is undoubtedly because a great many rules of [IHL] applicable in armed conflict are so fundamental to the respect of the human person and "elementary considerations of humanity". . .that the Hague and Geneva Conventions have enjoyed a broad accession. Further these fundamental rules

ing the performance of any other act criminal under international law, and (c) a treaty contemplating or conniving at the commission of acts, such as trade in slaves, piracy or genocide, in the suppression of which every State is called upon to co-operate. Other members expressed the view that, if examples were given, it would be undesirable to appear to limit the scope of the article to cases involving acts which constitute crimes under international law; treaties violating human rights, the equality of States or the principle of self-determination were mentioned as other possible examples."). In line with the pure meaning of *jus cogens*, the commentaries refer only to *treaties* that include *peremptory norms.*

[46] Bianchi, *supra* note 2, at 502 ("While the two notions may be complementary, they remain distinct, and to consider them as synonyms risks undermining the legal distinctiveness of each category.").

[47] Bianchi, *supra* note 2, at 492; *see generally* ARSIWA ILC Commentaries, *supra* note 18.

[48] ICJ Barcelona Traction, *supra* note 16, ¶ 33-34 (finding it did not refer to them as peremptory norms).

[49] *See* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Preliminary Objections, 1996 I.C.J. 595, ¶ 31 (July 11) [hereinafter ICJ Genocide].

[50] *See* East Timor (Port. v. Austl.), Judgment, 1995 I.C.J. 90, ¶ 29 (June 30).

[51] *See* Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 136 ¶ 155-57 (July 9) [hereinafter ICJ Wall Advisory Opinion].

[52] *Id.* at ¶ 157; *see generally* Peter Bekker, *Legality of the Threat or Use of Nuclear Weapons*, 91 AM. J. INT'L L. 126 (1997).

> are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law.[53]

The ICJ stopped there, making no mention of *erga omnes*. The ICJ referred back to the "human person," giving no indication as to what those IHL rules were and providing no legal basis for its use of the term "intransgressible" – the key ambiguity (although the use of the term "fundamental" has its history)[54] Bianchi believes that the ICJ "created the cacophonic neologism of 'intransgressible principles of humanitarian law' to avoid referring to *jus cogens*."[55] To a certain extent, the ICJ discusses aspects of consensualism and double consent with respect to IHL rules,[56] but stops short in its determination:

> It has been maintained in these proceedings that these principles and rules of international humanitarian law are part of *jus cogens* as defined in [VCLT article 53]. The question whether a norm is part of the *jus cogens* relates to the legal character of the norm. The request addressed to the Court by the General Assembly raises the question of the applicability of the principles and rules of international humanitarian law in cases of recourse to nuclear weapons and the consequences of that applicability for the legality of recourse to these weapons. But it does not raise the question of the character of the humanitarian law which would apply to the use of nuclear weapons. There is, therefore, no need for the Court to pronounce on this matter.[57]

The ICJ excluded any detailed analysis as to whether IHL rules—and which of them—constitute peremptory norms.[58] It does, however, refer to the "cardinal principles" of IHL as including the principle of distinction and prohibition against unnecessary suffering.[59] Yet, as noted above, the ICJ makes its determination only a few years later in the *Wall* advisory opinion, where the "great many rules of humanitarian law applicable in armed conflict" that "are so fundamental to the respect of the human person and 'elementary consideration of humanity'"—which, in *Nuclear Weapons*, constitute "intrangressible principles of international customary law"—"incorporate obligations which are essentially of an *erga omnes* character."[60] The ICJ does not automatically equate IHL rules with

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53 Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226 ¶ 79 (July 8) [hereinafter ICJ Nuclear Weapons Advisory Opinion].

54 *See* ICJ Nicaragua, *supra* note 27, at ¶ 218 (". . .fundamental general principles of humanitarian law"); *see also* Judith Gardham, *The Contribution of the International Court of Justice to International Humanitarian Law*, 14 LEIDEN J. INT'L L. 349, 355 (2001); Rosemary Abi-Saab, *The "General Principles" of Humanitarian Law According to the International Court of Justice*, 27 INT'L REV. RED CROSS 367 (1987).

55 Bianchi, *supra* note 2, at 502.

56 ICJ Nuclear Weapons Advisory *Opinion*, *supra* note 53, at ¶ 82.

57 *Id.* at ¶ 83.

58 *See* Gardham, *supra* note 54, at 357.

59 ICJ Nuclear Weapons Advisory Opinion, *supra* note 53, at ¶ 78.

60 ICJ Wall Advisory Opinion, *supra* note 51, at ¶ 79.

peremptory norms establishing *erga omnes*; rather, it enigmatically explains that IHL rules incorporate *erga omnes* obligations. In his report on the "fragmentation" of international law, ILC rapporteur Martti Koskeniemmi supposes that the norms the ICJ are referring to involve the "prohibition of hostilities directed at a civilian population ('the basic rules of [IHL]')."[61] While this is somewhat helpful, it is still elusive, as the grouping can encompass numerous IHL rules.

Of course, there is much to be said about the ICJ's failure to more critically examine the legality of nuclear weapons.[62] What is more unsatisfying is the Court's failure to more critically *apply* IHL rules to the use of such weapons[63] (and the impracticality of such an analysis). While the use of nuclear weapons would involve numerous IHL violations, the ICJ specifically discussed the principle of distinction and the prohibition against unnecessary suffering in *Nuclear Weapons*.[64] It may be inferred that these two are what most clearly constitute the ICJ's "intrangressible" principles. Nevertheless, Timothy McCormack expresses the opinion that "[*p*]*rima facie,* the application of these principles to the threat or use of nuclear weapons, particularly in view of the earlier steps in the [ICJ's] reasoning outlined above, would lead to a conclusion of illegality in almost all conceivable circumstances."[65]

The ILC explains in its ARSIWA commentaries that "[i]n the light of the description by ICJ of the basic rules of [IHL] applicable in armed conflict as "intransgressible" in character, it would also seem justified to treat these as peremptory."[66] The term "these" is not further scrutinized, but should be inclusive of the "great many" IHL rules that the ICJ has referred to. More explicitly, ILC also explains its view that "peremptory norms that are clearly accepted and recognized include the prohibitions of aggression, genocide, slavery, racial discrimination, crimes against humanity and torture, and the right to self-determination."[67] The ILC then goes on to add that "[t]here also seems to be wide-spread agreement with other examples listed in the [ILC's] commentary to article 53: viz. the

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[61] Int'l Law Comm'n, Rep. of the Study Group on the Fifty-Eighth Session, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law,* U.N. Doc. A/CN.4/L.682, at 189, ¶ 374 (Apr. 13, 2006).

[62] *See generally* Christopher Greenwood, *The Advisory Opinion on Nuclear Weapons and the Contribution of the International Court to International Humanitarian Law*, 6 INT'L REV. RED CROSS 65 (1997).

