

RE-EXAMINING THE EFFECTS ATTRIBUTED TO PEREMPTORY NORMS UNDER THE LAW OF STATE RESPONSIBILITY

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Writing in 1976 for the Philippine Law Journal, Professor Magallona sought to ‘demystify’ the concept of peremptory norms under the Vienna Convention on Law of Treaties (‘VCLT’). Despite their origin in natural law, Magallona argued that peremptory norms remain based on positivism.¹ Their effect is by no means derived from the importance of the interest that they protect. Rather, it is a consequence of the decision of states to afford a non-derogable status to the norms. Such a view, referred to as a ‘special form of *opinio juris*,’ continues to be affirmed in contemporary literature.² Arguably, it is also correct one—a view that recognises the realities of the international legal order and the role of states’ consent in international law-making.

Magallona confined his examination to the VCLT’s concept of peremptory norms—the nullity of conflicting legal norms (‘primary effect’). Yet, the decades following the VCLT’s adoption saw an inflation in the effects attributed to peremptory norms (‘secondary effects’).³ Generally,

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¹ Merlin Magallona, *The Concept of Jus Cogens in the Vienna Convention on the Law of the Treaties*, 51 PHIL L. J. 521, 522 (1976).

² See Ulf Linderfalk, *Creation of Jus Cogens—Making Sense of Article 53 of the Vienna Convention*, 71 HEIDELB. J. INT’L L. 360, 370–1 (2011); ROBERT KOLB, PEREMPTORY INTERNATIONAL LAW—JUS COGENS: A GENERAL INVENTORY 95 (Hart 2020).

³ Note that examples include the duty to nullify a municipal law contrary to peremptory norms, inapplicability of jurisdictional immunities, and assumption of universal jurisdiction by municipal courts (Mary Hansel, “*Magic*” or *Smoke and Mirrors? The Gendered Illusion of Jus Cogens*, in PEREMPTORY NORMS AS A LEGAL TECHNIQUE RATHER

these had been derived through deduction by appealing to the importance of the interests that the norms protect.⁴ While some of these remained within the realm of literature,⁵ there are two effects under the Law on State Responsibility that have enjoyed a wider degree of support. Indeed, the International Law Commission ('ILC' or 'Commission') included these effects, albeit as measures of 'progressive development',⁶ in its 2001 Articles on State Responsibility ('2001 Articles'),⁷ and had been the subject of its work on Peremptory Norms of General International Law ('2019 Draft Conclusions').⁸ The first, under 2001 Draft Article 41 (2019 Draft Conclusion 19),⁹ pertains to what was left of the abandoned concept of 'international crimes of states'—duties imposed upon states in cases of serious breaches of peremptory norms: cooperation, non-recognition, and non-assistance.¹⁰

THAN SUBSTANTIVE SUPER-NORMS, 475 (Dire Tladi ed., BRILL 2021). See Kyoji Kawasaki, *A Brief Note on the Legal Effects of Jus Cogens in International Law*, 34 HITOTSUBASHI J. L. & POL. 27, 28 (2006); Carlo Focarelli, *Promotional Jus Cogens: A Critical Appraisal of Jus Cogens' "Legal Effects"*, 77 NORD. J. INT'L LAW 429, 440 (2008).

⁴ KOLB, *supra* note 3, at 108; Focarelli, *supra* note 4, at 444; Erika de Wet, *Entrenching International Values through Positive Law: The (Limited) Effect of Peremptory Norms*, 15 (KFG Working Paper No. 25, 2019).

⁵ See Jean d'Aspremont, *Jus Cogens as a Social Contract without a Pedigree*, 46 NETH. Y.B. INT'L L. 85, 94 (2015) (noting the 'creative pull' of peremptory norms).

⁶ *Report on the Work of the 53rd Session*, [2001] II(2) Y.B. INT'L L. COMM'N 114, 127, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2).

⁷ Note that this article recognises that these provisions have had a significant impact on international law (Maurizio Arcari, *Future of the Articles on State Responsibility*, 93 QUESTIONS OF INT'L L. 3, 10 (2022); Simon Olleson, *Virtue of Pragmatism: Reflections on the Future of the Articles of State Responsibility*, 93 QUESTIONS OF INT'L L. 23, 32 (2022)). Yet, they arguably remain as a 'doctrinal product' (Carlo Focarelli, *International Law & Third-Party Countermeasures in the Age of Global Instant Communication*, 29 QUESTIONS OF INT'L L. 17, 19 (2016)) and is not independent source of law despite their influence (Hossein Sartipi & Ali Reza Hojatzadeh, *Erga-Omnisation of International Law*, 2 INT'L J. OF HUMANITIES & SOC. SCI. 189, 207 (2018)). Indeed, the two provisions that are the subject of this article have been deemed by the ILC as measures of progressive development (*Rep. on the Work of its 53rd Session*, *supra* note 7, at 114, 127).

⁸ U.N. GAOR, 71st Sess., U.N. Doc. A/74/10 (April 29–June 7 and July 8–Aug. 9, 2019).

⁹ *Id.* at 193.

¹⁰ *Report on the Work of the 53rd Session*, *supra* note 7, at 113–6 ('Article 41. . . 1. States shall cooperate to bring to an end through lawful means any serious breach [of a duty imposed by peremptory norm]. . . 2. No state shall recognise as lawful a situation created by [such breach], nor render aid or assistance in maintaining that situation). This is reproduced in U.N. Doc. A/74/10, *supra* note 9, at 193–8 (Draft Conclusion 19). Note James Crawford, *Third Report on State Responsibility*, [2000] II(2) Y.B. INT'L L.

The second, under 2001 Article 48 (2019 Draft Conclusion 17), refers to duties owed *erga omnes*,¹¹ or duties which ‘states other than an injured state’ have the competence to implement.¹²

This article, through *historical tracing* and *conceptual analysis*, examines the theoretical foundations of what may be collectively referred to as *les verticales*—peremptory norms and the secondary effects attributed to such norms.¹³ *Part I* recalls Magallona’s positivist approach towards

Comm’n 12, U.N. Doc. A/CN.4/507/Add.4, 108 (‘The draft articles cannot hope to anticipate future developments, and it is . . . necessary to reserve to the future such additional consequences. . . which may attach to [the] wrongful conduct by reason of its classification as . . . as a breach of [a duty] to the international community as a whole. Such a clause might perhaps be seen as an admission of defeat in the search for adequate and principled alternatives to existing article 19. But in the Special Rapporteur’s view, it is rather a realistic acknowledgement of the limits of codification and progressive development, at a time of rapid institutional and political change’).

¹¹ Note that this article uses the term ‘duties owed *erga omnes*’ instead of ‘obligations *erga omnes*.’ Arguably, the former is conceptually more accurate. While a ‘norm’ is objective and abstract, an obligation ‘personifies’ this norm and creates subjective legal relations (Roberto Ago, *Fifth Report on State Responsibility*, [1976] II(1) Y.B. Int’l L. Comm’n 3, 4, U.N. Doc. A/CN.4/291). An ‘obligation’ in this sense does not refer to the requirements imposed by a norm such that it ‘obliges’ those who are subject to it to a course of conduct that it must or must not do (PETER BIRKS & ERIC DESCHEEMAER, *ROMAN LAW ON OBLIGATIONS* 3–5 (Eric Descheemaeker ed., Oxford University Press 2014) (2014); MARTIN HOGG, *OBLIGATIONS: LAW & LANGUAGE* 15 (Cambridge University Press 2017) (2017)). It pertains to the juridical tie, resulting from the rule, between a state to whom a right is granted and the other upon which a duty is imposed (*Report on the Work of the 53rd Session*, *supra* note 7, at 14; 2 HENRY DE BRACON, *ON THE LAWS & CUSTOMS OF ENGLAND* 283 (Harvard University Press 1968); A.C. JOHNSON ET AL., *ROMAN STATUTES* (University of Texas Press 1961). See Wesley Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L. J. 710, 717 (1917)).

¹² *Report on the Work of the 53rd Session*, *supra* note 7, at 126–8 (‘Article 48. . . 1. Any state other than an injured state is entitled to invoke the responsibility of another State. . . if: (a) the [duty] breached is owed to a group of states including that state, and is established for the protection of a collective interest of the group; or (b) the [duty] breached is owed to the international community as a whole.’); U.N. Doc. A/74/10, *supra* note 9, at 190–3 (2019) (‘Conclusion 17. . . 1. Peremptory norms of general international law. . . give rise to [duties] owed to the international community as a whole. . . in which all states have a legal interest. . . 2. Any state is entitled to invoke the responsibility of another state for a breach of a peremptory norm of general international law’).

¹³ See James Crawford, *Multilateral Rights & Obligations in International Law*, 319 RECUEIL DES COURS DE L’ACADÉMIE DE DROIT INTERNATIONAL 325, 452 (2006).

peremptory norms. While the concept may be rooted in the natural law and public order theories, its ‘emergence. . . in positive international law’ was brought about by the states’ acceptance and recognition.¹⁴ Likewise, they ‘[do] not [imply] the existence of superior norms independent of the wills of states.’¹⁵ Rather, these rules become ‘normatively superior to others’ due to states’ consent.¹⁶ Of course, some scholars and states have justified peremptory norms based on the natural and public order theories. Yet, these risk peremptory norms are becoming necessarily subjective,¹⁷ and possibly ideological.¹⁸ Next, the article delves into the bases for the secondary effects attributed to peremptory norms within the law of state responsibility—the tripartite duties imposed upon states in case of serious breaches of duties imposed by peremptory norms (*Part II*) and the competence of states to invoke the responsibility in the absence of direct effect (*Part III*). Adopting Magallona’s view, it argues that the secondary effects cannot be justified through deduction alone, whether due to the importance of the interest that a norm safeguards or the common interest of states in the observance of the duty arising from the norm. These approaches disregard the international legal order’s realities where ‘states [remain] creators of the law’.¹⁹ It also risks the ‘over-extension of the role and purpose of the notion’ of peremptory norms.²⁰ The article submits that the process of ascertaining the effects of peremptory norms beyond the VCLT must necessarily be inductive. It should be demonstrated that states

¹⁴ Magallona, *supra* note 2, at 523.

¹⁵ *Id.* at 541.

¹⁶ *Id.*

¹⁷ KOLB, *supra* note 3, at 31; Karl Zemanek, *Metamorphosis of Jus Cogens: From an Institution of Treaty Law to the Bedrock of the International Legal Order?*, in *THE LAW OF TREATIES BEYOND THE VIENNA CONVENTION*, 384, 386 (Enzo Cannizzaro ed., Oxford University Press 2011) *citing* Michel Virally, *Réflexions sur le jus cogens*, 12 AFDI 5, 29 (1966).

¹⁸ Mary O’Connell, *Jus Cogens: International Law’s Higher Ethical Norms*, in *THE ROLE OF ETHICS IN INTERNATIONAL LAW*, 86–7 (Donald Earl Childress III ed., Cambridge University Press 2012); Cezary Mik, *Jus Cogens in Contemporary International Law*, 33 POL. Y.B. INT’L L. 27, 52 (2013).

¹⁹ Magallona, *supra* note 2, at 523. See Prosper Weil, *Towards Relative Normativity in International Law?*, 77(3) AM. J. INT’L L. 413, 441 (1983).

²⁰ Andreas Zimmermann, *Sovereign Immunity & Violations of International Jus Cogens—Some Critical Remarks*, 16 MICH. J. INT’L L. 433, 438 (1995).

have accepted these effects to be law.²¹ Such an examination, due to limitations of time and space, lies beyond the scope of the present analysis. Yet, given the varied views of states noted in *Parts II* and *III*, this may indeed be ripe for further studies.

I. A Positivist Approach to Peremptory Norms

As Magallona noted, perhaps the most crucial effect that the VCLT affords to collective norms is that of *peremptory norms*.²² Also known as *jus cogens* or ‘compelling law’,²³ these norms occupy the ‘highest hierarchical position among all other norms and principles’.²⁴ These include the norm against force,²⁵ several norms protecting human rights, such as those against

²¹ Magallona, *supra* note 2, at 523–4. See KOLB, *supra* note 3, at 113; Focarelli, *supra* note 4, at 449.

²² Magallona, *supra* note 2, at 541.

²³ See KOLB, *supra* note 3, at 1 (arguing that this may be an ‘imprecise expression, since all binding legal norms are compelling—not only *jus cogens* norms’).

²⁴ M. Cherif Bassiouni, *International Crimes: Jus Cogens & Obligations Erga Omnes*, 59(4) L. & CONTEMP. PROBS. 63 (1996), 67; ALEXANDER ORAKHELASHVILI, PEREMPTORY NORMS IN INTERNATIONAL LAW (Oxford University Press 2006), 9; *Reports on the Work of the 17th and 18th Sessions*, [1966] II(2) Y.B. Int'l L. Comm'n 1, 247, U.N. Doc. A/CN.4/SER. A/1966/Add.1; I.L.C., *Report on the Work of the 53rd Session*, *supra* note 7, at 76–7 (2001); Dire Tladi, *Fourth Report on Peremptory Norms*, U.N. Doc. A/CN.4/72, 24 ff (Jan. 31, 2019).

²⁵ See OLIVIER CORTEN, LAW AGAINST WAR: PROHIBITION ON THE USE OF FORCE IN CONTEMPORARY INTERNATIONAL LAW, 200 ff; André De Hoogh, *Jus Cogens & the Use of Armed Force*, in OXFORD HANDBOOK OF THE USE OF FORCE IN INTERNATIONAL LAW (Marc Weller ed., Oxford University Press 2015), 1164; Katie Johnston, *Identifying the Jus Cogens Norm in the Jus Ad Bellum*, 70 INT'L & COMPAR. L. Q 29 (2021).

genocide,²⁶ torture,²⁷ racial discrimination,²⁸ and slavery,²⁹ and the norm on a people's right to self-determination.³⁰ Some also argue that certain rules that safeguard the environment also possess this character.³¹ Peremptory

²⁶ See *Armed Activities on the Territory of the Congo* (Dem. Rep. Congo v. Rwanda), Jurisdiction & Admissibility, 2006 I.C.J. 6, 31–2 (Feb. 3) [hereinafter *Armed Activities*]; Roberto Ago, *Droit des traités à la lumière de la Convention de Vienne*, 134 RECUEIL DES COURS DE L'ACADÉMIE DE DROIT INTERNATIONAL 297, 324 (1971); Andrea Bianchi, *Human Rights & the Magic of Jus Cogens*, 19 EUR. J. INT'L L., 491–2 (2008).

²⁷ See *Questions relating to the Obligation to Prosecute or Extradite* (Belg. v. Sen.), Judgment, 2012 I.C.J. 422, 457 (July 20); *Prosecutor v. Delalić*, Case No. IT-96-21-T, Judgment, ¶454 (Int'l Crim. Trib. for the Former Yugoslavia Nov. 16 1998); *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, Judgment, ¶¶ 153–6 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998); *Cantoral-Benavides v. Peru*, Judgment, Merits, Inter-Am. Ct. H.R. (ser. C) No. 88, ¶ 99 (Aug. 18, 2001); *Tibi v. Ecuador*, Preliminary Objections, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 144, ¶ 143 (Sept. 7 2004); Christian Tomuschat, *Security Council & Jus Cogens*, in *PRESENT & FUTURE OF JUS COGENS*, 36 (ENZO CANIZZARO ed., Sapienza 2015).

²⁸ See WILLIAM SCHABAS, *THE CUSTOMARY INTERNATIONAL LAW OF HUMAN RIGHTS* (Oxford University Press 2021), 64–6, 167–8 citing *Georgia v. Russia*, App. No. 38263/08 (July 3, 2014), [https://hudoc.echr.coe.int/fre?i=001-207757#%22itemid%22:\[%22001-207757%22\]](https://hudoc.echr.coe.int/fre?i=001-207757#%22itemid%22:[%22001-207757%22]) (dissenting opinion of Tsotsoria, J.); Erika de Wet, *Emergence of International & Regional Value Systems as a Manifestation of the Emerging International Constitutional Order*, 19 LEIDEN J. INT'L L. 611, 616 (2006); Antonio Cassese, *Enhanced Role of Jus Cogens*, in *REALISING UTOPIA: FUTURE OF INTERNATIONAL LAW*, 162 (Antonio Cassese ed., Oxford University Press 2012); Tladi, *supra* note 25, at 45–6; Juridical Condition & Rights of Undocumented Migrants, Advisory Opinion OC-18/03, Inter-Am. Ct. H.R. (ser. A) No. 18, ¶¶ 97–101, 110–1 (Sept. 17, 2003).

²⁹ See Schabas, *supra* note 29, at 56 citing Hersch Lauterpacht (Special Rapporteur), *First Report on the Law of Treaties*, [1953] II(1) Y.B. INT'L L. COMM'N 90, 154–5, U.N. Doc. A/CN.4/63; Tladi, *supra* note 25, at 46–8 citing *Aloeboetoe v. Surin*, Reparation & Costs, Inter-Am. Ct. H.R. (ser. C) No. 15, ¶ 57 (Sept. 10, 1993); *Río Negro Massacres v. Guat.*, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 250, ¶ 227 (Sept. 4, 2012); Alfred Verdross, *Jus Dispositivum & Jus Cogens in International Law*, (1966) 50 AM. J. INT'L L. 55, 59 (1966); Mik, *supra* note 19, at 59.

³⁰ See Tladi, *supra* note 25, at 52 citing Stefan Kadelbach, *Genesis, Function, & Identification of Jus Cogens Norms*, 46 NETH. INT'L L. REV. 147, 152 (2016); Levan Alexidze, *Legal Nature of Jus Cogens in Contemporary International Law*, 172 RECUEIL DES COURS DE L'ACADÉMIE DE DROIT INTERNATIONAL 219, 229 (1981); Santalla Vargas, *In Quest of the Practical Value of Jus Cogens Norms*, 46 NETH. INT'L L. REV. 211, 227 (2016).

³¹ See ORAKHELASHVILI, *supra* note 25, at 65; Mark Byrne, *Can Responsibility for Climate Change Damage Be Criminalised?*, 4 CARBON & CLIMATE CHANGE L. REV. 278, 281 (2010); Jutta Brunnée, *Common Interest—Echoes from an Empty Shell? Some Thoughts on Common Interest & International Environmental Law*, 49 HEIDELB. J. INT'L L. 791, 804

norms restrict the capacity of states to ‘develop, maintain or change’ rules relating to norms that are deemed vital by the international community.³² The rationale being that there are rules which are essential to every state that contrary agreements cannot be allowed to prevail’.³³ In this sense, peremptory norms build a ‘line of defence’ to safeguard the ‘predominant and overriding interests’ of states by ‘[delimiting] the destructive effects of relativism and consensualism’.³⁴

A. *Development of Peremptory Norms within the VCLT*

Limitations on the contractual abilities, Magallona observed, was not a new concept and had been present in municipal legal systems.³⁵

(1989) noting Marjorie Whiteman, *Jus Cogens in International Law, with a Projected List*, 7 GA. J. INT’L & COMP. L. 609, 626 (1977); Antonio Gómez Robledo, *Le jus cogens international: Sa genèse, sa nature, ses fonctions*, 172 RECUEIL DES COURS DE L’ACADÉMIE DE DROIT INTERNATIONAL 9, 172 (1981); Alexidze, *supra* note 31, at 245. *Contra* Nilufer Oral, *Environmental Protection as a Peremptory Norm*, in PEREMPTORY NORMS OF GENERAL INTERNATIONAL LAW (JUS COGENS), 592 (Dire Tladi ed., BRILL 2021); Pierre-Marie Dupuy et al., *Customary International Law & the Environment*, in OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW, 393 (Rajamani Lavanya & Peel Jacqueline eds., 2nd ed. Oxford University Press 2021); PATRICIA BIRNIE, ET AL., INTERNATIONAL LAW & THE ENVIRONMENT (3rd ed. Oxford University Press 2007), 109–10; Krista Singleton-Cambage, *International Legal Sources & Global Environmental Crises: Inadequacy of Principles, Treaties & Custom*, 2 I.L.S.A. J. INT’L & COMPAR. L. 171, 185 (1995).

³² Michael Byers, *Conceptualising the Relationship between Jus Cogens & Erga Omnes Rules*, 66 NORDIC J. INT’L L. 211, 220 (1997); Christian Hillgruber, *Right of Third States to Take Countermeasures*, in FUNDAMENTAL RULES OF INTERNATIONAL LEGAL ORDER: JUS COGENS & OBLIGATIONS ERGA OMNES, 270 (Christian Tomuschat & Jean-Marc Thouvenin eds., Nijhoff 2006); Magallona, *supra* note 2, at 529; Bruno Simma, *From Bilateralism to Community Interest in International Law*, 250 RECUEIL DES COURS DE L’ACADÉMIE DE DROIT INTERNATIONAL 217, 288 (1994); YORAM DINSTEIN, WAR, AGGRESSION & SELF-DEFENCE (4th ed., Cambridge University Press 2011), 106; Dinah Shelton, *Hierarchy in International Law*, 100(2) AM. J. INT’L L. 291, 297 (2006).

³³ Brunnée, *supra* note 32, at 800; ANDRÉ DE HOOGH, OBLIGATIONS ERGA OMNES & INTERNATIONAL CRIMES: THEORETICAL INQUIRY INTO THE IMPLEMENTATION & ENFORCEMENT OF THE INTERNATIONAL RESPONSIBILITY OF STATES (Kluwer 1996), 39.

³⁴ Giorgio Gaja, *Protection of General Interests in the International Community*, 364 RECUEIL DES COURS DE L’ACADÉMIE DE DROIT INTERNATIONAL 9, 48 (2011); ORAKHELASHVILI, *supra* note 25, at 47; Kirsten Schmalenbach, *Article 53*, in VIENNA CONVENTION ON THE LAW OF TREATIES: COMMENTARY, 966, 983 (Oliver Dörr & Kirsten Schmalenbach eds., Springer 2018).

³⁵ Magallona, *supra* note 2, at 521.

Roman law distinguished between *jus dispositivum* and *jus strictum*. While 'parties may disregard *jus dispositivum* in their contractual relations, their [normative] acts must comply with *jus strictum*', otherwise they are void.³⁶ It also distinguished between *jus publicum* and *jus privatum*. The former is 'based on public interests and is thus non-derogable' while the latter is 'based on private interests and can . . . be altered by the parties'.³⁷ Other municipal orders also provided for the nullity of contracts, as in the case of English law with *acts contra bones mores*, French law with *ordre public*, and German law with *öffentliche Ordnung*.³⁸

In international law, scholars also 'explored the possibility of curbing the power of states' through 'mandatory norms'.³⁹ Early writers such as Grotius posited, based on natural law, that there existed norms to which the powers of the state did not extend.⁴⁰ Likewise, Vattel envisioned laws which are 'necessary and indispensable' that 'nations cannot alter it by agreement, nor individually or mutually release themselves from it'.⁴¹ Later writers, like Verdross, asserted that the interests of the international community required norms 'that prescribe a certain . . . behaviour unconditionally'.⁴² Norms of this character, he argued, 'cannot be derogated

³⁶ Jochen Frowein, *Reactions by Not Directly Affected States to Breaches of Public International Law*, 248 RECUEIL DES COURS DE L'ACADÉMIE DE DROIT INTERNATIONAL 345, 363 (1994).

³⁷ Robert Kolb, *Peremptory Norms as a Legal Technique rather than Substantive Super-Norms*, in PEREMPTORY NORMS OF GENERAL INTERNATIONAL LAW (JUS COGENS), 40 (Dire Tladi ed., BRILL 2021).

³⁸ MARK VILLEGGER, COMMENTARY ON THE 1969 VIENNA CONVENTION ON THE LAW OF TREATIES (Nijhoff 2009), 665.

³⁹ de Wet, *supra* note 5, at 7; Władysław Czapliński, *Concepts of Jus Cogens & Erga Omnes in International Law*, POL. Y.B. INT'L L. 87, 83 (1997); Stefan Kadelbach, *Jus Cogens, Obligations Erga Omnes, & other Rules—Identification of Fundamental Norms*, in FUNDAMENTAL RULES OF INTERNATIONAL LEGAL ORDER: JUS COGENS & OBLIGATIONS ERGA OMNES, 21 (Christian Tomuschat & Jean-Marc Thouvenin eds., Nijhoff 2005); Eva Uhlmann, *Community Interests, Jus Cogens, & Protection of the Global Environment: Developing Criteria for Peremptory Norms*, 11 GEORGETOWN INT'L ENV'T L. REV. 101, 101 (1998).

