International Crimes
Jus Cogens and *Obligatio Erga Omnes*

Cherif Bassiouni

Professor of law and President of the International Human Rights Law Institute, of Paul University College of Law; President, International Association of Penal Law; President, International Institute of Higher Studies in Criminal Sciences.

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 of 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*(47)”
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.

NOTES DE BAS DE PAGE

1*See, e.g.,* Vienna Convention on the Law of Treaties, *opened for signature* May 23, 1969, U.N. Doc. A/CONF.39/27. *See also* G.C. ROZANKIS, THE CONCEPT OF JUS COGENS IN THE LAW OF TREATIES (1976); DE HOOGH, *supra* note 41 (embodying the author's doctoral dissertation, which is rich in public international law material and mostly based on the work of the ILC, but poor on ICL).

2*See* M. Cherif Bassiouni, A Draft International Criminal Code and Draft Statute for an International Criminal Tribunal (1987) [hereinafter Bassiouni, Draft Code]; M. Cherif Bassiouni, *An Appraisal of the Growth and Developing Trends of International Criminal Law*, 45 Revue Internationale de Droit Pénal 405 (1974); *see, e.g.,* I, II, and II International Criminal Law (M. Cherif Bassiouni ed. 1986, 2d. rev. ed. forthcoming 1999); Lyal S. Sunga, The Emerging System of International Criminal Law (1997); International Criminal Law: A Collection of International and European Documents (Christine Van den Wyngaert ed., 1996); John Dugard & Christine Van den Wyngaert, International Criminal Law and Procedure (1996); International Criminal Law: A Collection of International and European Instruments (1996); Ndiva Kofele-Kale, International Law of Responsibility for Economic Crimes (1995); Farhad Malekian, The Concept of Islamic International Criminal Law (1994); Andre Huet & Renee Koering-Joulin, Droit Pénal International (1994); Bassiouni, *supra* note 29; Haidong Li, Die Prinzipien des Internationalen Strafrechts (1991); M. Cherif Bassiouni, International Crimes Digest/Index (1985); Claude Lombois, Droit Pénal International (2d. rev. ed. 1979); Mohammed Hassanein Ebeid, Al-Jarima Al- Dawlia (1979); Stefan Glaser, Droit International Pénal Conventionnel (Vol. 1 1971 & Vol. 2 1978); Guillermo J. Fierro, La Ley Pénal y el Derecho Internacional (1977); Bart DeSchutter, La Beligique et le Droit International Pénal (1975); 1 & 2 A Treatise on International Criminal Law (M. Cherif Bassiouni & Ved P. Nanda eds., 1973) [hereinafter 1 Treatise]; Dietrich Oehler, Internationales Strafrecht (1973); A.H.J. Swart, Internationaal Strafrecht (1973); Stanislaw Plawski, Étude des Principes Fondamentaux du Droit International Pénal (1972); Aktuelle Probleme des Internationalen Strafrechts (Dietrich Oehler & Paul G. Potz eds., 1970); Otto Triffterer, Dogmatische Untersuchungen zur Entwicklung des Materiellen Völkerstrafrechts seit Nurnberg (1966); International Criminal Law (G.O.W. Mueller & Edward M. Wise eds., 1965); Antonio Quintano-Ripoles, Tratado de Derecho Pénal Internacional y Pénal Internacional Pénal (1957); Stefan Glaser, Infractions Internationales (1957); George Dahm, Zur problemtik des Völkerstrafrechts (1956); Stefan Glaser, Introduction a l'Étude du Droit International Pénal (1954); Hans-Heinrich Jescheck, Die Verantwortlichkeit der Staatsorgane Nach Volkerstrafrechts (1952); Joseph B. Keenan & Brendan F. Brown, Crimes Against International Law (1950); Nino Levi, Diretto Pénale Internazionale (1949); Albert de La Pradelle, Une Revolution dans le Droit Pénal International (1946); Rolando Quadri, Diritto Pénale Internazionale (1944); Francesco Cosentini, Essai d'un Code Pénal International Dressé sur la Base Comparative des Projets & Textes Recents des Codes Pénaux (1937); Hellmuth Von Weber, Internationale Strafgerrichtsbarkeit (1934); Carlos Alcorta, Principios de Derecho Pénal Internacional (1931); Emil S. Rappaport, Le Problême du Droit Pénal Inter Étatique (1930); Henri Donnedieu de Vabres, Les Principes Modernes du Droit Pénal International (1928); Vespasian V. Pella, La Criminalité Collective des États et le Droit Pénal de l'Avenir (1925); Henri F. Donnedieu de Vabres, Introduction a l'Étude du Droit Pénal International (1922); Maurice Travers, Le Droit Pénal International et sa Mise en Oeuvre en Temps de Paix et en Temps de Guerre (1922); Josef Kohler, Internationales Strafrecht (1917); Salvatore Adinolfi, Diritto Internazionale Penale (1913); Friedrich Meili, Lehrbuch des Internationalen Strafrechts und Strafprozessrechts (1910); *see also, e.g.,* M.Cherif Bassiouni, *The Penal Characteristics of Conventional International Criminal Law*, 15

