Does Customary International Law Obligate States to Extradite or Prosecute Individuals Accused of Committing Crimes Against Humanity?

Evelyon CW Mack
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Evelon Corrie Westbrook Mack
Part I: Introduction

The effort to establish a Convention on Crimes Against Humanity (CAH) has gained support at the U.N. International Law Commission. While there are conventions addressing inter-State cooperation with respect to genocide (the 1948 Genocide Convention\(^1\)) and certain war crimes through the “grave breaches” provisions of the Geneva Conventions (the 1949 Geneva Conventions\(^2\) and Additional Protocol I\(^3\)), no comparable treaty exists for CAH.\(^4\) Proponents of a CAH Convention assert that this lack of a treaty addressing inter-State cooperation promotes impunity for international crimes that are particularly egregious and are prohibited as norms recognized as *jus cogens*.

In order to avoid safe havens for those who commit CAH, most proponents of a CAH Convention advocate that it must include an obligation to extradite or prosecute an offender that turns up in a State party’s territory. Proponents assert that the inclusion of such an obligation is particularly important because inconsistency in State practice prevents the obligation to extradite or prosecute from being regarded as part of customary international law. Others, while supporting a CAH Convention, argue that an obligation to extradite or prosecute for CAH exists as a part of customary international law, regardless of any treaty provision. The leading scholar who argues this position is

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Professor Cherif Bassiouni of DePaul University, and most scholars who advocate that a customary international law obligation to extradite or prosecute exists cite Bassiouni’s work.\(^5\) This paper explores the position of Bassiouni and others and concludes that the obligation to extradite or prosecute an offender who is alleged to have committed CAH does not at present exist as a matter of customary international law. Thus, the need to include the obligation to extradite and prosecute in a CAH Convention is necessary if such an obligation is deemed desirable.

Part I provides background information regarding the *aut dedere aut judicare* principle.\(^6\) This section also includes an introduction into Bassiouni’s argument. Part II discusses how State practice is inconsistent and not sufficiently widespread to support such an obligation. The inconsistency is evinced by the existence of various hurdles to the prosecution and extradition of alleged CAH offenders. Part IV demonstrates that, even if sufficient State practice could be established, there is nevertheless a lack of *opinio juris* by States with respect to that practice, meaning insufficient evidence that States are adhering to such practice out of a belief that they are legally compelled to do so. Part V further explores the argument by Bassiouni that an obligation to extradite or prosecute exists for CAH, despite inconsistent state practice, because the prohibition on CAH is a


\(^6\) This Latin expression includes the duty to surrender or extradite (*dedere*) or adjudicate or prosecute (*judicare*). Cherif Bassiouni and Edward Wise, *AUT DEDERE AUT JUDICARE: THE DUTY TO EXTRADITE OR PROSECUTE IN INTERNATIONAL LAW, xii (1995).*
rule of *jus cogens*. Judicial precedence from various international tribunals is explored in detail in this section because the tribunals have discussed the impact of *jus cogens* on the obligation to extradite or prosecute. Finally, Part VI offers some concluding thoughts.

**Part II: Background of Aut Dedere Aut Judicare**

Within multilateral treaties, the phrase *aut dedere aut judicare* is commonly used to refer to the obligation to either extradite or prosecute. The *aut dedere aut judicare* principle can be traced to the Nuremberg and Tokyo Tribunals established to prosecute offenders post World War II.\(^7\) Though neither Charter establishing those tribunals imposed an explicit duty to prosecute or extradite offenders, the parties committed themselves to cooperate in the investigation and bringing offenders to trial.\(^8\) The Statutes for the International Criminal Tribunals for Yugoslavia (ICTY) and Rwanda (ICTR) also included provisions that required to States to cooperate in holding offenders accountable.\(^9\) The 1998 Rome Statute, which currently has 121 State parties, established the International Criminal Court (ICC) and contained a more specific obligation on State parties to either extradite or prosecute CAH offenders.\(^10\)

In addition to these statutes, States have entered into various bilateral and multilateral treaties that may obligate them to extradite or prosecute individuals under the terms of those treaties. Of course, these statutes and treaties are only binding on State

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\(^7\) *Id.* at 112-13.

\(^8\) *Id.* at 114.


parties. In the absence of any specific relevant treaty obligation, States are under no obligation to honor an extradition request.\footnote{See Bassiouni and Wise, supra note 6, at 37 (“Modern opinion, in fact, is fairly clear that no obligation to extradite exists apart from treaty, and modern State practice generally reflects the view that, in the absence of an extradition treaty, there is no right under international law to insist that fugitives be surrendered”); and Kelly, supra note 5, at 497 (2003) (noting that traditionally it was accepted that no duty to extradite or prosecute existed in customary law, outside of treaties).}

Therefore, in order for a State to be obligated to extradite or prosecute individuals alleged to have committed CAH in the absence of a specific treaty, the obligation must exist as a matter of customary international law. For a norm to be customary international law, it must meet two recognized standards: States’ practice of the norm must be widespread and consistent; and followed out of the belief that the practice is obligatory based on a rule of law requiring it, or \textit{opinio juris}.

Professor Bassiouni argues that such an obligation exists as an exception to the rule that a legal duty is not binding unless incorporated into a treaty. More specifically, the \textit{aut dedere aut judicare} principle is a condition for the effective repression of offenses which are “against the world order” and condemned by the international community as a whole.\footnote{North Sea Continental Shelf (Ger./Den. & Ger./Neth.), 1969 I.C.J. 3, ¶ 77 (Feb. 20).} Because the international crimes are of concern to all States, all States “ought therefore to cooperate in bringing those who commit such offenses to justice.”\footnote{Bassiouni and Wise, supra note 6, at 24.} Bassiouni acknowledges that traditionally no customary international law obligation existed to prosecute or extradite. The current obligation he notes is “based not so much on induction from the existing materials of international law as on spinning out certain possibilities implicit in the use in an international context of the terms ‘crime’ and ‘community’ and then weaving them into a coherent pattern.”\footnote{Id. at 50.} Bassiouni’s position has
faced some resistance, which is the subject of this paper and will be discussed in further
detail below.

