UNIVERSAL JURISDICTION

A PRACTICE GUIDE

PART ONE | Theory

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THE THEORY OF UNIVERSAL JURISDICTION

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To understand the use of universal jurisdiction in any State, including the United States, an understanding of the concept of universal jurisdiction and how it is related other to other concepts of international law is of the utmost importance.

I. The Doctrine of Universal Jurisdiction in International Law

Universal jurisdiction—the jurisdiction over "acts committed outs*ide* [States'] territory by non-nationals whose victims also were not their nationals"[1]—arises in particular situations "where the circumstances, including the nature of the crime, justify the repression of some types of crime as a matter of international public policy."[2] The common notion of universal jurisdiction among the international legal community is reflected in Section 404 of the *Restatement (Third) of American Foreign Relations Law*, which declares:

> A state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genoc*ide*, war crimes, and perhaps certain acts of terrorism, even where none of the bases of jurisdiction indicated in § 402 is present.[3]

From this perspective, universal jurisdiction is essentially a function of jurisdiction to adjudicate crimes defined under international law.

The concept of jurisdiction, whether it is applied to civil or criminal matters, includes the authority to stipulate or create laws, the authority to resolve legal disputes, and the authority to enforce legal determinations or verdicts.[4] It also includes the manner in which jurisdiction can be exercised over an individual. Historically, such powers have been reserved to sovereign States.[5] Recognizing the importance of preventing disputes between States, as well as the need to provide consistency and predictability within the law to protect

1 Louis Henkin, Gerald L. Neuman, Diane F. Orentlicher & David W. Leebron, Human Rights 657 (1999).
2 Ian Brownlie, Principles of Public International Law 305 (7th ed. 2008); see also Máximo Langer, The Diplomacy of Universal Jurisdiction: The Political Branches and the Transnational Prosecution of International Crimes, 105 Am. J. Int'l L. 1, 1 (2011) ("The jurisdictional claim is predicated on the atrocious nature of the crime and legally based on treaties or customary international law.").
3 Restatement (Third) of the Foreign Relations Law of the United States §404.
4 M. Cherif Bassiouni, The History of Universal Jurisdiction [hereinafter Bassiouni, History of Universal Jurisdiction], in Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes under International Law 39, 40 (Stephen Macedo ed., 2004).
5 Id. at 40.

individuals from abuses arising out of multiple prosecutions for the same conduct, the roles of sovereignty, jurisdiction, and territory have traditionally been closely related.[6] According to Cedric Ryngaert:

> The law of jurisdiction is doubtless one of the most essential as well as controversial fields of international law, in that it determines how far, *ratione loci*, a State's laws might reach. As it ensures that States, especially powerful States, do not assert jurisdiction over affairs which are the domain of other States, it is closely related to the customary international law principles of non-intervention and sovereign equality of States.[7]

However, the universality principle[8] is based entirely on the nature of the crime without taking into account where the crime had taken place, the alleged or convicted perpetrator's nationality, victim's nationality, or any other relation the State may have the right to exercise such jurisdiction, which in itself may confer jurisdiction[9] to any State willing to prosecute the act in question.[10]

The uncontroversial crimes that are most often subject to universal jurisdiction in a majority of domestic, regional and international courts and tribunals are:

- crimes against humanity
- genocide
- war crimes[11]
- torture[12]

6 Id.
7 Cerdic Ryngaert, Jurisdiction in International Law 6 (Catherine Redgwell, Dan Sarooshi, Stefan Talmon eds., 2d ed. 2015).
8 The concept of universal jurisdiction surpasses traditional State sovereignty, which has been the historical ground for national criminal jurisdiction. Cherif Bassiouni in the History of Universal Jurisdiction, has identified two positions justifying the expansive reach of universal jurisdiction, including "the normative universalist position" and "a pragmatic policy-oriented" position. The normative universalist position acknowledges that certain core values exist and are shared throughout the international community. Such values are deemed significant enough to supersede standard territorial limits on the exercise of jurisdiction. A pragmatic policy-oriented position is conscious of the fact that occasionally certain shared international interests exist that call for an enforcement mechanism not restricted to State sovereignty (supra note 4, at 42).
9 The Principles on Universal Jurisdiction princ. 1(1), at 28 (Stephen Macedo ed., Princeton Univ. Program in Law & Pub. Affairs 2001) [hereinafter, Princeton Principles], available at https://lapa.princeton.edu/hosteddocs/unive_jur.pdf.
10 Ryngaert, supra note 7, at 120.
11 See id. at 5–6, for an understanding of what constitutes war crimes, which are primarily "defined in the Four Geneva Conventions and their Protocols" and "some of the most serious war crimes include killing of prisoners or civilians, torture, conducting unfair trials, unlawful deportation or transfer, the taking of hostages, and attacks on the civilian population." Id.
12 In an in-depth 2012 survey, Amnesty International examined 193 UN member States, finding that 147 (approx. 76.2%) out of 193 member States have provided for universal jurisdiction over one or more of the following crimes—war crimes, crimes against humanity, genocide and torture.

Amnesty International, Universal Jurisdiction: A Preliminary Survey of Legislation Around the World – 2012 Update 2 (2012), available at https://www.amnesty.org/en/documents/ior53/019/2012/en/.

As one can clearly observe these crimes are not only subject to universal jurisdiction, but represent norms of *jus cogens*, which makes them obligations *erga omnes* too.[13]

States appear to be broadening the scope of their jurisdiction to encompass crimes such as war crimes, crimes against humanity, genocide and torture.[14] For instance, in 1999 Belgium was almost completely alone in granting its courts the power to exercise universal jurisdiction over such crimes as genocide, crimes against humanity and war crimes in international armed conflicts; however, many other States, such as the United Kingdom and Germany, have now also adopted similar legislation.[15]

II. Understanding Universal Jurisdiction and ITs Place Within the realm of International Law

Universal jurisdiction and other areas of international law are interrelated. An understanding of how universal jurisdiction is interconnected with other theories of international law is thus necessary.

Subsection A will identify legally and non-legally binding customary norms of international law. Subsection B will look at the conflicting relationship between universal jurisdiction and legally binding customary norm, State Sovereignty. Subsection C identifies peremptory norms (or *jus cogens*), and briefly obligations *erga omnes*, considering their role in international normative hierarchy. Subsection D examines and presents an answer to whether universal jurisdiction is a legitimate legal implication for violations of *jus cogens* norms. Finally, Subsection E distinguishes between *aut dedere aut judicare* and universal jurisdiction.

