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COOPERATING THROUGH THE GENERAL ASSEMBLY TO END SERIOUS BREACHES OF PEREMPTORY NORMS

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Abstract The International Law Commission's 2019 Draft Conclusions on Peremptory Norms of International Law assert that States have an obligation to cooperate to end serious breaches of peremptory norms. International law provides scarce guidance, however, regarding how States are expected to fulfil that obligation. This article seeks to elaborate: first, whether the prohibition of crimes against humanity and the 'basic rules' of international humanitarian law are peremptory norms; second, what States are required to do to fulfil their obligation to cooperate; and third, how States might utilise the General Assembly as a forum through which to fulfil that obligation.

Keywords: peremptory norms, *jus cogens*, obligation to cooperate, General Assembly, crimes against humanity, international humanitarian law.

I. INTRODUCTION

In 2019, the International Law Commission (ILC) adopted Draft Conclusions on Peremptory Norms of International Law *(Jus Cogens*), on first reading (Draft Conclusions).[1] On the issue of State obligations arising from serious breaches of peremptory norms, the Draft Conclusions for the most part reiterate what was already enshrined in the 2001 Articles on the Responsibility of States for Internationally Wrongful Acts (ARSIWA).[2] Among other things, the Draft Conclusions affirm the stipulation in the ARSIWA that 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*)'.[3]

Although for the most part the Draft Conclusions reiterate the ILC's prior work, they do advance the legal commentary on State responsibility in

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[1] International Law Commission (ILC), 'Report of the International Law Commission on the Work of its 71st Session' (29 April–7 June and 8 July–9 August 2019) UN Doc A/74/10, 141–208 ('Draft Conclusions').

[2] ILC, 'Report of the International Law Commission on the Work of its 53rd Session (23 April–1 June and 2 July–10 August 2001) UN Doc A/56/10, 31–143 ('Articles on State Responsibility').

[3] ILC, Draft Conclusions (n 1) 145 (Draft Conclusion 19).

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relation to serious breaches of peremptory norms in three important respects. First, in contrast to the commentary to the ARSIWA, in which the ILC acknowledged that the duty to cooperate to end serious breaches of peremptory norms 'may reflect the progressive development of international law',[4] in its commentary to the Draft Conclusions, the ILC describes the obligation as '*now recognised* under international law'.[5] Second, although the Draft Conclusions do not provide a definitive list of peremptory norms, they do include a 'non-exhaustive list of norms that the ILC has previously referred to as having that status'.[6] Albeit not exactly a new development, this list is nevertheless a contribution to the unresolved discussion amongst legal scholars regarding which norms may be regarded as peremptory. And third, the Draft Conclusions provide further guidance regarding what the obligation to cooperate means for the way in which States are expected to use their membership of international organisations, in particular the General Assembly and the Security Council.[7]

These advances regarding the nature of State responsibility in relation to serious breaches of peremptory norms are timely. In recent years, the reports of UN commissions of inquiry and fact-finding missions have shone a spotlight on flagrant and persisting atrocity crimes. The Independent International Commission of Inquiry on the Syrian Arab Republic has documented evidence of the war crimes of launching indiscriminate attacks and deliberately targeting civilian objects, and says there are reasonable grounds to believe the Syrian Government has carried out a 'widespread or systematic attack against the civilian population, in pursuance of a firmly established policy to commit such acts comprising the crimes against humanity of murder, extermination, imprisonment, enforced disappearance, sexual violence, torture and other inhumane acts'.[8] In 2018 the Independent International Fact-Finding Mission on Myanmar (IIFFM) reported that 'gross human rights violations and serious violations of international humanitarian law' had been committed in Myanmar, many of them 'undoubtedly amount [ing] to the gravest crimes under international law'.[9] The Group of Eminent International and Regional Experts on Yemen has documented evidence of indiscriminate attacks on civilian areas, as well as disappearances, arbitrary detention and the torture of journalists, human rights defenders and religious minorities.[10] Similarly in relation to the Occupied Palestinian Territories, Afghanistan, Tigray (Ethiopia) and elsewhere, the UN Office of the High

[4] ILC, Articles on State Responsibility (n 2) 114.
[5] ILC, Draft Conclusions (n 1) 194 (emphasis added). [6] ibid 146–7. [7] ibid 195–6.
[8] UN Human Rights Council (UNHRC), 'Report of the Independent International Commission of Inquiry on the Syrian Arab Republic' (11 March 2021) UN Doc A/HRC/46/55, 22.
[9] UNHRC, 'Report of the Detailed Findings of the Independent International Fact-Finding Mission on Myanmar' (17 September 2018) UN Doc A/HRC/39/CRP.2, 419.
[10] UNHRC, 'Situation of Human Rights in Yemen, including Violations and Abuses since September 2014: Report of the Group of Eminent International and Regional Experts on Yemen' (13 September 2021) UN Doc A/HRC/48/20.

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Commissioner for Human Rights, UN Special Rapporteurs and/or independent human rights organisations have issued statements and reports regarding the ongoing commission of crimes against humanity and/or serious violations of international humanitarian law.[11] In all these contexts, to varying degrees, the prospect of a robust response by the Security Council is constrained by the likelihood of the veto of at least one of its permanent members.

The ILC's 2019 Draft Conclusions include the prohibition of crimes against humanity, as well as the 'basic rules of international humanitarian law', in the 'non-exhaustive list' of peremptory norms.[12] As such, according to the ILC, States have an obligation to cooperate to bring serious breaches of these norms to an end. However, there is scarcely any guidance regarding what States are required to do to fulfil that obligation. This lack of guidance presents a significant obstacle to the ascertainment of a workable doctrine of *jus cogens*.

In 2005, States agreed that 'the international community, through the United Nations, … has the responsibility to … help to protect populations from genocide, war crimes, ethnic cleansing and crimes against humanity'[13]—crimes now collectively referred to as atrocity crimes.[14] This responsibility is widely understood as a political not a legal principle.[15] This article considers whether the obligation to cooperate to end serious breaches of peremptory norms provides a basis for the characterisation of a State's obligation to respond to atrocity crimes as not just a political but a legal obligation; and thereafter, to understand what that obligation actually requires. Because allegations of genocide are less frequent and so hard to prove, and because obligations in relation to genocide are in any case enshrined in the Genocide Convention, this article focuses on the two other norms in the ILC's 'non-exhaustive list' that either are or at least substantially overlap with atrocity

[11] See, eg, UN Office of the High Commissioner for Human Rights (OHCHR), 'Tigray Conflict: Report Calls for Accountability for Violations and Abuses by All Parties' (Press Release, 3 November 2021) <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=27756&LangID=E>; OHCHR, 'UN Human Rights Chief Urges Action to Prevent Calamitous Consequences for the People of Afghanistan' (Press Release, 10 August 2021) <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=27370>; reports of the Special Rapporteur on the Situation of Human Rights in the Occupied Palestinian Territories, available at OHCHR, 'The Mandate of the Special Rapporteur on the Situation of Human Rights in the Palestinian Territory Occupied since 1967' <https://www.ohchr.org/en/hrbodies/sp/countriesmandates/ps/pages/srpalestine.aspx>.

[12] ILC, Draft Conclusions (n 1) 208. The other norms included in the ILC's non-exhaustive list are: the prohibition of aggression; the prohibition of genocide; the prohibition of racial discrimination and apartheid; the prohibition of slavery; the prohibition of torture; and the right of self-determination.

[13] UNGA Res 60/1 (16 September 2005) UN Doc A/RES/60/1.

[14] UN Office on Genocide Prevention and the Responsibility to Protect, 'Framework of Analysis for Atrocity Crimes' (2014) <https://www.un.org/en/genocideprevention/documents/about-us/Doc.3_Framework%20of%20Analysis%20for%20Atrocity%20Crimes_EN.pdf>.

[15] See M Labonte, 'R2P's Status as a Norm' in AJ Bellamy and T Dunne (eds), *The Oxford Handbook of the Responsibility to Protect* (Oxford University Press 2016) 133.

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crimes, namely, crimes against humanity and the 'basic rules of international humanitarian law'.[16]

This article begins (Part II) by reviewing the defining characteristic of peremptory norms, and assessing whether the prohibition of crimes against humanity and the 'basic rules of international humanitarian' law are indeed peremptory (it concludes that they are). Part III then examines the status and nature of the obligation to cooperate to end serious breaches of peremptory norms, drawing on the comments of the International Court of Justice (ICJ) in the *Bosnian Genocide Case*, and on the notion of 'due diligence'. Part IV then considers how States might utilise the General Assembly as a forum through which to fulfil their obligation to cooperate, particularly in circumstances in which the Security Council is hamstrung by the veto of one or more of its permanent members. It suggests four specific actions that States may take through the General Assembly, namely: condemning and legally characterising the conduct in question; making recommendations to and requesting reports from the UN Security Council; recommending sanctions; and pronouncing on the illegitimacy of the responsible regime. Part V concludes.

II. THE PEREMPTORY NATURE OF THE BASIC RULES OF INTERNATIONAL HUMANITARIAN LAW AND THE PROHIBITION OF CRIMES AGAINST HUMANITY

The notion of peremptory (*jus cogens*) norms is frequently described as something of a mystery in legal scholarship.[17] On the one hand, it is uncontroversial that there is a legal category of norms that have peremptory status, and that certain legal consequences flow from that status. It is also now well established that peremptory norms give rise to obligations *erga omnes*—that is, obligations that are owed to all States, and can be invoked by all States, because all States have an interest in their performance; and that moreover, recognition of a norm as peremptory carries with it particular *additional* consequences, due to the hierarchically superior nature of those norms.[18] On the other hand, there is no authoritative statement, nor legal consensus, regarding what the peremptory norms are.

[16] The relationship between the 'basic rules of international humanitarian law' and war crimes is discussed in Pt II.B of this article.

[17] eg A Orakhelashvili, *Peremptory Norms in International Law* (Oxford University Press 2006) 41; A D'Amato, 'It's a Bird, It's a Plane, It's Jus Cogens!'(1990) 6 ConnJIntlL 2; WE Conklin, 'The Peremptory Norms of the International Community' (2012) 23 EJIL 838; D Shelton, 'Sherlock Holmes and the Mystery of *Jus Cogens*' (2015) 46 NYIL 23.

[18] In legal scholarship, the relationship between the concepts of *jus cogens* and obligations *erga omnes* has been much discussed, and the concepts at times conflated. This is illustrated, inter alia, by the assertion that '[obligations *erga omnes*] are virtually coextensive with peremptory obligations (arising under norms of *jus cogens*)': ILC, 'Third Report on State Responsibility, by Mr James Crawford, Special Rapporteur' (2000) UN Doc A/CN.4/507 and Add 1–4, 35. See also C Bassiouni, 'International Crimes: *Jus Cogens* and *Obligatio Erga Omnes*' (1996) 59 LCP 68; Orakhelashvili (n 17) 269; J Frowein, 'Jus Cogens' in A Peters and R Wolfrum (eds), *Max*

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The Vienna Convention on the Law of Treaties (VCLT) defines a 'peremptory norm of general international law' as 'a norm accepted and recognised by the international community of States 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'.[19] It is generally accepted that 'general international law' in this context means customary international law.[20]

The VCLT's definition of peremptory norms has been critiqued on the grounds that it speaks only to the consequences of a rule having peremptory status, without explaining what it is that gives the rule its peremptory status in the first place. As Georges Abi-Saab observes, '*jus cogens* rules are defined by their effect, but the effect is the consequence and not the cause of the quality of the rules'.[21] Such critiques notwithstanding, the VCLT is broadly accepted as reflecting customary international law, including on the matter of *jus cogens*. The VCLT's definition of peremptory norms is repeated in the ILC's 2019 Draft Conclusions.[22]

In the literature that has sought to further elaborate the defining character of peremptory norms, it has been commonly asserted that the superior status of such norms derives from the fact that they protect the essential interests of the international community.[23] At the time of the drafting of the VCLT, ILC members referred to peremptory norms as rules existing in the 'interest of the international community as a whole', and as 'the minimum rules of conduct

Planck Encyclopedia of Public International Law (2013); P Malanczuk, 'Countermeasures and Self-Defense as Circumstances Precluding Wrongfulness in the International Law Commission's Articles on State Responsibility' (1983) 43 ZaoRV 705, 743. In fact, as discussed further in Part III of this article, not all norms giving rise to obligations *erga omnes* are necessarily peremptory: see C Mik, 'Jus Cogens in Contemporary International Law' (2013) 33 PolishYBIntlL 27, 54–5; C Tams, *Enforcing Obligations* Erga Omnes *in International Law* (Cambridge University Press 2009) 139–51; M Byers, 'Conceptualising the Relationship between Jus Cogens and Erga Omnes Rules' (1997) 66 NordJIntlL 211.