Before diving into the heart of the discussion, one concept related to the
obligation to extradite or prosecute that deserves discussion is the concept of universal
jurisdiction. Universal jurisdiction is the ability of a State to exercise jurisdiction over an
offender outside of the traditional bases of jurisdiction. Specifically, universal
jurisdiction allows the State to assert jurisdiction even though the crime did not occur
within its territory, and even though neither the offender nor the victim are nationals of
that State. While universal jurisdiction may allow a State to exercise jurisdiction over
an individual alleged to have committed CAH, it does not obligate a State to do so. Thus,
it is distinct from any obligation to extradite or prosecute. A full exploration of the
principle of universal jurisdiction is outside the scope of this article, but the
interrelatedness of the concepts renders it impossible to avoid some discussion of
universal jurisdiction when discussing the principle aut dedere aut judicare.

Part III: Inconsistent, Fluctuating, and Discrepant State Practice

In order to be a rule of customary international law, State practice of the
obligation to extradite or prosecute must be “constant and uniform.” Attempting to
label a norm as one of customary international law is a difficult task, especially when that

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16 The two main forms of universal jurisdiction are known as “pure,” which would allow any State to
exercise jurisdiction over a particular individual and “custodial” jurisdiction, which would only allow the
State to exercise jurisdiction when the alleged offender is present in that State’s territory. See Brady and
Meihigan, supra note 5, at 60-62, for an in-depth discussion of universal jurisdiction and its types.
17 Id. at 61.
18 See Special Rapporteur on the Obligation to Extradite or Prosecute, Third Rep. on the Obligation to
10, 2008) (by Zdzislaw Galicki) (noting that “it is impossible to eliminate or even marginalize the question
of universal jurisdiction whenever and wherever it appears in connection with the fulfillment of the
obligation to extradite or prosecute”).
19 Asylum (Colom./Peru), 1950 I.C.J. 266, at 276 (Nov. 20).
norm places an obligation on States to act. It is one thing to find a customary international law norm that obligates States to neither commit nor condone horrific acts of violence, such as torture, genocide, or CAH. It is entirely another thing to find a customary international law norm that then imposes obligations on States to act in certain ways to prevent individuals from committing those acts, especially when that obligation may interfere with the sovereignty of other States, the exercise of States’ jurisdiction, shaping national legislation, and the inner-workings of States’ criminal justice systems.

The Permanent Court of Justice recognized long ago that States have wide discretion to act in exercising jurisdiction, unless there is a customary international law norm against the exercise of jurisdiction.20 Outside of those norms, “every State remains free to adopt the principles which it regards as best and most suitable.”21 Advocates of the position that an obligation to extradite or prosecute CAH offenders exists as customary international law bear a heavy burden to demonstrate consistent, widespread, and uniform State practice. Determining constant and uniform practice is impossible when there “much uncertainty and contradiction,… much fluctuation and discrepancy in the exercise of [the practice,] and in the official views expressed on various occasions.”22 State practice regarding an obligation to extradite or prosecute CAH offenders is uncertain, contradictory, and filled with fluctuation and discrepancy, as evinced by numerous hurdles to extradition and prosecution that exist in State practice.

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20 S.S. Lotus (Fr. v. Turkey), 1927 P.C.I.J. (ser. A) No. 10, at ¶¶ 44-47 (Sept. 7).
21 Id. at ¶ 46.
22 Asylum, supra note 19, at 277.
A. Extradition Hurdles

i. Absence of Treaty

Many States refuse to extradite in the absence of a treaty, regardless of the crime committed. The United States, for example, is firmly grounded in this position. South Africa and the Russian Federation specifically rejected any customary obligation to prosecute or extradite in their comments to the U.N. International Law Commission in 2009 and 2008, respectively. At least seven other States indicated they did not believe the obligation to prosecute or extradition exists outside of treaties in the 2009 U.N. discussions. Although the number of States represented in these comments is low, the resistance of these States to the development of a customary international law norm regarding the obligation, and the fact that other States take the position that the obligation is customary is nature shows inconsistency and discrepancy in State practice. The resistance to the obligation being customary remains even though this issue has been on the International Law Commission’s agenda since 2005.

ii. Exception for Nationals

Another hurdle to extradition is that many states refuse to extradite its nationals. Pan American Flight 103, which was hijacked and forced to crash by explosion of a

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23 See Sosa v. Alvarez-Machain, 504 U.S. 655, 664 (1992) (noting that “[i]n the absence of an extradition treaty, nations are under no obligation to surrender those in their country to foreign authorities for prosecution”).


27 Since the topic of the obligation to extradite or prosecute was added to the agenda of the International Law Commission, the Special Rapporteur has consistently recognized that it is a common position among
bomb on-board while flying over Lockerbie, Scotland, in 1988 provides a well-known example.\textsuperscript{28} Both the United States and United Kingdom requested the extradition from Libya of two individuals, who were both Libyan nationals, suspected of the hijacking.\textsuperscript{29} In response, Libya refuse to extradite its own nationals, based on a domestic law prohibiting the extradition.\textsuperscript{30}

iii. Due Process Concerns

A major hurdle to the extradition of suspected CAH offenders is the State practice of refusing to extradite based on due process concerns. France has repeatedly refused to extradite individuals accused of committing CAH and genocide during the large-scale massacre of Tutsis by the Hutus in 1994.\textsuperscript{31} The denials are based on French concerns that Rwanda will deny the accused a fair trials, that Rwanda will hold individuals accountable for crimes that were not legally defined at the time the individual committed the acts, and that too much time has passed between the acts committed and the issuing of the arrest warrant.\textsuperscript{32} France made the decision to prosecute some of the individuals itself, holding the first trial resulting from the Rwandan genocide in early 2013, but found

\begin{itemize}
  \item \textsuperscript{28} Questions of Interpretation and Application of the 1971 Montreal Convention Arising from the Aerial Incident at Lockerbie (Libya v. U.S.), Preliminary Objections, 1998 I.C.J. 115, ¶ 1 (Feb. 1998).
  \item \textsuperscript{29} Id. at ¶ 25(f).
  \item \textsuperscript{30} Id.
\end{itemize}
insufficient evidence to prosecute others, which has frustrated its diplomatic relationship with the Rwandan government.\textsuperscript{33}

Additionally, some States refuse to extradite to countries that allow the death penalty.\textsuperscript{34} According to Amnesty International, as of the end of 2013, one hundred forty (140) States have abolished the death penalty in law or practice.\textsuperscript{35} On the other hand, a significant number of States, twenty-two, still maintain the death penalty as a lawful punishment, including four States that resumed executions in 2013.\textsuperscript{36} Refusals to extradite based on various due process concerns demonstrate fluctuation and discrepancy in State practice.

