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

Eveylon Corrie Westbrook Mack*

I. INTRODUCTION

The effort to establish a Convention on the Prevention and Punishment of 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[1] and certain war crimes through the "grave breaches" provisions of the Geneva Conventions,[2] no comparable treaty exists for CAH.[3] 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 by norms recognized as *jus cogens*.[4]

---

* Major Corrie Mack, USAF (B.A., Psychology and Anthropology, *cum laude*, The University of the South (1999), J.D., The George Washington University Law School (2004), LL.M., International and Comparative Law, The George Washington University Law School with Highest Honors (2014)) is currently assigned as a Deputy Staff Judge Advocate, Joint Special Operations Command, Fort Bragg, North Carolina. The author would like to give special thanks to Professor Sean D. Murphy, Professor Patricia Roberts Harris Research Professor of Law, The George Washington University Law School, for his guidance and mentorship.

1. *See* Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277.

2. *See* Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Treatment of Prisoners of War, Aug.12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, June 8, 1977, 1125 U.N.T.S. 3.

3. *See* Rep. of the Int'l Law Comm'n, 65th Sess., May 6–June 7, July 8–Aug. 9, 2013, Annex B, ¶ 1, U.N. Doc A/68/10; GAOR, 68th Sess., Supp. No. 10 (2013).

4. *Jus cogens* are preemptory norms that hold the highest status in the hierarchy of norms and always prevail over any inconsistent rule of international law, whether that rule is contained in a treaty or in customary international law. *See* Jurisdictional Immunities of

In order to avoid safe havens for those who commit CAH, most proponents of a CAH Convention advocate for the inclusion of a provision obligating States to extradite or prosecute an offender that is found in their territory. Proponents assert that the inclusion of such an obligation is particularly important because inconsistency in State practice currently 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 already exists as a part of customary international law.[5] Professor Cherif Bassiouni of DePaul University is the leading scholar who argues that an obligation to extradite or prosecute for CAH already exists, and most supporters of that position cite Bassiouni's work.[6] This paper explores the position of Bassiouni and others and concludes that the obligation to extradite or prosecute an alleged CAH offender does not, at present, exist as a matter of customary international law. Thus, it will be necessary to include a provision imposing an obligation to extradite and prosecute in a CAH Convention if such an obligation is deemed desirable.

Part II provides background information regarding the *aut dedere aut judicare* principle and also includes an introduction to Bassiouni's argument.[7] Part III discusses how State practice is inconsistent and not sufficiently widespread to support such an obligation. 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 that even States that do extradite or prosecute alleged CAH offenders may not do so out of a belief that they are legally compelled to do so. Part V further analyzes the argument by Bassiouni that an obligation to extradite or prosecute CAH offenders exists, despite inconsistent state practice, because the prohibition on CAH is a rule of

---

the State (Ger. v. It.), 2012 I.C.J. 99, ¶ 92 (Feb. 3).

5. *See generally* CHERIF BASSIOUNI & EDWARD WISE, AUT DEDERE AUT JUDICARE: THE DUTY TO EXTRADITE OR PROSECUTE IN INTERNATIONAL LAW (1995).

6. *See, e.g.*, Laura M. Olson, *Reinforcing Enforcement in a Specialized Convention on Crimes Against Humanity: Inter-State Cooperation, Mutual Assistance, and the* Aut Dedere Aut Judicare *Obligation*, *in* FORGING A CONVENTION FOR CRIMES AGAINST HUMANITY 325 (Leila Nadya Sadat ed., 2011); Amnesty Int'l, *International Law Commission: The Obligation to Extradite or Prosecute* (Aut Dedere Aut Judicare), at 8 n.13 (2009), *available at* http://amnesty.org/en/library/asset/IOR40/001/2009/en/1bcc3e24-a8cd-4f9e-a361-6a1e2e097b10/IOR4000109spa.pdf; Alan Brady & James Mehigan, *Universal Jurisdiction for International Crimes in Irish Law*, 43 IR. JUR. 59, 67–68 (2008); Michael Kelly, *Cheating Justice by Cheating Death: The Doctrinal Collision for Prosecuting Foreign Terrorists – Passage of* Aut Dedere Aut Judicare *into Customary Law & Refusal to Extradite Based on the Death Penalty*, 20 ARIZ. J. INT'L & COMP. L. 491, 496 (2003).

7. This Latin expression includes the duty to surrender or extradite (*dedere*) or adjudicate or prosecute (*judicare*). *See* BASSIOUNI & WISE, *supra* note 5, at xii.

jus cogens. Part V also explores various international judicial precedents that have discussed the impact of *jus cogens* on the obligation to extradite or prosecute. Finally, Part VI offers some concluding thoughts.

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.[8] The *aut dedere aut judicare* principle can be traced to the Nuremberg and Tokyo Tribunals which were established to prosecute offenders after World War II.[9] Though neither of the Charters establishing those tribunals imposed an explicit duty to prosecute or extradite offenders, the parties committed themselves to cooperate in investigating and bringing offenders to trial.[10] The Statutes for the International Criminal Tribunal for Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) also included provisions that required States to cooperate in holding offenders accountable.[11] The 1998 Rome Statute, which currently has 122 State parties,[12] established the International Criminal Court (ICC) and contained a more specific obligation on State parties to either extradite or prosecute CAH offenders.[13]

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.[14] Of course, these statutes and treaties are only binding on State parties. In the absence of any specific and relevant treaty obligation, States are under no obligation to honor an extradition request.[15]

---

8. *Id.* at 3.