13 While this is not a comprehensive list of all jus cogens norms traditionally exposed to universal jurisdiction (other notable jus cogens norms that would traditionally be subject to universal jurisdiction include the crime of aggression and piracy) there is an apparent relation between States subjecting perpetrators that breach norms of jus cogens, and therefore, obligations erga omnes, to universal jurisdiction. Furthermore, while some scholars have argued that these crimes do not automatically bring about the right of every State to exercise universal jurisdiction, others suggest that the act of States prosecuting genocide, torture, piracy, slavery, the crime of aggression, war crimes and crimes against humanity as crimes of universal jurisdiction has sufficient State practice and opinio juris to constitute customary international law (both arguments are discussed in further detail in Subsection D below).

14 See generally Amnesty Int'l, supra note 16; see also A. Hays Butler, The Growing Support for Universal Jurisdiction in National Legislation, in Universal Jurisdiction: National Courts and the Prosecution of Serious Crimes under International Law 67, 67 (Stephen Macedo ed., 2004).

15 Butler, supra note 19, at 67.

A. The Role of Custom in International Law

1. Identifying Legally & Non-Legally Binding Customary Norms of International Law

The international legal system is generally defined by its nature, as well as its function.[16] This notion is derived from the commonly accepted view that "public international law is the aggregate of the legal norms governing international relations."[17] Accordingly, its nature is meant to be an "a*ggregate of the legal norms*" that determine what States and individuals are required to do (prescriptive norms), required not to do (prohibitive norms),[18] or provided the option to do or not do (permissive norms).[19] Its functions on the other hand are found to exist in "*governing international relations*."[20] International law therefore serves as both a "normative order" and "factor of social organization."[21]

While international norms derived from custom comprise much of the international legal system, some customary norms are legally binding upon States, whereas others are considered non-legally binding even though they may be widely practiced.[22] This is because many non-legally binding norms obtain widespread State practice due to feelings of moral obligation or political expectancy, rather than a sense of legal obligation.[23] According to the International Court of Justice, legally

16 Prosper Weil, Relative Normativity in International Law?, 77 Am. J. Int'l L. 413 (1983).
17 1 P. Guggenheim, Traité de Droit International Public 1 (2d ed. 1967), translated in Weil, supra note 30, at 413.
18 See G.I. Tunkin, Remarks On the Judicial Nature of Customary Norms of International Law, 49 Calif. L. Rev 419, 420–22 (1961), for a discussion about how customary norms of international law can stem from both widespread international State practice, as well as widespread non-practice. Tunkin states that "as a rule, it is much easier, of course, to establish the existence of a customary norm of international law in the presence of positive actions by states, but there is no reason to deny the possibility of a customary norm of international law being established by the practice of abstinence from action." Id. at 421. To support his contention, Tunkin cites to Professor Basdevant's 1927 address to the Permanent Court of Justice on behalf of France in the famous "Lotus" case where he discusses whether abstinence from action can amount to a customary norm of international law, stating: "The custom observed by states to refrain from prosecuting foreign citizens charged with causing collision of vessels in the open sea constitutes a customary norm of international law." Id. (quoting The Case of the S.S. Lotus, P.C.I.J., ser. A, No. 10, at 25 (1927)).
19 Weil, supra note 30, at 413.
20 Id.
21 1 C. Rousseau, Droit International Public 25–26 (1971), translated in Weil, supra note 30, at 413.
22 See Abram Chayes & Antonia Chayes, The New Sovereignty 8–9 (1995), for an understanding of how a "social norm" may be practiced widely among States although it is not legally binding upon them
23 See Hunter, Salzman & Zaelke, supra note 28, at 308–9.

binding customary norms—referred to as customary norms of international law— are to be found, "primarily in the practice and *opinio juris* of States."[24] For an international norm to be regarded as a customary norm of international law, making it legally binding on all States, it requires:

1. widespread repetition of similar international acts by States over a considerable period of time (or *State practice*);

2. such acts be widely practiced because States believe they have a legal obligation to do so (or *opinio juris*); and

3. these acts are practiced by a significant number of States, while not being rejected by a significant number of States.[25]

Therefore, in order for a customary norm of international law to exist, there must be clear evidence of widespread State practice, *opinio juris*, and few "persistent objectors."[26] If it is evident that an international norm meets the above criteria, then that norm is considered binding customary international law, and thus all States are legally bound to it.

The approach for evaluating if a norm constitutes a legally binding norm of customary international law is empirical rather than normative—which is to say it requires one to explain "what law is" through observation *lex lata*) rather than "what law should be" (*lex ferenda*).[27] In order to identify whether a customary norm of international law is either legally binding or non-binding, it is critical to identify those sources that provide evidence of State practice and *opinio juris*.

24 Continental Shelf (Libya/Malta), 1985 I.C.J. 13, ¶ 27 (June 3).
25 Hoffman & Rumsey, supra note 26, at 113–14.
26 See Hunter, Salzman & Zaelke, supra note 28, at 309, for an explanation of what constitutes a "persistent objector." Hunter, Salzman and Zaelke explain that once a customary norm of international law is established "it becomes binding on all States, regardless of whether those States contributed to the formation of the custom," including "those States that did not follow the practice or express a belief that the practice was law will be bound by the rule." Id. However, under the traditional view of the persistent objector, "a State may exclude itself from the obligations of a particular customary rule by persistent conduct exhibiting an unwillingness to be bound by the rule of a refusal to recognize it as law." Id. (citing Restatement (Third) of Foreign Relations Law of the United States, § 102, cmt. b (1987)).
27 Daniel Bodansky, Customary (and Not So Customary) International Environmental Law, 3 Ind. J. Global Legal Stud. 105, 108–109 (1995).

