International Crimes

*Jus Cogens and Obligatio Erga Omnes*

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International crimes that rise to the level of *jus cogens* constitute *obligatio erga omnes* which are inderogable. Legal obligations which arise from the higher status of such crimes include the duty to prosecute or extradite, the non-applicability of statutes of limitations for such crimes, the non-applicability of any immunities up to and including heads of state, the non-applicability of the defense of “obedience to superior orders” (save as mitigation of sentence), the universal application of these obligations whether in time of peace or war, their non-derogation under “states of emergency,” and universal jurisdiction over perpetrators of such crimes.

*Jus Cogens as a Binding Source of Legal Obligation in International Criminal Law*

*Jus cogens* refers to the legal status that certain international crimes reach, and *obligatio erga omnes* pertains to the legal implications arising out of a certain crime’s characterization as *jus cogens*. Thus, these two concepts are different from each other.

International law has dealt with both concepts, but mostly in contexts that do not include international criminal law (“ICL”) (1). The national criminal law of the world’s major legal systems and ICL doctrine have, however scantily, dealt with each of the two concepts (2).
Furthermore, the positions of publicists and penalists on this question diverge significantly. The main divisions concern how a given international crime achieves the status of *jus cogens* and the manner in which such crimes satisfy the requirements of the "principles of legality." (3) With respect to the consequences of recognizing an international crime as *jus cogens*, the threshold question is whether such a status places *obligations erga omnes* upon states, or merely gives them certain rights to proceed against perpetrators of such crimes. This threshold question of whether *obligatio erga omnes* carries with it the full implications of the Latin word *obligatio*, or whether it is denatured in international law to signify only the existence of a right rather than a binding legal obligation, has neither been resolved in international law nor addressed by ICL doctrine.

To this writer, the implications of *jus cogens* are those of a duty and not of optional rights; otherwise, *jus cogens* would not constitute a peremptory norm of international law. Consequently, these obligations are non-derogable in times of war as well as peace. (4) Thus, recognizing certain international crimes as *jus cogens* carries with it the duty to prosecute or extradite (5) the non-applicability of statutes of limitation for such crimes (6) and universality of jurisdiction (7) over such crimes irrespective of where they were committed, by whom (including heads of state), against what category of victims, and irrespective of the context of their occurrence (peace or war). Above all, the characterization of certain crimes as *jus cogens* places upon states the *obligatio erga omnes* not to grant impunity to the violators of such crimes (8). Positive ICL does not contain such an explicit norm as to the effect of characterizing a certain crime as part of *jus cogens*. Furthermore, the practice of states does not conform to the scholarly writings that espouse these views. The practice of the states evidences that, more often than not, impunity has been allowed for *jus cogens* crimes, the theory of universality has been far from being universally recognized and applied, and the duty to prosecute or extradite is more inchoate than established, other than when it arises out of specific treaty obligations. There is also much question as to whether the duty to prosecute or extradite is in the disjunctive or in the conjunctive (9) which of the two has priority over the other and under what circumstances, and, finally, whether implicit conditions of effectiveness and fairness exist with respect to the duty to prosecute and with respect to extradition leading to prosecution (10).
The gap between legal expectations and legal reality is, therefore, quite wide. It may be bridged by certain international pronouncements(11) and scholarly writings(12) but the question remains whether such a bridge can be solid enough to allow for the passage of these concepts from a desideratum to enforceable legal obligations under ICL, creating state responsibility in case of noncompliance(13).

**Jus Cogens Crimes**

The term “jus cogens” means “the compelling law” and, as such, a jus cogens norm holds the highest hierarchical position among all other norms and principles(14). As a consequence of that standing, jus cogens norms are deemed to be “peremptory” and non-derogable.(15). Scholars, however, disagree as to what constitutes a peremptory norm and how a given norm rises to that level. The basic reasons for this disagreement are the significant differences in philosophical premises and methodologies of the views of scholarly protagonists. These differences apply to sources, content (the positive or norm-creating elements), evidentiary elements (such as whether universality is appropriate, or less will suffice), and value-oriented goals (for example, preservation of world order and safeguarding of fundamental human rights). Furthermore, there is no scholarly consensus on the methods by which to ascertain the existence of a peremptory norm, nor to assess its significance or determine its content. Scholars also disagree as to the means to identify the elements of a peremptory norm, to determine its priority over other competing or conflicting norms or principles, to assess the significance and outcomes of prior application, and to gauge its future applicability in light of the value-oriented goals sought to be achieved(16).