9. *Id.* at 112–13.

10. *Id.* at 114.

11. *See* S.C. Res. 827, art. 3, U.N. Doc S/RES/827 (May 25, 1993); S.C. Res. 955, art. 5, U.N. Doc. S/RES/955 (Nov. 8, 1994).

12. Cote d'Ivoire ratified the ICC Statute on 15 February 2013, bringing the total number of State parties to 122. *See* State Parties to the Rome Statute of the ICC Fact Sheet, COALITION FOR THE INTERNATIONAL CRIMINAL COURT (Feb. 15, 2013), http://www.iccnow.org/documents/RATIFICATIONSbyRegion_15Feb2013_eng.pdf.

13. *See* Rome Statute of the International Criminal Court, July 17, 1998, 2187 U.N.T.S. 90.

14. For an in-depth listing of these types of treaties and the provisions within dealing with the obligation to extradite or prosecute, see BASSIOUNI & WISE, *supra* note 5, at 11–19.

15. *See* BASSIOUNI & WISE, *supra* note 5, 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."); Kelly, *supra* note 6, at 497 (2003) (noting that traditionally it was accepted that no duty to extradite or prosecute

Therefore, in the absence of a specific treaty on point, a State would only be obligated to extradite or prosecute alleged CAH offenders if the obligation existed as a matter of customary international law.[16] For a norm to be customary international law, it must meet two recognized standards: (1) States' practice of the norm must be widespread and consistent, and (2) that practice must be motivated by the belief that the practice is obligatory based on a rule of law requiring it (*opinio juris*).[17]

Professor Bassiouni posits 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, he argues that the *aut dedere aut judicare* principle is a necessity for the effective repression of offenses that are "against world public order" and condemned by the international community as a whole.[18] Because international crimes are of concern to all States, Professor Bassiouni concludes that all States "ought therefore to cooperate in bringing those who commit such offenses to justice."[19]

Bassiouni acknowledges that, traditionally, no obligation to prosecute or extradite existed under customary international law.[20] He notes the current obligation 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."[21]

Before moving to the next section, one concept related to the obligation to extradite or prosecute that deserves discussion is that of universal jurisdiction. Universal jurisdiction is the ability of a State to exercise jurisdiction over an offender outside of the traditional bases of jurisdiction.[22] Specifically, universal jurisdiction *allows* a State to assert jurisdiction, even though the crime did not occur within its territory, and even though neither the offender nor the victim is a national of that State.[23] While universal jurisdiction may allow a State to exercise

existed in customary law, outside of treaties).

16. *See* BASSIOUNI & WISE, *supra* note 5, at 20.

17. *See* North Sea Continental Shelf (F.R.G./Den.; F.R.G./Neth.), 1969 I.C.J. 3, ¶ 77 (Feb. 20).

18. BASSIOUNI & WISE, *supra* note 5, at 24.

19. *Id.*

20. *Id.* at 22–23.

21. *Id.* at 50.

22. The two main forms of universal jurisdiction are known as "pure" jurisdiction, 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. Brady & Mehigan, *supra* note 6, at 60–62 (providing an in-depth discussion of universal jurisdiction and its types).

23. *Id.* at 61.

jurisdiction over an individual alleged to have committed CAH, it does not obligate a State to do so. Thus, universal jurisdiction 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 a basic understanding of universal jurisdiction is important when discussing the principle of *aut dedere aut judicare*.[24]

III. INCONSISTENT, FLUCTUATING, AND DISCREPANT STATE PRACTICE

Attempting to label a norm as one of customary international law is a difficult task, especially when that norm places an obligation on States to act. In order to be a rule of customary international law, State practice regarding the obligation to extradite or prosecute must be "constant and uniform."[25] 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 imposes obligations on States to act in certain ways to prevent individuals from committing those acts – especially when those obligations may interfere with the sovereignty of other States, the exercise of States' jurisdiction, the ability of States to shape their own 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.[26] Outside of those norms, "every State remains free to adopt the principles which it regards as best and most suitable."[27] 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. This is because determining constant and uniform practice is impossible when there is "much uncertainty and contradiction . . . much fluctuation and discrepancy in the exercise of [the practice,] and in the official views

24. *See* Special Rapporteur, *Third Rep. on the Obligation to Extradite or Prosecute* (Aut Dedere Aut Judicare), Int'l Law Comm'n, ¶ 127, U.N. Doc. A/CN.4/603 (June 10, 2008) (by Zdzislaw Galicki) ("[I]t is impossible to eliminate or even marginalize the question of universal jurisdiction whenever and wherever it appears in connection with the fulfilment of the obligation to extradite or prosecute.").

25. Asylum (Colom./Peru), 1950 I.C.J. 266, at 276 (Nov. 20).

26. *See* S.S. Lotus (Fr. v. Turk.) 1927 P.C.I.J. (ser. A) No. 10, ¶¶ 44–47 (Sept. 7).

27. *Id.* ¶ 46.

expressed on various occasions."[28] 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 current State practice.

A. EXTRADITION HURDLES

1. 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.[29] 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.[30] At least seven other States indicated they did not believe the obligation to prosecute or extradition exists outside of treaties during the 2009 U.N. discussions.[31] 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 in nature, shows inconsistency and discrepancy in State practice. This resistance to the obligation being customary has continued despite the fact that this issue has been on the International Law Commission's agenda since 2005.[32]

2. Exception for Nationals

Another hurdle to extradition is that many States refuse to extradite their own nationals.[33] Pan Am Flight 103 – which was hijacked and

---

28. Asylum (Colom./Peru), 1950 I.C.J. at 277.

29. *See* Sosa v. Alvarez-Machain, 504 U.S. 655, 664 (1992) ("In the absence of an extradition treaty, nations are under no obligation to surrender those in their country to foreign authorities for prosecution.").