Case W. Res. J. Int'l L. 27 (1983); Robert Friedlander, *The Foundations of International Criminal Law: A Present Day Inquiry,* 15 Case W. Res. J. Int'l L. 13 (1983); Leslie C. Green, *Is There an International Criminal Law?*, 21 Alberta L. Rev. 251 (1983); Farooq Hassan, *The Theoretical Basis of Punishment in International Criminal Law*, 15 Case W. Res. J. Int'l L. 39 (1983); G.O.W. Mueller*, International Criminal Law: Civistas Maxima*, 15 Case W. Res. J. Int'l L. 1 (1983); M. Cherif Bassiouni, *The Proscribing Function of International Criminal Law in the Process of International Protection of Human Rights,* 8 Yale J. World Pub. Ord. 193 (1982); Leslie C. Green, *New Trends in International Criminal Law*, 11 Isr. Y.B. H.R. 9 (1981); Hans-Heirich Jescheck, *Development, Present State and Future Prospects of International Criminal Law,* 52 Revue Internationale de Droit Pénal 337 (1981); Leslie C. Green, *International Crime and the Legal Process*, 29 Int'l & Comp. L.Q. 567 (1980); Leslie C. Green, *An International Criminal Code—Now?*, 3 Dalhousie L.J. 560 (1976); Yoram Dinstein, *International Criminal Law,* 5 Isr. Y.B. H.R. 55 (1975); Quincy Wright, *The Scope of International Criminal Law: A Conceptual Framework*, 15 Va. J. Int'l L. 561 (1975); M. Cherif Bassiouni, *An Appraisal of the Growth and Developing Trends of International Criminal Law*, 45 Revue Internationale de Droit Pénal 405 (1974); Robert Legros, *Droit Pénal International 1967*, 48 Revue de Droit Pénal et de Criminologie 259 (1968); Hans-Heinrich Jescheck, *état Actuel et Perspectives d'Avenir des Projets dans le Domaine du Droit International Pénal,* 35 Revue Internationale de Droit Pénal 83 (1964); W.J. Ganshof van der Meersch, *Justice et Droit International Pénal*, 42 Revue de Droit Pénal et de Criminologie 3 (1961); Leslie C. Green, *New Approach to International Criminal Law*, 28 Solic. 106 (1961); Jean Y. Dautricourt, *Le Droit International Pénal,* 37 Revue de Droit Pénal et de Criminologie 243 (1957); Jacques Verhaegen, *Les Impasses du Droit International Pénal*, 38 Revue de Droit Pénal et de Criminologie 3 (1957); Stefan Glaser, *Element Moral de l'Infraction Internationale*, 59 Revue Génèrale de Droit International Public 537 (1955); A.D. Belinfante, *Les Princips de Droit Pénal International et les Conventions Internationales,* 2 Nederlands Tijdschrift voor Internationaal Recht 243 (1955); Guiliano Vassalli, *In tema di Diretto Internazionale Pénal*, 56 Guistizia Penale 257 (1951); Stefan Glaser, *Les Infractions Internationales et Leurs Sanctions*, 29 Revue de Droit Pénal et de Criminologie 811 (1949); Henri F. Donnedieu de Vabres, *La Codification du Droit Pénal International,* 19 Revue Internationale de Droit Pénal 21 (1948); Stefan Glaser, *Le Principe de la Legalité des Delits et des Peines et les Procès des Criminels de Guerre*, 28 Revue de Droit Pénal et de Criminologie 230 (1948); Henri F. Donnidieu de Vabres, *Le Procès de Nuremberg et le Principe de la Legalité et des Peines*, 26 Revue de Droit Pénal et de Criminologie 813 (1947); Henri F. Donnidieu de Vabres, *Le Procès de Nuremberg Devant Les Principes Modernes du Droit Pénal International,* 7 Recueil Des Cours 481 (1947); Albert de La Pradelle, *Une Revolution Dans le Droit Pénal International*, 13 Nouvelle Revue de Droit International Privé 360 (1946); Max Radin, *International Crimes,* 32 Iowa L. Rev. 33 (1946); Gerald Abrahams, *Retribution: An Inquiry into the Possiblity of an International Criminal Law*, 92 Law J. 38, 45, 53 (1942); Roberto Ago, *Le Delit International,* 68 Recueil des Cours de l'Academie de Droit International de la Haye 419 (1939); Henri F. Donnidieu de Vabres, *La Repression Internationale des Delits du Droit des Gens*, 2 Nouvelle Revue de Droit International Privé 7 (1935); Vespasian P. Vella, *Plan d'un Code Repressif Mondial,* 12 Revue Internationale du Droit Pénal 348 (1935); Carlos Alcorta, *La Doctrina del Derecho Pénal Internacional,* 2 Revisita Argentina de Derecho Internacional 271 (1931); Guiseppe Sagone, *Pour un Droit Pénal International,* 5 Revue International de Droit Pénal 363 (1928); Quintiliano Saldana, *Projet de Code Pénal International*, 1 Congrès International de Droit Pénal (1926); G. Glover Alexander, *International Criminal Law*, 5 J. Comp. Legis. & Int'l L. 90 (1923); G. Glover Alexander, *International Criminal Law*, 3 J. Comp. Legis. & Int'l L. 237 (1921).