[63] *See* Timothy McCormack, *A Non Liquet on Nuclear Weapons: The ICJ Avoids the Application of General Principles of International Humanitarian Law*, 37 INT'L REV. RED CROSS 76 (1997); *see also* Gardham, *supra* note 54. Interestingly, and perhaps unfortunately, even the ICRC has shown caution; *see A Statement by Helen Durham, Director of Law and Policy, ICRC*, ICRC (Mar. 14, 2022), https://www.icrc.org/en/document/icrc-appeals-nuclear-weapons-never-used (saying instead that "[i]t is extremely doubtful that nuclear weapons could ever be used in accordance with the principles and rules of international humanitarian law.").

[64] *See* McCormack, *supra* note 63, at 84-85; *see also* ICJ Nuclear Weapons, *supra* note 53, at ¶ 78 (these two principles are nevertheless significant and revisited below).

[65] McCormack, *supra* note 63, at 85 (holding this is an opinion that this author subscribes to, however in *all,* rather than "almost all" circumstances).

[66] ARSIWA ILC Commentaries, *supra* note 18, at 113; *see also* Marco Sassòli, *State Responsibility for Violations of International Humanitarian Law*, 84 INT'L REV. RED CROSS 401, 420 (2002).

[67] ARSIWA ILC Commentaries, *supra* note 18, at 58, 85.

prohibitions against slavery and the slave trade, genocide, and racial discrimination and apartheid."[68] Forcible acquisition of territory (*i.e.*, annexation) also makes the list.[69]

Some mention should also be made from determinations of the International Criminal Tribunal for the Former Yugoslavia ("ICTY"). In *Furundzija*, the ICTY explained that the prohibition on torture constituted a peremptory norm.[70] The ICTY also made a similar determination with regards to the prohibition on genocide.[71] In *Kupreskic*, the ICTY explained that "most norms of [IHL], in particular those prohibiting war crimes, crimes against humanity and genocide, are also peremptory norms of international law or *jus cogens*, *i.e.*, of a non-derogable and overriding character."[72] This determination seems to be encompass several different areas of law unless it is to be understood that the ICTY was referring to IHL prohibitions that, when breached, would result in different categories of crimes.

For the purposes of understanding the relationship between State responsibility and IHL, the definition and subsequent criteria of peremptory norms are translated into *erga omnes*. Determinations have been made on the identification of peremptory norms, including IHL rules –although these decisions seem to be somewhat haphazard. The rules that fall within this scope are not particularly clear. The determinations have identified these rules, albeit a rigorous application of the criteria. Nonetheless, we are left with a framework applying the definition and criteria to certain IHL rules. The opinions of several commentators on this topic are instructive, which will be seen in the next section.

D. Tladi's Work

Over the past few years, ILC member Dire Tladi has covered the topic of "peremptory norms of general international law (*jus cogens*)."[73] An illustrative list was annexed to Tladi's fourth report and limited to peremptory norms that had been previously referred to by the ILC.[74] As explained in the summary within the next paragraph, Tladi's work is largely in line with the various authorities discussed above. Here, it is worth noting Tladi's draft conclusions, in line with the process of defining and identifying peremptory norms, as well as those references to IHL.

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[68] ARSIWA ILC Commentaries, *supra* note 18, at 112 (noting that racial discrimination and apartheid are not actually specifically mentioned as such in the VCLT ILC Commentaries).

[69] *Id.* at 114.

[70] Prosecutor v. Furundzija, Case No. IT-95–17/1-T, Judgment, ¶ 145 (Int'l Crim. Trib. for the Former Yugoslavia 1998); *see also* Suy, *supra* note 5, at 1232, ¶ 24.

[71] Prosecutor v. Stakic, Case No. IT-97–24-T, Judgment, ¶ 500 (Int'l Crim. Trib. for the Former Yugoslavia 2002); *see also* Suy, *supra* note 5, at 1232, ¶ 24.

[72] Prosecutor v. Kupreskic et al, Case No. IT-95-16-T, Judgment, ¶ 520 (Int'l Crim. Trib. for the Former Yugoslavia 2000).

[73] *See* Dire Tladi (Special Rapporteur), *Fifth Report on Peremptory Norms of General International Law (Jus Cogens)* Int'l L. Comm'n, U.N. Doc. A/CN.4/747 (Jan. 24, 2022) [hereinafter Tladi ILC Report].

[74] *See id.* at 5.

Tladi's draws the definition of peremptory norms from the VCLT.[75] Tladi adds that peremptory norms "are hierarchically superior to other rules of international law and are universally applicable."[76] Tladi then breaks down the criteria of identifying a peremptory norm: "(a) it is a norm of general international law; and (b) it is accepted and recognized by the international community of States as a whole as a norms from which no derogation is permitted and which can be modified only by a subsequent norm of international law having the same character."[77] For Tladi, "[c]ustomary international law is the most common basis for peremptory norms of international law (*jus cogens*)."[78] This is a bit of a departure from a more stringent standard that relies on both treaty and custom. Tladi then differentiates between "acceptance and recognition" between peremptory norms and general international law norms; that is, the former's non-derogability.[79]

Tladi then adds his draft conclusions on acceptance and recognition, in that: "[i]t is the acceptance and recognition by the international community of States as a whole that is relevant for the identification of peremptory norms of general international law (*jus cogens*);"[80] and "[a]cceptance and recognition by a very large majority of States is required for the identification of a norm as a peremptory norm of general international law (*jus cogens*)" while "acceptance and recognition by all States is not required."[81] Further, acceptance and recognition can take a wide range of forms.[82] Determinations made by international courts and tribunals (including reference to the ICJ specifically), as well as the "works of expert bodies" and "teachings of the most highly qualified publicists" are considered subsidiary means for determining peremptory norms.[83] Of course, this is keeping in mind that the wide range of forms that Tladi refers to in finding evidence of acceptance and recognition surely requires authoritative determinations, such as those of the ICJ.

With respect to *erga omnes*, Tladi's report provides the following:

> 1. Peremptory norms of general international law (*jus cogens*) give rise to obligations owed to the international community as a whole (obligations *erga omnes*), in which all States have a legal interest.

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[75] Tladi ILC Report, *supra* note 73, at 15.

[76] *Id.* at 16.

[77] *Id.* at 22.

[78] *Id.* at 23.

[79] *Id.* at 27 (stating that the former "can only be modified by a subsequent norm of general international law having the same character.").

[80] *Id.* at 29.

[81] *Id.*

[82] *Id.* at 34 ("Such forms of evidence include but are not limited to: public statements made on behalf of States; official publications; government legal opinions; diplomatic correspondence; legislative and administrative acts; decisions of national courts; treaty provisions; and resolutions adopted by an international organization or at an intergovernmental conference.").

[83] *Id.* at 37.

> 2. Any State is entitled to invoke the responsibility of another State for a breach of a peremptory norm of general international law (*jus cogens*), in accordance with the rules on the responsibility of States for internationally wrongful acts.[84]

Overall, for the most part, Tladi's conclusions mostly find agreement with the above-discussed scholarship in relation to the definition and criteria, acceptance, and recognition, as well as *erga omnes* obligations.[85] The next section will expand on Tladi's brief mention of IHL rules and, afterwards, the legal consequences pertaining to their possible peremptory norm status.