30. *See* Int'l Law Comm'n (61st Sess.), *The Obligation to Extradite or Prosecute* (Aut Dedere Aut Judicare)*: Comments and Information Received from Governments*, U.N. Doc. A/CN.4/612 (2009) ¶ 68 [hereinafter ICL 61st Sess., *Comments from Governments*]; Int'l Law Comm'n (60th Sess.), *The Obligation to Extradite or Prosecute* (Aut Dedere Aut Judicare)*: Comments and Information Received from Governments*, U.N. Doc. A/CN.4/599 (2008) ¶ 49.

31. *See* Special Rapporteur, *Fourth Rep. on the Obligation to Extradite or Prosecute* (Aut Dedere Aut Judicare), Int'l Law Comm'n, ¶¶ 79–80, U.N. Doc. A/CN.4/648 (June 10, 2008) (by Zdzislaw Galicki).

32. Rep. of the Int'l Law Comm'n, *supra* note 3, Annex A, ¶ 6.

33. Since the topic of the obligation to extradite or prosecute was added to the

forced to crash by explosion of a bomb on-board while flying over Lockerbie, Scotland, in 1988 – provides a well-known example.[34] Both the United States and United Kingdom requested that Libya extradite two Libyan nationals suspected of the hijacking.[35] In response, Libya refused to extradite its own nationals, basing its decision on its domestic law prohibiting such extraditions.[36]

3. Due Process Concerns

States may also refuse to extradite based on due process concerns. France, for example, has repeatedly refused to extradite individuals accused of committing CAH and genocide during the large-scale massacre of Tutsis by the Hutus in 1994.[37] France's policy of rejecting Rwanda's extradition requests is based on concerns that Rwanda will deny those accused fair trials, hold individuals accountable for crimes that were not legally defined at the time the acts were committed, and that too much time has passed between the acts committed and the issuing of the arrest warrant.[38] Instead of extraditing those accused to Rwanda, France decided to prosecute some of the individuals in French courts, holding the first trial resulting from the Rwandan genocide in early 2013.[39] However, France found insufficient evidence to prosecute some of the other individuals accused of committing CAH, which has frustrated its diplomatic relationship with the Rwandan government.[40]

Furthermore, some States refuse to extradite an individual to

---

agenda of the International Law Commission, the Special Rapporteur has consistently recognized that it is a common position among States that many will not extradite their own nationals. See Rep. of the Int'l Law Comm'n, 56th Sess., May 3– June 4, July 5–Aug. 6, 2004, Annex, ¶ 27(b), U.N. Doc. A/59/10; GAOR, 59th, Sess., Supp. No. 10 (2004) (noting "non-extradition of own nationals" as one possible limitation or exclusion in fulfilling the obligation to extradite or prosecute that should be included in the Commission's study of the obligation).

34. 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. 27).

35. *Id.* ¶ 25(f).

36. *Id.*

37. AFP, *France Charges Rwandan Doctor Over Genocide*, FOX NEWS (Sept. 20, 2013), http://www.foxnews.com/world/2013/09/20/france-charges-rwandan-doctor-over-genocide/.

38. AFP, *France Won't Extradite Genocide Suspects*, IOL NEWS (Feb. 26, 2014, 4:40 PM), http://www.iol.co.za/news/africa/france-won-t-extradite-genocide-suspects-1.1653254#.U0rcMyDD9jo.

39. *Id.*

40. David Whitehouse, *France Plans to Hold First Trial on Rwandan Genocide*, BLOOMBERG (Jan. 29, 2013, 4:51 AM), http://www.bloomberg.com/news/2013-01-29/france-plans-to-hold-first-trial-on-rwanda-genocide-by-next-year.html.

countries that allow the death penalty.[41] According to Amnesty International, as of the end of 2013, one hundred forty (140) States have abolished the death penalty in law or practice.[42] On the other hand, a significant number of States – twenty-two, to be precise – still maintain the death penalty as a lawful punishment, including four States that resumed executions in 2013.[43] These refusals to extradite based on various due process concerns demonstrate fluctuation and discrepancy in State practice with regard to the obligation to extradite or prosecute perpetrators of CAH.

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, State practice regarding prosecution of CAH offenders does not provide more consistent footing for deeming the obligation to extradite or prosecute a customary international law norm. Among the difficulties encountered by States who seek to prosecute CAH offenders are amnesty or asylum, inconsistency in national legislation criminalizing the acts at issue, inconsistency in the manner in which States exercise jurisdiction over alleged offenders, and the possible immunities granted to foreign government officials.

1. 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.[44] Amnesty can be a powerful tool in a post-conflict society and can help with the reintegration of

41. *See* Int'l Law Comm'n, 62th Sess., May 3–4 June, July 5–Aug. 6, 2010, *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) [hereinafter Study by Secretariat].

42. AMNESTY INT'L, DEATH SENTENCES AND EXECUTIONS 2013 (2014), http://www.amnestyusa.org/research/reports/death-sentences-and-executions-2013.