3Bassiouni, *supra* note 29, at 87.

4*See*, *e.g.*, M. Cherif Bassiouni, *States of Emergency and States of Exception: Human Rights Abuses and Impunity under Color of Law, in* Non-Derogable Rights and States of Emergency 125 (Daniel Prémont ed., 1996).
5*See* Bassiouni & Wise, *supra* note 31.
6*See* Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, *supra* note 18.
7*See generally* Randall, *supra* note 37; and Reydams, *supra* note 37.
8*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-Arriaza, *supra* note 41.
9*See* Bassiouni, *supra* note 36, at Ch.1.
10*See* Bassiouni & Wise, *supra* note 31, at 8.
11*See, e.g.*, *Question of the Punishment of War Criminals and of Persons Who have Committed Crimes Against Humanity*, G.A. Res. 2840, U.N. GAOR 3d Comm., 26th Sess., Supp. No. 29 at 88, U.N. Doc. A/8429 (1971); *Principles of International Co-operation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes Against Humanity*, G.A. Res. 3074, U.N. GAOR, 28th Sess., Supp. No. 30 at 78, U.N. Doc. A/9030 (1973).
12*See, e.g.*, Meron, *supra* note 2; *see also* Claudia Annacker, *The Legal Regime of "Erga Omnes" Obligations and International Law*, 46 Austrian J. Pub. Int'l L. 131 (1994); Theodor Meron, *On a Hierarchy of International Human Rights*, 80 Am. J. Int'l L. 1 (1986).
13*See* Ian Brownlie, State Responsibility: System of the Law of Nations (1983).
14*See* M. Cherif Bassiouni, *A Functional Approach to "General Principles of International Law"*, 11 Mich. J. Int'l L. 768, 801-09 (1990).
15*See, e.g.*, Hannikainen, *supra* note 40.
16*See, e.g.*, Ian Brownlie, Principles of Public International Law 512-15 (3d ed. 1979); 1 Hersh Lauterpacht, International Law 113 (Elihu 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.

N.G. Onuf & Richard K. Birney, *Peremptory Norms of International Law: Their Source, Function and Future*, 4 Denver J. Int'l L. & Pol'y 187 (1973).
17*See* Anthony D'Amato, The Concept of Custom in International Law 132 (1971).
18*See* Christenson, *supra* note 40; *cf.* Mark Janis, *Jus Cogens: An Artful Not a Scientific Reality*, 3 Conn. J. Int'l L. 370 (1988).
19*See supra* note 57.
20The ICTY Statute and the ICTR Statute, supra note 18, address genocide, crimes against humanity, and war crimes. The 1996 Code of Crimes includes these three crimes plus Aggression. *See Draft Code of Crimes Against Peace and Security of Mankind*: *Titles and Articles on the Draft Code of Crimes Against Peace and Security of Mankind adopted by the International Law Commission on its Forty-Eighth Session*, U.N. GAOR, 51st Sess., U.N. Doc. A/CN.4L.532 (1996), *revised by* U.N. Doc. A/CN.4L.532/Corr.1 and U.N. Doc. A/CN.4l.532/Corr.3; *Crimes Against U.N. Personnel*, *in* Bassiouni, *supra* note 34.

