

**Chicago-Kent College of Law**

---

**From the Selected Works of Bartram Brown**

---

January, 2001

# The Evolving Concept of Universal Jurisdiction (symposium)

Bartram Brown, *Chicago-Kent College of Law*

# The Evolving Concept of Universal Jurisdiction

Bartram S. Brown\*

## I. INTRODUCTION

The basic elements of universal jurisdiction are well known. Traditionally, international law requires some link of territory or nationality to a crime as the basis for a state's exercise of criminal jurisdiction. Universal jurisdiction is a special exception to this rule, applicable only to those, such as pirates, whose criminal acts render them *hostes humani generis*, the enemies of all humankind.<sup>1</sup> Such a person may be tried not only by states linked to the crime by territory or nationality, but by any other state.<sup>2</sup> Universal jurisdiction is a functional<sup>3</sup> doctrine

---

\* Associate Professor of Law, Chicago-Kent College of Law, Illinois Institute of Technology; Member, Council on Foreign Relations; Member, Board of Directors, Amnesty International/USA; Member, Advisory Board of the Central and Eastern European Law Initiative (CEELI) of the American Bar Association; Public Member, March-April 1999 and 2000, Delegation of the United States to the United Nations Commission for Human Rights. The views expressed herein are solely the author's.

1. See J. L. BRIERLY, *THE LAW OF NATIONS: AN INTRODUCTION TO THE INTERNATIONAL LAW OF PEACE* 311 (6th ed. 1963).

2. The principle has been described as follows:

This principle provides every state with jurisdiction over a limited category of offenses generally recognized as of universal concern, regardless of the situs of the offense and the nationalities of the offender and the offended. While the other jurisdictional bases demand direct connections between the prosecuting state and the offense, the universality principle assumes that every state has an interest in exercising jurisdiction to combat egregious offenses that states universally have condemned.

Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785, 788 (1988).

3. The Israeli court that convicted Adolph Eichmann of crimes against humanity stressed the functional need for universal jurisdiction in the following terms:

The abhorrent crimes defined in this Law are crimes not under Israeli law alone. These crimes which offended the whole of mankind and shocked the conscience of nations are grave offences against the law of nations itself ("*delicta juris gentium*"). Therefore, so far from in-

based on the need to remedy, in some small measure, the inability of the decentralized international system to enforce even its most fundamental laws.<sup>4</sup>

Universal jurisdiction began as a modest and narrow doctrine applicable only to piracy, but the concept has grown along with the international legal order. While it applies only to the most serious of the crimes defined by international law there is some dispute as to exactly which such crimes qualify. As the fundamental values and norms of the international system have evolved, so too has the number of crimes established by international law. Some of these new international crimes have become subject to universal jurisdiction. Multilateral negotiations leading to the adoption of the International Criminal Court (ICC) Statute were characterized by disputes over whether the ICC's three core crimes are truly subject to universal jurisdiction. Today, many believe that universal jurisdiction applies to a whole range of international crimes<sup>5</sup> beyond this short list of the ICC's core crimes.<sup>6</sup> Others would limit its application to piracy, genocide, and perhaps torture.<sup>7</sup>

---

*international law negating or limiting the jurisdiction of countries with respect to such crimes, international law is, in the absence of an International Court, in need of the judicial and legislative organs of every country to give effect to its criminal interdictions and to bring criminals to trial. The jurisdiction to try crimes under international law is universal.*

Cr.C. (Jm) 40/61, *The State of Israel v. Eichmann*, 1961, 45 P.M. 3, part II, para. 12 (emphasis added); see also <http://www.nizkor.org/hweb/people/e/eichmann-adolf/transcripts/judgment/judgment-002.html>.

4. See Randall, *supra* note 2, at 829 (quoting Feller, *Jurisdiction Over Offenses with a Foreign Element*, in 2 A Treatise on International Criminal Law 5, 32-33 (M. Bassiouni & V. Nanda eds. 1973)). "At present, domestic jurisdiction to prosecute international crimes is particularly important, because 'mankind has not yet proved mature enough to have set up an international criminal court.'" *Id.*

5. The U.S. Restatement endorses a very long list of crimes subject to universal jurisdiction. "A state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism . . . ." RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 404 (1986). Brownlie distinguishes the generally accepted right of any state to try and punish war criminals from the principle of universality which in his view is still disputed. He notes that "[i]n so far as the invocation of the principle of universality in cases apart from war crimes and crimes against humanity creates misgivings, it may be important to maintain the distinction." IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 305 (4th ed. 1990).