III. IHL Rules as Peremptory Norms of International Law

This section will discuss the IHL rules as peremptory norms, entertaining the academic discourse and applying the VCLT definition and criteria. It gives a general overview of how rules that are both conventional and customary—and as such non-derogable—can satisfy the definition and criteria through the reconstruction process. It will then be followed by a discussion on how the identification of IHL rules as peremptory norms leads to different considerations on the legal consequences for third States.

As discussed, Tladi annexes a non-exhaustive list of norms that the ILC has previously referred to as being peremptory. These include the following: the prohibition of aggression; the prohibition of genocide; prohibition of crimes against humanity; *the basic rules of international humanitarian law*; the prohibition of racial discrimination and apartheid; the prohibition of slavery; the prohibition of torture; and the right of self-determination.[86] As mentioned, there was a divide as to whether such a list should be published. For the most part, the language is, like its terminology on IHL rules, "basic" in that it avoids what might have rather been a lengthy discussion. While ICJ has given some indication as to what these IHL rules might be, we can also draw several ideas from the academic discourse.

A. The Academic Discourse

The previous section ended with a discussion on authoritative determinations of peremptory norms generally and IHL rules as peremptory norms specifically (primarily vis-à-vis the ICJ and ILC). However, there has been, over time, a healthy academic discourse on IHL rules as peremptory norms. Some scholars share similar ideas, others not so much.

From the outset, if we were to take a more conservative "treaty-plus-custom" approach and apply consensualism and double consent as described above, there should be little to no reason as to why the "great many" IHL rules could not be considered peremptory norms. Without judicial decisions (and from the ICJ in

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[84] Tladi ILC Report, *supra* note 73, at 52 (Draft conclusion 17).

[85] Throughout the Report, Tladi includes the comments of various States. For more of the development of Tladi's Report, as well as the views of States and other ILC members, readers can refer to Tlad's first to fourth reports.

[86] Tladi ILC Report, *supra* note 73, at 66 (Draft conclusion 23).

particular), we would be somewhat oblivious to a particular norm's status. None of the identified peremptory norms have gone through a comprehensive stocktaking exercise to assess their status. If we are to consider that peremptory norms are part of an exclusive club as a matter of legal policy and economy, then we would be severely constrained regardless.

In line with the above, Marco Sassòli explains that "[t]he ICJ, the ICTY and ILC consider that the basic rules of [IHL] are peremptory."[87] Sassòli agrees with the qualification of IHL's "basic rules" as peremptory.[88] Sassòli notes Condorelli and Chazournes' belief that "all rules of [IHL] are peremptory."[89] While this may seem to be a sweeping statement, none of the determinations—from the ICJ, ILC, or ICTY—provide such broad conclusions. Yet, according to Sassòli:

> It would be difficult to find rules of [IHL] that do not directly or indirectly protect rights of protected persons in international armed conflicts. In both international and non-international armed conflicts, those rules furthermore protect "basic rights of the human person" which are classic examples of *jus cogens*.[90]

Thus, these "basic rights/rules" are the classic examples of peremptory norms (creating *erga omnes*), amongst possible others. As such, Sassòli implies agreement with the Condorelli and Chazournes' position. The late James Crawford, one of the key figures behind the ARSIWA, similarly states that the basic rules of [IHL] are amongst "the least controversial" peremptory norms recognized by the ICJ.[91] He does not expand on this statement, but such interpretations can be both liberal and conservative at the same time, depending on how one views the basic rules. Overall, Sassòli's pool of IHL rules that enjoy peremptory norm status seem to be much larger than Crawford's pool, and closer to the Condorelli and Chazournes position.

Theodor Meron has opined that the "Geneva Conventions already contain some norms that can be regarded as *jus cogens*."[92] Meron suggests that "basic rights" in the Geneva Conventions and "especially Common Article 3" create *erga omnes* obligations (when read in conjunction with Common Article 1's ex-

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87 Sassòli, *supra* note 66, at 413-14 (explaining that "[i]t would be beyond the scope of this article to analyse which rules of international humanitarian law are basic enough to belond to *jus cogens*."); *see also* Frowein Jus Cogens, *supra* note 11, at ¶ 6 (as Frowein explains "the ICJ gave examples of obligations *erga omnes* which by their nature must also form part of *ius cogens*.").

88 Sassòli, *supra* note 66, at 420.

89 *Id.* at 413-14 (citing L. Condorelli and L. Boisson De Chazournes, *Quelques remarques à pro- pos de l'obligation des États de 'respecter et faire respecter' le droit international humani- taire en toutes circonstances, in* STUDIES AND ESSAYS ON INTERNATIONAL HUMANITARIAN LAW AND RED CROSS PRINCIPLES IN HONOUR OF JEAN PICTET 33-34 (1984)).

90 *Id.* at 414 (citing ICJ Barcelona Traction, *supra* note 16, at ¶ 34).

91 JAMES CRAWFORD, STATE RESPONSIBILITY: THE GENERAL PART 380 (2013). This is keeping in mind that Crawford cites the ICJ's ambiguous language from *Nuclear Weapons. See also* CRAWFORD, at 694-95.

92 THEODOR MERON, HUMAN RIGHTS AND HUMANITARIAN NORMS AS CUSTOMARY LAW 9 (1991) [hereinafter Meron (1991)]; *see also* Theodor Meron, *The Geneva Conventions as Customary Law,* 81 AM. J. INT'L L. 348, 350 (1987) [hereinafter Meron (1987)].

ternal obligation to "ensure respect").[93] This seems to find common ground with both Sassòli's and Crawford's thinking. However, Meron's inference to the "basic rights" are those primarily in Common Article 3, in addition to possible others. He states that "the prohibitions of murder, mutilation and torture, mentioned in Article 3(1)(a)" are *jus cogens*.[94] He comes to this conclusion based on the view that contractual norms are crystallized "into a principle of customary law and culminates in its elevation to *jus cogens* status."[95] This interpretation is seemingly in line with Lagerwall's analysis. His reasoning is as follows:

> The development of the hierarchical concept of *jus cogens* reflects the quest of the international community for a normative order in which higher rights are invoked as particularly compelling moral and legal barriers to derogations from and violations of human rights.[96]

Navia-Nieto entertains the possibility of adding the "grave breaches" of the four Geneva Conventions to the mix, which require penal sanctions and investigations and prosecutions for certain violations.[97] However, he explains that

> [a]lthough it can be suggested that there is a strong presumption that at least the 'grave breaches' provisions of the four Geneva Conventions have gained peremptory status, it has also been acknowledged that many of the norms contained within the conventions do not fulfil the criteria which are necessary for such a norm to be considered as *jus cogens*.[98]

Navia-Nieto believes, like Meron, that Common Article 3, paragraphs one and two, are what may be "*truly* peremptory in nature."[99] The common theme between these scholars is the grouping of "basic rules/rights." This finds its place in Common Article 3 to the four Geneva Conventions with the possibility of others. While Common Article 3 was originally focused on non-international armed con-

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[93] *See* Meron (1991), *supra* note 92, at 31; *see also* Meron (1987), *supra* note 92, at 355.

[94] Meron (1991), *supra* note 92, at 31; *see also* Meron (1987), *supra* note 92 (finding Meron does not provide the examples in his earlier piece).

