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Samantha V. Ettari

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# A FOUNDATION OF GRANITE OR SAND? THE INTERNATIONAL CRIMINAL COURT AND UNITED STATES BILATERAL IMMUNITY AGREEMENTS

## INTRODUCTION

Scholars of international law heralded the signing of the July 1998 Rome Statute, establishing the International Criminal Court,<sup>1</sup> as long overdue, auspicious, controversial, or simply wrong.<sup>2</sup> Nowhere in international law has a debate raged so fiercely over the legitimacy of a court, the evolution of the controlling law and the need for global cooperation as it has in the field of international criminal law.<sup>3</sup> For many organizations and political bodies, many of which had labored indefatigably to salvage and promote human rights, the establishment of the Court stood as the physical embodiment of their efforts.<sup>4</sup> After decades of flagrant human rights violations coupled with

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1. Hereinafter "ICC."

2. Mark S. Ellis, *The International Criminal Court and its Implication for Domestic Law and National Capacity Building*, 15 FLA. J. INT'L L. 215 (2002); International Criminal Court, *Historical Introduction*, at <http://www.icc-cpi.int/php/show/php?id=history> (last visited Nov. 14, 2003); Lawyers Committee For Human Rights, *The International Criminal Court*, at [http://www.lchr.org/international\\_justice/icc/icc.htm](http://www.lchr.org/international_justice/icc/icc.htm) (last visited on Nov. 14, 2003).

3. See International Criminal Court, *Historical Introduction*, *supra* note 2.

4. Upon the ratification of the Rome Statute, Amnesty International published a favorable commendation of the ICC and its goal of eradicating unaccountable perpetrators of human rights violations. "This is a very important moment in the struggle for international justice, because it means that people suspected of committing crimes against humanity, war crimes or genocide – no matter what their rank – may be tried by the court." Amnesty International further praised the mission and the authority of the court when it wrote, "A message is being sent around the world that people planning the worst crimes and human rights violations can no longer do so in the knowledge that they won't be held accountable." Press Release, Amnesty International, *The International Criminal Court – a Historic Development in the Fight for Justice* (Nov. 4, 2002), available at <http://www.amnesty.org>.

impunity,<sup>5</sup> a concerted initiative for an international criminal court was launched in the General Assembly in 1991.<sup>6</sup> But breathing life into the Court proved to be a Herculean task for the international community, resulting in a half-decade struggle to determine (1) which crimes would fall under the jurisdiction of the Court; (2) what structure and rules would be implemented for its effective operation; and (3) from what source would the Court derive its jurisdiction – from state consent,<sup>7</sup> territoriality<sup>8</sup> or universal jurisdiction?<sup>9</sup>

Under Article 12 of the Rome Statute, the ICC's jurisdiction originates from state consent,<sup>10</sup> which manifests itself through either territorial or nationality jurisdiction.<sup>11</sup> Alternatively, the ICC's ultimate and most compelling source of authority may rest, however, in the philosophical natural laws underpinning the relationship between the international community's rights

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5. On the eve of its one year anniversary, the ICC stated, "In the past century, millions of children, women and men have been victims of unimaginable atrocities that deeply shock the conscience of humanity." Press Kit, International Criminal Court, First Anniversary of the Court (Jul. 1, 2003), available at <http://www.icc-cpi.int/php/index.php>.

6. Bruce D. Landrum, *The Globalization of Justice: The Rome Statute of the International Criminal Court*, 2002 ARMY LAW 1, 4 (2002).

7. For the purposes of this article, the word "state" means "country," which is the customary vernacular of international law scholarship and practice.

8. *Infra* note 34.

9. *Infra* note 37.

Rome Statute of the International Criminal Court, U.N. Doc. A/CONF. 183/9, art. 12 - 13 (1998) (United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, July 17, 1998), reprinted in, 37 I.L.M. 998 (1998) [hereinafter Rome Statute].

10. "Preconditions to the exercise of jurisdiction: A State which becomes a Party to this Statute thereby accepts the jurisdiction of the Court with respect to the crimes referred to in article 5." *Id.* art. 12 (1).

11.

[T]he Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the court in accordance with paragraph 3: The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft; The State of which the person accused of the crime is a national.

*Id.* art. 12(2)(a)-(b).

and the correlative duties vested in the states.<sup>12</sup> Where such a relationship exists, the states are under an obligation to uphold and defend not only their citizens' rights but also the rights of the international community at large.<sup>13</sup> This obligation springs from a complex relationship between international crimes, *jus cogens* and obligations *erga omnes* that has developed in customary international law.<sup>14</sup> Where that relationship imposes an affirmative duty on a state to adjudicate, convict and punish violators of international human rights, a state cannot shirk that duty.<sup>15</sup>

This complex relationship between the international communities' right to prosecution and the states' duties to comply is not sufficiently protected, however, by consent or territorial-based jurisdiction. Instead, universal jurisdiction provides the strongest basis underpinning the ICC's authority, allowing for a more effective and formidable court.<sup>16</sup> Under the Rome Statutes' principle of complementarity,<sup>17</sup> the authority of the ICC is triggered when a state is unable or unwilling to fulfill its duties to the international community, which demand that the state adjudicate international criminal offenses subject to universal

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12. For the legal model on correlative rights and duties in a contract form, see Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 30 (1913). *Infra* note 86.

13. NINA H.B. JØRGENSEN, *THE RESPONSIBILITY OF STATES FOR INTERNATIONAL CRIMES* 217 (2000).

14. See Marjorie Cohn, *How U.S. Opposition to International Court Jeopardizes U.S. Troops*, Sep. 10, 2003, at <http://cnn.com> (last visited Sep. 15, 2003) [hereinafter *How U.S. Opposition*].

15. See Hohfeld, *Some Fundamental Legal Conceptions*, *supra* note 12, at 30-31.

16. Kofi Annan, in a message to the United Nations, asserted that "[o]nly a permanent court with universal jurisdiction can finally lay to rest the charge that the international community is being selective or applying double standards in deciding which crimes to investigate and punish." Kofi Annan, *Message of the Secretary-General of the United Nations*, in *THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A CHALLENGE TO IMPUNITY* xiii (Mauro Politi & Giuseppe Nesi eds., 2001).

17. "[T]he Court shall determine that a case is inadmissible where: The case is being investigated or prosecuted by a State which has jurisdiction over it, unless the State is unwilling or unable genuinely to carry out the investigation or prosecution; The case has been investigated by a State which has jurisdiction over it and the State has decided not to prosecute the person concerned, unless the decision resulted from the unwillingness or inability of the State genuinely to prosecute." Rome Statute, *supra* note 9, at art. 17(1)(a)-(b).

jurisdiction.<sup>18</sup> Essentially, this means that the state's duty is then discharged to the ICC, under the *jus cogens* and obligations *erga omnes* doctrines of customary international law.<sup>19</sup> Any treaty or agreement violating or impeding that discharge of duty violates customary international law.<sup>20</sup>

As of May 2004, ninety-four states had ratified the Rome Statute.<sup>21</sup> The United States is not one of these countries, and has been vociferous in its opposition, expressing strong reservations over the legitimacy of the ICC and its jurisdiction over United States citizens.<sup>22</sup> Less than five years after the Rome Statute authorized the ICC's creation, the United States launched an unprecedented campaign to secure bilateral immunity agreements.<sup>23</sup> The agreements explicitly exempt United

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18. *Id.* art. 17(1)(a)-(b).

19. On the discharge of duty to the ICC, Amnesty International wrote that the states that ratified the Rome Statute "have accepted the primary obligation to investigate and prosecute people accused of the crimes and when they are unable or unwilling to do so the International Criminal Court may bring them to justice." Press Release, Amnesty International, The International Criminal Court, *supra* note 4.

20. Vienna Convention on the Law of Treaties (1969), May 23, 1969, art. 53, 1155 U.N.T.S. 331.

21. International Criminal Court, States Parties, *available at* <http://www.icc-cpi.int/statesparties.html> (last visited Aug. 19, 2004).

22. *See The International Criminal Court: Protecting American Servicemen and Officials From the Threat of International Prosecution: Hearing Before the Comm. on Foreign Relations*, 106th Cong. 1-2 (2000) (statement of Sen. Jesse Helms, Chairman, Senate Comm. On Foreign Relations); *Id.* at 4-5 (statement of Hon. Caspar W. Weinberger, Former Sec. of Def.); *see also* Human Rights Watch, 'New Justice' vs. Impunity: *The International Criminal Court*, Jun. 18, 2003, *at* <http://www.hrw.org/editorials/2003/icc061803.htm>; *see generally*, Human Rights Watch, *United States Efforts to Undermine the International Criminal Court: Legal Analysis of Impunity Agreements*, *at* <http://www.hrw.org/campaigns/icc/docs/art98analysis.htm> (last visited Aug. 23, 2004).

23. The United States has engaged in a

widespread campaign to undermine and marginalize the ICC to prevent it from becoming an effective instrument of justice. ... The bilateral agreements sought by Washington would require states to send an American national requested by the ICC back to the U.S. instead of surrendering him/her to the ICC. Importantly, Washington's agreement would remove the ICC's oversight function, which is the fundamental principle underpinning the Rome Statute and is critical to close the door on impunity.

Human Rights Watch, *Bilateral Immunity Agreements*, Jun. 20, 2003, *available at* <http://www.hrw.org>.

States citizens from the ICC's reach.<sup>24</sup> The United States' efforts to obtain immunity agreements have invigorated the debate over the ICC's legitimacy and underline the importance of the court's jurisdictional basis.<sup>25</sup>

Part I of this note defines and identifies international crimes subject to universal jurisdiction and within the scope of the International Criminal Court. Part II discusses a state's duty under recognized doctrines of international law to punish perpetrators of those international crimes and the correlative right held by the international community to expect and demand adjudication. Part III suggests that if a state is unable or unwilling to prosecute those crimes, the state must discharge that duty to the ICC. Part IV asserts that the United States' bilateral immunity agreements restricting the authority of the ICC contravene the United States' duty to the international community and hence are illegal under *jus cogens*.

In April of 1999, less than a year after the signing of the Rome Statute and the birth of the ICC, a human rights crisis of mass proportions raged in Kosovo.<sup>26</sup> Academics, politicians, diplomats, and the media all grappled with the following issues: (1) humanitarian intervention; (2) genocide and other international crimes of that nature; (3) a state's privilege or obligation to intervene, prevent, or punish such crimes; and, (4) where to fit the ICC into the landscape of international criminal law.<sup>27</sup> One commentator, writing on the unheeded threats made by the Clinton administration to Slobodan Milosevic to impose war-crime prosecutions, concluded, "These threats have had no visi-

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The list of countries that have signed Bilateral Immunity Agreements with the United States continues to grow. The list of states that have succumbed to the United States' pressures to sign includes Bosnia-Herzegovina, Colombia, Dominican Republic, East Timor, El Salvador, Georgia, Honduras, Romania, India, Israel, Nicaragua, Rwanda, Sierra Leone, Sri Lanka, and Tajikistan. Many of these countries have reciprocal agreements with the United States that grant their citizens immunity from the ICC when on United States territory. *Id.* at 7-13.

24. See Cohn, *How U.S. Opposition*, *supra* note 14.

25. *Id.*; see also John R. Bolton, *The Risks and Weaknesses of the International Criminal Court from America's Perspective*, 64 *LAW & CONTEMP. PROBS.* 167 (2001).

26. See John R. Bolton, *Clinton Meets "International Law" in Kosovo*, *WALL ST. J.*, Apr. 5, 1999, at A23.

27. *Id.*

ble effect, and thus provide yet another compelling piece of evidence why the new International Criminal Court – created in nearby Rome just this last summer – rests on a foundation of sand.”<sup>28</sup>

By firmly establishing that the ICC’s jurisdiction is implicitly derived from universal jurisdiction, regardless of consent, nationality, or territorial jurisdiction, the ICC’s foundation would be solid, as the protection the ICC affords to the relationship between rights and duties could not be eroded by bilateral immunity agreements or any other attempts to limit its scope and reach.

## I. INTERNATIONAL CRIMES SUBJECT TO UNIVERSAL JURISDICTION AND THE INTERNATIONAL CRIMINAL COURT

### A. *The Birth of International Crimes*

Before World War II and the Nuremburg trials, very few crimes enjoyed the status of “international crimes.” While two crimes, piracy<sup>29</sup> and slavery<sup>30</sup>, had gained general consensus as subject to universal jurisdiction, it was not without considerable debate.<sup>31</sup> In the early twentieth century not all scholars were persuaded that universal jurisdiction applied. As a result, a debate raged in the scholarly rhetoric as to what form of jurisdiction was best applied to these crimes committed on the high seas and across international borders.<sup>32</sup>

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28. *Id.*

29. “A pirate is defined as one who, without legal authority from any State, attacks a ship with intention to appropriate what belongs to it.” *In re Piracy Jure Gentium* (1934) AC 586, 594-95 (internal quotes omitted).

30. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 (1980).

31. See MALCOLM SHAW, INTERNATIONAL LAW 470 (4th ed. 1997).

32. Subscribing to the universal jurisdiction paradigm, Shaw wrote:

Universal jurisdiction over piracy has been accepted under international law for many centuries and constitutes a long-established principle of the world community. All states may both arrest and punish pirates, provided of course that they have been apprehended on the high seas or within the territory of the state concerned. The punishment of the offenders takes place whatever their nationality and wherever they happen to carry out their criminal activities.

*Id.*

Some international legal scholars clung tenaciously to their preference for adjudication of criminal acts in domestic courts as opposed to international forums.<sup>33</sup> The twentieth-century scholar Georg Schwarzenberger, subscribing to the “state-sovereignty” or “territorial”<sup>34</sup> international legal theory, concluded in 1950 that “international criminal law in any true sense does not exist.”<sup>35</sup> “Territorial” scholars, such as Schwarzenberger, concluded that the crime of piracy was adjudicable only in domestic courts.<sup>36</sup> On the other hand, “naturalist” scholars,<sup>37</sup> including scholars who prescribe to universal juris-

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33. As late as the 1950s, seasoned international law scholars debated over whether criminal acts could ever come under the auspices of international jurisdiction. See John F. Murphy, *International Crimes*, in THE UNITED NATIONS AND INTERNATIONAL LAW 362 (Christopher C. Joyner ed., 1997), citing Georg Schwarzenberger, *The Problem of an International Criminal Law*, 3 CURRENT LEGAL PROBLEMS 263, 295 (1950).

34. The territorial principle of criminal jurisdiction is that “courts of the place where the crime is committed may exercise jurisdiction.” IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 303 (5th ed. 1998). Brownlie discusses the practical advantages of this theory of international criminal jurisdiction, including amongst them “a convenience of the forum and the presumed involvement of the interests of the state where the crime is committed.” *Id.* Shaw writes, in further support of the territorial principle, “That a country should be able to prosecute for offenses committed upon its soil is a logical manifestation of a world order of independent states and is entirely reasonable since the authorities of a state are responsible for the conduct of law and the maintenance of good order within that state.” SHAW, INTERNATIONAL LAW, *supra* note 31, at 458-59.

