The International Crime of Genocide: Obligations *Jus Cogens* and *Erga Omnes*, and their Impact on Universal Jurisdiction

Michelle Knorr*

Abstract

This paper explores the nature of the obligation to prevent and punish the international crime of genocide. It is argued that the status of the crime of genocide renders failure to prosecute offenders under universal jurisdiction principles as a breach of a state’s obligation to prevent genocide. The crime of genocide is a *jus cogens* norm of international law, which confers *erga omnes* obligations on states. This characterisation requires states to prevent and punish genocide through exercising their customary right of universal jurisdiction over suspects on their territory where a state with a closer nexus to the crime fails to act. By prosecuting offenders, thus deterring future genocide, a state fulfils its peremptory duty to prevent genocide. Currently the right to exercise universal jurisdiction is only sporadically invoked, despite the fact that it should be a binding obligation upon states not to provide safe-havens for persons accused of genocide. In order to realise fulfilment of this obligation, codification of the principle *aut dedere aut judicare* for genocide is, from a practical perspective, necessary. Strengthening of the legal regime to secure accountability for the crime of genocide is an essential step in ensuring that the international community does not continue simply to pay lip service to their duty to ensure justice is done and impunity eliminated in the face of genocide, arguably the most heinous of crimes.

1. Introduction

Genocide has been described as the ‘crime of crimes’,¹ yet persons accused of genocide can find safe-haven in many states unwilling to exercise jurisdiction over persons of foreign nationality who commit crimes in other parts of the world. This essay will first show that genocide is a *jus cogens* crime under customary international law from which *erga omnes* obligations flow. It will then show that while permissive universal jurisdiction over persons accused of genocide is an accepted principle of customary international law, the *jus cogens* nature of genocide means that universal jurisdiction is mandatory. It is argued here that the duty to exercise universal jurisdiction over genocide suspects on their territory, through acceptance of an *aut dedere aut judicare* obligation, is part of the customary law duty binding on all states to prevent genocide.

* Michelle Knorr has an LL.M. in International Human Rights Law at the University of Essex (2008). She graduated from Brown University (USA) with a B.A. in Politics in 2002 after which she worked for several international development and non-governmental organisations before becoming a lawyer. She is a barrister practicing primarily in immigration law and runs a charity, Nyumba Ya Thanzí, which supports community-designed projects in Malawi. She was a research assistant on a Rwandan genocide extradition case, *Government of Rwanda v. Brown (Bajinya) & Others*, before the UK courts.

Despite the fact that the legal basis for mandatory universal jurisdiction over genocide exists and states owe an *erga omnes* obligation to all other states to exercise such jurisdiction, state practice does not reflect this obligation. It is suggested that this resistance is mainly due to difficulties in implementing customary international law in domestic legal systems without a codified international framework; therefore codification of the obligation to prosecute or extradite genocide suspects is recommended.

2. Jurisdictional Principles

The primary form of jurisdiction employed by states is territorial jurisdiction, where a state prosecutes offenders regardless of their nationality for crimes committed within their territory. Other jurisdictional principles are also, albeit less frequently, employed by states, such as, *inter alia*, active personality, where the offender is a national of the prosecuting state; or passive personality, where the victim is a national of the prosecuting state. The common thread running through these jurisdictional principles is that the crime committed is in some sense tied to the state exercising jurisdiction, thus making it in the interest of that state to prosecute and removing the potential for allegations of unlawful interference in the affairs of other states.

The Princeton Principles on Universal Jurisdiction define universal jurisdiction as:

> criminal jurisdiction based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the state exercising such jurisdiction.

Universal jurisdiction is unique because it is solely the nature of the crime as a serious *international* crime, recognised by states as impacting the international community as a whole, which provides justification for the invocation of jurisdiction. As stated in the United States case of *Demjanjuk*, "International law provides that certain offences may be punished by any state because the offenders are enemies of all mankind and all nations have an equal interest in their apprehension and punishment." Under the principle of universal jurisdiction, states can prosecute offenders without the traditional nexus between them and the location of the crime or nationality of the victim or perpetrator. Genocide is the archetypal international crime, thus meeting the requisite severity to justify universal jurisdiction, and was included in the Princeton Principles without objection.

3. Genocide as a Crime Under International Law

---

2 This principle may be extended to include crimes that occur outside a state’s territory, but have a particular impact on the state in question.


4 The Princeton Project on Universal Jurisdiction is a project sponsored by the International Commission of Jurists and is a combined effort of eminent scholars and jurists to formulate principles in order to clarify this area of international law.


8 The Princeton Principles, fn.5 above, Commentary at 47; also see Randall, fn.7 above.
The international crime of genocide is defined in Article 2 of the Genocide Convention⁹ 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:
(a) killing members of the group;
(b) causing serious bodily or mental harm to members of the group;
(c) deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
(d) imposing measures intended to prevent births within the group;
(e) forcibly transferring children of the group to another group.