[95] Meron (1991), *supra* note 92, at 8-9 (he also cites a previous text where, in reference to the US Foreign Relations Law, where *jus cogens* norms "contents will be established through general custom or by universal or quasi-universal agreements" (citing THEODOR MERON, HUMAN RIGHTS LAW-MAKING IN THE UNITED NATIONS: A CRITIQUE OF INSTRUMENTS AND PROCESS 194 (1986)).

[96] Meron (1991), *supra* note 92, at 9.

[97] *See* Navia-Nieto (2003), *supra* note 22, at 636; *see also How "Grave Breaches" are Defined in the Geneva Conventions and Additional Protocols*, ICRC (June 4, 2004), https://www.icrc.org/en/doc/resources/documents/faq/5zmgf9.htm (noting the Fourth Geneva Convention provides the following "Grave breaches to which the preceding Article relates shall be those involving any of the following acts, if committed against persons or property protected by the present Convention: willful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or willfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly.").

[98] Navia-Nieto (2016), *supra* note 9, at 68 (citing LAURI HANNIKAINEN, PEREMPTORY NORMS (JUS COGENS) IN INTERNATIONAL LAW 605-606 (1988) (internal citation omitted)).

[99] Navia-Nieto (2016), *supra* note 9, at 68.

flicts, the approaches of the ICJ in *Nicaragua* and of the ICRC provide that these are clearly the minimum to be applied in all armed conflicts.[100] This is what the ICJ refers to as "fundamental general principles" of IHL in *Nicaragua*,[101] as drawn from Common Article 3.[102]

Navia-Nieto concludes that "based on a *strict* interpretation of the concept, it is suggested that many of the [Geneva Conventions] provisions cannot *truly* be described as *jus cogens*."[103] This seems to be largely based on Navia-Nieto's concerns with the possibility of denunciation or reservations and based entirely on treaty law. Yet, it should be noted that the Geneva Conventions do not allow for separate agreements that would adversely affect protected persons. Sassòli compares, for example, *jus cogens* vis-à-vis the law of treaties on the one hand,[104] and the prohibition of "separate agreements that adversely affect the situation of protected persons."[105] There is very little room to argue that IHL rules enjoying customary status are derogable. Laura Hannikainen argues that several factors in the Geneva Conventions seem to satisfy the peremptory norms criteria. These include: the absolute nature of many provisions; the prohibition on special agreements and denunciations contrary to its protections; the invalidity of renunciations; and the (near) universality of ratifications/accessions.[106] Yet, Navia-Nieto overlooks these considerations, explaining in a footnote, that Hannikainen also recognizes that "the number of norms fulfilling all the criteria is not necessarily very small, even if limited."[107]

A conservative view of IHL rules as peremptory norms revolves around what can be considered "basic rules." However, jurisprudence and literature tell us little about what the basic rules are. Some have included Common Article 3 to the Geneva Conventions as a baseline, with some other considerations, assuming their application to both non-international and international armed conflicts. A broader view includes the grave breaches regime. An even broader view says that most, if not all (or perhaps the ICJ's "great many") IHL rules that enjoy customary status (like those outlined in the ICRC study) are peremptory, on the basis of their non-derogability.

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[100] *See* Navia-Nieto (2016), *supra* note 9, at 69-70; *see also* Meron (1991), *supra* note 92, at 33; *see also* ICJ Nicaragua, *supra* note 27, ¶ 218-20.

[101] *See* Gardham, *supra* note 54, at 355; *see also* ICJ Nicaragua, *supra* note 27, ¶ 218.

[102] *See* Gardham, *supra* note 54, at 356; *see also* ICJ Nicaragua, *supra* note 27, ¶ 219.

[103] Navia-Nieto (2016), *supra* note 9, at 70 (emphasis in original) (including other provisions within the Geneva Conventions, Additional Protocols, and other IHL instruments "which reflect the principles contained within common Article 3"). *See also* Navia-Nieto (2003), *supra* note 22, at 640 (finding between the two pieces, Navia-Nieto's position remains similar).

[104] *See* Sassòli, *supra* note 66, at 414 (citing VCLT, *supra* note 9, at art. 53.).

[105] Sassòli, *supra* note 66, at 414 (citing arts. 6/6/6 & 7, respectively, of the four Geneva Conventions).

[106] *See* Hannikainen, *supra* note 98, at 605-06.

[107] Navia-Nieto (2003), *supra* note 22, at 636, n.170; *see also* Navia-Nieto (2016), *supra* note 9, at 68.

B. Applying the Definition and Criteria

As mentioned, the academic discourse draws its similarities and differences, with some conclusions more stringent than others, and with varying degrees of rigor. Of course, it should be noted that parts of the discourse are somewhat outdated, considering the lengths of progressive development and codification of international law over the past few decades.

Generally speaking, it should be noted that the four Geneva Conventions are virtually universal, with 196 High Contracting Parties, while Additional Protocol I includes 174, and Additional Protocol II includes 169. A significant portion of the Geneva Conventions is customary, as are part of the Additional Protocols.[108] The many IHL rules, particularly those that are both convention and customary, are non-derogable. These include those that the ICRC customary study classifies under the categories of: the principle of distinction; specifically protected persons and objects; specific methods of warfare; weapons; the treatment of civilians and person *hors de combat*; and implementation.[109]

On derogation, there is the question of the extent of denunciation and reservations within the Geneva Conventions; yet, even these should not undermine the underlying non-derogability of these rules.[110] For example, it is clear that there are no conditions whatsoever that would enable a State to commit torture during armed conflict. Torture in armed conflict is prohibited, with no exception, just like its prohibition under international human rights law ("IHRL").[111] However, one must be cognizant of those rules that have wiggle room, such as with respect to considerations of military necessity. Applying the VCLT definition and criteria would find difficulty where, for example, the destruction and seizure of property of an adversary is concerned.[112] The prohibition is not absolute, given that destruction or seizure can occur when required by imperative military necessity. However, the essence of the rule, minus the imperative, may also be considered non-derogable.

Drawing from the language of the ICJ in *Nuclear Weapons*, we can consider two particular rules: (1) distinction; and (2) prohibition on weapons of a nature to cause superfluous or unnecessary suffering. The broad concept of distinction can be expanded into several rules, such as the prohibitions on indiscriminate attacks, precautions, proportionality, and others. The specific rule of distinction—between civilians and combatants—would find no issues relating to its customary

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[108] *See generally* ICRC Customary IHL, *supra* note 6; *see also* Navia-Nieto (2016), *supra* note 9, at 67 ("In any event, many of the terms of the conventions are considered to constitute customary international law").

[109] *See generally* ICRC Customary IHL, *supra* note 6.

[110] *See* Navia-Nieto (2016), *supra* note 9, at 68.

[111] *See Rule 90: Torture and Cruel, Inhuman or Degrading Treatment*, ICRC, IHL DATABASES, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule90 (last visited May 19, 2023). Torture has been regularly referred to as a peremptory norm, without reference to either body of law.