35. Murphy, *International Crimes*, *supra* note 33, at 362. Schwarzenberger and others of his school of thought held solidly to the opinion that “an international criminal law that is meant to be applied to the world powers is a contradiction in terms. It presupposes an international authority which is superior to these states.” *Id.*

36. Schwarzenberger held that all crimes were of a nature most effectively handled in domestic courts:

The rules of international law both on piracy *jure gentium* and war crimes constitute prescription to States to suppress piracy within their own jurisdiction and to exercise proper control over their own armed forces, and an authorization to other States to assume an extraordinary criminal jurisdiction under their own municipal law in the case of piracy *jure gentium* and of war crimes committed prior to capture by the enemy.

*Id.*

37. Two theories of international jurisdiction seem to fit nicely under the naturalist theory – that of the “universality” principle, which “justifies the repression of some types of crime as a matter of international public policy,”



diction, believed piracy was in the domain of the international community, subject to global jurisdiction because of its universally detrimental effects.<sup>38</sup> Pirates traversing international waters often brandished the flag of their country of origin; yet they did not sail under the authority of that or any country.<sup>39</sup> Further, piracy was more palatably a crime subject to universal jurisdiction because (1) the crime occurred in international waters or on the “high seas”; (2) the pirate showed allegiance to no country (only to himself); and (3) consequently, the pirate had abandoned the protection or safeguards of his proclaimed state of affiliation.<sup>40</sup>

Slavery, also characterized by perpetration on the high seas and transnational, borderless activities, shared an early birth as an established international crime.<sup>41</sup> The preponderance of scholars and practitioners of international law now readily acknowledge that states have a right to exert universal jurisdic-

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and the more general “crimes under international law,” which expands the domain of the universality principle to incorporate crimes that “breach international law.” Universality when taken to this broader expanse allows that some crimes “may be punished by *any state* which obtains custody of persons suspected of responsibility.” BROWNIE, *supra* note 34, at 307-08.

38. The United Nations and scholars subscribing to universality ideologies arrived at a different view than the “territorial” scholars, advancing in the 1958 Geneva Convention on the High Seas that “the view of ‘piracy’ as a crime against international law seek[s] only a tribunal with jurisdiction to apply that law and punish the criminal.” Murphy, *International Crimes, supra* note 33, at 363, *citing* A. RUBIN, *THE LAW OF PIRACY* 319-37 (1988).

39. In *Re Piracy Jure Gentium*, the Privy Council called the pirate “a sea brigand. He has no right to any flag and is justiciable by all.” *In re Piracy Jure Gentium* (1934) AC 586, 594-95.

40. The Privy Council justified universal jurisdiction over the crime of piracy by distinguishing crimes committed on “terra firma” [firm land] as falling under the domain of the “municipal law of each country” from crimes committed on the “high seas,” which were “justiciable by any State anywhere.” *Id.* at 589. The Privy Council also held that the pirate, by committing his acts of piracy, “placed himself beyond the protection of any State. He is no longer a national, but “*hostis humani generis.*” *Id.*

41. The 1815 Declaration of the Congress of Vienna “equated traffic in slavery to piracy.” Since that time, slavery has been subjected to the same “universal condemnation that existed with respect to piracy.” M. Cherif Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, 42 VA. J. INT'L L. 81, 112-13 (2001), *citing* M. CHERIF BASSIOUNI, *INTERNATIONAL CRIMINAL LAW CONVENTIONS AND THEIR PENAL PROVISIONS* 637-734 (1997).

tion over piracy and slavery, the first acts to come under the heading of “international crimes.”<sup>42</sup>

### *B. Nuremburg and Beyond*

The question of whether criminal acts could transcend the traditional domestic-modeled jurisdictions and demand a more expansive accountability to an international legal body was presented to the international community with an unprecedented urgency in the aftermath of World War II.<sup>43</sup> This period, marked by an unparalleled human rights crisis, initiated a debate and ultimately an affirmation that some crimes reach such proportion and level of atrocity as to demand accountability to humanity at large.<sup>44</sup> At Nuremberg, the Military Tribunal “proclaimed the existence of two ‘new’ crimes under international law – crimes against peace and crimes against humanity.”<sup>45</sup>

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42. See SHAW, *INTERNATIONAL LAW*, *supra* note 31, at 470; Bassiouni, *Universal Jurisdiction*, *supra* note 41, at 112-13.

43. Murphy, *International Crimes*, *supra* note 33, at 364; SHAW, *INTERNATIONAL LAW*, *supra* note 31, at 471.

44. In the aftermath of World War II, the widespread effect and heinous nature of the war crimes committed under the Nazi regime caused outrage in the international community and it seemed the natural progression of international law to try the perpetrators of these atrocious acts. Yet this was not the first time war crimes had been addressed in the international arena. In 1927, in the wake of World War I, French Extradition Law provided that “acts committed in the course of a civil war would not be protected as political offences if they were acts of odious barbarism and vandalism prohibited by the laws of war.” I.A. SHEARER, *EXTRADITION IN INTERNATIONAL LAW* 186 (1971) (internal quotes omitted). Therefore, the trials at Nuremberg were consistent with a growing global effort towards eradicating war crimes and holding those responsible for their instigation liable. *Id.* at 185-87.

45. “Crimes against humanity clearly cover genocide and related activities.” SHAW, *INTERNATIONAL LAW*, *supra* note 31, at 472.

The Statute of the International Tribunal for the Former Yugoslavia provided that

[C]rimes against humanity are aimed at any civilian population and are prohibited regardless of whether they are committed in an armed conflict, international or internal in character and that crimes against humanity refer to inhumane acts of a very serious nature, such as willful killing, torture or rape, committed as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds.

*Id.*, citing Security Council Resolution 827 (1993).

This proclamation advanced a growing list of international crimes and evidenced an emergent awareness of the necessary international accountability required to squelch crimes committed against humanity as a whole.<sup>46</sup> All the individuals involved in prosecuting at the Nuremburg trials recognized the global responsibility to vindicate the crimes that had occurred under Hitler and his Nazi regime.<sup>47</sup> At Nuremburg, a foundation was laid down for future international remedies for international crimes.<sup>48</sup>

Hence, in the immediate years following World War II, crimes such as “genocide,”<sup>49</sup> “ethnic cleansing”<sup>50</sup> and “war crimes”<sup>51</sup> re-

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The Statute of the International Tribunal for Rwanda defines crimes against humanity as crimes committed “as part of a widespread or systematic attack against any civilian population on national, political, ethnic, racial or religious grounds,” encompassing “murder, extermination, enslavement, deportation, imprisonment, torture, rape, persecutions on political, racial and religious grounds, and other inhumane acts.” Statute of the International Tribunal for Rwanda, art. 3, Security Council Resolution 955 (1994).

46. Murphy, *International Crimes*, *supra* note 33, at 364, *citing* the Judgment of the International Military Tribunal, 6 FRD 69, 107 (1946). Murphy contends that the Charter of the Nuremberg Tribunal and the Convention on the Prevention and Punishment of the Crime of Genocide, adopted by the General Assembly on December 9, 1948, both affirming the “new crimes,” support the proposition that punishment for crimes against peace and against humanity is “recognized broadly as international customary law.” *Id.*; *see also* Peter Burns, *An International Criminal Tribunal: The Difficult Union of Principle and Politics*, in *THE PROSECUTION OF INTERNATIONAL CRIMES* 127 (Roger Clark & Madeleine Sann eds., 1994).

47. Justice Jackson, as Chief Prosecutor for the United States, said in his opening statement,

The privilege of opening the first trial in history for crimes against the peace of the world imposes a grave responsibility. ... That four great nations, flushed with victory and stung with injury, stay the hand of vengeance and voluntarily submit their captive enemies to the judgment of the law is one of the most significant tributes that Power has ever paid to Reason. We must never forget that the record on which we judge these defendants is the record on which history will judge us tomorrow.

Benjamin Ferencz, *From Nuremberg to Rome: A Personal Account* (2004), available at <http://www.benferencz.org/feb20041.htm>.

48. *Id.*

49. Genocide, as defined by the United Nations Security Council in Article 2 of the Statute of the International Tribunal for Rwanda, includes any of the following acts

ceived universal condemnation from the international community.<sup>52</sup> The development of customary international law defining these crimes and promoting their prosecution has led to global cooperation in creating *ad hoc* tribunals, such as the In-

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[C]ommitted with intent to destroy, in whole or in part, a national, ethnic, racial or religious group, as such: killing members of the group; causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group.

Statute of the International Tribunal for Rwanda, art. 2, *supra* note 45.

50. In its resolution creating an international tribunal for the prosecution of persons responsible for serious violations of international humanitarian law in Yugoslavia, the Security Council included in the list of reported crimes over which it had “grave alarm” “mass killings, massive, organized and systematic detention and rape of women, and the continuance of the practice of ethnic cleansings.” S.C. Res. 827, U.N. SCOR, 48th Year, 3217th mtg. at 1, U.N. Doc. S/RES/827 (1993); *see also* the Report of the International Law Commission on its Forty-Sixth Session, UN G.A.O.R., 49th Sess, Supp.No.10 UN Doc.A/49/10 (1994).

51. The four Geneva “Red Cross” Conventions of 1949 extended universal jurisdiction over “grave breaches” of crimes against humanity, which included “willful killing, torture or inhuman treatment, unlawful deportation of protected persons and the taking of hostages.” The list was later extended to include “attacking civilian populations.” SHAW, INTERNATIONAL LAW, *supra* note 31, at 471, *citing* G. I. D. DRAPER, THE RED CROSS CONVENTIONS, 105 (1958).

52. “War crimes and genocide are now widely accepted as being susceptible to universal jurisdiction.” REBECCA WALLACE, INTERNATIONAL LAW 114 (2002). In support of this rule of customary international law, Wallace points to two separate instances, the first, the *Eichmann Case*, in which Israel claimed jurisdiction on grounds that “a universal course (pertaining to the whole of mankind), [ ] vests the right to prosecute and punish crimes of this order in every state within the family of nations.” *Id.* at 114; *see also*, *Attorney-General of the Government of Israel v. Eichmann* 36 I.L.R. 5 (1961); Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785 (1988). Randall notes that Israel’s assertion of jurisdiction over Eichmann was distinct from previous Nazi trials in that “the state of Israel did not exist when Eichmann committed his crimes.” However, “the fact that Israel was not a state when Eichmann acted does not affect the legitimacy of Israel’s jurisdiction under the universality principle.” *Id.*, at 814. Second, Wallace finds support for universal jurisdiction over war crimes and genocide in the Charter of the Nuremberg Military Tribunal, art. 6, “which referred to crimes against peace, violations of the laws and customs of war, and crimes against humanity and for which there was to be individual responsibility... [T]he judgment[s] of the Tribunal are now accepted as international law.” WALLACE, *supra* at 52.

ternational Criminal Tribunals for Rwanda and the former Yugoslavia,<sup>53</sup> international courts, such as the War Crimes Tribunals in Sierra Leone and Cambodia,<sup>54</sup> and forums such as the South African Human Rights Commission and the Inter-American Commission on Human Rights,<sup>55</sup> all sufficiently equipped with the legal tools and precedents to try the perpetrators of international crimes.

The growing body of international documents that address war crimes and crimes against humanity strive to effectively and efficiently make those who perpetrate them accountable before *any* competent body, domestic or international, capable and willing.<sup>56</sup> In 1948, the Convention on the Prevention and Punishment of the Crime of Genocide set guidelines for punishing genocide.<sup>57</sup> The Convention declared genocide punishable during times of war as well as “in the absence of international armed conflict” and classified genocide as a “crime under international law” subject to universal jurisdiction.<sup>58</sup>

Almost thirty years later, in 1973, the United Nations General Assembly passed Resolution 3074, “Principles of International Co-operation in the Detection, Arrest, Extradition and Punishment of Persons Guilty of War Crimes and Crimes Against Humanity,” which declared that “States shall co-

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53. See International Criminal Tribunal for Rwanda, at <http://www.ictt.org/default.htm> (last visited Aug. 24, 2004); International Criminal Tribunal for the former Yugoslavia, at <http://www.un.org/icty/glance/index.htm> (last visited Aug. 24, 2004).

54. See Special Court for Sierra Leone, at <http://www.sc-sl.org/> (last visited Aug. 24, 2004); Special Tribunal for Cambodia, at <http://www.globalpolicy.org/intljustice/camindx.htm> (last visited Aug. 24, 2004).

55. See South African Human Rights Commission, at <http://www.sahrc.org.za/> (last visited Aug. 24, 2004); African Commission on Human and Peoples' Rights, at <http://www.achpr.org/> (last visited Aug. 24, 2004); Inter-American Commission on Human Rights, at <http://www.cidh.oas.org/DefaultE.htm> (last visited Aug. 24, 2004).

56. See SHAW, INTERNATIONAL LAW, *supra* note 31, at 472.

Following World War II, many of the international documents and bilateral and multilateral treaties promulgated in an effort to apprehend and try those responsible for war crimes avoided the use of the word ‘extradition’ in an effort to “give States the widest latitude in resorting to measures of rendition.” SHEARER, *supra* note 44, at 186.

57. G.A. Res. 260A(III) of 9 Dec. 1948. U.N. Treaty Series No. 78, at 279.

58. Nigel S. Rodley, *The International Legal Consequences of Torture, Extra-Legal Execution, and Disappearance*, in NEW DIRECTIONS IN HUMAN RIGHTS 177-78 (Ellen L. Lutz et al. eds., 1989).

operate with each other on a bilateral and multilateral basis with a view to halting and preventing war crimes and crimes against humanity, and shall take the domestic and international measures necessary for that purpose.”<sup>59</sup> Although the resolution specified that “every State has the right to try its own nationals for war crimes or crimes against humanity” and asserted that “persons against whom there is evidence that they have committed war crimes and crimes against humanity shall be subject to trial and, if found guilty, to punishment, as a general rule in the countries in which they committed those crimes,” the resolution does not preclude or exclude other States from apprehending and prosecuting perpetrators of war crimes and in fact calls for State cooperation.<sup>60</sup>

After Nuremberg, the international community gradually amassed a substantial list of international crimes, evidenced through treaties, General Assembly and Security Council Resolutions, and case law under which states had the privilege to adjudicate criminals under the doctrine of universal jurisdiction, regardless of whether the crimes had been perpetrated within their domestic borders or by their nationals.<sup>61</sup> International crimes of torture, slavery and/or deportation or forcible transfer of population, whether or not they were on a “massive” scale or “systematically” carried out, were firmly rooted in that doctrine.<sup>62</sup> Torture, defined as any act by which “severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining... information or confession, punishing him for an act he has committed or is suspected... or intimidat-

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59. 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 (XXVIII), U.N. GAOR, 28th Sess., Supp. No. 30, at 78 ¶ 3, U.N. Doc. A/9030 (1973).

60. *Id.* ¶ 2-3, 5.

Scholars have embraced this broader allowance of universal jurisdiction as well. “The resolution reaffirms that war crimes and crimes against humanity are subject to universal jurisdiction, calls upon states to assist each other in ‘detecting, arresting, and bringing to trial persons suspected of having committed such crimes and, if they are found guilty, in punishing them.’” Murphy, *International Crimes*, *supra* note 33, at 375.