1. Evidence of State Practice and *Opinio Juris*[28]

There is no precise definition of State practice. The ICJ requires "practice to be both extensive and virtually uniform and include those States that are particularly affected" by the norm in question.[29] Furthermore, neither a timeframe, nor rigorous or consistent conformity to the norm is necessary for State practice to be evident.[30] However, Hunter, Salzman and Zaelke maintain that it must be apparent "that State conduct which is inconsistent with the customary practice has generally been treated as a breach of a rule."[31] Determining whether sufficient State practice has been consistent enough to confirm widespread customary State practice relies on the particular facts of the case.[32]

After an international norm has achieved widespread State practice, it must fulfill a second condition—*opinio juris*—prior to becoming a customary norm of international law. *Opinio juris* requires that such a norm be generally followed because States view it as a part of international law.[33] In order to determine whether *opinio juris* exists, legal scholars and practitioners rely on various sources as evidence of its existence. The evidentiary sources relied on for *opinio juris* can also provide evidence of widespread State practice. Hunter, Salzman and Zaelke maintain that *opinio juris* is a "factual matter" that can be established by considering a wide variety of evidence, including:

> Diplomatic correspondence, government policy statements and press releases, opinions of official legal advisors, official manuals on legal questions, comments by governments on drafts produced by the International Law Commission, national legislation, international and national judicial decisions, legal briefs endorsed by the States, a pattern of treaties in the same form, resolutions and declarations by the United Nations, and other evidence.[34]

Such evidentiary sources would suggest that State practice stems from a States belief that it is legally obligated to follow the customary norm in question. Most customary norms of international law involve the interests of States.

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28 See [1950] 2 Y.B. Int'l L. Comm'n 367, U.N. Doc. A/CN.4/Ser.A/1950/Add.1 (1957), for a description of what the ILC identified as evidentiary sources that illustrate State practice and customary international law. The ILC report included texts of international instruments, decisions of international courts, decisions of national courts, national legislations, diplomatic correspondence, opinions of national legal advisers, and practice of international organizations.

29 Hunter, Salzman & Zaelke, supra note 28, at 308.

30 Id. at 308–309.

31 Id. at 309.

32 Id.

33 See Christian Dahlman, The Function of Opinio Juris in Customary International Law, 81 Nordic J. of Int'l L. 327 (2012), for a discussion on the function of opinio juris and an argument defending a weak version of the acceptance theory being applied to the concept of opinio juris, which supports the notion that a State's approval of a generally practiced norm is not required for a State to be legally bound by it. In addition, Dahlman claims, "The purpose of opinio juris is to prevent such a practice from being elevated to customary law. It is a filter that stops generally unwanted practice from becoming customary international law." Id. at 328.

34 Hunter, Salzman & Zaelke, supra note 28, at 309.

B. Conflicting Concepts of Universal Jurisdiction & State Sovereignty

Universal jurisdiction can fill a jurisdictional gap that may be required to hold perpetrators of international crimes accountable for their acts. However, as Cherif Bassiouni has rightfully pointed out, universal jurisdiction has been exercised in competition with other theories of jurisdiction[35] and other norms of customary international law, such as State sovereignty, in the past, and the odds that the doctrine will continue to conflict in this manner are virtually guaranteed.

State sovereignty is a widely acknowledged, legally binding customary norm of international law that shapes all international law,[36] including international human rights law. It is a norm that shapes global human rights instruments and has also been a key obstacle to States exercising universal jurisdiction over such crimes as genocide, torture, crimes against humanity and war crimes. There is an apparent fundamental tension between the interest of States to safeguard their sovereignty (i.e., their independence) and the acknowledgment that certain dilemmas, such as holding perpetrators of such crimes accountable for his or her offenses, call for international cooperation.[37]

Universal jurisdiction poses a significant conceptual and practical challenge to the widely held and practiced customary norm of state sovereignty. To put it simply, the customary norm of State sovereignty "reflects a broad sweep of responsibilities, rights, authorities and powers that international law confers when it confers 'Statehood.'"[38] A significant right that applies to statehood is the concept of sovereign equality, meaning that all States are regarded, and therefore treated, equally as legal actors in international law.[39] According to the 1970 UN Declaration on International Law, "[a]ll States enjoy sovereign equality."[40] Various elements of sovereign equality referred to in 1970 UN Declaration on International Law that are particularly critical in the universal jurisdictional context, including:

35 Bassiouni, History of Universal Jurisdiction, supra note 4, at 40.
36 See Hunter, Salzman & Zaelke, supra note 28, at 442.
37 Hunter, Salzman & Zaelke, supra note 28, at 442–43.
38 Id. at 443.
39 Id.
40 G.A. Res. 2625 (XXV), annex, Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance With the Charter of the United Nations (Oct. 24, 1970) [hereinafter 1970 UN Declaration on International Law].

1. States are *judicially equal*;

2. Each State enjoys the rights inherent in full sovereignty;

3. The territorial integrity and *political independence* of the State are inviolable;

4. Each State has the right freely to choose and develop its *political*, social, economic and cultural systems;

5. Each State has the duty to comply fully and in good faith with *its international obligations and to live in peace with other States.*[41]

From these elements of sovereign equality, it is apparent that the binding customary norm of State sovereignty will continue to impact the use of universal jurisdiction in international, regional, and domestic courts. We will discuss the practical implications of this tension throughout this *Practice Guide*.

C. Norms of *Jus cogens* in the International Normative Hierarchy

The doctrine of universal jurisdiction and other elements of international law often appear as interconnected with one another. Examples of this interconnectedness that are most noticeable include the relationship between peremptory norms (or *jus cogens*) and obligations *erga omnes*[42] and universal jurisdiction.

1. Identifying Peremptory Norms *(Jus cogens)* in International Law

Peremptory norms or *jus cogens* are an enigma in international law, and few academics or practitioners, if any, would contest this characterization. Sir Ian Sinclair's final remark in his section on *jus cogens* in his 1984 book detailing the Vienna Convention on the Law of Treaties undoubtedly captures the uncertainty of

41 1970 UN Declaration on International Law supra note 55 (emphases added).

42 Some international rules specify obligations owed to the international community as a whole that are so-called obligations erga omnes. Similar to jus cogens norms there is no universal agreed-upon list identifying erga omnes obligations. In actuality, what constitutes obligations erga omnes is even less clear. Obligations erga omnes, unlike jus cogens norms (discussed below), are considered obligations governed by the binding customary international norm of State responsibility.