[19] Vienna Convention on the Law of Treaties (adopted 22 May 1969, entered into force 27 January 1980) 1155 UNTS 331, art 53.

[20] U Linderfalk, 'The Source of Jus Cogens Obligations: How Legal Positivism Copes with Peremptory International Law' (2013) 82 NordJIntlL 379; I Brownlie, *Principles of Public International Law* (7th edn, Oxford University Press 2008) 510; L Hannikainen, *Peremptory Norms* (Jus Cogens) *in International Law* (Finnish Lawyers Publishing Company 1988) 225.

[21] G Abi-Saab, in Carnegie Endowment for International Peace, *The Concept of Jus Cogens in International Law* (Papers and Proceedings of the Conference on International Law, Lagonissi, Greece 1967) vol 2, 12–13. See also: U Linderfalk, 'What Is So Special About *Jus Cogens*? – On the Difference between the Ordinary and the Peremptory International Law' (2012) 14 IntCLRev 8; K Johnston, 'Identifying the *Jus Cogens* Norm in the *Jus ad Bellum*' (2021) 70 ICLQ 51.

[22] ILC, Draft Conclusions (n 1) 157 (Draft Conclusions 2 and 4).

[23] See eg A Verdross, 'Jus Dispositivum and Jus Cogens in International Law' (1966) 60 AJIL 55, 57–8; Orakhelashvili (n 17) 42–50; Conklin (n 17) 857–9; T Kleinlein, 'Jus Cogens as the 'Highest Law'? Peremptory Norms and Legal Hierarchies' in M den Heijer and H van der Wilt (eds), *Netherlands Yearbook of International Law 2015* (TMC Asser Press 2016) 198; S Kaderbach, 'Jus Cogens, Obligations Erga Omnes and other Rules – The Identification of Fundamental Norms' in C Tomuschat and JM Thouvenin (eds), *The Fundamental Rules of the International Legal Order* (Brill 2006) 34.

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necessary to make orderly international relations possible'.[24] Similarly in its commentaries to the ARSIWA, the ILC refers to peremptory norms as 'substantive rules of conduct that prohibit what has come to be seen as intolerable because of the threat it presents to the survival of States and their peoples and the most basic human values'.[25] In 2006, the ILC's Study Group on the Fragmentation of International Law observed that '[t]he [ILC] has stated continuously that it is not the universal acceptance that elevates a norm to the status of *jus cogens*, but its content.'[26] Whatever the ILC may have continuously stated, however, this substantive, values-based character of peremptory norms is not reflected in the definition of such norms provided in the VCLT, and affirmed in the 2019 Draft Conclusions, which makes acceptance and recognition that no derogation is permitted the sole criterion by which to identify *jus cogens* norms.[27]

The VCLT does not provide a list of peremptory norms; the ILC explained at the time that the 'right course' was for the content of the rules to be 'worked out in state practice and in the jurisprudence of international tribunals'.[28] However, international courts and tribunals have until quite recently been reticent to apply the concept of *jus cogens*.[29] The only norms the ICJ has explicitly recognised as peremptory are the prohibitions against genocide and torture,[30] and while other courts have recognised additional peremptory norms, in general the relatively small number of cases applying the concept and the lack of uniformity across jurisdictions makes it difficult to draw conclusions.

As noted above, the ILC's 2019 Draft Conclusions provide a 'non-exhaustive list of norms that the ILC has previously referred to as having [peremptory

[24] Discussed in Verdross (n 23) 57–8.

[25] ILC, Articles on State Responsibility (n 2) 112.

[26] ILC, 'Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law: Report of the Study Group of the International Law Commission' (13 April 2006) UN Doc A/CN.4/L.682, 189.

[27] On this issue, see discussion in Johnston (n 21) 51. The 2019 Draft Conclusions seek to go some way towards addressing this issue of *jus cogens* being defined only by their effect, rather than their substantive nature, by way of Draft Conclusion 3, which states (inter alia) that 'peremptory norms of general international law (*jus cogens*) reflect and protect fundamental values of the international community'. In submissions to the ILC, some States objected to Draft Conclusion 3 on the basis that it introduces new criteria for the identification of a *jus cogens* norm beyond the criteria enshrined in the VCLT. See, eg, written comments on the Draft Conclusions, submitted to the ILC ahead of its 73rd session, by Denmark (on behalf of Nordic countries), Germany, Russia, the UK and the US: available at ILC, 'Analytical Guide to the Work of the International Law Commission: Peremptory Norms of General International Law' (October 2021) ('Analytical Guide') <https://legal.un.org/ilc/guide/1_14.shtml>.

[28] T Weatherall, Jus Cogens: *International Law and Social Contract* (Cambridge University Press 2015) 201.

[29] See A Bianchi, 'Human Rights and the Magic of *Jus Cogens*' (2008) 19(3) EJIL 502.

[30] *Armed Activities on the Territory of the Congo (New Application: 2002) (Democratic Republic of the Congo v Rwanda)* (Jurisdiction of the Court and Admissibility of the Application) [2006] ICJ Rep 6, para 64; *Questions Relating to the Obligation to Prosecute or Extradite (Belgium v Senegal)* (Judgment) [2012] ICJ Rep 422, para 99.

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status]'.[31] The inclusion of this list has been heavily critiqued by States. Many have argued that the norms included in the 'non-exhaustive list' are insufficiently backed by evidence of State practice and *opinio juris*, and some have suggested that it is unclear whether the asserted norms satisfy the identification criteria set out in the Draft Conclusions themselves.[32] As such, it is uncertain whether the 'non-exhaustive list' will survive the second reading. Nevertheless, in the absence of any more authoritative list of peremptory norms, the list provides a useful starting point for an assessment of which norms may now be regarded as peremptory; even if it must at the same time be recognised that the inclusion of a norm in the list does not obviate the need for a proper assessment of State practice, *opinio juris* and international jurisprudence.

With that in mind, the following discussion considers the peremptory status of two of the norms included in the ILC's list: the prohibition of crimes against humanity; and the 'basic rules of international humanitarian law'. As noted above, a better understanding of the nature of the obligation to cooperate in relation to these two peremptory norms has the potential to significantly enhance our understanding of State obligations in relation to atrocity crimes—that is, those crimes in relation to which States have already accepted, by means of their acceptance of the responsibility to protect, a political responsibility.

A. The Prohibition of Crimes Against Humanity

The prohibition of crimes against humanity has not been explicitly recognised by the ICJ as a peremptory norm. In the 2012 *Jurisdictional Immunities* case, however, the ICJ appeared implicitly to accept the peremptory status of the prohibition of both crimes against humanity and war crimes. In the course of rejecting the argument that 'no rule which is not of the status of *jus cogens* may be applied if to do so would hinder the enforcement of a *jus cogens* rule', the Court referred to its earlier judgment in the *Arrest Warrant* case, and said that in that case:

[31] ILC, Draft Conclusions (n 1) at 203.

[32] UNGA Sixth Committee (74th Session), Summary Records of the 23rd–27th Meetings: UN Doc A/C.6/74/SR.23 (28 October 2019) (comments by Norway, China, Nicaragua, France and the Czech Republic); UN Doc A/C.6/74/SR.24 (29 October 2019) (comments by the Netherlands, Israel, Singapore, Ireland, Italy, the US, Australia and Thailand); UN Doc A/C.6/74/SR.25 (30 October 2019) (comments by Germany and Russia); UN Doc A/C.6/74/SR.26 (31 October 2019) (comments by India, Uzbekistan, Japan, Viet Nam, Republic of Korea, Armenia, Turkey, Bulgaria and Chile); UN Doc A/C.6/74/SR.27 (31 October 2019) (comments by Cyprus, Iran, the Philippines and Cameroon). See also written comments on the Draft Conclusions, submitted to the ILC ahead of its 73rd session, by the Czech Republic, Denmark (on behalf of Nordic countries), France, Germany, Israel, Italy, Japan, the Netherlands, Portugal, Russia, Singapore, Slovenia, South Africa, Spain, Switzerland, the UK and the US: available at ILC, 'Analytical Guide' (n 27).

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> the Court held, albeit without express reference to the concept of *jus cogens*, that the fact that a Minister for Foreign Affairs was accused of criminal violations of rules which *undoubtedly possess the character of jus cogens* did not deprive the Democratic Republic of Congo of the entitlement which it possessed … to demand immunity on his behalf.[33]

In the *Arrest Warrant* case, the Congolese Minister for Foreign Affairs was suspected of having committed 'war crimes or crimes against humanity'—the Court did not in its judgment distinguish between the status of those two crimes. In upholding his immunity from criminal prosecution, the Court did not expressly address the question of whether those crimes were prohibited by *jus cogens* norms. It did, however, reference the statement of Lord Millet in the *Pinochet* case that there could be no immunity for crimes protected by *jus cogens* norms,[34] and found that customary international law did *not* recognise such an exception to the immunity of government ministers. While it would be a stretch to interpret *Arrest Warrant* itself as endorsement of the peremptory status of crimes against humanity and war crimes, when the judgment is read together with the Court's later reference in *Jurisdictional Immunities* to rules 'undoubtedly possess[ing] the character of *jus cogens*', it does appear that the ICJ has accepted that both crimes against humanity and war crimes are prohibited by *jus cogens* norms.

A number of other international courts and tribunals have regarded the prohibition of crimes against humanity as a *jus cogens* norm. The International Criminal Court (ICC) has said that 'it is generally agreed that the interdiction of crimes against humanity enjoys the status of *jus cogens*',[35] and the International Criminal Tribunal for the former Yugoslavia (ICTY) has said similarly that the norms 'prohibiting war crimes, crimes against humanity and genocide' are 'peremptory norms of international law or *jus cogens*'.[36] The Special Court of Sierra Leone has also seemingly accepted the *jus cogens* status of crimes against humanity: in the context of a discussion about crimes against humanity and universal jurisdiction, the Court said that 'a state cannot sweep [crimes against humanity] into oblivion and forgetfulness … [because] the obligation to protect human dignity is a peremptory norm'.[37]

The peremptory status of the prohibition of crimes against humanity has also been accepted by the inter-American human rights system, as well as by several

[33] *Jurisdictional Immunities of the State (Germany v Italy: Greece Intervening)* (Judgment) [2012] ICJ Rep 99 ('*Jurisdictional Immunities*') para 95 (emphasis added).

[34] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium)* (Judgment) [2002] ICJ Rep 3, para 56.

[35] *Prosecutor v Ruto v Sang* (Decision on Request for Excusal from Continued Presence at Trial) ICC-01/09-01/11, T Ch V(a) (18 June 2013) paras 42–43.

[36] *Prosecutor v Kupreškić* (Judgment) ICTY-95-16-T, T Ch (14 January 2000) ('*Kupreškić*') para 520.

[37] *Prosecutor v Kallan and Kamara* (Decision on Jurisdiction: Lome Accord Amnesty) SCSL-2004-15-AR72(E) and SCSL-2004-16-AR72(E) (13 March 2004) 29–30.

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domestic courts. In 2006 the Inter-American Court of Human Rights held that the 'prohibition to commit crimes against humanity is a *jus cogens* rule',[38] and that statement has been subsequently relied upon by the Inter-American Commission on Human Rights.[39] The Argentinian and Chilean Supreme Courts have both described the prohibition of crimes against humanity as a *jus cogens* rule,[40] and the Court of Bosnia and Herzegovina has described the *jus cogens* status of 'criminal liability for crimes against humanity' as 'established'.[41] Domestic courts in the US, Greece, Spain and the Republic of Korea have all seemingly accepted, for the most part without critique or analysis, that the prohibition of crimes against humanity is a peremptory norm,[42] and the Italian Supreme Court has accepted the *jus cogens* nature of 'norms for the protection of fundamental human rights'.[43]

The ILC's Draft Articles on Crimes Against Humanity describe the prohibition of crimes against humanity as a peremptory norm of international law in its preambular paragraph. Special Rapporteur on Peremptory Norms Dire Tladi has observed that when written responses were received from States on the Draft Articles, 'only one State, France, questioned the inclusion of the preambular paragraph', and even in that case France was not questioning the correctness of the preambular paragraph, but merely its 'appropriateness given that the subject of *jus cogens* was being considered in a different topic'.[44]

[38] *Case of Almonacid-Arellano et al v Chile* (Preliminary Objections, Reparations and Costs Judgment) Inter-American Court of Human Rights Series C 154 (26 September 2006) para 99; affirmed in *Case of the Miguel Castro-Castro Prison v Peru* (Merits, Reparations and Costs Judgment) Inter-American Court of Human Rights Series C No 160 (25 November 2006) para 402.