43. *Id.*

44. Michael P. Scharf, *Aut Dedere Aut Iudicare*, *in* MAX PLANCK ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, ¶ 11 (June 2008), *available at* http://opil.ouplaw.com/view/10.1093/law:epil/9780199231690/law-9780199231690-e758?rskey=oXyj26&result=5&prd=EPIL.

displaced civilians and former fighters.[45] 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."[46]

Yet, many countries still grant amnesty and asylum to alleged CAH offenders. One source lists seventeen different countries that have, during the past thirty years, granted amnesty to former members of ruling regimes that committed CAH, including Algeria, Angola, Argentina, Brazil, Cambodia, Chile, Columbia, El Salvador, Guatemala, Haiti, Honduras, Cote d'Ivoire, Nicaragua, Peru, Sierra Leone, South Africa, Togo, and Uruguay.[47]

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 granted amnesty by Sierra Leone. The Court simultaneously held that domestic amnesties are not illegal under international law.[48] 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.[49] This holding, along with the long list of countries that have granted amnesty or asylum, provide additional evidence that the obligation to extradite or prosecute has not yet reached customary status.

2. Inconsistency in National Legislation

If the State wants to prosecute an individual for CAH, but lacks national laws that criminalize the acts at issue, there is an obvious hurdle to prosecution. This hurdle can also frustrate extradition when a State refuses to grant a State's extradition request because the offense is not

45. U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Rep. of the Secretary-General*, ¶ 32, U.N. Doc. S/2004/616 (Aug. 23, 2004).

46. *Id.* ¶ 64(c). A review of the record of the debate regarding this report demonstrates 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. SCOR, 59th Sess., 5052nd mtg. at 26, 37–38, U.N. Doc. S/PV.5052 (Oct. 6, 2004).

47. Scharf, *supra* note 44, ¶ 10.

48. Prosecutor v. Kallon & Kamara, Case No. SCSL-2004-15-AR72(E), Case No. SCSL-2004-16-AR72(E), Decision on Challenge to Jurisdiction: Lome Accord Amnesty, ¶¶ 62, 91, (Sp. Ct. for Sierra Leone App. Chamber Mar. 13, 2004).

49. *Id.* ¶ 82.

criminalized in the requesting State.[50] Another problem may arise when States differ in how they define what acts constitute CAH.[51] For example, even if the requesting State criminalizes CAH in its national legislation and the granting State approves the extradition of the alleged CAH offender, it may later be determined that the offender's acts do not qualify as CAH in the State that ultimately received custody over the offender. At that point, the alleged offender cannot be prosecuted for the egregious criminal acts committed. In such a situation, has the requesting State somehow violated an obligation to prosecute the offender? Or has the granting State perhaps violated an obligation to extradite or prosecute by not discovering that prosecution was not available in the requesting State before consenting to the extradition request?

A 2013 study by the International Human Rights Clinic at The George Washington University (GWU) Law School attempted to determine the extent to which States have prohibited CAH under their own domestic laws.[52] 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.[53] Therefore, almost half of U.N. Member States and over a third of the State parties to the Rome Statute have not ensured that they have the ability to prosecute CAH in their national courts. The lack of national legislation related to CAH in each of these States evinces fluctuation and inconsistency in State practice with regard to the obligation to extradite or prosecute, rather than uniformity.

Even in those States that have national legislation related to CAH, the statutory definitions are "substantially different."[54] For purposes of

---

50. Study by Secretariat, *supra* note 41, ¶ 139.

51. *See* Diane F. 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 & WISE, *supra* note 5, 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"); James D. Fry, *Terrorism as a Crime Against Humanity and Genocide: the Backdoor to Universal Jurisdiction*, 7 UCLA J. INT'L L. & FOREIGN AFF. 169, 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").

52. Arturo Carrillo & Annalise Nelson, *Comparative Law Study and Analysis of National Legislation Relating to Crimes Against Humanity and Extraterritorial Jurisdiction*, *avalaible at* http://www.law.gwu.edu/Academics/EL/clinics/IHRC/Documents/CAH_Final_Web.pdf (July 2013) [hereinafter *GWU Law CAH Report*].

53. *Id.* at 3.

54. *Id.*; *see also* Cherif Bassiouni, *Crimes Against Humanity: The Case for a*

the obligation to extradite or prosecute, the variation in definitions "may hinder the effective prosecution or extradition of suspects, as well as other forms of inter-State cooperation."[55]

3. Inconsistency in Exercising Universal Jurisdiction

State practice is also inconsistent regarding the exercise 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.[56] France has only exercised 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 when the alleged offender "usually resides" in France.[57] Thus, France has the ability to prosecute CAH offenders, as CAH fall within the jurisdiction of the ICC, but only when the offender *usually resides in France*. In this way, France is exercising universal jurisdiction, but in a more limited way than other States.

Spain, on the other hand, has exercised universal jurisdiction over offenders who have allegedly committed *jus cogens* crimes.[58] 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 has been denied by Spain.[59] Under the proposed bill, Spain

---

Specialized Convention, 9 WASH. U. GLOB. STUD. L. REV. 575, 582 (2010) (finding that only fifty-five States have criminalized CAH as of December 2010); Amnesty International, *Universal Jurisdiction: A Preliminary Survey of Legislation Around the World*,AI Index IOR 53/109/2012 (Oct. 2012), *available at* http://www.amnesty.org/en/library/asset/IOR53/019/2012/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. *GWU Law CAH Report*, *supra* note 52, at 7–8. Thus, the GWU Law CAH Report seems to be most complete and encompassing.

55. *GWU Law CAH Report*, *supra* note 52, at 3.

56. Brady & Mehigan, *supra* note 6, at 77–78.

57. Questions Relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.), 2012 I.C.J. 423, ¶ 39 (July 20) (separate opinion of Judge Abraham).