This conventional definition of genocide is recognised as a crime under international law for which individual and state responsibility¹⁰ can arise even where a state has not ratified the Genocide Convention. Article 38 International Court of Justice (hereinafter ICJ) Statute confirms that general principles and international custom, inter alia, are sources of international law. The ICJ has recognised that the ‘principles underlying the Convention are principles which are recognised by civilised nations as binding on states without any conventional obligation.’¹¹ This statement engenders the view that the prohibition against genocide is considered a ‘general principle’ of international law,¹² formed on the basis that the denial of the right to existence of targeted human groups is ‘a denial that shocks the conscious of mankind and results in great losses to humanity, and which is contrary to moral law.’¹³

International custom is created through ‘evidence of a general practice accepted as law’.¹⁴ The widespread acceptance of the Genocide Convention, currently by 140 State parties,¹⁵ along with the affirmation of genocide as an international crime in numerous General Assembly (hereinafter GA) Resolutions,¹⁶ the inclusion of the crime of genocide in the statutes of the International Tribunal for the Former Yugoslavia (hereinafter ICTY),¹⁷ the International Tribunal for Rwanda (hereinafter ICTR)¹⁸ and the International Criminal Court (hereinafter ICC),¹⁹ and the

---

¹¹ Reservations to the Convention on the Prevention and Punishment of the Crime of Genocide, Advisory Opinion 1951 ICJ Reports, p.23; quoted in Legality of the Threat or Use of Nuclear Weapons (Advisory Opinion), 1996 ICJ Reports 226 at para. 31. (Although ICJ jurisprudence is not binding, except on the parties to a dispute (Art.59 ICJ Statute 1945), it is recognised as a subsidiary means of determining the law, along with the teachings of the most highly qualified publicities (Art. 38 ICJ Statute 1945), and so both are highly persuasive in determining the content of customary international law.)
¹³ Ibid; see also GA Resolution 96(I) 1946 (adopted unanimously).
¹⁴ Article 38, ICJ Statute 1945. Customary international law is formed by evidence of state practice coupled with opinio juris, indicating that states believe themselves to be legally bound to such practice.
¹⁶ See for example GAResolution 96(I) 1946 which recognised genocide as an international crime prior to the adoption of the Genocide Convention; and GA Resolution 180(III) 1992. The ICJ in Legality of Nuclear Weapons, fn.11 above at para. 70, has recognised that although GA Resolutions are not binding they can ‘provide evidence important for establishing the existence of a rule or emergence of opinio juris.’
incorporation of genocide as a crime in the domestic legislation of numerous states,\(^\text{20}\) provides overwhelming evidence that the prohibition against genocide is perceived by states as a binding legal obligation under customary international law. Article 1 Genocide Convention expressly recognises that genocide was a pre-existing crime under international law: ‘The Contracting Parties confirm that genocide….is a crime under international law…’ (emphasis added).

Moreover, the prohibition against genocide has developed beyond an ordinary customary international law. Protection of people from acts of genocide has been recognised as an *erga omnes*\(^\text{21}\) state obligation, meaning that the duty to enforce this obligation is owed by every state to the international community as a whole. Indeed, the prohibition against genocide has reached *jus cogens* status; meaning that genocide is a peremptory norm of international law, which is ‘a norm accepted and recognised 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.’\(^\text{22}\)

Bassiouni sets out the legal basis for recognition of a *jus cogens* norm as:

(1) international pronouncements, or what can be called international *opinio juris*, reflecting that these crimes are deemed part of general customary law;
(2) language in preambles or other provisions of treaties applicable to these crimes which indicates that these crimes have higher status in international law;
(3) the large number of states which have ratified treaties related to these crimes; and
(4) the ad hoc international investigations and prosecutions of perpetrators of these crimes.\(^\text{23}\)

As well as meeting the above criteria the crime should be recognised as one that affects ‘the interests of the world community as a whole because [it] threaten[s] the peace and security of humankind [and/or] because [it] shock[s] the conscience of humanity.’\(^\text{24}\) Other considerations are the number of legal instruments that exist to evidence the development of the rule into one of *jus cogens*, incorporation into national legislation, national prosecutions for a given crime, and academic writings.\(^\text{25}\)

As established above, genocide meets the first criterion, having been recognised as part of general customary law, and genocide has been included as an international crime of the utmost gravity in several international criminal instruments and incorporated into national legislation in many states. The second criterion is satisfied given that the preamble of the Genocide Convention describes genocide as ‘a crime under international law, contrary to the spirit and aims of the United Nations and condemned by the civilised world’ and as an ‘odious scourge’;


\(^{24}\) See fn.23 above at 173.

\(^{25}\) See fn.23 above at 174.
while the Rome Statute recognises genocide as one of ‘the most serious crimes of concern to the international community as a whole’ and, in its preamble, describes the crimes set out therein as ‘such grave crimes [that] threaten the peace, security and well-being of the world’. As above, the Genocide Convention is widely ratified, as is the Rome Statute; 162 states have ratified at least one of these treaties. The prohibition on genocide as a jus cogens norm of international law has been recognised multiple times in ICJ jurisprudence, in the jurisprudence of national courts, and has been confirmed by eminent scholars of international law. The crime of genocide surely qualifies for peremptory status - it has been described as being ‘at the apex of the pyramid’ in any hierarchy of crimes; as the ICTR has aptly stated, genocide is the ‘crime of crimes’.