61. *Id.*

62. *Id.* at 366.

ing him or other persons,"<sup>63</sup> is one of the oldest practiced and most widely condemned crimes under international law.<sup>64</sup> Thus, all States clearly have a privilege (more commonly labeled a right in scholarly vernacular) either to extradite an alleged torturer or try him where he is found on the basis of universality of jurisdiction.<sup>65</sup>

Even the jurisprudence of the United States condemns torture and acknowledges universal jurisdiction over the torturer, no matter where the crime was committed, analogizing the torturer to "the pirate and slave trader before him – *hostis humani generis*, an enemy of mankind."<sup>66</sup> In *Filartiga v. Pena-Irala*, the United States Court of Appeals for the Second Circuit held that "deliberate torture perpetrated under color of official authority violates universally accepted norms of the international law of human rights, regardless of the nationality of the parties. Thus, whenever an alleged torture is found and served with process by an alien within our borders [there is] federal jurisdiction."<sup>67</sup>

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63. G.A. Res. 3452, 30th Sess. U.N. GAOR Supp. No. 34 at 91, U.N. Doc. A/1034 (1975). Torture as defined in the "Declaration on the Protection of All Persons from Being Subjected to Torture" does "not include pain or suffering arising only from, inherent or incidental to lawful sanctions to the extent consistent with the Standard Minimum Rules for the Treatment of Prisoners." *Id.*

64. See Murphy, *International Crimes*, *supra* note 33, at 370-71. See also "Torture and other Cruel, Inhuman or Degrading Treatment or Punishment." G.A. Res. 57/200, U.N. GAOR, 57th Sess., 77th mtg. at 1, U.N. Doc. A/RES/57/200 (2003); "Optional Protocol to the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment." G.A. Res. 57/199, U.N. GAOR, 57th Sess., U.N. Doc. A/RES/57/199 (2003).

65. See Rodley, *supra* note 58, at 182-83.

66. *Filartiga v. Pena-Irala*, 630 F.2d 876, 890 (2d Cir. 1980).

67. *Id.* at 878.

The Filartiga family, citizens of Paraguay, brought this action in the Eastern District of New York against Americo Norberto Pena-Irala, a citizen of Paraguay and the former Inspector General of Police in Asuncion, Paraguay. The Filartigas claimed that their son had been tortured and killed by Pena as retaliation for the father's political activities and beliefs and had autopsies demonstrating that the seventeen-year-old boy's death "was the result of professional methods of torture." When the Filartigas brought an initial action against Pena in Paraguay their attorney was also tortured and subsequently disbarred on trumped-up charges. At the time of this suit in the United States, the suit in Paraguay had been pending over four years. The Second

In addition to the well established international crimes subject to universal jurisdiction that allow states to extradite or try perpetrators, an additional body of crimes is gradually gaining a foothold in the international community and may eventually afford states the same privilege to try and punish the perpetrator where found.<sup>68</sup> Examples of international activities that have long since plagued the global community, and are rapidly evolving into “international crimes” that in the near future may be subject to adjudication under the doctrine of universal jurisdiction, include drug trafficking<sup>69</sup> and international terrorism.<sup>70</sup>

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Circuit based its jurisdiction over Pena on the practices and obligations of the international community.

In the twentieth century the international community has come to recognize the common danger posed by the flagrant disregard of basic human rights and particularly the right to be free of torture... [C]ivilized nations have banded together to prescribe acceptable norms of international behavior. From the ashes of the Second World War arose the United Nations Organization, amid hopes that an era of peace and cooperation had at last begun.

*Id.*, at 878-79, 890.

68. From the “Single Convention on Narcotic Drugs” in 1960 to the bilateral and multilateral treaties in the following decades, which expanded extraditable offenses to include violations of narcotics laws, there is an ever-increasing movement towards the addition of trafficking in narcotic drugs to the ranks of crimes subject to universal jurisdiction. See CHRISTOPHER L. BLAKESLEY, *TERRORISM, DRUGS, INTERNATIONAL LAW, AND THE PROTECTION OF HUMAN LIBERTY: A COMPARATIVE STUDY OF INTERNATIONAL LAW, ITS NATURE, ROLE, AND IMPACT IN MATTERS OF TERRORISM, DRUG TRAFFICKING, WAR, AND EXTRADITION* 140, 214 (1992), *citing* the 1986 Supplementary Extradition Treaty Between the United States and the Federal Republic of Germany; *citing* the United States–French Supplementary Treaty taken from the United States Draft Extradition Convention; *see also* Molly McConville, *A Global War on Drugs: Why the United States Should Support the Prosecution of Drug Traffickers in the International Criminal Court*, 37 AM. CRIM. L. REV. 75 (2000) (advancing the need for an international court and universal jurisdiction over drug traffickers); REPORT OF THE TASK FORCE ON AN INTERNATIONAL CRIMINAL COURT OF THE AMERICAN BAR ASSOCIATION 5 (1994) (One of the original jurisdiction proposals for the International Criminal Court was that it have limited jurisdiction over international drug trafficking only).

69. See Murphy, *International Crimes*, *supra* note 33, at 369-70, *citing* 1936 Convention for the Suppression of Illicit Traffic in Dangerous Drugs, 198 LNTS 229 (Murphy notes that this Convention called for “drug traffickers to be punished by *all governments*, regardless of the criminal’s nationality or the place where the crime was committed.”); *also citing* Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, U.N. Doc. E/Conf.



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82/15/Corr. 1 & Corr.2, *adopted by consensus* Dec. 20, 1988, reprinted in 28 ILM 493 (1989).

Drug Trafficking's escalation into the echelons of international crimes is increasingly due to the fact that the crime is often transnational, includes or breeds other forms of crime, and demonstrates a serious threat to "international peace and security." *See generally*, McConville, *A Global War on Drugs*, *supra* note 68, at 75.

70. The General Assembly Resolution on "Protection of Human Rights and Fundamental Freedoms While Countering Terrorism" reiterated the World Conference on Human Rights of June 1993 by stating that

[A]cts, methods and practices of terrorism in all its forms and manifestations are activities aimed at the destruction of human rights, fundamental freedoms and democracy, threatening territorial integrity, security of States and destabilizing legitimately constituted Governments, and....the international community should take the necessary steps to enhance cooperation to prevent and combat terrorism.

G.A. Res. 57/219, U.N. GAOR, 57th Sess., U.N. Doc. A/57/219 (2003).

"Whether the crimes covered by the anti-terrorist conventions may be classified as "international crimes" is debatable. At the very least, they establish a legal framework for states parties to cooperate toward punishment of the perpetrators of these crimes." Murphy, *International Crimes*, *supra* note 33, at 368. *See also* Dinah L. Shelton, *The Relationship of International Human Rights Law and Humanitarian Law to the Political Offense Exception to Extradition*, in *NEW DIRECTIONS IN HUMAN RIGHTS* 149-50 (Ellen L. Lutz et al. eds., 1989). As early as the 1970s, the European community recognized the need for global cooperation in apprehending and prosecuting terrorists. *See* BLAKESLEY, *supra* note 68, at 140-42, *citing* The European Convention on the Suppression of Terrorism, *opened for signature* Jan. 27, 1977, E.T.S. No. 90, *reprinted in* 15 I.L.M. 1272-76 (1976).

States which were a party to the European Convention on the Suppression of Terrorism "obtaining custody of a person who has allegedly engaged in that specified violent conduct [are] *obligated* to prosecute or extradite that person." European Convention, *supra* at art. 7.

Immediately following the terrorist attacks on New York City and Washington, D.C., the Security Council issued Resolution 1368, in which it called on all States "to work together urgently to bring to justice the perpetrators, organizers and sponsors of these terrorist attacks and [stressed] that those responsible for aiding, supporting or harbouring [*sic*] the perpetrators, organizers and sponsors of these acts will be held accountable." S.C. Res. 1368, U.N. SCOR, 56th Year, 4370th mtg. at 1, U.N. Doc. S/RES/1368 (2001).

Under Resolution 1377, the Security Council stressed "continuing international efforts to broaden the understanding among civilizations and to address regional conflicts and the full range of global issues, including development issues [in order to] contribute to international cooperation and collaboration, which themselves are necessary to sustain the broadest possible fight against international terrorism." The UN also called on all States to "become parties as soon as possible to the relevant international conventions

*C. Crimes within the Jurisdiction of the International Criminal Court*

Considering the legal scholarship and development of international criminal law in the preceding century, the Rome Statute astutely placed the following three crimes squarely within the jurisdiction of the International Criminal Court: genocide, crimes against humanity and war crimes.<sup>71</sup> All three were unarguably crimes of universal jurisdiction under customary international law.<sup>72</sup>

Genocide was defined as

Any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such: killing members of the group; causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group; [and] forcibly transferring children of the group to another group.<sup>73</sup>

Crimes against humanity were defined in exhaustive detail.<sup>74</sup> A crime against humanity is any murder, extermination,<sup>75</sup> enslavement,<sup>76</sup> deportation or forcible transfer of population,<sup>77</sup> im-

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and protocols relating to terrorism.” S.C. Res. 1377, U.N. SCOR, 56th Year, 4413th mtg. at 1, U.N. Doc. S/RES/1377 (2001). *See also* S.C. Res. 1465, U.N. SCOR, 58th Year, 4706th mtg. at 1, U.N. Doc. S/RES/1465 (2003); S.C. Res. 1456, U.N. SCOR, 58th Year, 4688th mtg. at 1, U.N. Doc. S/RES/1456 (2003); S.C. Res. 1455, U.N. SCOR, 58th Year, 4686th mtg. at 1, U.N. Doc. S/RES/1455 (2003); S.C. Res. 1452, U.N. SCOR, 57th Year, 4678th mtg. at 1, U.N. Doc. S/RES/1452 (2002); S.C. Res. 1450, U.N. SCOR, 57th Year, 4667th mtg. at 1, U.N. Doc. S/RES/1450 (2002); S.C. Res. 1440, U.N. SCOR, 57th Year, 4632nd mtg. at 1, U.N. Doc. S/RES/1440 (2002).

71. Rome Statute, *supra* note 9, at art. 5(1).

72. *See* Murphy, *International Crimes*, *supra* note 33, at 364.

73. Rome Statute, *supra* note 9, at art. 6(a)-(e).

74. Rome Statute, *supra* note 9, at art. 7.

75. Extermination “includes the intentional infliction of conditions of life, *inter alia* the deprivation of access to food and medicine, calculated to bring about the destruction of part of a population.” *Id.* at art. 7(2)(b).

76. Enslavement was defined as “the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children.” *Id.* at art. 7(2)(c).

77. Deportation or forcible transfer of population is defined as “forced displacement of the persons concerned by expulsion or other coercive acts from

prisonment, torture,<sup>78</sup> rape, sexual slavery, enforced prostitution, enforced disappearance of persons<sup>79</sup> or “other inhumane acts of similar character intentionally causing great suffering, or serious injury to body or to mental or physical health” committed as part of “a widespread or systematic attack directed against any civilian population, with knowledge of the attack.”<sup>80</sup> Sex crimes were also listed as crimes against humanity, including “forced pregnancy,<sup>81</sup> enforced sterilization, or any other form of sexual violence of comparable gravity.”<sup>82</sup>

War crimes were also defined in the statute in great and painstaking detail. First, war crimes are described as “grave breaches of the Geneva Conventions of 12 August 1949” [including but not limited to] willful killing; torture or inhumane treatment, and willfully causing great suffering, or serious injury to body or health.<sup>83</sup> Also included in the definition of war crimes were “other serious violations of the laws and customs applicable in international armed conflict” such as “intentionally directing attacks against the civilian population...or against individual civilians not taking direct part in hostilities.”<sup>84</sup> The Statute also defined certain acts as war crimes, regardless of the conflict’s character—international or domestic.<sup>85</sup>

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the area in which they are lawfully present, without grounds permitted under international law.” *Id.* at art. 7(2)(d).

78. Torture is defined as “intentional infliction of severe pain or suffering, whether physical or mental, upon a person in the custody or under the control of the accused; except that torture shall not include pain or suffering arising only from, inherent in or incidental to, law sanctions.” *Id.* at art. 7(2)(e).

79. Enforced disappearance of persons is defined as “the arrest, detention or abduction of persons by, or with the authorization, support or acquiescence of, a State or a political organization, followed by a refusal to acknowledge that deprivation of freedom or to give information on the fate or whereabouts of those persons, with the intention of removing them from the protection of the law for a prolonged period of time.” *Id.* at art. 7(2)(i).

80. *Id.* at art. 7(1).

81. Forced pregnancy is defined as “the unlawful confinement of a woman forcibly made pregnant, with the intent of affecting the ethnic composition of any population or carrying out other grave violations of international law. This definition shall not in any way be interpreted as affecting national laws relating to pregnancy.” *Id.* at art. 7(2)(f).

82. *Id.* at art. 7(1)(g).

83. *Id.* at art. 8(2)(a).

84. *Id.* at art. 8(2)(b)(i).

85. *Id.* at art. 8(2)(c).

## II. STATE DUTY TO ADJUDICATE INTERNATIONAL CRIMES OF

## UNIVERSAL JURISDICTION: INTERPLAY OF RIGHTS AND DUTIES

In 1913, Wesley Newcomb Hohfeld introduced a legal paradigm regarding rights and duties that established a correlative relationship between the holder of a right and the holder of a duty.<sup>86</sup> Groundbreaking and controversial,<sup>87</sup> Hohfeld's assertion that for every legal right there was a correlative duty, created a context in which legal jurists could determine whether a party had a distinct right for which it was owed a duty or conversely a privilege for which there was no correlative right.<sup>88</sup> A "right" was a claim, enforceable by state power, "that others act in a certain manner in relation to the right-holder."<sup>89</sup> According to Hohfeld, a right was "much more complex than a mere legal advantage."<sup>90</sup> The weaker claim of privilege, often confused as a right, entailed "permission to act in a certain manner without being liable for damages to others and without others being able to summon state power to prevent those acts."<sup>91</sup> Hohfeld was primarily concerned with clarifying "the fundamental difference

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86. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, *supra* note 12, at 30.

87. According to Joseph William Singer, Hohfeld's paradigm evoked a great deal of contention among legal scholars and practitioners, some of whom believed it "path breaking" or a "brilliant innovation" and others who thought it "naïve." Other scholars debated over whether Hohfeld's model was too broad (the eight terms – rights, privileges, powers, immunities, no-rights, duties, disabilities and liabilities – should be trimmed) or too narrow (the terms must be increased to create a more usable paradigm, taking into consideration other kinds of legal relationships). Joseph William Singer, *The Legal Rights Debate In Analytical Jurisprudence From Bentham to Hohfeld*, 1982 WIS. L. REV. 975, 978, 989-90, 992 (1982).

88. Hohfeld, *Some Fundamental Legal Conceptions*, *supra* note 12, at 30-31.

89. Singer, *Legal Rights Debate*, *supra* note 87, at 986. In their review of Richard Primus' book THE AMERICAN LANGUAGE OF RIGHTS, Jack N. Rakove and Elizabeth Beaumont introduce three reasons for exerting rights in conjunction with Hohfeld's definition. First, a right may be asserted to "claim general authority for specific propositions," secondly, "to attempt to entrench politically precarious practices," and lastly "to declare particular practices or propositions to be of special importance." Jack N. Rakove & Elizabeth Beaumont, *Rights Talk in the Past Tense*, 52 STAN. L. REV. 1865, 1873 (2000) (book review).

90. Ben Saul, *In the Shadow of Human Rights, Human Duties, Obligations, and Responsibilities*, 32 COLUM. HUM. RTS. L. REV. 565, n.126 (2001).