⁴⁰ Magallona, *supra* note 2, at 522 citing HUGO GROTIUS, DE JURE BELLI AC PACIS, 40 (Francis W. Kelsey trans., Clarendon 1625).

⁴¹ EMER DE VATTEL, THE LAW OF NATIONS, 4 (Fenwick Hudson trans., Clarendon 1758).

⁴² ELENA KATSELLI PROUKAKI, PROBLEM OF ENFORCEMENT IN INTERNATIONAL LAW: COUNTERMEASURES, THE NON-INJURED STATE & IDEA OF INTERNATIONAL COMMUNITY, 15

from by the will of the contracting parties'.⁴³ Mosler similarly described a public order consisting of rule of vital importance that agreements to the contrary have no legal force.⁴⁴ Still, others, such as Oppenheim, argued based on positivism, that there are 'universally recognised principles' that rendered any conflicting treaty void.⁴⁵

As Magallona observed, peremptory norms eventually 'found its way into positive law' through the VCLT.⁴⁶ Special Rapporteur Lauterpacht (1953–5), in his 1953 Report, proposed that a treaty is void if 'its performance involves an [unlawful] act'.⁴⁷ The voidness, he submitted, derives not from their 'inconsistency with customary law' but with '[public policy's] overriding principles'.⁴⁸ Fitzmaurice further refined Lauterpacht's proposal. He submitted that a treaty, to be effective, must have 'essential validity', meaning that it must be formally, temporarily, and substantially valid.⁴⁹ He posited that a treaty lacks substantial validity if it contravenes or involves in its execution an infraction of 'principles and rules. . . which are. . . *jus cogens*'.⁵⁰ Finally, Waldock submitted that *jus cogens* 'means a peremptory

(Routledge 2010) citing Alfred Verdross, *Forbidden Treaties in International Law*, 31 AM. J. INT'L L. 571, 571–2 (1937). See Zemanek, *supra* note 18, at 381; Shelton, *supra* note 33, at 298.

⁴³ Verdross, *supra* note 43, at 571.

⁴⁴ Frowein, *supra* note 37, at 364 citing Hermann Mosler, *International Society as a Legal Community*, 140 RECUEIL DES COURS DE L'ACADÉMIE DE DROIT INTERNATIONAL 1, 18 (1974).

⁴⁵ Byers, *supra* note 33, at 213 citing LASSA OPPENHEIM, INTERNATIONAL LAW 528 (Longmans 1905).

⁴⁶ Magallona, *supra* note 2, at 523. See Pierre-Marie Dupuy, *A General Stocktaking of the Connections between the Multilateral Dimension of Obligations & Codification of the Law of Responsibility*, 13(5) EUR. J. INT'L L. 1053, 1055 (2002); Jure Vidmar, *Rethinking Jus Cogens after Germany v Italy*, 55 NETH. INT'L L. REV. 1, 3 (2013).

⁴⁷ Lauterpacht, *supra* note 30, at 154 ('[Draft] Article 15. . . A treaty, or any of its provisions, is void if its performance involves an act which is illegal under international law and if it is declared so to be by the [ICJ]'). See also *Documents of the 5th Session*, [1953] II Y.B. INT'L L. COMM'n 163, 165, U.N. Doc. A/CN.4/L.46.

⁴⁸ Lauterpacht, *supra* note 30, at 155 ('These principles need not necessarily have crystallised in [an] accepted rule of law. . . They may be expressive of rules of international morality so cogent that [any] tribunal would consider them as forming part of those principles of law generally recognised by civilised nations').

⁴⁹ Gerald Fitzmaurice (Special Rapporteur), *Third Report on the Law of Treaties*, [1958] II Y.B. INT'L L. COMM'n 20, 30–1, U.N. Doc. A/CN.4/SER.A/1958/Add.1.

⁵⁰ *Id.* at 23 ('[Draft] Article 16. . . (2) It is essential to the validity of a treaty that it should be in conformity with or not contravene, or that its execution should not involve an

norm of general international law from which no derogation is permitted except upon a ground specifically sanctioned by general international law' and 'which may be modified or annulled only by a subsequent norm of general international law'.⁵¹ He also cited examples that included the use of threat or force, any conduct characterised as an 'international crime', and any act or omission that international law requires every state to cooperate to suppress or punish.⁵²

The ILC accepted the concept of peremptory norms. Yet, views regarding its nature diverged.⁵³ Some submitted that these norms are based on public order.⁵⁴ Others argued that they are derived from positive law 'explicitly or implicitly recognised by states'.⁵⁵ The debate was not settled, and the ILC merely noted the divergent opinions but 'justified the [adoption of the] proposed draft article [on peremptory norms] as an attempt to seize

infraction of those principles and rules of international law which are . . . *jus cogens*'), 27 ('Draft Article 17. . . Only if the treaty involves a departure from or conflict with absolute and imperative rules or prohibitions of . . . law in the nature of *jus cogens* that a cause of invalidity can arise'), 40–1.

⁵¹ Humphrey Waldock, *Second Report on the Law of Treaties*, [1963] II Y.B. Int'l L. Comm'n 36, 38–9 ('[Draft] Article 1. . . (3). . . (c) "*Jus cogens*" means a peremptory norm of general international law from which no derogation is permitted except upon a ground specifically sanctioned by general international law, and which may be modified or annulled only by a subsequent norm of general international law'), 39 ('A *jus cogens* rule is a rule embodying a norm of general international law from which no derogation is permitted and which can only be modified or set aside by the creation of a further norm of general international law'), U.N. Doc. A/CN.4/156/Add.1-3.

⁵² *Id.* at 40 ('Imperfect though the international legal order may be, the view that . . . there is no international public order—no rule from which states cannot at their own free will contract out—has become increasingly difficult to sustain.'). 52 ('Draft Article 13. . . 4. The provisions of this article do not apply, however, to a general multilateral treaty which abrogates or modifies a rule having the character of *jus cogens*'). See *Report on the Work of the 15th Session*, [1963] II Y.B. Int'l L. Comm'n YbILC 187, 198, U.N. Doc. A/CN.4/163.

⁵³ VILLEGER, *supra* note 39, at 666–7.

⁵⁴ Schmalenbach, *supra* note 35, at 970 citing *Summary Records of the 15th Session*, [1963] I Y.B. Int'l L. Comm'n 1, 64, U.N. Doc. A/CN.4/SR.673.

⁵⁵ Schmalenbach, *supra* note 35, at 970 citing I.L.C., *supra* note 55, at 63, 69; Kolb, *supra* note 38, at 24 ('What is essential. . . is that the rule is recognised in its peremptory quality. . . by. . . states'); Kolb, *supra* note 3, at 35 ('[The concept of peremptory norms] is hierarchically neutral'); Magallona, *supra* note 2, at 528.

a comparatively recent development in international law'.⁵⁶ As for states, many considered the concept an important step for international law.⁵⁷ While some deemed peremptory norms to be a 'fairly new concept',⁵⁸ others considered it to be a 'long-standing principle'.⁵⁹ However, there were also concerns regarding the basis for peremptory norms,⁶⁰ and the criteria for

⁵⁶ Schmalenbach, *supra* note 35, at 970 citing I.L.C., *supra* note 53, at 198 ('Whatever imperfections [the] law may still have. . . [the view that] there is no rule from which states cannot at their own free will contract out has become. . . difficult to sustain. . . In codifying the law of treaties [the ILC] must take the position that there are rules and principles from which states are not competent to derogate by a treaty arrangement').

⁵⁷ Schmalenbach, *supra* note 35, at 972; Anne Lagerwall, *Article 64*, in *THE VIENNA CONVENTIONS ON THE LAW OF TREATIES: A COMMENTARY* 1461 (Olivier Corten & Pierre Klein eds., Oxford University Press 2011).

⁵⁸ Schmalenbach, *supra* note 53, at 972. See Humphrey Waldock, *Fifth Report on the Law of Treaties*, [1966] II(2) Y.B. Int'l L. Comm'n 1, 21, U.N. Doc. A/CN.4/183, 21 (Brazil), 21-2 (Cyprus), 22 (Czechoslovakia, Ecuador), 23 (Thailand, United Arab Republic); U.N. GAOR, 1st Sess., 52nd plen. mtg. at 296 (Kenya), 296-7 (Cuba), 298 (Chile), 53rd plen. mtg. at 300 (Sierra Leone), 303 (Uruguay), 305 (Cyprus), 54th plen. mtg. at 311 (Hungary), 56th plen. mtg. at 322 (Ukraine), 324 (Monaco, Norway), 325 (Thailand), 326 (Trinidad & Tobago), U.N. Doc. A/CONF.39/11 (March 26-May 24, 1968); U.N. GAOR, 2nd Sess., 19th plen. mtg. at 95 (Philippines, Germany FR), 97 (Cuba), 98 (Cameroon), 100 (Ukraine), 20th plen. mtg. at 101 (Romania), 102 (Bulgaria), 103 (Cyprus), 105 (Belarus), 106 (Libya), U.N. Doc. A/CONF.39/11/Add.1 (April 9-May 22, 1969).

⁵⁹ Schmalenbach, *supra* note 35, at 972. See Waldock, *supra*, at 22 (Guatemala, Italy, Philippines, Poland, Syria), 23 (Venezuela, Yugoslavia) (1966); U.N. GAOR, 1st Sess., 52nd plen. mtg. at 294 (USSR, Mexico), 295 (Iraq), 297 (Lebanon), 298 (Nigeria), 53rd plen. mtg. at 301 (Madagascar, Colombia), 54th plen. mtg. at 308 (Argentina), 310 (Israel), 311 (Italy), 312 (Romania), 55th plen. mtg. at 315 (Spain), 317 (Brazil), 320 (Ivory Coast), 56th plen. mtg. at 321 (Tanzania), 327 (Mali), U.N. Doc. A/CONF.39/11 (March 26-May 24, 1968); U.N. GAOR, 2nd Sess., 19th plen. mtg. at 96 (Ecuador), 97 (Romania), 20th plen. mtg. at 103 (Iraq), 104 (Italy), 106 (Libya), U.N. Doc. A/CONF.39/11/Add.1 (April 9-May 22, 1969).

⁶⁰ Schmalenbach, *supra* note 35, at 972. Note that some adopted the natural (Waldock, *supra* note 59, at 21 (Algeria), 22 (Panama); U.N. GAOR, 1st Sess., 52nd plen. mtg. at 294 (Mexico), 295 (Iraq), 296 (Kenya), 297 (Lebanon), 298 (Nigeria), 53rd plen. mtg. at 301 (Ghana, Colombia), 302 (Poland), 305 (Cyprus), 54th plen. mtg. at 312 (Romania), 56th plen. mtg. at 324 (Monaco), U.N. Doc. A/CONF.39/11 (March 26-May 24, 1968); U.N. GAOR, 2nd Sess., 19th plen. mtg. at 95 (Philippines), 99 (Poland), 20th plen. mtg. at 104 (Italy), 105 (Costa Rica, Uruguay), U.N. Doc. A/CONF.39/11/Add.1 (April 9-May 22, 1969)) and public order theories (Waldock, *supra* note 59, at 21 (Algeria, Brazil), 22 (Panama), 23 (Uruguay); U.N. GAOR, 1st Sess., 52nd plen. mtg. at 294 (Mexico), 295 (Greece), 296 (Iraq), 53rd plen. mtg. at 302 (Poland), 303 (Uruguay), 304 (United Kingdom), 54th plen. mtg. at 307 (Belarus), 311 (Italy), 313 (Bulgaria), 55th plen. mtg. at 316 (Pakistan), 317

their identification.⁶¹ Nevertheless, most accepted the concept and states adopted VCLT Article 53 with only a few votes against or abstentions.⁶²

B. Effect of Peremptory Norms under the VCLT

As Magallona observed, the ‘specific function of [peremptory] norms’ is to ‘limit the freedom of the [states] parties to a treaty in determining the content of their agreement’.⁶³ Peremptory norms prohibit states from derogating from norms ‘accepted and recognised’ to be

(Brazil), 318 (Czechoslovakia), 320 (Ivory Coast), 56th plen. mtg. at 325 (Thailand, Malaysia), U.N. Doc. A/CONF.39/11 (March 26–May 24, 1968); U.N. GAOR, 2nd. Sess., 19th plen. mtg. at 95 (Philippines), 96 (Ecuador), 97 (Romania, United Kingdom), 20th plen. mtg. at 103 (Cyprus), 106 (Libya)). Others adopted the positivist view (Waldock, *supra* note 59, at 21 (Algeria), 22 (Iraq); U.N. GAOR, 1st Sess., 52nd plen. mtg. at 295 (United States), 296 (Kenya), 298 (Nigeria), 53rd plen. mtg. at 302 (Poland), 54th plen. mtg. at 306 (Sweden), 311 (Hungary), 55th plen. mtg. at 317 (Brazil), 56th plen. mtg. at 322–3 (Philippines), 327 (Mali), U.N. Doc. A/CONF.39/11 (March 26–May 24, 1968); U.N. GAOR, 2nd Sess., 19th plen. mtg. at 95 (Germany), U.N. Doc. A/CONF.39/11/Add.1 (April 9–May 22, 1969)).

⁶¹ See Waldock, *supra* note 59, at 21 (United Kingdom, Brazil), 22 (Indonesia, Iraq); U.N. GAOR, 1st Sess., 52nd plen. mtg. at 294 (Mexico), 295 (Greece), 53rd plen. mtg. at 300 (Turkey), 304 (United Kingdom), 54th plen. mtg. at 306 (Sweden), 309 (France), 55th plen. mtg. at 316 (Australia), 318 (Japan, Germany FR), 320 (Belgium), 56th plen. mtg. at 323 (Switzerland), 325 (Malaysia), 326 (Trinidad & Tobago), U.N. Doc. A/CONF.39/11 (March 26–May 24, 1968); U.N. GAOR, 2nd. Sess., 19th plen. mtg. at 93 (France), 95 (Germany FR), 97 (Cuba, United Kingdom), 20th plen. mtg. at 101 (Japan), 102 (United States), 103 (Switzerland), 104 (Malaysia), 105 (Netherlands), U.N. Doc. A/CONF.39/11/Add.1 (April 9–May 22, 1969).

⁶² Schmalenbach, *supra* note 35, at 975. See Waldock, *supra* note 59, at 20 (Luxembourg), 21 (Turkey); U.N. GAOR, 1st Sess., 53rd plen. mtg. at 300 (Turkey), 54th plen. mtg. at 309 (France), 55th plen. mtg. at 316 (Australia), U.N. Doc. A/CONF.39/11 (March 26–May 24, 1968); U.N. GAOR, 2nd Sess., 19th plen. mtg. at 93–5 (France: ‘Some submit. . . that *jus cogens* was [based on] notions of internal law such as public policy [and] law. But. . . there [are] substantial differences between [the] international [and] national societies.’); 95 (Australia: ‘Shared the difficulties. . . in agreeing to become bound by a doctrine so imprecisely formulated’); 99 (Turkey: ‘[Peremptory norms relate to the] hierarchy of norms. . . But such a presupposed a hierarchy. . . [is] not to be found in the international [legal order which differs from] internal law’); 20th plen. mtg. at 106 (Belgium: ‘The international legal order. . . was as yet unorganised and to incorporate. . . *jus cogens* into it would therefore be premature’), U.N. Doc. A/CONF.39/11/Add.1 (April 9–May 22, 1969).

⁶³ Magallona, *supra* note 2, at 529.

peremptory.⁶⁴ Simply, states are not permitted to ‘contract out’ of peremptory norms in their legal relations with one another.⁶⁵ In a ‘purely technical sense’, these norms provide a ‘technique for solving conflicts between rules of international law’.⁶⁶ They function as the opposite of the *lex specialis* principle.⁶⁷ Peremptory norms deny the derogating norm’s operation ‘to uphold the general legal regime’ for every state and ‘protect some collective interest’.⁶⁸ Thus, under VCLT Article 53, a treaty that conflicts with an existing peremptory norm is considered wholly invalid due to the ‘disregard of the [peremptory norm’s] proscription’.⁶⁹ Yet, the VCLT is ‘much more forgiving’ for agreements that conflict with a peremptory norm that subsequently emerges.⁷⁰ Under VCLT Article 64, only the derogating provision, if separable, is deemed void as it is ‘merely refuted by subsequent legal developments’.⁷¹

Peremptory norms are also characterised by their ‘rigidity’ and

⁶⁴ Vienna Convention on the Law of Treaties, art. 53, May 23, 1969, 115 U.N.T.S. 331 (entered into force Jan. 27, 1980) [hereinafter VCLT].

⁶⁵ Hillgruber, *supra* note 33, at 270.

⁶⁶ Ulf Linderfalk, *Effect of Jus Cogens Norms: Whoever Opened Pandora’s Box, Did You Ever Think About the Consequences?*, 18 EUR. J. INT’L L. 853, 854 (2007). See Zemanek, *supra* note 18, at 400. *Contra* Simma, *supra* note 33, at 287 (‘Jus cogens distinguishes itself from systems that merely regulate the conflict of norms’).

⁶⁷ Kolb, *supra* note 3, at 35.

⁶⁸ *Id.*

⁶⁹ VCLT, *supra* note 65; Schmalenbach, *supra* note 35, at 983; Dire Tladi, *Third Report on Peremptory Norms*, U.N. Doc. A/CN.4/714, 16 (Feb. 12, 2018); ORAKHELASHVILI, *supra* note 25, at 139 (‘The nullity under Article 53 is a special case of nullity. . . it is not simply the illegality subsumable within the bilateral relations of the parties, but the objective illegality requiring objective elimination.’). Note that ‘a reading of articles 65 and 66 of the [VCLT] together leads to the conclusion that only a state which is a party to a treaty conflicting with a peremptory norm can challenge the validity of such a treaty’ (DE HOOGH, *supra* note 34, at 41; Enzo Cannizzaro, *A Higher Law for Treaties?*, in LAW OF TREATIES BEYOND THE VIENNA CONVENTION 431 (Enzo Cannizzaro ed., Oxford University Press 2011); Christian Tomuschat, *Obligations arising for States Without or Against Their Will*, 241 RECUEIL DES COURS DE L’ACADÉMIE DE DROIT INTERNATIONAL 195, 363 (1993); Magallona, *supra* note 2, at 536. *Contra* DE HOOGH, *supra* note 34, at 42; Tladi, *supra*, at 22; ORAKHELASHVILI, *supra* note 25, at 141–2; Zemanek, *supra* note 18, at 392).

⁷⁰ VCLT, *supra* note 65, art. 64; Kirsten Schmalenbach, *Article 64*, in VIENNA CONVENTION ON THE LAW OF TREATIES: COMMENTARY (Oliver Dörr & Kirsten Schmalenbach eds., Springer 2018).

⁷¹ Schmalenbach, *supra* note 71. See Lagerwall, *supra* note 58, at 1457.

‘resistance to change’.⁷² The VCLT does not prescribe ‘legal stagnation’.⁷³ As Waldock remarked, ‘it would. . . be wrong to consider rules now accepted’ as peremptory to be ‘immutable and incapable of abrogation or amendment’.⁷⁴ Yet, peremptory norms make modification difficult, thereby placing an additional protection for the interests they safeguard. As in many domestic systems in which the ‘only protection from abrogation for entrenched rights is a more onerous process of change,’⁷⁵ peremptory norms may only be modified through the acceptance and recognition by an overwhelming majority of states. Until such time, ‘groups of states that fall short of a “very large majority” will neither be able to derogate from nor modify the contours of an existing [peremptory] norm’.⁷⁶

Finally, the norm’s peremptory character applies to states even if they have not accepted and recognised its status or have objected to its emergence. While the VCLT is silent on the matter, some scholars and states hold this view.⁷⁷ This is due to the ‘very concept’ of peremptory norms, which ‘would be frustrated’ if some states were ‘allowed to escape [its]

⁷² Hillgruber, *supra* note 33, at 270.

⁷³ Schmalenbach, *supra* note 35, at 984.

⁷⁴ Waldock, *supra* note 52, at 53.

⁷⁵ Johnston, *supra* note 26, at 51.

⁷⁶ *Id.*

⁷⁷ See Tladi, *supra* note 70, at 58–9 *citing* Juridical Condition & Rights of Undocumented Migrants, *supra* note 29, at ¶¶4–5; Domingues v. U.S., Case 12.285, Inter-Am. Comm’n H.R., Report No. 62/02, OEA/Ser.L/V/II.117, doc. 1 rev. 1 ¶ 49 (2000); Kolb, *supra* note 3, at 96; Schmalenbach, *supra* note 35, at 989 *citing* LAURI HANNIKAINEN, PEREMPTORY NORMS (JUS COGENS) IN INTERNATIONAL LAW: DEVELOPMENT, CRITERIA, PRESENT STATUS 214 (Finnish Lawyer 1988); MAURIZIO RAGAZZI, CONCEPT OF INTERNATIONAL OBLIGATIONS ERGA OMNES 67 (Oxford University Press 1997); Shelton, *supra* note 33, at 304. *See also* I.L.C., *Peremptory Norms: Comments & Observations of Governments*, U.N. Doc. A/CN.4/748 39 (Japan), 67 (Cyprus), 71 (Spain), 73 (US) (March 9, 2022). *But see* Magallona, *supra* note 2, at 528–9; Ulf Linderfalk, *Source of Jus Cogens Obligations: How Legal Positivism Copes with Peremptory Norms*, 82 NORD. J. INT’L L. 369, 385 (2013); MAARTEN BOS, A METHODOLOGY OF INTERNATIONAL LAW 246, 250 (Elsevier 1984); GODEFRIDNESS VAN HOOFF, RETHINKING THE SOURCES OF INTERNATIONAL LAW 160–2 (Kluwer 1983); CHRISTOS ROZAKIS, CONCEPT OF JUS COGENS 76–80 (North Holland 1976). *But see also* I.L.C., *supra*, 69 (The Netherlands), 72 (UK), 68 (Israel), 70 (Russia), 72 (United Kingdom).

application. . . on the ground of persistent objection'.⁷⁸ Others argue that peremptory norms are characterised by their 'universal application' and the persistent objector rule would contradict this, as it in effect permits derogation.⁷⁹ Still, some posit that states, 'by participating in the international legal system,' consent to the possibility that there are norms to which they would not be able to derogate even in the absence of their consent.⁸⁰

C. *Theoretical Bases of Peremptory Norms*

The VCLT's concept of peremptory norms is arguably 'now well-established'.⁸¹ Yet, there remains a 'doctrinal controversy' regarding its foundations.⁸² Broadly, there are three views on the basis of peremptory norms—the natural, public order, and positive law theories.⁸³ Understandably, the complexity of this issue requires a separate examination. Indeed, a vast amount of literature has been dedicated to the examination of the concept's roots.⁸⁴ The analysis below provides an overview of these debates, which would also aid the next chapter's examination of the nature of duties owed *erga omnes*.

The naturalist theory, through scholars like Grotius and Vattel,⁸⁵ arguably provided the impetus for the development of peremptory norms.⁸⁶ Under this, peremptory norms are founded on 'principles of morality' which

⁷⁸ Ragazzi, *supra* note 78, at 66; Sondre Helmersen, *Prohibition of the Use of Force as Jus Cogens: Explaining Apparent Derogations*, 56 NETH. INT'L L. REV. 167, 172 (2014).

⁷⁹ Tladi, *supra* note 70, at 58 (2018).

⁸⁰ Johnston, *supra* note 26, at 39 citing Byers, *supra* note 33, at 228.

⁸¹ Crawford, *supra* note 14, at 417; Eric Suy Eric, *Article 53*, in THE VIENNA CONVENTIONS ON THE LAW OF TREATIES 1226 (Olivier Corten & Eckart Klein eds., Oxford University Press 2011). See *Armed Activities*, at 32; *Jurisdictional Immunities of the State* (Ger. v. It.; Greece intervening), Judgment, 2012 I.C.J. 99, 140–2 (Feb. 3); Furundžija, at ¶¶ 153–4; *Juridical Condition & Rights of Undocumented Migrants*, at 310.