6. These three core crimes, as defined in the ICC statute are genocide, crimes against humanity, and the most serious war crimes. See Rome Statute of the International Criminal Court, 37 I.L.M. 999, arts. 5-8 (1998).

7. See, e.g., *The House of Lords Decision on the Extradition of General Pinochet*. See *Regina v. Bartle*, U.K. House of Lords, Mar. 24, 1999, *reprinted in* 38

At present, many important questions regarding the doctrine remain unanswered. For those crimes to which it does apply, does universal jurisdiction merely provide states with the option of exercising jurisdiction, or does it oblige them to do so? Do states have the right to grant amnesty for international crimes subject to universal jurisdiction? Lastly, might universal jurisdiction also imply the obligation to try to prevent the crimes from being committed?

## II. THE EVOLUTION OF UNIVERSAL JURISDICTION IN RESPONSE TO SOCIAL AND HISTORICAL FACTORS

Over the last few centuries, the principle of universal jurisdiction has evolved quite a bit from its original form. Some version of the principle now applies, not only to piracy, but to a longer list of international crimes including the slave trade, genocide, torture, and more. The list has lengthened as the scope of international law has become broader. In the past decade, the practice of states with regard to universal jurisdiction has also begun to evolve much more rapidly.

Multilateral negotiations on the creation of a permanent International Criminal Court, conducted between 1994 and 2000, provided the occasion for a great deal of discussion and reflection about the doctrine of universal jurisdiction. Many governments, including those of key U.S. allies,<sup>8</sup> argued during the ICC negotiations that the core crimes of genocide, war crimes and crimes against humanity were all subject to universal jurisdiction, obviating the need for any state to consent to their prosecution by the ICC. Just before the Rome Conference, where the text of the ICC Statute was negotiated, Germany circulated a paper outlining the argument for a strong and independent ICC based on universal jurisdiction.<sup>9</sup> The

---

I.L.M. 581 (1999) (ruling that even head of state immunity could not shield Chile's General Pinochet from extradition for acts of torture subject to universal jurisdiction) available at <<http://www.parliament.the-stationery-office.co.uk/pa/ld199697/ldjudgmt/ldjudgmt.htm>> (visited Oct. 14, 2000).

8. "Proposals ranged from universal jurisdiction, advocated for example by Germany, to the mandatory consent of the state of nationality of the accused, argued most forcefully by the United States." Philippe Kirsch & John T. Holmes, *The Rome Conference on an International Criminal Court: The Negotiating Process*, 93 A.J.I.L. 2 n.8 (1999).

9. In March of 1998 Germany had argued as follows:

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. This means that, in a given case of genocide, crime against humanity or war crimes, each and every State can exercise its own national criminal jurisdiction, regardless of

U.S. government did not deny that genocide is subject to universal jurisdiction, but was unwilling to concede this with regard to war crimes and crimes against humanity.

The U.S. government vigorously opposed all proposals to build the jurisdiction of the ICC upon the foundation of universal jurisdiction, preferring to base the ICC's jurisdiction upon state consent. In a sense, the U.S. government position prevailed, because under the jurisdictional compromise ultimately incorporated into the Rome Statute, the ICC will be based not on universal jurisdiction,<sup>10</sup> but upon the right of every State to prosecute crimes committed on its territory or by its nationals. Thus, either the territorial State or the State of nationality of the accused must consent to every case prosecuted by the ICC, except for those referred under the authority of the United Nations Security Council.<sup>11</sup> This provides the ICC with two very conservative jurisdictional bases,<sup>12</sup> each of which is independent of the principle of universal jurisdiction. Strangely enough, some U.S. critics of the ICC find universal jurisdiction to be such

---

whether the custodial State, the territorial State or any other State has consented to the exercise of such jurisdiction beforehand. This is confirmed by extensive practice. . . .

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. By ratifying the Statute of the ICC, the States Parties accept in an official and formal manner that the ICC can also exercise criminal jurisdiction with regard to these core crimes. This means that, like the Contracting States, the ICC should be competent to prosecute persons which have committed one of these core crimes, regardless of whether the territorial State, the custodial State or any other State has accepted the jurisdiction of the Court.

The Jurisdiction Of The International Criminal Court: An Informal Discussion Paper Submitted By Germany, UN Doc. A/AC.249/1998/DP.2, 23 March 1998. (citation omitted) *quoted in*, Amnesty International, *Making The Right Choices - V, Recommendations to the Diplomatic Conference*, May 1998 - AI INDEX: IOR 40/10/98, available at <<http://www.amnesty.it/campaign/icc/library/aidocs/14001098.pdf>> (visited Feb. 23, 2001).