The concepts of erga omnes and jus cogens are related, yet are not interchangeable or necessarily interdependent. Bassiouni explains the relationship as follows: ‘Jus cogens refers to the legal status that certain international crimes reach, and obligation erga omnes pertains to the legal implications arising out of a certain crime’s characterisation as jus cogens.’ It may be true that all jus cogens norms of international law give rise to erga omnes obligations, but the converse, that all norms from which erga omnes obligations flow are jus cogens is questionable. For example, arguably all customary human rights norms carry with them erga omnes obligations, yet all have certainly not reached the status of jus cogens.

In the case of the prohibition on genocide, the principles of jus cogens and erga omnes both apply and impact jurisdiction. Despite the fact that the terms jus cogens and erga omnes have been used frequently in conjunction with the crime of genocide in recognition of its gravity, there exists little clarity as to how these terms affect the legal obligation to prevent and punish genocide. An attempt will be made below to clarify this effect, but first the source of universal jurisdiction over genocide will be examined.

4. The source of universal jurisdiction over the international crime of genocide

---

26 Article 5 Rome Statute.
28 Armed Activities on the Territory of the Congo (New Application 2002) (DRC v. Rwanda), 3 Feb. 2006 (ICJ Judgment) at para. 64; confirmed in Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Yugoslavia), 26 Feb. 2007 (ICJ Judgment) at para. 161, and Dissenting Opinion of Judge Kreca 11 July 1996 (ICJ Judgment) at para.102: ‘The norm prohibiting genocide, as a norm of jus cogens, establishes obligations of a State toward the international community as a whole, hence by its very nature it is the concern of all States ...the norm prohibiting genocide as a universal norm binds States in all parts of the world’; and Requests for Provisional Measures, 13 Sept. 1993 (ICJ Rep.325) Separate Opinion of Judge Lauterpacht at para. 100: “[T]he prohibition of genocide has long been regarded as one of the few undoubted examples of jus cogens.”
29 Nulyarimma, fn.21 above, at para.36: ‘...under customary international law there is an international crime of genocide, which has acquired the status of jus cogens or a peremptory norm.’ See also Nikolai Jorgi (No.263), Bundesverfassungsgericht (Federal Constitutional Court), Fourth Chamber, Second Senate, 12 Dec. 2000, 2 BvR 1290/99.  
32 See fn.1 above.
33 Bassiouni (1996), fn.30 above at 63.
34 Bassiouni (2003), fn.23 above at 177.
35 Barcelona Traction, fn.21 above.
Despite the fact that universal jurisdiction is not provided for in the Genocide Convention, it is generally accepted that under customary law universal jurisdiction is permissible over the crime of genocide. Although the Convention does not require universal jurisdiction, it does not expressly prohibit it. The territorial jurisdiction provided for in the Convention has subsequently been seen as a non-exhaustive ‘compulsory minimum’ obligation between state parties. ICJ, ICTY, and ICTR jurisprudence has recognised that genocide, as a grave international crime, gives rise to universal jurisdiction. Many national courts, inter alia in Australia, Germany, Israel, and even US courts despite arguing against inclusion of universal jurisdiction in the Genocide Convention, have recognised universal jurisdiction over genocide as flowing from customary international law. Furthermore, legislation has been introduced in countries such as Canada and Germany specifically allowing for universal jurisdiction over genocide. The Restatement (Third) of the Foreign Relations Law of the United States 1987 confirms that, ‘Universal Jurisdiction to punish genocide is widely accepted as a principle of customary law.’ The Council of Europe Parliamentary Assembly has even suggested that the Genocide Convention should be revised allowing alleged perpetrators of genocide to be tried outside of the territory in which they committed their crimes.

This widespread recognition is of *permissive* universal jurisdiction, rather than mandatory, meaning that states are free to choose whether they wish to exercise jurisdiction over genocide suspects. States are not compelled to incorporate the full scope of jurisdiction allowed by international law. This is consistent with the *Lotus* decision, which emphasised that states are free to extend the application of their laws as far as they desire, providing that there is no rule of international law that prohibits the exercise of such jurisdiction.

---

36 Article VI Genocide Convention provides: ‘Persons charged with genocide … shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction …’ Universal jurisdiction was proposed for inclusion in the Genocide Convention but was rejected, see Schabas (2000), fn.20 above at 356-358.


38 A-G Israel *v. Eichmann* (1968) 36 ILR 5, at para. 25; Randall, fn.7 above at 837.


41 *Prosecutor v. Ntuyahaga* (Case No. ICTR-90-40-T). In this case the court allowed an indictment to be withdrawn so that the accused could be tried in Belgium and emphasised that it ‘in line with the General Assembly and the Security Council of the United Nations, … encourages all States, in application of the principle of universal jurisdiction, to prosecute and judge those responsible for serious crimes such as genocide …’

42 Schabas (2000), fn.20 above at 358. The US saw universal jurisdiction as ‘one of the most dangerous and unacceptable of principles’.