Some scholars see jus cogens sources and customary international law as the same(17), others distinguish between them(18), while still others question whether jus cogens is simply not another semantical way of describing certain “general principles”(19). This situation adds to the level of uncertainty as to whether jus cogens is a source of ICL.

The legal literature discloses that the following international crimes are jus cogens: aggression, genocide, crimes against humanity, war crimes, piracy, slavery and slave-related practices, and torture. Sufficient legal basis exists to reach the conclusion that all these crimes are part of jus cogens(20).
This legal basis consists of the following:

I. international pronouncements, or what can be called international *opinio juris*, reflecting the recognition that these crimes are deemed part of general customary law(21)

II. language in preambles or other provisions of treaties applicable to these crimes which indicates these crimes’ higher status in international law(22)

III. the large number of states which have ratified treaties related to these crimes(23)

IV. the *ad hoc* international investigations and prosecutions of perpetrators of these crimes(24)

If a certain rigor is to apply, however, this legal basis cannot be examined in a cumulative manner. Instead, each one of these crimes must be examined separately to determine whether it has risen to a level above that stemming from specific treaty obligations, so that it can therefore be deemed part of general international law applicable to all states irrespective of specific treaty obligations(25). To pursue the approach suggested, it is also necessary to have a doctrinal basis for determining what constitutes an international crime and when in the historical legal evolution of a given crime it can be said to achieve the status of *jus cogens*(26).

As discussed below, certain crimes affect the interests of the world community as a whole because they threaten the peace and security of humankind and because they shock the conscience of humanity(27). If both elements are present in a given crime, it can be concluded that it is part of *jus cogens*. The argument is less compelling, though still strong enough, if only one of these two elements is present(28). Implicit in the first, and sometimes in the second element, is the fact that the conduct in question is the product of state-action or state-favoring policy. Thus, essentially, a *jus cogens* crime is characterized explicitly or implicitly by state policy or conduct, irrespective of whether it is manifested by commission or omission. The derivation of *jus cogens* crimes from state policy or action fundamentally distinguishes such crimes from other international crimes. Additionally, crimes which are not the product of state action or state-favoring policy often lack the two essential factors which establish the *jus cogens* status of a particular crime, namely a threat to the peace and security of mankind and conduct or consequences which are shocking to the conscience of humanity.
Each of these *jus cogens* crimes, however, does not necessarily reflect the co-existence of all the elements. Aggression is on its face a threat to peace and security, but not all acts of aggression actually threaten the peace and security of humankind. While genocide and crimes against humanity shock mankind’s conscience, specific instances of such actions may not threaten peace and security. Similarly, slavery and slave-related practices and torture also shock the conscience of humanity, although they rarely threaten the peace and security.

Piracy, almost nonexistent nowadays(29), neither threatens peace and security nor shocks the conscience of humanity, although it may have at one time(30). War crimes may threaten peace and security; however, their commission is only an aggravating circumstance of an already existing condition of disruption of peace and security precisely because they occur during an armed conflict, whether of an international or non-international character. Furthermore, the extent to which war crimes shock the conscience of humanity may depend on the context of their occurrence and the quantitative and qualitative nature of crimes committed(31).

Three additional considerations must be taken into account in determining whether a given international crime has reached the status of *jus cogens*.

The first has to do with the historical legal evolution of the crime. Clearly, the more legal instruments that exist to evidence the condemnation and prohibition of a particular crime, the better founded the proposition that the crime has risen to the level of *jus cogens*(32).

The second consideration is the number of states that have incorporated the given proscription in their national laws(33).

The third consideration is the number of international and national prosecutions for the given crime and how they have been characterized(34). Additional supporting sources that can be relied upon in determining whether a particular crime is a part of *jus cogens* is other evidence of “general principles of law”(35) and the writings of the most distinguished publicists(36).