58. 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. R v. Bow Street Metropolitan Stipendiary Magistrate, *Ex parte* Pinochet Ugarte, [1998] UKHL 41, [1999] 1 A.C. 147 (H.L.). The alleged acts of torture were not committed in Spain or the United Kingdom, nor were they committed against citizens of the United Kingdom. *Id.* Furthermore, because General Pinochet was only in the United Kingdom for medical treatment, he was not "usually resid[ing]" there as required in France's use of universal jurisdiction. *See supra* text accompanying note 57.

59. *Spanish Lawmakers Should Reject Proposal Aimed at Closing the Door on Justice for the Most Serious Crimes*, HUMAN RIGHTS WATCH.ORG (Feb. 10, 2014),

would only exercise universal jurisdiction in one of those specified instances, or when guided by treaty.[60] The outcome of the bill is pending, but this recent development demonstrates that even one of the States that has been very progressive in establishing jurisdiction over CAH offenders is potentially scaling back its ability to prosecute or extradite.

4. 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 *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."[61] For example, Australia brought charges for war crimes and CAH against a sitting government official, the President of Sir Lanka.[62] But, within a day, Australia's Attorney General had quashed the charges, citing Head of State immunity.[63]

Another example is the recent decision by the European Court of Human Rights in *Jones v. United Kingdom*. In that case, the Court found no customary international law exception to state immunity for Saudi Arabian officials in a civil proceeding brought by British citizens who alleged they were tortured by the officials while in detention.[64] The Court acknowledged "some emerging support" in favor of an exception to immunity in civil cases involving claims of torture, but ultimately found that the "bulk of authority" supports immunity.[65]

Although *Jones* involved torture, rather than CAH, it 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.[66] As a result, an increasing number of

---

http://www.hrw.org/news/2014/02/10/spanish-lawmakers-should-reject-proposal-aimed-closing-door-justice-most-serious-cri.

60. *Id.*

61. Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.), 2002 I.C.J. 3, ¶ 51 (Feb. 14).

62. Anna Hood & Monique Cormier, *Prosecuting International Crimes in Australia: The Case of the Sri Lankan President*, 13 MELB. J. INT'L L. 235, 237 (2012).

63. *Id.*

64. Jones v. United Kingdom, App. No. 34356/06, 40528/06 Eur. Comm'n H.R. Rep. 1, 20 (2014).

65. *Id.* ¶ 71.

66. Steven Freeland, *A Prosecution Too Far? Reflections on the Accountability of*

former Heads of State have been criminally prosecuted in either international tribunals, such as the ICTY, ICTR, or ICC, or under national law after leaving office.[67]

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 allow government officials to escape prosecution by virtue of their office. This is especially true for government officials, who are charged with working for and protecting citizens. By violating the trust that comes inherent with the office, the government officials should face more liability for committing egregious acts such as CAH, not less. Yet immunities are still frequently used to shield certain officials from action against them.[68] The fact that certain government officials never face any sort of justice for committing CAH further evinces a weakness in the claim that a customary international law obligation to prosecute or extradite CAH offenders exists.

C. OTHER SOURCES THAT MAY SUPPORT AN OBLIGATION IN CUSTOMARY INTERNATIONAL LAW

Even Bassiouni, the most ardent supporter of a customary international law obligation to extradite or prosecute for CAH, concedes that the inconsistencies in State practice, as well as the various definitions of CAH, weaken support for the existence of such an obligation.[69] "Contemporary practice furnishes far from consistent evidence of the actual existence of a general obligation to extradite or prosecute with respect to international offenses."[70] In response to the inconsistencies in State practice, Bassiouni cites other sources that may evince the development of consistent and widespread support within the International Community for an obligation to prosecute or extradite CAH offenders, what he terms "normative utterances."[71]

Perhaps a large number of international and multilateral treaties that contain the obligation could demonstrate the development of a norm. The number of international treaties containing the obligation to extradite or

---

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).

67. *Id.*

68. *Id.*

69. Bassiouni, *supra* note 54, at 582–83.

70. BASSIOUNI & WISE, *supra* note 5, at 43.

71. *Id.* at 46.

prosecute is increasing every year.[72] This growth in international treaties alone cannot establish a binding customary rule, but "the development of international practice based on the growing number of treaties establishing and confirming such an obligation may lead to the beginning of the formulation of an appropriate customary norm."[73] Because States sign and agree to the international instruments, such instruments may evince support for the rules contained in the treaties.

Some States, however, reject this logic.[74] One of those States, the Russian Federation, specifically rejected the existence of an obligation under customary international law as inferred from the existence of a large body of international treaties because inferring such obligations may result in nonsensical rules of customary international law.[75] Delegates from the Russian Federation noted, for instance, that one could argue that States have an obligation to grant extradition requests based upon the large number of extradition treaties in existence.[76]

Other evidence cited to demonstrate a customary international obligation to extradite or prosecute includes General Assembly Resolutions 2840[77] and 3074,[78] 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, including extradition, to ensure punishment of offenders and to cooperate in sharing information.[79] 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."[80] 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.[81] They

72. *Third Rep. on the Obligation to Extradite or Prosecute* (Aut Dedere Aut Judicare), *supra* note 24, ¶ 124.

73. *Id.*

74. 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 themselves or extraditing them," he admits that his co-author does not agree to the validity of this position. BASSIOUNI & WISE, *supra* note 5, at 68.