⁸² Lagerwall, *supra* note 58, at 1457; Dire Tladi, *First Report on Peremptory Norms*, U.N. Doc. A/CN.4/693, 29 (March 8, 2016).

⁸³ Lagerwall, *supra* note 58, at 1457, 1466; Tladi, *supra* note 83, at 30.

⁸⁴ See the selected bibliography in KOLB, *supra* note 3, at 130–7.

⁸⁵ See GROTIUS, *supra* note 41, at 40; DE VATTEL, *supra* note 42, at 4.

⁸⁶ Suy, *supra* note 82, at 1225.

are ‘inherent’ in legal systems.⁸⁷ The norm’s peremptory character derives not from states’ will.⁸⁸ Instead, it is rooted in the norm’s nature and the significance of the interest that it protects.⁸⁹ As the norm reflects the international community’s ‘fundamental values’, it is ‘placed in a hierarchically superior position in relation to all other norms’.⁹⁰ From this ‘higher position flows’ the conflicting inferior norms ‘nullity or inapplicability’.⁹¹

Related to the naturalist view is the public order theory. The approach agrees that peremptory norms protect values that are fundamental to the international community.⁹² However, in contrast with the natural law theory, the peremptory effect is based on *ordre public* or a body of ‘rules embedded in the international legal system and indispensable for its existence and the operation.’⁹³ Such forms the ‘minimum core of

⁸⁷ Tladi, *supra* note 83, at 31 *citing* Mark Janis, *Nature of Jus Cogens*, 3 CONN. J. INT’L L. 359, 361 (1987); Dan Dubois, *Authority of Peremptory Norms: State Consent or Natural Law?*, 78 NORD. J. INT’L L. 133, 134 (2009); O’Connell, *supra* note 19, at 97; SANTIAGO VILLALPANDO, L’ÉMERGENCE DE LA COMMUNAUTÉ INTERNATIONALE DANS LA RESPONSABILITÉ DES ETATS 77 (Graduate Institute 2005) (‘La fonction du jus cogens dans le système juridique—et notamment l’impossibilité pour les Etats d’y déroger au moyen d’un traité—a rappelé à d’aucuns le “fantôme” du “vieux droit naturel” qui se présenterait “sous un déguisement nouveau”’), *citing* KRYSZYNA MAREK, CONTRIBUTION À L’ÉTUDE DU JUS COGENS EN DROIT INTERNATIONAL, RECUEIL D’ÉTUDES DE DROIT INTERNATIONAL EN HOMMAGE À PAUL GUGGENHEIM 445 (Graduate Institute 1968); Charles de Visscher, *Positivisme et “jus cogens”*, 71 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 7, 9–10 (1971); Gómez Robledo, *supra* note 32, at 24.

⁸⁸ Frowein, *supra* note 37, at 365; ANTÔNIO TRINDADE, INTERNATIONAL LAW FOR HUMANKIND: TOWARDS A NEW JUS GENTIUM 294–5 (Nijhoff 2013).

⁸⁹ Crawford, *supra* note 14, at 412; ORAKHELASHVILI, *supra* note 25, at 10; PROUKAKI, *supra* note 43, at 26 *citing* Fitzmaurice, *supra* note 50, at 20, 40–1. *See* TRINDADE, *supra* note 89, at 291.

⁹⁰ Kolb, *supra* note 38, at 22 *citing* Patrícia Galvão Teles, *Peremptory Norms of General International Law (Jus Cogens) & the Fundamental Values of the International Community*, in PEREMPTORY NORMS OF GENERAL INTERNATIONAL LAW (JUS COGENS) (Dire Tladi ed., BRILL 2021), 45 ff.

⁹¹ Kolb, *supra* note 38, at 22.

⁹² ORAKHELASHVILI, *supra* note 25, at 37; Simma, *supra* note 33, at 288; Galvão Teles, *supra* note 91, at 46. *See* I.L.C., *Fragmentation of International Law*, U.N. Doc. A/CN.4/L.682, 167 (April 13, 2006).

⁹³ ORAKHELASHVILI, *supra* note 25, at 28–9 *cited in* Schmalenbach, *supra* note 35, at 967; Mosler, *supra* note 45, at 18; ARNOLD MCNAIR, LAW OF TREATIES 213–4 (Clarendon 1961);

norms and principles safeguarding certain higher interests' of every state that 'binds them all equally'.⁹⁴ Broadly speaking, public order theorists argue that because peremptory norms encompass 'the minimum threshold of the international value system' or constitute the 'apex of the legal system',⁹⁵ derogations from these norms 'can have no legal force'.⁹⁶ In other words, the norm's peremptory effect is due to the fact that derogations contravene rules which are of vital importance to the international community and are 'intrinsically superior'.⁹⁷ Thus, they must override the 'tenets of a consensus-based international law-making'.⁹⁸

The natural law and public order theories have 'historical links' to the development of peremptory norms and enjoy significant support. Yet, they are not without criticisms.⁹⁹ Primarily, these pertain to the theories' 'technical insufficiency' as to the norms' identification and content.¹⁰⁰ The reliance on the importance or 'moral value' of the norm alone, as one scholar points out, 'is too weak a criterion' and 'on such a question, opinions can and will largely differ'.¹⁰¹ Of course, peremptory norms may well

Cassese, *supra* note 29, at 160 cited in Galvão Teles, *supra* note 91, at 46; THOMAS WEATHERALL, *JUS COGENS: INTERNATIONAL LAW & SOCIAL CONTRACT* 16, 99–100 (Cambridge University Press 2017). See Brunnée, *supra* note 32, at 800; Evan Criddle & Evan Fox-Decent, *A Fiduciary Theory of Jus Cogens*, 34 *YALE J. INT'L L.* 331, 344 (2009).

⁹⁴ ORAKHELASHVILI, *supra* note 25, at 28; Byers, *supra* note 33, at 228.

⁹⁵ See Thomas Kleinlein, *Jus Cogens Re-examined: Value Formalism in International Law*, 28 *Eur. J. Int. Law* 295, 300 (2017); Philip Allot, *Reconstituting Humanity—New International Law*, 3 *Eur. J. Int. Law* 219, 250 (1992).

⁹⁶ Mosler, *supra* note 15, at 382.

⁹⁷ Orakhelashvili, *supra* note 25, at 8; Antonio Cassese & Joseph Weiler, *Remarks in Antonio Cassese & Joseph Weiler Joseph* (eds), *Change & Stability in International Law* (De Gruyter 1988), 97.

⁹⁸ Jure Vidmar, *Protecting the Community Interest in a State Centric Legal System: UN Charter & Certain Norms of "Special Standing"* in Wolfgang Benedek Wolfgang, et al. (eds), *Community Interest in International Law* (Intersentia 2014), 115; Schmalenbach, *supra* note 35, at 966; Mosler, *supra* note 15, at 34; Tomuschat, *supra* note 40, at 307; Erika de Wet, *Sources & the Hierarchy of International Law* in Samantha Besson & Jean d'Aspremont (eds), *Oxford Handbook of the Sources of International Law*, 632 (2017).

⁹⁹ Tladi, *supra* note 83, at 31; note Prosper Weil, *Le droit international en quête de son identité*, 237 *Recueil des Cours de l'Académie de Droit International* 11, 274 (1992); Maurice Kamto, *La volonté de l'Etat en droit international*, 310 *Recueil des Cours de l'Académie de Droit International* 133, 353 (2004).

¹⁰⁰ Kolb, *supra* note 3, at 31.

¹⁰¹ *Id.* at 31.

represent the core values of the international community. Indeed, as Magallona noted, peremptory norms reflect the ‘recognition of necessity on the part of . . . states born out of historical experience common to them’.¹⁰² However, as another argues, attempting to identify these norms ‘independently from the will of states’ leads to ‘arbitrary conclusions’ that depend mainly ‘on one’s own perception of fundamental values’.¹⁰³

The same may be said about claims concerning the public order. For some scholars, including Magallona, the analogy with municipal law may be questionable.¹⁰⁴ Such a concept ‘does not necessarily fit international law’ which lacks the ‘development and differentiation’ of the municipal order.¹⁰⁵ As the international legal order ‘lacks an appropriate structure’, the content and identification of peremptory norms become largely left to ‘manifestations of the guiding principles’ which are ‘mostly nothing more than the author’s opinion on what the essential and indispensable’.¹⁰⁶ This subjective criterion leads to ‘unverifiable assertions’ and possibly undue expansion of norms deemed peremptory.¹⁰⁷ The standard becomes unnecessarily subjective,¹⁰⁸ and creates uncertainty as to what norms ‘graduate from the status of an ordinary norm’ to a ‘higher grade’.¹⁰⁹

There is also the question of who determines the peremptory norms’ content. The naturalist and public order theories submit that peremptory norms exist independently of states’ will.¹¹⁰ Yet, both still require some sort of ‘legislator’ and more often than not rely on ‘subjective opinions of scholars, judges, or officials’ or the views of a few states.¹¹¹ This makes the

¹⁰² Magallona, *supra* note 2, at 524-525.

¹⁰³ Mik, *supra* note 19, at 52.

¹⁰⁴ Magallona, *supra* note 2, at 523.

¹⁰⁵ Zemanek, *supra* note 18, at 385.

¹⁰⁶ *Id.* at 384, 386, *citing* Michel Virally, *Réflexions sur le jus cogens*, 12 *Annuaire français de droit international* 5, 29 (1966).

¹⁰⁷ Zemanek, *supra* note 18, at 385.

¹⁰⁸ Kolb, *supra* note 3, at 31.

¹⁰⁹ Wiel, *supra* note 20, at 435; Monica Hakimi, *Constructing an International Community*, 111 *Am. J. Int. Law* 317, 333 (2017).

¹¹⁰ Gleider Hernandez, *A Reluctant Guardian: The International Court of Justice & the “International Community”*, 83(1) *Br. Yearb. Int. Law* 13, 38 (2013).

¹¹¹ O’Connell, *supra* note 19, at 86-87; Mik, *supra* note 19, at 52-52; Zemanek, *supra* note 18, at 384.

process ‘bluntly and excessively ideological in nature’.¹¹² It opens the possibility for some states or scholars to arrogate to ‘themselves the role of law-giver’ and possibly ‘erasing any distinction between *lex lata* and *lex ferenda* in the name of progress and values’.¹¹³ Worse, it allows for the imposition by a minority of their ‘values and aspirations to all on a global scale’, thereby ‘fostering parochial interests’.¹¹⁴

To this end, positivists argue that despite their ‘natural law gloss’, peremptory norms ‘remains primarily premised on state consent’.¹¹⁵ Magallona stressed this when he stated that the ‘emergence of the concept of [peremptory norms] is by ‘no means merely [its] *lex lata* transformation [from] natural law [or its] municipal law analogy’. Rather, it is due to the acknowledgement of states in a ‘legal order’ where they remain ‘the creators of the law’.¹¹⁶ In stronger terms, Magallona claimed that the ‘recognition of [peremptory norms]... does not mean at all the existence of superior norms independent of the wills of states’.¹¹⁷ It should be noted that this in no way makes the norms’ importance and the interests that it protects irrelevant.¹¹⁸

¹¹² Kolb, *supra* note 3, at v; See also Florian Hoffmann, *International Legalism & International Politics* in Anne Orford & Florian Hoffmann (eds), *Oxford Handbook of the Theory of International Law* (Oxford University Press 2016), 960.

¹¹³ *Id.*; Kolb, *supra* note 3, at 26; Carlo Focarelli, *International Law as Social Construct: Struggle for Global Justice*, Oxford University Press, at 470, (2012).

¹¹⁴ Bianchi, *supra* note 27, at 495-496; See Schaumburge-Müller Sten, *To What Extent does International Law Obstruct the Protection of Common Interests?* in Wolfgang Benedek, et al. (eds), *Community Interest in International Law* (Intersentia 2014), 41 ([‘In] emphasising common values and shared interests... they are more prone to the risk of making the mistake of conceiving particular interests as universal interests’); Symposium, *McDougal’s Jurisprudence: Utility, Influence, Controversy*, 79 AM. SOC’Y INT’L L. PROC. 266 (1985) (Schacter: ‘By subordinating law to policy, the... approach virtually dissolves the restraints of rules and opens the way for partisan or subjective policies disguised as law’).

¹¹⁵ James Green, *Questioning the Peremptory Status of the Prohibition of the Use of Force*, 32 Mich. J. Int. Law 215, 257 (2011); Oppenheim, *supra* note 46, at 528; Magallona, *supra* note 2, at 522; Czapliński, *supra* note 40, at 87; Pierre-Marie Dupuy, *Droit International Public* (Dalloz 1995), 14–6. *Contra* Raphaële Rivier, *Droit international public* (2nd edn, Presses universitaires de France 2013), 565; Orakhelashvili, *supra* note 25, at 107; Tomuschat, *supra* note 70, at 306-307.

¹¹⁶ Magallona, *supra* note 2, at 523, 526.

¹¹⁷ *Id.* at 541.

¹¹⁸ Kolb, *supra* note 38, at 54; Ragazzi, *infra* note 298, at 54, (‘The “intrinsic value” of a certain rule and the fact that it is “rooted in the international conscience”... is reflected

However, positivists submit that these *per se* do not dictate the norm's status.¹¹⁹ They may be the reason why states 'in [their] legal policy [decide] to reinforce that norm' to 'make it particularly effective'.¹²⁰ Nonetheless, it is the states' recognition that affords the norm its peremptory effect.¹²¹

Arguably, this view, which Magallona deems to represent the 'consensual nature of [peremptory] norms',¹²² is one that remains faithful to the wording of Article 53 of the VCLT. It is worth pointing out that some view the provision as one that defines peremptory norms and, in turn, deem it tautologous.¹²³ By stating that 'a peremptory norm. . . is a norm accepted and recognised by the international community of states as a whole as a norm from which no derogation is permitted. . . which can be modified only by a subsequent norm. . . having the same character', it appears to assume what remains to be established.¹²⁴ However, this apparent circularity may be solved if Article 53 is not deemed to define peremptory norms but rather one that describes the process by which peremptory norms are formed.¹²⁵

In this regard, it may be argued that the process of 'elevating' an ordinary norm to peremptory status is akin to the formation of customary international law.¹²⁶ In the same way that custom, in its traditional—and

in the acceptance and recognition of that rule as a rule of *jus cogens*.'). See also James Crawford, *Responsibility to the International Community as a Whole*, 8 Ind. J. Global Legal Stud. 303, 314 (2001) ('A formulation. . . which appears to exclude that moral element does not seem appropriate.').

¹¹⁹ Hillgruber, *supra* note 33, at 271.

¹²⁰ See *id.*

¹²¹ Kolb, *supra* note 38, at 24; Magallona, *supra* note 2, at 528.

¹²² Magallona, *supra* note 2, at 527.

¹²³ Linderfalk, *infra* note 128, at 362; Czapliński, *supra* note 40, at 87; Johnston, *supra* note 26, at 41, citing Robledo Gómez, *supra* note 32, at 112; Daniel Costelloe, *Legal Consequences of Peremptory Norms in International Law* (Cambridge University Press 2017), 15; T Minagawa, *Essentiality & Reality of International Jus Cogens*, 2 Hitotsubashi J. Law Polit. 1, 4 (1984).

¹²⁴ Linderfalk, *infra* note 128, at 370.

¹²⁵ *Id.* at 371; Ragazzi, *infra* note 298, at 51; Dire Tladi, *Second Report on Peremptory Norms*, U.N. Doc. A/CN.4/706, 17, 32 (March 16, 2017).

¹²⁶ Linderfalk, *infra* note 128, at 370-371; Kolb, *supra* note 3, at 67; Villalpando, *supra* note 88, at 77; De Hoogh, *supra* note 34, at 39; Green, *supra* note 116, at 243-244; Serge Sur, *Remarks in Antonio Cassese & Joseph Weiler (eds), Change & Stability in International Law* (De Gruyter 1988), 128; Byers, *supra* note 33, at 226; Lagerwall, *supra* note 58, at 1467.

arguably correct—conception, is formed by the concurrence of state practice and *opinio juris*,¹²⁷ norms become peremptory because states decide that the norms should possess a non-derogable character.¹²⁸ That is, states consider an existing norm to be fundamentally important.¹²⁹ Because of this, they deem it ‘desirable’ and ‘appropriate’ that no derogations from the norm be permitted and that no modification of the norm by ‘ordinary means’ be allowed.¹³⁰ If this is supported by broad, representative, and consistent state practice and *opinio juris*, then the norm has become peremptory.¹³¹ Thus, a norm’s peremptory status is not determined by its nature or character but by states’ acceptance and recognition.¹³²

II. Serious Breaches, Nullity of Non-Normative Acts & the Corresponding Duties Imposed on ‘Third States’

Since the adoption of the VCLT, attempts have been made to broaden the legal effects of peremptory norms beyond their nullifying effect on treaties.¹³³ As mentioned in the introduction, there are two effects often attributed to peremptory norms. The first pertains to duties imposed upon ‘third states’ should there be a ‘serious’ breach of duties imposed by peremptory norms.¹³⁴ The second refers to the competence of states, although not injured or directly affected by a breach of an international

Contra Orakhelashvili, *supra* note 25, at 107 (‘[The view is] incompatible with the moral basis of jus cogens and its necessity as public order’); Tladi, *supra* note 83, at 32, (‘Jus cogens has . . . been . . . a revolution against “le froid cynisme positiviste”’).

¹²⁷ See Robert Kolb, Selected Problems in the Theory of Customary International Law, 50(2) *Neth. Int. Law Rev.* 119, 120 (2003); Linderfalk, *infra* note 128, at 364, *citing* John Finnis, *Natural Law & Natural Rights* (Oxford University Press 1980), 238.

¹²⁸ Helmersen, *supra* note 79, at 170, *citing* Hugh Thirlway, *The Sources of International Law*, Oxford University Press, (2014), 119; Robert Kolb, *Formal Source of Jus Cogens in Public International Law*, 53 *Zeitschrift für öffentliches Recht* 69, 103, (1998); Byers, *supra* note 33, at 222; Johnston, *supra* note 26, at 46-47.

¹²⁹ Kolb, *supra* note 38, at 41.

¹³⁰ Linderfalk, *infra* note 128, at 373.

¹³¹ *Id.* at 374; De Hoogh, *supra* note 34, at 39; Green, *supra* note 116, at 244.

¹³² Weil, *supra* note 100, at 427, (‘A rule acquires superior normative density once its pre-eminence is accepted and recognised’); U.N. GAOR, *supra* note 9, at 167.

¹³³ Vidmar, *supra* note 47 at 17; Erika de Wet, *Invoking Obligations Erga Omnes in the Twenty-First Century: Progressive Developments since Barcelona Traction*, 38 *S.A.Y.I.L.* 1, 6 (2013); Johnston, *supra* note 26, at 41.

¹³⁴ Johnston, *supra* note 26, at 44.

duty, to implement the responsibility of the wrongful state. The next two sections question the conceptual basis for attributing these effects to peremptory norms.

Understandably, the Commission did not delve into these effects during the drafting of the VCLT. At the time, its mandate was limited to issues concerning the regulation of international agreements. Thus, its consideration of peremptory norms was limited to their non-derogability and nullifying effect.¹³⁵ It did not, however, intend to pre-empt issues arising from other fields of international law.¹³⁶ For this reason, some submit that the VCLT only partially codified the effects of peremptory norms and that these norms may have effects beyond VCLT Articles 53 and 64.¹³⁷ Indeed, since the VCLT's adoption, attempts have been made to broaden the peremptory norms' effects,¹³⁸ including the consequences for 'third states' or states not directly affected by the wrongful act, should states commit serious breaches of duties imposed by peremptory norms.¹³⁹

A. *Development of International Crimes & Serious Breaches of Peremptory Norms*

The VCLT's concept of peremptory norms influenced the ILC's work on state responsibility.¹⁴⁰ In 1976, Special Rapporteur Ago (1969–80) posited that, like the VCLT, which distinguished between 'ordinary' and

¹³⁵ Erika de Wet, *Prohibition of Torture as Jus Cogens & its Implications for National & Customary Law*, 15 Eur. J. Int. Law 97, 99 (2004).

¹³⁶ Vienna Convention on the Law of Treaties, Article 73, May. 23 1969, vol. 1155, ('The . . . Convention shall not prejudice any question that may arise . . . from . . . the responsibility of a state'); Tladi, *supra* note 126, at 17; Linderfalk, *supra* note 67, at 867-869.

¹³⁷ Tladi, *supra* note 70, at 30; Summa, *supra* note 33, at 288; Trindade, *supra* note 89, at 295.

¹³⁸ Vidmar, *supra* note 47 at 17; Kolb, *supra* note 3, at 106; Gaja, *supra* note 35, at 52; Shelton, *supra* note 33, at 305; Johnston, *supra* note 25, at 44; De Hoogh, *supra* note 34, at 41.

¹³⁹ Crawford, *supra* note 14, at 465; Kolb, *supra* note 3, at 106.

¹⁴⁰ Eric Wyler, *From "State Crime" to Responsibility for "Serious Breaches of Obligations under Peremptory Norms*, 13(5) Eur. J. Int. Law 1147, 1150 (2002) citing Ago, *supra* note 12, at 28-29; Marina Spinedi, *From One Codification to Another: Bilateralism & Multilateralism*, Codification of the Law of Treaties & the Law of State Responsibility, 13(5) Eur. J. Int. Law 1099, 1125 (2002); U.N. GAOR, 28th Session Summary record, U.N. Doc. A/CN.4/SER.A/1976/Add.1 (Jul. 23, 1976).

‘fundamental’ norms, the law on state responsibility must also differentiate between ‘ordinary’ and ‘serious’ breaches of international duties.¹⁴¹ In his 1976 Draft Article 18 (1996 Draft Article 19), Ago proposed the concept of an ‘international crime’ or the breach of a duty ‘so essential for the protection of the [international community’s] fundamental interests’ accepted and recognised ‘by that community as a whole’.¹⁴² It must be stressed that Ago, in using the term ‘crime’, did not refer to the municipal concept of crime nor intend to impose criminal responsibility upon states.¹⁴³ Rather, its purpose was to create an ‘aggravated regime’ for breaches of certain fundamental duties.¹⁴⁴ For Ago, these include the breach of the duty not to threaten or use force; the duty to protect fundamental human rights such as those on genocide, racial discrimination, and slavery; and the duty to safeguard the environment.¹⁴⁵

Ago’s departure from the ILC prevented him from developing the consequences of international crimes.¹⁴⁶ This task fell on Special Rapporteurs Riphagen (1980–6) and Arangio-Ruiz (1988–96). Riphagen

¹⁴¹ Eric Wyler, *From “State Crime” to Responsibility for “Serious Breaches of Obligations under Peremptory Norms*, 13(5) Eur. J. Int. Law 1147, 1150 (2002) citing Ago, *supra* note 12, at 28-29; Marina Spinedi, *From One Codification to Another: Bilateralism & Multilateralism*, Codification of the Law of Treaties & the Law of State Responsibility, 13(5) Eur. J. Int. Law 1099, 1125 (2002); U.N. GAOR, 28th Session Summary record, U.N. Doc. A/CN.4/SER.A/1976/Add.1 (Jul. 23, 1976).

¹⁴² *Id.* at 26; U.N. GAOR, *supra* note 141, at 96; U.N. GAOR, 29th Session Summary record, U.N. Doc. A/32/10-EN (Jul. 9, 1977); U.N. GAOR, 48th Session Summary Record, U.N. Doc. CN.4/L528/Add.3 at 109, 112 (Jan. 1997).

¹⁴³ U.N. GAOR, *supra* note 141, at 104; See U.N. GAOR, 47th Session Summary Record, U.N. Doc. A/47/10 (Nov. 3, 2015).

¹⁴⁴ George Abi-Saab, *The Uses of Article 19*, 10 Eur. J. Int. Law 339, 342, 346 (1999) citing Joseph Weiler, Antonio Cassese, & Marina Spinedi (eds), *International Crimes of State: A Critical Analysis of the ILC’s Draft Article 19 on State Responsibility* (De Gruyter 1989), 52; De Hoogh, *supra* note 34, at 49.