The jurisprudence of the Permanent Court of International Justice (“PCIJ”) and the International Court of Justice (“ICJ”) is also instructive in determining the nature of a particular crime. The ICJ, in its opinion in *Nicaragua v. United States: Military and Paramilitary Activities in and Against Nicaragua*,(37) relied on *jus cogens* as a fundamental principle of international law.
However, that case also demonstrates the tenuous basis of using legal principles to resolve matters involving ideological or political issues or calling for other value judgments(38). Earlier, the ICJ held that the prohibition against genocide is a *jus cogens* norm that cannot be reserved or derogated from(39).

As noted above, *jus cogens* leaves open differences of values, philosophies, goals, and strategies of those who claim the existence of the norm in a given situation and its applicability to a given legal issue(40). Thus, *jus cogens* poses two essential problems for ICL; one relates to legal certainty and the other to a norm’s conformity to the requirements of the “principles of legality.” The problem of normative positivism becomes more evident in the case of a void in positive law in the face of an obvious and palpable injustice, such as with respect to crimes against humanity, as enunciated in the Statute of the International Military Tribunal (“IMT”) in the London Charter of August 8, 1945(41). The specific crimes defined in Article 6(c) of the London Charter fall into the category of crimes which were not addressed by positive law, but depended on other sources of law to support implicitly the formulation of a crime(42).

Proponents of natural law advocate that *jus cogens* is based on a higher legal value to be observed by prosecuting offenders, while proponents of legal positivism argue that another principle whose values and goals are, at least in principle, of that same dignity, namely the “principle of legality”—nullum crimen sine lege—should prevail(43). A value-neutral approach is impossible; thus, the only practical solution is the codification of ICL(44).

**Obligatio Erga Omnes**

The *erga omnes* and *jus cogens* concepts are often presented as two sides of the same coin. The term *erga omnes* means “flowing to all,” and so obligations deriving from *jus cogens* are presumably *erga omnes*(45). Indeed, legal logic supports the proposition that what is “compelling law” must necessarily engender an obligation “flowing to all.”

The problem with such a simplistic formulation is that it is circular. What “flows to all” is “compelling,” and if what is “compelling” “flows to all,” it is difficult to distinguish between what constitutes a “general principle” creating an obligation so self-evident as to be “compelling” and so “compelling” as to be “flowing to all,” that is, binding on all states(46).
In the *Barcelona Traction* case, the ICJ stated: “An essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising *vis-à-vis* another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.”

Thus, the first criterion of an obligation rising to the level of *erga omnes* is, in the words of the ICJ, “the obligations of a state towards the international community as a whole”(48). While the ICJ goes on to give examples of such obligations in *Barcelona Traction* (49), it does not define precisely what meaning it attaches to the phrase “obligations of a state towards the international community as a whole”(50).

The relationship between *jus cogens* and *obligatio erga omnes* was never clearly articulated by the PCIJ and the ICJ, nor did the jurisprudence of either court explicitly articulate how a given norm becomes *jus cogens*, or why and when it becomes *erga omnes* and what consequences derive from this. Obviously, a *jus cogens* norm rises to that level when the principle it embodies has been universally accepted, through consistent practice accompanied by the necessary *opinio juris*, by most states(51). Thus, the principle of territorial sovereignty has risen to the level of a “peremptory norm” because all states have consented to the right of states to exercise exclusive territorial jurisdiction(52).

*Erga omnes*, as stated above, however, is a consequence of a given international crime having risen to the level of *jus cogens*(53). It is not, therefore, a cause of or a condition for a crime's inclusion in the category of *jus cogens*.

The contemporary genesis of the concept *obligatio erga omnes* for *jus cogens* crimes is found in the ICJ's advisory opinion on *Reservations to the Convention on the Prevention and Punishment of Genocide* (54). The concept also finds support both in the ICJ's *South West Africa* cases(55) as well as from the *Barcelona Traction*(56) case. However, it should be noted that the *South West Africa* cases dealt, *inter alia*, with human rights violations and not with international crimes *stricto sensu*(57) and that the *Barcelona Traction* case concerned an issue of civil law.

It is still uncertain in ICL whether the inclusion of a crime in the category of *jus cogens* creates rights or, as stated above, non-derogable duties *erga omnes*.
The establishment of a permanent international criminal court having inherent jurisdiction over these crimes is a convincing argument for the proposition that crimes such as genocide, crimes against humanity, war crimes and torture are part of *jus cogens* and that obligations *erga omnes* to prosecute or extradite flow from them(58).