The norm of State responsibility is broad and often refers to violations of all obligations under international law. Because obligations erga omnes are commonly related to norms of customary international law, or explicitly referred to as such in international agreements, not all international obligations raise to the class of erga omnes. Moreover, while all jus cogens norms are erga omnes obligations not all erga omnes obligations are considered jus cogens norms. Most of the literature suggests that those erga omnes obligations not in the same class as jus cogens norms may not be subject to universal jurisdiction. What is clear, though, is that the two concepts are interrelated and that it is an erga omnes obligation that a State prosecutes violations of jus cogens norms regardless of jurisdiction. See discussion at infra Subsection D.4.

this body of international law, "the mystery of *jus cogens* remains a mystery."[43] Some norms, however, are widely regarded as *jus cogens*. According to International Law Commission ("ILC"):

> The most frequently cited examples of *jus cogens* norms are the prohibition of aggression, slavery, and the slave trade, genocide, racial discrimination, apartheid and torture, as well as basic rules of international humanitarian law applicable in armed conflict, and the right to self-determination. Also, other rules may have a *jus cogens* character inasmuch as they are accepted as a whole as norms from which no derogation is permitted.[44]

Some scholars observe the Trials of the Major War Criminals at Nuremberg as the first introduction of *jus cogens* through natural law.[45] However, the terms "peremptory norm" and "*jus cogens*" first appeared in written format in the Vienna Convention on the Law of Treaties (VCLT), which was adopted on May 23, 1969.[46] Article 53 of the VCLT defined peremptory norm (or *jus cogens*) as "a norm accepted and recognized by the international community of states as whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character." [47]Since the VCLT did not include examples of norms of *jus cogens*, many scholars and practitioners view the formal definition of *jus cogens* in Article 53 as an established formula used to test whether a norm qualifies as a norm of *jus cogens*.[48]

To qualify as a norm of *jus cogens*, a norm must satisfy three tests outlined in Article 53 of the VCLT: the norm in question must be (a) "accepted and recognized by the international community of States as a whole" as a norm for which (b) "no derogation is permitted," and which (c) "can be modified only by a subsequent norm of general international law having the same character."[49] Though Article 53 of the VCLT provides a formula, it does not provide a definition or a list of norms that fall under the category of *jus cogens*. Therefore,

43 Ian Sinclair, The Vienna Convention on the Law of Treaties 226 (Manchester Univ. Press ed., 2d ed. 1984).
44 Int'l Law Comm'n, Fragmentation of International Law: Difficulties Arising From the Diversification and Expansion of International Law, Rep. of the Study Group of the Int'l Law Comm'n on Its Fifty-Eighth Session, ¶ 14, sec. 6(33), at 21, U.N. Doc. A/CN.4/L.702 (Jul. 18, 2006) [hereinafter 2006 ILC Study Group Report].
45 Alexander Orakhelashvili, Peremptory Norms in International Law 37 (Vaughan Lowe ed., Oxford Univ. Press 2008).
46 Vienna Convention on the Law of Treaties, art. 53, May 23, 1969, 1155 U.N.T.S. 344 [hereinafter VCLT]. The VCLT entered into force on January 27, 1980.
47 Id.
48 Maurizio Ragazzi, The Concept of International Obligations Erga Omnes 51 (Oxford Univ. Press ed. 1997).
49 Maurizio Ragazzi, The Concept of International Obligations Erga Omnes 51 (Oxford Univ. Press ed. 1997).

it is necessary to turn to scholarly publications to establish the distinct character of peremptory norms.[50]

A common theme appears to reside among these scholars, which is, unlike customary norms, norms of *jus cogens* must satisfy a categorical criterion in that they must protect the international community as a whole, not just State interests as customary norms often do. Domestic courts have also made a similar distinction between international custom and *jus cogens* norms, such as the United States Ninth Circuit Court of Appeals.[51] In *Siderman de Blake v. Republic of Argentina*, the court found *jus cogens* norms and customary international law "differed in one important respect" in that:

> Customary international law…rests on the consent of states…. *[J]us cogens* embraces customary laws considered binding on all nations and is derived from values taken to be fundamental by the international community, rather than from the fortuitous or self-interested choices of nations.[52]

The connection to community interest as distinctive from the individual interests of States is an essential element in determining whether a norm has a peremptory character. An inquiry must be made into whether a norm is intended to benefit a particular actor or the interest of the community.[53] It must be further asked whether derogation from this norm would ever be considered valid.[54] Thus, as proposed by Hannikainen, if a norm protects the international community interest and derogation from such a norm would result in a serious offense to that interest, the norm's peremptory character may be assumed.[55] It therefore can be presumed that the difference between customary norms of international law and norms of *jus cogens* is that the latter must fulfill the categorical criterion of protecting the interest of the international community as a whole, and it must "operate in an absolute and unconditional way"[56] from which derogation could never be permitted.

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50 Ian Brownlie has defined jus cogens as "rules of customary law which cannot be set aside by treaty or acquiescence but only by the formation of a subsequent customary rule of contrary effect." However, many scholars draw a distinction between the underlying purpose of jus cogens and that of customary norms of international law. Alexander Orakhelashvili maintains that "[t]he purpose of jus cogens is to safeguard the predominant and overriding interests and values of the international community as a whole as distinct from the interests of individual States." Prior to that Alan Brunder argued that norms of jus cogens embody "a transcendent common good of the international community, while jus dispositivum is customary law that embodies a fusion of self-regarding national interests." Furthermore, Lauri Hannikainen contends, "there is virtually no disagreement that the purpose of international peremptory law is to protect overriding interests and values of the international community of States." (Lauri Hannikainen, Peremptory Norms in International Law: Historical Development, Criteria, Present Status 4 (Helsinki 1988)). Most importantly, as Karl Zemanek has noted, jus cogens "do not protect the common values or interests of a random group of States but the basic values on which the international community as a whole is built."(Karl Zemanek, New Trends in the Enforcement of Erga Omnes Obligations, 4 Max Planck Y.B. of U.N. Law 1 (2000), 6).

51 Siderman de Blake v. Republic of Argentina, 965 F.2d 699 (9th Cir. 1992).

52 Id. at 715 (9th Cir. 1992).

53 Orakhelashvili, supra note 60, at 47.

54 Id.

55 Hannikainen, supra note 68, at 20.

56 Orakhelashvili, supra note 60, at 67.

D. Universal Obligation to Prosecute *Jus cogens* Violations

The theory of universal jurisdiction does not extend only to violations *jus cogens* norms.[57] The truth of the matter, however, is that the majority of judicial systems and State governments have traditionally been more willing to accept *jus cogens* norms as invoking universal jurisdiction if violated. Even then, courts, especially domestic courts, are uneasy to rule in favor of extending universal jurisdiction over suits alleging *jus cogens* violations brought by foreign nationals. Judges often appear more at ease determining treaty obligations than evaluating evidence of widespread State practice and *opinio juris* with respect to a proposed *jus cogens* norm.

This *Practice Guide* will argue that not only is universal jurisdiction a valid legal approach to prosecute violations of *jus cogens* norms, but also that all States are legally obliged, in theory, to uphold this customary standard—for which no derogation is permitted—when confronted with injured parties with no means of adequate access to justice. To support this contention this subsection will examine first the relation between norms of *jus cogens* and universal jurisdiction and the growing acceptance in the international community that violations of such norms establish universal jurisdiction.