\textbf{B. Prosecution Hurdles}

The previous section discussed hurdles that States impose on extradition of individuals accused of committed CAH, but a State could prosecute that individual and still fulfill an obligation to extradite or prosecute. However, hurdles to the prosecution of CAH offenders exist just as they do to their extradition. These hurdles include, for example, granting amnesty or asylum, inconsistency in national legislation criminalizing the acts, inconsistency with which States exercise jurisdiction over alleged offenders, and immunities granted to foreign government officials.


\textsuperscript{34} See \textit{Survey of Multilateral Conventions Which May be of Relevance for the Work of the International Law Commission on the Topic “The Obligation to Extradite or Prosecute (Aut Dedere Aut Judicare,)”} Study by the Secretariat, ¶ 139, U.N. Doc. A/CN.4/630 (June 18, 2010).


\textsuperscript{36} \textit{Id.}
i. Amnesty and Asylum

Amnesty immunizes an alleged offender from domestic prosecution and asylum puts the alleged offender out of the jurisdictional reach of domestic prosecution by the State whose nationals committed the crime or in whose territory the crimes occurred. Amnesty can be a powerful tool in a post-conflict society and can help with the reintegration of displaced civilians and former fighters. Granting amnesty or giving asylum to individuals who commit CAH, however, flies in the face of any customary international law obligation to ensure such persons do not face impunity for their horrific acts. Recognizing this, the U.N. Secretary General in a 2004 Report to the Security Council recommended that any Security Council resolutions and mandates “[r]eject any endorsement of amnesty for genocide, war crimes, or crimes against humanity.”

Yet, many countries still grant amnesty and asylum. One source lists seventeen different countries which have, during the past thirty years, granted amnesty to individuals from the former ruling regime who committed CAH within their respective borders, including Algeria, Angola, Argentina, Brazil, Cambodia, Chile, Colombia, El Salvador, Guatemala, Haiti, Honduras, Cote d’Ivoire, Nicaragua, Peru, Sierra Leone, South Africa, Togo, and Uruguay.

In Prosecutor v. Kallon, the Special Court for Sierra Leone carefully crafted its holding to maintain jurisdiction over an individual accused of CAH who was previously

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39 Id. at ¶ 64(c). A review of the record of the debate regarding this report that States found this recommendation to be controversial. Only two of the fifteen members of the Council, Brazil and Costa Rica, supported the recommendation and many others opposed it. U.N. Security Council 5052nd Meeting Verbatim Record, Oct. 6, 2004, U.N. Doc. S/PV.5052, Resumption 1 at 26, 37-38 (Oct. 6, 2004).
40 Michael Scharf, *supra* note 37, at ¶ 10.
granted amnesty by Sierra Leone, while also holding that domestic amnesties are not illegal under international law. The Court decided that a norm “that a government cannot grant amnesty for serious violations of crimes under international law” has not yet “crystallised” as customary international law. This holding, as well as the long list of countries who have granted amnesty or asylum, provides additional evidence that the obligation to extradite or prosecute has not yet reached customary status.

ii. Inconsistency in National Legislation

If the State wants to prosecute an individual for CAH, but lacks national laws that criminalize the acts, this presents an obvious hurdle to prosecution. This hurdle can also frustrate extradition when a State refuses to extradite to a State requesting it because the offense is not criminalized in the requesting State. A related hurdle to prosecution that is perhaps less obvious is when States differ in how they define what acts constitute CAH. Specifically, even if the requesting State criminalizes CAH in its national legislation and the granting State approves the extradition of the alleged CAH offender to that State, it may later be determined that the offender’s acts do not qualify as CAH in the requesting State. Now, the alleged offender cannot be prosecuted for the horrific acts committed. Has the requesting State somehow violated an obligation to

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42 Id. at ¶ 82.
43 Secretariat Study, supra note 34, at ¶ 139.
44 See Diane Orentlicher, Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime, 100 YALE L.J. 2537, 2585 (1991) (noting that “the law of crimes against humanity is difficult to apply, in part because the meaning of the term is shrouded in ambiguity”); Bassiouni and Wise, supra note 6, at 112 (listing eight international documents that set out crimes against humanity, but also acknowledging that thirty-eight other instruments “dating from 1943 to 1980 also contain relevant provisions, but have been assigned to other categories of international crime”); and James Fry, Terrorism as a Crime Against Humanity and Genocide: The Backdoor to Universal Jurisdiction, 7 UCLA J. INT’L L. & FOREIGN AFF. 169, at 184 (2002) (exploring the various definitions of crimes against humanity in international law as evidence that “no one identical meaning of ‘crimes against humanity’ prevails in the various international agreements that attempt to provide a definition”).
prosecute the offender? Or, has the granting State perhaps violated an obligation to extradite or prosecute by not discovering before extradition that prosecution was not available in the requesting State?

A 2013 study by the International Human Rights Clinic at The George Washington University (GWU) Law School focused on national legislation worldwide to determine the extent to which States have prohibited CAH under their own domestic laws. The study found that only 54 percent of U.N. Member States (104 of 193) and 66 percent of Rome Statute States (80 of 121) have some form of national legislation relating to the prohibition of CAH. Therefore, almost half of U.N. Member States and over a third of the State parties to the Rome Statute do not feel obligated to ensure that they have the ability to prosecute CAH in their national courts. It is possible that all of these States feel obligated to extradite all CAH offenders, but the lack of national legislation related to CAH in each of these States evinces fluctuation and inconsistency in State practice, rather than uniformity.