[39] Inter-American Commission on Human Rights, *Application to the Inter-American Court of Human Rights in the case of Vargas v Columbia,* Case 12, 531 (14 November 2008) at fn 66; Inter-American Commission on Human Rights, *Application to the Inter-American Court of Human Rights in the case of Gelman v Uruguay*, Case 12,607 (21 January 2010) para 66; Inter-American Commission on Human Rights, *Lopez et al v Columbia*, Case 12.573, Rep No 64/11 (31 March 2011) at fn 275.

[40] Corte Suprema de Justicia de la Nación (SCJN) (National Supreme Court of Argentina), *Riveros v Office of the Public Prosecutor*, Case M/2333/XLII (2007); see also SCJN, *Office of the Prosecutor v Priebke*, Case P/457/XXXI (1995); SCJN, *Chile v Clavel and Lautaro*, Case A/533/XXXVIII (2004); SCJN, *Re Pinto v Relatives of Tomas Rojas*, Case 3125-04 (2007).

[41] Court of Bosnia and Herzegovina, *Prosecutor's Office of Bosnia and Herzegovina v Anic* (Verdict) Case SI-1-K-005596-11-Kro (2011) para 27.

[42] See *Sarei v Rio Tinto*, 487 F 3d 1193 (9th Cir 2007); *In Re 'Agent Orange' Product Liability Litigation*, MDL 381, No 04-CV-400 (EDNY 2005) 214; Areios Pagos (Supreme Court, Greece), *Germany v Prefecture of Voiotia*, Case 11/2000 (2000); Audiencia Nacional (National Court of Spain), *Public Prosecutor's Office v Manzorro,* Case 16/2005, Aranzadi JUR 2005/132318 (2005); High Court of Korea, *Yeo v Nippon Steel & Sumitomo Metal*, Case 2012 Na 44947 (2013).

[43] Corte di Cassazione (Cass) (Court of Cassation, Italy), *Ferrini v Germany*, Case 5044/2004 (2004); Cass, *Germany v Mantelli*, Case 14201/2008 (2008); Cass, *Lozano v Italy*, Case 31171/2008 (2008); Cass, *Germany v Milde*, Case 1072/2009 (2009).

[44] ILC, 'Fourth Report on Peremptory Norms of General International Law (*Jus Cogens*) by Dire Tladi, Special Rapporteur' (31 January 2019) UN Doc A/CN.4/727 ('Fourth Report on Peremptory Norms') 63.

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The most authoritative modern definition of crimes against humanity is that provided in the Rome Statute of the International Criminal Court (Rome Statute). Article 7 of the Rome Statute identifies a series of criminal acts that, 'when committed as a part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack', constitute a crime against humanity. The acts include murder, extermination, imprisonment in violation of fundamental rules of international law, torture, rape and other forms of sexual violence, and enforced disappearance.[45] It has been suggested that it is unclear whether 'all of the "underlying crimes" encompassed within this definition of crimes against humanity are indeed protected by *jus cogens*';[46] however, such suggestion seems to miss the point that it is the widespread and systematic nature of the 'attack' that gives the criminal acts their character as crimes against humanity. It bears noting that in the jurisprudence referred to above, when the prohibition of crimes against humanity is described as a *jus cogens* norm, there is typically no distinction drawn between the specific underlying criminal acts. Thus, if the prohibition of crimes against humanity has been authoritatively recognised as a *jus cogens* norm—as the preceding analysis suggests—it ought not to matter whether the widespread and systematic attack is comprised of acts of murder, torture, deportation, rape or other form of sexual violence, or any combination thereof.

B. The 'Basic Rules of International Humanitarian Law'

The ILC's 2019 Draft Conclusions include 'the basic rules of international humanitarian law' as part of the 'non-exhaustive list' of norms the ILC has previously referred to as peremptory.[47] In support, the ILC references two outputs of the Study Group on Fragmentation of International Law, and its own commentary to the ARSIWA.[48] The outputs of the Study Group referred to merely reference the commentary to the ARSIWA, and note that the 'basic rules of international humanitarian law' are among the most 'frequently cited' candidates for consideration as *jus cogens* norms.[49] The commentary to the ARSIWA references the ICJ's *Nuclear Weapons* Advisory Opinion, in which the Court described the 'fundamental rules' of international humanitarian law as 'intrangressible principles of international customary law', and asserts that in light of that, it would 'seem justified to treat these [rules] as peremptory'.[50]

[45] Rome Statute of the International Criminal Court (adopted 17 July 1998, entered into force 1 July 2002) 2187 UNTS 3, art 7.

[46] J Trahan, *Existing Legal Limits to Security Council Veto Power in the Face of Atrocity Crimes* (Cambridge University Press 2020) 156.

[47] ILC, Draft Conclusions (n 1) 203.

[48] ibid 205–6.

[49] ILC, 'Report of the International Law Commission on the Work of Its 58th Session' (1 May–9 June and 3 July–11 August 2006) UN Doc A/61/10, 177–84; ILC, Fragmentation of International Law (n 26) 188.

[50] ILC, Articles on State Responsibility (n 2) 113.

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In *Nuclear Weapons*, the ICJ in fact explicitly declined to express a view on the peremptory status of the rules of international humanitarian law.[51] Thus, some scholars have rightly observed that it cannot be assumed that by 'intrangressible', the Court meant peremptory.[52] However, as Special Rapporteur Dire Tladi has observed, 'it is not clear what else the term can mean in that context. It surely could not mean rules that may not be violated … since, by definition all rules, including rules of a *jus dispositivum* character, would be of that nature.'[53] Accepting that by 'intransgressible', the Court had to have meant more than merely inviolable, but acknowledging also that the Court explicitly opted *not* to use the word 'peremptory', it is asserted here that what the Court must have meant was non-derogable. It is important to recall that non-derogable in this context means not only that a rule cannot be violated, but that States cannot absolve themselves of obligations flowing from the rule. As Katie Johnston explains, 'a derogation is … not concerned with factual conduct that is not in compliance with an obligation of a party that is bound by a norm, but rather with legal or normative acts'.[54] The reason that 'intransgressible' must have meant 'non-derogable', is that there is simply no other relevant descriptor of the status of rules of customary international law between binding (inviolable), and peremptory. Thus, in describing the fundamental rules of international humanitarian law as 'intransgressible principles of customary international law', the ICJ was effectively describing those rules as rules of customary international law that could not be derogated from—in other words, peremptory norms, according to the criteria prescribed by the VCLT. This approach aligns with the view expressed by the ICTY, that 'most customary rules of international humanitarian law' are peremptory, 'ie of a non-derogable and overriding character'.[55]

In its commentaries to the 2019 Draft Conclusions, the ILC does not elaborate which of the 'basic rules of international humanitarian law' it is referring to, in its non-exhaustive list of peremptory norms. Thus, several States have critiqued the inclusion of this norm in the list, on the basis that it is insufficiently precise.[56] While this criticism seems justified, it bears noting that the question of which rules of international humanitarian law constitute the 'basic rules'—or to use the

[51] *Legality of the Threat or Use of Nuclear Weapons* (Advisory Opinion) [1996] ICJ Rep 226 ('*Nuclear Weapons*') para 83.

[52] See C Brolmann *et al.*, 'Advisory Report on the Draft Conclusions of the International Law Commission on Peremptory Norms of General International Law' (Advisory Commission on Public International Law 2020) <www.advisorycommitteeinternationallaw.nl/publications/advisory-reports/2020/07/27/peremptory-norms-of-general-international-law>; D Shelton, 'Normative Heirarchy in International Law' (2006) 100 AJIL 306.

[53] ILC, Fourth Report on Peremptory Norms (n 44) 53.

[54] Johnston (n 21) 43.

[55] *Prosecutor v Tadić* (Appeal on Jurisdiction) IT-94-1-AR72, A Ch (2 October 1995) ('*Tadić*') para 143; *Kupreškić* (n 36) para 520.

[56] See written comments on the Draft Conclusions, submitted to the ILC ahead of its 73rd Session, by Austria, Israel, Slovenia, Spain, Switzerland and the US: available at ILC, 'Analytical Guide' (n 27).

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ICJ's term, the 'fundamental rules'—is in fact not particularly controversial. In *Nuclear Weapons*, the ICJ defined the 'cardinal principles contained in the texts constituting the fabric of humanitarian law'—that is, those it proceeded to describe as intransgressible—as follows:

> The first is aimed at the protection of the civilian population and civilian objects and establishes the distinction between combatants and non-combatants; States must never make civilians the object of attack and must consequently never use weapons that are incapable of distinguishing between civilians and military targets. According to the second principle, it is prohibited to cause unnecessary suffering to combatants: it is accordingly prohibited to use weapons causing them such harm or uselessly aggravating their suffering.[57]

The ICTY has also recognised the prohibition of deliberate attacks on civilians or civilian objects as a 'universally recognised principle', together with the principle that 'reasonable care must be taken in attacking military objectives so that civilians are not needlessly injured'.[58] It notes that this latter principle has 'always been applied in conjunction with the principle of proportionality, whereby any incidental (and unintentional) damage to civilians must not be out of proportion to the direct military advantage gained by the military attack'.[59] The ICTY has recognised further the customary (and uncontested) nature of the prohibition of attacks that do not discriminate between civilians and combatants.[60]

The General Assembly has similarly affirmed, as 'basic principles for the protection of civilians in armed conflicts': the requirement that distinction be made between combatants and civilians; the requirement that precautions be taken to avoid injury, loss or damage to civilians; the prohibition of attacks targeting civilians or civilian objects; and the requirement that civilians should not be the object of reprisals, forcible transfers or other assaults on their dignity.[61]

The International Committee of the Red Cross asserts that the principle of distinction, the prohibition of indiscriminate attacks, the requirements of proportionality and precautions in attack, and the prohibition of weapons causing superfluous injury or unnecessary suffering, are all rules of customary international law applicable in both international and non-international armed conflict.[62] While these references relate generally to the customary, not necessarily peremptory, nature of the principles described, the point here is to illustrate that the 'basic' or 'fundamental' rules of international humanitarian law are well established and for the most part uncontroversial.

[57] *Nuclear Weapons* (n 51) 257.
[58] *Kupreškić* (n 36) paras 521, 524.
[59] ibid para 524.
[60] ibid.
[61] UNGA Res 2675 (XXV) (9 December 1970) UN Doc A/RES/2675 (XXV); see also UNGA Res 2444 (XXIII) (19 December 1968) UN Doc A/RES/2444 (XXIII).
[62] See International Committee of the Red Cross, 'Customary International Humanitarian Law Database', rules 1, 11, 14, 15 and 70 <https://ihl-databases.icrc.org/customary-ihl/eng/docs/v1_rul>.

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In addition to the ICJ's somewhat masked recognition of the peremptory nature of the 'fundamental rules' of international humanitarian law, there is some judicial support for the peremptory nature of war crimes. As discussed above in relation to crimes against humanity, in its *Jurisdictional Immunities* Advisory Opinion, the ICJ seemed implicitly to accept the peremptory nature of the norms prohibiting both war crimes and crimes against humanity.[63] The ICTY, the US District Court of the Eastern District of New York and the Greek Supreme Court have all explicitly described the prohibition of war crimes as a rule of *jus cogens*,[64] and the US Appeals Court, the Argentinian Supreme Court and the Italian Supreme Court have done so implicitly.[65] Numerous scholars also include war crimes in their list of peremptory norms.[66]

This judicial and scholarly recognition of the prohibition of 'war crimes' as a peremptory norm, rather than the 'basic rules of international humanitarian law', warrants examination. It is pertinent to recall here that international humanitarian law and international criminal law serve different purposes. As Adil Haque describes, international humanitarian law 'guide[s] the prospective conduct of military commanders and soldiers on the battlefield', whereas international criminal law, 'guide[s] the retrospective evaluation of past offences by courts'.[67] Put otherwise, international criminal law translates principles of international humanitarian law into specific crimes for which individuals can be tried and punished. The Rome Statue, specifically, translates principles of international humanitarian law into crimes for which individuals can be tried and punished at the ICC.