¹⁴⁵ Ago, *supra* note 12, at 54, ([Draft] Article 18. . . 2. The breach by a state of an international [duty against]. . . the threat or use of force. . . is an “international crime”. . . 3. The serious breach by a state of an international [duty] established by a norm of general international law accepted and recognised as essential by the international community. . . (a) respect for the. . . right of self-determination; or (b) respect for human rights. . . or (c) the conservation. . . of a resource common to all mankind is also an “international crime”).

¹⁴⁶ Pierre Klein, *Responsibility for Serious Breaches of Obligations Deriving from Peremptory Norms of International Law*, 13 Eur. J. Int. Law 1241, 1244 (2002).

proposed that three distinct duties imposed on third states (1984 Draft Article 14/1996 Draft Article 53) should an international crime be committed.¹⁴⁷ First, states have a *duty not to recognise* the legal situation created by the wrongful act.¹⁴⁸ Second, states also have a *duty not to aid or assist* the wrongful state in maintaining the situation that resulted from the breach of duty.¹⁴⁹ Third, states have a *duty to cooperate* with other states in carrying out these two duties.¹⁵⁰ Riphagen and Arangio-Ruiz also proposed mechanisms for dealing with state crimes in line with Ago's work.¹⁵¹ Riphagen allotted a central role to the UN to respond to these wrongful acts.¹⁵² For his part, Arangio-Ruiz developed a 'complex machinery' involving the UN and the ICJ.¹⁵³

¹⁴⁷ Willem Riphagen, *Third Report on State Responsibility*, II(1) YbILC 22, 48–9 (1982) ('[Draft] Article 6: An internationally wrongful act of a state, which constitutes an international crime, entails a [duty] for every other state: (a) not to recognise as legal the situation created by such act; (b) not to render aid or assistance to the author state in maintaining the situation created by such act; and (c) to join other states in affording mutual assistance in carrying out the [duties] under (a) and (b)'); Gaetano Arangio-Ruiz, *Fifth Report on State Responsibility*, II(1) YbILC 3, 35, 38 (1995); Gaetano Arangio-Ruiz, *Seventh Report on State Responsibility*, II(1) YbILC 6, 16–7 (1995); U.N. GAOR, Report on the Work of the 37th Session, U.N. Doc. A/40/10, (Jul. 26, 1985); U.N. GAOR, 48th Session Summary Record, U.N. Doc. CN.4/L528/Add.3 at 109, 112 (Jan. 1997).

¹⁴⁸ Willem Riphagen, *First Report on State Responsibility*, II(1) YbILC 107, 115–20 (1980); Riphagen, *supra* note 148, at 48–50; See *Legal Consequences of the Continued Presence of South Africa in Namibia*, Advisory Opinion, 1970 I.C.J. 16, 56 (Jun. 21, 1970); *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory*, Advisory Opinion, 2004 I.C.J. 136, 200–1 (Jul. 9, 2004); Lagerwall Anne, *Le principe ex injuria jus non oritur en droit international*, Collection De Droit International, 141–159, (Feb, 18, 2016),

¹⁴⁹ Riphagen, *supra* note 148, at 49. See Willem Riphagen, *Fourth Report on State Responsibility*, Yearbook of the International Law Commission, 1983, vol. II, pt. 1 (1983); Willem Riphagen, *Sixth Report on State Responsibility*, II(1) Yearbook of the International Law Commission, 1985, vol. II, pt. 1 (1986).

¹⁵⁰ Riphagen, *supra* note 148, at 48 (1982). See Willem Riphagen, *Fifth Report on State Responsibility*, Yearbook of the International Law Commission, 1984, vol. II, pt. 1 (1984).

¹⁵¹ See Ago, *supra* note 12, at 43–44.

¹⁵² Riphagen, *supra* note 148, at 48. See Klein, *supra* note 147, at 1244–1245 citing Pierre-Marie Dupuy, *Sécurité collective et organisation de la paix*, 97 R.G.D.I.P. 617, 619, 623 (1993).

¹⁵³ Gaetano Arangio-Ruiz, *Fourth Report on State Responsibility*, Yearbook of the International Law Commission, 1992, vol. II, 6, 22 (1992); Arangio-Ruiz, *supra* note 148, at 38; U.N. GAOR, *supra* note 144, at 117, ('Article 19. . . 1. Any state. . . claiming that an international crime has been or is being committed. . . shall bring the matter to the [GA]

Yet, the notion of international crimes was a contentious subject.¹⁵⁴ The ILC included the concept in the provisionally adopted 1996 Draft Articles, but doubts remained as to the concept.¹⁵⁵ There were concerns as to the implications of the term ‘crime’.¹⁵⁶ Although, as mentioned above, the term was ‘merely intended to designate’ a ‘serious violation of international law and involved no criminal connotation’,¹⁵⁷ much reluctance remained within the ILC and among states due to its punitive implications.¹⁵⁸ There were also questions concerning the consequences attributed to international crimes.¹⁵⁹ Indeed, for some, the duties of *cooperation*, *non-recognition*, and *non-assistance* were not limited to international crimes but

or [SC]’s [attention]... 2. If the [GA] or [SC] resolves... that the allegation is sufficiently substantiated to justify the grave concern of the international community, any state... may bring the matter to [ICJ] by unilateral application for... a judgment whether the alleged international crime has been or is being committed... 5. A decision of the [ICJ] that an international crime has been or is being committed shall fulfil the condition for the implementation, by any state... of the special or supplementary legal consequences of international crimes of states’).

¹⁵⁴ Stern, *supra* note 142, at 6; Martin Dawidowicz, *Third Party Countermeasures in International Law*, Cambridge University Press, 85, (2017); Linos-Alexander Sicilianos, *Classification of Obligations & the Multilateral Dimension of the Relations of International Responsibility*, 13(5) Eur. J. Int. Law 1127, 1130 (2002). See Krystyna Marek, *Criminalising State Responsibility*, 14 Rev. Belge. Dr. Intern. 460, 462, (1978).

¹⁵⁵ James Crawford, *First Report on State Responsibility*, Yearbook of the International Law Commission, vol. 2 part 1, 17–8 (1998); U.N. GAOR, *Report on the Work of the 50th Session*, U.N. Doc. A/53/10 (Aug. 14 1998). See Pemmaraju Sreenivasa Rao, *International Crimes & State Responsibility*, Maurizio Ragazzi (ed), *International Responsibility Today: Essays in Memory of Oscar Schachter* (Nijhoff 2005), 67. See also Abi-Saab, *supra* note 145, at 344–346.

¹⁵⁶ U.N. GAOR, *supra* note 156, at 66.

¹⁵⁷ U.N. GAOR, *supra* note 144, at 48; U.N. GAOR, *supra* note 143, at 63; Anthony Duff, *State Responsibility: An Outsider’s View in Samantha Besson* (ed), *Theories of International Responsibility Law*, 76, Cambridge University Press, (2022).

¹⁵⁸ U.N. GAOR, *supra* note 156, at 66; Francois Voeffray, *L’actio popularis ou la défense de l’intérêt collectif devant les juridictions internationales* (Graduate Institute 2004), 270–1. See I.L.C., *State Responsibility: Comments & Observations of Governments*, 53rd Session, U.N. Doc. A/CN.4/515, 64 (France), 65 (Mexico); 65 (Netherlands), 65–6 (Slovakia) (March 19, 2001).

¹⁵⁹ U.N. GAOR, *supra* note 156 at 72; Dupuy, *supra* note 47, at 1063.

extended to other wrongful acts.¹⁶⁰ Finally, some ILC members and states questioned Riphagen and Arangio-Ruiz's proposal concerning the institutionalisation of responses to international crimes. This was due to the view that the proposed mechanisms were 'too broad to be realistic' and did not 'fit the states' sense of international law'.¹⁶¹

Ultimately, the ILC chose to 'disaggregate the notion of "crime" into its various components' and integrate them with the other concepts under the 2001 Articles.¹⁶² It removed the term 'international crime' from the 2001 Articles.¹⁶³ However, it retained the 'aggravated regime' that distinguished between breaches of duties arising from ordinary and peremptory norms.¹⁶⁴ This was reformulated under 2001 Article 40 as 'serious breaches by a state

¹⁶⁰ U.N. GAOR, *supra* note 144, at 55, *cited in* Crawford, *supra* note 14, at 11, 19-22. Sicilianos, *supra* note 155, at 1128; Int'l Law Comm'n, *supra* note 159, at 64 (France), 65 (Mexico), 66 (UK), 67 (Japan).

¹⁶¹ U.N. GAOR, *supra* note 144, at 48; Klein, *supra* note 147, at 1252; U.N. GAOR, *supra* note 156, at 71; Dawidowicz, *supra* note 155, at 83, *citing* U.N.G.A., 'Topical Summary of the Discussion of the Sixth Committee, 50th Session' (16 February 1996) UN Doc A/CN.4/472/Add.1, 25-7; Dupuy, *supra* note 47, at 1063.

¹⁶² Crawford, *supra* note 14, at 470; U.N. GAOR, *supra* note 156, at 77, ('Systematic development in the draft articles'). See Kadelbach, *supra* note 40, at 36, ('Different concepts are found which relate to [this] category, but are only vaguely described and [are] insufficiently coordinated'). Note that peremptory norms also affect other provisions of the 2001 Articles. 2001 Article 26 provides that states' acts 'not in conformity with a [duty] arising from a peremptory norm' may not preclude the wrongfulness of such wrongful acts. Likewise, 2001 Article 50 provides that the taking of countermeasures shall not affect duties imposed by peremptory norms.

¹⁶³ Sicilianos, *supra* note 155, at 1128; Rao, *supra* note 156, at 79, *citing* Alain Pellet, *New Draft Articles of the ILC on the Responsibility of States for Internationally Wrongful Acts: A Requiem for States' Crime?*, 32 Yearbook of the International Law Commission, 2001, vol. II (Part Two) 55, 58 (2001).

¹⁶⁴ Christian Tams, *Do Serious Breaches Give Rise to Any Specific Obligations of the Responsibility State*, 13 Eur. J. Int. Law 1161, 1162 (2002); Tullio Treves, *Settlement of Disputes & Non-Compliance Procedures*, Tullio Treves, et al. (eds), *Non-Compliance Procedures and Mechanisms and the Effectiveness of International Environmental Agreements* (TMC Asser 2009), 232; Stern, *supra* note 142, at 7, ('Ce qui était le crime international s'est dilué et a été remplacé par d'autres concepts relevant plus ou moins du même registre de préoccupations. . . ce que l'on pourrait appeler un fait illicite qualifié, au lieu et place du crime international').

of a [duty] arising under a peremptory norm'.¹⁶⁵ Under 2001 Article 41, should there be a 'gross or systematic failure' by a state to fulfil its duties under a peremptory norm, third states, in what the ILC deemed a 'progressive measure', must cooperate to bring to an end through lawful means such serious breach.¹⁶⁶ Furthermore, they have the duty not to recognise as lawful any situation created by the breach and the duty not to aid or assist the wrongful state in maintaining the situation.¹⁶⁷ The ILC reiterated these consequences in Draft Conclusion 19 of its 2022 Draft Conclusions on the Identification and Legal Consequences of Peremptory Norms ('2022 Draft Conclusions').¹⁶⁸ It also asserted that these three duties have become customary.¹⁶⁹

B. *Conceptual Foundations of the Effects of Serious Breaches of Peremptory Norms*

¹⁶⁵ U.N. GAOR, *supra* note 13, at 112-113, ('A "serious" breach is defined. . . as one which involves "a gross or systematic failure by the responsible state to fulfil the obligation" in question. The word "serious" signifies that a certain order of magnitude of violation is necessary in order not to trivialise the breach. . . To be regarded as systematic, a violation would have to be carried out in an organised and deliberate way. In contrast, the term "gross" refers to the intensity of the violation or its effects; it denotes violations of a flagrant nature, amounting to a direct and outright assault on the values protected by the rule').

¹⁶⁶ *Id.* at 114. See Crawford, *supra* note 11, at 108, ('The draft articles cannot hope to anticipate future developments, and it is. . . necessary to reserve to the future such additional consequences, penal and other, which may attach to internationally wrongful conduct by reason of its classification as. . . as a breach of [a duty] to the international community as a whole').

¹⁶⁷ U.N. GAOR, *supra* note 13, at 114-116.

¹⁶⁸ U.N. GAOR., *Report on the Work of the 73rd Session*, U.N. Doc. A/77/10, 70 (2022), ('Draft Conclusion 19. . . 1. States shall cooperate to bring to an end through lawful means any serious breach by a state of [a duty] arising under a peremptory norm of general international law (jus cogens); 2. No State shall recognise as lawful a situation created by a serious breach by a state of [a duty] arising under a peremptory norm of general international law (jus cogens), nor render aid or assistance in maintaining that situation. . .')

¹⁶⁹ *Id.* at 71 ('The [duty] to cooperate to bring to an end serious breaches of obligations arising under peremptory norms of general international law. . . is now recognised under international law'), 76 ('Already in 2001, the Commission had recognised that the duties of non-recognition and non-assistance were part of customary international law').

The attribution of legal consequences to peremptory norms beyond the VCLT deserves comment. In contrast with the VCLT, which became positive law due to states' consent, the additional effects attributed to peremptory norms have generally been derived either by extending the concept of non-derogability to include material acts or by deduction based on the 'higher rank' of the norms.

For some, the effects of peremptory norms cover not only the conclusion of treaties but also unilateral acts.¹⁷⁰ These acts 'can be of any type' so long as they are 'intended to produce effects on the national or international plane'.¹⁷¹ The view is rooted in the need to 'ensure the 'practical utility' of peremptory norms'.¹⁷² It is claimed that limiting the effect of peremptory norms to normative acts disregards that material acts also produce detrimental consequences 'if allowed to be valid and to go unchallenged'.¹⁷³ Thus, in the same way that peremptory norms nullify conflicting norms, they likewise deprive contrary material acts of their legality.¹⁷⁴ Accordingly, states have a duty to 'eliminate as far as possible the

¹⁷⁰ Cannizzaro, *supra* note 70, at 425; Mik, *supra* note 19, at 45; Orakhelashvili, *supra* note 25, at 208 citing Hannikainen, *supra* note 78, at 7; P. Saladin, *Völkerrechtliches Jus Cogens und Schweizerisches Landesrecht* in G. Jenny & W. Kalin (eds), *Die Schweizerische Rechtsordnung in Ihren Internationalen Bezügen* (Bern 1988), 73. See Robert Jennings, *General Course on Principles of International Law*, 121 *Recueil des Cours de l'Académie de Droit International* 323, 564 (1967); Eric Suy, *Concept of Jus Cogens in International Law, Lagonissi Conference: Papers & Proceedings*, vol II (Carnegie Endowment for International Peace 1967), 75.

¹⁷¹ Orakhelashvili, *supra* note 25, at 216; Cannizzaro, *supra* note 70, at 425, ('Jus cogens. . . are not confined to the law of treaties [but] can also be offended by unilateral conduct.');

Mik, *supra* note 19, at 45, ('Jus cogens [applies]. . . to factual actions in the context of responsibility, as broadly understood, for a breach of international law'); Juridical Condition & Rights of Undocumented Migrants, *supra* note 29, (Trinidad, concurring); Suy, *supra* note 171, at 75; Jennings, *supra* note 172, at 564.

¹⁷² Mik, *supra* note 19, at 36.

¹⁷³ Orakhelashvili, *supra* note 25, at 212, ('Acts of states consisting purely in their conduct'), 213. See Hersch Lauterpacht, *Règles générales du droit de la paix*, 62 *Recueil des Cours de l'Académie de Droit International* 5, 291 (1937) ('Unlawful acts or [their] consequences or immediate manifestations') cited in Anne Lagerwall, *Non-Recognition of Jerusalem as Israel's Capital*, 34 *Questions of International Law* 33, 34 (2018).

¹⁷⁴ Orakhelashvili, *supra* note 25, at 206, ('Jus cogens has expanded to encompass. . . all legal acts') citing Juridical Condition & Rights of Undocumented Migrants, *supra* note 29, at ¶99.

consequences of any act performed in reliance on any provision which conflicts with the peremptory norm of general international law' and must 'bring their mutual relations into conformity with the peremptory norm of general international law'.¹⁷⁵

However, several authors submit that this view conflates derogations and breaches.¹⁷⁶ It must be stressed that peremptory norms under the VCLT deal with the former and restrict the law-making capacity of states by limiting their competence to 'contract out' of peremptory norms in their legal relations.¹⁷⁷ When states 'derogate' from a norm, they replace a 'general legal regime' with another that is conflicting, which in turn becomes applicable *inter se*.¹⁷⁸ Derogations are concerned with normative or legal acts, including arguably unilateral ones,¹⁷⁹ that create rules, give rise to rights, or impose duties upon other states.¹⁸⁰ Simply, a derogation refers to a situation in which states create rules among themselves that are in 'direct conflict' with another norm.¹⁸¹ Should there be a derogation from a peremptory norm, the VCLT deems that conflicting normative act to be invalid.¹⁸² On the other hand, breaches concern material acts that pertain to

¹⁷⁵ Vienna Convention on the Law of Treaties, Article 71, May. 23 1969, vol. 1155; Orakhelashvili, *supra* note 25, at 216, 282; Kadelbach, *supra* note 31, at 38.

¹⁷⁶ Kolb, *supra* note 3, at 37; Kolb *supra* note 38, at 104 Jerzy Sztucki, *Jus Cogens & Vienna Convention on the Law of Treaties* (Springer 1974), 67–68; See Weil, *supra* note 100, at 261; Krystyna Marek, "Jus cogens" en droit international, Recueil d'études de droit international en hommage à Paul Guggenheim (Faculté de droit de l'Université de Genève 1968), 441. Note Christian Tomuschat, *Reconceptualizing the Debate on Jus Cogens & Obligations Erga Omnes—Concluding Observations*, Christian Tomuschat & Jean-Marc Thouvenin (eds), *Fundamental Rules of International Legal Order: Jus Cogens & Obligations Erga Omnes* (Nijhoff 2005), 430; Vidmar, *supra* note 47, at 13.

¹⁷⁷ Hillgruber, *supra* note 33, at 270; Zemanek, *supra* note 18, at 394.

¹⁷⁸ Kolb, *supra* note 3, at 2; Orakhelashvili, *supra* note 25, at 137.

¹⁷⁹ Johnston, *supra* note 26, at 43 citing Sztucki, *supra* note 177, at 68; Karl Zemanek, *How to Identify Peremptory Norms of International Law* in Pierre-Marie Dupuy (ed), *Essays in Honour of Christian Tomuschat* (Engel 2006), 1116; Kawasaki, *supra* note 4, at 32; Kolb, *supra* note 3, at 113; Victor Rodriguez-Cedeño, *Fifth Report on the Unilateral Acts of States*, II Yearbook of the International Law Commission 93, 104 (2002).

¹⁸⁰ Robert Kolb, *Théorie du Jus Cogens International: Essai de Relecture du Concept* (Graduate Institute 2001), 91, cited in Zemanek, *supra* note 18, at 394.

¹⁸¹ Jurisdictional Immunities (2012), *supra* note 82, at 141; Helmersson, *supra* note 79, at 175.

¹⁸² Kolb, *supra* note 3, at 28; Johnston, *supra* note 26, at 46.

the non-observance or non-performance of duties imposed by norms.¹⁸³ A material act may be legal or illegal depending on whether it violates a particular rule.¹⁸⁴ However, while a state may breach a duty through a material act, it does not create a rule that constitutes a derogation.¹⁸⁵ For this reason, Kolb and Weil argue that extending the peremptory norms' nullifying effect under the VCLT to cover material acts is a logical impossibility since material acts involve no derogation.¹⁸⁶

Others, including the ILC, suggest that peremptory norms' additional effects may be derived from the importance of the interests that they safeguard.¹⁸⁷ To some extent, this echoes Ago's basis for the 'international crimes'.¹⁸⁸ These norms are deemed superior and 'carry more weight than others'.¹⁸⁹ As a 'matter of hierarchy', they apply to inferior norms in the same way that they apply to treaties to 'guarantee the integrity of the interest' they protect.¹⁹⁰ Thus, the law of state responsibility must attach graver consequences to breaches of duties imposed by peremptory norms.¹⁹¹ To not do so, some argue, risks the 'legitimation of acts offending against' peremptory norms and renders the concept devoid of 'intelligible

¹⁸³ Hakimi, *supra* note 110, at 334; Zemanek, *supra* note 18, at 393; Kolb, *supra* note 3, at 59; See Shelton, *supra* note 33, at 297.

¹⁸⁴ Kolb, *supra* note 3, at 59, 101.

¹⁸⁵ *Id.* at 28; Marek, *supra* note 88, at 441 cited in Zemanek, *supra* note 18, at 393; Séverine Knuchel, *Jus Cogens: Identification & Enforcement of Peremptory Norms* (Schulthess 2015), 180; Costelloe, *supra* note 124, at 185-186.

¹⁸⁶ Weil, *supra* note 100, at 261 cited in Orakhelashvili, *supra* note 25, at 207; Denis Alland, *Countermeasures of General Interest*, 13 Eur. J. Int. Law 1220, 1237 (2002) ('Saying that a wrongful action derogates from jus cogens or anything else has no meaning from a technical legal viewpoint'); Rozakis, *supra* note 78, at 18.

¹⁸⁷ Report on the Work of the 53rd Session, *supra* note 7, at 110-112; Orakhelashvili, *supra* note 25, at 205; Gaja, *supra* note 35, at 51. See Abi-Saab, *supra* note 145, at 339, 341; John Dugard, *Recognition & the United Nations* (Cambridge University Press 1987), 142.

¹⁸⁸ Ago, *supra* note 12, at 54.

¹⁸⁹ Ulf Linderfalk, *International Legal Hierarchy Revisited—Status of Obligations Erga Omnes*, 80 Nord. J. Int. Law 1, 9 (2011). See Trindade, *supra* note 89, at 298-309; *La Cantuta v. Peru, Judgement*, Inter-American Court of Human Rights (ser. C) No. 213, ¶¶58-60 (May 26, 2010) (separate opinion by Trindade, J.).

¹⁹⁰ Orakhelashvili, *supra* note 25, at 207.

¹⁹¹ Abi-Saab, *supra* note 145, at 339; Gaja, *supra* note 35, at 51; Spinedi, *supra* note 141, at 1110; Tladi, *supra* note 70, at 30, citing *Report on the Work of the 53rd Session*, *supra* note 7, at 56.

meaning'.¹⁹² These consequences include nullifying or invalidating a material act 'whose object is unlawful' and the effects of which are 'contrary to . . . public policy'.¹⁹³

It is recognised that the VCLT is not exhaustive as to the effects of peremptory norms.¹⁹⁴ Article 53 makes it clear that the provision applies only for the VCLT's purposes.¹⁹⁵ Thus, there may be other effects that may be attributed to peremptory norms.¹⁹⁶ Yet, it must equally be stressed that a norm's peremptory status and the importance of the interests it safeguards are not 'trump cards that can be played against all other' norms.¹⁹⁷ The importance of the interests that peremptory norms protect does not *per se* imply a 'hierarchical superiority' nor the attribution of additional consequences to these norms.¹⁹⁸ This approach, based on deduction, risks the 'over-extension of the role and purpose of the notion' of peremptory norms.¹⁹⁹

¹⁹² ORAKHELASHVILI, *supra* note 25, at 205.

¹⁹³ Suy, *supra* note 171, at 75; ORAKHELASHVILI, *supra* note 25, at 205, 213 ("Public policy is a factor which nullifies not just contract but legal acts of all kinds.").

¹⁹⁴ Tladi, *supra* note 126, at 17; Vidmar, *supra* note 47, at 2.

¹⁹⁵ Dubois, *supra* note 88, at 144, *cited in* Linderfalk, *supra* note 3, at 362.

¹⁹⁶ Tladi, *supra* note 70, at 30; KOLB, *supra* note 3, at 8.