43 *Demjanjuk*, fn.6 above; *Eichmann*, fn.38 above; *Ntaryarimma*, fn.21 above; *Nikolai Jorgić*, fn.29 above. Note, as will be discussed below, there is a critical difference between recognising that international law permits the exercise of universal jurisdiction and states legislating to allow it to be exercised domestically.

44 Schabas (2003), fn.12 above at 60.


48 Permanent Court of International Justice (hereinafter PCIJ), Series A, No. 10, pp.18-19.
It has been argued that the *Lotus* (1927) approach to jurisdiction has now been limited by later development of the general international law principle of sovereign equality prohibiting interference in the sovereign affairs of states, as enshrined in Article 2(1) UN Charter. However this ‘limit’ is unconvincing with regard to jurisdiction over a *jus cogens* international crime such as genocide, which has been universally condemned and impacts the international community as a whole. The specific reason why universal jurisdiction has been upheld for serious crimes such as genocide but not for ordinary crimes is that due to the internationally shocking nature of the crime it is in the interest of every state to prosecute perpetrators and so, such prosecution cannot be said to be the sole ‘sovereign affair’ of any one state. Thus, whether or not the *Lotus* principle has been limited by future developments in international law it remains intact in so far as the present issue is concerned.

There have been instances of judicial opposition to the view that universal jurisdiction arises under customary law for international crimes, however these *dicta* have not pointed to an existing rule of customary international law prohibiting universal jurisdiction, thus have not proved a legal basis for their contention. Following the *Lotus* decision a rule prohibiting the exercise of universal jurisdiction would have to exist for universal jurisdiction to be contrary to customary international law, and thus there would need to be evidence of state practice and *opinio juris* indicating such a rule. Considering that a number of national courts, and also international courts, have recognised universal jurisdiction without any international condemnation or opposition from other states, it can hardly be argued that states practice has evidenced a legal obligation not to exercise universal jurisdiction. The majority of domestic decisions negating the exercise of universal jurisdiction relate to restrictions in domestic law preventing jurisdiction, rather than its permissibility under international law.

The existence of universal jurisdiction under customary law is not evinced by sporadic judicial statements that counter universal jurisdiction. As recognised by the ICJ in *Nicaragua*, when determining customary international law ‘it is not to be expected that in the practice of states the rules in question should have been perfect’. Applying this line of reasoning, the arguably baseless instances of opposition to universal jurisdiction as a principle of customary law do not negate the fact that universal jurisdiction over genocide is permissible under customary international law. Moreover, a hypothetical norm forbidding the exercise of universal jurisdiction under customary international law would be inherently contrary to the peremptory status of genocide. As above universal jurisdiction arises due to the nature of the crime, thus cannot be negated by these pronouncements.

5. The impact of *jus cogens* and *erga omnes* on universal jurisdiction: is there a duty to prosecute?

---

49 *Arrest Warrant*, fn.47 above, Separate Opinion of President Guillaumes at para.16.
51 Schabas (2000), fn.20 above.
52 See, for example, *In re Javor, ordonnance*, N. Parquet 94052 2002/7, Tribunal de grande instance, Paris, 6 May 1994, 2.
54 Schabas (2003), fn.12 above at 57, referring to *Nicolai Jorgić*, fn.29 above.
The *permissive* nature of universal jurisdiction is in conflict with the status of the crime of genocide as a *jus cogens* peremptory norm of international law from which *erga omnes* obligations flow, because in practice it means that states are free to allow persons suspected of genocide to reside within their borders free from prosecution or inquiry. It has been recognised that the possibility of impunity for those committing international crimes is not acceptable. The preamble to the Rome Statute states, ‘it is the duty of every State to exercise its criminal jurisdiction over those responsible for international crimes’ and the Draft Code of Crimes against the Peace and Security of Mankind provides that, ‘the state party in the territory of which an individual alleged to have committed a crime [of genocide, among other recognised international crimes] is present shall extradite or prosecute that individual’ and that ‘each state party shall take such measures as may be necessary to establish its jurisdiction over the crimes’. However these statements are not situated in binding international law and the international community is still struggling to define a system by which all international criminals will be brought to justice. So, the question remains, do the principles of *jus cogens* and *erga omnes* add any weight to the calls for mandatory universal jurisdiction?

To reiterate, the principle of *jus cogens*, meaning ‘compelling law’, concerns the status of the crime under international law as a peremptory, nonderogable norm of international law. Bassiouni argues that the ‘implications of *jus cogens* are those of a duty and not of optional rights’, which arguably engages a duty to prosecute or extradite and mandates universality of jurisdiction over such crimes. The prevention and punishment of genocide is an express obligation on parties to the Genocide Convention, and the prevention duty has been held by the ICJ not to be territorially limited precisely due to the peremptory status of genocide under customary law. Furthermore, the ICJ has recognised that the principles enshrined by the Genocide Convention are binding in customary law, and that both ‘condemnation and international cooperation’ to combat genocide are of ‘universal character’. Schabas explains that, ‘It is uncontroversial to maintain that the duty to prevent genocide is one of customary law, applicable even to States that have not signed or ratified the 1948 Convention.’ The jurisprudence of the World Court and opinions of leading academics, therefore, confirm that prevention of genocide is part of the *jus cogens* obligation prohibiting genocide.