91. Singer, *Legal Rights Debate*, *supra* note 87, at 986.

between legal liberties ([with corresponding] privileges) and legal rights [with corresponding duties].<sup>92</sup>

Although Hohfeld did not originally discuss his paradigm in the framework of human rights, eventually his model was applied to the determination of what human rights or “moral rights” were true rights or “legal claims” and which were mere privileges or “liberties.”<sup>93</sup> Genuine rights cannot be “created” or “bestowed” by a State, as can liberties or privileges.<sup>94</sup> Rather, States in a Hohfeldian context may only choose to ignore or recognize human rights, and despite an attempt to ignore or disavow those rights, the State’s correlative *duty* to the right remains.<sup>95</sup> Human rights law represents a distinct area of the law in which legal and moral rights and duties intersect and over-

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92. Singer holds that Hohfeld’s motivation for creating this paradigm was to clear up a centuries-long confusion between rights and privileges. Hohfeld “criticized his predecessors for not understanding the ‘fundamental and important difference between a right (or claim) and a privilege or liberty.’” Hohfeld’s paradigm clearly established that difference, employing “correlatives [to] express a single legal relation from the point of view of two parties.” *Id.* at 987. Hohfeld sought to end the use of the word “right” when the legal jurist or scholar more precisely intended to “invoke any of the other entitlements.” Rakove & Beaumont, *Rights Talk*, *supra* note 89, at 1873.

93. James M. Donovan, *Baby Steps or One Fell Swoop?: The Incremental Extension of Rights Is Not a Defensible Strategy*, 38 CAL. W. L. REV. 1, 51-52 (2001).

94. *Id.* at 45-46.

95. Donovan discussed human rights in this context as “rights beyond the reach of the state because it is not within the state’s power to deprive us of our humanity other than, perhaps, to kill us. The contrast is presumably between inalienable human rights and merely civil rights that the state can control, bestow and withdraw.” He reinforced that *true* human rights are “inalienable.” *Id.*

Whether or not certain human rights are inherently born of “natural law” or are identified by another theoretical philosophy, as societies develop and change “[States’] understanding and grants of rights to their members must also change and develop.” Donovan’s concept of emerging human rights coexists with a practice in which “rights will necessarily be recognized and enforced piecemeal. The category of ‘human rights’ is therefore a cluster right that has accreted over time as new rights have been identified and new categories of persons encompassed.” *Id.* at 56.

For a discussion on human rights springing from natural law, see generally Theodore S. Orlin & Martin Scheinin, *Introduction to THE JURISPRUDENCE OF HUMAN RIGHTS LAW: A COMPARATIVE INTERPRETIVE APPROACH* 22 (Theodore S. Orlin et al. eds.) (2000).

lap, creating “a range of express, implied, correlative, regional, and emergent human duties, obligations, and responsibilities.”<sup>96</sup>

In addition to its duty to ensure that human rights are maintained within its domestic borders, a state also has a role in apprehending and trying those who violate international criminal laws<sup>97</sup> under the doctrine of universal jurisdiction.<sup>98</sup> A subject of ongoing debate is whether that role, under the Hohfeldian paradigm, is a mere privilege with no corresponding right or rather an outright obligation with a correlative right vested in the international community.<sup>99</sup> A state’s *privilege*, often re-

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96. Saul wrote that “many legal duties are based on, or codify, pre-existing moral duties, although all moral duties are not necessarily legally enforceable ones.” He defined a “duty” as a “task or action that a person is bound to perform for moral or legal reasons,” and an “obligation” as “a moral or legal requirement.” Despite an attempt to distinguish the two, Saul conceded “both duty and obligation are allied with the idea of coercion, in that they are burdens imposed on, or required of, someone.” Saul, *In the Shadow of Human Rights*, *supra* note 90, at 575, 580 (internal quotes omitted). See also Donovan, *Incremental Extension of Rights*, *supra* note 93, at 52 (“Because some legal rights are obviously not moral rights, the relationship between the two is neither that of synonyms nor subsets, but instead constitutes a third relationship: Legal rights and moral rights are independent but intersecting categories”).

97. International criminal law “assigns criminal responsibility for certain particularly serious violations of international law.” Steven R. Ratner, *The Schizophrenias of International Criminal Law*, 33 *TEX. INT’L L. J.* 237, 238 (1998), *citing* STEVEN R. RATNER & JASON S. ABRAMS, *ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY* 9 (1997).

98. “Universal jurisdiction may be exercised by a state without any jurisdictional connection or link between the place of commission, the perpetrator’s nationality, the victim’s nationality, and the enforcing state.” The rationale behind universal jurisdiction is to “enhance world order by ensuring accountability for the perpetration of certain crimes.” Bassiouni, *Universal Jurisdiction for International Crimes*, *supra* note 41, at 88-89.

Ratner proposes two main purposes for universal jurisdiction: a symbolic one, “as a statement of international concern about the severity of the act” and as a practical one, “as a means of improving enforcement that generally presupposes universal jurisdiction and requires states to extradite or prosecute offenders.” Ratner, *Schizophrenias of International Criminal Law*, *supra* note 97, at 253.

99. Ratner concludes that states do have a right under universal jurisdiction to try international crimes but no obligation or duty to do so. Addressing genocide in particular, he wrote, “[C]ustomary international law clearly recognizes the right (though not the duty) of a state to prosecute for genocide

ferred to as a *right* outside the Hohfeldian paradigm, to try for international crimes developed into a rule of customary international law over the latter half of the twentieth century, despite criticism and opposition from some international law practitioners.<sup>100</sup>

When applying the doctrine of universal jurisdiction to Hohfeld's categories of correlative rights and duties and corresponding non-rights and privileges,<sup>101</sup> a state's right to try international crimes clearly subject to universal jurisdiction is recognized under customary international law as an indisputable Hohfeldian privilege.<sup>102</sup> Therefore, when a state finds the perpetrator, national or not, of a recognized international crime such as piracy, slavery, genocide, war crimes and crimes against humanity on its soil, it has the privilege to try that individual regardless of the location of his crime.<sup>103</sup> As a mere

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committed anywhere, regardless of the nationality of the perpetrator or the victim." *Id.* at 254.

100. Critiquing reports published by Amnesty International and Human Rights Watch, renowned international scholar M. Cherif Bassiouni cautioned, "Universal jurisdiction is not as well established in conventional and customary international law as its ardent proponents, including major human rights organizations, profess it to be." Bassiouni, *Universal Jurisdiction*, *supra* note 41, at 83, n.1.

Despite scholarly controversy, it is a fact that "many states have jurisdiction to try offenses that have taken place outside their territory." SHAW, *INTERNATIONAL LAW* *supra* note 31 at 453, 470. Even Bassiouni concedes in his article that universal jurisdiction exists for certain international crimes, whether through *jus cogens* or customary international law, but should be utilized cautiously. *See generally*, Bassiouni, *Universal Jurisdiction*, *supra* note 41.

101. Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 *YALE L.J.* 16, 30 (1913), *supra* note 12.

102. STEVEN R. RATNER & JASON S. ABRAMS, *ACCOUNTABILITY FOR HUMAN RIGHTS ATROCITIES IN INTERNATIONAL LAW: BEYOND THE NUREMBERG LEGACY* 9, 254 (1997).

103. For select evidence that these crimes are subject to universal jurisdiction under customary international law *see In re Piracy Jure Gentium* (1934) AC 586, *supra* note 29 (piracy); Bassiouni, *Universal Jurisdiction*, *supra* note 41, at 88-89 (slavery); Statute of the International Tribunal for Rwanda, Art. 2, Security Council Resolution 955 (1994), *supra* note 45 (genocide); REBECCA WALLACE, *INTERNATIONAL LAW* 114 (2002), *supra* note 52 (genocide and war crimes); "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 (XXVIII), U.N. GAOR, 28th Sess., Supp.

privilege, however, the international community has no correlative right to demand that the state apprehend and try the international criminal; rather, under Hohfeld's paradigm, they have a *non-right*, which bestows no expectation that the individual state has or will fulfill a duty or obligation to try.<sup>104</sup>

Without establishing a duty invested in the states, the international community only has the ability to encourage the state to exert its privilege; it cannot enforce a right.<sup>105</sup> Yet, as the list of international crimes continues to evolve,<sup>106</sup> and new crimes such as drug trafficking and terrorism slowly begin gaining recognition as possible crimes subject to universal jurisdiction,<sup>107</sup> other crimes formerly justiciable as a state's *privilege* may have metamorphosed into crimes for which a state has a *duty* to adjudicate.<sup>108</sup>

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No. 30, at 78 ¶ 3, U.N. Doc. A/9030 (1973); *supra* note 59 (crimes against humanity).

104. Hohfeld, *Some Fundamental Legal Conceptions*, *supra* note 12, at 30-31.

105. For a brief discussion of the pressures international organizations place on states to exert authority under universal jurisdiction, see Bassiouni, *Universal Jurisdiction*, *supra* note 41, at 83, n.1.

106. The Restatement, in its discussion of the customary law of human rights, qualifies a short list of acts that violate those laws, which includes genocide, slavery, slave trade, and a consistent pattern of gross violations of internationally recognized human rights. In a comment, the writers of the Restatement qualify, "the list is not necessarily complete, and is not closed: human rights not listed in this section may have achieved the status of customary law, and some rights might achieve that status in the future." If the rights continue to evolve, then clearly the privilege to try crimes that violate those rights would grow apace. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 cmt. a (1987).

The Reporters' Notes also indicate that other rights may "already have become customary law and international law may develop to include additional rights." It is even noted that an argument has been advanced that "customary international law is already more comprehensive than here indicated." RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 Rep. n.1 (1987).

107. Murphy, *International Crimes*, *supra* note 33, at 369-70, *citing* 1936 Convention for the Suppression of Illicit Traffic in Dangerous Drugs, 198 LNTS 229, *supra* note 69; BLAKESLEY, *supra* note 68, at 140-41.

108. On the evolution of international crimes subject to universal jurisdiction, see generally Bartram S. Brown, *The Evolving Concept of Universal Jurisdiction*, 35 NEW ENG. L. REV. 383 (2001). "As the fundamental values and norms of the international system have evolved, so too has the number of



Among international legal scholars, there is an emerging consensus that for particular international crimes a state's *privilege* to apprehend and try perpetrators has undoubtedly ripened into an affirmative duty or obligation.<sup>109</sup> Utilizing Hohfeld's paradigm, this maturation of a privilege into a duty stems from the developing relationship of the international community to the actual international crimes.<sup>110</sup> If some international crimes transcend a non-right status and assume the label of *right*, then the correlative duty must be vested somewhere.<sup>111</sup> The principle that those rights have correlative duties intrinsically vested in individual states has gained a great deal of weight, rooted in the international doctrines of *jus cogens* and obligations *erga omnes*.<sup>112</sup>

In order to establish that states have an obligation to adjudicate international crimes subject to universal jurisdiction, it must first be established that certain rights are indeed held by the international community.<sup>113</sup> Applying the Hohfeldian model, legal academic Ben Saul asserted, "In civil rights and human rights law, the most commonly recognized duties are correlative duties, referring to those duties that complement specific rights... [A] right is a legal advantage that entails a correspond-

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crimes established by international law. Some of these new international crimes have become subject to universal jurisdiction." *Id.* at 384.

109. Saul, *In the Shadow of Human Rights*, *supra* note 90, at 585; Samuel K. Murumba, *The Universal Declaration of Human Rights at 50 and the Challenge of Global Markets: Themes and Variations*, 25 BROOK. J. INT'L L. 5 (1999); Nigel S. Rodley, *The International Legal Consequences of Torture, Extra-Legal Execution, and Disappearance*, in NEW DIRECTIONS IN HUMAN RIGHTS 177 (Ellen L. Lutz et al. eds., 1989), *supra* note 58 (highlighting specific war crimes that, under the Geneva Convention, "oblige states parties to exercise criminal jurisdiction on the basis of the principle of universality of jurisdiction").

110. Hohfeld, *Some Fundamental Legal Conceptions*, *supra* note 12, at 30-31.

111. *Id.*

112. Brown, *The Evolving Concept of Universal Jurisdiction*, *supra* note 108, at 391-94.

113. ANDRÉ DE HOOGH, OBLIGATIONS *ERGA OMNES* AND INTERNATIONAL CRIMES: A THEORETICAL INQUIRY INTO THE IMPLEMENTATION AND ENFORCEMENT OF THE INTERNATIONAL RESPONSIBILITY OF STATES 56-57 (1996). In a discussion on the ILC-draft on State responsibility, de Hoogh discusses theories behind international crimes and corresponding state responsibilities and obligations, particularly regarding "safeguarding the human being... prohibiting slavery, genocide and *apartheid*." *Id.* at 56.

ing duty or disadvantage.”<sup>114</sup> Major human rights treaties, the rhetoric of which spans the last two centuries and has gained increasing prominence in the last half century, support the belief that “the primary responsibility for the protection of human rights falls upon State Parties.”<sup>115</sup> The preamble to the Universal Declaration of Human Rights reinforces that sentiment when stating that citizens of the world have “equal and inalienable rights,” which “should be protected by the rule of law.”<sup>116</sup> The Restatement on Foreign Relations addresses those rights promulgated in the Declaration and acknowledges that some rights enjoy a more conscientious protection.<sup>117</sup> “All the rights proclaimed in the Universal Declaration and protected by the principal International Covenants are internationally recognized human rights, but some rights are fundamental and intrinsic to human dignity.”<sup>118</sup> Subsequently, States have the correlative duty to uphold the “fundamental and intrinsic” rights that belong to the International Community as a whole.<sup>119</sup> Un-

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114. Saul, *In the Shadow of Human Rights*, *supra* note 90, at 585.

115. Saul turned for support to human rights documents as old as the French Revolution’s 1789 Declaration of the Rights of Man and of the Citizen and more recently the preamble of the Universal Declaration of Human Rights, the 1966 International Covenant on Civil and Political Rights and the 1966 International Convent on Economic, Social and Cultural Rights. It must be pointed out here, however, that many of the “rights” listed in early documents like the 1688 English Bill of Rights or the 1789 French Declaration of the Rights of Man are, under the Hohfeldian paradigm, “privileges” as opposed to “rights”. *Id.* at 588, 610.

116. *Universal Declaration of Human Rights*, G.A. Res. 217 (III), U.N. GAOR, 3d Sess., at 71, U.N. Doc. A/810 (1948). Although some of the “rights” listed would fall under “privileges or liberties” in the Hohfeldian model, traditional rights to which the State owed a correlative duty included the “right to life, liberty and security of person,” the right not to be held “in slavery or servitude,” and the right not to be “subjected to torture or to cruel, inhuman or degrading treatment or punishment.” *Universal Declaration of Human Rights*, *Id.* at art. 3-5.

117. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 cmt. m (1987).