Even those States that have national legislation related to CAH, the statutory definitions are “substantially different.” For purposes of the obligation to extradite or

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46 Id. at 3.
47 Id. at 3. See also Cherif Bassiouni, Crimes Against Humanity: The Case for a Specialized Convention, 9 WASH. U. GLOB. STUD. L. REV. 575, 582 (2010) (finding, based on his own research, only fifty-five States criminalized CAH as of December 2010); and Amnesty International, Universal Jurisdiction: A Preliminary Survey of Legislation Around the World, Amnesty Int’l (2012), available at http://www-secure.amnesty.org/en/library/asset/IO/R53/019/2012/en/2769ce03-16b7-4dd7-8ea3-95f4c64a522a/ior530192012en.pdf (finding that ninety-one States had some form of domestic legislation prohibiting CAH). The GWU Law CAH Report incorporated these other studies into theirs and analyzed those results, finding some problems with legislation included by those studies. GW Law CAH Report, supra note 45, at 7-8. Thus, the GWU Law CAH Report seems to be most complete and encompassing.
prosecute, the variation in definitions “may hinder the effective prosecution or extradition of suspects, as well as other forms of inter-State cooperation.”

iii. Inconsistency in Exercising Universal Jurisdiction

States practice is also inconsistent regarding the obligation to extradite or prosecute in the exercise (or lack) of universal jurisdiction over CAH offenders. For example, the Irish government extended universal jurisdiction to war crimes, but refused to do so to genocide and CAH. France, for another example, has only given universal jurisdiction in three instances, for acts of torture, for crimes covered by the ICTY and the ICTR, and for crimes within the jurisdiction of the ICC if the alleged offender usually resides in France. Thus, France has the ability to prosecute CAH offenders as that is also a crime within the jurisdiction of the ICC, but with the limitation that the offender must usually reside in France. In this way, France is exercising universal jurisdiction, but in a more limited way than has been exercised by other States.

Spain, for example, has exercised universal jurisdiction over offenders who have allegedly committed jus cogens crimes. However, legislators from Spain recently introduced a bill to limit universal jurisdiction for CAH to Spanish nationals or foreigners who either habitually reside in Spain or who are present in Spain, and whose extradition

48 Id. at 3.
49 Brady and Mehigan, supra note 5, at 77-78.
50 Questions Relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.), 2012 I.C.J. 423, ¶ 39 (Jul. 20) (separate opinion of Judge Abraham).
51 Spain exercised universal jurisdiction to seek extradition of former Chilean President General Augusto Pinochet for acts of torture when he travelled to the United Kingdom for medical treatment. Queen v. Bow Street Metropolitan Stipendiary Magistrate (Ex parte Pinochet Ugarte), (2000) 1 A.C. 147 (1999). The alleged acts of torture were not committed in Spain or the United Kingdom or against citizens of the United Kingdom, and General Pinochet was only in the United Kingdom for medical treatment, thus not “usually resid[ing]” there as required in France’s use of universal jurisdiction.
has been denied by Spain.\textsuperscript{52} Under the proposed bill, outside of the conditions listed, treaties are required to guide Spain’s actions.\textsuperscript{53} The outcome of the bill is pending, but this recent develop demonstrates that even States who have been thus far been very progressive toward establishing jurisdiction over CAH offenders is potentially scaling back its ability to prosecute or extradite.

\textit{iv. Immunity}

Finally, the extent of immunity for government officials, and particularly Heads of State, who commit CAH is a much debated topic that presents another impediment to a customary international law obligation to extradite or prosecute CAH offenders. In the \textit{Arrest Warrant} case, the ICJ reaffirmed that “[c]ertain holders of high-ranking office in a State, such as the Head of State,…enjoy immunities from jurisdiction in other States, both civil and criminal.”\textsuperscript{54} For example, charges were brought in Australia for war crimes and CAH against a sitting government official, the President of Sir Lanka, which the Attorney General quashed citing Head of State immunity within a day of charges being brought.\textsuperscript{55}

Another example is the recent decision by the European Court of Human Rights in \textit{Jones & Others v. United Kingdom}, where the Court found no customary international law exception to state immunity for Saudi Arabian officials in a civil proceeding brought by British citizens who claimed they were tortured by the officials while in detention.\textsuperscript{56}


\textsuperscript{53} Id.


\textsuperscript{56} Jones & Others v. United Kingdom, App. No. 3456/06, 40528/06 (2014), at ¶¶ 71-73.
The Court acknowledged “some emerging support” in favor of an exception to immunity for civil cases involving claims of torture, but still found that the “bulk of authority” supports immunity. 57

Although Jones involved torture, rather than CAH, that case demonstrates how reluctant courts are to ignore state immunity in cases brought against current government officials, even in the case of the most egregious crimes. Many States, however, will not extend that immunity once the official leaves office and an increasing number of former Heads of State have been the subject of criminal prosecutions in either international tribunals, such as the ICTY, ICTR, or ICC, or under national law. 58

It seems contradictory to, on the one hand, claim that CAH are so abhorrent to the International Community as a whole that all offenders should face justice for their acts and, on the other, to let government officials escape prosecution by virtue of their office, and at times even after they have left office. This is especially true because government officials who, as public servants are charged with working for and protecting citizens, should face more liability for committing such horrific acts as CAH, not less. Yet, immunities are still frequently used to shield certain officials from action against them. The fact that certain government officials never face any sort of justice for committing CAH further evinces a weakness in the claim of any customary international law obligation to prosecute or extradite CAH offenders.

57 Id. at ¶ 71.
58 Steven Freeland, A Prosecution Too Far? Reflections on the Accountability of Heads of State under International Criminal Law, 41 VICT. U. WELLINGTON L. REV. 179, 189-90 (2010) (noting that the arrest warrants issued by the ICC against current President al-Bashir discussed above represents the first time that the ICC has acted against an incumbent Head of State and the move has been met with some controversy).
C. Other Sources that Support an Obligation in Customary International Law?

Even the most ardent supporter of a customary law obligation to extradite or prosecute for CAH, Bassiouni, concedes that the inconsistency in State practice, as well as the various definitions of CAH, weakens support for the existence of such an obligation.\(^59\) “Contemporary practice furnishes far from consistent evidence of the actual existence of a general obligation to extradite or prosecute with respect to international offenses.”\(^60\) In response to this weakness of State practice, Bassiouni leans on other sources that may evince consistent and widespread practice, what he terms “normative utterances.”\(^61\) Perhaps a large number of international and multilateral treaties that contain the obligation, for example, could evince the development of a norm.