75. ICL 61st Sess., *Comments from Governments*, *supra* note 30, ¶ 50.

76. *Id.*

77. G.A. Res. 2840 (XXVI), U.N. GAOR, 26th Sess., U.N. Doc. A/8592, at 88 (Dec. 18, 1971).

78. G.A. Res. 3074 (XXVIII), U.N. GAOR, 28th Sess., U.N. Doc. A/9326, at 79 (Dec. 3, 1973).

79. G.A. Res. 2840, *supra* note 77, at 88.

80. G.A. Res. 3074, *supra* note 78, at 79.

81. International Law Association, *Final Report of the Committee on Formation of*

cannot, however, create new rules of customary international law.[82] Interestingly, nearly forty-five years after these resolutions were passed, State practice concerning the obligation to extradite or prosecute remains inconsistent.

IV. LACK OF OPINIO JURIS

In addition to assessing State practice, it is necessary to assess the *opinio juris* of States when determining if a norm is a part of customary international law.[83] To do so, one must ask whether, with respect to existing practice, States feel obligated – independent of a treaty obligation – to extradite or prosecute CAH offenders. 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."[84] This difficulty arises in part because there are many international acts which are "performed almost invariably," but are motivated by other considerations, such as "courtesy, convenience, or tradition, and not by any sense of legal duty."[85] 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. *Opinio juris* may also be lacking 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."[86]

A. STATE PRACTICE

Reports produced by the U.N. International Law Commission, as well as judicial precedence, provide helpful guidance in assessing *opinio juris*. States have consistently been divided on whether the obligation to

---

Customary (General) International Law, London, at 55 (2000), *available at* http://www.ila-hq.org/en/committees/index.cfm/cid/30.

82. *Id.*

83. North Sea Continental Shelf (Ger. v. Den.; Ger. v. Neth.) 1969 I.C.J. 3, ¶ 77 (Feb. 20).

84. *Id.*

85. *Id.*; *see also* ICL 61st Sess., *Comments from Governments*, *supra* note 30, ¶ 53 (noting that government officials from the Russian Federation have said 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").

86. Questions Relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.), 2012 I.C.J. 423, ¶¶ 37–38 (July 20) (separate opinion of Judge Abraham) (emphasis added).

prosecute or extradite has gained customary status.[87] While some States believe the obligation is based only on treaties and does not have customary character, others argue that it has gained customary status, at least for crimes such as genocide, CAH, war crimes, torture, and terrorism.[88] Still, other States acknowledge that "grounds to claim" that an obligation is acquiring customary international law status, at least as to certain crimes, is 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).[89]

In 2009, the delegate from Argentina emphasized that "[w]hile there existed an *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]."[90] 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."[91] 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.

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.[92] 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."[93]

Significantly, in 2013, the Working Group established by the

87. *Third Rep. on the Obligation to Extradite or Prosecute* (Aut Dedere Aut Judicare), *supra* note 24, ¶ 98.

88. *Id.*

89. *Id.*

90. *Id.*

91. ICL 61st Sess., *Comments from Governments*, *supra* note 30, ¶ 51.

92. Questions Relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.), 2012 I.C.J. 423, ¶ 39 (July 20) (separate opinion of Judge Abraham).

93. *Id.*

International Law Commission on the Obligation to Extradite or Prosecute abandoned a study of whether an obligation exists in customary international law.[94] Conducting a review of the history of the 1996 Draft Code of Crimes Against the Peace and Security of Mankind, the Working Group noted that the obligation contained within the Code 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*."[95] The Working Group decided to examine, instead, the obligation as it exists in treaties and attempted to identify where gaps exist in the current regime.[96]

B. RECENT ICJ JURISPRUDENCE

In *Belgium v. Senegal*, the ICJ specifically discussed 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 individuals who commit the crime of torture.[97] The Court held that the determination of whether or not a customary obligation to extradite or prosecute fell outside of its jurisdiction since the dispute between the State parties did not relate to breaches of obligations under customary international law.[98] In its 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 various crimes which Habre was accused of committing, including CAH, genocide, and war crimes.[99] Arguably, Belgium's failure to rely on a customary international law obligation to extradite or prosecute 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 a relevant norm in their interactions with other States regarding perpetrators of serious international crimes.

Furthermore, in his separate opinion, Judge Abraham emphasized that he believed the evidence presented during the proceedings did "not come close to establishing the existence of a general practice and an

94. Rep. of the Int'l Law Comm'n, *supra* note 3, Annex A, ¶¶ 4, 20 (internal citations omitted).

95. *Id.*

96. *Id.*

97. Questions Relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.), 2012 I.C.J. 423, ¶¶ 54–55 (July 20).

98. *Id.* ¶ 55.

99. *Id.* ¶ 54.

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."[100]

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.[101]

Certain crimes may reach *jus cogens* status, for example, because they threaten the peace and security of humankind or shock the conscience of humanity.[102] A crime can become *jus cogens* based on widespread international practice and on the *opinio juris* of States.[103] 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.[104]

Assuming the prohibition against CAH is a *jus cogens* norm, then it is one from which no State can derogate.[105] 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."[106]

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.[107] When an international crime is

100. *Id.* ¶ 25; *see also* Questions Relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.), 2012 I.C.J. 423, ¶ 32 (Jul. 20) (Sur, J., dissenting) (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").

101. Cherif Bassiouni, *International Crimes: Jus Cogens and Obligatio Erga Omnes*, 59 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 be modified only by a subsequent norm of general international law having the same character").