10. U.S. Ambassador Scheffer concedes this much when he notes that "while we successfully defeated initiatives to empower the court with universal jurisdiction, a form of jurisdiction over non-party states was adopted by the conference despite our strenuous objections." David J. Scheffer, *Developments at the Rome Treaty Conference: Statement by the Ambassador at Large for War Crimes Issues and Head of the U.S. Delegation to the UN Diplomatic Conference on the Establishment of a Permanent International Criminal Court Before the Senate Foreign Relations Committee, Washington, DC*; July 23, 1998, DEP'T ST. DISPATCH, August, 1998, at 20.

11. See Rome Statute, *supra* note 6, arts. 12(2), 13.

12. Theodor Meron refers to this strict state consent requirement when he asserts that the Statute "suffers . . . from timidity." Theodor Meron, *The Court We Want*, WASH. POST, Oct. 13, 1998 at A15.

an inviting target that they have nonetheless made it the focus of their criticism of the Rome Statute.<sup>13</sup> The U.S. government has questioned the application of universal jurisdiction to war crimes and crimes against humanity, and it also objects to the transfer to the ICC of any rights enjoyed by States to prosecute those responsible for universal jurisdiction crimes.

After years of rejecting the ICC Statute, the U.S. government signed it on December 31, 2000: the last day any State could sign that treaty without ratifying it first.<sup>14</sup> President Clinton stated that signing was "the right action to take at this point" but noted that "we are not abandoning our concerns about significant flaws in the treaty." Even upon signing, Clinton declined to recommend the treaty to the Senate for its approval, signaling that the U.S. remains unwilling to accept the jurisdiction of the ICC.<sup>15</sup> The Bush Administration has already indicated that it does not support the ICC.<sup>16</sup>

The jurisdiction of the ICC remains an issue for the future as the Rome Statute awaits the 60 ratifications it needs to come into effect. Meanwhile, Spain's attempt to prosecute General Pinochet for crimes in Chile has set the tone for a new willingness of national prosecutors to bring charges against those responsible for international crimes wherever they have been committed.<sup>17</sup>

---

13. As Senator Jesse Helms once argued:

[T]he delegates in Rome included a form of "universal jurisdiction" in the Court statute. This means that, even if the U.S. never signs the treaty, and even if the U.S. Senate refuses to ratify it, the countries participating in this Court will regard American soldiers and citizens to be within the jurisdiction of the International Criminal Court. That, Mr. Chairman, is nonsense.

*Hearing on the United Nations International Criminal Court Before the Senate Foreign Relations Comm.*, July 23, 1998, (Statement of Senator Jesse Helms, Member, Senate Foreign Relations Comm.) available in 1998, FEDERAL DOCUMENT CLEARING HOUSE CONGRESSIONAL TESTIMONY, July 23, 1998.

14 See, Rome Statute, *supra* note 6, art. 125(1).

15 *Clinton's Words: 'The Right Action,'* THE NEW YORK TIMES, Jan. 1, 2001 at A6 (reproducing the text of President Clinton's statement authorizing the United States to sign the ICC Statute.)

16 "As you know, the United States, the Bush administration, does not support the International Criminal Court. . . . President Clinton signed the treaty, but we have no plans to send it forward to our Senate for ratification." Maggie Farley, *Powell Outlines New Policy in U.N. Visit*, L.A. TIMES, Feb. 15, 2001 at A4.

17. Clifford Krauss, *Britain Arrests Pinochet to Face Charges By Spain*, N.Y. TIMES, Oct. 18, 1998, Late Edition at A1.

### III. FACTORS INFLUENCING THE SCOPE AND DEVELOPMENT OF UNIVERSAL JURISDICTION

#### *A. Universal Jurisdiction and Self-Defense: Parallels Between Two Dynamic Concepts*

Dynamic and powerful doctrines of law help the international society to adapt to changing conditions. Self defense and universal jurisdiction are two such doctrines. It may prove useful here to examine the parallels between them. These two principles share a number of important characteristics. Each is based on fundamental values, and each lends itself easily to flexible, dynamic and controversial interpretations.