The number of international treaties containing the obligation to extradite or prosecute is increasing every year.\(^62\) Although alone this growth in international treaties cannot establish a binding customary rule, “the development of international practice based on the growing number of treaties establishing and confirming such an obligation may lead at least to the beginning of the formulation of an appropriate customary norm.”\(^63\) Because States sign and agree to the international instruments, such instruments may evince support for the rules contained in the treaties.

However, some States specifically reject this logic.\(^64\) Delegates from the Russian Federation, for example, specifically rejected the existence of an obligation under

\(^{59}\) Bassiouni, *supra* note 47, at 582-83.

\(^{60}\) Bassiouni and Wise, *supra* note 6, at 43.

\(^{61}\) Id. at 46.

\(^{62}\) Third Rep. on the Obligation to Extradite or Prosecute (Aut Dedere Aut Judicare), *supra* note 18, at ¶ 124.

\(^{63}\) Id.

\(^{64}\) Even though Bassiouni’s argument relies “more heavily [than State practice] on postulating the existence of a genuine international community which has, in effect, legislated through multilateral conventions to create a genuine body of criminal law which all States are bound to enforce, either by prosecuting offenders
customary international law as inferred from the existence of a large body of international treaties because, to do so, may result in some nonsensical rules of customary international law. They noted, for example, it may be asserted that the existence of a large number of extradition treaties means that a customary rule has emerged that States are obliged to grant extradition requests.65

Other evidence cited to demonstrate a customary international obligation to extradite or prosecute includes General Assembly Resolutions 284066 and 3074,67 both from the early 1970s. In Resolution 2840, the General Assembly, “convinced that the effective punishment” of CAH is important to ending and preventing such crimes, “urges” states to take measures to ensure punishment of offenders, including extradition, and to cooperate in sharing information.68 In Resolution 3074, passed two years later, the General Assembly directs that States “shall” cooperate in prosecuting CAH and on “questions of extraditing such persons.”69 These General Assembly resolutions carry significant weight, particularly because no State voted against them, and they can provide evidence of existing norms of customary international law.70 They cannot, however, create new rules of customary international law.71 Interestingly, nearly forty-five years after these resolutions were passed, State practice concerning the obligation to extradite or prosecute is still inconsistent.

themselves or extraditing them,” he admits that his co-author does not agree to the validity of this position. Bassiouni and Wise, supra note 6, at 68.

68 G.A. Res. 2840, supra note 66, at 88.
69 G.A. Res. 3074, supra note 67, at 79.
71 Id.
Part IV: Lack of Opinio Juris

In addition to assessing State practice, it is necessary to assess the opinio juris of the States when determining if a norm is custom.\textsuperscript{72} To do so, one must ask whether, with respect to existing practice, States feel a sense of obligation – outside of a treaty obligation – to honor the obligation to extradite or prosecute for CAH. Identifying opinio juris can be challenging. As explained by the ICJ, the “frequency, or even habitual character of the acts is not in itself enough.”\textsuperscript{73} This is because there are many international acts which are “performed almost invariably,” but are motivated by other considerations, such as of “courtesy, convenience, or tradition, and not by any sense of legal duty.”\textsuperscript{74} An opinio juris of an obligation to extradite or prosecute may be lacking, for example, where State parties fail to honor the obligation by neither extraditing nor prosecuting an offender of CAH, or where States decide to extradite or prosecute “on the basis of a purely unilateral choice and sovereign decision, without in any sense believing that they were required to do so by some international obligation, whether conventional or customary – but solely in the belief that international law entitled them to do so.”\textsuperscript{75}

A. State Practice

Reports produced by the U.N. International Law Commission, as well as judicial precedence, provide helpful guidance in assessing opinio juris. As discussed in Section II.A.i. above, since this topic has been studied by the International Law Commission, States have consistently been divided on whether the obligation to prosecute or extradite

\textsuperscript{72} North Sea Continental Shelf, supra note 12, at ¶ 77.
\textsuperscript{73} Id. at ¶ 77.
\textsuperscript{74} Id. See also Comments from the Governments to the Int’l Law Comm’n, U.N. Doc. A/CN.4/599, supra note 24, at ¶ 53 (citing government officials from the Russian Federation as noting that it is very difficult to determine in practice whether the State is extraditing out of a sense of opinio juris or “simply on the basis of the principle of reciprocity”).
\textsuperscript{75} Belgium v. Senegal (separate opinion of Judge Abraham), supra note 50, at ¶¶ 37-38 (emphasis added).
had gained customary status.\textsuperscript{76} While some States believe the obligation is based only on treaties and does not have customary character, others consider that it has gained customary status, at least for crimes such as genocide, crimes against humanity, war crimes, torture and terrorist crimes.\textsuperscript{77} Still others acknowledge “grounds to claim” that the obligation is acquiring customary international law status, at least to certain crimes, based on the ICC Statute and the 1996 draft Code of Crimes Against the Peace and Security of Mankind (which includes genocide, crimes against humanity, and war crimes under the obligation).\textsuperscript{78}

In 2009, the delegate from Argentina emphasized that “[w]hile there existed an \textit{opinio juris} with regard to the most serious crimes, namely genocide, crimes against humanity, and war crimes, that did not warrant any conclusion as to the application to such crimes of the principle in question [the obligation to extradite or prosecute].”\textsuperscript{79} In 2008, the Russian Federation expressed a similar sentiment, stating that “the existence of a customary rule obliging States to exercise their criminal jurisdiction or to grant extradition requests in respect of a specific type of crime may also not readily be inferred from the existence of a customary rule prohibiting these types of crimes.”\textsuperscript{80}

While neither Argentina nor the Russian Federation on their own determine what constitutes a rule of customary international law for the entire international community, these comments demonstrate States’ continuing resistance to the position that the obligation to extradite or prosecute is customary international law. Significantly, the

\begin{footnotes}
\item[76] Third Rep. on the Obligation to Extradite or Prosecute (\textit{Aut Dedere Aut Iudicare}), supra note 18, at ¶ 98.
\item[77] Id. at ¶ 98.
\item[78] Id. at ¶ 98 n. 19.
\item[79] Id. at ¶ 98 n. 20.
\end{footnotes}
Working Group established by the International Law Commission shifted gears from a study of whether an obligation exists in customary international law to studying instead the obligation as it exists in current treaties and how to strengthen the conventional regime with regard to the obligation, including identifying where gaps exist in the current regime, such as in relation to most crimes against humanity, war crimes other than grave breaches, and war crimes in non-international armed conflict.\(^{81}\)