102. Bassiouni, *supra* note 101, at 69.

103. Questions Relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.), Judgment, 2012 I.C.J. 422, 457 (July 20).

104. Bassiouni, *supra* note 101, at 68.

105. BASSIOUNI & WISE, *supra* note 5, at 54 (emphasis added).

106. *Id.* (emphasis added).

107. Prosecutor v. Anto Furund'ija, Case No. IT-95-17/1-T, Judgement, ¶ 151 (Int'l

recognized as *jus cogens*, the "threshold question" is the effect of the obligations *erga omnes* now imposes on States to proceed against alleged offenders of that crime.[108] 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 rights.[109] The duties that attach would include the obligation to extradite or prosecute, the non-applicability of statutes of limitations, and 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.[110]

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 specific State obligations.[111] 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 impose the obligation to extradite or prosecute.[112] The former does not necessarily give rise to the latter.[113]

In the majority opinion, the judges also declined to extend the

---

Crim. Trib. for the Former Yugoslavia Dec. 10, 1998) ("[T]he 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.").

108. Bassiouni, *supra* note 101, at 65 ("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 [not] been resolved in international law . . . .").

109. *Id.*

110. *Id.* at 65–66.

111. Questions Relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.), Judgment, 2012 I.C.J. 422 (July 20).

112. *See id.* at 477 (separate opinion of Judge Abraham); *see also id.* at 615 (dissenting opinion of Judge Sur) ("[T]he 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.").

113. Questions Relating to the Obligation to Prosecute or Extradite (Belg. v. Sen.), Judgment, 2012 I.C.J. 422 (July 20) (separate opinion of Judge Abraham).

obligation to extradite or prosecute to acts of torture that occurred before the Convention Against Torture (CAT) entered into force in Senegal.[114] 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."[115] This language implies the right or authority to prosecute or extradite for crimes that fall outside the jurisdiction of the treaty, rather than a non-derogable duty.[116]

Other international tribunals have discussed the impact of *jus cogens* norms on State responsibilities related to the norms. In *Prosecutor v. Furund'ija*,[117] 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.[118] 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."[119] 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,"[120] but prohibit States from prosecuting and punishing offenders.[121] 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.[122] Finally, the ICTY notes that it "would seem that other consequences"[123] of a *jus cogens* norm would include that the crime of torture not be subject to a statute of limitations and not be excluded under a political offense exemption. Even so, the ICTY refrained from labeling these consequences as clear, evident, or well defined.[124]

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.[125] In *Goiburas v. Paraguay*,[126] the Court

114. *Id.* at 457.

115. *Id.* at 458.

116. *Id.*

117. Prosecutor v. Anto Furund'ija, Case No. IT-95-17/1-T, Judgement (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998).

118. *Id.* ¶ 153–57.

119. *Id.* ¶ 156 (emphasis added).

120. *Id.*

121. *Id.*

122. *See id.* ¶ 156.

123. *Id.* ¶ 157.

124. *See id.*

125. *E.g.*, Goiburu v. Paraguay, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 153, ¶ 128 (Sept. 22, 2006).

held that the States party to the American Convention are bound to extradite or prosecute individuals responsible for torture and enforced disappearances because they "occurred in a context of the systematic violation of human rights," which constitute CAH.[127] 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."[128] 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."[129] Thus, it cannot be said that the Court found an independent obligation to extradite or prosecute that arises from customary international law when a particular offense is condemned as *jus cogens*.

B. RELATIONSHIP BETWEEN *JUS COGENS* AND OTHER NON-CONFLICTING NORMS

The second major principle that can be drawn 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.[130] As explained by the ICJ, "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 concept of *jus cogens* which would require their modification or would displace their application."[131]

Bassiouni specifically rejects the idea that immunities could override the obligation to extradite or prosecute, which is an *erga omnes*

126. Goiburu v. Paraguay, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 153 (Sept. 22, 2006).

127. *Id.*

128. *Id.*

129. *Id.* ¶ 132. The Judgment also notes that the universal international obligations include the U.N. Charter, the Geneva Conventions, the Genocide Convention, and General Assembly Resolutions and Declarations. *Id.* at 84 n.87.

130. Jurisdictional Immunities of the State (Ger. v. It.), 2012 I.C.J. 99, ¶ 95–97 (Feb. 3) ("[E]ven 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.").

131. *Id.* ¶ 95.

obligation for all *jus cogens* crimes, such as CAH.[132] Bassiouni also includes statutes of limitations and the failure to exercise universal jurisdiction over CAH, no matter where the crimes were committed, as *erga omnes* obligations are non-derogable duties imposed on the State.[133] In other words, Bassiouni takes the position that these other aspects of international law – immunities, universal jurisdiction, and 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.[134] As such, in Bassiouni's view, 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*.[135]

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 honor the *jus cogens* norm. Questions of immunity, jurisdiction, statutes of limitations, or definitions of CAH in national legislation are among those unanswered by the mere fact that a crime has been designated as *jus cogens*. The ICJ made it clear that 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.[136] 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 *jus cogens* nature of a crime necessarily means that the obligation to extradite or prosecute displaces other norms that may hinder its enforcement.[137] In *Al-Adsani v. United Kingdom*,[138] all judges of the

132. Bassiouni, *supra* note 101, at 65–66.

133. *Id.*

134. *Compare id.*, *with* Jurisdictional Immunities of the State (Ger. v. It.), 2012 I.C.J. ¶ 95.

135. Bassiouni, *supra* note 101, at 65–66.

136. *See supra* text accompanying notes 22–23.