**Conclusion**

There are both gaps and weaknesses in the various sources of ICL norms and enforcement modalities. The work of the ILC in formulating the 1996 Draft Code of Crimes is insufficient. A comprehensive international codification would obviate these problems, but this is not forthcoming. Existing state practices are also few and far between and are insufficient to establish a solid legal basis to argue that the obligations deriving from *jus cogens* crimes are in fact carried out as established by law, or at least as perceived in the writings of progressive jurists. Thus, it is important to motivate governments to incorporate the obligations described into their national laws as well as to urge their expanded use in the practice of states. Jurists have, therefore, an important task in advancing the application of these ICL norms, which are an indispensable element in the protection of human rights and in the preservation of peace.


Bassiouni, supra note 29, at 87.

See Bassiouni & Wise, supra note 31.

See Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, supra note 18.

See generally Randall, supra note 37; and Reydams, supra note 37.

See supra note 12; see also Rummel, supra note 1; Transitional Justice, supra note 11; Mark J. Osiel, Ever Again: Legal Remembrance of Administrative Massacre, 144 U. Pa. L. Rev. 463 (1995); Roht-Arias, supra note 41.

See supra note 36, at Ch.1.

See Bassiouni, supra note 31, at 8.


See, e.g., Hannikainen, supra note 40.

See, e.g., Ian Brownlie, Principles of Public International Law 512-15 (3d ed. 1979); 1 Hersh Lauterpacht, International Law 113 (Eliz Lauterpacht ed., 1970); George Schwarzenberger, International Law and Order 5 (1971); Christenson, supra note 40; Parker & Neylon, supra note 40. Other commentators have also noted that the function of peremptory norms in the context of international law has not been adequately addressed:

Peremptory norms of international law (jus cogens) have been the subject of much recent interest. In light of their extensive and quite unprecedented treatment by the International Law Commission and the Vienna Conference on the Law of Treaties, it may be surprising that attention has not been greater. At the same time, inquiry into the relationship between peremptory norms and the sources and functions of international law have been virtually non-existent. This is indeed surprising, given the recent substantial interest in these areas as part of a larger “theoretical explosion” in international legal studies.


19See supra note 57.


22See Bassiouni, supra note 34.

23See id.

24See Bassiouni, supra note 6.

25For the proposition that some violations of the *Geneva Conventions* are *jus cogens* see Meron, supra note 2, at 9. See also *Military and Paramilitary Activities* (Nicar. v. U.S.), 1986 I.C.J. 14, 95 (June 27)(concerning the applicability of the *Vienna Convention on the Law of Treaties*); Bassiouni, supra note 34, at 341-46. The *Vienna Convention on the Law of Treaties* with annex, 23 May 1969, U.N. A/Conf. 39/27, specifies in Article 53 that a treaty provision contrary to *jus cogens* is null and void. Article 71, paragraph 1(a) makes it clear, however, that the entire treaty is not null and void if the parties do not give effect to the provision in question. The I.C.J. has also considered the question. In *U.S. Diplomatic and Consular Staff in Teheran* (U.S. v. Iran), 1980 I.C.J. 3 (May 24), the Court holds that some treaty obligations can also be “obligations under general international law,” and in its advisory opinion on reservations to the *Convention on Genocide* 1951 I.C.J. 15 (May 28) it holds that the *Genocide Convention* is part of customary law.

26In a tongue-in-cheek way, Professor Anthony D’Amato reflected the loose way in which *jus cogens* is dealt with in international law in the title of his short essay *It’s a Bird, it’s a Plane, it’s *Jus Cogens!**, 6 Conn. J. Int’l L. 1 (1990).