France provides another example of the lack of *opinio juris* regarding the obligation to extradite or prosecute because it did not enact its limited universal jurisdiction legislation out of a sense of a customary international law obligation.\(^{82}\) Instead, France chose to extend universal jurisdiction to the crimes under the jurisdiction of the ICTY, ICTR, and ICC “of its own free and sovereign choice, without considering as far as it was itself concerned – or asserting in relations to others – that States were required to do so.”\(^{83}\)

**B. Jurisprudence**

The ICJ, in *Belgium v. Senegal*, specifically addressed that the prohibition against torture is grounded in the *opinio juris* of States, but declined to decide whether there is a customary international law obligation to extradite or prosecute.\(^{84}\) The Court held it had no jurisdiction to decide that issue since the dispute between the State parties did not relate to breaches of obligations under customary international law.\(^{85}\) In its

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\(^{81}\) Rep. of the Int’l Law Comm’n, *supra* note 4, at Annex A, ¶ 4, 20 (recognizing the obligation as contained in the 1996 Draft Code of Crimes Against the Peace and Security of Mankind, based on a review of the Draft Code’s history, is “driven by the need for an effective system of criminalization and prosecution of the said core crimes [including CAH], rather than actual State practice and *opinio juris*” (internal citations omitted)).

\(^{82}\) *Belgium v. Senegal* (separate opinion of Judge Abraham), *supra* note 50, at ¶ 39.

\(^{83}\) *Id.*

\(^{84}\) *Id.* at ¶ 54-55.

\(^{85}\) *Id.* at ¶ 55.
communications with Senegal requesting the extradition of Hissene Habre, Belgium focused on Senegal’s obligations under the CAT to extradite for the crime of torture and made no mention of a customary international law obligation to extradite for torture or for any of the other crimes which Habre was accused of committing, including CAH, genocide, war crimes, and other crimes. Arguably, the failure of Belgium to rely on a customary international law for torture, or any of the other crimes for which Habre was facing prosecution, indicates that States do not find a customary international law obligation as a relevant norm to rely upon in its interactions with other States regarding offenders of serious international crimes.

Furthermore, in his separate opinion, Judge Abraham emphasized that he believed the evidence presented during the proceedings in the case did “not come close to establishing the existence of a general practice and an opinio juris which might give rise to the customary obligation upon a country…to prosecute a former foreign leaders before its courts…, unless it extradites him.”

**Part V: Impact of Jus Cogens on Erga Omnes Obligations**

To be a *jus cogens*, or peremptory, norm is to hold the highest hierarchical position among other norms and means that no derogation would ever be permitted.

Certain crimes may reach *jus cogens* status, for example, because they threaten the peace

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86 Id. at ¶ 54.
87 Id. at ¶ 25. See also Belgium v. Senegal (dissent opinion of Judge Sur), supra note 50, at ¶ 32 (noting that while the universal prohibition of torture is a customary international rule of law, the “same is not true of the obligation to prosecute”).
88 Cherif Bassiouni, *International Crimes: Jus Cogens and Obligatio Erga Omnes*, 59 AUT LAW & CONTEMP. PROBS. 63, 67 (1996). See also Vienna Convention on the Law of Treaties art. 53, May 23, 1969, 1155 U.N.T.S. 331 (noting that a treaty is “void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law” and that a peremptory norm is one “from which no derogation is permitted and which can modified only by a subsequent norm of general international law having the same character”).
and security of humankind or shock the conscience of humanity.89 A crime can become
jus cogens based on widespread international practice and on the opinio juris of States.90
Other evidence of a jus cogens norm may include language in preambles or other
provisions of treaties and ad hoc international investigations and prosecutions of
offenders.91

Assuming the prohibition against CAH is a jus cogens norm, then it is one from
which no State can derogate. From there, Bassiouni’s argument is that since States
cannot derogate from the prohibition against CAH, then States also have an obligation
not to condone offenses involving egregious violations of human rights, and that this
“imports an obligation to do everything that can be done to ensure that offenders are
punished.”92

This last step in the argument merits further elaboration. The concept of obligato
erga omnes pertains to the legal implications or obligations imposed upon States that are
owed to all other members of the international community.93 When an international
crime is recognized as jus cogens, then the “threshold question” is the effect of the
obligations erga omnes now imposed on States to proceed against alleged offenders of
that crime.94 Bassiouni takes the position that, for those crimes recognized as jus cogens,
States assume erga omnes obligations that are non-derogable duties, rather than optional

89 Id. at 69.
90 Belgium v. Senegal, supra note 50, at ¶ 99.
91 Bassiouni, supra note 88, at 68.
92 Id. at 54.
93 Prosecutor v. Anto Furund’ija, Case No. IT-95-17/1-T, Judgement, ¶¶ 151-52 (Dec. 10, 1998),
http://www.icty.org/x/cases/furundzija/tjug/en/fur-tj981210e.pdf (noting that the violation of an erga
omnes obligation “simultaneously constitutes a breach of the correlative right of all members of the
international community and gives rise to a claim for compliance accruing to each and every member,
which then has the right to insist on fulfillment of the obligation or in any case to call for the breach to be
discontinued”).
94 Bassiouni, supra note 88, at 65 (acknowledging that “whether obligatio erga omnes carries with it the
full implications of the Latin word obligation, or whether it is denatured in international law to signify only
the existence of a right rather than a binding legal obligation” has not been resolved in international law).
rights. The duties that attach would include the obligation to extradite or prosecute, the non-applicability of statutes of limitations, the universality of jurisdiction over the crimes no matter where they are committed and irrespective of who committed them, including Heads of State among others.\(^95\)

A. Relationship Between *Jus Cogens* and Obligations on States Beyond No Derogation

Two principles of law that have been developed by international jurisprudence stand in the way of Bassiouni’s argument. The first principle, which can be found in *Belgium v. Senegal*, is that the prohibition of a crime as *jus cogens* does not necessarily give rise to obligations on States. Though the judges declined to decide whether an obligation exists in customary international law to extradite or prosecute for alleged offenses of torture, two judges wrote separately to emphasize the distinction between determining the prohibition against a torture to be a *jus cogens* norm and extending the *jus cogens* status to the obligation to extradite or prosecute.\(^96\) The former does not necessarily give rise to the latter.