The UN Charter itself refers to self-defense as an "inherent right," in a nod to the fundamental nature of the right. At the same time it purports to limit the scope of the right.<sup>18</sup> In practice, states have invoked the right of self defense<sup>19</sup> in situations clearly outside the scope of the Charter's terms.<sup>20</sup> The legal and/or political organs of the UN have often rejected the argument that a more expansive notion of self defense can justify the use of force.<sup>21</sup>

---

18. See U.N. CHARTER, art. 51. In addition to the traditional requirements of necessity and proportionality, the UN Charter imposes a number of additional conditions upon the exercise of the right of self-defense. These include the requirement of a prior armed attack, the extinction of that right once the Security Council has taken measures to maintain international peace and security, and the requirement that states report all acts of self-defense to the Security Council. See *id.*

19. See Stephen Castle & Colin Brown, *Serbia Offensive: 'Barbaric' Milosevic Must Take the Blame*, THE INDEP. (London), Mar. 25, 1999, News at 2. At the Berlin Summit of the European Union, only days after the NATO bombing mission for Kosovo had begun, European leaders defended it in moral, humanitarian and political terms. Two of those leaders seemed at least implicitly to invoke the doctrine of self-defense. Gerhard Schröder, the German Chancellor said NATO was ready "to defend the common, basic values of freedom, democracy and human rights," and French President Jaques Chirac described the operation as one to defend "peace on our soil, peace in Europe." See *id.*

20. According to the British Foreign office:

The two most discussed instances of alleged humanitarian intervention since 1945 are the Indian invasion of Bangladesh in 1971 and Tanzania's invasion of Uganda in 1979. But although both did result in unquestionable benefits . . . [India and Tanzania] were reluctant to use humanitarian ends to justify their invasion of a neighbor's territory. Both preferred to quote the right to self-defense under Article 51.

UNITED KINGDOM FOREIGN OFFICE POLICY DOCUMENT NO. 148, *reprinted in*, 57 BRIT.Y.B.INT'L L. 619 (1986).

21. See *Military and Paramilitary Activities in and against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14 at 102-04 (June 27, 1986).

Like self-defense, universal jurisdiction can claim a basis in natural law. Indeed, if the natural right of self-defense is based on fundamental human nature, the natural right to punish the enemies of all man-kind is based on the arguably higher principles of community and civilization.<sup>22</sup>

Powerful normative principles such as these will inevitably seek application in practice. As international society evolves, the historical tendency seems to be towards a more restricted interpretation of the right of self-defense as exemplified by article 51 of the UN Charter, and towards a more liberal application of universal jurisdiction. The optimist might see a tendency towards the rule of law in international society. The pessimist would feel constrained to point out that the interests of states will limit the development of universal jurisdiction.

### *B. Universal Jurisdiction Threatens State Interests*

According to a key and cherished aspect of state sovereignty, the general rule is that each state may exclude others from exercising jurisdiction over events on its territory,<sup>23</sup> especially those involving only its own nationals. But if a genocidal faction seizes power and its policy is to commit and condone crimes against humanity, these “local” acts could invite prosecutions by other states under the doctrine of universal jurisdiction.

In this context, the U.S. government’s defensive attitude towards the developing ICC can be seen as part of a larger phenomenon. Governments perceive external jurisdiction over their territory and nationals to be a

---

22. De Vattel notes the cogency of the interests underling this principle:

Nations have the greatest interest in causing the law of nations, which is the basis of their tranquillity, to be universally respected. If any one openly tramples it under foot, they all may and ought to rise up against him; and, by uniting their forces to chastise the common enemy, they will discharge their duty towards themselves, and towards human society, of which they are members.

See EMMERICH DE VATTEL, THE LAW OF NATIONS OR PRINCIPLES OF THE LAW OF NATURE APPLIED TO THE CONDUCT AND AFFAIRS OF NATIONS AND SOVEREIGNS Book I, Chap. XXIII, § 283 (Joseph Chitty trans., New ed. 1883) (1758) *available at* (visited Dec. 3, 2000) <<http://www.constitution.org/vattel/vattel02.htm>>.

23. As de Vattel wrote in 1758:

The sovereignty united to the domain establishes the jurisdiction of the nation in her territories, or the country that belongs to her. It is her province, or that of her sovereign, to exercise justice in all the places under her jurisdiction, to take cognizance of the crimes committed, and the differences that arise in the country. Other nations ought to respect this right.

de Vattel, *supra* note 22, at Book II, Chap. I. § 84.



threat to their interests and to their sovereignty. Sovereignty is at bay on more than one score.<sup>24</sup> The reality is that the sovereign prerogatives of states are inevitably reduced by the development of international society, and in particular by the strengthening of international law and international institutions. This can be a hard pill for states to swallow even when they acknowledge the need for more effective international mechanisms.