¹⁹⁷ Vidmar, *supra* note 47, at 19; Johnston, *supra* note 26, at 46. *See* Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), Judgment, 2002 I.C.J. 3, 25–6 (Feb. 14); Jurisdictional Immunities, *supra* note 82, at 140 ("This argument depends upon the existence of a conflict between a rule, or rules, of jus cogens, and the rule of customary law which requires one state to accord immunity to another. . . [For the Court], however, no such conflict exists."); Armed Activities, *supra* note 27, at 52 ("The mere fact that. . . peremptory norms. . . are at issue in a dispute cannot in itself constitute an exception to the principle that its jurisdiction always depends on the [parties'] consent."), 88 (separate opinion by Dugard, J.) ("The scope of jus cogens is not unlimited and that the concept is not to be used as an instrument to overthrow accepted doctrines of international law."); Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro), Judgment, 2007 I.C.J. 43, 104 (Feb. 26) ("It has no power to rule on alleged breached of other [duties] of international law. . . that is so even if the alleged breaches are [duties imposed by] peremptory norms.").

¹⁹⁸ Vidmar, *supra* note 99, at 116. *See* Hillgruber, *supra* note 33, at 271; Paolo Picone, *The Distinction between Jus Cogens & Obligations Erga Omnes*, in *THE LAW OF TREATIES BEYOND THE VIENNA CONVENTION* 411, 421 (Enzo Cannizzaro ed., 2011).

¹⁹⁹ de Wet, *supra* note 136, at 99; Johnston, *supra* note 26, at 46.

This apprehension is not unfounded. As some note, the ‘effects of *jus cogens* have exploded in all directions . . . like a seminal Big Bang’.²⁰⁰ Aside from the duties of *cooperation*, *non-recognition*, and *non-assistance*, other effects, whose status remains uncertain,²⁰¹ have been attributed to peremptory norms. These include the inapplicability of jurisdictional immunities of states,²⁰² the duty to exercise diplomatic protection,²⁰³ the assumption of universal jurisdiction by municipal courts,²⁰⁴ and, as will be examined in *Part III-B*, the competence of a ‘state other than an injured state’ to invoke the responsibility.²⁰⁵ It bears stressing that these effects have often been ‘obtained by deductive reasoning’ by appealing to the ‘fundamental values at stake’.²⁰⁶ Of course, it is ‘perfectly plausible’ that peremptory norms may have these effects, given that they protect the international community’s fundamental interests.²⁰⁷ However, as in the case of the identification of peremptory norms discussed in *Part I-C*, the deductive approach is not without danger, given its subjectivity.²⁰⁸ It opens

²⁰⁰ KOLB, *supra* note 3, at 108; Kawasaki, *supra* note 4, at 28. See KNUCHEL, *supra* note 186, at 4 (“It appears as a ‘do-it-all’ kind of a norm”); Focarelli, *supra* note 4, at 440; d’Aspremont, *supra* note 6, at 94.

²⁰¹ ROBERT KOLB, *THEORY OF INTERNATIONAL LAW* 326 (2016) (“These . . . have often gone well beyond what is actually borne out by practice.”); Kawasaki, *supra* note 4, at 28 (“They seem to proliferate without borders and without order and the entropy surrounding this notion appears to be increasing.”).

²⁰² KOLB, *supra* note 3, at 108, *citing* Andrea Bianchi, *Gazing at the Crystal Ball (Again): State Immunity & Jus Cogens Beyond Germany v. Italy*, 4 J. INT’L DISPUTE SETTLEMENT 457, 457–75 (2013), and Séverine Knuchel, *State Immunity & the Promise of Jus Cogens*, 9 NW. UNIV. J. INT. HUM. RIGHTS 149, 149–83 (2011). See ORAKHELASHVILI, *supra* note 25, at 322.

²⁰³ KOLB, *supra* note 3, at 108–9, *citing* Joe Verhoeven, *Sur les “bons” et les “Mauvais” Emplois du jus cogens*, 5 ANUARIO BRASILEIRO DE DIREITO INTERNACIONAL 133, 159 (2002).

²⁰⁴ Bassiouni, *supra* note 25, at 63; ANTONIO CASSESE, *INTERNATIONAL LAW* 205–8 (2nd ed. 2005); Trindade, *supra* note 89, at 383.

²⁰⁵ *Report on the Work of the 53rd Session*, *supra* note 7, at 111; *Report on the Work of the 71st Session* *supra* note 9, at 191–2; Tladi, *supra* note 70, at 40–3. See Bassiouni, *supra* note 25, at 73; DE HOOGH, *supra* note 34, at 59; Fitzmaurice Malgosia, *Liability for Environmental Damage Caused to the Global Commons*, 5 REV. EUR. COMP. & INT’L ENV’T L. 305, 307 (1996); Sicilianos, *supra* note 155, at 1137; ORAKHELASHVILI, *supra* note 25, at 245; Proukaki, *supra* note 43, at 50.

²⁰⁶ KOLB, *supra* note 3, at 108; Focarelli, *supra* note 4, at 444–5.

²⁰⁷ Focarelli, *supra* note 4, at 442.

²⁰⁸ KOLB, *supra* note 3, at 109 (“A new effect can be ‘discovered’ in line with the apparent needs of the international society and the vision of the legal operator.”), 114 (“In a sort

the concept to ‘varying standards and agendas’, making it the ‘epicentre of an unlimited series’ of effects regardless of actual state practice and *opinio juris*.²⁰⁹

Arguably, the process of ascertaining the effects of peremptory norms beyond the VCLT arguably needs to be inductive rather than deductive. What must be shown is that states have accepted these effects, which may only be done through recourse to state practice and *opinio juris*.²¹⁰ Again, it is important to stress that such an approach does not minimise the importance of the interests that peremptory norms safeguard. Instead, it only stresses that the nature of these interests is not determinative *per se*.²¹¹ While these may motivate states to afford certain effects to peremptory norms, it is their acceptance of these effects that makes these attributes law.²¹²

In this regard, states’ responses to the effects attributed to peremptory norms under the ILC’s 2001 and 2022 Draft Conclusions suggest that *opinio juris* is divergent. Some welcomed 2001 Articles 40 and 41.²¹³

of ontogenetic process, any type of consequence could be drawn from the concept. . . as varying defined by several legal operators.”).

²⁰⁹ *Id.* at 111; Picone, *supra* note 199, at 421.

²¹⁰ KOLB, *supra* note 3, at 113, *citing* Focarelli, *supra* note 4, at 439. See Fernando L. Bordin, *Reflection of Customary International Law: Authority of Codifications & ILC Draft Articles*, 63 INT’L & COMP. LAW Q. 535, 547 (2014).

²¹¹ See Hillgruber, *supra* note 33, at 271; DE HOOGH, *supra* note 34, at 39.

²¹² KOLB, *supra* note 3, at 110, 113.

²¹³ See Int’l Law Comm’n, Rep. on the Work of Its Fifty-Second Session, U.N. Doc. A/CN.4/513, at 20, 22–4 (2001); Int’l Law Comm’n, *supra* note 159, at 65 (Argentina, Austria, & Nordic Countries), 65 (Netherlands, Poland, & Slovakia), 66 (Spain), 67 (Austria), 69 (South Korea); U.N. GAOR, 56th Sess., Summary record of the 11th mtg. at 5 (Finland on behalf of Nordic countries), 7 (New Zealand), 9 (Belgium), U.N. Doc. A/C.6/56/SR.11 (Oct. 29, 2001); U.N. GAOR, 56th Sess., Summary record of the 12th mtg. at 4 (South Africa), 5 (Netherlands), 7 (Bahrain), 11 (Germany), U.N. Doc. A/C.6/56/SR.12 (Oct. 31, 2001); U.N. GAOR, 56th Sess., Summary record of the 13th mtg. at 4 (Italy), 5 (Mali), 7 (Poland), U.N. Doc. A/C.6/56/SR.13 (Oct. 31, 2001); U.N. GAOR, 56th Sess., Summary record of the 14th mtg. at 2 (Sierra Leone), 4 (Greece), 6 (India), 8 (Russia), 9 (Mongolia), 10 (Portugal), U.N. Doc. A/C.6/56/SR.14 (Nov. 1, 2001); U.N. GAOR, 56th Sess., Summary record of the 15th mtg. at 2 (Chile), 3 (Hungary), 4–5 (Jordan), 5 (Thailand), 8 (Argentina), 9 (Ireland), U.N. Doc. A/C.6/56/SR.15 (Nov. 1, 2001); U.N. GAOR, 56th Sess., Summary record of the 16th mtg. at 4 (Slovakia), U.N. Doc. A/C.6/56/SR.16 (Nov. 2, 2001).

Several agreed with the view, espoused by some authors,²¹⁴ that these reflected custom.²¹⁵ Yet, others criticised 2001 Articles 40 and 41,²¹⁶ or the view that these are customary.²¹⁷ The same is true for 2022 Draft Conclusion 19. While some supported the claim that the duties of *cooperation*, *non-assistance*, and *non-recognition* are customary,²¹⁸ others did not.²¹⁹ One state

²¹⁴ See for example Abi-Saab, *supra* note 145, at 55; Andrea Gattini, *A Return Ticket to "Communitarisme", Please*, 13 EUR. J. INT'L L. 1181, 1188–92 (2002). *Contra* Mark Toufayan, *A Return to Communitarianism? Reacting to 'Serious Breaches of Obligations Arising Under Peremptory Norms of General International Law' Under the Law of State Responsibility and United Nations Law*, 42 CAN. Y.B. INT'L L. 197, 207 (2004) ("This we are told, is consisted with state practice despite its admittedly parse and embryonic nature.").

²¹⁵ See Int'l Law Comm'n, *supra* note 159, at 66 (Spain); U.N. GAOR, 56th Sess., Summary record of the 11th mtg., *supra* note 214, at 6 (Morocco); U.N. GAOR, 56th Sess., Summary record of the 15th mtg., *supra* note 214, at 8 (Argentina).

²¹⁶ See Int'l Law Comm'n, *supra* note 159, at 64 (France), 65 (Mexico & Netherlands), 66 (UK), 67 (China & Japan), 69–70 (US); U.N. GAOR, 56th Sess., Summary record of the 13th mtg., *supra* note 214, at 5 (Israel).

²¹⁷ See Int'l Law Comm'n, *supra* note 159, at 65 (Mexico), 66 (UK), 68 (Japan), 69 (South Korea), 71 (US); U.N. GAOR, 56th Sess., Summary record of the 13th mtg., *supra* note 214, at 5 (Israel); U.N. GAOR, 56th Sess., Summary record of the 14th mtg., *supra* note 214, at 3 (Mexico), 11 (US).

²¹⁸ See Tladi, *supra* note 25, at 5; U.N. GAOR, 73rd Sess., Summary record of the 25th mtg. at 6 (Cyprus), U.N. Doc. A/C.6/73/SR.25 (Oct. 26, 2018); U.N. GAOR, 73rd Sess., Summary record of the 27th mtg. at 18 (Iran), U.N. Doc. A/C.6/73/SR.27 (Oct. 30, 2018); U.N. GAOR, 74th Sess., Summary record of the 23rd mtg. at 13 (Nicaragua), U.N. Doc. A/C.6/74/SR.23 (Oct. 28, 2019); U.N. GAOR, 74th Sess., Summary record of the 24th mtg. at 11 (Italy: "They were simply a restatement of the normative elements that were already part of the law. . . of state responsibility."), 19 (Micronesia), U.N. Doc. A/C.6/74/SR.24 (Oct. 29, 2019); U.N. GAOR, 74th Sess., Summary record of the 25th mtg. at 4 (Cuba), U.N. Doc. A/C.6/74/SR.25 (Oct. 30, 2019); U.N. GAOR, 74th Sess., Summary record of the 26th mtg. at 3–4 (Spain), 5 (Togo), U.N. Doc. A/C.6/74/SR.26 (Oct. 31, 2019); U.N. GAOR, 74th Sess., Summary record of the 27th mtg. at 8 (South Africa), U.N. Doc. A/C.6/74/SR.27 (Oct. 31, 2019); Dire Tladi (Special Rapporteur on Peremptory Norms of General International Law), *Fifth Rep. on Peremptory Norms*, at 55 (Cyprus, Nicaragua, & Cuba), U.N. Doc. A/CN.4/747 (Jan. 24, 2022); Int'l Law Comm'n, *supra* note 78, at 85 (Cyprus), 86 (Italy), 87 (Netherlands), 88 (Spain).

²¹⁹ See U.N. GAOR, 73rd Sess., Summary record of the 27th mtg., *supra* note 219, at 10 (Israel: "Draft conclusions 20 [Duty to cooperate] and 21 [Duty not to recognise or render assistance], which were largely based on the [2001 Articles], which themselves did not reflect customary. . . law."); U.N. GAOR, 74th Sess., Summary record of the 23rd mtg., *supra* note 219, at 20 (Poland: "[R]equired further consideration."); U.N. GAOR, 74th Sess., Summary record of the 24th mtg., *supra* note 219, at 4 (Israel); Tladi, *supra* note

further commented that the Commission's work was 'not grounded on legal authority' but 'reflected an effort to imagine, through deductive reasoning, ways in which certain principles could apply in hypothetical circumstances'.²²⁰ Another stressed that the 'determination of the . . . consequences of *jus cogens* 'must be based on the relevant provisions of the [VCLT] and supported by adequate state practice'.²²¹ One further reminded the ILC to 'stay true to the Westphalian principle. . . that law was one made by states'.²²²

219, at 55 (Israel, UK, & US), 56 (Japan); Int'l Law Comm'n, *supra* note 78, at 8 (France: "It must be admitted that the manner in which *jus cogens*. . . reflects a development of the concept that goes beyond what was envisaged in [the] [VCLT]."), 84 (Australia: "Requests that the commentaries identify further practice and *opinio juris*."), 86 (Israel: "The commentary [should] make it clear that it does not reflect existing law."), 87 (Japan: "Practice after the adoption of the [2001 Articles] should be examined with a view to ascertaining whether Draft Article 41 has been accepted by states."), 88 (Russia), 89 (UK: "[E]ncourages the [ILC] to acknowledge the unsettled status of the draft conclusions." and US: "The supposed [duties] do not reflect customary international law.").

²²⁰ U.N. GAOR, 73th Sess., Summary record of the 29th mtg. at 6 (US), U.N. Doc. A/C.6/73/SR.29 (Oct. 31, 2018).

²²¹ Helmut 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 ILC, in PEREMPTORY NORMS OF GENERAL INTERNATIONAL LAW (JUS COGENS)*, *supra* note 32, at 241, *citing* U.N. GAOR, 73rd Sess., Summary record of the 25th mtg., *supra* note 219, at 3 (China). *See* U.N. GAOR, 73rd Sess., Summary record of the 26th mtg. at 4 (Slovakia: "[N]oted with concern that several of the draft conclusions on the topic. . . were based merely on doctrinal opinions rather than state practice."), 14 (New Zealand: "The [ILC] should continue to take a cautious and balanced approach to its work on the subject."), 15 (Romania: "The [ILC's approach] must be based on state practice, rather than on doctrinal approaches."), U.N. Doc. A/C.6/73/SR.26 (Oct. 26, 2018); U.N. GAOR, 73rd Sess., Summary record of the 27th mtg., *supra* note 219, at 10 (Israel); U.N. GAOR, 74th Sess., Summary record of the 23rd mtg., *supra* note 219, at 9 (Nordic Countries: "Considering the relatively limited and varying practice. . . caution was called for."), 15 (Slovakia: "A rushed outcome, with scant regard for the divergent views of states, was unlikely to lead to success."), 18 (UK: "The [ILC] had adopted [an] expansive and theoretical approach, which had resulted in a set of draft conclusions that covered a diverse range of sensitive issues and that did not, in all respects, reflect current law or practice.").

²²² Aust, *supra* note 222, at 241, *citing* U.N. GAOR, 74th Sess., Summary record of the 27th mtg., *supra* note 219, at 9 (Cameroon). *See* U.N. GAOR, 74th Sess., Summary record of the 24th mtg., *supra* note 219, at 4, 6 (Israel); U.N. GAOR, 74th Sess., Summary record of the 26th mtg., *supra* note 219, at 10 (Turkey).

The states' objections to the ILC's findings are not without merit. Arguably, the instances of practice cited by the Commission to support its conclusions may be attributed on grounds other than states' recognition of these duties' legal status. For instance, as to the duty of non-recognition, the ILC suggested that this has been accepted as evinced by the practices and views of states in instances such as the actions of South Africa in Namibia (1948–91) and Israel's conduct in the Occupied Palestinian Territories (1967–).²²³ It also claimed that the *Namibia* and *Wall* advisory opinions support this view.²²⁴ In *Namibia*, the ICJ stated that states were duty-bound not to 'recognise the illegality and invalidity of South Africa's continued presence in Namibia' and had 'to refrain from lending any support or any form of assistance to South Africa with reference to its occupation of Namibia'.²²⁵ Likewise, the Court made similar statements in the *Wall* advisory opinion 'given the character and the importance of the rights and duties involved'.²²⁶

However, as some authors and states pointed out, the ILC's conclusion is doubtful considering that the states' actions in the cited instances were due to SC resolutions urging states not to recognise the wrongful acts' effects.²²⁷ Indeed, this was the ICJ's rationale in *Namibia* when it noted that the SC resolutions on Namibia were 'adopted in conformity with the . . . Charter' such that UN member states are duty-bound 'to accept

²²³ Tladi, *supra* note 70, at 38–40; U.N. GAOR, *supra* note 9, at 197–8; Tladi, *Fifth Rep. on Peremptory Norms*, *supra* note 219, at 55.

²²⁴ Tladi, *supra* note 70, at 34–40, citing *Namibia*, *supra* note 149, at 54–5; *Wall*, *supra* note 149, at 200.

²²⁵ *Namibia*, *supra* note 149, at 54–5.

²²⁶ *Wall*, *supra* note 149, at 200.

²²⁷ See S.C. Res. 276 (Jan. 30, 1970); S.C. Res. 298 (Sept. 25, 1971); S.C. Res. 446 (Mar. 22, 1979); S.C. Res. 478 (Aug. 20, 1980). See also Anne Bird, *Third State Responsibility for Human Rights Violations*, 21 EUR. J. INT'L L. 883, 886, 888 (2010) ('[SC] resolutions all contained the duty of collective non-recognition.');

Martin Dawidowicz, *Obligation of Non-Recognition of an Unlawful Situation*, in THE LAW OF INTERNATIONAL RESPONSIBILITY 683 (James Crawford et al. eds, 2010); KOLB, *supra* note 3, at 112. Note Crawford, *supra* note 14, at 465 ('At a more general level, the [duty] of non-recognition of legality is peripheral to any issue of criminality.').

and carry them out'.²²⁸ The same may be said about the *Wall* opinion. While it is true that the Court considered the 'importance of the duties . . . involved',²²⁹ it also recognised the SC resolutions that deemed all Israel acts relating to the Occupied Palestinian Territories as invalid.²³⁰ Furthermore, as to the duty of non-assistance, aside from questions whether it finds support in practice,²³¹ some have also questioned whether it is a distinct duty or whether it is simply a logical consequence of the fact that states also incur responsibility for aiding and assisting breaches of international law duties.²³² Finally, as to the duty to cooperate, the Commission concluded that this has 'become recognised under international law',²³³ to which some states concurred.²³⁴ Yet, others criticised this finding, citing the absence of practice.²³⁵ Arguably, the criticism is well-founded. As one author suggests,

²²⁸ Namibia *supra* note 149, at 53, *citing* S.C. Res. 264 (Mar. 20, 1969); S.C. Res. 269 (Aug. 12, 1969); S.C. Res. 276, *supra* note 228; Wall, *supra* note 149, at 216 (separate opinion by Higgins, J.).

²²⁹ Wall, *supra* note 149, at 200.

²³⁰ See S.C. Res. 276, *supra* note 228; S.C. Res., *supra* note 228. Note Wall, *supra* note 149, at 232 ("The duty not to recognise amounts, therefore, in my view to [a duty] without real substance.") (separate opinion by Kooijmans, J.).

²³¹ Bird, *supra* note 228, at 889 ("This [duty] does not reflect [positive] law, and state practice can be found which does not comply with this [duty]."); Stefan Talmon, *The Duty Not to 'Recognize as Lawful' a Situation Created by the Illegal Use of Force or Other Serious Breaches of a Jus Cogens Obligation: An Obligation Without Real Substance?*, in THE FUNDAMENTAL RULES OF THE INTERNATIONAL LEGAL ORDER 99, 106 (Christian Tomuschat & Jean-Marc Thouvenin eds., 2006); Int'l Law Comm'n, *supra* note 78, at 86 (Israel), 86 (Japan), 87 (The Netherlands), 89 (UK), 90 (US).

²³² Aust, *supra* note 222, at 251.

²³³ U.N. GAOR, 73rd Sess., Report of the International Law Commission. *supra* note 169, at 76.

²³⁴ U.N. GAOR, *supra* note 9, at 194. See U.N. GAOR, 73rd Sess., Summary record of the 26th mtg., *supra* note 222, at 16 (Portugal); U.N. GAOR, 74th Sess., Summary record of the 24th mtg., *supra* note 219, at 19 (Micronesia); U.N. GAOR, 74th Sess., Summary record of the 26th mtg., *supra* note 219, at 5 (Togo); Int'l Law Comm'n, *supra* note 78, at 87 (Netherlands); Tladi, *Fifth Rep. on Peremptory Norms*, *supra* note 219, at 55 (Cyprus, Nicaragua, & Cuba).

²³⁵ Tladi, *Fifth Rep. on Peremptory Norms*, *supra* note 219, at 85. See Wall, *supra* note 149, at 233–4 (separate opinion by Kooijmans, J.); Int'l Law Comm'n, *supra* note 78, at 85 (Israel: "The [ILC] has itself acknowledged in the Commentary [to the 2001 Articles] that '[i]t may be open to question whether general international law at present prescribes a positive duty of cooperation. . . in that respect [such duty] may reflect the progressive development of international law'. . . This remains true today."), 87 (Japan), 89 (UK), 89

while the duty is ‘gaining legal traction’, it ‘remains almost entirely aspirational’.²³⁶ Furthermore, it is also yet to be determined if the duty to cooperate is a distinct duty or simply a logical consequence of the conduct’s illegality. As Judge Higgins noted, the ‘binding determination made by the SC’ that an act is ‘illegal cannot remain without consequence’.²³⁷ This entails a ‘legal consequence [for states], namely that of putting an end to an illegal situation’.²³⁸

III. Duties Owed *Erga Omnes* & the Competence of ‘States Other than an Injured State’

The second effect pertains to duties owed *erga omnes*. The ICJ, in a *dictum* in its 1970 *Barcelona Traction* decision, distinguished between norms that impose duties owed *inter se* or by states ‘*vis-à-vis* another state’ and those owed *erga omnes* or to the ‘international community as a whole’.²³⁹ The latter spans duties derived from collective norms such as those that outlaw ‘acts of aggression and . . . genocide’ along with ‘rules concerning the basic rights of the human person’ including ‘slavery and racial discrimination’.²⁴⁰ According to the Court, these norms, ‘by their very nature. . . are the concern of all states’. Thus, ‘in view of the importance of the rights involved’, all states ‘have a legal interest in their protection’ and impose duties owed *erga omnes*.²⁴¹ This suggests that states, even in the absence of direct effect, have the capacity to implement responsibility for breaches of these duties.²⁴²

A. Development of Duties Owed *Erga Omnes*

(US: “There is neither a relevant rule of customary international law nor express agreement of states to accept such [a duty].”).

²³⁶ Hakimi, *supra* note 110, at 335.

²³⁷ Namibia, *supra* note 149, at 53.

²³⁸ Wall, *supra* note 149, at 216 (separate opinion by Higgins, J.), *citing* Haya de la Torre (Colom. v. Peru), Judgment, 1951 I.C.J. 71, 82 (June 13).

²³⁹ Barcelona Traction, Light and Power Company, Limited (Belg. v. Spain), Judgment, 1970 I.C.J. 3, ¶33 (Feb. 5).

²⁴⁰ *Id.* at ¶¶ 34, 91.

²⁴¹ *Id.* at ¶ 33.