In the majority opinion, the judges also declined to extend the obligation to extradite or prosecute to acts of torture that occurred before the Convention Against Torture (CAT) entered into force for the Senegal. The Court emphasized that while Senegal cannot be required to prosecute those earlier acts of torture under the terms of the CAT, “nothing in that instrument prevents them from doing so.”\(^97\) This language implies

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\(^95\) Id. at 65-66.

\(^96\) *Belgium v. Senegal* (separate opinion of Judge Abraham), *supra* note 50, at ¶ 25. *See also* *Belgium v. Senegal* (dissenting opinion of Judge Sur), *supra* note 50, at ¶ 34 (noting that “the provision [within CAT] establishing the obligation to submit the case to the competent authorities for the purpose of prosecution is clearly of a different nature to the prohibition of torture itself”).

\(^97\) Id. at ¶ 102.
the right or authority to prosecute or extradite for crimes that fall outside the jurisdiction of the treaty, rather than a non-derogable duty.

Other international tribunals have discussed the impact of *jus cogens* norms on State responsibilities related to the norms. In *Prosecutor v. Furund’ija*, the ICTY discussed at length the obligations imposed on States and individuals by the nature of a prohibition of a crime based on a peremptory norm.\(^98\) Specifically, one consequence of the *jus cogens* character is that “every State is entitled to investigate, prosecute and punish or extradite individuals accused of torture, who are present in a territory under its jurisdiction.”\(^99\) The Tribunal notes it would be inconsistent to prohibit torture to “such an extent as to restrict the normally unfettered treaty-making power” of States, but prohibit the States from prosecuting and punishing offenders.\(^100\) Significantly, throughout the discussion, the judges focused on the right and authority of States to prosecute or extradite offenders, but not the obligation to do so. Finally, the ICTY notes that it “would seem that other consequences” of a *jus cogens* norm would be that torture not be subject to a statute of limitations and not excluded under a political offense exemption, but they refrain from labeling these consequences as clear, evident, or well-defined.\(^101\)

The Inter-American Court of Human Rights has also addressed *jus cogens* norms and observed that the obligation to extradite or prosecute comes along with those norms. In *Goiburias et al. v. Paraguay*,\(^102\) the Court held that the States parties to the American Convention are bound to extradite or prosecute individuals responsible for torture and

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\(^98\) *Prosecutor v. Furund’ija*, *supra* note 93, at ¶¶ 153-57.
\(^99\) *Id.* at ¶ 156 (emphasis added).
\(^100\) *Id.*
\(^101\) *Id.* at ¶ 157.
enforced disappearances which, because they “occurred in a context of the systematic violation of human rights,” constitute CAH. The Court emphasized that the acts committed were violations of *jus cogens* norms and, thus, “entail the activation of national and international measures, instruments and mechanisms to ensure their effective prosecution and the sanction of the authors.” The holding of the case is based not only on the status of *jus cogens* crimes, but also on the binding obligations that arise for State parties from “the mechanisms of collective guarantee established in the American Convention, together with the regional and universal international obligations on the issue.” The regional and universal international obligations included the U.N. Charter, the Geneva Conventions, the Genocide Convention, General Assembly Resolutions and Declarations. Thus, it cannot be said that the Court found an independent obligation to extradite or prosecute that arises from customary international law.

**B. Relationship Between *Jus Cogens* and Other Non-Conflicting Norms**

The second major principle from the jurisprudence regarding the relationship between *jus cogens* norms and other norms of international law is that the status of a *jus cogens* norm does not preclude the application of another norm that may hinder enforcement of the *jus cogens* norm in the absence of a direct conflict between the two norms. As explained by the Court, “the rules which determine the scope and extent of jurisdiction and when that jurisdiction may be exercised do not derogate from those substantive rules which possess *jus cogens* statute, nor is there anything inherent in the

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103 *Id.* at ¶ 128.
104 *Id.*
105 *Id.* at ¶ 132.
106 *Id.* at ¶ 132 n.87.
107 Jurisdictional Immunities of the State (Ger. v. It.), 2012 I.C.J. 99, ¶¶ 95-98 (Feb. 3) (holding, therefore, that “even on the assumption that the proceedings in the Italian courts involved violations of *jus cogens* rules, the applicability of the customary international law on State immunity was not affected”).
concept of *jus cogens* which would require their modification or would displace their application.\(^{108}\)

Bassiouni specifically rejects that immunities could override the obligation to extradite or prosecute, which is an *erga omnes* obligation for all *jus cogens* crimes, such as CAH.\(^{109}\) Bassiouni also includes statutes of limitations and the failure to exercise universal jurisdiction over CAH no matter where committed as *erga omnes* obligations that are non-derogable duties imposed on the State.\(^{110}\) In other words, Bassiouni takes the position that these other aspects of international law – immunities, universal jurisdiction, statutes of limitations – are in direct conflict with the *jus cogens* prohibition on CAH (as well as other international crimes), rather than the ICJ’s position that they are merely hindrances to enforcement. As such, these other norms or aspects of international law must give way to the obligation to extradite or prosecute based on the nature of the crime being *jus cogens*.

If Bassiouni’s position is correct, the question becomes where to draw the line. All sorts of norms of international criminal law normally within the discretion of the State would also conflict with the obligation to extradite and prosecute. Thus, if taken to the extreme, Bassiouni’s position could result in absurdities, such as requiring States to rewrite not only national laws but all criminal laws in each jurisdiction within the State in order to eliminate anything that may hinder enforcement of the *jus cogens* norm. *Jus cogens* means that a State cannot derogate from that norm, but it does not answer all questions about how States should the State should ensure to honor the *jus cogens* norm, such as questions of immunity, jurisdiction, statutes of limitations, or definitions of CAH.

\(^{108}\) Id.