118. *Id.*

119. See Murumba, *The Universal Declaration of Human Rights at 50 and the Challenge of Global Markets*, *supra* note 109, at 5 (“As originally conceived in the Universal Declaration, and in antecedent natural law theorizing, human rights were principally the claims of individuals against or upon the state or the society it represented. In Hohfeldian terms, the state had the primary duties correlative to these rights” (internal quotes omitted)); *see also*

der the Declaration, "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."<sup>120</sup> Under the Hohfeldian model, the implication exists that the correlative duty to provide an effective remedy lies with the States.<sup>121</sup>

In the late twentieth century, momentum increased for a mandatory requirement upon states to extradite for the commission of all international crimes for which there is universal jurisdiction, even in the absence of an extradition treaty.<sup>122</sup> Such a requirement would consequently transform extradition for international crimes from a state *privilege* to a state *duty*.<sup>123</sup> Beyond the scope of universal jurisdiction, there are standard customs and general principles of international law involving extradition under treaties, which many states utilize to bring "international crimes" under their jurisdiction.<sup>124</sup> Under the General Assembly's 1990 Model Treaty on Extradition, the obligation/duty is analogous to a contract, where the State required to extradite under the treaty owes a duty correlative to the right of the State demanding extradition.<sup>125</sup> Furthermore, an argument can be made, implementing the human rights application of Hohfeld, that states are under a moral obligation, arising under natural law, that exists whether or not extradition is concretely embedded in a treaty.<sup>126</sup> While many international

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RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 cmt. m (1987).

120. *Universal Declaration of Human Rights*, *supra* note 116, at art. 8.

121. Hohfeld, *Some Fundamental Legal Conceptions*, *supra* note 12, at 30-31.

122. Despite overwhelming scholarly support for universal jurisdiction, Rebecca Wallace unequivocally holds that there is no duty to extradite in the absence of treaties; however, she does note that the ILC's Draft Code of Crimes, Art. 6 "[s]eeks to impose an obligation on state to extradite an individual alleged to have committed crimes against humanity." WALLACE, *supra* note 52, at 119.

123. Saul, *In the Shadow of Human Rights*, *supra* note 90, at 580. Here the word "duty" can be interchanged easily with the word "obligation." Both connote burdens "imposed on, or required on, someone."

124. Model Treaty on Extradition. G.A. Res. 45/116, U.N. GAOR, 45th Sess., 68th mtg., U.N. Doc. A/RES/45/116 (1990).

125. *Id.*

126. "While legal obligations may be the most familiar form of obligations, there are also obligations which are not specifically legal, such as those aris-

crimes have come under universal jurisdiction as a rule of customary international law, the United Nations and other international bodies began at the end of the 20<sup>th</sup> Century to push codification of universal jurisdiction over these crimes, particularly through the Model Treaty on Extradition.<sup>127</sup> In addition to affirming the human rights application to the correlative right/duty contract-model, the Model Treaty encourages states to update existing treaties, or enter into treaties that conform to “recent developments in international law,” which include the consideration and application of universal jurisdiction where appropriate.<sup>128</sup>

Earlier treaties dealing with multilateral extradition set basic guidelines for extradition, establishing safeguards that are applicable when applied to international crimes subject to or exempt from universal jurisdiction.<sup>129</sup> Under the 1957 European Convention on Extradition, an *obligation* to extradite under existing extradition treaties was upheld for cases where the conditions for extradition had been fulfilled, including “a minimum degree of seriousness”<sup>130</sup> and “double criminality.”<sup>131</sup> However, where no treaty exists, if it were established that extradition and adjudication for certain international crimes were no longer privileges but rather duties, confronted States would be

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ing from some precept or any kind of duty. Such obligations are inherent in the very nature of man and are often called moral law.” SATYA DEVA BEDI, *EXTRADITION IN INTERNATIONAL LAW AND PRACTICE* 52 (1968).

127. Model Treaty on Extradition, *supra* note 124; *see also* Murphy, *International Crimes*, *supra* note 33, at 377.

128. Model Treaty on Extradition, *supra* note 124.

Additionally, the Model Treaty seeks to assist States in extradition matters regarding criminal acts of a terrorist character, illicit traffic in narcotic drugs and psychotropic substances, and all other crimes that undermine respect for human dignity mindful of the “rights conferred upon every person involved in criminal proceedings.” All of the listed acts are international crimes over which the debate rages as to whether they have risen to the level of crimes deserving universal jurisdiction. *Id.*

129. Christine van den Wyngaert & Guy Stessens, *Mutual Legal Assistance in Criminal Matters in the European Union*, in *INTERNATIONAL CRIMINAL LAW AND PROCEDURE* 302-04 (John Dugard & Christine van den Wyngaert eds., 1996).

130. The offense must be punishable with a custodial sentence of at least a year. *Id.*

131. The offense for which extradition is requested should be punishable under the laws of both the requesting and the requested state. *Id.*

obligated to comply with the requirements of universal jurisdiction.<sup>132</sup>

This duty to comply with the obligations of universal jurisdiction arises under the extrinsically bound international concepts of obligations *erga omnes*<sup>133</sup> and *jus cogens*.<sup>134</sup> Obligations *erga omnes* “flow from a class of norms the performance of which is owed to the international community as a whole.”<sup>135</sup> The con-

132. DE HOOGH, OBLIGATIONS *ERGA OMNES* AND INTERNATIONAL CRIMES, *supra* note 113, at 164-65.

133. The Latin expression *erga omnes* means “towards all.” In the *Barcelona Traction* case, the International Court of Justice used the term in its dicta to describe an obligation a State or States had to the International Community. “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*.” The Court further expounded on the concept by contextualizing it in a human rights framework. “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.” *Barcelona Traction, Light and Power Co. (Belg. v. Spain), Limited: Second Phase*, 1970 I.C.J. 3, p. 33-34; *see also* MAURIZIO RAGAZZI, *THE CONCEPT OF INTERNATIONAL OBLIGATIONS ERGA OMNES* 1-2 (1997).

134. *Jus cogens* has been described as “rules to protect some common concerns of the subjects of law. A contractual arrangement, despite its being *inter partes*, may nevertheless affect such general values and interests as are considered indispensable by a society at a given time.” LAURIE HANNIKAINEN, *PEREMPTORY NORMS (JUS COGENS) IN INTERNATIONAL LAW: HISTORICAL DEVELOPMENT, CRITERIA, PRESENT STATUS* 1 (1988).

The 1969 Vienna Convention on the Law of Treaties stipulated in Art. 53 that

A treaty is void if, at the time of its conclusion, it *conflicts with a peremptory norm of general international law*. For the purposes of the present Convention a peremptory norm of general international law is a norm accepted and recognized by the international community of states as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

Vienna Convention on the Law of Treaties (1969), May 23, 1969, art. 53, 1155 U.N.T.S. 331 (emphasis added).

According to Ragazzi, “The origins of the concept of *jus cogens* are usually traced back to some writings of the earlier part of this century, but the concept has not been utilized with any degree of consistency in the practice of States and by international tribunals in the period before the adoption of the Vienna Convention.” RAGAZZI, *INTERNATIONAL OBLIGATIONS ERGA OMNES*, *supra* note 133, at 44-45.

135. NINA H.B. JØRGENSEN, *THE RESPONSIBILITY OF STATES FOR INTERNATIONAL CRIMES* 97 (2000), *supra* note 13.

cept, despite its inherent logic, has only in the past half-century worked its way into the international legal vernacular.<sup>136</sup> *Jus cogens* norms function “to protect the society and its institutions from harmful consequences of individual agreements.”<sup>137</sup> Lending to the confusion is the fact that beyond acts of slavery, which have long since engendered the protection of *jus cogens*, “relatively few examples of *jus cogens* enjoy unanimous support; for many proposed peremptory rules, there are bound to be enthusiastic and lukewarm supporters, as well as open and hidden opponents.”<sup>138</sup> Therefore, some legal scholars, like Maurizio Ragazzi, conclude that the relationship between obligations *erga omnes* and *jus cogens* in the context of human rights is still developing and “uncertain.”<sup>139</sup> Yet, other international scholars hold to an emerging and flourishing consensus that both concepts have distinct viability and applicability to international human rights law.<sup>140</sup>

Perhaps nowhere are *jus cogens* and obligations *erga omnes* more compatible than when applied to human rights and international crimes subject to universal jurisdiction.<sup>141</sup> Professor

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136. RAGAZZI, INTERNATIONAL OBLIGATIONS *ERGA OMNES*, *supra* note 133, at 12. Ragazzi points to documents arising in the wake of the *Barcelona Traction* case of the 1970s: “After the *Barcelona Traction* case, references to the concept of obligations *erga omnes* have occurred both in judgments and advisory opinions rendered by the International Court and pleadings of the parties” (citing in particular to the cases on *Nicaragua*, *East Timor* and *Bosnia-Herzegovina*).

Because “the precise implications in practice of the concept of obligations *erga omnes* have not yet been established, and the idea of an *action popularis* in international law is not well accepted,” obligations *erga omnes* are difficult to define and harder still to identify. JØRGENSEN, RESPONSIBILITY OF STATES FOR INTERNATIONAL CRIMES, *supra* note 13, at 94.

137. HANNIKAINEN, PEREMPTORY NORMS (JUS COGENS) IN INTERNATIONAL LAW, *supra* note 134, at 1.

138. RAGAZZI, INTERNATIONAL OBLIGATIONS *ERGA OMNES*, *supra* note 133, at 57.

139. *Id.* at 48-49.

140. Orlin & Scheinin, *Introduction* to THE JURISPRUDENCE OF HUMAN RIGHTS LAW, *supra* note 95 at 1.

141. Ragazzi concludes that the similarities between *jus cogens* and obligations *erga omnes* stem from three factors. First, “like obligations *erga omnes*, norms of *jus cogens* are meant to protect the common interests of States and basic moral values.” Secondly, “classic examples of norms of *jus cogens* which emerged during the codification of the law of treaties largely coincide with the examples of obligations *erga omnes* given in the *Barcelona Traction case*.”

Kenneth Randall noted, "Universal crimes, obligations *erga omnes* and peremptory norms may be viewed as doctrinal siblings, sharing the common lineage of a modern world legal order based on global peace and human dignity."<sup>142</sup> At the Florence Conference on State Responsibility, a model was advanced to show the intricate relationship between *jus cogens*, obligations *erga omnes* and international crimes, where a large circle represented obligations *erga omnes*, within it a smaller circle representing *jus cogens*, and within that a smaller circle, representing international crimes.<sup>143</sup>

By analyzing why legal theorists link the three concepts together, one can arrive at a another model for their inter-relatedness: "The intention behind the *erga omnes* theory... is to sound the death knell of narrow bilateralism and sanctified egoism for the sake of the universal protection of fundamental norms relating, in particular, to human rights."<sup>144</sup> Similar to the *jus cogens* doctrine and its relation to the theory of international crimes, "[obligations *erga omnes*] is inspired by highly respectable ethical considerations."<sup>145</sup> When discussing interna-

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And finally, Ragazzi concludes that "characteristic expressions attaching to the concept of *jus cogens* (such as the international community 'as a whole') occur also in the International court's dictum on obligations *erga omnes*." RAGAZZI, INTERNATIONAL OBLIGATIONS *ERGA OMNES*, *supra* note 133, at 72. Despite the similarities, Ragazzi still concludes, however, "[T]he concept of obligations *erga omnes* is independent from that of *jus cogens*." JØRGENSEN, RESPONSIBILITY OF STATES FOR INTERNATIONAL CRIMES, *supra* note 13, at 96, n.19.

142. Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785, 841 (1988), *supra* note 52. Randall observed, however, that "pragmatic, political, and other legal considerations sometimes pose obstacles, whether warranted or not, to the domestic implementation of each of those principles and doctrines." *Id.* at 841.

143. JØRGENSEN, RESPONSIBILITY OF STATES FOR INTERNATIONAL CRIMES, *supra* note 13, at 97 (citing G. Gaja, *Obligations Erga Omnes, International Crimes, and Jus Cogens: A Tentative Analysis of Three Related Concepts*, in INTERNATIONAL CRIMES OF STATES: A CRITICAL ANALYSIS OF THE ILC'S DRAFT ARTICLE 19 ON STATE RESPONSIBILITY 151, 160 (J.H.H. Weiler, M. Spinedi & A. Cassese eds.) (1989). Jørgensen points out that the ILC adopted this view that *jus cogens* "is a narrower category than obligations *erga omnes*." *Id.* at 97, n. 22.

144. JØRGENSEN, RESPONSIBILITY OF STATES FOR INTERNATIONAL CRIMES, *supra* note 13, at 96, *citing* P. Weil, *Toward Relative Normativity in International Law* 1983 AJIL 77, 432 (1983).

145. *Id.* at 96.

tional crimes, Ragazzi warns legal jurists to take caution, no matter what paradigm is utilized, not to lose sight of the existing “rights and remedies” under established international law.<sup>146</sup>

The Restatement on Foreign Relations expressly addresses violations of customary human rights law in the context of *jus cogens* and obligations *erga omnes*, reinforcing the direct relationship between the two doctrines and international crimes.<sup>147</sup> The writers of the Restatement explicitly assert that not all human rights are peremptory norms or *jus cogens*, but that genocide, slavery or slave trade, and torture, among a lengthier list of international crimes, emphatically are.<sup>148</sup> Any international agreement “that violates them is void.”<sup>149</sup> A clear duty exists for states to abide by the principles of *jus cogens* in regard to those listed international crimes. The Restatement unequivocally states that the responsibility is “to all states” – hence to the international community.<sup>150</sup> “Violations of the rules stated... are violations of obligations to all other states.”<sup>151</sup> Additionally, the writers of the Restatement hold that if the obligations to the international community are violated “*any state* may invoke the ordinary remedies available to a state when its rights under customary law are violated.”<sup>152</sup>

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146. Ragazzi includes a very detailed breakdown of international crimes, as provided by the International Law Commission, which includes “(a) a serious breach of an international obligation of essential importance for the maintenance of international peace and security... (c) a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide, *apartheid*...” RAGAZZI, INTERNATIONAL OBLIGATIONS *ERGA OMNES*, *supra* note 133, at 15.

147. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 cmt. n - o (1987).

148. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 cmt. n (1987).

149. *Id.*

150. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 cmt. o (1987).

151. Those obligations are obligations *erga omnes*. *Id.*

152. *Id.* (emphasis added).



Genocide,<sup>153</sup> an indisputable international crime with universal jurisdiction, is a prime example of an international crime to which the States owe the international community obligations *erga omnes* not to commit or tolerate and to which the *jus cogens* norm applies.<sup>154</sup> The writers of the Restatement list genocide first on their list of crimes that violate customary laws of human rights.<sup>155</sup> William Schabas asserts that the sources of international law support the coexistence of the three concepts – international crimes, *jus cogens* and obligations *erga omnes* – as a rule of customary international law.<sup>156</sup>

In the case against Serbia, Judge *ad hoc* Elihu Lauterpacht wrote that “the duty to “prevent” genocide is a duty that rests upon all parties and is a duty owed by each party to every other.”<sup>157</sup> In the judgment on the preliminary objections raised by the Federal Republic of Yugoslavia, that International Court

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153. Under the 1948 Convention on the Prevention and Punishment of Genocide, Art. 1 stated that “genocide, whether committed in time of peace or time of war, is a crime under international law.” Convention on the Prevention and Punishment of the Crime of Genocide, U.N. GAOR Res. 260 (III) A, 78 U.N.T.S. 277 (Dec. 9, 1948). “This treaty is now considered a rule of modern customary international law, bind[ing] on all states (whether they have ratified the Convention or not) and requiring them to prosecute acts of genocide.” GEOFFREY ROBERTSON, *CRIMES AGAINST HUMANITY: THE STRUGGLE FOR GLOBAL JUSTICE* 228 (2000).