Prior to the Rome Statute, earlier international criminal tribunals defined war crimes simply as violations (or serious violations, in the case of the ICTY) of humanitarian law.[68] Conversely, the Rome Statute's definition of war crimes does *not* fully reflect the basic rules of international humanitarian law, as enshrined in customary international law, on which those crimes are based. The definition of war crimes in the Rome Statute does not, for example, encompass the reckless or negligent failure to distinguish between civilians and combatants; nor the use of indiscriminate means or methods of warfare; nor the pursuit of military advantage at unnecessary cost to civilians; nor the

[63] *Jurisdictional Immunities* (n 33) 141.

[64] *Kupreškić* (n 36) para 520; *In Re 'Agent Orange' Product Liability Litigation*, MDL 381, No 04-CV-400 (EDNY 2005) 136; Areios Pagos (Supreme Court, Greece), *Germany v Margellos,* Case 6/2000 (2002).

[65] *Sarei v Rio Tinto,* 487 F 3d 1193 (9th Cir 2007); SCJN, *Chile v Clavel*, Case A/533/XXXVIII (2004) para 28; and see cases cited at (n 43).

[66] See, eg, Weatherall (n 28) 215; Bassiouni (n 18); E Wyler and L Castellanos-Jankiewicz, 'Serious Breaches of Peremptory Norms' in A Nollkaemper and I Plakokefalos (eds), *Principles of Shared Responsibility in International Law* (Cambridge University Press 2014) 286; Trahan (n 46) 148.

[67] A Haque, 'Protecting and Respecting Civilians: Correcting the Substantive and Structural Defects of the Rome Statute' (2011) 14 New Criminal Law Review 520.

[68] A Cassese, 'The Italian Court of Cassation Misapprehends the Notion of War Crimes' (2008) 6 JICJ 1085.

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incidental killing of civilians that is not 'clearly' excessive relative to the military advantage sought.[69] In short, as Haque has shown, the Rome Statute 'fails to fully enforce four core principles of humanitarian law designed to protect civilians: distinction, discrimination, necessity, and proportionality'.[70]

The Rome Statute is generally regarded as providing the most authoritative definition of war crimes. Because of the gap between war crimes as described in the Rome Statute, and the principles of customary international humanitarian law on which those crimes are based, the tendency of jurists and scholars to include 'war crimes' in their list of peremptory norms, instead of the fundamental rules of international humanitarian law, is problematic—at least as concerns the implications for State responsibility. It also regresses from the ICJ's recognition in its *Nuclear Weapons* Advisory Opinion of the 'fundamental rules of humanitarian law' as 'intransgressible' (non-derogable) rules of customary international law.

The primary source of peremptory norms of international law is customary international law, not the treaty rules that reflect—sometimes only partially—those customary norms.[71] This is so particularly in the case of the Rome Statute, which was negotiated and agreed for the specific purpose of designating the crimes within the jurisdiction of the ICC. What this means for the task of identifying peremptory norms in the field of international humanitarian law is that the point of reference must be customary international humanitarian law, and in particular the 'fundamental rules' recognised by the ICJ as 'intransgressible', rather than the Rome Statute.

It bears noting that in the ICJ's *Jurisdictional Immunities* Advisory Opinion, in which the Court seemingly accepted the peremptory nature of war crimes and crimes against humanity, the question with which the Court was concerned was one of individual criminal responsibility. It might be supposed that if the Court had been called upon to consider the substantive principles of international humanitarian law—and perhaps, whether a State could absolve itself of obligations arising from those principles—the Court might have referred to the peremptory nature of the fundamental rules of international humanitarian law, rather than the peremptory nature of the crimes deriving from those rules.

As it stands, what the ICJ appears to have done—reading together *Nuclear Weapons*, *Arrest Warrant* and *Jurisdictional Immunities*—is to have recognised the peremptory nature of the fundamental rules of international humanitarian law (in particular the principle of distinction and the prohibition of unnecessary suffering), and *additionally*, recognised the peremptory nature of the rules that have translated those principles, albeit imperfectly, into crimes attracting individual criminal responsibility.

With regard to the obligation to cooperate to end serious breaches of peremptory norms, what this means is that States are obliged to cooperate to

[69] See discussion in Haque (n 67).
[70] ibid 519.
[71] See discussion in Johnston (n 21) 35–6.

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end serious breaches of the 'fundamental rules' of international humanitarian law, as defined by customary international law and interpreted by international courts and tribunals,[72] *and* more specifically, to cooperate also to bring an end to serious breaches of the prohibition of war crimes (that is, all war crimes, there being no such thing as a non-serious war crime).

III. THE STATUS AND NATURE OF THE OBLIGATION TO COOPERATE TO END SERIOUS BREACHES OF PEREMPTORY NORMS OF INTERNATIONAL LAW

A. Status of the Obligation to Cooperate

As noted above, in its commentary to the 2019 Draft Conclusions, the ILC asserts that the obligation to cooperate to end serious breaches of peremptory norms of international law is 'now recognised under international law'.[73] In support, the ILC cites the ICJ's *Wall* and *Chagos* Advisory Opinions, a decision of the Inter-American Court of Human Rights, a decision of the UK House of Lords, and its own Draft Articles on the Protection of Persons in the Event of Disasters.[74]

The ICJ's *Wall* (2004) and *Chagos* (2019) Advisory Opinions do not explicitly affirm that customary international law recognises an obligation to cooperate to end serious breaches of peremptory norms. In its *Wall* Advisory Opinion, the ICJ found that Israel's construction of a wall in the Occupied Palestinian Territories violated Israel's obligation *erga omnes* to respect the Palestinian right of self-determination; and that as such, all States were under an obligation 'to *see to it* that any impediment, resulting from the construction of the wall, to the exercise of the Palestinian people of its right to self-determination is brought to an end'.[75] Similarly, in its *Chagos* Advisory Opinion, the ICJ affirmed that the obligation to respect the right to self-determination was an obligation *erga omnes*, and proceeded to determine that States 'must cooperate with the United Nations to complete the decolonization of Mauritius'.[76] This element of the *Chagos* Advisory Opinion has been rightly criticised as seemingly conflating obligations *erga omnes* with the obligations associated with a serious breach of a peremptory norm.[77]

In fact, in international law it does not automatically follow that just because an obligation has *erga omnes* status, all States have an obligation to put an end to a breach of that obligation—as they would for a serious breach of a peremptory

[72] eg *Nuclear Weapons* (n 51); *Tadić* (n 55); *Kupreškić* (n 36); UNGA Res 2675 (XXV) (n 61); UNGA Res 2444 (XXIII) (n 61). [73] ILC, Draft Conclusions (n 1) 194. [74] ibid 194–5.

[75] *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory* (Advisory Opinion) [2004] ICJ Rep 136 ('*Wall*') para 159 (emphasis added).

[76] *Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965* (Advisory Opinion) [2019] ICJ Rep 95 ('*Chagos*') para 180.

[77] C Eggett and S Thin, 'Clarification and Conflation: Obligations Erga Omnes in the Chagos Opinion' (*EJIL:Talk!*, 21 May 2019) <www.ejiltalk.org/clarification-and-conflation-obligations-erga-omnes-in-the-chagos-opinion/>.

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norm. The ICJ did not in either its *Wall* or *Chagos* Advisory Opinions make any reference to peremptory norms, let alone to the specific consequences that flow from the identification of a norm as peremptory.[78] The *Wall* and *Chagos* Opinions are important insofar as they support the general notion that third States have a positive duty to cooperate to bring an end to breaches of at least *some* obligations *erga omnes*, irrespective of any treaty obligation owed by the concerned State. It seems a stretch, however, to regard the Opinions as affirming the existence in customary international law of an obligation to cooperate to end serious breaches of peremptory norms.[79]

The assertion that customary international law recognises an obligation to cooperate to end serious breaches of peremptory norms is controversial. As several scholars have observed, State practice in support of such an obligation is not plentiful, and it is difficult to find evidence of *opinio juris* to the effect that States regard themselves as bound by customary international law to cooperate to bring an end to serious breaches of peremptory norms.[80] Such concern was echoed by several States in their written submissions on the Draft Conclusions, provided to the ILC in 2021 ahead of its 73rd Session. The US, for example, argued that there was 'no basis to assert that there is a binding obligation on non-breaching States to address the wrongful act, as there is neither a relevant rule of customary international law nor express agreement of States to accept such an obligation'.[81] Israel asserted that 'the particular consequences referred to in Draft Conclusion 19 [including the obligation to cooperate to bring an end to serious breaches of peremptory norms] do not reflect existing international law';[82] and the UK, similarly, 'encouraged the Commission to acknowledge the unsettled status' of the obligations flowing from serious breaches of peremptory norms.[83] Other States, however, expressed support for the ILC's assertion regarding the customary status of

[78] See HP Aust, 'Legal Consequences of Serious Breaches of Peremptory Norms in the Law of State Responsibility: Observations in the Light of the Recent Work of the International Law Commission' in D Tladi (ed), *Peremptory Norms of General International Law: Perspectives and Future Prospects* (Brill Nijhoff 2021).

[79] Similar critiques regarding the ILC's reliance on the *Wall* and *Chagos* Advisory Opinions, as support for the customary nature of the obligation to cooperate, were made by Israel, Italy, Japan and the US in their written comments on the Draft Conclusions, submitted to the ILC ahead of its 73rd Session: see ILC, 'Analytical Guide' (n 27).

[80] eg A Bird, *Third State Responsibility for Human Rights Violations* (2011) 21 EJIL 887; Aust (n 78) 82.

[81] US Government, 'Comments of the United States on the International Law Commission's Draft Conclusions on Peremptory Norms of General International Law (*Jus Cogens*) and Draft Annex, Provisionally adopted by the Drafting Committee on First Reading' (30 June 2021) 15 <https://legal.un.org/ilc/sessions/73/pdfs/english/jc_us.pdf>.

[82] Government of Israel, 'ILC Draft Conclusions on "Peremptory Norms of General International Law (*Jus Cogens*)" – Israel's Comments and Observations' (15 July 2021) para 51 <https://legal.un.org/ilc/sessions/73/pdfs/english/jc_israel.pdf>.

[83] UK Mission to the UN, 'Comments and Observations of the United Kingdom of Great Britain and Northern Ireland on the Draft Conclusions on Peremptory Norms of General International Law (*Jus Cogens*) adopted by the International Law Commission on First Reading' (30 June 2021) para 22 <https://legal.un.org/ilc/sessions/73/pdfs/english/jc_uk.pdf>.

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the obligation to cooperate;[84] while others refrained from expressing a view either for or against the customary status of the obligation, but requested the ILC to provide further evidence of State practice and *opinio juris* in support of such status.[85]

In addition to the concerns expressed by some States regarding the ILC's assessment of the obligation to cooperate to end serious breaches of peremptory norms, it is pertinent to note that several States have expressed concern regarding the pace at which the Draft Conclusions have taken shape, the lack of consultation with States, the insufficiency of State practice underpinning the ILC's conclusions, and the extent to which the Draft Conclusions push the boundaries of the ILC's mandate to codify and progressively develop international law. At the 2019 meeting of the General Assembly's Sixth Committee at which the Draft Conclusions were debated, Slovakia's representative said that the ILC had 'boldly proceeded to the adoption of the whole set of draft conclusions on first reading' and that a 'rushed outcome, with scant regard for the divergent views of States, was unlikely to lead to success'.[86] The UK, in its written submission to the ILC on the Draft Conclusions, recalled that it had 'consistently urged the Commission to progress cautiously and to take full account of the lack of practice when proposing draft conclusions'.[87] Spain, similarly, cautioned that 'the effort of systemic construction will only be robust and have normative authority if it enjoys the necessary consensus of the international community of States', and it described the Draft Conclusions as a '*starting point* for a constructive dialogue'.[88]

ILC pronouncements are not, in themselves, sources of law. As such, an assessment of the extent to which the asserted obligation to cooperate in fact reflects customary international law will be informed by further comments

[84] See UNGA Sixth Committee (74th Session), Summary Records of the 23rd, 26th and 27th Meetings: UN Doc A/C.6/74/SR.27 (31 October 2019) (comments by South Africa); UN Doc A/C.6/74/SR.26 (31 October 2019) (comments by Spain); UN Doc A/C.6/74/SR.23 (28 October 2019) (comments by Nicaragua); and see also written comments on the Draft Conclusions, submitted by Columbia, Cyprus, the Czech Republic, Spain and Italy to the ILC ahead of its 73rd Session: ILC, 'Analytical Guide' (n 27).