It is submitted that since the duty to prevent genocide, without territorial limit, is part of the *jus cogens* prohibition against genocide in customary law, mandatory universal jurisdiction over genocide suspects present on a state’s territory is obligatory under customary international law. It

---

55 This Code was developed by the ILC on request of the GA, see: (GA Res 51/160 (1997), A/RES/51/160). It is a non-binding instrument, but is relevant to the interpretation of international law.


57 Article 8, fn.56 above.


59 Article 1, Genocide Convention. See fn.9 above.

60 *Application of the Convention on Genocide* (1996), fn.28 above at para.31, and *Application of the Convention on Genocide* (2007) fn.28 above at para.162 support this argument in recognising that the *jus cogens* characteristic of genocide is ‘significant’ in understanding the Conventional duty to prevent and punish genocide.

61 *Reservations to the Genocide Convention*, fn.11 above at 23.

62 W. Schabas, ‘Genocide, Crimes Against Humanity, and Darfur: The Commission of Inquiry’s Findings on Genocide’, (2006) *Cardozo Law Review* 27, pp.1703-1705 at p.1703. The Commission of Inquiry wanted to ensure that genocide was established in Darfur so that the duty to prevent was triggered.
is fundamental to criminal law that the prosecution of offenders and subsequent imposition of penalties has a deterrent and thus a preventative effect. This is expressly recognised by the ICJ in the context of the Genocide Convention: ‘Because those provisions regulating punishment also have a deterrent and therefore a preventative effect or purpose, they could be regarded as meeting and indeed exhausting the undertaking to prevent the crime of genocide stated in Article I and mentioned in the title.’ Prosecution of offenders is therefore a logical and important part of the duty to prevent genocide. A crucial aim of the international criminalisation of any crime is to ensure that those who commit such crimes do so in the knowledge that they will be punished for doing so. Failure to prosecute is therefore failure to engage in effective prevention of future genocides.

As set out by the ICJ, the duty to prevent genocide requires that a state take all measures within its power to prevent genocide. A state’s capacity to have a deterrent effect is crucial, but it is irrelevant whether an individual state’s actions would alone be enough to prevent genocide since the duty is one of conduct not result, particularly since the cumulative actions of states exercising their influence could bring about the desired preventative effect. Considering the content of the duty to prevent, when any state has a person accused of genocide on its territory it can be said to have the capacity to ‘prevent’ genocide through initiating proceedings. No state can argue that their actions alone will not produce a deterrent effect, since it is the duty of all states to prosecute offenders on their territory and if this were accomplished then a significant measure of prevention would ensue.

Although under the Lotus principle it is unlikely that a prohibition on exercising mandatory universal jurisdiction in absentia exists, it is only where the accused is present in a state that the obligation to exercise mandatory universal jurisdiction is invoked, because only then does the state have the requisite ‘capacity’ to take preventative action. The requirement for the presence of the accused is sensible for practical as well as legal reasons; without such a condition every state would have an obligation to exercise jurisdiction over every person accused of genocide everywhere in the world, which would lead to constant jurisdictional conflict. It is a condition that has already been imposed nationally by some states exercising universal jurisdiction, despite otherwise allowing trials in absentia. For due process reasons it is also important. For example, trial in absentia may violate Article 14(3)(d) International Covenant on Civil and Political Rights (hereinafter ICCPR), which provides for the right of the accused to appear during his or her trial. A charge of genocide is arguably the most serious crime a person could be accused of; therefore their ability to present a defence, particularly in the politically charged atmosphere of an extraterritorial trial, is paramount. Furthermore, the presence of a person suspected of genocide is the trigger for the application of the aut dedere aut judicare principle, meaning that the state must either prosecute or extradite the accused to face prosecution elsewhere.

---

63 Fn.62 above at para.159. The Court held that the obligations in Article I created more far reaching obligations than just those contained in the rest of the Convention (see para.162).
65 See fn.64 above.
68 See, Rabinovitch, fn.66 above at 22-23. The Human Rights Committee has stated that an accused that fails to appear for trial vitiates this right, but some jurists dispute this position.
69 Herein the duty to prosecute - ‘aut judicare’ - refers to an obligation to submit persons to the competent authorities for prosecution, who are required to consider whether or not to prosecute in good faith.
*Aut dedere aut judicare* is as a rule related to universal jurisdiction, under which a state may not shield a person suspected of certain categories of crimes. Instead, it is required either to exercise jurisdiction (which would necessarily include universal jurisdiction in certain cases) over a person suspected of certain categories of crimes or to extradite the person to a state able and willing to do so or to surrender the person to an international criminal court with jurisdiction over the suspect and the crime.\(^{70}\)

This formulation of *aut dedere aut judicare* places an emphasis on prosecution whether or not a request for extradition has been made, while another formulation requires only that prosecution be considered once extradition has been requested and refused; it is the former formulation that is required to implement a state’s duty to prevent genocide by arresting impunity of international criminals. There can be no scope for condoning a violation of a peremptory norm of international law, and declining to exercise jurisdiction and permitting a person accused of genocide to move freely within one’s territory because no extraterritorial court wishes to prosecute would be doing just that.