27Threats to peace and security are essentially political judgments, and the U.N. Charter gives that function under Chapter VII to its primary political organ, the Security Council. Thus it is difficult to assess in objective legal terms what constitutes aggression. See, among the many writers on the subject, Yoram Dinstein, *War, Aggression and Self-Defense* (1988). As to what is (or what is not) shocking to the conscience of humanity, that too may be a subjective factor. For example, a single killing, coupled with the required intent to “destroy in whole or in part” required in Article II of the *Genocide Convention*, is sufficient for that single act to be called genocide. But the killing of an estimated 2 million Cambodians is not genocide because it is not by one ethnic, religious, or national group against another, but by the same national, religious, and ethnic group against its own members, and for political reasons. Since political and social groups are excluded from the protected groups in the *Genocide Convention*, such massive killing is not deemed to be genocide, unless it can be factually shown that there is a diversity between the perpetrator and victim groups. Thus, one killing would be genocide and consequently *jus cogens*, while 2 million killings would not. Such mass killings do however fall under crimes against humanity and war crimes, and are therefore *jus cogens* crimes under other criminal labels. See Bassiouni, supra note 29.


32 See, e.g., Bassiouni, supra note 34.

33 This is particularly true with respect to the military laws of 188 states that embody the normative proscriptions and prescriptions of the Geneva Conventions of August 12, 1949; 147 states for Additional Protocol 2 and 139 for Additional Protocol II. See Bassiouni, supra note 34, at 252.

34 See Bassiouni, supra note 6.

35 See Bin Cheng, *General Principles of Law as Applied by International Courts and Tribunals* (George W. Keeton & Georg Schwarzenberger eds., 1953); Bassiouni, supra note 29.


40 One example in ICL is the nonapplicability of the “defense of obedience to superior orders” to a patently illegal order. But when is such order deemed illegal on its face and on what normative basis? See Yoram Dinstein, *The Defense of “Obedience to Superior Orders” in International Law* (1965); Leslie Green, *Superior Orders and Command Responsibility*, 1989 Can. Y.B. Int’l L. 167.

41 London Charter, supra note 8.


43 See Bassiouni, supra note 29, Ch. 2.


45 See Randall, supra note 37, at 829-30 (1988); Reydams, supra note 37.

46 In an important study bearing on the *erga omnes* and *jus cogens* relationship, Professor Randall notes that “traditionally international law functionally has distinguished the *erga omnes* and *jus cogens* doctrines.” Randall, supra note 37, at 830. However, he, too, seems to accept the *sine qua non* relatively. *Jus cogens* means compelling law. [The *jus cogens* concept refers to] peremptory principles or norms from which no derogation is permitted, and which may therefore operate to invalidate a treaty or agreement between States to the extent of the inconsistency with any such principles or norms. Id.

While authoritative lists of obligations *erga omnes* and *jus cogens* norms do not exist, any such list likely would include the norms against hijacking, hostage taking, crimes against internationally protected persons, apartheid, and torture. Traditionally,
international law functionally has distinguished the erga omnes and jus cogens doctrines, which addresses violations of individual responsibility. These doctrines nevertheless, may subsidiarily support the right of all states to exercise universal jurisdiction over the individual offenders. One might argue that "when committed by individuals," violations of erga omnes obligations and peremptory norms "may be punishable by any State under the universality principle." Id.


48id.

49Id. The court further stated in the ensuing paragraph:
Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person, including protection from slavery and racial discrimination. Some of the corresponding rights of protection have entered into the body of general international law (Reservations to the Convention and Punishment of the Crime of Genocide, Advisory Opinion, I.C.J. Reports 1951, p. 23); others are conferred by international instruments of a universal or quasi-universal character.

50Barcelona Traction, 1970 I.C.J. at 32.

51In Right of Passage Over Indian Territory (Portugal v. India), 1960 I.C.J. 123, 135 (Apr. 12) (Fernandes, J. dissenting), Judge Fernandes states:
It is true that in principle special rules will prevail over general rules, but to take it as established that in the present case the particular rule is different from the general rule is to beg the question. Moreover, there are exceptions to this principle. Several rules cogenses prevail over any special rules. And the general principles to which I shall refer later constitute true rule of jus cogens over which no special practice can prevail.

See also Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276, 1971 I.C.J. 66 (June 21) (Fernandes, J, dissenting).

52See S.S. "Lotus" (France v. Turk.), 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7).

53Meron, supra note 2, at 188-97.


56Barcelona Traction, Light and Power Co. Ltd. (Belg. v. Spain), 1970 I.C.J. 3 (Feb. 5); see Christenson, supra note 97.