[85] See written comments on the Draft Conclusions, submitted to the ILC ahead of its 73rd Session, by Australian, Japan and the Netherlands: ILC, 'Analytical Guide' (n 27).

[86] UNGA Sixth Committee (74th Session), Summary Record of the 23rd Meeting (29 October 2019) UN Doc A/C.6/74/SR.23, 15, and see also comments by Poland at that same meeting. See also similar comments by Greece, Russia and Japan, in UNGA Sixth Committee (74th Session), Summary Records of the 24th–26th Meetings: UN Doc A/C.6/74/SR.24 (29 October 2019) (Greece); UN Doc A/C.6/74/SR.25 (30 October 2019) (Russia) and UN Doc A/C.6/74/SR.26 (31 October 2019) (Japan).

[87] UK Mission to the UN (n 83) para 2.

[88] Government of Spain, 'Comments and Observations of the Kingdom of Spain on the Draft Conclusions of Peremptory Norms of General International Law (*Jus Cogens*) adopted by the International Law Commission' paras 13–14 (emphasis added) <https://legal.un.org/ilc/sessions/73/pdfs/english/jc_spain.pdf>. See also Permanent Missions of Sweden, Iceland, Norway, Denmark and Finland to the UN, 'Joint Nordic Comments and Observations on the ILC Draft Conclusions on Peremptory Norms of General International Law (Jus Cogens)' <https://legal.un.org/ilc/sessions/73/pdfs/english/jc_denmark_nordic.pdf>.

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received from States on the Draft Conclusions, and—over time—by the way in which that obligation is accepted by States as well as by courts and tribunals. In the meantime, it bears noting that while ILC pronouncements are not sources of law, they are persuasive 'subsidiary means for the determination of rules of law'.[89] In 2008, Justice Rosalyn Higgins remarked upon 'the high percentage [of ICJ judgments] in which reference has been made to the work of the ILC';[90] and since then the Court has continued to refer to the ILC's work in determining the customary status of rules.[91] As of 31 January 2020, the ICJ had expressly relied upon the ILC's work in 23 decisions and advisory opinions.[92] In doing so, it typically has not engaged in its own analysis of the State practice and *opinio juris* on which the ILC's work relies.[93]

Danae Azaria suggests that the ILC's pronouncements may be regarded as an 'offer of interpretation' to States, and that 'whenever States fail to engage with the ILC's interpretive offer, international courts and tribunals are likely to rely on the ILC's interpretive pronouncements as a subsidiary means for determining rules of law'.[94] As such an offer, the ARSIWA have been particularly persuasive. By early 2019 the ARSIWA had been referenced in 249 decisions of international tribunals,[95] and as David Caron has observed, many courts and tribunals now do 'not assess [the ARSIWA], but instead … accept them as a given'.[96] As of early 2016, Article 41 of the ARSIWA, on the obligation to cooperate, had been referenced at least 23 times in decisions and advisory opinions of the ICJ—more than almost any other Article in the ARSIWA.[97] In short, while the status of the asserted obligation to cooperate to end serious breaches of peremptory norms is to some extent undermined by the concerns expressed by States both at the 2019 meeting of the General Assembly's Sixth Committee, and subsequently in written comments to the ILC, it is—conversely—bolstered by the long-standing reliance by courts and

[89] Statute of the International Court of Justice (18 April 1946) TS 993, art 38(1).

[90] R Higgins, 'Keynote Address H.E. Judge Rosalyn Higgins, President of the International Court of Justice' (Sixtieth Anniversary of the International Law Commission, 19 May 2008) 2 <www.icj-cij.org/public/files/press-releases/8/14488.pdf>.

[91] LB de Chazournes, 'The International Law Commission in a Mirror—Forms, Impact and Authority' in United Nations (ed), *Seventy Years of the International Law Commission* (United Nations 2020) 149.

[92] D Azaria, 'Codification by Interpretation: The International Law Commission as an Interpreter of International Law' (2020) 31(1) EJIL 173.

[93] De Chazournes (n 91) 148.

[94] Azaria (n 92) 100.

[95] UNGA, 'Responsibility of States for Internationally Wrongful Acts: Compilation of Decisions of International Courts, Tribunals and Other Bodies: Report of the Secretary General' (23 April 2019) UN Doc A/74/83, para 5.

[96] DD Caron, 'The ILC Articles on State Responsibility' (2002) 96(4) AJIL 868.

[97] UNGA, 'Responsibility of States for Internationally Wrongful Acts: Compilation of Decisions of International Courts, Tribunals and Other Bodies: Report of the Secretary General' (20 June 2017) UN Doc A/71/80/Add.1, 6. Articles that as of January 2016 had been referenced more frequently than Article 41 were Articles 4 (conduct of organs of a State), 30 (obligation of cessation and non-repetition) and 35 (restitution).

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tribunals on the ILC's pronouncements in general, and the ARSIWA in particular.

This article does not interrogate further the assertion that the obligation to cooperate to end serious breaches of peremptory norms has attained customary status. Whether or not one accepts such assertion, it is the case that Draft Conclusion 19 (the obligation to cooperate) may be relied upon by States as a guide—an 'interpretive offer', to use Azaria's term—regarding the conduct of their international relations. As such, this article proceeds on the basis that, regardless of the precise legal status of the obligation to cooperate, there is value—particularly for States who aspire to 'best practice' in their international relations—in better understanding what that obligation requires. In particular, there is value in better understanding how States might fulfil the obligation by leveraging their membership of international organisations.

B. The Nature of the Obligation to Cooperate

The ILC's commentary to Article 41(1) of the ARSIWA describes the obligation to cooperate to end serious breaches of peremptory norms as a 'positive duty' that calls for 'a joint and coordinated effort by all States to counteract the effects of these breaches'.[98] Neither the ARSIWA nor the 2019 Draft Conclusions suggest what measures States should take to fulfil that obligation.

Both the ICJ and the ILC, in their respective analyses of the obligation to bring an end to breaches of certain norms of international law—self-determination, in the case of the ICJ, and peremptory norms, in the case of the ILC—have emphasised the role of the UN. In its *Wall* Advisory Opinion, the ICJ, having found that States were under an obligation to 'see to it' that any impediment to the Palestinian right to self-determination was brought to an end, said that 'the United Nations, and especially the General Assembly and the Security Council, should consider what further action is required to bring to an end the illegal situation'.[99] Similarly in its *Chagos* Advisory Opinion, as noted above, the Court referred to the obligation of States to 'cooperate with the United Nations' to ensure the decolonisation of Mauritius.[100]

The ILC's commentary to Article 41(1) of the ARSIWA notes that cooperation 'could be organised in the framework of a competent international organisation, including the United Nations'.[101] The commentary to the Draft Conclusions notes similarly that 'the collective system of the United Nations is the preferred framework for cooperative action'.[102] It notes further that when faced with a serious breach of a peremptory norm, 'where an

[98] ILC, Articles on State Responsibility (n 2) 114.
[99] *Wall* (n 75) 200.
[100] *Chagos* (n 76) 139.
[101] ILC, Articles on State Responsibility (n 2) 114.
[102] ILC, Draft Conclusions (n 1) 195.

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international organisation has discretion to act, the obligation to cooperate imposes a duty on the members of that international organisation to act with a view to the organisation exercising that discretion in a manner to bring to an end the breach of a peremptory norm of international law'.[103]

In the absence of more precise guidance from either the ILC or the ICJ regarding what is required by the obligation to cooperate, reference may be made to the comments of the ICJ in the *Bosnian Genocide Case* regarding the nature of the obligation to prevent genocide, and to the well-established notion in international law of 'due diligence', upon which the Court in that case expressly relied. In relation to the task of 'determining the specific scope of the duty to prevent in the Genocide Convention', the Court said that 'in this area the notion of "due diligence", which calls for an assessment *in concreto*, is of critical importance'.[104]

Across various areas of international law—international environmental law, international investment law, the law of the sea and international human rights law, among others—the due diligence standard has been used to provide substance to State obligations that are 'somewhat indeterminate or unclear'.[105] In the *Bosnian Genocide Case*, as Larissa van den Herik and Emma Irving observe, the due diligence standard was utilised to 'substantiate a provision [the obligation to prevent genocide] that had previously been labelled as normatively empty'.[106] In a similar vein, the 'notion of due diligence' can substantiate the obligation to cooperate to end serious breaches of peremptory norms.

In 2016, the Study Group on Due Diligence of the International Law Association (ILA) described the due diligence standard as:

> At its heart, … concerned with supplying a standard of care against which fault can be assessed. It is a standard of reasonableness, … that seeks to take account of the consequences of wrongful conduct and the extent to which such consequences could feasibly have been avoided by the State or international organisation that either commissioned the relevant act or which omitted to prevent its occurrence.[107]

Due diligence standards differ depending on the primary obligation to which they attach. The Seabed Disputes Chamber of the International Tribunal of the Law of the Sea (ITLOS), in its *Seabed Mining* Advisory Opinion, observed that 'the content of "due diligence" obligations may not easily be

[103] ibid 196.

[104] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)* (Judgment) [2007] ICJ Rep 43 ('*Bosnian Genocide Case*') para 430.

[105] International Law Association Study Group on Due Diligence in International Law (ILA Study Group), 'Second Report' (July 2016) 47; L van den Herik and E Irving, 'Due Diligence and the Obligation to Prevent Genocide and Crimes Against Humanity' (Grotius Centre Working Paper Series, No 2018/082-PIL, 22 October 2018).

[106] van den Herik and Irving (n 105) 2.

[107] ILA Study Group (n 105) 2.

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described in precise terms';[108] and the ILA Study Group observed similarly that 'there is not one single standard of due diligence that applies to all primary norms'.[109] For purposes of understanding the obligation to cooperate to end serious breaches of peremptory norms, specifically crimes against humanity and the basic rules of international humanitarian law, the ICJ's application of the due diligence standard in the *Bosnian Genocide Case* is particularly pertinent.

In that case the Court invoked the notion of due diligence to support its interpretation of the obligation as one of 'conduct and not result, in the sense that a State cannot be under an obligation to succeed, … in preventing the commission of genocide: the obligation is rather to employ *all means reasonably available to them*, so as to prevent genocide so far as possible'.[110] This correlates with the 'reasonableness' test, common to due diligence standards across the various areas of international law in which the standard has been employed. The ILA Study Group described 'reasonableness' as the 'overarching standard', and as a 'golden thread in determining which measures States should take in a duly diligent manner'.[111] In the *Bosnian Genocide Case*, the ICJ applied a version of this standard when it said that if a State 'has available to it means likely to have a deterrent effect on those suspected of preparing genocide, or reasonably suspected of harbouring specific intent …, it is under a duty to make such use of these means as the circumstances permit'.[112] Drawing on this analysis, one might suppose that as applied to the obligation to cooperate to end serious breaches of peremptory norms, duly diligent States would be expected to use all available means, so far as circumstances permit, that are likely to deter the ongoing commission of those breaches.

Due diligence standards have typically required a connection between the State whose responsibility is in question and the perpetrator of the wrongful conduct. The ILC Study Group described this requirement as being about a State's control over territory where the wrongs are occurring, or influence over non-State actors engaging in the wrongful conduct.[113] In the *Bosnian Genocide Case* the ICJ accepted that a State's due diligence obligation to prevent genocide was not territorially limited, but it did nevertheless premise the obligation on a State's 'capacity to influence' the genocidal actors.[114] As noted above, however, due diligence standards differ according to the legal obligation to which they attach. For purposes of the obligation to cooperate to end serious breaches of peremptory norms, neither the commentary to the ARSIWA nor the commentary to the Draft Conclusions premise the

[108] Seabed Disputes Chamber of the International Tribunal for the Law of the Sea, *Advisory Opinion on the Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area* (2011) 50 ILM 458 ('*Seabed Mining Advisory Opinion*') para 117.
[109] ILA Study Group (n 105) 21.
[110] *Bosnian Genocide Case* (n 104) para 430 (emphasis added).
[111] ILA Study Group (n 104) 7.
[112] *Bosnian Genocide Case* (n 104) para 431.
[113] ILA Study Group (n 105) 11.
[114] *Bosnian Genocide Case* (n 104) para 430.