This preferred formulation\(^{71}\) is provided for by the 1949 Geneva Conventions\(^{72}\) that criminalise ‘grave breaches’\(^{73}\) of the Conventions, which are serious violations of the laws of war in international armed conflict recognised as international crimes.\(^{74}\) Parties are under ‘the obligation to search for persons alleged to have committed … grave breaches’ and must ‘bring such persons regardless of their nationality, before its own courts’, or they can extradite the accused to another party.\(^{75}\) The 1949 Geneva Conventions are the sole example of codified *mandatory* universal jurisdiction for international crimes.

When the *jus cogens* prohibition against torture\(^{76}\) was codified in the Convention Against Torture (hereinafter CAT)\(^{77}\) the duty to extradite or prosecute persons suspected of torture regrettably took the weaker form, only expressly requiring a person to be submitted for prosecution if an extradition request is received and refused. However, the CAT Committee has submitted that, ‘[e]ven before the entry into force of the Convention against Torture, there existed a general rule of international law which should oblige all states to take effective measures to prevent torture and to punish acts of torture.’\(^{78}\) Although this *dicta* of the Committee

---


71 Though the term *aut dedere aut judicare* is not used the obligation is the same.

72 UN *Treaty Series*, 3.

73 Grave breaches are identified in Geneva Convention I Article 50, Geneva Convention II, Article .51; Geneva Convention II, Article 130; Geneva Convention IV, Article 147.

74 Article 5(1)(c) & Article 8(2)(a) Rome Statute, fn.19 above.

75 Geneva Convention I Article 49, Geneva Convention II, Article 50; Geneva Convention II, Article 129; Geneva Convention IV, Article 146; and see Randall, fn.7 above at 817-8: the obligation to prosecute is not limited to parties to the conflict.

76 Demjanjuk, fn.6 above; *ex p. Pinochet*, fn.50 above, per Lord Browne-Wilkinson. Both cases recognise torture as a *jus cogens* international crime.


has been described as ‘rather aspirational’, in the Pinochet case Lord Browne-Wilkinson supports this view: ‘The torture convention was agreed not in order to create an international crime which had not previously existed, but to provide an international system under which the international criminal—the torturer—could find no safe haven.’ (emphasis added) The implication is, that, although the obligation under CAT is lesser, there was a pre-existing customary law duty to prosecute or extradite torture suspects as a result of the jus cogens status of torture, exactly as is argued herein with respect to genocide.

Importantly, aut dedere aut judicare is compatible with the principle of subsidiarity. Subsidiarity provides that universal jurisdiction should only be exercised where a state with territorial jurisdiction, or other closer nexus with the crime, is unwilling or unable to prosecute the accused in accordance with international human rights and due process standards. The exercise of universal jurisdiction should be a substitute for other prosecution in states better placed to prosecute the accused. Prosecuting an offender in the territory in which the crime took place is more convenient with regard to witness testimony and evidence collection; furthermore it addresses the victims’ rights to see justice done. The principle aut dedere aut judicare is compatible with subsidiarity because it allows for the extradition of suspects in lieu of prosecution, and extraditing a suspect to face a fair trial is still compatible with a state’s duty to prevent genocide. It is prosecution somewhere that is unavoidable as a matter of duty.

Commentators have recognised that, as a result of the inclusion of aut dedere aut judicare in multiple international treaties dealing with international crimes, ‘a state has indicated that with respect to international offences it believes that the best way to ensure compliance is to impose such an obligation’, and it is argued by some to be an emerging rule of customary international law.

These precedents, set by the codification of mandatory universal jurisdiction for grave breaches of the Geneva Conventions and, to an extent, torture, support the argument made herein: there should be implementation of an existing customary law duty to prevent and punish the jus cogens crime of genocide; a duty which includes recognition of mandatory universal jurisdiction over suspects within a state’s territory through application of the aut dedere aut judicare principle. However state practice has not reflected such a duty, despite acceptance of the prohibition of genocide as a jus cogens norm from which erga omnes obligations flow. The erga omnes principle means that states should be held internationally liable where they fail to take action against genocide suspects present on their territory under the doctrine of state responsibility.