²⁴² JAMES CRAWFORD, STATE RESPONSIBILITY: GENERAL PART 66 (2013); Crawford, *supra* note 14, at 425. See Christian J. Tams & Antonios Tzanakopoulos, *Barcelona Traction at 40: The ICJ as an Agent of Legal Development*, 23 LEIDEN J. INT’L L. 781, 792 (2010).

The *dictum* in *Barcelona Traction* was not the first attempt to endow states with the general competence to implement responsibility.²⁴³ Early writers had already advocated for this.²⁴⁴ Grotius submitted that states may implement another's responsibility 'not only on account of [harm] committed against themselves or their subjects' but also for injuries that 'do not directly affect them but excessively violate the laws of nature or nations'.²⁴⁵ While other scholars of the time, such as Vattel, disagreed with this assertion,²⁴⁶ later writers like Heffter and Bluntschli supported Grotius' claim and postulated that serious breaches of duties that affect all states should permit every state to redress the wrong.²⁴⁷ This view gained further traction with authors such as Hall, Root, Jessup, and Hersch Lauterpacht.²⁴⁸

²⁴³ RAGAZZI, *supra* note 78, at 17; Marthe Bradley, *Jus Cogens' Preferred Sister: Obligations Erga Omnes and the International Court of Justice – Fifty Years after the Barcelona Traction Case*, in PEREMPTORY NORMS OF GENERAL INTERNATIONAL LAW (*JUS COGENS*), *supra* note 32, at 194. See Alfred Rubin, *Actio Popularis, Jus Cogens, & Erga Omnes?*, 35 N. ENG. L. REV. 265, 278 (2001).

²⁴⁴ RAGAZZI, *supra* note 78, at 17–18; CHRISTIAN J. TAMS, ENFORCING OBLIGATIONS ERGA OMNES IN INTERNATIONAL LAW 48–49 (2005); VILLALPANDO, *supra* note 88, at 137–40.

²⁴⁵ Dupuy, *supra* note 47, at 1066, *citing* GROTIUS, *supra* note 41, at 504–6; VOEFFRAY, *supra* note 159, at 215.

²⁴⁶ Georg Nolte, *From Dionisio Anzilotti to Roberto Ago: The Classical International Law of State Responsibility and the Traditional Primacy of a Bilateral Conception of Inter-state Relations*, 13 EUR. J. INT'L L. 1083, 1085 (2002), *citing* 1 EMER DE VATTEL, LE DROIT DES GENS, OU PRINCIPES DE LA LOI NATURELLE, APPLIQUÉS À LA CONDUITE ET AUX AFFAIRES DES NATIONS ET DES SOUVERAINS ¶ 348 (n.p., 1758). *But see* CORNELIUS VAN BYNKERSHOEK, DE FORO LEGATORUM LIBER SINGULARIS 554 (n.p., 1744).

²⁴⁷ AUGUST WILHELM HEFFTER, DAS EUROPÄISCHE VÖLKERRECHT DER GEGENWART 222 (Berlin, 1882), *cited in* Frowein, *supra* note 37, at 40; JOHANN CASPAR BLUNTSCHLI, DAS MODERNE VÖLKERRECHT DER CIVILISIRTEN STATEN 265 (Nördlingen, Beck 1878), *cited in* Proukaki, *supra* note 43, at 60. *Contra* GEORG FRIEDRICH VON MARTENS, EINLEITUNG IN DAS POSITIVE EUROPÄISCHE VÖLKERRECHT 295 (Göttingen, Dieterich 1796).

²⁴⁸ See WILLIAM EDWARD HALL, TREATISE OF INTERNATIONAL LAW 57 (Oxford, Clarendon 1895) ("When a state grossly and patently violates [a duty of] international law . . . of serious importance, it is competent to any state, or to the body of states, to hinder the wrongdoing for being accomplished, or to punish the wrongdoer."); PHILIP C. JESSUP, A MODERN LAW OF NATIONS 11 (1948), *citing* Elihu Root, *The Outlook for International Law*, 10 AM. J. INT'L L. 1, 9 (1916) ("Violations of the law of such a character as to threaten the peace and order of the community of nations must be deemed to be a violation of the right of every civilised nation to have the law maintained and a legal injury to every nation."); 1 LASSA F. L. OPPENHEIM, INTERNATIONAL LAW: A TREATISE 308 (Hersch Lauterpacht ed., 1937) ("If a state . . . violates such [duties] of the Law of Nations as are

But again, scholars like Anziliotti and Strupp disagreed, suggesting that responsibility may only be implemented by the states whose rights had been infringed.²⁴⁹

Courts also recognised this prerogative before *Barcelona Traction*. The Permanent Court of International Justice's ('PCIJ') 1923 *Wimbledon* case involved a claim from the UK, France, Italy, and Japan against Germany for breach of duties under the Treaty of Versailles. While Japan and Italy were not directly affected, the PCIJ deemed the claims admissible as 'each of the [applicants] has a clear interest in the execution of [Article 386 of the Treaty of Versailles]'.²⁵⁰ Likewise, the European Commission of Human Rights ('ECmHR') recognised states' general competence to bring claims against other states under the European Convention on Human Rights ('ECHR'). In the 1961 *Pfunders* and 1969 *Greek* cases, it held that while the applicant states were not directly affected, their claims were admissible as the parties' 'purpose. . . in concluding the [ECHR] was not to concede to each other reciprocal rights and [duties]. . . but to establish a common public order'.²⁵¹ Finally, there were the *Southwest Africa* cases brought before the ICJ by Liberia and Ethiopia against South Africa for the breach of its duties under the 1920 Mandate Agreement. In its 1962 judgement on preliminary objections, the Court deemed the claim admissible as the Agreement's Article 7(2) granted the League of Nations' members a 'legal right or interest' in South Africa's observance of its duties 'towards the inhabitants of the

universally recognised by custom or are laid down in law-making treaties, other states have a right to intervene and to make the delinquent submit to the rules concerned."). Note Amos J. Peaslee, *The Sanction of International Law*, 10 AM. J. INT'L L. 328, 335–6 (1916); CLYDE EAGLETON, *THE RESPONSIBILITY OF STATES IN INTERNATIONAL LAW* 226 (1928).

²⁴⁹ See Nolte, *supra* note 247, at 1084–5 citing DIONISIO ANZILOTTI, *TEORIA GENERALE DELLA RESPONSABILITÀ DELLO STATO NEL DIRITTO INTERNAZIONALE* 88 (Florence Lumachi ed., 1902); HENRY HALLECK, *INTERNATIONAL LAW* 309, 1089 (New Jersey, D. Van Nostrand 1861), citing KARL STRUPP, *DAS VÖLKERRECHTLICHE DELIKT* 16 (1920); KARL STRUPP, *DIE VÖLKERRECHTLICHE HAFTUNG DES STAATES* 8 (1927). See also 2 CHARLES DE VISSCHER, *LA RESPONSABILITÉ DES ÉTATS* 116–9 (1924); FRANZ VON LISZT, *DAS VÖLKERRECHT* 280, 287 (Max Fleischmann ed., 1925).

²⁵⁰ *S.S. Wimbledon* (U.K. et al v. Ger.), Judgment, 1923 P.C.I.J. (ser A.) No. 1, at 20 (Aug. 17).

²⁵¹ *Austria v. It.*, App. No. 788/60, 1961 Y.B. Eur. Conv. on H.R. 138 (Eur. Comm'n on H.R.); *Den. et al. v. Greece*, App. Nos. 3321/67, 3322/67, 3323/67, 3344/67, 1969 Y.B. Eur. Conv. on H.R. _ (Eur. Comm'n on H.R.).

Mandated Territory' and the 'League . . . and its members'.²⁵² Yet, the Court, after a change in its composition, reversed this stance in 1966 and held that the Mandate system did not give rise to rights and duties outside the system as a whole.²⁵³ Thus, while League members had an interest in the observance of the duties under the Mandate system, it was the UN's appropriate organs that possessed the competence to implement the wrongful state's responsibility and not individual states.²⁵⁴ Unsurprisingly, the reversal was negatively received.²⁵⁵ For this reason, the *dictum* in *Barcelona Traction* has often been viewed as an effort from the Court to 'right a wrong.'²⁵⁶

It bears stressing that the opinions of tribunals and scholars discussed above do not necessarily reflect law as acknowledged and practised by states. Neither did the ICJ in *Barcelona Traction* explicitly rule that states, in the absence of direct effect, may implement responsibility for

²⁵² Southwest Africa (Eth. & Liber. v. S. Afr.), Preliminary Objections, 1962 I.C.J. 319, 343 (March 1). *But see* 455 (dissenting opinion by Winiarski, J.) ("Article 7 cannot be interpreted in such a way as to conflict with the general rule of procedure according to which the applicant state must have the capacity to institute proceedings."); 550–2 (dissenting opinions by Spender & Fitzmaurice, J.); 569 (dissenting opinion by Morelli, J.).

²⁵³ Southwest Africa (Eth. & Liber. v. S. Afr.), Judgment, 1966 I.C.J. 6, 47 (Jul. 18) ("[The claim of the applicants] amounts to a plea that the Court should allow the equivalent of an *actio popularis* or [the prerogative of any state] to . . . vindicate . . . public interest. But although a right of this kind may be known to certain municipal systems of law, it is not known to international law as it stands at present.").

²⁵⁴ *Id.* *See id.* at 67 (separate opinion by Van Wyk, J.). *But see id.* at 60 (separate opinion by Morelli, J.); 219 (dissenting opinion by Koo, J.); 246 (dissenting opinion by Korestky, J.), 246; 254 (dissenting opinion by Tanaka, J.); 325 (dissenting opinion by Jessup, J.); 491 (dissenting opinion by Mbanefo, J.).

²⁵⁵ TAMS, *supra* note 245, at 65; Claudia Annacker, *The Legal Regime of "Erga Omnes" Obligations in International Law*, 46 AUSTRIAN J. PUB. INT'L. L. 131, 133 (1994); D.N. Hutchinson, *Solidarity & Breaches of Multilateral Treaties*, 59 BRIT. Y.B. INT'L. L. 151, 174 (1988); Ingo Venzke, *Public Interests in the International Court of Justice—A Comparison Between Nuclear Arms Race (2016) & South West Africa (1966)*, 111 AM. J. INT'L L. (UNBOUND) 68, 68 (2017).

²⁵⁶ Legal Consequences of the Separation of the Chagos Archipelago, Advisory Opinion, 2019 I.C.J. 95, 310 (Feb. 29) (separate opinion by Robinson, J.), *citing* Crawford, *supra* note 14, at 410, 423; Application of the Genocide Convention (Gam. v. Myan.), Preliminary Objections, 2022 I.C.J. 474, 520 (July 22) (dissenting opinion by Xue, J.).

breaches of duties owed *erga omnes*.²⁵⁷ Since that decision, the Court, despite ample opportunities, has abstained from discussing its effects.²⁵⁸ Only recently did it clarify what has been asserted in literature in its 2012 *Obligation to Prosecute and Extradite* judgment,²⁵⁹ and in its 2022 *Application of the Genocide Convention* decision on preliminary objections.²⁶⁰ For the Court, albeit dealing only with duties owed *erga omnes partes*, states have the competence, although not directly affected by the breach, to implement responsibility for breaches of duties arising from certain collective norms.²⁶¹

This view is in accord with the conclusions of the ILC in its 2001 Articles, discussed below, which at the time the Commission deemed as ‘progressive measures’.²⁶² Following extensive discussions, the ILC decided to abandon the definition of ‘injured states’ solely based on the infringement of rights and precluding the reactions from states only affected in their legal interests (1996 Draft Article 40) which was based on a synallagmatic view of legal relations that insisted on the ‘exact correlation’ between the duty of one state and the subjective right of another.²⁶³ Instead, the ILC adopted 2001 Articles 42 and 48 that distinguished between ‘injured

²⁵⁷ Frowein, *supra* note 37, at 406; André Nollkaemper, *International Adjudication of Global Public Goods: Substance and Procedure*, 23 EUR. J. INT’L L. 769, 784 (2012); TAMS, *supra* note 245, at 162; Annacker, *supra* note 256, at 133. See *Nuclear Tests (Austl. v. Fr.)*, Judgment, 1974 I.C.J. 253, 387 (Dec. 20) (dissenting opinion by de Castro, J.) (“These remarks. . . should be taken cum grano sali.”); *Application of the Genocide Convention (Gam. v. Myan.)*, *supra* note 257, ¶ 10 (dissenting opinion by Xue, J.).

²⁵⁸ See for example *Nuclear Tests*, *supra* note 258; *East Timor (Port. v. Austl.)*, Judgment, 1995 I.C.J. 90 (June 30); *Whaling in the Antarctic (Austl. v. Japan, N.Z. intervening)*, Judgment, 2014 I.C.J. 226 (Mar. 31). Note GLEIDER HERNANDEZ, *THE INTERNATIONAL COURT OF JUSTICE AND THE JUDICIAL FUNCTION* 214 (2014) (“The Court’s. . . judgments. . . are characterised by their careful avoidance of explicit reliance upon community norms.”).

²⁵⁹ *Obligation to Prosecute or Extradite*, *supra* note 28, at 460.

²⁶⁰ *Application of the Genocide Convention*, *supra* note 257, at 508, 510. See *Application of the Torture Convention (Can. & Neth. v. Syria)*, Provisional Measures, 2023 I.C.J. 584, 605–6 (Nov. 16); *Application of the Genocide Convention in Gaza (S. Afr. v. Isr.)*, Provisional Measures, 2024 I.C.J. 1, 12 (May 24).

²⁶¹ *Obligation to Prosecute or Extradite*, *supra* note 28, at 460; *Application of the Genocide Convention (Gam. v. Myan.)*, Provisional Measures, 2020 I.C.J. 1, 17 (Jan. 23); *Application of the Genocide Convention*, *supra* note 257, at 508–10.

²⁶² *Report on the Work of the 53rd Session*, *supra* note 7, at 117, 126–7.

²⁶³ Ago, *supra* note 142, at 192; Riphagen, *supra* note 148, at 38; Arangio-Ruiz, *supra* note 154, at 44.

states' and 'states other than an injured state'. The former pertains to states whose rights had been infringed or directly affected by the wrongful act.²⁶⁴ The latter refers to those who have not been 'injured' by a breach of a duty but nevertheless possess an 'interest' in the performance or observance of the duties imposed by international norms.²⁶⁵ These duties may be owed to a 'group of states' and 'established for the protection of the collective interest of the group' or the 'international community as a whole'.²⁶⁶

It is worth noting that this split between 'injured states' and 'states other than an injured state' received varied reactions from states. Some 'welcomed' it 'as a major improvement' that acknowledged the 'diversity of international [duties], notably [duties] owed *erga omnes*',²⁶⁷ and distinguished between the 'directly affected' and 'indirectly affected' states.²⁶⁸ Other states sought clarification as to the concepts of 'collective

²⁶⁴ I.L.C., *Report on the Work of the 53rd Session* (n _), 88–95, 95–107, 128–37 (2001).

²⁶⁵ *Id.* at 127.

²⁶⁶ Crawford, *supra* note 11, at 34.

²⁶⁷ Int'l Law Comm'n, Rep. on the Work of Its Fifty-Second Session, *supra* note 214, at 9, 25. See U.N. GAOR, 55th Sess., Summary record of the 16th mtg. at 2 (New Zealand), 5 (Egypt), 7 (Australia), U.N. Doc. A/C.6/55/SR.16 (Oct. 25, 2000); U.N. GAOR, 55th Sess., Summary record of the 17th mtg. at 13 (Austria), U.N. Doc. A/C.6/55/SR.17 (Oct. 27, 2000); U.N. GAOR, 55th Sess., Summary record of the 20th mtg. at 5 (Mexico), U.N. Doc. A/C.6/55/SR.20 (Oct. 31, 2000); Int'l Law Comm'n, *supra* note 159, at 73 (Mexico), 75 (South Korea, & Slovakia), 76 (US), 79 (Austria), 80 (Denmark); U.N. GAOR, 56th Sess., Summary record of the 11th mtg., *supra* note 214, at 5 (Finland), 8 (New Zealand), 9 (Belgium); U.N. GAOR, 56th Sess., Summary record of the 12th mtg., *supra* note 214, at 9 (Australia); U.N. GAOR, 56th Sess., Summary record of the 13th mtg., *supra* note 214, at 10 (Cyprus); U.N. GAOR, 56th Sess., Summary record of the 14th mtg., *supra* note 214, at 5 (Greece), 9 (Mongolia); U.N. GAOR, 56th Sess., Summary record of the 15th mtg., *supra* note 214, at 4 (Hungary & Jordan), 6 (Venezuela).

²⁶⁸ Int'l Law Comm'n, Rep. on the Work of Its Fifty-Second Session, *supra* note 214, at 9, 25. See U.N. GAOR, 55th Sess., Summary record of the 14th mtg. at 11 (Japan), U.N. Doc. A/C.6/55/SR.14 (Oct. 23, 2000); U.N. GAOR, 55th Sess., Summary record of the 15th mtg. at 10 (Argentina), U.N. Doc. A/C.6/55/SR.15 (Oct. 24, 2000); U.N. GAOR, 55th Sess., Summary record of the 16th mtg., *supra* note 268, at 2 (New Zealand), 4 (Italy); U.N. GAOR, 55th Sess., Summary record of the 18th mtg. at 7 (Cyprus), 13 (US), U.N. Doc. A/C.6/55/SR.18 (Oct. 27, 2000); Int'l Law Comm'n, *supra* note 159, at 45 (US), 75 (UK), 79 (Argentina), 81 (UK); U.N. GAOR, 56th Sess., Summary record of the 12th mtg., *supra* note 214, at 4 (South Africa), 7 (Bahrain); U.N. GAOR, 56th Sess., Summary record of the 14th mtg., *supra* note 214, at 7 (India), 8 (Russia); U.N. GAOR, 56th Sess., Summary record

interests' and duties owed to the 'international community as a whole'.²⁶⁹ A few also asked if the provisions reflected state practice.²⁷⁰ Still, some criticised the change. Several maintained that the concept of an 'injured state' under the 1996 Draft Article 40, based on the infringement of rights, was 'clearer and more direct' even for collective norms.²⁷¹ A few questioned the existence of a community capable of possessing rights.²⁷² Finally, some states, perhaps mindful of the risks,²⁷³ questioned the competence of states to implement responsibility without direct effect.²⁷⁴

Arguably, the ILC had linked the concept of invocation of responsibility to measures of a formal character such as the 'raising or presentation of a claim against another state or the commencement of proceedings before . . . tribunals'.²⁷⁵ Yet, it has also recognised the role of

of the 15th mtg., *supra* note 214, at 7 (Argentina), 8 (Croatia), 9 (Ireland); U.N. GAOR, 56th Sess., Summary record of the 16th mtg., *supra* note 214, at 6 (Guatemala).

²⁶⁹ See U.N. GAOR, 55th Sess., Summary record of the 18th mtg., *supra* note 269, at 4 (Jordan); U.N. GAOR, 55th Sess., Summary record of the 19th mtg., at 12 (South Korea), U.N. Doc. A/C.6/55/SR.19 (Oct. 30, 2000); Int'l Law Comm'n, *supra* note 159, at 81 (Argentina); U.N. GAOR, 56th Sess., Summary record of the 14th mtg., *supra* note 214, at 3 (Mexico).

²⁷⁰ See Int'l Law Comm'n, *supra* note 159, at 73 (Mexico); U.N. GAOR, 56th Sess., Summary record of the 12th mtg., *supra* note 214, at 3 (Belarus); U.N. GAOR, 56th Sess., Summary record of the 14th mtg., *supra* note 214, at 9 (Cameroon). See also Int'l Law Comm'n, *supra* note 78, at 82 (US).

²⁷¹ Int'l Law Comm'n, Rep. on the Work of Its Fifty-Second Session, *supra* note 214, at 25. See U.N. GAOR, 55th Sess., Summary record of the 15th mtg., *supra* note 269, at 3 (France), 8 (Netherlands), 14 (Greece); Int'l Law Comm'n, *supra* note 159, at 74 (France), 75 (Netherlands), 76, 80 (Japan); U.N. GAOR, 56th Sess., Summary record of the 12th mtg., *supra* note 214, at 2 (Japan).

²⁷² U.N. GAOR, 55th Sess., Summary record of the 15th mtg., *supra* note 269, at 3 (Israel), 6 (India).

²⁷³ DAWIDOWICZ, *supra* note 155, at 73; Tom Ruys, *Legal Standing & Public Interest Litigation—Are All Erga Omnes Breaches Equal?*, 20 CHINESE J. INT'L L. 457, 492 (2021).

²⁷⁴ See U.N. GAOR, 56th Sess., Summary record of the 11th mtg., *supra* note 214, at 10 (China); U.N. GAOR, 56th Sess., Summary record of the 16th mtg., *supra* note 214, at 4 (Iran).

²⁷⁵ *Report on the Work of the 53rd Session*, *supra* note 7, at 117. See Crawford, *supra* note 14, at 169; Edith B. Weiss, *Invoking State Responsibility in the Twenty-First Century*, 96 AM. J. INT'L L. 798, 800 (2002); Jonathan Charney, *Third State Remedies in International Law*, 10 MICH. J. INT'L L. 57, 60 (1989); Matthew Happold, "Injured State" in the Breach of a Non-Proliferation Treaty & the Legal Consequences of Such a Breach, in NON-PROLIFERATION

countermeasures as another aspect of implementation, considering the ‘imperfect structure’ of the legal system that lacks an effective and ‘centralised system of enforcement’.²⁷⁶ However, due to the divergent opinions of states on the capacity of ‘states other than an injured state’ to take countermeasures, the ILC decided to institute a ‘saving’ or ‘without prejudice clause’ in the form of 2001 Article 54.²⁷⁷ Thus, it left its resolution to ‘the further development of international law’.²⁷⁸ Simply, it is a *renvoi* to customary law’ that the ILC deemed not ripe for codification.²⁷⁹

B. *Conceptual Foundations of Duties Owed Erga Omnes*

The basis for the competence of states to implement responsibility for breaches of duties owed *erga omnes*, without direct effect, lies in the reconfiguration of legal relations from the synallagmatic to the non-synallagmatic.²⁸⁰ The predominant view, which translates *erga omnes* as ‘owed to all’, deems duties owed *erga omnes* to be owed not to states individually. Rather, they are owed to a collective—‘a group of states or the “international community as a whole”’.²⁸¹ This constitutes a departure from

LAW AS A SPECIAL REGIME 175, 177 (Daniel Joyner & Marco Roscini eds., 2012); Frowein, *supra* note 37, at 423–5.

²⁷⁶ *Report on the Work of the 44th Session*, [1992] II(2) Y.B. Int'l L. Comm'n 17, 19, U.N. Doc. A/CN.4/SER.A/1992/Add.I (Part 2); Proukaki, *supra* note 43, at 69; Alland, *supra* note 187, at 1223.

²⁷⁷ James Crawford, *Fourth Report on State Responsibility*, [2000] II Y.B. Int'l L. Comm'n 3, 18, U.N. Doc. A/CN.4/517 and Add.1. See U.N. GAOR, 55th Sess., Summary record of the 14th mtg., *supra* note 269, at 7 (UK).

²⁷⁸ *Report on the Work of the 53rd Session*, *supra* note 7, at 139.

²⁷⁹ Alan T. Nissel, *The ILC Articles on State Responsibility: Between Self-Help and Solidarity*, 38 N.Y.U.J. INT'L L. & POL. 355, 364 (2005).

²⁸⁰ Annacker, *supra* note 256, at 135–6; Peter Coffman, *Obligations Erga Omnes and the Absent Third State*, 39 GER. Y.B. INT'L L. 285, 296, 301 (1996); Spinedi, *supra* note 141, at 1123; Sicilianos, *supra* note 155, at 1128; Juliette McIntyre, *Crawford's Multilateralism and the International Court of Justice*, 40 AUST. Y.B. INT'L L. 271, 273–5 (2022); Joost Pauwelyn, *Typology of Multilateral Treaty Obligations: Are WTO Obligations Bilateral or Collective in Nature?*, 14 EUR. J. INT'L L. 907, 908 (2003).