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obligation on a relationship between third States and the perpetrator(s). Indeed, in the commentary to the Draft Conclusions, the ILC's reliance on the ICJ's *Wall* and *Chagos* Advisory Opinions—and the reference in both of those Opinions to the duty of 'all States'—suggests that the obligation to cooperate is *not* contingent upon a relationship between third States and the perpetrator(s).[115]

Drawing on the analysis of the ICJ in the *Bosnian Genocide Case*, together with other jurisprudence and academic commentary on due diligence, one can suppose that States with particular relationships with the perpetrator(s) of serious breaches of peremptory norms might have heightened obligations; but there will also be steps that *all* States should take, by way of due diligence, irrespective of any relationship with the perpetrator(s). Bearing in mind the comments of both the ICJ and the ILC preferencing cooperation through the UN, an example of such a step would be support for an appropriate UN resolution, aimed at bringing a serious breach of a peremptory norm to an end.

In recent years, some scholars have asserted that the obligation to cooperate to end serious breaches of peremptory norms requires members of the Security Council to not block resolutions which 'attempt to end or alleviate the violation of a peremptory norm'.[116] Such arguments run up against the fact that a basic characteristic of due diligence obligations is that they do not prescribe the *specific conduct* that States must take. As van den Herik and Irving observe in relation to the obligation to prevent genocide and crimes against humanity, the obligation 'does not contain a clear-cut positive obligation to resort to a specific type of action'; rather, 'at the core of the obligation … lies an obligation to make informed decisions about the most appropriate course of conduct, coupled with an obligation to explain those decisions and subsequent conduct'.[117] On the other hand, however, it is clear that States must use *all available means*. In relation to the obligation to cooperate, and recalling again the ILC's and the ICJ's preference for cooperation through the UN, it is difficult to see how a member of the Security Council could block a resolution aimed at ending a serious breach of a peremptory norm—imposing an arms embargo or targeted sanctions, for example—without falling afoul of its obligation to cooperate. At the very least, the non-cooperating State would be required to provide adequate justification for its preferred course of action.[118]

[115] ILC, Draft Conclusions (n 1) 195.

[116] Trahan (n 46) 174. See also D Costelloe, *Legal Consequences of Peremptory Norms of International Law* (Cambridge University Press 2017) 221; J Heieck, 'The Responsibility Not to Veto Revisited: How the Duty to Prevent Genocide as a *Jus Cogens* Norm Imposes a Legal Duty Not to Veto on the Five Permanent Members of the Security Council' in R Barnes and V Tzevelekos (eds), *Beyond Responsibility to Protect* (Intersentia 2018) 103, 122.

[117] van den Herik and Irving (n 105) 8.

[118] For a contrary view, see P Webb, 'Deadlock or Restraint? The Security Council Veto and the Use of Force in Syria' (2014) 19(3) JC&SL 471, 480–1. Responding to Heieck's assertion that Russia and China breached their obligation to cooperate by vetoing Security Council resolutions

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While it is undoubtedly members of the Security Council that have the greatest capacity to address serious breaches of peremptory norms, the inevitability of competing national interests means that collective action through the Council is not always possible. The unique powers and responsibility of the Security Council do not obviate the obligations of other States to cooperate to end serious breaches of peremptory norms, using all means available to them, including their membership of other international organisations. If the Council will not take appropriate measures, the General Assembly provides an appropriate forum through which States can fulfil such obligation. And as for members of the Security Council, duly diligent members of the General Assembly should normally be expected to support resolutions aimed at ending serious breaches of peremptory norms, unless they can provide good reason for not doing so. Such an analysis is supported by the statement of the ILC in its commentary to the Draft Conclusions, that when faced with a serious breach of a peremptory norm, member States of an international organisation are under a duty to 'act with a view to the organisation exercising [its] discretion in a manner' to bring an end to the breach.[119]

In the academic commentary on due diligence, there are three additional insights that shed light on the nature of the obligation to cooperate to end serious breaches of peremptory norms. The first relates to the importance of solidarity. As Nina Jørgensen has observed, some measures taken in response to an infringement of fundamental interests of the international community 'may have minimal effect if … evaded or ignored by other States'. Similarly, efforts by States to pass a General Assembly resolution aimed at ending serious breaches of peremptory norms will be ineffective without the support of a two-thirds majority. Thus, 'it would seem that where the effectiveness of measures rests on universality'—or, in this case, a majority—the obligation to cooperate means that 'States may not claim neutrality'.[120] On this point it is pertinent to recall also the comments of the ICJ in the *Bosnian Genocide Case* that it is 'irrelevant whether the State whose responsibility is in issue claims, or even proves, that even if it had employed all means reasonably at its disposal, they would not have sufficed to prevent the commission of genocide', because 'the possibility remains that the combined effort of

on Syria, Webb argues that 'it is quite a leap of logic to then say that the exercise of veto is causally linked to violations of international law on the ground'. With respect, this statement appears to misunderstand the nature of a State's obligation to use 'all means reasonably at its disposal'. In the *Bosnian Genocide Case*, in relation to the obligation to prevent genocide, the ICJ explicitly discounted the requirement for a causal link between the alleged omission of the State whose responsibility is in question, and the wrongful conduct: *Bosnian Genocide Case* (n 104) para 430.

[119] ILC, Draft Conclusions (n 1) 196; see also ILC, 'Third Report on Peremptory Norms of General International Law (*Jus Cogens*), by D Tladi, Special Rapporteur' (12 February 2018) UN Doc A/CN.4/714, 34.

[120] N Jørgensen, 'The Obligation of Cooperation' in J Crawford *et al.* (eds), *The Law of International Responsibility* (Oxford University Press 2010) 695, 700.

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several States, each complying with its obligation to prevent, might have achieved the result … which the efforts of only one State were insufficient to produce'.[121] It is, indeed, the power of the 'combined efforts of all States' that is the essence of the obligation to cooperate.

The second insight from the commentary on due diligence relates to the requirement of knowledge, and the relevance of digital technologies in this regard. The ILA Study Group said that 'States can usually only be expected to act in accordance with a due diligence obligation to prevent harm if the State has knowledge of the situation which requires action.'[122] Similarly in the *Bosnian Genocide Case*, the Court said that a State's duty to prevent genocide arises 'at the instant that the State learns of, or should normally have learned of, the existence of a serious risk that genocide will be committed'.[123] In both jurisprudence and academic commentary, it has been recognised that the question of what a State ought to have known must be assessed in the light of available technology—and as such, that standards may be expected to change over time. In 2011, the ITLOS Seabed Disputes Chamber recognised that 'measures considered sufficiently diligent at a certain moment may become not diligent enough in light, for instance, of new scientific or technological knowledge'.[124] In the context of crimes against humanity or violations of the basic rules of international humanitarian law, as digital technologies become more advanced and readily accessible, and social media brings previously out-of-reach situations into the public domain, it will likely become increasingly implausible for States to claim that they did not know about the wrongful conduct in question.[125]

The third insight from the commentary on due diligence that is pertinent to the obligation to cooperate is that due diligence standards may be expected to vary according to the 'importance of the interest requiring protection'.[126] The ILA Study Group on Due Diligence explained in its 2016 report that 'what is considered to be reasonable in exercising due diligence to prevent genocide (a violation of a norm of *jus cogens*) will obviously be more demanding than that which is expected for the prevention of harm to property or financial interests'.[127] Thus, one would expect that the level of due diligence required in relation to the obligation to cooperate to end serious breaches of peremptory norms should be of the highest order.

To conclude on the nature of the obligation to cooperate: while a member State could not be held responsible for a failure on the part of either the Security Council or the General Assembly to take action aimed at ending a serious breach of a peremptory norm, a State could feasibly be held responsible for failing to vote in favour of a resolution aimed at putting an

[121] *Bosnian Genocide Case* (n 104) para 430.
[122] ILA Study Group (n 105) 12.
[123] *Bosnian Genocide Case* (n 104) para 431.
[124] *Seabed Mining Advisory Opinion* (n 108) para 117.
[125] See discussion in van den Herik and Irving (n 105) 10–14.
[126] ILA Study Group (n 105) 21.
[127] ibid 20.

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end to the breach—on the basis that such a resolution is one of the means available to States that might have a deterrent effect on the perpetrator(s). Extrapolating from the approach taken by the ICJ in the *Bosnian Genocide Case*, and drawing on the well-established due diligence standard, it should be irrelevant for a State to argue that even if it had tried to get an appropriate resolution through the Council or the Assembly, the resolution would never have passed, or that even if it had passed, it would not have brought the serious breach in question to an end; because the 'possibility remains' that if a sufficient number of States had banded together in support of an appropriate UN resolution, that combined action may have been sufficient to deter the perpetrators of the serious breach of the peremptory norm.

IV. WAYS IN WHICH THE GENERAL ASSEMBLY CAN BE USED TO END SERIOUS BREACHES OF PEREMPTORY NORMS

Under the UN Charter, the General Assembly is competent to make recommendations to assist in the 'realisation of human rights', and on matters of international peace and security.[128] The Assembly's powers in relation to international peace and security are limited by Article 12(1) of the Charter, which provides that while the Security Council is exercising its functions in respect of a particular dispute or situation, the Assembly 'shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests';[129] however, the significance of this restriction has been whittled away over time. In its 1962 *Certain Expenses* Advisory Opinion, the ICJ described the Council's responsibility for international peace and security as 'primary, not exclusive', and said that the UN Charter made it 'abundantly clear' that the Assembly was 'also to be concerned with international peace and security'.[130] Several decades later, in its *Wall* Advisory Opinion, the ICJ observed that 'there has been an increasing tendency … for the General Assembly and the Security Council to deal in parallel with the same matter concerning international peace and security'.[131] Following the *Wall* Opinion, Article 12(1) has come to be regarded as having limited relevance.[132]

Based on the General Assembly's powers as described in the UN Charter and interpreted by the ICJ, the following discussion canvasses four ways in which States may use the Assembly as a means through which to fulfil, at least partially, their obligation to cooperate to end serious breaches of peremptory norms. By way of example, particular reference is made to the serious violations of the basic rules of international humanitarian law and crimes against humanity currently underway in Syria and Myanmar; however, the

[128] UN Charter arts 11(1), 13(1)(b).
[129] ibid art 12(1).
[130] *Certain Expenses of the United Nations* (Advisory Opinion) [1962] ICJ Rep 151 ('*Certain Expenses*') 163.
[131] *Wall* (n 75) para 27.
[132] See R Higgins *et al.*, *Oppenheim's International Law: United Nations* (Oxford University Press 2017) 59–60.

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options described may be similarly applicable as responses to other serious breaches of peremptory norms, particularly in contexts in which the Security Council is blocked by the veto of one or more of its permanent members. In setting out the options in this way, it is not presupposed that such courses of action will be politically feasible, or indeed likely to be effective, in any given case. Such options will obviously need to be assessed on a case-by-case basis, guided primarily by the question of which measures might influence the perpetrators, but bearing in mind also the requirement for States to use *all* available means.

A. Condemning and Legally Characterising the Crimes in Question

As a first step in responding to credible reports of crimes against humanity and/or violations of international humanitarian law, the General Assembly may critique the conduct in question, and explicitly describe it as likely constituting a crime against humanity and/or a violation of the fundamental rules of international humanitarian law, or a war crime. Such a statement would not in itself have any binding legal effect, but it would attest to the existence of international consensus—or majority view—regarding the characterisation of the conduct in question, and that characterisation could have legal consequences.