---

81 See Principle 8, Princeton Principles, fn.5 above.
83 Goodwin-Gill, fn.58 above at 220.
85 Galicki, fn.70 above at paras. 55 and 57; Broomhall, fn.20 above at 406. See also, N. Larsaeus, ‘The Relationship between Safeguarding Internal Security and Complying with International Obligations of Protection. The Unresolved Issue of Excluded Asylum Seekers’ (2004) Nordic Journal of International Law 73:69-97,p.85: Larsaeus argues that although there is acceptance of the principle there is inadequate evidence of state practice supported by opinio juris to assert that aut dedere aut judicare is a rule of customary international law for international crimes.
The concept of *erga omnes* is an international law principle that concerns state responsibility - obligations owed by states to the whole international community. Under international human rights law it has been accepted that part of a state’s duty in protecting human rights is to exercise due diligence to counter human rights violations, including: investigating violations, where appropriate bringing perpetrators to justice and providing victims with access to justice - an analogy is apparent here with a state’s duty to protect persons against genocide in international criminal law. The *jus cogens* nature of genocide means that the *erga omnes* obligation extends to all states to take measures within their capacity to suppress acts of genocide wherever they occur. It should be the case that the responsibility of a state is invoked when it does not at least take steps to investigate and prosecute, or extradite a person accused of genocide, since this is a violation of their obligations to the international community.

The fact that state practice in terms of formally invoking the responsibility of states that provide a safe-haven for persons accused of genocide is non-existent, is of little relevance. As is clear in the International Law Commission Draft Articles on State Responsibility (hereinafter ILC DAs), there is only an *entitlement* to invoke the responsibility of another state, rather than an obligation to do so, and due to the political nature of inter-state relations, and ‘the old dogma of respect for internal affairs of other international subjects’ states often refrain from exercising this right. However, any other state could claim cessation of the wrongful act and assurances of non-repetition, therefore could demand that a state cease to provide a safe-haven for an accused, necessarily requiring that they be prosecuted or extradited to face prosecution elsewhere, but there is no convenient international body to supervise these obligations under international law.

Recourse to the ICJ is a possibility, but not a readily accessible one since it is only available where parties accept the jurisdiction of the court and decisions can take years. Resort to the Security Council (hereinafter SC) is another avenue under Article 35 of the UN Charter because failure to observe duties incurred under the obligation to prevent genocide could be viewed as ‘likely to endanger the maintenance of international peace and security’. The SC could then recommend ‘appropriate procedures or methods of adjustment’ under Article 36. However, these options are each politically heavy-handed and would be unlikely to occur unless fundamental

---

86 Randall, fn.7 above at 838.
87 Bassiouni (2003), fn.23 above at 97. See also Application of the Convention Genocide (2007), fn.28 above at para.430, which states that in assessing the duty to prevent genocide the notion of ‘due diligence’ is of critical importance.
88 Under both international human rights law and international criminal law international public law principles of state responsibility are applied to determine the obligations of states under international law.
90 Article 48 ILC DAs.
92 Article 30 & Article 48(2) ILC DAs.
94 This is the requirement for SC involvement under Article 34 of the UN Charter; see for example, Complaint By Argentina (Eichmann Case) Initial Proceedings, Repertoire of the Practice of the SC 1959-1963 at 160-161. Available at: http://www.un.org/Depts/dpa/repertoire/index.html. Last accessed 17 Mar. 2007: Lack of respect for jurisdictional sovereignty was an issue though not the decisive one. Nevertheless, the dispute indicates that jurisdictional issues which may affect international peace and security can be brought before the SC under Article.33 *et seg.* of the UN Charter. In this case it is noteworthy that the SC did not recommend return of Eichmann, rather it acknowledged that it was the concern of all peoples that he be brought to justice, see SC Res. 138(1960) [S/4349].
state interests were at stake; prosecution of international criminals is unlikely to qualify. Unfortunately, there is no international enforcement mechanism for genocide, akin to those set up to supervise compliance with human rights which are in part designed to avoid politicisation of complaints.95

Failures to recognise mandatory universal jurisdiction have been explained through the prism of the natural law / positive law divide, with proponents of natural law arguing that jus cogens status automatically requires the prosecution of offenders, while positivists counter that the principle of legality applies equally, thus preventing prosecution without codification.96 However, applied to the current problem, this framework only provides a tenuous explanation for the minority of failures on the part of states to prosecute genocide suspects within their borders, because even where both the state of origin and state of refuge have criminalised genocide there is still no acknowledged obligation to prosecute. Furthermore, the nature of genocide as a crime under customary international law of the utmost gravity has long been recognised as attracting criminal sanction internationally, and the international community has seen no issue in establishing the ICTY and ICTR, nor did they oppose the Nuremberg Tribunals which prosecuted genocide under the rubric of crimes against humanity97 despite a lack of prior codification of such crimes. Other excuses provided are the obvious difficulties in securing witnesses’ testimony and evidence when crimes were committed abroad.98 While these are legitimate concerns, they can be partially alleviated by international cooperation (which is required under the erga omnes obligation on all states to prevent genocide)99 and modern technology. Moreover, ‘inconvenience’ or expense are not legitimate excuses for failing to comply with peremptory obligations.

The reality is that state practice does not embrace the obligation to prosecute serious international criminals, despite a duty to do so under peremptory customary international law. As Brown acknowledges, ‘In a logically coherent and integrated legal order these three legal concepts [universal jurisdiction, jus cogens and erga omnes] might be different sides of the same coin, essentially coextensive and generally overlapping. In practice this does not yet appear to be the case.’100 It seems that it is primarily the practical difficulties anticipated by domestic courts and legislators in the absence of an international framework that prevents states from fulfilling their obligation to prosecute persons on their territory accused of genocide under the universality principle.