²⁸¹ Crawford, *supra* note 11, at 34; Annacker, *supra* note 256, at 149; Coffman, *supra* note 281, at 298; TAMS, *supra* note 245, at 130; Julio Barboza, *Legal Injury: The Tip of the Iceberg in the Law of State Responsibility?*, in INTERNATIONAL RESPONSIBILITY TODAY: ESSAYS IN MEMORY OF OSCAR SCHACHTER 7, 21 (Maurizio Ragazzi ed., 2005), citing Atila Tanzi, *Is*

the traditional approach to implementation in which obligations create subjective relations among states. Instead, norms that impose duties owed *erga omnes* create objective legal relationships,²⁸² an extension of the concept of absolute obligations,²⁸³ that do not allocate individual rights to states.²⁸⁴ Being objective, norms that impose duties owed *erga omnes* ‘can only be fulfilled or breached towards the community and not to individual states’.²⁸⁵

The resulting legal relationships are non-synallagmatic and do not give rise to bundles of bilateral relations.²⁸⁶ There is no longer an exact correlation between the duty imposed on one state and the subjective right granted to another.²⁸⁷ A state on which a duty owed *erga omnes* is imposed performs its duty not to individual states but to the ‘international community as a whole’.²⁸⁸ Accordingly, under the predominant and communitarian view, a state seeking to implement responsibility for a breach of a duty arising from a collective norm, in the absence of direct effect, does not rely on its subjective right.²⁸⁹ It does not possess this right as

Damage a Distinct Condition for the Existence of a Wrongful Act?, in UN CODIFICATION OF RESPONSIBILITY 1, 8 (Marina Spinedi & Bruno Simma eds., 1987).

²⁸² Annacker, *supra* note 256, at 136, 147; Rachael L. Johnstone, *Invoking Responsibility for Environmental Injury in the Arctic Ocean*, 6 Y.B. OF POLAR L. 3, 13 (2014); TAMS, *supra* note 245, at 133.

²⁸³ Simma, *supra* note 33, at 370; Vassilis P. Tzevelekos, *Revisiting the Humanisation of International Law: Limits and Potential – Obligations Erga Omnes, Hierarchy of Rules and the Principle of Due Diligence as the Basis for Further Humanisation*, 6 ERASMUS L. REV. 62, 70 (2013).

²⁸⁴ Crawford, *supra* note 11, at 99; Annacker, *supra* note 256, at 147; Kamen Sachariew, *State Responsibility for Multilateral Treaty Violations: Identifying the “Injured State” and Its Legal Status*, 35 NETH. INT’L L. REV. 273, 279 (1988).

²⁸⁵ Annacker, *supra* note 256, at 149; Crawford, *supra* note 11, at 34; Coffman, *supra* note 281, at 298; TAMS, *supra* note 245, at 130; Barboza, *supra* note 282, at 21, *citing* Tanzi, *supra* note 282, at 8.

²⁸⁶ Annacker, *supra* note 256, at 149; Bradley, *supra* note 244, at 203; Nollkaemper, *supra* note 258, at 786; Pauwelyn, *supra* note 281, at 908; Barboza, *supra* note 282, at 21, *citing* Tanzi, *supra* note 282, at 17.

²⁸⁷ Sachariew, *supra* note 285, at 281; Kyoji Kawasaki, *The “Injured State” in the Law of State Responsibility*, 28 HITOTSUBASHI J. L. POL. 17, 27 (2000).

²⁸⁸ Linderfalk, *supra* note 67, at 862; Hutchinson, *supra* note 246, at 199.

²⁸⁹ Crawford, *supra* note 11, at 99 (2000); Linderfalk, *supra* note 190, at 10-11; TAMS, *supra* note 245, at 174, *citing* Roberto Ago, *Obligations Erga Omnes & Community*, in

it is the international community that is the intended beneficiary of the duty.²⁹⁰ Rather, its competence is premised on its interest, ‘presumably not [a] right but nevertheless something entitled to protection’,²⁹¹ as a member of the collective to which the duty is owed.²⁹² This interest in the ‘integrity of the [collective norm] and in the common value protected by norm’ entitles it to demand the observance or performance of the duty even if not injured or directly affected.²⁹³ Thus, if a duty owed *erga omnes* is breached, all states, even those that have not been directly affected, may implement the wrongful state’s responsibility.²⁹⁴

The nature of the duties owed *erga omnes*, like peremptory norms, deserves examination. While the concept may be established,²⁹⁵ there remain theoretical differences regarding its foundations.²⁹⁶ For instance, some claim that what elevates a duty from being owed *inter se* to *erga omnes* is the importance of the interest that the norm protects.²⁹⁷ That is, the

INTERNATIONAL CRIMES OF STATE: A CRITICAL ANALYSIS OF THE ILC’S DRAFT ARTICLE 19 238 (Joseph Weiler et al. eds., 1989).

²⁹⁰ Crawford, *supra* note 14, at 434; Annacker, *supra* note 246, at 147; Sachariew, *supra* note 285, at 279.

²⁹¹ HUGH THIRLWAY (ED.), *LAW & PROCEDURE OF THE INTERNATIONAL COURT OF JUSTICE: FIFTY YEARS OF JURISPRUDENCE*, VOL. I 76 (2013); Crawford, *supra* note 14, at 434.

²⁹² *Report on the Work of the 53rd Session*, *supra* note 7, at 127; James Crawford, *Responsibility for Breaches of Communitarian Norms: An Appraisal of Article 48 of the ILC Articles on Responsibility* in *FROM BILATERALISM TO COMMUNITY INTEREST: ESSAYS IN HONOUR OF BRUNO SIMMA* 227 (Ulrich Fastenrath, et al. eds., 2011); Annacker *supra* note 246 at 146-147.

²⁹³ Annacker, *supra* note 246, at 146; Crawford, *supra* note 14, at 434, 444; Dupuy Pierre-Marie, *Deficiencies of State Responsibility relating to Breaches of “Obligations owed to the International Community as a Whole”* in *REALISING UTOPIA: FUTURE OF INTERNATIONAL LAW* 215 (Cassese Antonio ed., 2012).

²⁹⁴ *Report on the Work of the 53rd Session*, *supra* note 7, at 126-127; Crawford, *supra* note 293, at 228-229, 239 citing Institut de Droit International (IDI), *Resolution on Obligations Erga Omnes in International Law* art. 1(a) (2005). See Gaja, *supra* note 35, at 97; Spinedi, *supra* note 141, at 1123.

²⁹⁵ Alland, *supra* note 187, at 1229; Bradley, *supra* note 244, at 196; Nollkaemper, *supra* note 258, at 784.

²⁹⁶ Johnstone, *supra* note 283, at 13; PROUKAKI, *supra* note 43, at 49; See TAMS, *supra* note 245, at 128.

²⁹⁷ See e.g. Maurizzio Ragazzi, *International Obligations Erga Omnes: Their Moral Foundation & Criteria of Identification* in *REALITY OF INTERNATIONAL LAW: ESSAYS IN HONOUR OF IAN BROWNLIE* 466 (Guy Goodwill-Gill & Stefan Talmon eds., 1999);

norms' importance or value is its 'distinctive feature',²⁹⁸ reflects the 'notion of value-loaded community interest',²⁹⁹ forms the 'common core of norms',³⁰⁰ gives them a 'higher normative value',³⁰¹ and grants them a 'different . . . status than others'.³⁰² By 'reason of the importance of the rights' that these norms protect,³⁰³ all states have the competence to implement responsibility for breaches of the duty arising from the norm.³⁰⁴

Others claim that it is the commonality of interests of states in the norms that affords *erga omnes* effect to these rules.³⁰⁵ By 'their very nature',

ORAKHELASHVILI, *supra* note 25, at 243; TRINDADE, *supra* note 89, at 291, 314, 443; Bradley, *supra* note 244, at 199.

²⁹⁸ PROUKAKI, *supra* note 43, at 50.

²⁹⁹ Vidmar, *supra* note 99, at 11; Ragazzi, *supra* note 78, at 466 *citing* Southwest Africa, *supra* note 253 (dissenting opinion of Tanaka, J.).

³⁰⁰ Int'l L. Ass'n, *First Report of the Study Group on the Law of State Responsibility and Its Basis* ¶105 (2000).

³⁰¹ Linderfalk *supra* note 190 at 5, *citing* A. J. J. de Hoogh, *The Relationship Between Jus Cogens, Obligations Erga Omnes and International Crime: Peremptory Norms in Perspective*, 42 Austrian J. Pub. & Int'l L. 183, 192 (1991); Jost Delbrück, *Laws in the Public Interest—Some Observations on the Foundations and Identification of Erga Omnes Norms in International Law in LIBER AMICORUM GUNTHER JAENICKE* 35 (Volkmar Gotz, et al. eds., 1998); Ronald St. John Macdonald, *Fundamental Norms in Contemporary International Law*, 25 Can. Yearb. Int. Law 115, 136-139 (1987); Dinah Shelton, *Hierarchy of Norms & Human Rights: Of Trumps and Winners*, 65 Sask. Law Rev. 301, 323 (2002); Bardo Fassbender, *UN Charter as Constitution of the International Community*, 36 Colum. J. Transnat'l Law 529, 591-592 (1998).

³⁰² MALCOLM N. SHAW, *INTERNATIONAL LAW* 124 (6th ed. 2008).

³⁰³ Barcelona Traction, *supra* note 240, at 32; ORAKHELASHVILI, *supra* note 25, at 84, 243. See Int'l Law Comm'n, *supra* note 78, at 82 (Switzerland).

³⁰⁴ PROUKAKI, *supra* note 43, at 54, 59; Bradley, *supra* note 244, at 200; Theodor Meron, *On a Hierarchy of International Human Rights*, 80 Am. J. Int. Law 1, 9 (1986).

³⁰⁵ See e.g. Institut de Droit International (IDI), *supra* note 295, at art. 1 *cited in* Int'l Law Comm'n, *Fragmentation of International Law*, *supra* note 93, at 203 (2006); Annacker, *supra* note 246, at 149; COMMUNITY INTEREST IN INTERNATIONAL LAW 223 (Wolfgang Benedek, et al. eds., 2014); Samantha Besson, *Community Interests in International Law: Whose Interests Are They & How Should We Best Identify Them?*, in COMMUNITY INTERESTS ACROSS INTERNATIONAL LAW 38 (Eyal Benvenisti & Georg Nolte eds., 2017); Yoshifumi Tanaka, *Legal Consequences of Obligations Erga Omnes in International Law*, 68 Neth. Int. Law Rev. 1, 9 (2021); Bradley *supra* note 244 at 213; Massimo Iovane, et al., *Some Introductory Remarks in PROTECTION OF GENERAL INTERESTS IN CONTEMPORARY INTERNATIONAL LAW* 5 (Massimo Iovane, et al. eds., 2021); Rüdger Wolfrum, *Identifying Community Interests in International Law: Common*

these norms concern all states such that every state has an interest in the performance of the duties to which they give rise.³⁰⁶ This holds even when they have not been directly affected.³⁰⁷ The common interests in the norm also mean that they cannot remain as ‘non-directed responsibilities’,³⁰⁸ nor can they be ‘left to the free disposition of states’.³⁰⁹ This affects ‘the way [the duty] is performed’.³¹⁰ They are no longer owed to states individually but to the ‘international community as a whole’.³¹¹ Thus, every state may implement responsibility for breaches of the duty.³¹²

These approaches, based on the importance and commonality of interests in norms, relate to the norm’s substance and are referred to as ‘material approaches’.³¹³ In contrast, the ‘structural approach’ posits that what differentiates duties owed *erga omnes* from duties owed *inter se* is not the value nor the commonality of states’ interests in a particular norm but the resulting legal relations.³¹⁴ For the adherents of this view, duties owed

Spaces & Beyond in COMMUNITY INTERESTS ACROSS INTERNATIONAL LAW 19 (Eyal Benvenisti & Georg Nolte eds., 2017); Christina Voigt, *Delineating the Common Interest in International Law* in COMMUNITY INTEREST IN INTERNATIONAL LAW 223 20 (Wolfgang Benedek, et al. eds., 2014); TRINDADE, *supra* note 89, at 347; Toufayan, *supra* note 215, at 203.

³⁰⁶ Barcelona Traction, *supra* note 240, at 32; Crawford, *supra* note 14, at 413; Annacker, *supra* note 246, at 136; Ragazzi, *supra* note 78, 17; Tanaka, *supra* note 306, at 9; Voigt, *supra* note 306, at 20, *citing* Dinah Shelton, *Common Concern of Humanity*, 1 *Iustum Aequum Salutare* 33, 38 (2009).

³⁰⁷ Lea Brilmayer & Isaias Yemane Tesfalidet, *Third State Obligations & the Enforcement of International Law*, 44(1) N.Y.U. J.I.L.P. 1, 11 (2011); Shelton, *supra* note 33, at 319.

³⁰⁸ Besson, *supra* note 306, at 41.

³⁰⁹ Bruno Simma, *International Crimes: Injury & Countermeasures* in INTERNATIONAL CRIMES OF STATE: A CRITICAL ANALYSIS OF THE ILC’S DRAFT ARTICLE 19 285 (Joseph Weiler, et. al eds., 1989).

³¹⁰ Annacker, *supra* note 246, at 149.

³¹¹ Tanaka, *supra* note 306, at 9; Vidmar, *supra* note 99, at 110; Annacker, *supra* note 246, at 149; Bradley, *supra* note 233, at 213.

³¹² *Report on the Work of the 53rd Session*, *supra* note 7, at 126-127; *Obligation to Prosecute or Extradite*, *supra* note 28, at 450; *Application of the Genocide Convention*, *supra* note 28, at 36; *Int’l Law Comm’n*, *supra* note 78, at 81 (Spain); *Tladi*, *supra* note 219, at 52 (France, Spain, & Switzerland).

³¹³ Tams, *supra* note 245, at 136.

³¹⁴ *Id.* at 130; *Int’l Law Comm’n*, *Fragmentation of International Law*, *supra* note 93, at 197.

erga omnes are characterised by their non-synallagmatic character.³¹⁵ If a norm does not create synallagmatic relations, it imposes duties owed *erga omnes*.³¹⁶ In contrast, its 'moderate version' restricts duties owed *erga omnes* to those that are 'non-bilateralisable and important'.³¹⁷

Arguably, the material approaches give rise to several problems already seen in the natural law and public order theories on peremptory norms discussed in *Part I-C* and *Part II-B*. These assume that the values that states afford to norms can be easily established. Yet, states seldom say if one norm is more important than another.³¹⁸ Furthermore, there are no established criteria to determine the importance of norms in international law.³¹⁹ The process is subjective and creates uncertainty as to what norms 'graduate from the status of an ordinary norm' to a 'higher grade'.³²⁰ This lack of objectivity risks the undue proliferation of norms that impose duties owed *erga omnes*.³²¹

Moreover, the recourse to the interests' importance raises the question of 'to whom is it important?'.³²² Opinions concerning an interest's

³¹⁵ Tams, *supra* note 245, at 131, citing Annacker, *supra* note 246, at 136; RENÉ LEFEBER, *TRANSBOUNDARY ENVIRONMENTAL INTERFERENCE & THE ORIGIN OF STATE LIABILITY* 113-114 (1996); IAN SEIDERMAN, *HIERARCHY IN INTERNATIONAL LAW: HUMAN RIGHTS DIMENSION* 126-129 (2001); Olivia Lopes Pegna, *Counter-claims and Obligations Erga Omnes before the International Court of Justice*, 9 Eur. J. Int. Law 724, 732 (1998), citing Frank Biermann, *Common Concern of Humankind: Emergence of a New Concept of Environmental Law*, 34 Archiv des Völkerrechts 426, 451 (1996); CARSTEN ALEXANDER GÜNTHER, *DIE KLAGEBEFUGNIS DER STATEN IN INTERNATIONALEN STREITBEILEGUNGSVERFAHREN* 99-101, 109-115 (1999); Bruno Simma, *Does the UN Charter Provide an Adequate Legal Basis for Individual or Collective Responses to Violations of Obligations Erga Omnes?* in *FUTURE OF INTERNATIONAL LAW ENFORCEMENT* 132-133 (Jost Delbrück & Ursula Heinz eds., 1993); ANDREAS PAULUS, *DIE INTERNATIONALE GEMEINSCHAFT IM VÖLKERRECHT* 335 (2001).

³¹⁶ Seiderman, *supra* note 316, at 126-129.

³¹⁷ Tams, *supra* note 245, at 133-135. See Crawford, *supra* note 119, at 314 ('A formulation. . . [that excludes] that moral element does not seem appropriate.').

³¹⁸ Linderfalk, *supra* note 190, at 8-9.

³¹⁹ Tanaka, *supra* note 306, at 9; Voefray, *supra* note 159, at 224, citing THEODOR MERON, *HUMAN RIGHTS & HUMANITARIAN NORMS AS CUSTOMARY LAW* 192 (1989).

³²⁰ See Weil, *supra* note 20, at 425.

³²¹ Ragazzi, *supra* note 78, at 163; Tams, *supra* note 245, at 117.

³²² Linderfalk, *supra* note 190, at 8.

value largely depend on one's perception.³²³ For this reason, the attribution of importance to an interest tends to be based on 'nothing more than the author's opinion on what is essential and indispensable'.³²⁴ This makes the process 'bluntly and excessively ideological in nature'.³²⁵ It makes it possible for a select few to arrogate upon 'themselves the role of law-giver',³²⁶ and allows for the imposition by a minority of their 'values and aspirations' thereby 'fostering parochial interests'.³²⁷ In other words, the approach gives rise to a 'syllogistic transformation' that 'allows the interpreter' to attribute *erga omnes* effect to existing rules by simply 'elaborating on the need' for such an effect.³²⁸

The same arguments may be made regarding the commonality of interests of states. Arguably, the concept of collective interests 'is not wholly unambiguous' as 'there is no universally established criterion for deciding on [such] interests'.³²⁹ Consequently, this lack of subjectivity runs the risk of a 'snowballing effect' that leads to the undue expansion of norms that are considered to impose duties owed *erga omnes*.³³⁰ More importantly, the existence of common interests of states in the norms does not necessarily mean that the duties they impose are owed *erga omnes*. As discussed above, all states have an interest in the compliance of other states with their duties. However, this interest, by itself, 'by no means authorises. . . every state to demand the performance [or observance] by every other state of its duties'

³²³ See de Wet, *supra* note 134, at 7; Mik, *supra* note 19, at 52; Alexandra Hofer, *Negotiating International Public Policy through Adoption & Contestation of Sanctions*, 50 R. Bel. Dr. Int. 440, 442 (2017).

³²⁴ See Zemanek, *supra* note 18, at 384, citing Gómez Robledo, *supra* note 32, at 167, 386, citing Tomuschat, *supra* note 70, at 307.

³²⁵ See Kolb, *supra* note 3, at v; VOEFFRAY, *supra* note 159, at 224 ('Vouloir différencier entre les droits "fondamentaux" de l'homme et de simples droits "ordinaires" serait un exercice à la fois ardu d'un point de vue conceptuel et délicat sur le plan politique').

³²⁶ See Kolb, *supra* note 3, at v; Focarelli, *supra* note 114, at 470.

³²⁷ See Bianchi, *supra* note 27, at 495-496.

³²⁸ Focarelli, *supra* note 114, at 470.

³²⁹ Tanaka, *supra* note 306, at 9.

³³⁰ Ruys, *supra* note 274, at 467; Mao Xiao, *Public-Interest Litigation before the International Court of Justice: Comment on The Gambia v Myanmar Case*, 21 Chin. J. Int. Law 589, 598 (2002). See Weil, *supra* note 20, at 432; Duff, *supra* note 158, at 81 ('[Duties owed *erga omnes* as they are understood] are not grounded in agreements; it is unclear what pre-existing interests of each state they protect, or why individual states should have standing to invoke responsibility').

in case of breach.³³¹

This article takes the view that the value of the interest that a norm protects and whether such an interest is shared by all states do not *per se* imply *erga omnes* status. There may be factors that motivate the attribution of such status to a particular duty. They may be the rationale why states, in their legal policy, agree that the duties imposed by the norm be owed to every state.³³² However, they do not, by themselves, dictate the ‘enforceability by every legal subject of the relevant legal system’.³³³ As one scholar notes, ‘the real answer [should] lie elsewhere’.³³⁴ Like peremptory norms whose formation, as discussed in *Part I-C*, has been likened to the formation of custom, it is the acceptance and recognition of states that make duties owed *erga omnes*.³³⁵ In a sense, duties owed *erga omnes* result from a ‘two-step process’ in which states agree on a rule and then decide

³³¹ Riphagen, *supra* note 150, at 21. See *Southwest Africa*, *supra* note 253, at 34; *Lac Lanoux* (Fr. v. Spain) 62 R.G.D.I.P. 179, 116 (1957); *East Timor*, *supra* note 259, (dissenting opinion of Skubizewski, J.), 256.

³³² Hillgruber, *supra* note 33, at 271; Sartipi & Hojatzadeh, *supra* note 8, at 222; See Linderfalk, *supra* note 190, at 10; Mao, *supra* note 331, at 598, *citing* *Nuclear Tests* (Austl. v. Fr.), *Provisional Measures*, 1973 I.C.J. 99 (separate opinion of Gros, J.), 290.

³³³ Hillgruber, *supra* note 33, at 271; See Jose De Jesús, *Obligations Erga Omnes as Multilateral Obligations In International Law* 189 (2012) (Thesis, University of Oxford).

³³⁴ Linderfalk, *supra* note 190, at 10; Hillgruber, *supra* note 33, at 272 (‘It needs to be demonstrated that states have created a norm. . . that allows [“states other than an injured state”] to respond to violations [of the duties they impose]’). See *Obligation to Prosecute or Extradite*, *supra* note 28, (separate opinion, Skotnikov, J.), 484; (dissenting opinion of Xue, J.), 575 (‘The fact that the states parties have a common interest in their observance. . . does not, in and by itself, give that state standing to bring a case in the Court.’); *Application of the Genocide Convention*, *supra* note 198, (dissenting opinion of Xue, J.), 6; *Application of the Torture Convention*, *supra* note 261, (dissenting opinion of Xue, J.), 1-2 (‘Whether the states parties accepted. . . *actio popularis*. . . is. . . determined by the intention of the parties’).

³³⁵ Byers, *supra* note 33, at 233; Bradley, *supra* note 244, at 203. See Hillgruber, *supra* note 33, at 270 (‘[The competence of states] cannot simply and directly be. . . deduced from legal constructions. . . without having regard to. . . methods of establishing [custom] and interpreting treaties’); Andreas Paulus, *Whether Universal Values can Prevail over Bilateralism & Reciprocity* in *REALISING UTOPIA: FUTURE OF INTERNATIONAL LAW* 91 (Antonio Cassese ed., 2012); Pranay Lekhi, *Nuclear Problem: A Communitarian Response*, 68 *Neth. Int. Law Rev.* 89, 100 (2021) (‘The. . . procedural rule is dependent on the. . . substantive right’).

that the duties it imposes are owed *erga omnes*.³³⁶ Because of the importance and the interest of every state in a norm, states deem it desirable and appropriate that all states have the competence to implement responsibility for breaches of the duty that it imposes.³³⁷

The structural approach also suffers from problems. To begin with, it remains to be seen whether the legal relations arising from duties owed *erga omnes* may only be characterised as non-synallagmatic. Indeed, several scholars argue that this is not the case.³³⁸ Assuming it does, such an approach arguably tends to ‘cast the net too wide’, including all norms that give rise to non-synallagmatic relations.³³⁹ More importantly, the view dispenses with process and focuses on result. Non-synallagmatic relations are only the result of the process of the formation of duties owed *erga omnes*. Yet, they are not determinative. They merely characterise the relations created by norms deemed to impose duties owed *erga omnes*.³⁴⁰

³³⁶ Byers, *supra* note 33, at 233; Bradley, *supra* note 244, at 203; See Hillgruber, *supra* note 33, at 270 (‘[The competence of states] cannot simply and directly be . . . deduced from legal constructions. . . without having regard to . . . methods of establishing [custom] and interpreting treaties’); Paulus, *supra* note 336, at 91.