[112] *See Rule 50: Destruction and Seizure of Property of an Adversary*, ICRC, IHL DATABASES, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule50 (last visited May 19, 2023).

status.[113] This principle—which is not specifically referred to in either the Hague Regulations or Geneva Conventions—finds its codification in articles 48, 51(2), and 52(2) of Additional Protocol I.[114] Moreover, there is no possibility of derogation.[115] With respect to unnecessary suffering, the same arguments and logic apply with respect to its specificity (or lack thereof), customary status, and non-derogability.[116] As explained, while the ICJ did not use the term "peremptory" *per se* to discuss these specific IHL rules, the ILC interprets the ICJ conclusions to mean just that.[117] The jurisprudence has broadly implied different sets of IHL rules as constituting peremptory norms creating *erga omnes* obligations through general language, without identifying each specifically.

Peremptory norms should generally encompass IHL rules that meet the VCLT definition and criteria. If we consider the arguments for Common Article 3, grave breaches, or distinction and unnecessary suffering based on *Nuclear Weapons*, how would it be any different than applying VCLT article 53 to, the range of IHL rules on, for example: those falling under the concept of distinction; rules pertaining to specifically protected persons (medical, humanitarian, *etc.*); certain methods of warfare; certain weapons; and others? It would be a futile exercise to assume that because of the diversity of IHL rules, it would be difficult to recognize certain norms as peremptory as opposed others, particularly those that are considered to have customary status and are non-derogable. Consider IHRL, which includes several broad provisions in various treaties, such as prohibitions on the denial of the right to self-determination, torture, arbitrary deprivation of life, and slavery. These have all assumed peremptory norm status.[118] Of course, while the context of a specific violation may be argued, it would not, as such, challenge the essence of the particular rule. These are not unlike IHL rules on hostilities or specifically protected humanitarian workers within the Geneva Conventions and Additional Protocols. The ICCPR, for example, includes a number of these IHRL rules, but never once mentions their peremptory norm status.[119] The same logic can, and should be, applied to various Geneva Conventions provisions, to say the least.

Complementing the authoritative determinations and academic discourse, one can use the example of the principle of distinction and related principles applica-

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[113] *See Rule 1: The Principle of Distinction between Civilians and Combatants*, ICRC, IHL DATABASES, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule1 (last visited May 19, 2023).

[114] *Id.; see also Practice Relating to Rule 1. The Principle of Distinction between Civilians and Combatants*, ICRC, IHL DATABASES, https://ihl-databases.icrc.org/customary-ihl/eng/docs/_rul_rule1 (last visited May 19, 2023).

[115] *See generally Practice Relating to Rule 1*, *supra* note 114 (emphasis on ICTY cases therein).

[116] *See Rule 70: Weapons of a Nature to Cause Superfluous Injury or Unnecessary Suffering*, ICRC, IHL DATABASES, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule70 (last visited May 19, 2023). One difference to be noted here are the specific prohibitions on specific weapons in other treaties. *See generally,* ICRC Customary IHL, *supra* note 6 (stating rules on various weapons, including those weapons that are indiscriminate, poisonous, nuclear, biological, chemical, *etc.*).

[117] *See* ARSIWA ILC Commentaries, *supra* note 18, at 113.

[118] See the discussion above.

[119] See the discussion above.

ble to situations of hostilities. As mentioned, the key language on distinction is to be found in Additional Protocol I.[120] The same goes for related principles pertaining to the prohibition on indiscriminate attacks,[121] proportionality in attacks,[122] and precautions in attack.[123] Of course, each of these has a history of developing the core principle, but the essence of these rules are prescribed in Additional Protocol I rather than the Geneva Conventions. These rules enjoy customary status, and do not allow for the possibility of derogation, although specific attacks may be argued with varying interpretations. Nevertheless, the rules pertaining to distinction are relied upon by the ICJ, ILC, and scholars for the purpose of arguing for their peremptory norm status. There are no bright lines, but a reliance on how they perceive those rules in terms of consensualism and double consent.

One should also consider the fact that IHL rules are regularly violated. While most, if not all, States would agree on particular peremptory norms, it does not mean that they are not seriously breached in quite numerous and various contexts. Regardless of these breaches, compared to IHL, third State measures on these peremptory norms have stricter requirements. When the obligations of Common Article 1 are looked at within the scope of rules on State responsibility, third States may argue for stronger measures in like with the latter. In fact, the updated commentaries on the Geneva Conventions attempt to do just that (as explained in the next sub-section).

The ICRC unfortunately does not delve into the legal character of the rules it considers as peremptory norms. Instead, it broadly reviews the extent of Common Article 1, and translating the obligation to "ensure respect" into *erga omnes* obligations.[124] The ICRC is not—although it should have been—explicit in tying *erga omnes* with peremptory norms. Otherwise, then, it would seem that *erga omnes* is a much, much broader concept that the one that is typically tied to peremptory norms.[125] Perhaps the ICRC's hesitancy may be explained by the protective nature of IHL lawyering and its hesitancy in "conflating" with the law on State responsibility. Perhaps it is the ICRC's somewhat unwavering, and perhaps naïve, reliance on the body of law that it serves. Perhaps it is an attempt to

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[120] Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protections of Victims of International Armed Conflicts arts. 48, 51(2), 52(2), 8 June 1977, 1125 UNTS 3 [hereinafter Additional Protocol I].

[121] *See Rule 11: Indiscriminate Attacks*, ICRC, IHL DATABASES, https://ihl-databases.icrc.org//eng/docs/v1_rul_rule11 (last visited May 19, 2023); *see also* Additional Protocol I, *supra* note 120, at art. 51(4).

[122] *See Rule 14: Proportionality in Attack*, ICRC, IHL DATABASES, https://ihl-databases.icrc.org//eng/docs/v1_rul_rule14 (last visited May 19, 2023); *see also* Additional Protocol I, *supra* note 120, at art. 51(5)(b).

[123] *See Rule 15: Principle of Precautions in Attack*, ICRC, IHL DATABASES, https://ihl-databases.icrc.org//eng/docs/v1_rul_rule15 (last visited May 19, 2023); *see also* Additional Protocol I, *supra* note 120, at art. 57(1).

[124] *See* ICRC, Customary IHL, *Erga Omnes, supra* note 6.

[125] *See generally* THOMAS WEATHERALL, JUS COGENS: INTERNATIONAL LAW AND SOCIAL CONTRACT 351-83 (2015); *see* Paolo Picone, *The Distinction Between Jus Cogens and Obligations Erga Omnes*, THE LAW OF TREATIES: BEYOND THE VIENNA CONVENTION 411 (Enzo Cannizaro ed., 2011).

link *erga omnes* with the body of law as a whole, rather than specific rules. Nonetheless, the ICRC approach provides a convenient segue into the discussion on what may be the added value of arguing that IHL rules enjoy peremptory norm status. This answer is to be found in legal consequences—*i.e.*, the roles and responsibilities of third States—for violations of peremptory norms.

IV. Peremptory Norms as a Means of Compliance and Enforcement

This final section will explore the added value of finding that IHL rules enjoy peremptory norm status, thus creating *erga omnes* obligations. Generally, there should be no issue with Sassòli's belief that "perceived disrespect for IHL is worse than its actual disrespect."[126] Yet, the disrespect for IHL is real and the regime seems at times primitive and inefficient in dealing with violations. This might be due to a misconception that Common Article 1 provides a sufficient interpretation of the law on State responsibility for IHL purposes, or perhaps even a superior interpretation in light of its perceived primacy. This is certainly debatable. While it is progressing, Common Article 1 is still a *primitive* law when compared to the strides that the law of State responsibility has undertaken and continues to undertake. This is especially in light of jurisprudence to that effect. Moreover, while the ICRC presents a sophisticated, and significantly developed, interpretation of third State obligations vis-à-vis Common Article 1, it also exercises restraint.