21*See* Michael Ackehurst, *Custom as a Source of International Law,* 1974 Brit. Y.B. Int'l. L. 1.
22*See* Bassiouni, *supra* note 34.
23*See id.*
24*See* 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, Agression 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.
28ICL doctrine has not however sufficiently dealt with the doctrinal bases of international crimes, elements of international criminalization, and the criteria for their application to each and every international crime. This is evident in the writings of most ICL scholars. *See* M. Cherif Bassiouni, *The Sources and Content of International Criminal Law: A Theoretical Framework*, *in* I International Criminal Law (M. Cherif Bassiouni ed., 3d ed. forthcoming 1999); M. Cherif Bassiouni, *Characteristics of International Criminal Law Conventions and International Criminal Law and Human Rights*, *in* 1 International Criminal Law: Crimes 1 & 15 (M. Cherif Bassiouni ed., 1986); Daniel Derby, *A Framework for International Criminal Law*, *in* 1 International Criminal Law: Crimes 33 (M. Cherif Bassiouni ed., 1986).
29Except for the notable problem in the South Asia Seas. *See* G.O.W. Mueller & Freda Adler, Outlaws of the Ocean: The Complete Book of Contemporary Crime on the High Seas (1985).
30*See* Jacob Sundberg, *The Crime of Piracy, in* I International Criminal Law (M. Cherif Bassiouni ed., 3d ed. forthcoming 1999).

31*See* Theodor Meron, *International Criminalization of Internal Atrocities,* 89 Am. J. Int'l L. 554 (1995) (arguing that artificial legal distinctions between conflicts of an international and non-international character should be eliminated, a position strongly supported by this writer; *see* M. Cherif Bassiouni (in Collaboration with Peter Manikas), The International Criminal Tribunal for the Former Yugoslavia (1995)). *See also* Howard Levie, Terrorism In War Crimes: The Law of War Crimes (1993).

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

33This 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.

36II Hugo Grotius, De Jure Belli ac Pacis, ch. XXI, §§ III, IV, *in* Classics of International Law 526-29 (James B. Scott ed. & F. Kelsey trans., 1925); II Emmerick de Vattel, The Law of Nations, *in* Classics of International Law (Charles G. Fenwick trans., 1916).

371986 I.C.J. 14. *See generally* Appraisals of the ICJ's Decision: Nicaragua v. United States (Merits), 81 Am J. Int'l. L. 77 (1987).

38*See* Law and Force in the New International Order (Lori Fisler Damrosch & David Scheffer eds., 1991).

39*See* Advisory Opinion of the International Court of Justice on Reservations to the Convention on the Prevention and the Punishment of the Crime of Genocide, 1951 I.C.J. 1, 15 (May 28); Convention on the Prevention and the Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277.

40One 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 in National and International Law (1976); Nico Keijzer, Military Obedience (1978); Ekkhart Muller-Rappard, L'Ordre Superieur Militaire et la Responsibilite Penale du Subordonne (1965); Leslie Green, *Superior Orders and Command Responsibility,* 1989 Can. Y.B. Int'l L. 167.

41London Charter, *supra* note 8.

42*See*, *e.g.*, Bassiouni, *supra* note 29; M. Cherif Bassiouni, *International Law and the Holocaust*, 9 Cal. W. Int'l. L.J. 201, 208-14 (1979).

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

44*See* Bassiouni, Draft Code, *supra* note 45; *see also Draft Code of Crimes, supra* note 63; M. Cherif Bassiouni, *The History of the Draft Code of Crimes Against the Peace and Security of Mankind, in* I International Criminal Law (M. Cherif Bassiouni ed., 2d ed. forthcoming 1999).

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

46In 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.*

47Barcelona Traction, Light and Power Co. Ltd. (Belg. v. Spain), 1970 I.C.J. 3, 32 (Feb. 5).

48*Id.*

49*Id.* 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.

50*Barcelona 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 *cogestes* 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).

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

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

541951 ICJ Rep. 15 (May 28); *see* Gordon Christenson, *The World Court and Jus Cogens*, 81 Am. J. Int'l L. 93 (1987).

55(Preliminary Objections) (*Ethiopia v. South Africa; Liberia v. South Africa*), 1963 ICJ Rep. 319 (Dec. 21); *see* Christenson, *supra* note 97.

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

57Lech Gardocki, *Report, Les Crimes Internationaux et le Droit Pénal Interne*, 60 Revue Internationale de Droit Pénal 91 (1989); Otto Triffterer, *Report, Les Crimes Internationaux et le Droit Pénal Interne,* 60 Revue Internationale de Droit Pénal 31 (1989).

58On the establishment of the permanent international criminal court, see *Report of the Preparatory Committee on the Establishment of an International Criminal Court*, U.N. GAOR 51st Sess., Supp No. 22, U.N. Doc A/51/22 (1996); *The International Criminal Court: Observations and Issues Before the 1997-98 Preparatory Committee; and Administrative and Financial Implications*, 13 Nouvelles Études Pénales (M. Cherif Bassiouni ed. 1997).