States have claimed an interest in protecting their citizens from "inappropriate" prosecutions even when conducted outside their territory. These extraterritorial rights have a long history. In *Reid v. Covert*,<sup>25</sup> the United States Supreme Court reviewed the practice of Western states, during the Middle Ages, who used treaties to protect their nationals abroad from the application of foreign law and the jurisdiction of foreign courts.<sup>26</sup> As international systems developed and the nation-state system emerged this aspect of extraterritorial rights was weakened by the doctrine of absolute territorial sovereignty. Later, in the 19th century, the principle of extraterritorial jurisdiction was generally applied only to legal systems seen as "inferior" to those of Western Christian countries.<sup>27</sup> During this period the British and Americans negotiated treaties with China extending

---

24. See RAYMOND VERNON, *SOVEREIGNTY AT BAY* ch. 2 (1971).

25. See *Reid v. Covert* 354 U.S. 1 (1957). This case involved the wife of an Air Force sergeant, accused of the murder of her husband in England, who was tried by a United States court-martial in that country. Her conviction was set aside when the Supreme Court ruled that, as a civilian, her Constitutional right to trial by jury had been violated.

26. The Supreme Court described the cultural hostility between Christian and Moslem countries during the Middle Ages in observing:

[I]t was a matter of deep interest to Christian governments to withdraw the trial of their subjects, when charged with the commission of a public offence, from the arbitrary and despotic action of the local officials. Treaties conferring such jurisdiction upon these consuls were essential to the peaceful residence of Christians within those countries and the successful prosecution of commerce with their people.

*Id.* (quoting *In re Ross*, 140 U.S. 453, 462-63 (1891)).

27. In the 18th and 19th centuries a new justification was needed:

The emergence of the nation-state in Europe and the growth of the doctrine of absolute territorial sovereignty changed the nature of extraterritorial rights. No longer were strangers to be denied the advantages of local law. Indeed, territorial sovereignty meant the exercise of sovereignty over all residents within the borders of the state, and the system of extraterritorial consular jurisdiction tended to die out among Christian nations in the 18th and 19th centuries. But a new justification was found for the continuation of that jurisdiction in those countries whose systems of justice were considered inferior . . .

See *id.* at 60.

British and United States consular jurisdiction to shield their nationals in that country from the jurisdiction of the local courts.<sup>28</sup>

State interests are no longer the be-all and end-all of international law. That law rises above the narrow interests of any state in recognizing the universal jurisdiction of all to prosecute those responsible for certain special crimes of concern to the entire international community. It follows that no state has a legitimate interest shielding its nationals from criminal responsibility for genocide, crimes against humanity or the most serious war crimes. Suggestions to the contrary evoke a colonialist concept of exclusive extraterritorial rights, which has little relevance to modern practice. In light of this history, the attempt to shield U.S. nationals from ICC jurisdiction at all costs seems woefully inappropriate.

#### IV. THE SCOPE OF UNIVERSAL JURISDICTION TODAY

##### A. *Does Universal Jurisdiction Imply A Duty To Punish The Crimes Concerned?*

The traditional form of universal jurisdiction requires no action by states.<sup>29</sup> It merely allows them the *option* of prosecuting certain crimes

---

28. During this period the US went to great lengths to shield its nationals from the jurisdiction of Chinese courts:

Until 1842, China had asserted control over all foreigners within its territory . . . but, as a result of the Opium War, Great Britain negotiated a treaty with China whereby she obtained consular offices in five open ports and was granted extraterritorial rights over her citizens. On July 3, 1844, Caleb Cushing negotiated a similar treaty on behalf of the United States. In a letter to Secretary of State Calhoun, he explained: "I entered China with the formed general conviction that the United States ought not to concede to any foreign state, under any circumstances, jurisdiction over the life and liberty of a citizen of the United States, unless that foreign state be of our own family of nations, -- in a word, a Christian state." Later treaties continued the extraterritorial rights of the United States . . .

Reid v. Covert, 354 U.S. at 60 (citations omitted).

29. Cf. the codification of the customary law rule on universal jurisdiction to try pirates as it appears in the 1982 United Nations Convention on the Law of the Sea:

##### *Seizure of a pirate ship or aircraft*

On the high seas, or in any other place outside the jurisdiction of any State, every State *may* seize a pirate ship or aircraft, or a ship or aircraft taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure *may* decide upon the penalties to be imposed, and *may* also determine the action to be taken with regard to the ships, aircraft or property, subject to the rights of third parties acting in good faith.

even if they have no traditional link of territory or nationality to the matter.<sup>30</sup> However, this optional jurisdiction is in derogation of what might otherwise be the exclusive jurisdiction of the state over the acts of its nationals on its territory.