In the *Wall* advisory opinion, the ICJ specifically called for the High Contracting Parties to the Fourth Geneva Convention to "ensure compliance" with that Convention.[127] Over the years, there have been several attempts to raise and address the gaps in IHL compliance and enforcement.[128] Yet, what does this actually mean in practice? The IHL system is full of problems – not from without, but from within. Reciprocity between warring parties, for example, cannot alone serve as a sufficient means of compliance or enforcement.[129] IHL cannot operate as a "self-contained" system capable of ensuring compliance and enforcement without the developed (and developing) jurisprudence on State responsibility.[130] The IHL treaties are, like their IHRL treaty counterparts, self-imposed by way of ratification or accession and subject to considerable deference. Where

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[126] *See Is the Law of Armed Conflict in Crisis and How to Recommit to its Respect?*, ICRC (June 3, 2016), https://www.icrc.org/en/document/law-armed-conflict-crisis-and-how-recommit-its-respect.

[127] *See* ICJ Wall Advisory Opinion, *supra* note 51, ¶ 149.

[128] *See 31st International Conference 2011: Resolution 1 – Strengthening Legal Protection for Victims of Armed Conflicts*, ICRC, https://www.icrc.org/en/doc/resources/documents//31-international-conference-resolution-1-2011.htm (last visited May 19, 2023); *see generally* Rep. by Int'l Comm. Red Cross on the 28th International Conference of the Red Cross and Red Crescent, *International Humanitarian Law and the Challenges of Contemporary Armed Conflicts*, Geneva, Switzerland, 03/IC/09, (Sep. 2003) https://www.icrc.org/en/doc/assets/files//__final_ang.pdf.

[129] *See generally Rule 140: Principle of Reciprocity*, ICRC, IHL DATABASES, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul_rule140 (last visited May 19, 2023); BRYAN PEELER, THE PERSISTENCE OF RECIPROCITY IN INTERNATIONAL HUMANITARIAN LAW 3 (2019).

[130] *See* Sassòli, *supra* note 66, at 403-04 ("To hold that [IHL] may be implemented only by its own mechanisms would leave it as a branch of law of a less compulsory character and with large gaps"). Sassòli weighs the pros and cons of both legal regimes throughout the piece.

IHRL obligations find their limits, peremptory norm status creates an additional layer in compliance and enforcement through third State scrutiny (*e.g.*, on torture, racial discrimination, denial of the right to self-determination, *etc.*). Through convergence, third States are given a stronger, and more stringent legal basis to act. As is well known, the rules on State responsibility demand not only non-recognition and non-aid or assistance, but international cooperation that is *both* individual and collective. IHL, in that sense, should not be seen unlike IHRL.

So, what difference would it make if particular IHL rules were treated as peremptory norms? What is offered here is a comparative view of the IHL and State responsibility regimes, in terms of secondary rules for third States. This addresses how third States play a role in compliance and enforcement vis-à-vis the IHL and State responsibility regimes – and how the former *necessitates* the latter. The arguments for roles and responsibilities of third States in IHL have certainly evolved over time. Much of this has been dependent on broadening the narrow scope of Common Article 1. The "external dimension" of the obligation to "ensure respect" was not really a fundamental aspect of Common Article 1, which more catered to an "internal dimension" when the Geneva Conventions were adopted.[131] This is, for the most part, a more recent evolution and far from its peak. More contemporary interpretations of Common Article 1 heavily depend on the law of State responsibility to re-interpret its scope. This has further developed IHL beyond its primitive nature.

Over time, IHL has moved to expand the scope of third State obligations by way of Common Article 1. First, there are the *negative* obligations. In line with contemporary IHL interpretations, the updated ICRC commentaries explain that third States have an obligation to neither encourage nor aid or assist in violations of conventions, despite its textual absence.[132] This language is not owed to IHL, but to the law on State responsibility. Interestingly, in the context of negative obligations, the ICRC commentaries explain that

> Common Article 1 and the rules on State responsibility thus operate at different levels. The obligation to ensure respect for the Conventions is an autonomous primary obligation that imposes more stringent conditions than those required for the secondary rules on State responsibility for aiding or assisting. What is at stake is more than aid or assistance to violations of the rules of international law but concerns aid or assistance to violations of rules whose observance the High Contracting Parties have specifically undertaken to respect and ensure respect for. Financial, mate-

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[131] *See* Theo Boutruche & Marco Sassòli, *Expert Opinion on Third States' Obligations Vis-à-Vis IHL Violations Under International Law, with a Special Focus on Common Article 1 to the 1949 Geneva Conventions* (Nov. 8, 2016).

[132] *See Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field. Geneva, 12 August 1949, Commentary of 2016,* ICRC, IHL DATABASES, ¶¶ 154, 158-63, https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/Comment.xsp?action=OpenDocument&documentId=72239588AFA66200C1257F7D00367DBD [hereinafter ICRC Updated Commentaries] (this is drawn from the commentaries to the Third Geneva Convention, as the provision is identical throughout the four Geneva Conventions).

> rial or other support in the knowledge that such support will be used to commit violations of humanitarian law would therefore violate common Article 1, even though it may not amount to aiding or assisting in the commission of a wrongful act by the receiving States for the purposes of State responsibility.[133]

This seems to be a narrow reading of ARSIWA Article 16, and removed from the language of articles 40 and 41 on peremptory norms.[134] As Harriet Moynihan explains, the reality of the mental element "may lie somewhere in between" knowledge and intent.[135] Moreover, with respect to peremptory norms, a showing of knowledge or intent is unnecessary.[136] As the ILC commentaries explain, while ARSIWA Article 16 "presupposes that the State has 'knowledge of the circumstances of the internationally wrongful act'. . .[t]here is no need to mention such a requirement in [Article 41(2)] as it is hardly conceivable that a State would not have notice of the commission of a serious breach by another State."[137] Thus, it would appear that the ICRC paradoxically narrows the scope of the rules on State responsibility, distancing itself from peremptory norms, while broadening scope of Common Article 1 vis-à-vis those very rules. While the primary rules are to be found in conventional and customary IHL, the regime offers little without the secondary rules in terms of how States are to interpret their negative obligations under IHL. Further, the ICRC's updated commentaries offer little to show anything of significant relevance to contemporary perceptions of third State roles and responsibilities vis-à-vis the Geneva Conventions (and IHL generally).

The ICRC then adds that "under general international law, States have an obligation not recognize as lawful a situation created by a serious breach of peremptory norms of international law and not to render aid or assistance in maintaining such a situation."[138] For IHL, despite the textual absence once again, the ICRC adds

> These obligations are relevant for the Geneva Conventions inasmuch as they embody norms from which no derogation is permitted. In its 2004 Advisory Opinion in the *Wall* case, the International Court of Justice seems to have linked the same obligations with Article 1 of the Fourth Convention. These obligations can be seen, moreover, as a corollary of

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133 ICRC Updated Commentaries, *supra* note 132, at ¶ 160 (identifying that the ICRC, the utility of Common Article 1 is that there is no *intent* requirement, while the rules on State responsibility require intent); *see also id.* at ¶ 159.