154. WILLIAM A. SCHABAS, *GENOCIDE IN INTERNATIONAL LAW* 444-45 (2000).

155. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 (1987).

156. Turning to the sources of international law, Schabas discusses four International Court of Justice cases arising as a result of breaches of the Genocide Convention, namely Pakistan against India (1972), Bosnia and Herzegovina against Yugoslavia (1993) and the Yugoslavia counter-claim (1997), and the Yugoslavia claim against members of the North Atlantic Treaty Organization (NATO) (1999). Schabas also references the *Barcelona Traction* case and its “oft-cited remark about the *erga omnes* nature of the prohibition of genocide.” He refers to the *Nuclear Weapons* case, in which some states argued, “The prohibition of genocide (as set out in the Genocide Convention) was a relevant rule of customary law applicable to the question of nuclear weapons.” The court did take into consideration that line of argument in deciding the *Nuclear Weapons* case. It greatly qualified, however, the application of prohibition against genocide to the matter at hand. SCHABAS, *GENOCIDE IN INTERNATIONAL LAW*, *supra* note 154, at 474-75.

157. *Id.* at 493.

addressed obligations *erga omnes*,<sup>158</sup> writing, “[T]he rights and obligations enshrined by the [Genocide] Convention are rights and obligations *erga omnes*. The Court noted that the obligations each State thus has to prevent and to punish the crime of genocide are not territorially limited by the Convention.”<sup>159</sup> Ragazzi proposes that the right vested in the International Community, to which the corresponding duty lies with the States, is not limited to the act of genocide, but rather suggests that “the character *erga omnes* would not be restricted to the prohibition of genocide, but would attach in general to the ‘rights and obligations enshrined by the Convention’, an expression that would seem to include the obligations to prevent and *punish* acts of genocide.”<sup>160</sup>

The Restatement reinforces the doctrine that all states have a *duty* to adjudicate, convict and punish those who perpetuate the crime of genocide.<sup>161</sup> Parties bound by the Genocide Convention “are bound also by the provisions requiring states to punish persons guilty of conspiracy, direct and public incitement, or attempt to commit genocide...and to extradite persons accused of genocide.”<sup>162</sup> If a state failed to act in accordance with its re-

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158. Both the Republic of Bosnia-Herzegovina and the Federal Republic of Yugoslavia had raised the issue. RAGAZZI, *INTERNATIONAL OBLIGATIONS ERGA OMNES*, *supra* note 133, at 96.

159. *Id.* (citing *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, Preliminary Objections, I.C.J. Reports 1996, p. 23, para. 31).

160. *Id.*

Bartram S. Brown suggests that states may be more comfortable with the obligation to punish crimes such as genocide than with an obligation to prevent them. Whether or not that is the case, the analysis would imply that the duty does exist, despite the states’ willingness to accept that obligation. Brown, *The Evolving Concept of Universal Jurisdiction*, *supra* note 108, at 395-96.

161. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 cmt. d (1987).

162. *Id.* Even parties not party to the Genocide Convention are under those obligations. Its provisions have become rules of customary international law. *Id.* See also RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 Rep. n.3 (1987)(Genocide was declared an international crime as early as the Nuremberg Charter, but was classified at that time as a “crime against humanity”). See also Mark A. Summers, *The International Court of Justice’s Decision in Congo v. Belgium: How Has it Affected the Development of a Principle of Universal Jurisdiction that would Obligate All States to Prosecute War Criminals?*, 21 B.U. INT’L L.J. 63, 81-82 (2003) (“Soon after the 1949

sponsibilities to adjudicate, punish, or extradite perpetrators of genocide, that state would seriously “breach on a widespread scale” an “international obligation of essential importance for safeguarding the human being...”<sup>163</sup>

An ongoing debate regarding the doctrine of humanitarian intervention is often coupled with any discussion of a state’s duty to adjudicate and punish genocide.<sup>164</sup> A healthy dispute continues to rage regarding its permissibility, absent any discussion of privileges or obligations.<sup>165</sup> The debate dates well before the

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Geneva and Genocide Conventions were adopted, their prohibitions against war crimes and genocide were regarded as customary international law.”)

163. RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 Rep. n.3 (1987).

164. As early as Germany’s aggressions of 1933, states of the world considered whether they had a right (or in a Hofeldian context a privilege) to intervene when human rights were violated. SCHABAS, GENOCIDE IN INTERNATIONAL LAW, *supra* note 154, at 491. The Geneva Convention did not specify that a state had the privilege or the duty to intervene in episodes of genocide. *Id.*

More recently, during the humanitarian intervention undertaken in Kosovo, President William Clinton stated, “We should not countenance genocide or ethnic cleansing anywhere in the world if we have the power to stop it.” Bob Davis, *Pledging a ‘Clinton Doctrine’ for Foreign Policy Creates Concerns for Adversaries and Allies Alike*, WALL. ST. J., Aug. 6, 1999, at A12. This statement presupposed a right to try and punish when stating that genocide should not be “countenanced” and proposed an independent state’s privilege to intervene in its cessation or prevention.

165. HANNIKAINEN, PEREMPTORY NORMS (JUS COGENS) IN INTERNATIONAL LAW, *supra* note 134, at 80-81.

In the case of Yugoslavia, Judge Lauterpacht concluded that customary international law – looking primarily at the *practice* of the states – might regrettably hold that “inactivity” on the parts of states to genocidal conduct is “permissible.” This would reinforce the concept that under the rules of customary international law, there is no duty, if indeed even a privilege, for an independent state to take actions with the purpose of preventing or ending genocide. SCHABAS, GENOCIDE IN INTERNATIONAL LAW, *supra* note 154, at 495. Some scholars considered the humanitarian intervention undertaken in Kosovo “illegal but legitimate.” Timothy Garton, *Imagine No America*, THE GUARDIAN, Sept. 19, 2002, at 21.

And yet other scholars hold that humanitarian intervention is a rule of customary international law. International Law Professor Jack Goldsmith concluded, “If you read the letter of international law, it does not expressly provide an exception for a humanitarian intervention. But many people think such an exception does exist as a matter of custom and practice.” William Glaberson, *Conflict in the Balkans: The Law: Legal Scholars Support Case for Using Force*, N.Y. TIMES, Mar. 27, 1999, at A8.

establishment of the United Nations and has been a part of international rhetoric since the nineteenth century.<sup>166</sup> Due to fear of over-use and misapplication,<sup>167</sup> the international community including the United Nations has shied away from writing a direct rule for its application.<sup>168</sup> Failing to do so has enabled its continued abuse and done nothing to mitigate its dangers.<sup>169</sup> Despite initial breakdown in the dialogue over whether humanitarian intervention is a legitimate means, many scholars make compelling arguments that along with the duty to try, convict, and punish perpetrators of genocide, there is also a right – or a Hohfeldian *privilege* – to prevent genocide through the use of humanitarian intervention.<sup>170</sup> Yet a fervent confidence exists among select academics that humanitarian intervention may soon, if it has not already, mature into a state's duty where international crimes subject to obligations *erga om-*

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166. “By the end of the 19th century the *majority of publicists* admitted the right of humanitarian intervention... However, that doctrine was vague.” HANNIKAINEN, PEREMPTORY NORMS (JUS COGENS) IN INTERNATIONAL LAW, *supra* note 134, at 80.

Forcible humanitarian intervention may even have been more palatable prior to the establishment of the United Nations. Armed force was legitimized in the name of humanitarian intervention on a number of occasions, including the French invasion into Lebanon to assist Christians undergoing Syrian persecution in 1860, and again in 1877 when Russia invaded Bosnia and Herzegovina to assist in religious conflicts resulting in severe persecutions of minority peoples. Paul Lewis, *The Right to Intervene for a Humanitarian Cause*, N.Y. TIMES, July 12, 1992, § 4, at 22.

167. “Humanitarian intervention is even more malleable than most principles of international law, and is a treacherous ground on which to stand.” John R. Bolton, *Clinton Meets ‘International Law’ in Kosovo*, WALL ST. J., Apr. 5, 1999, at A23 (internal quotes omitted), *supra* note 26.

168. Gwynne Dyer, *Same Old Song at the U.N.*, REC. (N.J.), Sept. 23, 2003, at Opinion. U.N. members cannot “figure out how to write a rule on humanitarian intervention that could not be exploited by the great powers to justify neo-colonial interventions.” Dyer concluded that in that case, “it’s better not to write it at all.” *Id.*

169. A real danger is the temptation to justify use of force by labeling it a humanitarian intervention when it is not so or fails to meet any of the established requirements for one. See, e.g., Ian Williams, *The Humanitarian Temptation*, NATION, Dec. 9, 2002 (book review).

170. After the events in Somalia and Bosnia, it was no longer a question of “whether States individually or the international community as a whole *could* intervene... but rather that they *must* intervene.” SCHABAS, GENOCIDE IN INTERNATIONAL LAW, *supra* note 154, at 492.

nes and the peremptory norms of *jus cogens* appear.<sup>171</sup> Nevertheless, for many international legal academics, a state's duty to launch a humanitarian intervention may still be a "maybe."<sup>172</sup>

The triumvirate of *jus cogens*, obligations *erga omnes*, and international crimes attach to other crimes subject to universal jurisdiction similar in makeup to genocide, prompting the states to fulfill their duty to the international community and to prosecute.<sup>173</sup> For crimes against humanity and war crimes, which "by virtue of their level of atrocity, attract universal jurisdiction," the obligation to punish, rooted in obligations *erga omnes*, must exist.<sup>174</sup> Almost two-thirds of all states have, either through legislation, treaties, or constitutions, granted their courts authority to "exercise universal jurisdiction over some conduct amounting to war crimes..."<sup>175</sup> Approximately ninety-

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171. During the United States deliberations on whether or not to involve itself in the conflict raging in Rwanda, State Department spokeswoman Christine Shelley said that the "United States was not prepared to declare that genocide was taking place in Rwanda because 'there are obligations which arise in connection with the use of the term.'" *Id.* at 495 (citing PHILIP GOUREVITCH, WE WISH TO INFORM YOU THAT TOMORROW WE WILL BE KILLED WITH OUR FAMILIES, STORIES FROM RWANDA 153 (1998)).

172. According to Michael Walzer, a political philosopher at the Institute for Advanced Study at Princeton University, the doctrine of humanitarian intervention may suggest a state "ha[s] a right, and maybe an obligation, to go in and stop it if you can." Peter Steinfels, *Reshaping Pacifism to Fight Anguish in Reshaped World*, N.Y. TIMES, Dec. 21, 1992, at A1.

173. "Customary international law also recognizes any crime that is universally condemned by the international community as a *jus cogens* international crime, which gives rise to obligations *erga omnes*. In accordance with customary international law, an obligation *erga omnes* requires a state party to extradite or prosecute perpetrators of these crimes found within its territory." Lindsay Glauner, *The Need for Accountability and Reparation: 1830-1976 The United States Government's Role in the Promotion, Implementation, and Execution of the Crime of Genocide Against Native Americans*, 51 DEPAUL L. REV. 911, 913-14 (2002).

Ragazzi writes, "[W]hile it is true that the concept of obligations *erga omnes* can and does contribute to the protection and promotion of human rights, it is equally true that human rights are instrumental to the consolidation of such concepts as obligations *erga omnes*." RAGAZZI, INTERNATIONAL OBLIGATIONS *ERGA OMNES*, *supra* note 133, at 135.

174. ROBERTSON, CRIMES AGAINST HUMANITY, *supra* note 153, at 248; *see also* Brown, *Evolving Concept of Universal Jurisdiction*, *supra* note 108, at 395.

175. AMNESTY INTERNATIONAL, UNIVERSAL JURISDICTION – THE DUTY OF STATES TO ENACT AND ENFORCE LEGISLATION, ch. 1, *available at* <http://www.amnesty.org> (last visited Aug. 23, 2004). Amnesty estimates that

five states have implemented some form of legislation granting their courts universal jurisdiction over “persons suspected of at least some crimes against humanity.”<sup>176</sup> Torture is one crime against humanity often addressed in legislative grants of jurisdiction to domestic courts.<sup>177</sup> However, even if a state does not incorporate grants of jurisdiction into its legislative or constitutional bodies, customary international law still grants jurisdiction.<sup>178</sup> In the *Congo v. Belgium* case brought before the International Court of Justice, Judges Kooijmanns and Buergenthal concluded, “[E]xercising extraterritorial jurisdiction is *obligatory* when the conditions of the post-war conventions are met.”<sup>179</sup>

In addition to genocide, war crimes and crimes against humanity, *jus cogens* and obligations *erga omnes* are firmly recognized as having dominion over the international crime of aggression.<sup>180</sup> Chapter VII of the Charter of the United Nations addresses Acts of Aggression, stating that the Security Council

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at least 120 states have enacted legislation “which would appear to permit their courts to exercise universal jurisdiction over conduct amounting to some or all war crimes in certain circumstances.” *Id.* The extensive list of states include Algeria, Argentina, Armenia, Australia, Austria, Belgium, Belize, Bolivia, Bosnia and Herzegovina, Brazil, Bulgaria, Canada, Chile, China, Colombia, Côte d’Ivoire, Czech Republic – to name only a few. *Id.* Although the majority of the states have never availed themselves of the existing liberties afforded their courts to exercise universal jurisdiction, the international and domestic legal instruments of the states would permit such a show of authority.

176. AMNESTY INTERNATIONAL, *UNIVERSAL JURISDICTION*, *supra* note 175, at ch. 6. States listed in the Amnesty report include, but are not limited to, Algeria, Argentina, Armenia, Australia, Austria, Belgium, Bolivia, Brazil, Canada, Chile, China, Colombia, Denmark, Ecuador, Egypt, Finland, France, Germany, Greece, Ireland, Israel, Japan, Mexico, the Netherlands, New Zealand, Russian Federation, Spain, Sweden, Turkey, United Kingdom, United States, and Venezuela. *Id.*

177. *Id.*

178. AMNESTY INTERNATIONAL, *UNIVERSAL JURISDICTION*, *supra* note 175, at Introduction.

179. Summers, *The International Court of Justice’s Decision in Congo v. Belgium*, *supra* note 162, at 95 (citing *Congo v. Belgium*, 2002 I.C.J. at PP 59-60 (Joint Separate Opinion of Higgins)).

180. The international crime of aggression can be defined as “an armed attack by one State against another... bolstered by the requirement that there must be a *serious* breach of an international obligation essential for the maintenance of international peace and security.” DE HOOGH, *OBLIGATIONS ERGA OMNES AND INTERNATIONAL CRIMES*, *supra* note 113, at 309.

“shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security.”<sup>181</sup> In the *Barcelona Traction* case, the first example cited by the court of an obligation *erga omnes* is the “outlawing of acts of aggression.”<sup>182</sup>

Where a state is unable or unwilling to judge and punish perpetrators of genocide, war crimes or crimes against humanity, the duty to adjudicate does not disappear.<sup>183</sup> Under the continued use of Hohfeldian paradigm, the international community has not relinquished its right to retribution; hence the duty remains.<sup>184</sup> If a right exists, the correlative duty cannot “impede” that right.<sup>185</sup> In addition, the holder of the right can demand the “performance of other subjects’ obligations.”<sup>186</sup> Because a breach

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181. U.N. CHARTER art. 39.