³³⁷ Byers, *supra* note 33, at 233; Bradley, *supra* note 244, at 203; Annacker, *supra* note 246, at 136 (‘[Duties owed] *erga omnes* necessarily protect . . . community interests [and] are the result of “consensus according to which respect for certain fundamental values is not to be left to the free disposition of states individually”’). See Linderfalk, *supra* note 190, at 10.

³³⁸ See De Hoogh, *supra* note 34, at 44, 53; Stern, *supra* note 142, at 15-16; VILLALPANDO, *supra* note 88 at, 237, 242, 254; 279, 397; Barboza, *supra* note 282, at 21; HERNANDEZ, *supra* note 259, at 222; Duff, *supra* note 158, at 80; HUGH THIRLWAY (ED.), *LAW & PROCEDURE OF THE INTERNATIONAL COURT OF JUSTICE: FIFTY YEARS OF JURISPRUDENCE*, VOL. II 1151 (2013); De Jesús, *supra* note 334, at 103, 186; NATAŠA NEDESKI, *SHARED OBLIGATIONS IN INTERNATIONAL LAW* 65, 81, 87 (2022). See also Kawasaki, *supra* note 288, at 20, 22; Weiss, *supra* note 276, at 803; VOEFFRAY, *supra* note 159, at 229; Picone, *supra* note 199, at 421; Hutchinson, *supra* note 256, at 160, 165; Ottavio Quirico, *Towards a Peremptory Duty to Curb Greenhouse Emissions?*, 44 *Fordham Int. Law J.* 923, 928 (2021); Wilfred Jenks, *The General Welfare as a Legal Interest in JUS ET SOCIETAS: ESSAYS IN TRIBUTE TO WOLFGANG FRIEDMAN* 154 (G. Wilner ed., 1979); Martti Koskenniemi, *Solidarity Measures: State Responsibility as a New International Order?*, 71 *Br. Year B. Int. Law* 337, 344 (2002).

³³⁹ Ruys, *supra* note 274, at 456; PROUKAKI, *supra* note 43, at 49. See Tams, *supra* note 245, at 133.

³⁴⁰ See Hillgruber, *supra* note 33, at 272; Byers, *supra* note 33, at 233; Bradley, *supra* note 244, at 203.

As stressed in *Part I-B*, peremptory norms deal with the validity of a norm and prohibit states from derogating from norms ‘accepted and recognised’ to be peremptory.³⁴¹ On the other hand, duties owed *erga omnes* deal with the competence of every state to implement responsibility of the wrongful state.³⁴² While the exact relationship between the two concepts is yet to be definitively established,³⁴³ the predominant view attributes a strong link between the two.³⁴⁴ That is, either peremptory norms are coextensive with duties owed *erga omnes* or peremptory norms invariably give rise to duties owed *erga omnes*.³⁴⁵

As to the first view, several scholars claim, and some states agree,³⁴⁶ that peremptory norms and duties owed *erga omnes* are ‘two sides of the same coin’.³⁴⁷ That is, they are ‘merely designations for the same thing from different viewpoints’.³⁴⁸ While they differ as to their effects, they are ‘virtually’ or ‘largely’ coextensive.³⁴⁹ The peremptory status of a norm implies that the duty it imposes is owed *erga omnes* and *vice versa*. The rationale for this view appears to primarily lie in deduction. Both concepts protect

³⁴¹ VCLT, *supra* note 63, art. 53. See Picone, *supra* note 199, at 413.

³⁴² Crawford, *supra* note 14, at 412; Crawford, *supra* note 293, at 239; Int’l Law Comm’n, Fragmentation of International Law, *supra* note 98, at 193.

³⁴³ Tladi, *supra* note 78, at 42; De Hoogh, *supra* note 334, at 81; Int’l Law Comm’n, Fragmentation of International Law, *supra* note 98, at 204.

³⁴⁴ Frowein, *supra* note 37, at 405, citing H. Thierry, *L’évolution du droit international cours général de droit international public*, 222 Recueil des Cours de l’Académie de Droit International 9, 62 ff (1990).

³⁴⁵ Tams, *supra* note 245, at 146.

³⁴⁶ See U.N. GAOR, 56th Sess., Summary record of the 11th mtg., *supra* note 214, at 6 (Finland on behalf of Nordic states); U.N.G.A., *Verbatim Record, 56th Session, 14th Meeting*, U.N. Doc. A/56/PV.14 (Oct. 2, 2001), 11 (Portugal); U.N. GAOR, 56th Sess., Summary record of the 15th mtg., *supra* note 214, at 4-5 (Jordan); U.N. GAOR, 74th Sess., Summary record of the 26th mtg., *supra* note 219, at 10 (Armenia).

³⁴⁷ Simma, *supra* note 33, at 300; Tams, *supra* note 245, at 146, noting Hannikainen, *supra* note 78, at 269-292; STEPHANIE PIEPER, NEUTRALITÄT VON STAATEN 388-389 (1997); HEINRICH BERNHARD REIMANN, IUS COGENS IM VÖLKERRECHT 97 (1971); Robledo Gómez, *supra* note 32, at 62.

³⁴⁸ Sicilianos, *supra* note 115, at 1136; Sartipi & Hojatzadeh, *supra* note 8, at 208; Gattini, *supra* note 215, at 1184 (‘Mere difference in accent’).

³⁴⁹ Crawford, *supra* note 11, at 34.

fundamental values.³⁵⁰ This is evident from the examples of norms recognised as peremptory and deemed to impose duties owed *erga omnes*. Due to the importance of such values, every state has an interest in their protection.³⁵¹ Finally, there is a universal recognition of this fundamental nature.³⁵² The peremptory status is ‘acknowledged and recognised by the international community as a whole,’ and thus the duties the norm imposes are owed to the ‘international community as a whole’.³⁵³

Nevertheless, many are not prepared to accept this equivalence. Others agree that the peremptory status of a norm only means that its duties are owed *erga omnes*.³⁵⁴ However, the same may not be said about the converse.³⁵⁵ This claim seems to be derived from observation. Norms

³⁵⁰ Byers, *supra* note 33, at 233; Ragazzi, *supra* note 78, at 72; Ronald St. John Macdonald, *International Community as a Legal Community* in TOWARDS WORLD CONSTITUTIONALISM 870 (Ronald St. John Macdonald & Johnston Douglas eds., 2005). See Iain Scobbie, *Invocation of Responsibility for the Breach of Obligations under Peremptory Norms of General International Law*, 13 Eur. J. Int. Law 1201, 1210 (2002); Wyler, *supra* note 141, at 1157.

³⁵¹ Barcelona Traction, *supra* note 240, at 325. See Int'l Law Comm'n, *supra* note 78, at 82 (Switzerland); Tladi, *supra* note 219, at 52 (France, Spain, & Switzerland).

³⁵² Giorgio Gaja, *Obligations Erga Omnes, International Crimes & Jus Cogens: A Tentative Analysis of Three Related Concepts* in INTERNATIONAL CRIMES OF STATE: A CRITICAL ANALYSIS OF THE ILC'S DRAFT ARTICLE 19 149 ff. (Joseph Weiler, et. al eds., 1989)

³⁵³ ORAKHELASHVILI, *supra* note 25, at 245. See Ragazzi, *supra* note 78, at 189. See Int'l Law Comm'n, *supra* note 78, at 81 (Spain).

³⁵⁴ Bassiouni, *Jus Cogens & Obligations Erga Omnes* *supra* note 25 at 73; Alain Pellet, *Conclusions* in FUNDAMENTAL RULES OF INTERNATIONAL LEGAL ORDER: JUS COGENS & OBLIGATIONS ERGA OMNES 418 (Christian Tomuschat & Jean-Marc Thouvenin eds., 2005), cited in Tladi *supra* note 78 at 43; Gaja, *supra* note 35, at 55; Int'l Law Comm'n, *Fragmentation of International Law*, *supra* note 98, at 204 (2006); Marco Longobardo, *Standing of Indirectly Injured States in the Litigation of Community Interests before the ICJ: the Gambia v. Myanmar & Beyond*, Int. Community Law Rev. 1, 8 (2021); TRINDADE, *supra* note 89, at 276, 297, 312. See Tladi, *supra* note 219, at 52 (France, Spain, & Switzerland); U.N. GAOR, 74th Sess., Summary record of the 26th mtg., *supra* note 219, at 11 (Estonia); Int'l Law Comm'n, *supra* note 78, at 80 (Italy), 82 (Switzerland).

³⁵⁵ Int'l Law Comm'n, *Fragmentation of International Law*, *supra* note 98, at 204 (2006); Gaja, *supra* note 35, at 55; Pellet, *supra* note 164, at 418; Tams, *supra* note 245, at 146, noting Paulus, *supra* note 316, at 413-415; Giorgio Gaja, *Jus Cogens Beyond the Vienna Convention*, 172 Recueil des Cours de l'Académie de Droit International 271, 281 (1981); Meron, *supra* note 305, at 11; Alain Pellet, *Can a State Commit a Crime? Definitely, Yes!*, 10 Eur. J. Int. Law 425, 429 (1999); STEFAN KADELBACH, ZWINGENDES VÖLKERRECHT 32-33 (1992); GÜNTHER, *supra* note 316, at 111-114; Dupuy, *supra* note 47, at 1074; Byers,

deemed peremptory, such as the norm against force and some norms that protect human and peoples' rights, like the prohibition of genocide, torture, racial discrimination, slavery, and the respect for self-determination, are also considered to impose duties owed *erga omnes*.³⁵⁶ However, not all norms acknowledged to impose duties owed *erga omnes* have been widely-recognised to possess peremptory status, as in the case of certain norms safeguarding the environment.³⁵⁷ By material implication, peremptory status implies that the duties it imposes are owed *erga omnes*.³⁵⁸ In short, the two concepts are concentric rather than coextensive.³⁵⁹

Again, the recourse to deduction arguably leads to problems.³⁶⁰ As discussed in *Part II-B*, this involves the attribution of effects to peremptory norms solely on account of the fundamental character of the values they protect or the commonality of interests of states in these values. Scholars stressed that the value of interests and their commonality are not 'trump cards' that justify the attribution of consequences to such norms without the acceptance of states.³⁶¹ The same may be said about the *erga omnes* status of norms. The general competence of states to implement

supra note 33, at 237; ORAKHELASHVILI, *supra* note 25, at 268; PROUKAKI, *supra* note 43, at 33; Shabtai Rosenne, *Decisions of the International Court of Justice & the New Law of State Responsibility* in INTERNATIONAL RESPONSIBILITY TODAY: ESSAYS IN MEMORY OF OSCAR SCHACHTER 304 (Maurizzio Ragazzi ed., 2005); Sicilianos, *supra* note 155, at 1137; VILLALPANDO, *supra* note 88, at 84.

³⁵⁶ Tladi, *supra* note 78, at 40–41; Bradley, *supra* note 244, at 215; De Hoogh, *supra* note 334, at 48; Erika de Wet, *Jus Cogens & Obligations Erga Omnes* in OXFORD HANDBOOK OF INTERNATIONAL HUMAN RIGHTS LAW 555 (Dinah Shelton ed., 2013); Kadelbach, *supra* note 31, at 27.

³⁵⁷ Int'l Law Comm'n, Fragmentation of International Law, *supra* note 98, at 205; Dupuy, *supra* note 32, at 393; BIRNIE, *supra* note 32, at 109–10.

³⁵⁸ Note that this can logically be represented as: all norms, *n*, that are peremptory, *P*, also impose duties that are owed *erga omnes*, *E*. That is, $\forall n ([n \in P] \Rightarrow [n \in E])$. Thus, $P \subseteq E$. Further, it may be said that $P \Rightarrow E$ but not $E \Rightarrow P$.

³⁵⁹ Gaja, *supra* note 35, at 156; Sicilianos, *supra* note 155, at 1137; *Summary Records of the 50th Session*, (1998) I Y.B. Int'l Law Comm'n 1, 104, U.N. Doc. A/CN.4/SER.A/1998; U.N. GAOR, Summary Records of the 50th Sess., *supra* note 9, at 191 (2019); Tladi, *supra* note 78, at 41; U.N. GAOR, Topical Summary of the Discussion of the Sixth Committee, 55th Sess., *supra* note 214, at 21 (2001); Int'l Law Comm'n, *supra* note 78, at 80 (Italy); U.N. GAOR, 74th Sess., Summary record of the 26th mtg., *supra* note 219, at 11 (Estonia).

³⁶⁰ See Bassiouni, *supra* note 25, at 72; Picone, *supra* note 199, at 412.

³⁶¹ Vidmar, *supra* note 99, at 116; Kolb, *supra* note 3, at 38.

responsibility for breaches of duties arising from collective norms is 'by no means the logical conclusion to be necessarily drawn' from their importance or the interest of states in their protection.³⁶² They may be factors for the attribution of *erga omnes* status, but they are not determinative.³⁶³ It is the acceptance and recognition of states that affords the state's general competence to invoke the responsibility of the wrongful state.³⁶⁴ Thus, the fact that both concepts protect important values to which every state possesses an interest does not, by itself, imply that peremptory norms necessarily mean duties owed *erga omnes*.

With regard to the claim based on implication, it is not unnoticed that all known examples of peremptory norms are also duties owed *erga omnes*. However, stress must be laid on 'all known' examples of peremptory norms. Granted that all known peremptory norms also impose a duty *erga omnes*. Nevertheless, to say that all peremptory norms, even those yet to be recognised, will also impose duties owed *erga omnes* may be a hasty generalisation that prejudges future examples of peremptory norms and duties owed *erga omnes*.³⁶⁵ The relationship between the two concepts is better described as a correlation rather than an implication. The *erga omnes* status is not a necessary consequence of peremptory status. Instead, norms that are considered peremptory also tend to be acknowledged to impose duties owed *erga omnes*.³⁶⁶

³⁶² Hillgruber, *supra* note 33, at 271; VOEFFRAY, *L'actio popularis supra* note 159, at 223-224 ('Le caractère erga omnes d'une obligation internationale découle. . . non de l'importance intrinsèque de l'intérêt protégé'); De Jesús, *supra* note 334, at 190.

³⁶³ Linderfalk, *supra* note 190, at 10; Hillgruber, *supra* note 33, at 272. See Weil, *supra* note 20, at 430 ('There is a growing tendency. . . to consider that peremptory norms [grant] standing [to every state] to call for those [duties] to be fulfilled and to assert [another's] responsibility').

³⁶⁴ Hillgruber, *supra* note 33, at 271-272; De Hoogh, *supra* note 34, at 37. See also Application of the Genocide Convention, *supra* note 247 (dissenting opinion of Xue, J.), at 525.

³⁶⁵ Tanaka, *supra* note 306, at 11 ('As a consequence, an attempt to identify [duties owed erga omnes] by reference to jus cogens may entail the risk of explaining the unknown by means of the more unknown (ignotum per ignotius). . . Therefore, it is difficult to consider that [duties owed] erga omnes can be properly identified on the basis of the concept of jus cogens'). But note that Tanaka nevertheless claims that 'jus cogens norms derive from the matrix of [duties owed] erga omnes, but not the reverse situation'.

³⁶⁶ See Etienne Henry, *Alleged Acquiescence of the International Community to Revisionist Claims of International Customary Law (With Special Reference to the Jus Contra Bellum Regime)*, 18 Melb. J. Int. Law 1, 18 (2017) ('Often. . . not necessarily always. . . the erga

States may indeed be motivated by similar factors in attributing peremptory *erga omnes* effects to norms. However, this does not mean that states, when agreeing that norms permit no derogations, necessarily agree that the duty the norm imposes is also owed *erga omnes*. As may be observed from the discussions above and *Part I-C*, the two differ in their process of formation. For peremptory norms, the interest that the norm protects is fundamentally important to the community. Thus, states deem it desirable and appropriate that no derogations from the norm be permitted and that no modification of the norm be allowed.³⁶⁷ For duties owed *erga omnes*, the interest is also fundamentally important to the community. Accordingly, states deem it desirable and appropriate that all states possess the competence to implement responsibility for breaches of the duty that the norm imposes.³⁶⁸

As discussed in *Part II-B*, the attribution of effects to peremptory norms outside the VCLT is an inductive process rather than a deductive one. It needs to be shown that states have accepted these additional effects to be positive law, which may only be done through recourse to the views and practices of states.³⁶⁹ Again, this does not minimise the character of interests that peremptory norms safeguard. Rather, the importance of the values and the commonality of interests are factors for the attribution of consequences to peremptory norms, but are not determinative *per se*.³⁷⁰ It may be the motivation for states to afford distinct effects to peremptory norms, it is their recognition that makes these attributes part of positive law.³⁷¹

Arguably, the view that peremptory norms impose duties owed *erga*

omnes character of the rights and [duties] flowing from a customary rule coincides with [its] peremptory character’).

³⁶⁷ Linderfalk, *supra* note 3, at 377.

³⁶⁸ Byers, *supra* note 33, at 233; Bradley, *supra* note 244, at 203; Annacker, *supra* note 246, at 140. See Hillgruber, *supra* note 33, at 270. Compare VOEFFRAY, *supra* note 159, at 223 (‘C’est à la communauté internationale de décider si elle veut conférer à une obligation *erga omnes* un caractère indérogeable’).

³⁶⁹ Kolb, *supra* note 3, at 113; Focarelli, *supra* note 114, at 449.

³⁷⁰ Kolb, *supra* note 3, at 110; Hillgruber, *supra* note 33, at 271; De Hoogh, *supra* note 34, at 39.

³⁷¹ See Kolb, *supra* note 38, at 38; Focarelli, *supra* note 114, at 459; Bordin, *supra* note 211, at 547.

omnes does not necessarily reflect positive international law. Even other material sources, for the longest time, have offered little help. For its part, the ICJ has yet to ‘pronounce that a link exists between peremptory norms. . . and [duties owed] *erga omnes*’.³⁷² In contrast, the ILC implicitly linked the two concepts in its 2001 Articles,³⁷³ and explicitly asserted in its 2022 Draft Conclusion 17 that ‘peremptory norms of . . . give rise to [duties] owed [*erga omnes*].’³⁷⁴ Yet, states’ reactions to this conclusion were divergent. Some states supported this claim.³⁷⁵ Others suggested that it needs more clarification or evidence.³⁷⁶ Still, a few have expressly voiced their opposition to this conclusion.³⁷⁷

³⁷² U.N. GAOR, *supra* note 9, at 191 (2019); Bassiouni, *supra* note 25, at 73. See Toufayan, *supra* note 215, at 209.

³⁷³ *Report on the Work of the 53rd Session*, *supra* note 7 at 111–112; Crawford, *supra* note 11, at 49 (‘They are thus virtually coextensive with peremptory obligations. . . For if a particular [norm] can be set aside or displaced as between two states, it is hard to see how that [duty] is owed to the international community as a whole’), 99 (‘It may be inferred that the content of those [duties] is largely coextensive with the content of the peremptory norms’); Crawford, *supra* note 14, at 473 (‘The discarded notion of “international crime” has been broken down into a number of distinct components, more closely related to the twin concepts of peremptory norms and [duties owed] to the international community as a whole, which have always provided its legal. . . underpinnings’). See although referring to the deleted 1976 Draft Article 18/1996 Draft Article 19 I.L.C., *Report on the Work of its 28th Session*, *supra* note 141, at 102; *Summary Records of the 36th Session*, (1984) I Y.B. Int’l Law Comm’n., 1, 262; Int’l Law Comm’n., *Report on the Work of the 48th Session: State Responsibility*, U.N. Doc. CN.4/L.528/Add.3 at 109, 112 (Jan. 1997).

³⁷⁴ Tladi, *supra* note 219, at 52.

³⁷⁵ See U.N. GAOR, 74th Sess., Summary record of the 26th mtg., *supra* note 219, at 10 (Armenia), 11 (Estonia). See Int’l Law Comm’n, *supra* note 78, at 80 (Italy), 82 (Switzerland); Tladi, Fifth Report on Peremptory Norms, *supra* note 219, at 52 (France, Spain, & Switzerland); Tladi, Fourth Report on Peremptory Norms, *supra* note 25, at 5.

³⁷⁶ See U.N. GAOR, 74th Sess., Summary record of the 24th mtg., *supra* note 219, at 14 (US); U.N. GAOR, 74th Sess., Summary record of the 25th mtg., *supra* note 219 at 4 (Cuba); U.N. GAOR, 73rd Sess., Summary record of the 26th mtg., *supra* note 222, at 8 (Slovakia), 16 (Portugal); U.N. GAOR, 74th Sess., Summary record of the 27th mtg., *supra* note 219, at 9 (Cameroon); Int’l Law Comm’n, *supra* note 78, at 80 (Japan), 81 (Russia & Spain); Tladi, *supra* note 219, at 53 (Japan).

³⁷⁷ See Int’l Law Comm’n, *supra* note 78, at 82. (US: ‘The commentary should therefore be adjusted to make clear that the [2001 Articles] are not necessarily the “rules” referenced in Draft Conclusion 17, as they. . . have not yet become subject to state agreement’). See also U.N. GAOR, 56th Sess., Summary record of the 13th mtg., *supra* note 214 at 5 (Israel:

Conclusion

Through *historical tracing* and *conceptual analysis*, this article examined the theoretical foundations of peremptory norms and the secondary effects attributed to such norms. It began by recalling Magallona's positivist view of peremptory norm. While peremptory norms are rooted in the natural law and public order theories, their emergence in international law, as Magallona argued, was brought by states' consent. Likewise, while they possess normatively superiority compared with ordinary norms, in the sense that conventional norms that derogate from those deemed peremptory are invalidated, they do not imply the existence of superior norms independent of the wills of states. Rather, these norms occupy their position due to the acknowledgement of states.

Next, this article separately examined the bases for the secondary effects attributed to peremptory norms within the law of state responsibility: first, the duties imposed upon states in case of serious breaches of duties imposed by peremptory norms; second, the competence of states to invoke the responsibility in the absence of direct effect. It argued that these secondary effects cannot be justified by recourse to deductive methods—whether due to the importance of the interest that a norm safeguards or the common interest of states in the observance of the duty arising from the norm. Such approaches risk the over-extension of the role and purpose of peremptory norms.

While most states have ratified the VCLT and Article 53 has arguably become customary, states' acceptance is arguably limited to its primary effect. Attaching additional consequences to peremptory norms through deductive methods go well beyond what states accepted in the VCLT. It is not claimed that the VCLT's concept of peremptory norms is exhaustive—there may as well be effects that these norms may entail. However, the process of attributing 'new' effects to peremptory norms outside the VCLT must necessarily be, considering the structure of the international legal order, based on the states' consent. Accordingly, the method must be

⁷Not convinced. . . that jus cogens [norms] coincided with the norms [that impose duties owed erga omnes]'), 7 (Poland).

inductive. That is, it should be shown that states have accepted these effects to be law by examining both state practice and *opinio juris*.

It is submitted that these observations are in accord with Professor Magallona's 1976 reflections on peremptory norms. As Magallona noted, the concept's inclusion in the VCLT may well be a 'landmark that [shifted] the whole perspective of the theory of international law'. However, this does not imply 'at all the existence of superior norms independent of the [consent] of states'.³⁷⁸ Applied to the secondary effects attributed to peremptory norms discussed in this article, it must be remembered, as Magallona insisted, that their normative values must be 'brought about only by the concordance of wills of states themselves'.³⁷⁹ However, as noted above, the states' reaction to these secondary effects have been divergent. To this end, further inductive studies are warranted to determine whether they have become positive law.³⁸⁰

³⁷⁸ Magallona, *supra* note 2, at 541.

³⁷⁹ *Id.*

³⁸⁰ Note that arguably, the practice of states in responding to breaches of duties imposed by norms deemed peremptory since 1969 (the adoption of the VCLT) has been limited and inconsistent. Seldom have states cooperated to 'bring to an end' serious breaches of peremptory norms. The non-recognition by states of the situations created by these breaches arose not because of peremptory norms but due to their duty to comply with UNSC resolutions. The non-assistance by states to wrongful states may be attributed to the fact that should they have rendered aid, they too would have breached their international law duties. Similarly, only in limited instances have 'states other than an injured state'—mostly Western—sought to implement responsibility for breaches of duties imposed by peremptory norms, whether by measures of a 'formal character' or countermeasures, in the absence of injury or direct effect. This examination is the subject of the author's doctoral dissertation.