The ICJ has accepted that the General Assembly may pass 'resolutions which make determinations or have operative design'. The Court has described such resolutions as 'not a finding of facts, but the formulation of a legal situation'.[133] One of the ways in which the Assembly has acted upon this competence is by characterising State conduct as being in breach of particular rules of international law, including the fundamental rules of international humanitarian law, and the norms prohibiting crimes against humanity and war crimes. For example, in the context of decolonisation in the 1960s, the Assembly 'condemn[ed] the policies of racial discrimination and segregation [in Southern Rhodesia]…, which constitute a crime against humanity',[134] and similarly condemned the policies of the Portuguese Government in relation to the Portuguese Territories 'as a crime against humanity'.[135] In relation to apartheid South Africa in the 1980s, the Assembly 'reaffirm[ed] that apartheid is a crime against humanity',[136] and in relation to Israel, also in the 1980s, the Assembly 'declar[ed] that Israel's grave breaches of [the Fourth

[133] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council* (Advisory Opinion) [1971] ICJ Rep 16, 50. For discussion, see R Barber, 'Does International Law Permit the Provision of Humanitarian Assistance without Host State Consent? Territorial Integrity, Necessity and the Determinative Function of the General Assembly' (2022) 23 YIHL (forthcoming); M Ramsden, *International Justice in the United Nations General Assembly* (Edward Elgar 2021) 22–65.

[134] UNGA Res 2022 (XX) (5 November 1965) UN Doc A/RES/2022 (XX).

[135] UNGA Res 2184 (XXI) (12 December 1966) UN Doc A/RES/2184 (XXI).

[136] UNGA Res 43/50 C (5 December 1988) UN Doc A/RES/43/50 C.

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Geneva Convention] are war crimes'.[137] In relation to Bosnia and Herzegovina, the Assembly recognised that the practice of rape in the context of armed conflict 'constitutes a war crime', and in certain circumstances, 'a crime against humanity and an act of genocide'.[138] Following the Rwandan genocide, the Assembly expressed its concern regarding reports that 'genocide and systematic, widespread and flagrant violations of international humanitarian law and crimes against humanity have been committed'.[139] Similarly following the alleged genocide against the Rohingya in Myanmar in 2017, the Assembly expressed concern at the findings of the IIFFM that there was 'sufficient information to warrant investigation and prosecution … for genocide …, [and] that crimes against humanity and war crimes have been committed'.[140]

General Assembly resolutions of this nature may be relied upon by States or international organisations as a basis for their own actions, or may be accorded evidentiary value by international courts or tribunals. To provide just one example: as noted above, following the alleged genocide against the Rohingya in Myanmar in 2017, the Assembly passed Resolution 73/264 (2018), reiterating a number of the findings of the IIFFM that were suggestive of genocide, and expressing concern at the IIFFM's finding that there was sufficient information to warrant investigation and prosecution for genocide.[141] That resolution enhanced the feasibility of a State party to the Genocide Convention instituting proceedings before the ICJ, alleging a breach of the Genocide Convention—as indeed Gambia did in 2019.[142] When the ICJ responded to Gambia's application by ordering provisional measures to prevent genocide, it relied heavily on the Assembly's resolutions.[143]

In relation to the Syrian conflict, the General Assembly has already condemned the 'systematic, widespread and gross violations of international human rights law and violations of international humanitarian law', including inter alia the 'indiscriminate and disproportionate attacks against the civilian population and against civilian infrastructure', the 'deliberate targeting [of] civilians or civilian objects' and the 'starvation of civilians as a method of warfare and the use of chemical weapons'. The Assembly has recognised,

[137] UNGA Res 46/47 (9 December 1991) UN Doc A/RES/46/47.

[138] UNGA Res 48/143 (20 December 1993) UN Doc A/RES/48/143; UNGA Res 49/205 (23 December 1994) UN Doc A/RES/49/205; UNGA Res 51/115 (12 December 1996) UN Doc A/RES/51/115.

[139] UNGA Res 49/206 (23 December 1994) UN Doc A/RES/49/206.

[140] UNGA Res 73/264 (22 December 2018) UN Doc A/RES/73/264.

[141] ibid.

[142] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar)* (Application Instituting Proceedings and Request for Provisional Measures) General List No 178 [2019] <www.icj-cij.org/public/files/case-related/178/178-20191111-APP-01-00-EN.pdf>.

[143] *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (The Gambia v Myanmar)* (Provisional Measures Order) [2020] ICJ Rep 3, 28; and see discussion in M Ramsden, 'The Crime of Genocide in General Assembly Resolutions: Legal Foundations and Effects' (2021) 21(3) HRLRev 671, 690–1.

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moreover, that some of the violations of international humanitarian and human rights law committed in Syria constitute war crimes or crimes against humanity.[144] In relation to Myanmar, as noted above, the Assembly has expressed concern at the findings of the IIFFM that crimes against humanity and war crimes have been committed, and that 'the military has consistently failed to respect international human rights law and international humanitarian law'.[145] In response to the violence that has been ongoing since the 2021 military coup in Myanmar, as a first step towards fulfilling their obligation to cooperate to end what appear to be serious breaches of peremptory norms, States could propose an Assembly resolution expressing concern regarding the reports of the Special Rapporteur on human rights in Myanmar that the attacks on protesters amount to crimes against humanity. Moreover, in relation to both Syria and Myanmar, the Assembly could go one step further and characterise the crimes in question as serious breaches of peremptory norms, thus implicitly evoking—albeit without any binding legal effect—the responsibilities of States to cooperate to bring those serious breaches to an end.

B. Making Recommendations to and Requesting Reports from the Security Council

A second way in which the General Assembly may be used by States to fulfil their obligation to cooperate to end serious breaches of peremptory norms is by making recommendations to or requesting reports from the Security Council.

The UN Charter empowers the General Assembly to make recommendations to the Security Council on any matter within the scope of the Charter, including—explicitly—recommendations relating to international peace and security.[146] The Assembly has made recommendations to the Security Council on several occasions in the past. Its recommendations have ranged from general requests that the Council adopt appropriate measures or 'concrete recommendations for action',[147] to more specific recommendations regarding exactly what measures the Council should impose. Among other things, the Assembly has recommended that the Council: impose mandatory oil and arms embargoes;[148] impose 'comprehensive and mandatory sanctions';[149] take steps relating to emergency airdrops of humanitarian aid and safe areas for civilians;[150] establish an ad hoc international criminal tribunal;[151] and refer situations to the

[144] UNGA Res 75/193 (16 December 2020) UN Doc A/RES/75/193.
[145] UNGA Res 73/264 (n 140).
[146] Arts 10–11.
[147] UNGA Res 74/264 (27 December 2019) UN Doc A/RES/74/264.
[148] UNGA Res 32/116 B (16 December 1977) UN Doc A/RES/32/116 B; UNGA Res 38/39 D (5 December 1983) UN Doc A/RES/38/39 D.
[149] eg UNGA Res 36/172 A (17 December 1981) UN Doc A/RES/36/172 A; UNGA Res 38/39 A (5 December 1983) UN Doc A/RES/38/39 A.
[150] UNGA Res 47/121 (18 December 1992) UN Doc A/RES/47/121.
[151] ibid.

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ICC.[152] The Council is not obliged to act on the Assembly's recommendations, but history suggests that in some circumstances, Assembly recommendations may contribute to a build-up of momentum that can ultimately pressure the Council to act.[153] As such, in situations in which States are aware of a serious breach of a peremptory norm, and the Council is not adequately responding, utilising the Assembly to make recommendations to the Council is an important step that States can take in fulfilment of their obligation to cooperate to bring that breach to an end. In relation to both Syria and Myanmar, for example, the Assembly could recommend that the Council impose a mandatory arms embargo, impose mandatory targeted sanctions against those credibly suspected of having committed crimes against humanity and/or war crimes, and refer suspected perpetrators to the ICC.

The UN Charter also empowers the General Assembly to 'receive and consider … special reports from the Security Council', with such reports to include 'an account of the measures that the Security Council has decided upon or taken to maintain international peace and security'.[154] The Charter does not state explicitly that the Assembly may request such reports; it is presumed, however, that the Assembly's competence to 'receive and consider' special reports also entails a competence to request them.[155]

In situations in which States have knowledge of a serious breach of a peremptory norm of international law, and the Security Council is not responding effectively, a request by the Assembly for a report from the Council regarding its handling of the matter could raise the public profile of a crisis and, in turn, increase pressure on the Council to act. In relation to the serious breaches of peremptory norms in Syria and Myanmar, such requests could, for example, explicitly reference—respectively—the reports of the Commission of Inquiry on Syria, and the statement by the Special Rapporteur on human rights in Myanmar regarding the likely occurrence of crimes against humanity, and could request an account of measures that the Council will be taking in response to those reports, in fulfilment of its responsibility for the maintenance of international peace and security.

C. Recommending Sanctions

A third—and more substantive—way in which States may use the General Assembly as a means through which to fulfil their obligations in response to

[152] eg UNGA Res 71/202 (19 December 2016) UN Doc A/RES/71/202; UNGA Res 71/203 (19 December 2016) UN Doc A/RES/71/203.

[153] See discussion in R Barber, 'The Powers of the UN General Assembly to Prevent and Respond to Atrocity Crimes: A Guidance Document' (Asia-Pacific Centre for the Responsibility to Protect 2021) 20 <https://r2pasiapacific.org/article/2021/04/powers-un-general-assembly-prevent-and-respond-atrocity-crimes-guidance-document>.

[154] Art 15(1).

[155] See, eg, L Goodrich, *Charter of the United Nations: Commentary & Documents* (World Peace Foundation 1946) 106.

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serious breaches of peremptory norms is to recommend to States that they impose sanctions targeting the suspected perpetrators. As noted above, pursuant to its recommendatory powers in the UN Charter, the Assembly is competent to make recommendations on any matter within the scope of the Charter, and specifically relating to international peace and security and human rights. The Assembly's recommendatory powers on matters of international peace and security are limited by Article 11(2) of the UN Charter, which provides that the Assembly shall refer any question 'on which action is necessary' to the Security Council; however, the ICJ has affirmed that this restriction applies only to 'coercive or enforcement action'.[156] It is broadly accepted that the Assembly is competent to recommend measures not involving the use of military force.[157]

The General Assembly has previously recommended to States that they impose a range of diplomatic, economic and other sanctions. The most robust of the Assembly's sanctions recommendations were made in the 1960s–80s, in response to South African aggression and apartheid, and in support of the independence struggles in the Portuguese Territories and Southern Rhodesia. The Assembly's recommendations to States in these contexts included that they adopt 'comprehensive and mandatory sanctions', prevent the sale and supply of arms, sever diplomatic relations, boycott trade, and more generally adopt legislative, administrative and other measures in order to isolate the concerned regimes 'politically, economically, militarily and culturally'.[158] Other contexts in which the Assembly has recommended sanctions and/or arms embargoes include the Korean War,[159] the Congolese civil war,[160] Israeli aggression against Iraq,[161] and Israel's occupation of and aggression against the Palestinian territories.[162] Most of the Assembly's sanctions recommendations have been made without the Security Council having imposed mandatory sanctions. Thus, the Assembly's recommendations have been for States to act autonomously—insofar as that term is used to mean without Council authorisation[163]—in imposing the recommended measures.

[156] *Certain Expenses* (n 130) 164.

[157] N White, 'The Relationship between the UN Security Council and the General Assembly in Matters of International Peace and Security' in M Weller (ed), *The Oxford Handbook on the Use of Force in International Law* (Oxford University Press 2015) 305; Higgins *et al.* (n 132) 977; S Talmon, 'The Legalizing and Legitimizing Function of UN General Assembly Resolutions' (2014) 108 AJIL Unbound 123.

[158] eg UNGA Res 2107 (XX) (21 December 1965) UN Doc A/RES/2107 (XX); UNGA Res 2383 (XXIII) (7 November 1968) UN Doc A/RES/2383 (XXIII); UNGA Res 41/35 A–B (10 November 1986) UN Doc A/RES/41/35 A–B; UNGA Res ES-8/2 (14 September 1981) UN Doc A/RES/ES-8/2.

[159] UNGA Res 500 (V) (18 May 1951) UN Doc A/RES/500 (V).

[160] UNGA Res 1474 (ES-IV) (20 September 1960) UN Doc A/RES/1474 (ES-IV).

[161] UNGA Res 36/27 (13 November 1981) UN Doc A/RES/36/27.

[162] eg UNGA Res 42/209 B (11 December 1987) UN Doc A/RES/42/209 B.