6. The challenge of prosecuting genocide suspects extraterritorially in national courts

It has been established that persons who commit genocide are international criminals and should be investigated and, if appropriate, prosecuted, however domestic jurisdictional barriers may arise preventing prosecution, despite recognition that jurisdiction is at least permissive under international law. This is particularly the case in dualist legal systems where international law

95 Cassese (2005), fn.91 above at 265-268.
96 Bassiouni (2003), fn.23 above at 175.
97 Article 6(c) Statute of the International Military Tribunal in the London Charter of 8 Aug. 1945.
98 Goodwin-Gill, fn.58 above at 204.
99 Fn.98 above at 220.
100 Brown, fn.3 above at 392; Mitchell, fn.58 above: see generally for a detailed treatment of implementation problems in national legal systems.
must first be incorporated into domestic law for it to take effect in national courts. In the UK *Pinochet* case, for example, the majority of the Law Lords held that the only crimes for which Pinochet could be extradited were cases of torture occurring after 1988, the point at which CAT was incorporated into domestic law in the UK, despite recognition that this was a crime under international law prior to 1988. However, Lord Millett’s dissent on this point provides a promising argument for traditionally dualistic common law systems which have greater difficulty justifying universal jurisdiction. He says, ‘Customary international law is part of the common law, and accordingly I consider that the English courts have and always have had extra-territorial criminal jurisdiction in respect of crimes of universal jurisdiction under customary international law.’ Nevertheless, a similar finding to the *Pinochet* majority was made in the Australian case of *Nulyarimma* where the court stated:

> It is one thing to say Australia has an international legal obligation to prosecute or extradite a genocide suspect found within its territory, and that the Commonwealth Parliament may legislate to ensure that obligation is fulfilled; it is another thing to say that, without legislation to that effect, such a person may be put on trial for genocide before an Australian court.

It was held that only national legislation could create new crimes.

Even for monist systems, where international law is typically automatically applicable in domestic legal systems, there can be problems where a prosecutor tries to rely on customary law, rather than a treaty-based commitment. In the Swiss case of *Niyonteze* an attempt was made to prosecute a Rwandan suspected of genocide. It failed because at the time of the trial Switzerland was not a party to the Genocide Convention and the customary international norms, though acknowledged, were perceived as too vague to be the basis for prosecution because they did not provide for a penalty, thus in light of the principle of legality were not directly applicable in Swiss law. Similarly in France there must be an express provision for the courts to accept universal jurisdiction. Customary law can be perceived as too ‘*indeterminate and unstable*’ to directly give rise to offences and jurisdiction.

Despite these *domestically legitimate* barriers to exercising jurisdiction, if there is a mandatory obligation to exercise jurisdiction over persons in a state’s territory accused of genocide, states are still in breach of their international obligations when they fail to allow for prosecution: domestic law cannot be used as an excuse not to perform obligations under international law.

Accordingly, if a lack of implementing legislation is problematic in certain jurisdictions then states must legislate to provide for universal jurisdiction over genocide. Although the general rule of international law is that states have complete freedom nationally in fulfilling international

---

101 See Slaughter, fn.67 above at 176.
102 *ex p. Pinochet*, fn.50 above per Lord Millett.
103 *Nulyarimma*, fn.21 above at para.20.
106 Slaughter, fn.67 above at 178.
107 Ibid.
legal obligations, thus there can be no duty to legislate per se, arguably where a norm is jus cogens there is an obligation to adopt the necessary implementing legislation.\textsuperscript{109}

Realistically, these implementation problems will only be solved in the wake of clarifying the obligation on states to prosecute international criminals through codification of existing duties under customary law and creation of an enforceable international legal framework within which to carry them out. This is part of the current work of the ILC. The focus of the ILC study is on the ‘prosecution focused’ version of the aut dedere aut judicare principle, which the ILC has accepted as the international community’s method of choice for implementing duties in the international criminal law sphere\textsuperscript{110}, and the recent report of the ILC Special Rapporteur on aut dedere aut judicare has recommended codification of this norm.\textsuperscript{111}

7. Conclusion

This essay has established that the prohibition of the crime of genocide is a jus cogens norm of international law, which confers erga omnes obligations on states. This requires them to prevent and punish genocide through exercising their customary right of universal jurisdiction over suspects on their territory where a state with a closer nexus to the crime fails to act. Currently this right is only sporadically invoked, despite the fact that it should be a binding obligation upon states not to provide safe-havens for persons accused of genocide. In order to realise this obligation codification of the principle aut dedere aut judicare for genocide is recommended. Strengthening of the legal regime to secure accountability for the crime of genocide is an essential step in ensuring that the international community does not continue simply to pay lip service to their duty to ensure justice is done and impunity eliminated in the face of genocide, arguably the most heinous of crimes.

\textsuperscript{109} Cassese (2005), fn.91 above at 219.

\textsuperscript{110} Enache-Brown and Fried, fn.84 above at 629; and Galicki, fn.70 above at para.41.

\textsuperscript{111} Galicki, fn.70 above at paras.55 and 57.