134 ARSIWA ILC Commentaries, *supra* note 18, at art. 16 ("A State which aids or assists another State in the commission of an internationally wrongful act by the latter is internationally responsible for doing so if: (a) that State does so with knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that State.").

135 Harriet Moynihan, *Aiding and Assisting: The Mental Element Under Article 16 of the International Law Commission's Articles on State Responsibility*, 71 INT'L COMP. L. Q. 455, 471 (2018) (and further conclusions).

136 *See id.* at 470.

137 ARSIWA ILC Commentaries, *supra* note 18, at 115.

138 ICRC Updated Commentaries, *supra* note 132, at ¶ 163.

> the duty neither to encourage nor to aid or assist in the *commission* of violations of the Conventions.[139]

As such, the ICRC commentaries refrain from exploring the status of IHL rules as peremptory norms and, subsequently, the more stringent measures offered by the rules on State responsibility. The ICRC cautiously explains that the ICJ "seems to have linked" the obligations of non-recognition and non-aid and assistance with Common Article 1. Yet, this seems to be a stretch. Given the nature of the ICRC's interpretation of Common Article 1, it is unfortunate that its commentaries end there. The ICRC could have engaged in an analysis that builds upon ICJ, ILC, and other determinations but, for one reason or another, chose otherwise.

In addition to negative obligations, there are also the *positive* obligations. As per the ICRC, States are to do everything reasonably within their power to bring an end to violations, and prevent them from occurring.[140] However, States are "free to choose between different possible measures, as long as those adopted are considered adequate to ensure respect."[141] These are obligations of *means*, and not of *results*, to be carried out with *due diligence*.[142] States are not scrutinized then because a desired result was not achieved; rather, they are if they failed to take all measures within their power to achieve the desired result.[143] As explained by the ICRC, the required *due diligence* varies according to various contextual factors: "its content depends on the specific circumstances, including the gravity of the breach, the means reasonably available to the State, and the degree of influence it exercises over those responsible for the breach."[144] This explanation is drawn from minimal authority[145] and instead, the ICRC explains that a "similar due diligence obligation exists under Article 1 of the 1948 Genocide Convention."[146] For third States not party to an armed conflict involving IHL violations, a singular approach that neglects convergence with the rules on State responsibility gives them little to work with. The law on State responsibility, in many ways a homogenization of international law's secondary rules, is kept at a distance.

Under IHL, there are limits to the measures that can be adopted. Common Article 1 does not provide clear grounds to adopt measures and is unclear in terms of specificity. In theory, measures adopted should be proportionate to the violation they are meant to end. Since Common Article 1 does not establish pri-

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139 ICRC Updated Commentaries, *supra* note 132, at ¶ 163.

140 *Id.* at ¶¶ 164-65.

141 *Id.* at ¶ 165.

142 *Id.*

143 *See* Knut Dörmann & Jose Serralvo, *Common Article 1 to the Geneva Conventions and the Obligation to Prevent International Humanitarian Law Violations*, 96 INT'L REV. RED CROSS, 707, 724 (2014).

144 ICRC Updated Commentaries, *supra* note 132, at ¶ 165.

145 *Id.* (and sources cited therein).

146 *See id.* at ¶ 166; *see also* Dörmann & J. Serralvo, *supra* note 143, at 725; *see also* Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. 43, ¶ 430 (Feb. 26).

macy between collective and individual measures, States can "pick-and-choose" among a wide range of measures to be taken individually, by a group of States or within the framework of international organizations. These can include: friendly and diplomatic (weaker) measures, such as diplomatic dialogue and exerting diplomatic pressure by means of confidential protests or public denunciations; and also stronger measures, such as applying measures of retorsion, adopting lawful countermeasures, conditioning, limiting or refusing arms transfers, and referring the issue to a competent international organization (*e.g.*, through the UN Security Council or General Assembly).[147] Overall, the ICRC's approach is based on a collection of scattered and inconsistent State practice. While admirable, it can be reduced to practically nothing. By all means, the greater the political relationship between the offending State and the third State, the "friendlier" the measures may be. Of course, all this is not to say that a thorough and progressive reading of Common Article 1 and its external dimension is not of profound importance – particularly in light of IHL's compliance and enforcement gaps. Rather, it is to say Common Article 1, again, *necessitates* convergence with the rules on State responsibility.

When it comes to serious breaches of peremptory norms, the ARSIWA defines a specific set of third State obligations. ARSIWA Article 41 determines that when a serious[148] breach of a peremptory norm occurs, all States are obliged not to *recognize* as legal any effect of the violation, nor to *aid* or *assist* in the commission of the violation, and to positively *cooperate* to bring an end to the violation.[149] In terms of non-assistance, this "extends not only to assistance in the commission of the breach, but assistance in maintaining an internationally unlawful situation that may result."[150] Thus, the "obligation not to assist the responsible State is limited to acts that would assist in preserving the situation created by the breach."[151] While not specifically an obligation, "a State may legitimately avoid all types of international co-operation with the responsible State if it so wishes."[152] As Crawford notes, the qualification of a situation as unlawful is but a first step to bring an unlawful situation to an end.[153] As such, "[a]n authoritative prior determination as to the nature of the wrongful act is desirable, if not a necessity, if the obligation to cooperate is to be meaningful."[154] States should collectively bring to an end, through lawful means, an unlawful situation. This is a departure from the IHL "pick-and-choose" approach. Cooperation is key and,

147 A more specific list can be found in ICRC's updated commentaries to the four GCs; *see* ICRC Updated Commentaries, *supra* note 132, at ¶¶ 180-81.

148 "A breach will be considered 'serious' where 'it involves a gross or systematic failure by the responsible state to fulfil the obligation.'" Crawford, *supra* note 91, at 381.

149 *See* ARSIWA, *supra* note 3, at art. 41; *see also* Crawford, *supra* note 91, at 380.

150 Crawford, *supra* note 91, at 385.

151 Nina H. B. Jørgensen, *The Obligation of Non-Assistance to the Responsible States*, *in* THE LAW OF INTERNATIONAL RESPONSIBILITY 687, 691 (James Crawford, Alain Pellet & Simon Olleson eds., 2010).