1. The Doctrine of Universal Jurisdiction & Norms of Jus cogens

In 1991, the International Criminal Tribunal for the Former Yugoslavia ("ICTY") held that torture was a *jus cogens* norm, and in addition, that there was a clear interrelation between the normative character of *jus cogens* and the exercise of universal jurisdiction.[58] The ICTY stated:

> One of the consequences of the *jus cogens* character bestowed by the international community upon the prohibition of torture is that every State is entitled to investigate, prosecute, and punish … individuals accused of torture.[59]

This proposition was quickly put to the test in one of the most famous cases involving the exercise of universal jurisdiction: the *Pinochet* case.

57 See, e.g., Alvarez-Machain v. United States, 331 F.3d 604, 613 (9th Cir. 2003), rev'd, 542 U.S. 692 (2004) (declaring "given the non-derogable nature of jus cogens norms, it comes as no surprise that we have found that a jus cogens violation is sufficient to satisfy the 'specific, universal, and obligatory' standard. But the fact that a violation of this subcategory of international norms is sufficient to warrant an actionable claim under the ATCA does not render it necessary.")

58 Zimmermann, supra note 18, at 337.

59 Prosecutor v. Furundzija, Case No. IT-95-17/1-T, Judgment, ¶ 156 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998).

2. The Pinochet Case: Opening the Doors to the Universal Jurisdiction

The *Pinochet Case* showed how the international community viewed, and in some ways, came to accept the use of universal jurisdiction to prosecute violations of *jus cogens* norms. The case dealt with an attempt to hold General Augusto Pinochet, the former Chilean head of state from 1973 to 1990, legally accountable for the heinous acts he committed in violation of international human rights law while in power.[60] The *Pinochet* I case found a broad basis to prosecute international crimes constituting an affront to *jus cogens* norm, but that decision was overturned and subsumed by the *Pinochet III* holding, which found a narrower basis to hold Pinochet liable for torture.

Pinochet I

In the Pinochet I decision, Lords Nicholls, Steyn and Hoffman held that Pinochet did not have immunity from British courts with respect to allegations of torture, and thus, had no immunity to extradition. This finding was based on the argument that Pinochet's alleged crimes—violating the *jus cogens* norm against torture as well as Section 134 of the Criminal Justice Act that made torture a crime in the United Kingdom despite where it was committed or the nationality of the perpetrator—was an international crime not protected from judicial prosecution without regard to immunity for a former head of state, or territoriality of criminal law. [61]

Lord Steyn wrote:

> [T]he development of international law since the Second World War justifies the conclusion that by the time of the 1973 coup d'état, and certainly ever since, international law condemned genocide, torture, hostage taking and crimes against humanity (during an armed conflict or in peace time) as international crimes deserving of punishment. Given this state of international law, it seems to me difficult to maintain that the commission of such high crimes may amount to acts performed in the exercise of the functions of a Head of State.

Pinochet III

As noted, *Pincohet* I was vacated by the House of Lords after complaints were directed against Lord Hoffman on the basis of bias. A new, seven-judge panel of law lords was convened to decide the fate of Pincohet.. Known as *Pinochet III*, this judgment ordered the extradition of Pinochet, but on much narrower grounds

60 See generally Naomi Roht-Arriaza, Pinochet Effect, The: Transnational Justice in the Age of Human Rights, (Univ. of Penn. Press ed., 2005).
61 See the Law Lords' Pinochet I decision, ex parte Pinochet Ugarte, 3 W.L.R. 1456;. See also Falk, supra note 81, at 113.

than *Pinochet I*. Six of the seven law lords concluded that a combination of U.K. domestic law and the Convention Against Torture treaty, which had been ratified by the United Kingdom, Spain, and Chile, made torture an offense subject to universal jurisdiction, for which there could be no immunity. Lord Millett would have gone significantly farther than the other law lords, postulating a firm relationship between *jus cogens* norms and universal jurisdiction that did not necessarily rely on either a treaty or domestic law.

> [C]rimes prohibited by international law attract universal jurisdiction under customary international law if two criteria are satisfied. First, they must be contrary to a peremptory norm of international law so as to infringe a *jus cogens*. Secondly, they must be so serious and on such a scale that they can justly be regarded as an attack on the international legal order.[62]

Lord Browne-Wilkinson came to a similar conclusion, as well as, alleging:

> The *jus cogens* nature of the international crime of torture justifies states in taking universal jurisdiction over torture wherever committed. International law provides that offences *jus cogens* may be punished by any state….[63]

According to Lord Millet, Lord Browne-Wilkinson and Ryngaert, violating a norm of *jus cogens* appears to be the sort of offense worthy of prosecution by any State through the use of universal jurisdiction. The rationale behind this belief is that the international community views such crimes in violation of *jus cogens* norms as so horrific that no rational State could possibly object to the use of universal jurisdiction to prosecute the perpetrator, because no State would feel as if its interests were harmed. Then, theoretically speaking, universal jurisdiction over such crimes would clearly be within a State's right under international law. This may not always be the case, though, especially when dealing with States' foreign relations, which is what

62 Law Lords' Pinochet IIII decision, ex parte Pinochet Ugarte , 38 I.L.M. at 649 (H.L. 1999).
63 Id. at 588.

exactly occurred between Chile, Spain and Britain in the case of Pinochet.[64]

However, some international law scholars and practitioners contend that this so-called *jus cogens* rationale, though conceptually plausible, is in reality an insufficient explanation for the exercise of universal jurisdiction and urge caution in that regard based on political realities and objections to a foreign court trying government officials for such crimes.[65]

3. The Doctrine of Universal Jurisdiction & Customary International Law

The following examples provide evidence of State practice and *opinio juris* with regards to the exercise of universal jurisdiction to prosecute violations of *jus cogens* norms under customary international law:

- The establishment by the Security Council of the United Nations of two ad hoc criminal tribunals for the former Yugoslavia (ICTY)—covering crimes of genocide, crimes against humanity, violations of laws or customs of war, and grave breaches of the Geneva Conventions, including enslavement, rape, sexual violence, torture and ethnic cleansing—and for Rwanda (ICTR)—involving genocide and crimes against humanity, including murder, extermination, enslavement, deportation, rape and persecutions on political, racial and religious grounds—and