137. *E.g.*, Al-Adsani v. United Kingdom, App. No. 35763/97, 34 Eur. Ct. H.R. 273, http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-59885 (last visited Sept. 20, 2014).

138. *Id.*

European Court of Human Rights agreed that torture is a non-derogable *jus cogens* crime, but they split on whether that means that its status would negate the application of State immunity.[139] The majority held that the *jus cogens* nature of the prohibition of torture did not displace State immunity in a civil suit for damages.[140] In a separate concurring opinion, two judges argued that practical considerations must be kept in mind when considering an absolute priority of the prohibition against torture in every situation.[141] The two judges reasoned that in order to achieve international cooperation, "including cooperation with a view to eradicating the vice of torture, presupposes the continuing existence of certain elements of a basic framework for the conduct of international relations."[142]

In strongly worded dissents, six judges argued that by the very nature of a *jus cogens* norm, a State "cannot invoke hierarchically lower rules (in this case, those on State immunity) to avoid the consequences of the illegality of its actions."[143] These judges emphasize that "[i]n the event of a conflict between a *jus cogens* rule and any other rule of international law, the former prevails."[144] The majority agreed with this assertion, but it found that, due to the distinction between civil and criminal proceedings, the *jus cogens* nature of the prohibition on torture has different implications on the obligations of the State.[145]

Similar to the disagreement among the judges in *Al-Adsani*, it is unlikely that States will ever come to a consensus that certain *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. A recent example illustrates the sensitivity of accusing government officials of serious international crimes and the impact such accusations can have on diplomatic relationships between States. In 2003, Belgium brought proceedings against senior United States political and military officials, including President George H.W. Bush, for war crimes under Belgian universal jurisdiction provisions.[146] Despite the nature of the crimes alleged, the United States immediately rebuked Belgium, threatening to move the headquarters of the North Atlantic Treaty Organization away from

139. *Id.* ¶ 66.

140. *Id.*

141. *Id.* at 25 (Pellonpaa, J., concurring).

142. *Id.* at 27.

143. *Id.* at 30 (Rozakis & Caflish, JJ., dissenting).

144. *Id.*

145. *Id.* at 31 ("It is not the nature of the proceedings which determines the effects that a *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 lower rule.").

146. Brady & Mehigan, *supra* note 6, at 80; Hood & Cormier, *supra* note 62, at 246.

Brussels.[147] In response, Belgium subsequently enacted new legislation limiting the scope of Belgium's universal jurisdiction.[148] This situation illustrates that, despite the desire by Bassiouni and others that immunity not displace the obligation to prosecute or extradite – at least for the most egregious international crimes – State practice is not congruent with that position.[149] This example also highlights the need for specific provision regarding the obligation to extradite or prosecute in a CAH Convention.

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.[150] However, for an obligation to be one of customary international law, State practice must be consistent and widespread and must be motivated by a sense of *opinio juris*, not solely out of a desire to fulfill a treaty obligation or for any other reason, such as political considerations.[151] As demonstrated throughout this paper, neither of those conditions is fulfilled regarding an obligation to extradite or prosecute for CAH.

Trying to progressively develop the concept of an obligation to extradite or prosecute, a Special Rapporteur of the International Law Commission began to draft articles in 2007 that would articulate the obligation.[152] However, due to the "diversity in the formulation, content, and scope of the obligation to extradite or prosecute in conventional practice,"[153] the effort at drafting specific articles related to the obligation seems to have been abandoned.[154] 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

147. *See US Attacks Belgium War Crimes Law*, BBC NEWS (June 12, 2003, 21:29 GMT), http://news.bbc.co.uk/2/hi/europe/2985744.stm.

148. *Id.*

149. *Compare* Bassiouni, *supra* note 101, at 65–66, *with* Brady & Mehigan, *supra* note 6, at 80, *and* Hood & Cormier, *supra* note 62, at 246, *and US Attacks Belgium War Crimes Law*, *supra* note 147.

150. *See supra* text accompanying notes 68–71.

151. *See* North Sea Continental Shelf, 1969 I.C.J. 3, ¶ 77.

152. *See* Special Rapporteur, *Second Rep. on the Obligation to Extradite or Prosecute* (Aut Dedere Aut Judicare), Int'l Law Comm'n, U.N. Doc. A/CN.4/585, ¶ 76 (June 11, 2007) (by Zdzislaw Galicki).

153. Rep. of the Int'l Law Comm'n, *supra* note 3, Annex A, ¶ 18.

154. *Id.*

prosecute best suits their objective in a particular circumstance."[155]

Abandoning draft articles devoted to the obligation to extradite or prosecute is a reasonable course of action.[156] 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.[157] 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.

Still, the lack of draft articles means that the gaps in the enforcement of egregious international criminal offenses, such as CAH, remain.[158] Additionally, the inconsistency, fluctuation, and discrepancy in State practice, and lack of *opinio juris* discussed throughout this paper demonstrates that no obligation yet exists as a matter of customary international law. Therefore, in order to help close the enforcement gaps, an effort to establish a Convention on CAH should include an obligation to extradite or prosecute imposed on State parties.[159]

---

155. *Id.*; *see also Survey of Multilateral Conventions*, *supra* note 41, ¶ 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.").

156. *See* Rep. of the Int'l Law Comm'n, *supra* note 3, Annex A, ¶ 18.

157. *Id.*

158. *See id.* Annex B, ¶ 1.

159. *See* Olson, *supra* note 6, at 326 (emphasis added) ("Given 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.").