152 *Id.*

153 Crawford, *supra* note 91, at 389.

154 Nina H. B. Jørgensen, *The Obligation of Cooperation*, *in* THE LAW OF INTERNATIONAL RESPONSIBILITY 695, 700 (James Crawford, Alain Pellet & Simon Olleson eds., 2010).

as the ILC ARSIWA commentaries explain "such cooperation. . . is often the *only* way of providing an effective remedy." [155] This is in addition to that fact that *all* States may invoke the responsibility of another States for breaches of obligations owed to the international community as a whole (*i.e.*, individual measures).[156] In Sassòli's discussion of State responsibility for IHL violations,[157] he opines:

> Rules on State responsibility, in particular as codified by the ILC, are exclusively addressed to States individually and as members of the international society. Their possible impact on better respect for [IHL] should therefore not be overestimated, especially not when compared to the preventive and repressive mechanisms directed at individuals.[158]

Similarly, if we were to look at IHRL treaties—take the Convention Against Torture—we may come to the same conclusion. There, we find that in conjunction with conventional and customary IHRL, we can treat State responsibility as separate from the particular provisions pertaining to the "preventive and repressive mechanisms directed at individuals."[159] Here, we must clearly differentiate between State responsibility and individual criminal responsibility. Sassòli then adds that the ARSIWA and its commentaries "do clarify, however, many important questions concerning implementation of international humanitarian law and may therefore help to improve the protection of war victims by States."[160] Here, Sassòli favors convergence, arguing that "through the combined mechanisms of international humanitarian law and of the general rules on State responsibility, all other States are able and are obliged to act when violations occur" and that the ARSIWA "applied to international humanitarian law violations, remind us that all States can react lawfully and clarify to a certain extent what States should do."[161]

For the ICRC, ensuring respect for IHL is an *erga omnes* obligation.[162] However, the ICRC makes no mention of IHL rules as constituting peremptory norms. For the ARSIWA, where peremptory norms are concerned, a State owing *erga omnes* obligations may invoke the responsibility of another State for breaching those obligations.[163] Neither the Geneva Conventions nor the Additional Protocols offer that extent of the possibility. Where Common Article 1 has been inter-

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155 *See* ARSIWA ILC Commentaries, *supra* note 18, at 114 (emphasis added).

156 *See* ARSIWA, *supra* note 3, at art. 48; *see also* ARSIWA ILC Commentaries, *supra* note 18, at 127; *see also* ARSIWA, *supra* note 3, at art. 54; *see also* ARSIWA ILC Commentaries, *supra* note 18, at 137-39.

157 *See* Sassòli, *supra* note 66, at 402.

158 *See id.* at 433.

159 *See* Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment arts. 4-9, Dec. 10, 1984, 1465 U.N.T.S. 85.

160 *See* Sassòli, *supra* note 66, at 433.

161 *Id.*

162 *See* ICRC, Customary IHL, Erga Omnes, *supra* note 6.

163 *See* ARSIWA, *supra* note 3, at arts. 33, 42, 48, and 54; *see also* Frowein Erga Omnes, *supra* note 16, at ¶ 9.

preted as encompassing IHL rules as creating obligations *erga omnes*,[164] the ARSIWA clearly creates this obligation. Additional Protocol I Article 89 is more expansive in that it provides that "[i]n situations of serious violations of the Conventions or of this Protocol, the High Contracting Parties undertake to act, jointly or individually, in co-operation with the United Nations and in conformity with the United Nations Charter."[165] Overall, it is argued here that ARWISA cooperation obligations are much broader and should not be seen as a choice between individual and collective measures.

Tladi reiterates the ARSIWA language. In terms of the particular consequences of serious breaches of peremptory norms:

> 1. States shall cooperate to bring to an end through lawful means any serious breach by a State of an obligation arising under a peremptory norm of general international law (*jus cogens*).
>
> 2. No State shall recognize as lawful a situation created by a serious breach by a State of an obligation arising under a peremptory norm of general international law (*jus cogens*), nor render aid or assistance in maintaining that situation.
>
> 3. A breach of an obligation arising under a peremptory norm of general international law (*jus cogens*) is serious if it involves a gross or systematic failure by the responsible State to fulfil that obligation.
>
> 4. This draft conclusion is without prejudice to the other consequences that a serious breach by a State of an obligation arising under a peremptory norm of general international law (*jus cogens*) may entail under international law.[166]

Given IHL's development, it is possible that Common Article 1's external dimension (*i.e.*, ensuring respect) can have greater significance. However, this is still a work in progress and, much of this owes itself to the rules on State responsibility. The convergence of these two regimes would offer much to contemporary situations of armed conflict. For one, where IHL rules also constitute peremptory norms, there is a stronger legal basis to act and both collectively *and* individually. Moreover, in line with *erga omnes* obligations, *all* States have a legal interest and, as such, an obligation to take action. The IHL regime is still very much a primitive regime, particularly where this concerns the roles and responsibilities of third States. Where IHL rules are treated as peremptory norms, an additional, and more sophisticated and meaningful, layer of responsibilities and obligations comes into play. The IHL regime's "pick-and-choose" approach neither holds ground in terms of its effectiveness, nor its limited view of non-recognition. Of course, as Sassòli explains "[a]lthough there unquestionably has to be the necessary political will, the need to respect and ensure respect for inter-

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[164] *See* Sassòli, *supra* note 66, at 426.

[165] *Id.* at 428-430.

[166] *See* Tladi ILC Report, *supra* note 73, at 54 (draft conclusion 19).

national humanitarian law is not a matter of politics, but rather a matter of law."[167] Nevertheless, a convergence between Common Article 1 and the rules on State responsibility is suggested. A convergent model would necessitate international cooperation and not leave third State action to a makeshift list of suggestions.

V. Conclusions

This paper argues for treating IHL rules as peremptory norms of international law. In particular, it explains that IHL rules that are both conventional and customary, and are non-derogable, should meet the definition and criteria of peremptory norms as provided by the VCLT. Here, it is preferred, although not necessary, that the rule is derived from treaty-plus-custom. This should not be controversial, particularly where there is consensualism and double consent. While the ICJ has exercised restraint in identifying IHL rules as peremptory norms, the ILC and several publicists have understood the ICJ's language as meaning that IHL rules enjoy peremptory norm status, especially where linked to *erga omnes* obligations. It is time to move beyond the generalities of referring to the "basic rules of IHL" as constituting peremptory norms.

Unfortunately, much of the literature has not undergone a rigorous application of the VCLT definition and criteria to IHL rules. At the same time, determinations have not done the same for other peremptory norms of international law, such as the denial of the right to self-determination, racial discrimination, and apartheid, as well as others. The "great many" IHL rules determined as having customary status, such as those listed by the ICRC, include no possibility of derogation, even in situations of withdrawal or denunciation from an IHL treaty, like the Geneva Conventions. While this is not to say that there can be varying interpretations in specific cases, the essence of the rules remains. Applying the VCLT criteria to these rules, with the support of international jurisprudence on IHL rules as peremptory norms, creates a convincing argument.

In terms of legal consequences, the primitive nature of the IHL regime has only been developed through an interpretation guided by the law and rules on State responsibility. In effect, the rules on State responsibility create a legal basis for stronger, more stringent measures, particularly international cooperation, in dealing with violations of IHL rules considered to have peremptory norm status. A convergent model between IHL and the rules of State responsibility is suggested, and even necessary. It shifts away from the "pick-and-choose" model of individual and collective measures collected from an inconsistent and a scattered State practice. While the peremptory norm club has largely remained exclusive, there are, in fact, a "great many" IHL rules that satisfy the criteria for membership. Practice, scholarship, and jurisprudence should not shy away from backing their membership, and award them the benefits of that club (*i.e.*, third State responsibility).

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[167] *See* Sassòli, *supra* note 66, at 433.