64 Other scholars have also suggested that a clear relationship exists between invoking the doctrine of universal jurisdiction and a violation of norms of jus cogens. See for example Ryngaert, supra note 7, at 127–28, in which Cedric Ryngaert points to the apparent interconnectedness between the two areas of international law, claiming "Nowadays, the main offenses arguably amendable to universal jurisdiction are the so-called 'core crimes against international law' . . . . They are violations of jus cogens, and on that basis arguably subject to universal jurisdiction. Because any State is expected to prevent and punish such crimes, their being amendable to universal jurisdiction may not spark international protest." Id. Some international law scholars and practitioners contend that this so-called jus cogens rationale, though conceptually plausible, is in reality an insufficient explanation for the exercise of universal jurisdiction. These scholars suggest that jus cogens norms are not subject to universal jurisdiction simply because they are jus cogens; instead, these scholars argue that subjecting such offenses to universal jurisdiction has in itself become a principle of customary international law provided that sufficient evidence of widespread State practice and opinio juris exists. See, Ryngaert, (supra note 7, at 128) for a discussion on why the jus cogens rationale may be insufficient with regards to the argument that such offenses, what he refers to as core crimes, are automatically subject to universal jurisdiction. Ryngaert alleges that "conceptually, all States may indeed consider perpetrators of core crimes as hostes humani generis, and have no qualms about them being prosecuted by any State. In practice, however, qualms may abound. Because core crimes are typically committed by State actors using the State's machinery, they often have a highly political connotation. States may have a strong interest in not having their State actors hauled before foreign courts, and not having foreign courts indirectly pass judgment of their policies." Id. Thus, Ryngaert argues that "because foreign protest against assertions of universal jurisdiction is not unlikely… State practice and opinio juris in favor of universal jurisdiction ought to be specifically ascertained." Id.

Furthermore, other scholars and practitioners contend that while jus cogens norms are often associated closely with universal jurisdiction, that confining universal jurisdiction merely to jus cogens would be undesirable. For instance, The Princeton Principles of Universal Jurisdiction encourage States, international law institutions, practitioners, and scholars to make connections between other aspects of international law and universal jurisdiction (Lori F. Damrosch, Comment: Connecting the Threads in the Fabric of International Law, in UNIVERSAL JURISDICTION: NATIONAL COURTS AND THE PROSECUTION OF SERIOUS CRIMES UNDER INTERNATIONAL LAW 91, 91 (Stephen Macedo ed., 2004)).

This is evident through the following Princeton Principles, which claim that a State shall exercise universal jurisdiction in Principle 1(5) ("in accordance with its rights and obligations under international law"), Principle 2(1) (over "serious crimes under international law" including piracy, slavery, war crimes, crimes against peace, crimes against humanity, genocide and torture), and Principle 2(2) ("without prejudice to the application of universal jurisdiction to other crimes under international law") (Princeton Principles, supra note 8, princs. 1(5), 2(1)–(2), at 29; see also id. princs. 7, 9(2), at 31, 33).

It is worth noting that Principle 2(2) does not limit universal jurisdiction to the crimes involving jus cogens norms listed in Principle 2(1), which illustrates the desire to take a possibly more flexible approach to exercising universal jurisdiction over "serious crimes under international law." As international law scholar Lori Damrosch notes such flexibility is "desirable because it is far from obvious that we should exclude coverage of 'piracy like practices' (such as air terrorism)" (Damrosch, supra note 96, at 94).

Thus, it may be the case that universal jurisdiction is not only limited to jus cogens norms.

65 Ryngaert, supra note 7, at 128, for a discussion on why the jus cogens rationale may be insufficient with regards to the argument that such offenses, what he refers to as core crimes, are automatically subject to universal jurisdiction. Ryngaert alleges that "conceptually, all States may indeed consider perpetrators of core crimes as hostes humani generis, and have no qualms about them being prosecuted by any State. In practice, however, qualms may abound. Because core crimes are typically committed by State actors using the State's machinery, they often have a highly political connotation. States may have a strong interest in not having their State actors hauled before foreign courts, and not having foreign courts indirectly pass judgment of their policies." Id. Thus, Ryngaert argues that "because foreign protest against assertions of universal jurisdiction is not unlikely… State practice and opinio juris in favor of universal jurisdiction ought to be specifically ascertained." Id.

the jurisprudence developed by those two tribunals with respect to those crimes;

- The United Nations Transitory Authority for East Timor adoption of Regulation No. 15 (2000), creating special panels as part of the District Court in Dili and which were provided with universal criminal jurisdiction with regard to genocide, crimes against humanity, and war crimes;

- The creation of the Nuremberg International Military Tribunal and the International Military Tribunal for the Far East, and their prosecution of crimes against humanity, war crimes, and the crime of aggression, particularly over vigorous objection that such crimes (particularly aggression) may not have existed prior to the creation of the tribunals;

The Special Court for Sierra Leon;

- The jurisprudence of the Permanent Court of International Justice and of the International Court of Justice;

The Rome Statute of the International Criminal Court;

- The four Geneva Conventions of 1949 (i.e., Articles 49, 50, 129 and 146, respectively) and the first Additional Protocol (i.e., Article 85(1)),[66] establishing universal jurisdiction over grave breaches relating to the conduct of hostilities;

- Numerous State parties and signatories to the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (161 State parties and 9 State signatories),[67] the Convention on the Prevention and Punishment of the Crime of Genocide (147 State parties and 1 State signatory),[68] and the four Geneva Conventions (196 State parties)

66 See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 49, Aug. 12, 1949, 75 U.N.T.S. 31 [hereinafter First Geneva Convention]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, art. 50, Aug. 12, 1949, 75 U.N.T.S. 85 [hereinafter Second Geneva Convention]; Geneva Convention Relative to the Treatment of Prisoners of War, art. 129, Aug. 12, 1949, 75 U.N.T.S. 135 [hereinafter Third Geneva Convention]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 146, Aug. 12, 1949, 75 U.N.T.S. 287 [Fourth Geneva Convention]; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, art. 85(1), June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I].

67 See Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, arts. 5–8, Dec. 10, 1984, 1465 U.N.T.S. 85 [hereinafter Convention Against Torture].

68 See Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 (entered into force Jan. 12, 1951) [hereinafter Genocide Convention].

and Protocol I (147 State parties and 3 State signatories), to carry out their obligations under treaty have done so by enacting legislation that extends universal jurisdiction over such crimes.