Cherif Bassiouni has invoked the doctrines of *jus cogens* and of obligations *erga omnes*, (flowing towards and binding upon all) in suggesting that states should have a duty to prosecute crimes of universal jurisdiction, and not just an optional right to prosecute.<sup>31</sup> In doing so he raises a number of issues about the relationship between these three doctrines. All three doctrines, universal jurisdiction, *jus cogens* and obligations *erga omnes* involve compelling principles of law creating rights or obligations for every state. Each of them also applies only to a very limited, and vaguely defined, range of situations. In a logically coherent and integrated legal order these three legal concepts might be different sides of the same coin, essentially coextensive and generally overlapping. In practice this does not yet appear to be the case.

There is a substantial overlap among these doctrines as all three would presumably apply to the prohibition of genocide. The International Court of Justice (ICJ) has identified that prohibition as a *jus cogens* norm<sup>32</sup> from

---

United Nations Convention on the Law of the Sea, Oct. 7, 1982, 21 I.L.M. 1261, art. 105 (emphasis added).

30. See Randall, *supra* note 2, at 792. Speaking of the 1982 UNCLOS treaty's codification of the rule on universal jurisdiction to try pirates, Randall notes that "[t]his provision indicates that parties have the right, but not the obligation, to assume jurisdiction over piratical acts with which they have no connection." *Id.*

31. As Cherif Bassiouni has noted:

This threshold question of whether *obligatio erga omnes* carries with it the full implications of the Latin word *obligatio*, or whether it is denatured in international law to signify only the existence of a right rather than a binding legal obligation, has neither been resolved in international law nor addressed by ICL doctrine.

To this writer, the implications of *jus cogens* are those of a duty and not of optional rights; otherwise *jus cogens* would not constitute a peremptory norm of international law.

M. Cherif Bassiouni, *Accountability for International Crime and Serious Violations of Fundamental Human Rights: International Crimes: Jus Cogens and Obligation Erga Omnes*, 59 LAW & CONTEMP. PROBS. 63, 65 (1996).

32. The concept of *jus cogens* is defined in the Vienna Convention on the Law of treaties as follows:

Article 53   Treaties conflicting with a peremptory norm of general international law (*jus cogens*)

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

which no derogation or reservation is permitted.<sup>33</sup> Genocide is also a crime *subject* to universal jurisdiction. With regard to these two doctrines it is important to note that the overlap is limited. A violation of *jus cogens* may often qualify as an international crime subject to universal jurisdiction and vice-versa, but this need not necessarily be the case. There is still some question as to how far either doctrine extends beyond the relatively non-controversial case of genocide. The idea of obligations *erga omnes* is much more widely applicable.

The obligations of states *erga omnes*, are owed not just to another state but to the international community as a whole.<sup>34</sup> These obligations apply to a broad range of matters, arguably including the entire array of internationally recognized human rights.<sup>35</sup> In contrast, few would argue that all human rights violations are subject to universal jurisdiction, although the historical trend is indeed in that direction.

Recognizing that international crimes other than genocide may constitute violations of a *jus cogens* norm could have a number of implications, most of which would presumably make it more difficult for any state to grant impunity to those responsible.<sup>36</sup> In this context, Diane

---

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, Concluded at Vienna, 23 May 1969, Jan. 27, 1980, UN Doc A/Conf 39/28, (1980), 8 ILM 679, art. 53.

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

34. In the Barcelona Traction case, the International Court of Justice defined the concept of obligations *erga omnes* in the following terms:

An essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising *vis-a-vis* another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes*.

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

35. See Jonathan I. Charney, *NATO's Kosovo Intervention: Anticipatory Humanitarian Intervention in Kosovo*, 93 A.J.I.L. 834, 835 (1999). "Contemporary international law prohibits violations of human rights and humanitarian law committed by a state against its own citizens. These duties are owed *erga omnes*, to all the world." *Id.*

36. The implications for impunity could be extreme:

[R]ecognizing certain international crimes as *jus cogens* carries with it the duty to prosecute or extradite, the non-applicability of statutes of

Orentlicher and others have explored the duty to prosecute human rights violations of a past regime.<sup>37</sup>

Universal jurisdiction, at least in its post WW II codification, seems to imply some state obligations. International law can, and in some cases does, impose upon states the duty to prosecute those responsible for serious international crimes. The 1949 Geneva Conventions<sup>38</sup> and the 1984 Torture Convention<sup>39</sup> not only define international crimes, but also oblige State-Parties either to try or to extradite those believed to have committed them. This obligation has emerged as the preferred modern form of universal jurisdiction, although there is some dispute over whether it qualifies as universal jurisdiction at all.<sup>40</sup>

---

limitation for such crimes, and universality of jurisdiction over such crimes irrespective of where they were committed, by whom (including Heads of State), against what category of victims, and irrespective of the context of their occurrence (peace or war). Above all, the characterization of certain crimes as *jus cogens* places upon states the *obligatio erga omnes* not to grant impunity to the violators of such crimes.