182. RAGAZZI, INTERNATIONAL OBLIGATIONS *ERGA OMNES*, *supra* note 133, at 74; *see also* DE HOOGH, OBLIGATIONS *ERGA OMNES* AND INTERNATIONAL CRIMES, *supra* note 113, at 56, *citing* the ILC-draft, Commentary Article 19, Part One, 95-96 on State responsibility (Paragraph 3(a) states that “a serious breach of international obligation of essential importance for the maintenance of international peace and security, such as that prohibiting aggression” may result in an international crime).

183. Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, *supra* note 12, at 31-32.

184. *Id.* Although historically some countries have conducted “fact-finding followed by forgiveness” as a means of exercising reconciliation for human rights violations, this method of resolution is unacceptable under the concept of obligations *erga omnes*. The practice of “Truth and Reconciliation” is inconsistent “with the view that crimes against humanity attract an *erga omnes* obligation to prosecute and punish.” States such as Bolivia, Uruguay, Chile, El Salvador, Haiti and Argentina, to name a few, violated their duty to the international community by failing to prosecute and punish and instead imposing a Truth and Reconciliation process upon individuals and regimes that carried out gross violations of human rights. *See generally*, ROBERTSON, CRIMES AGAINST HUMANITY, *supra* note 153, at 266-78. *See also*, Mark S. Ellis, *The International Criminal Court and Its Implication for Domestic Law and National Capacity Building*, 15 FLA. J. INT'L L. 215, 229 (2002).

185. DE HOOGH, OBLIGATIONS *ERGA OMNES* AND INTERNATIONAL CRIMES, *supra* note 113, at 67 (“If a right has been validly conferred by a permissive rule, a correlative obligation must be seen to exist not to impede the exercise of such a right”).

186. *Id.* “The necessity of correlative rights is postulated on the basis that there must always be, at least theoretically and to begin with, another subject of international law entitled to demand the performance of an obligation.” *Id.*

of those obligations “generally affect[s] particular or all States,”<sup>187</sup> when a state breaches, the obligation or duty must be adopted by another state or international forum in order for the international community to see its rights safeguarded and preserved.<sup>188</sup>

Increasing support for the view that states cannot harbor perpetrators of international crimes has strengthened.<sup>189</sup> “Under the *aut dedere aut judicare* (extradite or prosecute) rule, [states] are *required* to exercise jurisdiction over such persons no matter where the crime occurred or to extradite them to a state able and willing to do so.”<sup>190</sup> If no such state exists then the state should surrender them to an international criminal court “with jurisdiction over the suspect and the crime.”<sup>191</sup>

### III. THE INTERNATIONAL CRIMINAL COURT: WHEN STATES CANNOT OR WILL NOT FULFILL THEIR OBLIGATION IT SHOULD BE DISCHARGED TO THE CRIMINAL COURT

The ICC was established to function complementarily to national criminal jurisdiction.<sup>192</sup> The ICC was never intended to replace domestic courts prosecuting war crimes, genocide and crimes against humanity; rather, the concept of complementarity<sup>193</sup> was embraced as a safeguard against fears that the court

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De Hoogh notes another compelling necessity that drives the right/obligation paradigm is the urgency for “an imperative... kind of measure against repetition.” Prosecution, conviction and punishment for those responsible for the commission of an international crime can secure that assurance. *Id.* at 165.

187. This suggests that the “international community” at large would suffer the effects of the breach.

188. DE HOOGH, OBLIGATIONS *ERGA OMNES* AND INTERNATIONAL CRIMES, *supra* note 113, at 68.

189. AMNESTY INTERNATIONAL, UNIVERSAL JURISDICTION, *supra* note 175, at Introduction.

190. *Id.*

191. *Id.*

192. The Preamble to the Rome Statute of the International Criminal Court emphasizes that “it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes,” but that where a state cannot fulfill its obligation the court exists to complement national criminal jurisdiction. Rome Statute, *supra* note 9, at Preamble & Art. 1.

193. Complementarity means that “instead of replacing national jurisdictions, the Court will intervene only in those situations where national justice systems are unavailable or ineffective. Unlike the Yugoslav and Rwanda Tribunals, the ICC does not have ‘primacy’ over national jurisdictions.”



could potentially usurp the role of functional domestic courts in their capacity to adjudicate such crimes.<sup>194</sup> If a state is able to perform its obligation to try perpetrators of these three international crimes, the ICC cannot intervene; where a state is unable or unwilling to act, however, that state's obligation will be discharged to the ICC for full and proper adjudication.<sup>195</sup>

In 1994, the American Bar Association's Task Force on the ICC strongly favored a court "complementary in nature."<sup>196</sup> Prompted by a fear that the ICC would challenge state sovereignty and erode existing domestic judicial schemes, complementary jurisdiction seemed the ideal way for the court to assure that the international goal of punishing and eradicating international crimes like genocide did not undermine functional state courts that could adjudicate with agility and conscientiousness.<sup>197</sup> Subsequently, the ICC was established in 1998 under the principle of "complementarity," which relegated the ICC to a deferential role, second in line to adjudicate a crime only after the state failed to administer justice.<sup>198</sup>

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Mauro Politi, *The Rome Statute of the ICC: Rays of Light and Some Shadows*, in *THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A CHALLENGE TO IMPUNITY 14* (Mauro Politi & Giuseppe Nesi eds., 2001).

194. "The concept of complementarity can be viewed as a procedural and substantive safeguard against a supranational institution curtailing the sovereign rights of nations. It ensures that the judgments of a domestic court are not replaced by the judgments of an international court." Ellis, *The International Criminal Court*, *supra* note 2, at 219.

195. "[U]nder the concept of complementarity, the ICC will only have jurisdiction if there is a breakdown in the national system of justice or a state simply fails to act." *Id.* at 221-22.

196. See REPORT OF THE TASK FORCE ON AN INTERNATIONAL CRIMINAL COURT OF THE AMERICAN BAR ASSOCIATION 49 (1994), *supra* note 68.

197. There was a recommendation by the Task Force that care be taken "to assure that ongoing efforts at mutual legal assistance are not undermined. Structures must be created that supplement and reinforce existing schemes. The rule of law must be strengthened and not eroded as a result of the creation of an international criminal court." *Id.* at 49.

198. Sarah B. Sewall et al., *The United States and the International Criminal Court: An Overview*, in *THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT: NATIONAL SECURITY AND INTERNATIONAL LAW 3* (Sarah B. Sewall & Carl Kaysen eds., 2000).

The United States had great fear, however, that the ICC would override state sovereignty by abandoning complementarity. "Therefore, the United States may remain apprehensive until the ICC demonstrates its reasoning and intent over time." *Id.* at 20. That apprehension was manifested in

Extradition has generated much academic and political concern over the past century.<sup>199</sup> The difficulties arising under a state's "extradite or prosecute" dilemma fueled much of the early ICC debates.<sup>200</sup> Where the state is unwilling to extradite or prosecute, the Rome Statute established that the ICC can step in and exert its jurisdiction.<sup>201</sup> Unwillingness may be manifested through sham trials or a state "going through the motions" of investigating and instigating a criminal prosecution where none is forthcoming.<sup>202</sup> Of course it may consist of no trial at all. One scholar suggested that in order for a government/judicial system to be labeled unwilling there must be a

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the United States decision to refrain from participating in the court under the Bush Administration. That refusal on the part of the United States to support the ICC has been predicted as a great undermining of the court and increasing its likelihood of potential failure. Scholar Leila Nadya Sadat wrote in 2000, "Sadly, one of the major obstacles to the Court's successful establishment is the refusal of the United States to participate in the creation of this new international institution. There is not doubt that the failure of the United States to join and to support the League of Nations contributed to the ultimate demise of that institution, and one wonders whether the ICC is similarly doomed before it is even established." Leila Nadya Sadat, *The Evolution of the ICC: From the Hague to Rome and Back Again*, in *THE UNITED STATES AND THE INTERNATIONAL CRIMINAL COURT: NATIONAL SECURITY AND INTERNATIONAL LAW* 41 (Sarah B. Sewall & Carl Kaysen eds., 2000).

199. See REPORT OF THE TASK FORCE ON AN INTERNATIONAL CRIMINAL COURT, *supra* note 68, at 47.

One of the greatest frustrations in the United States' war on drugs has long been the inability to extradite targeted drug kingpins to the United States to stand trial. Addressing the House of Representatives Subcommittee on Criminal Justice, Drug Policy and Human Rights, Chairman John Mica stated that the key to successful international law enforcement was extradition, particularly with regards to South America. The lack of an extradition treaty with Mexico was considered an impediment to the United States' ability to effectively counter drug trafficking and other related international crimes. *International Law: The Importance of Extradition: Hearing Before the Subcomm. on Criminal Justice, Drug Policy, and Human Resources*, 106th Cong. 1-3 (1999) (statement of Rep. John L. Mica, Chairman, Subcomm. on Criminal Justice, Drug Policy, and Human Resources).

200. REPORT OF THE TASK FORCE ON AN INTERNATIONAL CRIMINAL COURT, *supra* note 68, at 47.

201. See Rome Statute, *supra* note 9, at art. 17(3).

202. WILLIAM A. SCHABAS, AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT 66 (2001).

“systematic pattern of judicial inaction in pertinent cases,” not a failure to successfully prosecute one or two individual cases.<sup>203</sup>

Conversely, a state may be willing to prosecute human rights abuses, but unable to do so. Under the Rome Statute, a state is unable to prosecute when “due to a total or substantial collapse or unavailability of its national judicial system, the State is unable to obtain the accused or the necessary evidence and testimony or otherwise unable to carry out its proceedings.”<sup>204</sup> Scholar Mark Ellis proposed four likely categories for states unable to carry out proceedings: (1) states entangled in conflict (domestic or international); (2) states experiencing political unrest or economic crisis; (3) states in transition; and (4) states entirely lacking a judicial system satisfying the international standard.<sup>205</sup> Similarly, Mauro Politi offered that certain situations would trigger the court’s awareness of a state unable to adjudicate, such as the “total or partial collapse of a national judicial system” or the “presence of [a] sham proceeding [ ] undertaken to shield the accused from criminal responsibility.”<sup>206</sup>

A wealth of examples arises out of the South American states. Chile and Argentina, countries which saw gross human rights violations during the mid-twentieth century under brutal dictatorships, were in many senses unable to properly try perpetrators, despite a willingness to do so, due to the grants of amnesty or pardons written into law to shield the defendants.<sup>207</sup> This situation fits into Ellis’ second and third paradigms.<sup>208</sup> States experiencing political unrest may, according to Ellis, threaten the “independence of the judiciary and its proper functioning.”<sup>209</sup> A good example of this type of judicial breakdown can be seen in the political pressure and military threats directed at judges in Uruguay, resulting in unsuccessful initiatives against human rights violations until the 2000 election of a president commit-

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203. Remigius Chibueze, *United States Objection to the International Criminal Court: A Paradox of “Operation Enduring Freedom,”* 9 ANN. SURV. INT’L & COMP. L. 19, 41 (2003).

204. Rome Statute, *supra* note 9, at art. 17(3).

205. Ellis, *The International Criminal Court*, *supra* note 2, at 238.

206. Politi, *The Rome Statute of the ICC*, *supra* note 193, at 15.

207. Roseann M. Latore, *Coming Out of the Dark: Achieving Justice for Victims of Human Rights Violations by South American Military Regimes*, 25 B.C. INT’L & COMP. L. REV. 419, 432-33 (2002).

208. Ellis, *The International Criminal Court*, *supra* note 2, at 238.

209. *Id.* at 239.

ted to investigating disappearances and kidnapped children.<sup>210</sup> The creation of the ICC was seen by scholars and proponents of accountability in these fragile democracies of South America as a maturation of international law, evidenced by the establishment of this forum for adjudication, the sole function of which was to fulfill the states' duties to adjudicate where the governments were unable to do so.<sup>211</sup>

Because states have a duty to prosecute international crimes under obligations *erga omnes*, the ICC assures that the duty, the right correlative to which is vested in the international community, is fulfilled.<sup>212</sup> If the state is unable to promote and protect human rights through prosecuting those who violate them, the duty vested in the state can be fulfilled by the ICC.<sup>213</sup> Even states not party to the Rome Statute have an obligation not to frustrate its purpose.<sup>214</sup> To do so contravenes the discharge of a state's obligation to a forum that is capable of satisfying the state's duty when the state is unable to do so. This violates the norms of *jus cogens* and obligations *erga omnes*,

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210. See Latore, *Coming Out of the Dark*, *supra* note 207, at 433.

211. *Id.* at 446.

212. "The Statute of the International Criminal Court will have an important impact on the existing regime of international guarantees for the protection of human rights." Fausto Pocar, *The Rome Statute of the International Criminal Court and Human Rights*, in *THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A CHALLENGE TO IMPUNITY* 70 (Mauro Politi & Giuseppe Nesi eds., 2001).

213.

The current system of international guarantees is essentially based, both at the universal and at the regional level, on procedures aimed at establishing whether States observe their obligations to promote and protect human rights, as set forth in customary rules or treaty provisions. When violations occur, the purpose of such procedures is to make a finding in this respect and to set a pressure on the State in order that it conforms to its obligations.

*Id.*

214. Giuseppe Nesi, *The Obligation to Cooperate with the International Criminal Court and States Not Party to the Statute*, in *THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A CHALLENGE TO IMPUNITY* 223 (Mauro Politi & Giuseppe Nesi eds., 2001). Giuseppe Nesi concludes that "an obligation to cooperate even for States not Parties that do not sign any cooperation agreement with the Court could be deduced from instruments different from the Statute." He is referring to instruments establishing universal jurisdiction and *jus cogens* over the crimes under the jurisdiction of the Court, such as the Geneva Convention on Genocide. *Id.* at 222.

which mandate that the state punish those who commit crimes of genocide, crimes against humanity and war crimes.<sup>215</sup> The establishment of the ICC assures that the obligation of the States to the international community will be carried out, strengthening the system of accountability.<sup>216</sup>

This argument for discharging a state's duty to the ICC finds greatest strength in universal jurisdiction, despite the ICC's purported basis on state consent.<sup>217</sup> Early in the ICC's inception, modern scholars, international practitioners and forward-thinking states pushed for jurisdiction based on universal jurisdiction, rather than on the consent of states.<sup>218</sup> In order for the ICC to effectively complement domestic courts such jurisdiction was seen as essential and feasible since the ICC only had jurisdiction over crimes already recognized as subject to universal jurisdiction.<sup>219</sup> Under that proposition, a state's consent to the ICC was irrelevant; if a state could not or would not fulfill its duty to prosecute, then automatically the duty would flow to the ICC, which would exert its authority through universal jurisdic-

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215. *Id.*

216. Pocar, *The Rome Statute of the International Criminal Court and Human Rights*, *supra* note 212, at 72.

217. See KRISTINA MISKOWIAK, *THE INTERNATIONAL CRIMINAL COURT: CONSENT, COMPLEMENTARITY AND COOPERATION* 33 (2000); Rome Statute, *supra* note 9, at art. 12. See also Geoffrey Bindman, *Illegal U.S. Campaign Against International Justice: Washington and the International Court*, INT'L HERALD TRIB., July 16, 2003, at 8.