- Domestic State practice (e.g., finding that 147 (approx. 76.2%) out of 193 U.N. member States have provided for universal jurisdiction over one or more of the following crimes—war crimes, crimes against humanity, genocide and torture).[69]

The fact that the international community has empowered tribunals, ratified treaties, and has not condemned, but rather accepted, State practice of enacting domestic legislation providing for universal jurisdiction over *jus cogens* violations is evidence that universal jurisdiction is widely accepted State practice and to establish the right of a State to prosecute breaches of *jus cogens* norms through universal jurisdiction.

Due to such substantial State practice and *opinio juris*, universal jurisdiction exercised over certain crimes, predominantly piracy, war crimes, crimes against humanity, the crime of aggression, genocide and torture,[70] must be afforded universal jurisdiction in international, regional and domestic courts as a principle of customary international law—particularly in situations where the victim of *jus cogens* violations is stripped of the right of access to justice because domestic remedies are either nonexistent, inadequate or ineffective.

4. The Doctrine of Universal Jurisdiction & Obligations *Erga omnes*

Lastly, this *Practice Guide* argues that obligations *erga omnes* require all States to criminalize *jus cogens* violations and prosecute such acts through the establishment of universal jurisdiction when domestic legal remedies fail in the country where the act took place. All *jus cogens* norms have the character of obligations *erga omnes*, which are "obligations of a State towards the international community as a whole."[71] Such obligations acquire hierarchical status due to the universal scope of their applicability. As the I.C.J. has ruled,

69 Amnesty Int'l, supra note 16.
70 Princeton Principles, supra note 8, princ. 2(1), at 29.
71 2006 ILC Study Group Report, supra note 59, ¶ 14, sec. 6(37), at 22.

"these rules concern all States and all States can be held to have a legal interest in the protection of the rights involved,"[72] and all States, "may invoke the responsibility of the State" in violation of such *erga omnes* obligations.[73]

Theoretically speaking, because *jus cogens* are norms for which no derogation is permitted, every State is obligated, regardless of any treaty, custom, or domestic law, to prosecute breaches of such norms since any legal instrument in opposition would ultimately be rendered void. And since no State may claim persistent objector status, any State rejecting or disregarding its *erga omnes* obligation to prosecute *jus cogens* violations through the use of universal jurisdiction—particularly in instances where insufficient access to domestic remedies exists, even in the absence of a call for action—would not only cause a State to breach its obligation but would cause it to commit a *jus cogens* violation.

While conceptually valid, this theory has not played out as such in practice, as many States passively refuse to uphold their obligations to enforce *erga omnes* obligations. However, this does not limit States or human rights legal scholars and practitioners from advancing or invoking the notion that the customary international right to access adequate justice, the principle of customary international law allowing States to prosecute violations of *jus cogens* norms through the use of universal jurisdiction, and the *erga omnes* obligation requiring States to do such, must be enforced or else they will be squandered and deadened by a State refusing to follow inherent international custom.

5. The Doctrine of Universal Jurisdiction & Right of Access to Justice

Untested in the Courts, but of potential use to possible victims of human rights abuses, is a theory of universal jurisdiction that rests on the idea that all people have a basic human right to access justice.

In terms of domestic and regional courts extending their jurisdictional reach to establish universal jurisdiction to remedy *jus cogens* violations, most courts require a foreign plaintiff to exhaust all domestic remedies first. When systematic *jus cogens* violations are present the perpetrator is usually the State or a State-actor,

72 See Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain) (Second Phase), Judgment, 1970 I.C.J. Rep. 3, 32, ¶ 33 (declaring that "…an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature, the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations erga omnes.").

73 2006 ILC Study Group Report, supra note 59, ¶ 14, sec. 6(37), at 22.

making it impossible for a victim to have access to justice at the domestic level. This is usually because of a combination of barriers, such as State immunity, blanket amnesty provided to former State officials, threat of State retaliation, the plaintiffs being refugees or asylum seekers residing abroad, collapse of social institutions, or lack of sufficient resources to provide adequate damages. It is therefore frequently the case that victims of *jus cogens* violations are barred from exercising their right of access to justice domestically, and they may be barred from exercising such rights abroad since foreign courts may refuse to establish universal jurisdiction due to the absence of any link between the victim, perpetrator or territory where the crime was committed and the foreign court in question. The recognition, however, of an individual's right of adequate and effective access to justice as a binding obligation on State parties in various international and regional instruments, and the continued expansion of State practice in implementing *forum necessitatis* to produce such a right out of a sense of a legal obligation, indicates that this right has ripened into customary international law.[74]

Scholars often point to States adhering to the doctrine of *Forum necessitatis* as evidence of an individual's right to access adequate and effective justice being customary international law.

- *Forum necessitatis* is a legal doctrine "allow[ing] proceedings to be brought when there would otherwise be no access to justice."[75]

- According to some scholars, "[i]f a court can refuse jurisdiction because another forum is more appropriate, thereby refusing to serve as the battleground for justice, in cases with no other competent forum, courts should accept jurisdiction to prevent a denial of justice."[76]

- Many States' domestic court systems adhere to similar rules resembling the legal doctrine of *forum necessitatis*[77]

Besides the practice of national courts, a number of international and regional treaties point to the right to

74 See generally Christopher A. Whytock, Foreign State Immunity and the Right to Court Access, 93 B.U. L. Rev. 2033, 2050–52, 2055–59 (2013); Stephanie Redfield, Searching for Justice: The Use of Forum Necessitatis, 45 Geo. J. Int'l L. 893, 903–06, 908–15 (2014).
75 Commission Green Paper on the Review of the Council Regulation (EC) No 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, at 4, COM (2009) 175 final (Apr. 21, 2009), available at http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52009DC0175&from=EN.
76 Redfield, supra note 101, at 908.
77 Id.

adequate and effective justice as a customary norm of international law.

The UDHR (The Universal Declaration of Human Rights) and ICCPR (the International Covenant on Civil and Political Rights), explicitly provide individuals with the right of access to justice for supposed violations of specified rights:

- UDHR
  - "[e]veryone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law."[78]

- ICCPR
  - each State party must undertake to ensure that any individual seeking a remedy for alleged violations of the individual's rights under the covenant "shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy."[79]

A number of other international and regional legal instruments recognize the right of access to justice for alleged violations of specific rights:

- African Charter of Human Rights and Peoples' Rights
  - provides that "[e]very individual shall have the right to have his cause heard," and that this right comprises, among other privileges, "the right to an appeal to competent national organs against acts of violating his fundamental rights as recognized and guaranteed by conventions, laws, regulations and customs in force."[80]

78 UDHR, supra note 105, art. 8.
79 ICCPR, supra note 106, art. 2.
80 African Charter on Human and Peoples' Rights art. 7(1)(a), June 27, 1981, 1520 U.N.T.S. 217 (fifty-three State parities).

- Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters
  - requires State parties to ensure that all individuals "have access to a review procedure before a court of law and/or another independent and impartial body established by law" to dispute State action protected under the convention.[81]

- Charter of Fundamental Rights of the European Union
  - Article 47 establishes individuals' right to an effective remedy and to a fair trial, declaring that "[e]veryone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an effective remedy before a tribunal in compliance with the conditions laid down in this Article," as well as that "[e]veryone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal previously established by law. Everyone shall have the possibility of being advised, defended and represented."[82]

  - Article 47 proceeds to state that "[l]egal aid shall be made available to those who lack sufficient resources in so far as such aid is necessary to ensure effective access to justice."[83]

Some international and regional agreements provide individuals with a more general right of access to justice:

- European Convention of Human Rights
  - Article 6 states "[i]n the determination of his civil rights and obligations or any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law." [84]

81 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters art. 9, June 25, 1998, 2161 U.N.T.S. 447 (forty-six State parties).
82 Charter of Fundamental Rights of the European Union art. 47, 2000 O.J. (C 364) 1, 20.
83 Id.
84 Convention for the Protection of Human Rights and Fundamental Freedoms art. 6, Nov. 4, 1950, 213 U.N.T.S. 221, 228 (forty-seven State parties). See also Golder v. United Kingdom, 18 Eur. Ct. H.R. (ser. A) at 18 (1975) (finding that Article 6 of the European Convention on Human Rights "secures to everyone the right to have any claim relating to his civil rights and obligations brought before a court or tribunal. In this way the Article embodies the 'right to a court,' of which the right of access, that is the right to institute proceedings before courts in civil matters, constitutes one aspect only. To this are added the guarantees laid down by Article 6…as regards both the organisation and composition of the court, and the conduct of the proceedings. In sum, the whole makes up the right to a fair hearing.").

- American Convention on Human Rights
  - Article 8 provides that "[e]very person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other nature." [85]

- The Treaty on the Functioning of the European Union

  - Article 67(4) declares that "[t]he Union shall facilitate access to justice;"[86]
  - Article 81(2) providing that the European Parliament and the Council shall adopt certain measures that provide for "effective access to justice."[87]

- 1980 Hague Conference on Private International Law
  - "desiring to facilitate international access to justice," concluded the Convention on International Access to Justice by pronouncing that "[n]ationals of any Contracting State and persons habitually resident in any Contracting State shall be entitled to legal aid for court proceedings in civil and commercial matters in each Contracting State on the same conditions as if they themselves were nationals of and habitually resident in that State."[88]

These international instruments have dual legal weight. First, because of their power as legally binding treaties, they impose an obligation on relevant State parties to provide for the individual right of access to justice.[89] Second, these international and regional treaties are evidence of the right of access to justice as being a principle of customary international law, which of course means would make such norms binding on

85 Organization of American States, American Convention on Human Rights art. 8(1), Nov. 22, 1969, 1144 U.N.T.S. 143, 147 [hereinafter OAS] (twenty-five State parties); see also id. art. 46(1)(a) (providing that "[a]dmission by the Commission of a petition of communication in accordance with Articles 44 [any person or group of persons] or 45 [State party] shall be subject to the following requirements" including, among other things, "that the remedies under domestic law have been pursued and exhausted in accordance with generally recognized principles of international law"); id. art. 46(2) (stating that the provisions in Article 46(1)(a) "shall not be applicable" where "(a) the domestic legislation of the state concerned does not afford due process of law for the protection of the right or rights that have allegedly been violated; (b) the party alleging violation of his rights has been denied access to the remedies under domestic law or has been prevented from exhausting them; or (c) there has been unwarranted delay in rendering a final judgment under the aforementioned remedies"); Velásquez Rodríguez v. Honduras, Inter-Am. Ct. H.R. (ser. C), ¶ 174 (1988) (concluding, pursuant to Article 46(1)(a) of the OAS, that "[t]he State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation") (emphasis added); id. ¶¶ 81, 71, 76, 80, 117 (recognizing that the "domestic judicial remedies in Honduras were ineffective in protecting human rights, especially the rights of disappeared persons to life, liberty and personal integrity") (emphasis added).

86 Consolidated Version of the Treaty on the Functioning of the European Union art. 67(4), 2012 O.J. C 326/47, at 73, available at http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:12012E/TXT&from=EN.

87 Id. art. 81(2)(e), at 78.

88 Convention on International Access to Justice art. 1, Oct. 25, 1980, 1510 U.N.T.S. 375, 376, available at http://www.uhdigm.adalet.gov.tr/sozlesmeler/coktaraflisoz/lahey/lah29_ing.pdf (the convention entered into force in 1977 and has twenty-six parties).

89 See VCLT, supra note 61, art. 26 ("Every treaty in force is binding upon the parties to it and must be performed by them in good faith.").

all States regardless of whether they are a party to such a treaty.[90] Since the right of access to adequate and effective justice has risen to the status of customary international law, victims of *jus cogens* violations would thus possess the right of access to justice in any forum when domestic remedies are nonexistent, inadequate or ineffective—in other words, the ability to exercise universal jurisdiction.

E. Differentiating Between Aut dedere Aut judicare and Universal Jurisdiction

Under the principle of *aut dedere aut judicare*, a State is obligated to confer its jurisdiction on any perpetrator of a crime committed within its territory, if the State cannot or refuses to extradite him or her.[91] It is important to recognize, however, that the concept of *aut dedere aut judicare* is distinguishable from universal jurisdiction, and a declaration of jurisdiction on the basis of such a principle, is in no means a declaration of universal jurisdiction.

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90 See, e.g., Francesco Francioni, The Rights of Access to Justice Under Customary International Law, in Access to Justice As a Human Right 42 (Francesco Francioni ed., 2007) ("[A]ccess to justice is a right recognized under general international law…"); Elena Sciso, Italian Judges' Point of View on Foreign States' Immunity, 44 Vand J. Transnat'l L. 1201, 1212 (2011) (endorsing the Italian stance on there being a fundamental human right of access to justice "recognized by international customary law as well as by universal and regional agreements on the issue"); Jan Wouters et al., Belgian Court of Cassation, 105 Am. J. Int'l L. 560, 567 (2011) (exposing the observation that the individual right of access to justice is customary international law).

91 Ryngaert, supra note 7, at 123.