Bassiouni, *supra* note 31, at 65-66.

37. See, e.g., Diane Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537 (1991).

38. Under the Geneva Conventions of 1949, the parties must search for, and if successful, either prosecute or extradite those alleged to have committed the "grave breaches" they define. The following provision is typical:

*Each High Contracting party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts. It may also, if it prefers, and in accordance with the provisions of its own legislation, hand such persons over for trial to another High Contracting party concerned, provided such High Contracting party has made out a prima facie case.*

Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 Aug. 1949, art. 146, 6 U.S.T. 3516, 75 U.N.T.S. 287 (emphasis added).

39. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, U.N. GAOR, 3d Comm., 93rd plen. mtg. Supp. No. 51, art. 7(1) at 197, U.N. Doc. A/Res/39/51 (1984) (noting the principle of extradite or prosecute, as expressed here in the Torture Convention, has become a cornerstone of international criminal law). "The State Party in the territory under whose jurisdiction a person alleged to have committed any offence referred to in article 4 is found shall in the cases contemplated in article 5, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution." *Id.* (emphasis added).

40. See Brownlie, *supra* note 5, at 305. Brownlie distinguishes the generally accepted right of any state to try and punish war criminals from the principle of universality which in his view is still disputed. He notes that "[i]n so far as the invocation of the principle of universality in cases apart from war crimes and crimes against humanity creates misgivings, it may be important to maintain the distinction." *Id.*

Can treaty obligations relating to universal jurisdiction be said to create obligations *erga omnes* when a treaty can only directly bind State-Parties? Perhaps not, but these treaties establish a new model of universal jurisdiction. If and when this new model becomes generalized into customary international law, the idea of an obligation *erga omnes* to prosecute will increasingly come to be associated with universal jurisdiction. The Preamble of the Rome ICC Statute reflects this trend when it refers to the "duty of every State to exercise its criminal jurisdiction over those responsible for international crimes."<sup>41</sup> The duty referred to can only be described as an obligation *erga omnes*.

*B. Does Universal Jurisdiction Imply A Duty To Prevent Universal Jurisdiction Crimes?*

Requiring states to *punish* universal jurisdiction crimes represents a major step in the development of universal jurisdiction. Does the concept now include a state duty to *prevent* such crimes as well? Article 1 of the Genocide Convention does engage the State-Parties "to prevent and to punish" the crime of genocide.<sup>42</sup> Can the duty to prevent genocide, applicable under an almost universally accepted treaty regime, now be applied more generally to all crimes subject to universal jurisdiction under customary international law? Even if it can, what is the territorial scope of this obligation? Are parties to the convention required to prevent genocide wherever it may occur in the world, or are they merely required to prevent genocide on their own territory?

Imposing a broad duty to prevent genocide could have unintended consequences. If states are under the obligation to prevent genocide, even in other countries, they might be reluctant to acknowledge that genocide is taking place. In practice, the U.S. government and the U.N. have been wary of invoking the concept of genocide, even in response to widespread and systematic ethnically-targeted atrocities.<sup>43</sup> The U.S. did not

---

41. Rome Statute of the International Criminal Court, 37 I.L.M. 999, Preamble para. 6 (1998).

42. See Convention on the Prevention and Punishment of the Crime of Genocide, Jan. 12, 1951, art. 1, 102 Stat. 3045, 78 U.N.T.S. 277 [hereinafter Genocide Convention]. "The Contracting Parties confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and to punish." *Id.*

43. Boutros Boutros-Ghali has acknowledged this problem.

In April and May of 1994, as massacres of Rwandan Tutsis took place, the United Nations Security Council hesitated about using the 'g word.' Boutros Boutros-Ghali, then Secretary-General, said that this was out of fear that if the Council agreed genocide was taking place, it would have no alternative but to intervene militarily.

acknowledge that the 1994 massacres in Rwanda constituted genocide until years later when President Clinton apologized for failing to confront the crime of genocide as it occurred.<sup>44</sup> When the U.S. and its NATO allies needed to offer some legal justification for the bombing of Serbia on behalf of Kosovo, they were careful not to invoke the Genocide Convention. Oddly enough, they were also careful not to invoke the controversial doctrine of humanitarian intervention as a legal justification.<sup>45</sup>

States are presumably more comfortable with the optional right to exercise universal jurisdiction over international crimes, than they are with the obligation to prevent those crimes from being committed. The practice of states, that is, their inaction in the face of genocide in Rwanda in 1994 and Cambodia in the 1970s, suggests that they have not yet truly accepted the obligation to prevent genocide on the territory of other states.