218. Germany proposed that state consent should be irrelevant. Sounding very much like proponents of universal jurisdiction, the German proposal for the ICC's basis of jurisdiction stated,

Under current international law, all States may exercise universal criminal jurisdiction concerning acts of genocide[,] crimes against humanity[,] and war crimes, regardless of the nationality of the offender, the nationality of the victims and the place where the crime was committed... Given this background there is no reason why the ICC – established on the basis of a Treaty concluded by the largest number of States – should not be in the very same position to exercise universal jurisdiction for genocide, crimes against humanity and war crimes in the same manner as the Contracting Parties themselves.

U.N. Doc. A/AC.249/1998/DP.2, *cited in* MISKOWIAK, *THE INTERNATIONAL CRIMINAL COURT*, *supra* note 203, at 35.

219. MISKOWIAK, *THE INTERNATIONAL CRIMINAL COURT*, *supra* note 217, at 33; see also JENNIFER ELSEA, *INTERNATIONAL CRIMINAL COURT: OVERVIEW AND SELECTED LEGAL ISSUES* 18-25 (2003); SCHABAS, *AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT*, *supra* note 202, at 60.

tion.<sup>220</sup> Despite the ICC's ultimate establishment as consent based, the fundamental existence of obligations *erga omnes* and the principles of universal jurisdiction override that consent-based jurisdiction and compel all states to refrain from interfering with the satisfaction of the international community's right to try perpetrators of human rights violations.<sup>221</sup>

#### IV. THE UNITED STATES' BILATERAL IMMUNITY AGREEMENTS CONFLICT WITH A STATE'S DUTY TO EXTRADITE FOR INTERNATIONAL CRIMES

In 1994, when the jurisdiction of the ICC, its interplay with the states, and the basis for its authority were all the subject of hot debate, the American Bar Association's Task Force monitored the progress towards the establishment of the ICC.<sup>222</sup> Discussions regarding the basis of the ICC's jurisdiction clearly incorporated a recognition and assertion that *jus cogens* would be the earmark of the court's foundation, the cement that bound the ICC's jurisdiction over crimes violating "fundamental norms."<sup>223</sup> Less than ten years later, phrases like *jus cogens* and fundamental international norms were no longer included in the United States' vocabulary when analyzing or weighing the ICC's authority.<sup>224</sup> Distracted by unfounded fears that the ICC

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220. See MISKOWIAK, *THE INTERNATIONAL CRIMINAL COURT*, *supra* note 217, at 33.

221. *Id.* at 33-35.

222. REPORT OF THE TASK FORCE ON AN INTERNATIONAL CRIMINAL COURT, *supra* note 68, at 1.

223. Bowing to development in international law, the Task Force conceded:

[T]here cannot any longer be a principled objection by Americans to the use of 'fundamental norms.' The United States for many years took the position that there was no such thing as *jus cogens* and that therefore it could not be bound by a customary norm to which it had not manifested its assent during the formative period of the norm. However, the Vienna Convention on the Law of Treaties, in Article 53, has now put that matter to rest.

*Id.* at 11.

224. In 1998, the United States, after years of input on the language, jurisdiction, authority and structure of the court, voted against the ICC along with China, Iran, Iraq, Israel and Libya. However, before leaving office, President William Clinton authorized the United States signing of the Rome Statute on December 31, 2000. The statute was not submitted to the Senate for ratification, and less than two years later in May 2002, the Bush administration nul-

would use its authority to prosecute a political agenda, the United States' focus shifted further away from the underpinnings of the ICC and its inherent jurisdiction over certain international crimes, and instead challenged the ICC's authority over Americans and its purportedly limitless autonomy.<sup>225</sup>

Pointing to General Pinochet's extradition to Spain to stand trial for human rights violations executed under his dictatorship in Chile, United States politicians feared machinations by the ICC to attempt jurisdiction over American Service-members despite the United States' withdrawal from participation in the ICC.<sup>226</sup> The legitimacy of the ICC came under attack and the United States Congress passed the American Servicemembers' Act, prohibiting cooperation with the ICC and restricting U.S. participation in peacekeeping missions where a risk of ICC prosecution existed. It also began blocking military aid to countries unless they signed agreements shielding U.S. troops present in their territory from extradition to the ICC.<sup>227</sup>

Simultaneously, the United States launched its bilateral immunity campaign to assure that United States citizens would

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lified the U.S. signature to the Rome Statute. Chibueze, *United States Objection to the International Criminal Court*, *supra* note 203, at 21-22.

225. *The International Criminal Court: Protecting American Servicemen and Officials From the Threat of International Prosecution: Hearing Before the Comm. on Foreign Relations*, 106th Cong. 1-2 (2000) (statement of Sen. Jesse Helms, Chairman, Senate Comm. on Foreign Relations).

The U.S.' fears were particularly unfounded since the complementary nature of the court assures that established and functional judicial systems such as the ones in the U.S. would be highly unlikely to ever undergo a challenge from the ICC. Additionally, politically motivated trials would be hard to launch since the Security Council can stall any ICC prosecution it seems premature or unfounded. Furthermore, a pre-trial chamber must determine that there is reasonable basis for action. Chris Patten, *Globalization and the Law*, EUR. UNION PRESS RELEASES, Oct. 21, 2003, available at 2003 WL 60919637; Guy Dinmore, *Washington Presses Ahead with War Crimes Deals - International Criminal Court*, FIN. TIMES, May 8, 2003, at 10.

226. *The International Criminal Court: Protecting American Servicemen and Officials From the Threat of International Prosecution: Hearing Before the Comm. on Foreign Relations*, 106th Cong. 4-6 (2000) (statement of Hon. Casper W. Weinberger, Former Secretary of Defense). On Pinochet's extradition and its universal jurisdiction basis see Latore, *Coming Out of the Dark*, *supra* note 207, at 440-42.

227. Pub. L. No. 107-206, §§ 2001-2015, 116 Stat. 820, 899-909 (2002); Bruce D. Landrum, *The Globalization of Justice: The Rome Statute of the International Criminal Court*, 2002 ARMY LAW 1, 14 (2002).

never be under the jurisdiction of the ICC, no matter where they lived or were stationed, no matter what international crimes they committed. In agreeing to the immunity agreements, foreign governments promised not to honor subpoenas or warrants issued by the ICC against Americans.<sup>228</sup> By November 2003, seventy countries had signed immunity agreements.<sup>229</sup> The immunity agreements established that the two agreeing states would not extradite each other's citizens to the ICC without mutual consent.<sup>230</sup> Justifying the bilateral immunity agreements by pointing to the Rome Statute's Article 98, the United States stated that the ICC itself allowed for these immunities.<sup>231</sup>

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228. Philip Shishkin & Jess Bravin, *German Refusal Involving New War-Crime Tribunal May Further Strain Ties*, WALL ST. J., Oct. 1, 2002, at A19.

229. Guy Dinmore, *US Attacks European Union Over Immunity Agreements*, FIN. TIMES, Nov. 4, 2003, at 1.

230. Chibueze, *United States Objection to the International Criminal Court*, *supra* note 203, at 50.

The United States' Article 98 Proposal ironically reaffirms the complementary nature of the ICC and its inability to supplant functional national criminal jurisdiction. However, it still assures that "absent the expressed consent" of the United States or the signatory state, citizens shall not be "surrendered or transferred by any means to the International Criminal Court for any purpose or surrendered or transferred by any means to any other entity or third country, or expelled to a third country, for the purpose of surrender or transfer to the International Criminal Court." U.S. Government Article 98 Proposal, available at [www.hrw.org](http://www.hrw.org) (last visited on Aug. 23, 2004).

231. Article 98 of the Rome Statute states:

The Court may not proceed with a request for surrender or assistance which would require the requested State to act inconsistently with its obligations under international law with respect to the state or diplomatic immunity of a person or property of a third State, unless the Court can first obtain the cooperation of that third State for the waiver of the immunity. The Court may not proceed with a request for surrender which would require the requested State to act inconsistently with its obligations under international agreements pursuant to which the consent of a sending State is required to surrender a person of that State to the Court, unless the Court can first obtain the cooperation of the sending State for the giving of consent for the surrender.

Rome Statute, *supra* note 9, at art. 98.

David Scheffer, the Clinton administration diplomat who negotiated Article 98, rebutted the Bush interpretation of Article 98, stating that the provision was "designed for U.S. military forces stationed overseas, as well as diplomats and Peace Corps workers. 'We didn't care about mercenaries.'"



These Article 98 or bilateral immunity agreements contravene a state's established obligation under customary international law to prosecute and punish perpetrators of international crimes and, where failing to do so, the ability of the ICC to fulfill the state's obligation to the international community.<sup>232</sup> Governments<sup>233</sup> and international law scholars<sup>234</sup> around the world have deemed the agreements illegal for various reasons under international law.<sup>235</sup> Under *jus cogens*, a treaty cannot violate certain international norms, and under obligations *erga omnes* there is an international norm that bequeaths a duty to states to apprehend, prosecute and punish those who perpetrate the international crimes of genocide, war crimes and crimes against humanity.<sup>236</sup> A bilateral immunity agreement that con-

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Philip Shishkin & Jess Bravin, *EU Offers Deal on U.S. Immunity From Tribunal*, WALL ST. J., Sep. 13, 2002, at A8.

232. Additionally, international legal scholars have argued that the bilateral immunity agreements are illegal under the customary international law principle of *pacta sunt servanda*, "which obligates a state party not to do anything that will undermine its treaty obligations. State parties to the ICC agreed in Article 88 to 'ensure that there are procedures available under their national law for all forms of cooperation' listed in Part 9 of the Rome Statute." Bilateral Immunity Agreements undermine a state's ability to comply with the terms of the treaty and accordingly are illegal. Chibueze, *United States Objection to the International Criminal Court*, *supra* note 203, at 51.

233. In September, 2002, France and Germany concluded that exempting the U.S. from the authority of the ICC "would undermine the tribunal." *U.S. Exemption from Tribunal Is Opposed*, WALL ST. J., Sep. 3, 2002, at A16.

234. Richard Dicker, an international law expert at Human Rights Watch, stated, "The United States is pressing countries to enter into illegal contracts with them." Elizabeth Neuffer, *Delegates Discuss US Effort to Limit War Crimes Tribunal*, BOSTON GLOBE, Sep. 6, 2002, at A 13.

235. Swiss Foreign Ministry legal adviser Nicolas Michel stated that his country favored "a strong and independent court," and that the US' attempts to excuse itself from the court's jurisdiction would "weaken the court." Neuffer, *Delegates Discuss US Effort to Limit War Crimes Tribunal*, *supra* note 220, at A 13. Heads of legal departments from countries belonging to the European Union met in September, 2002 to find possible ways of addressing the United States' concerns regarding the court without weakening it, but concluded that much of the court's existing vulnerabilities were the result of attempts to appease United States' concerns. *EU Governments Seek Answer to US Demands Over International Court*, AGENCE FR.-PRESSE, Sep. 4, 2002, at \*1.

236. AMNESTY INTERNATIONAL, INTERNATIONAL CRIMINAL COURT: THE UNLAWFUL ATTEMPT BY THE SECURITY COUNCIL TO GIVE US CITIZENS PERMANENT IMPUNITY FROM INTERNATIONAL JUSTICE, *available at* <http://www.amnesty.org> (last visited Aug. 23, 2004).

travenes that established duty, under *jus cogens*, must be illegal.<sup>237</sup>

The greatest concern has consistently been the fear that United States' actions would undermine the ICC, which indeed they have.<sup>238</sup> By undermining the ICC and frustrating states' attempts to cooperate with the ICC, the United States commits a small disservice compared to the infringement on the international communities' rights, thwarted by the encouragement of states' shirking their obligations to "ensure that people responsible for these crimes [i.e. genocide, war crimes, and crimes against humanity], as the most serious crimes under international law, are brought to justice."<sup>239</sup>

## V. CONCLUSION

Although the ICC has based its authority on consent and territoriality,<sup>240</sup> its most persuasive and sound basis rests on universal jurisdiction.<sup>241</sup> The crimes over which the ICC has jurisdiction are crimes against humanity,<sup>242</sup> war crimes<sup>243</sup> and genocide.<sup>244</sup> All three have gained firm recognition as crimes over which there is universal jurisdiction, and are collectively accepted as crimes for which the state has at minimum a *privilege*, under Hohfeld's paradigm, to prosecute perpetrators. Stronger still is the fact that these three crimes have matured into crimes for which there is a *duty*, an obligation *erga omnes*, invested in the states, to prosecute and punish those who commit these crimes.<sup>245</sup>

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237. *Id.*

238. *US Bilateral "Non-Surrender" Agreements Regarding the International Criminal Court*, M2 PRESSWIRE, Oct. 1, 2002, at \*1.

239. *NGOs Express Disappointment at Reports that Australia May Sign U.S. ICC Immunity Agreement: Historic ICC Supporter Has Stronger Role to Play*, M2 PRESSWIRE, July 11, 2003, at \*1.

240. Rome Statute, *supra* note 9, at art. 12.

241. Kofi Annan, *Message of the Secretary-General of the United Nations*, in *THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A CHALLENGE TO IMPUNITY* xiii (Mauro Politi & Giuseppe Nesi eds., 2001), *supra* note 16.

242. Rome Statute, *supra* note 9, at art. 7.

243. Rome Statute, *supra* note 9, at art. 8.

244. Rome Statute, *supra* note 9, at art. 6.

245. Lindsay Glauner, *The Need for Accountability and Reparation: 1830-1976 The United States Government's Role in the Promotion, Implementation,*

Under *jus cogens* as established by the Vienna Convention, an independent treaty is illegal if it conflicts “with a peremptory norm of general international law.”<sup>246</sup> The United States, in its efforts to immunize its citizens from international criminal accountability, has introduced into the international forum bilateral immunity agreements that directly contravene the discharge of unable or unwilling states’ duties to prosecute international crimes to the ICC.<sup>247</sup> When that duty is contravened, the outstanding right, vested in the international community, a right bound and transfixed by obligations *erga omnes*, is left with an unfulfilled correlative duty for which it is owed completion.

If indeed a time arises when the United States’ bilateral immunity agreements are used as a shield from the ICC, *jus cogens*, in its intricate relationship with obligations *erga omnes* and international crimes, demands that the bilateral immunity agreements be viewed as illegal – unenforceable and unable to contravene the proper role of the ICC in its complementary capacity. The failure to do so would do more than simply undermine the ICC; it would shake the delicate and solidifying foundation made up of the union between states’ obligations, the international community’s rights, and the international crimes that compel the relationship between the two. The failure to employ *jus cogens* in enforcing the illegality of Article 98 immunity agreements will surely weaken that fragile foundation, and what could have continued to mature into a concrete relationship between rights, duties and the adjudication of international crimes will crumble, too weak to assert its legitimate and

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*and Execution of the Crime of Genocide Against Native Americans*, 51 DEPAUL L. REV. 911, 913-14 (2002), *supra* note 173.

246. Vienna Convention on the Law of Treaties (1969), May 23, 1969, art. 53, 1155 U.N.T.S. 331, *supra* note 20.

247. Chibueze, *United States Objection to the International Criminal Court*, *supra* note 203, at 51.

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legal authority based on the sound principles of universal jurisdiction.

*Samantha V. Ettari*\*

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