[163] In the analysis of most scholars, as well as in UN documents, sanctions recommended by the General Assembly but not mandated by the Security Council are legally categorised as unilateral/autonomous sanctions: see R Barber, 'An Exploration of the General Assembly's Troubled Relationship with Unilateral Sanctions' (2021) 70 ICLQ 348.

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The effectiveness of sanctions as a tool to combat human rights violations is contested. In general, research shows that sanctions can in some circumstances influence State behaviour, but that success is limited. One oft-cited study of 174 sanctions regimes from the First World War through to 2000 found sanctions to be 'at least partially successful' in 34 per cent of cases.[164] A more recent analysis focusing only on multilateral sanctions found that sanctions were more effective at 'constraining' a target (depriving a target of access to resources needed to engage in a proscribed activity) or 'signalling' (publicly asserting the target's deviation from an international norm) than they were at coercing a change of behaviour. That study found that 27 per cent of the sanctions episodes examined were effective at 'constraining', 27 per cent were effective at 'signalling', and just 10 per cent were effective at coercing behavioural change.[165]

The fact that sanctions cannot in themselves be counted upon to end serious breaches of peremptory norms, however, does not mean that sanctions should not be utilised as part of a package of measures aimed at bringing such breaches to an end. Targeted sanctions have been consistently recommended by human rights bodies as a response both to the post-coup violence in Myanmar, and war crimes and crimes against humanity in Syria.[166] In relation to Myanmar, the General Assembly's resolution in June 2021 recommending that States 'prevent the flow of arms into Myanmar' was a significant step forward, and an indication of what the Assembly can do, when the political will is there. The Assembly could go further and recommend that States discontinue any cooperation with the Myanmar military, discontinue any financial assistance to government bodies seen as legitimising the military junta, prohibit transactions with enterprises owned or controlled by the military, and impose asset freezes and travel bans against individuals allegedly responsible for crimes against humanity. In relation to Syria, in fulfilment of the obligation to cooperate to end serious breaches of peremptory norms, States could similarly work towards an Assembly resolution recommending to States that they impose targeted sanctions such as asset freezes and travel bans against individuals allegedly responsible for crimes against humanity and war crimes.

D. Denying Legitimacy to the Responsible Regime

A fourth way in which States may utilise the General Assembly as a forum through which to fulfil their obligations in relation to serious breaches of

[164] G Hufbauer, J Schott and KA Elliot, *Economic Sanctions Reconsidered* (Peterson Institute for International Economics 2007) 158–60.

[165] T Biersteker, M Tourinho and S Eckert, *Targeted Sanctions: The Impacts and Effectiveness of United Nations Action* (Cambridge University Press 2016) 236.

[166] See, eg, UNHRC, Report of the Syria Commission of Inquiry (n 8) 26; OHCHR, 'Statement by Thomas H. Andrews, UN Special Rapporteur on the Situation of Human Rights in Myanmar' (11 March 2021) <www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=26884&LangID=E>.

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peremptory norms is to deny legitimacy to an allegedly responsible regime. Such a course will likely only be considered constructive in very particular circumstances, namely, when the regime in question came to power by force, and there is an alternate authority with a legitimate claim to be the government—a scenario arguably playing out now in Myanmar.

There are two ways in which the General Assembly may deny legitimacy to a regime: it may reject the credentials of the delegates put forward to represent their States at the Assembly itself; and/or it may pass a resolution describing the regime in question as illegitimate, and calling upon States not to accord that regime diplomatic recognition.

On the first point, the General Assembly's procedural rules state that member States should submit their representatives' credentials to the Secretary-General ahead of General Assembly sessions, and that such credentials should 'be issued either by the Head of State or Government or by the Minister for Foreign Affairs'.[167] The Assembly's Credentials Committee verifies that the administrative requirements are satisfied, and on that basis makes a recommendation to the Assembly. In what is typically a procedural exercise, the Assembly then approves or rejects the recommended credentials. In the rare event that competing authorities claim at once to represent a member State, the Assembly has previously determined that its decisions will be made 'in light of the Purposes and Principles of the Charter and the circumstances of each case'.[168] In the case of Myanmar in 2021, competing credentials claims were submitted by representatives of both the military junta, and the civilian government in exile. As this article goes to press, the Credentials Committee has just recommended to the Assembly that it defer its decision on Myanmar's representation.[169] While this course of action will rightly deny the junta the privilege of representing Myanmar at the Assembly, in the context of the alleged crimes against humanity perpetrated by Myanmar's military junta following the 2021 coup, it should be open to the Assembly to not only defer its decision on Myanmar's representation, but to go further and outrightly reject the credentials of the junta's representatives.[170]

Some scholars assert that even in the absence of competing claims by rival authorities both claiming to represent their State, the General Assembly may still make a substantive enquiry into the 'representativeness' of the proposed delegate(s). In a 2008 opinion on the feasibility of challenging the credentials of Myanmar's then-ruling military junta, for example, nine eminent legal

[167] UNGA, 'Rules of Procedure of the General Assembly' (2008) UN Doc A/520/Rev 17, Rule 27.
[168] UNGA Res 396 (V) (14 December 1950) UN Doc A/RES/396 (V).
[169] M Nichols, 'U.N. Committee Agrees Taliban, Myanmar Junta Not Allowed in U.N for Now' (*Reuters*, 2 December 2021) <https://www.reuters.com/world/asia-pacific/taliban-myanmar-junta-unlikely-be-let-into-un-now-diplomats-2021-12-01/>.
[170] See R Barber *et al.*, 'Legal Opinion: United Nations Credentials Committee: Representation of the State of Myanmar to the UN' (Myanmar Accountability Project 2021) 5 <https://the-world-is-watching.org/wp-content/uploads/2021/09/Myanmar-Legal-Opinion-Final-2.pdf>.

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scholars opined that 'where a situation arises from internal or external repression … the Credentials Committee may consider … factors such as the legitimacy of the entity issuing the credentials, the means by which it achieved and retains power, and its human rights record'.[171] The opinion concluded that, even in the absence of competing claims, it was open to the Credentials Committee to recommend to the Assembly that the credentials of the junta's representatives be rejected, on the basis of—among other things—the junta's violation of the 'peremptory norms of international human rights law'.[172]

Relatedly, in the case of Myanmar, the Assembly could pass a resolution describing the military junta as illegitimate, and calling upon States not to accord it diplomatic recognition. Such a resolution would not be unprecedented. In the 1960s, the Assembly passed a series of resolutions on what was then Southern Rhodesia, calling upon States to end relations with the 'illegal racist minority regime'.[173] Similarly in relation to apartheid South Africa in the 1970s, the Assembly passed a resolution proclaiming that South Africa's 'racist regime' was illegitimate and had no right to represent the South African people.[174]

Many States have a policy of not formally recognising new governments when they come to power; rather, they recognise 'States not governments', and imply their acceptance (or not) of new governments through governmental acts such as public statements, the conduct of diplomatic relations and ministerial contact.[175] At the time of writing, many States have refrained from conveying their acceptance of Myanmar's military junta. Conversely, however, the junta's representatives were accorded the right to represent Myanmar at the Human Rights Council in March 2021 (twice), and at the meeting of the UN Economic and Social Commission for Asia and the Pacific in April.[176] A General Assembly resolution describing the junta as illegitimate could reduce the likelihood of States as well as international and regional organisations engaging in further conduct that boosts the junta's

[171] C Chinkin *et al.*, 'Opinion: In re: United Nations Credentials Committee: Challenge to the Credentials of the Delegation of the State Peace and Development Council to represent Myanmar/Burma' (2008) 6 <www.birmaniademocratica.org/GetMedia.aspx?id=8d671814cf8c422eab6074bf46e7ab23&s=0&at=1>.

[172] ibid 15. See also discussion in R Barber, 'Could the General Assembly Exclude Myanmar from the UN by Refusing to Recognise the Credentials of its Ruling Military Junta?' (*EJIL:Talk!*, 26 February 2021) <http://www.ejiltalk.org/could-the-general-assembly-exclude-myanmar-from-the-un-by-refusing-to-recognise-the-credentials-of-its-ruling-military-junta/>.

[173] See, eg, UNGA Res 2508 (21 November 1969) UN Doc A/RES/2508.

[174] UNGA Res 31/6 I (9 November 1976) UN Doc A/RES/31/6 I.

[175] See, eg, H Charlesworth, 'The New Australian Recognition in Comparative Perspective' (1991) 18 MULR 1.

[176] See discussion in R Barber, 'The General Assembly Should Provide Guidance to the UN System on the Question of Who Gets to Represent Myanmar' (*EJIL:Talk!*, 7 June 2021) <www.ejiltalk.org/the-general-assembly-should-provide-guidance-to-the-un-system-on-the-question-of-who-gets-to-represent-myanmar/>.

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legitimacy. As with the other measures described above, such a resolution could not be expected to immediately prompt the junta to curb its violent suppression of protests; indeed, the military has said explicitly that it has 'to learn to walk with only few friends'.[177] But if those few remaining friends were to come together, pursuant to an Assembly recommendation, and take steps to isolate Myanmar's military junta economically, politically and diplomatically, there is a possibility that such isolation, combined with other pressures, could suffice to influence the military to end its serious breaches of peremptory norms of international law.

V. CONCLUSION

There are, at present, significant gaps in the international law on peremptory norms. On the one hand, it is uncontroversial that international law recognises a category of norms having peremptory status, and that certain consequences flow from that status. Moreover, following the ARSIWA and the 2019 Draft Conclusions, there is authority for the proposition that States have a legal obligation to cooperate to bring serious breaches of peremptory norms to an end. On the other hand, there is no legal consensus regarding what the peremptory norms are, and scarce guidance regarding what States are required to do to fulfil their obligation to cooperate. Further clarifying the nature of this obligation, and the norms to which the obligation attaches, has the potential to contribute not only to our understanding of the role and significance of peremptory norms in international law, but also to our understanding of State obligations in relation to atrocity crimes.

This article has sought to make a contribution in this regard, by: affirming that the basic rules of international humanitarian law and the norms prohibiting crimes against humanity and war crimes *are* peremptory norms; and canvassing a range of ways in which States may utilise the General Assembly to at least partially fulfil their obligation to cooperate to bring breaches of those norms to an end.

It must be stressed that none of the measures described in Part IV of this article could be expected to, in themselves, bring an end to a serious breach of a peremptory norm of international law. It is pertinent to recall here (again) the comments of the ICJ in the *Bosnian Genocide Case*, albeit specifically pertaining to the obligation to prevent genocide, that States must 'employ all *means reasonably available to them*', and that it is not a defence for a State to claim that 'even if it had employed all means reasonably at its disposal, they would not have sufficed', because 'the possibility remains that the combined efforts of States, … might have achieved the result … which

[177] UN News, '"Stability of the Region" Hangs on Myanmar, Declares UN Special Envoy' (3 March 2021) <www.news.un.org/en/story/2021/03/1086332>.

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the efforts of only one State were insufficient to produce'.[178] It is similarly pertinent to recall the comment of the ILC, that the obligation to cooperate to end serious breaches of peremptory norms 'imposes a duty on the members of [an] international organisation to act with a view to the organisation exercising [its] discretion in a manner to bring to an end the breach of a peremptory norm of international law'.[179]

Reading the statement by the ICJ in the *Bosnian Genocide Case* together with the ILC's elaboration of the obligation to cooperate to end serious breaches of peremptory norms, and informed by the jurisprudence and academic commentary on due diligence, what is clear is that States are required to use all possible (legal) means that *may* contribute to bringing a serious breach of a peremptory norm to an end. As such, if there is even a *possibility* that a General Assembly resolution recognising criminal conduct as likely constituting a crime against humanity or war crime, or an Assembly recommendation to the Security Council, or recommendation for sanctions, or resolution describing a regime as illegitimate, could contribute to a build-up of pressure that might ultimately prompt the perpetrator of a serious breach to change its behaviour, then the obligation to cooperate requires States to pursue that course. States are not required to *achieve* the action sought—there may be no realistic prospect that a two-thirds majority of the General Assembly could actually be corralled to take any of the steps described above—but, extrapolating from the approach taken by the ICJ in the *Bosnian Genocide Case*, they are obliged to at least try.

[178] *Bosnian Genocide Case* (n 104) para 430 (emphasis added).
[179] ILC, Draft Conclusions (n 1) 196.

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