## V. CONCLUSIONS

How far has the law of universal jurisdiction actually evolved, and how far should we expect it to evolve in the near future? At this point there is a continuum, a sliding scale of universal jurisdiction applicable in various degrees to different international crimes. From the option to prosecute the odd pirate in the 17th century, the doctrine has developed through treaty

---

William Schabas, *The Greatest Crime*, THE WASH. TIMES, Dec. 7, 1998, Final Edition, at A19.

44. President Clinton apologized, on behalf of the international community, for failing to speak out and to acknowledge that genocide was occurring in Rwanda:

The government-led effort to exterminate Rwanda's Tutsi and moderate Hutus, as you know better than me, took at least a million lives. . . . These events grew from a policy aimed at the systematic destruction of a people. The ground for violence was carefully prepared, the airwaves poisoned with hate, casting the Tutsis as scapegoats for the problems of Rwanda, denying their humanity. All of this was done clearly to make it easy for otherwise reluctant people to participate in wholesale slaughter. . . . The international community, together with nations in Africa, must bear its share of responsibility for this tragedy as well. *We did not act quickly enough after the killing began. We should not have allowed the refugee camps to become safe haven for the killers. We did not immediately call these crimes by their rightful name: genocide.*

President William J. Clinton, *President of the United States Delivers Remarks to Survivors of Genocide In Rwanda, March 25, 1998*, FDCH POLITICAL TRANSCRIPTS, March 25, 1998 (emphasis added). See also John F. Harris, *Clinton Tells Rwandans: World Too Slow to Act; Genocide Survivors Give Accounts of '94 Horror*, THE WASH. POST, Mar. 26, 1998, Final Edition, at A1.

45. See Bartram S. Brown, *Humanitarian Intervention at a Crossroads*, 41 WM. & MARY L. REV. 1683, 1684 (2000).

practice to the point where states now accept the obligation to punish, or cooperate in punishing, certain of the more recent universal jurisdiction crimes. The next logical step would presumably be to require states to prevent universal jurisdiction crimes from being committed, but territorial limitations and other practical considerations will necessarily limit the scope of any such obligation.

An obligation to prevent universal jurisdiction crimes from being committed on the territory of another state could only be fulfilled via a corresponding right of humanitarian intervention. The latter right is not generally accepted today,<sup>46</sup> and this limits prospects for international recognition of an extraterritorial obligation to prevent genocide. States have accepted, however, that they must do everything they can to prevent genocide and other universal jurisdiction crimes from occurring within their own borders.

Recent developments with regard to universal jurisdiction have been very positive, but universal jurisdiction alone can go only so far in imposing obligations upon states. The role of universal jurisdiction is to compensate for the lack of a centralized international legal order, not to create one. Despite its limitations, the effective application of universal jurisdiction has grown dramatically. This dynamic and changing doctrine has already proved to be a powerful tool in the hands of national prosecuting authorities.<sup>47</sup> Further progress seems inevitable as the fundamental humanitarian values driving the evolution of universal jurisdiction gain even broader acceptance by the international community as a whole.<sup>48</sup> Through this process the duty to prosecute universal jurisdiction crimes, and perhaps even the duty to prevent them, could eventually gain recognition as compelling *jus cogens*<sup>49</sup> norms from which no derogation is permitted.

---

46. The prevalent view among states is that humanitarian intervention is inconsistent with the prohibition on the use of force set out in Article 2(4) of the UN Charter unless the intervention is authorized by decision of the Security Council under Chapter VII of the Charter. See U.N. CHARTER at 1700.

47. Baltasar Garzon, the Spanish prosecutor who attempted to extradite Chilean General Pinochet from the UK face trial for international crimes, succeeded not only in clarifying that the concept of universal jurisdiction applied to torture crimes. He also energized the social, political and legal process within Chile which eventually led to Pinochet's being arrested and charged in his own country. See, Clifford Krauss, *Pinochet's Arrest Ordered By Judge*, N.Y. TIMES, Dec. 2, 2000, Late Edition, at A1.

48. The growing and already widespread trend towards acceptance of the ICC and its jurisdiction constitutes an important step in this direction. The Rome ICC Statute currently has 117 signatories and 23 ratifications, and the ICC will officially come into being with the deposit of the 60th instrument of ratification. See *The Coalition for an International Criminal Court Homepage*, (visited Dec. 6, 2000) <<http://www.igc.apc.org/icc/>>.

49. See the Vienna Convention's definition of *jus cogens* at *supra* note 32.