\(^{110}\) Id.
in national legislation. The ICJ made clear the answers to these questions fall within the wide discretion of States unless a customary international law norm exists that restricts the exercise of jurisdiction.\textsuperscript{111} As discussed throughout this paper, the obligation to extradite or prosecute has not yet reached that customary status.

Other jurisprudence also seems to weigh against the argument that the \textit{jus cogens} nature of a crime necessarily means that the obligation to extradite or prosecute displaces other norms that may hinder its enforcement. In \textit{Al-Adsani v. United Kingdom},\textsuperscript{112} all judges of the European Court of Human Rights agreed that torture is a non-derogable \textit{jus cogens} crime, but they split on whether that means that its status would negate the application of State immunity.\textsuperscript{113} The majority held that the \textit{jus cogens} nature of the prohibition of torture did not displace State immunity in a civil suit for damages.\textsuperscript{114} In a separate concurring opinion, two judges argued that practical considerations must be kept in mind when considering an overall absolute priority of the prohibition against torture in every situation.\textsuperscript{115} This is because in order to achieve international cooperation, including cooperation with a view to eradicating torture, there must be “the continuing existence of certain elements of a basic framework for the conduct of international relations.”\textsuperscript{116}

In strongly worded dissents, six judges argued that by the very nature of a \textit{jus cogens} norm, a State cannot invoke “hierarchically lower rules (in this case, those on

\begin{footnotes}
\item[111] See \textit{supra} text accompanying notes 20-21.
\item[113] Bassiouni, \textit{supra} note 88, at ¶¶ 66-67.
\item[114] \textit{Id.} at ¶¶ 66-67.
\item[115] Al-Adsani v. United Kingdom, \textit{supra} note 112, at 294 (concurring opinions of Judge Pellonpaa and Judge Bratza).
\item[116] \textit{Id.} at 297
\end{footnotes}
State immunity)” to avoid the consequences of the illegal acts.\textsuperscript{117} These judges emphasize that, “[i]n the event of a conflict between a \textit{jus cogens} rule and any other rule of international law, the former prevails,” to which the majority agreed.\textsuperscript{118} The majority, however, found that due to the distinction between civil and criminal proceedings, the \textit{jus cogens} nature of the prohibition on torture has different implications on the obligations of the State.\textsuperscript{119}

It is difficult to imagine that there will ever be consensus among all States that certain \textit{jus cogens} crimes have the effect of overriding all other international law norms, especially immunity for certain government officials, regardless of whether the trial is criminal or civil. In 2003, Belgium brought proceedings against senior United States political and military officials, including President George HW Bush, for war crimes under Belgian universal jurisdiction provisions.\textsuperscript{120} This caused such a strain on the diplomatic relations between the two countries that the United States threatened to move the headquarters of the North Atlantic Treaty Organization away from Brussels, and Belgium subsequently enacted new legislation limiting the scope of Belgium’s universal jurisdiction.\textsuperscript{121}

\textsuperscript{117} \textit{Id.} at 298-99 (dissenting opinions of Judge Rozakis, Judge Caflish, Judge Wildhaber, Judge Costa, Judge Cabral Barreto, Judge Vajic).

\textsuperscript{118} \textit{Id.} at 298.

\textsuperscript{119} \textit{Id.} at 300 (noting that “[i]t is not the nature of the proceedings which determines the effects that a \textit{jus cogens} rule has upon another rule of international law, but the character of the rule as a peremptory norm and its interaction with a hierarchically [sic] lower rule.”)

\textsuperscript{120} Brady and Mehigan. \textit{supra} note 5, at 80; \textit{and} Hood and Cormier, \textit{supra} note 55, at 246-47.

\textsuperscript{121} \textit{US Attacks Belgium War Crimes Law, BBC NEWS} (June 12, 2002), http://news.bbc.co.uk/2/hi/europe/2985744.stm.
Part VI: Conclusion

The desire to impose obligations on States to end impunity for CAH has strong support within the international community, as evident in the General Assembly Resolutions from the early 1970s. However, for an obligation to be one of customary international law, State practice must be consistent and widespread and must be done out of sense of opinio juris and not due solely to fulfill a treaty obligation. As demonstrated throughout this paper, neither of those conditions is fulfilled regarding an obligation to extradite or prosecute.

In trying to progressively develop the concept of an obligation to extradite or prosecute, in 2007, a Special Rapporteur of the International Law Commission began to draft articles that would articulate the obligation. However, due to the “diversity in the formulation, content, and scope of the obligation to extradite or prosecute in conventional practice,” the effort at drafting specific articles related to the obligation seems to have been abandoned. In fact, in 2013, the Working Group noted that it “would be futile for the Commission to engage in harmonizing the various treaty clauses on the obligation,” and “consider[ed]” that, when drafting treaties, States “can decide for themselves as to which conventional formula on the obligation to extradite or prosecute best suits their objective in a particular circumstance.”

122 See supra text accompanying notes 47-48.
125 Id. See also Secretariat’s Survey, supra note 34, at ¶ 153 (“[W]hile it is possible to identify some general trends and common features in the relevant provisions, conclusive findings regarding the precise scope of each provision need to be made on a case-by-case basis, taking into account the formulation of the provision, the general economy of the treaty in which it is contained and the relevant preparatory works.”)
Abandoning draft articles devoted to the obligation to extradite or prosecute is a reasonable course of action. Attempting to coordinate and include all particular procedures used by States regarding the obligation as applied to particular individuals for their crimes would be cumbersome and unwieldy. Additionally, even once the effort was completed and assuming States were mostly in consensus on its provisions, any treaty provision that contradicted any of the draft articles would trump the articles. However, the lack of draft articles, in addition to the inconsistency, fluctuation, and discrepancy in State practice, means that the gaps in the enforcement of certain international offenses, such as CAH, remain. In order to help close the gaps, an effort to establish a Convention on CAH should include an obligation to extradite or prosecute imposed on State parties.126

126 See Olson, supra note 5, at 326 (noting that, “[g]iven the debate on the customary nature of the obligation [to extradite or prosecute], practically speaking, a specialized convention on crimes against humanity must include the obligation to extradite and/or prosecute in order to meet the Stated, primary objective of the treaty – ending impunity.” (emphasis added)).