Beyond Dichotomy between Deduction and Induction

— Critical Appraisal on the Approaches to Universal Jurisdiction —

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Introduction

Universal criminal jurisdiction \(^{(1)}\) is the assertion of jurisdiction over

\(^{(1)}\) The definition of universal jurisdiction varies among authors. Some define it in relation to the category of offence (piracy, genocide) or the nature of the offence (international crime). See Restatement (Third) of the Foreign Relations Law of the United States, Vol. I (1985), at 254, §404; The Princeton Principle on Universal Jurisdiction (2001), at 28, Principle 1. Others define it in relations to the scope of the state that may exercise it (‘every state’ or ‘any state’). See, Z. Galicki, ’Preliminary Report on the Obligation to Extradite or Prosecute (aut dedere aut judicare)’, UN Doc. A/CN.4/571, 7 June 2006, para.19; K. Randall, ’Universal Jurisdiction Under International Law’, 66 Texas Law Review (1988), at 788. The present study tries to avoid any preconceptions with regards to whether and how these elements are related to universal jurisdiction, which will be examined later, and prefers the definition focusing on the modality of exercising jurisdiction as presented above.
conduct committed outside the territory of the state asserting jurisdiction over the actions of a national of another state against a national of another state. In other words, it is the assertion of jurisdiction over an act that has no link to the state exercising it in terms of the locus of the crime or the nationality of the offenders or victims.

This category of jurisdiction began manifesting as a trend in the 1990s with regard to serious international crimes and grave violations of human rights. Behind this was a zeitgeist\(^{(2)}\) that could be observed in the spirit of cooperation generated among great powers at the end of the Cold War, the phenomenon of globalization in various fields, and the re-emerged interventionism. This changing legal climate also led the international society to direct its attention towards the project of international criminal justice. Galvanised by the mass atrocities in Yugoslavia and Rwanda, the project evolved into a global fight against impunity’,\(^{(3)}\) which resulted in the establishment of international criminal tribunals, including the International Criminal Court, the first permanent criminal court in history.\(^{(4)}\) Along with international criminal tribunals, universal jurisdiction has been perceived as one of the central apparatuses for promoting this ongoing project.

This trend has also found supporters among states, with Belgium and Spain as the most notable forerunners. In 1993, Belgium enacted a law\(^{(5)}\) implementing the four 1949 Geneva Conventions and Additional Protocols\(^{(6)}\) (the Geneva Conventions), in which a list of 20 acts constituting grave breaches of the Conventions and Protocols were designated as ‘crimes under


international law (crimes de droit international)’ and made punishable in accordance with the Act. The Act was later amended in 1999\(^{(7)}\) (the amending legislation is hereinafter referred to as the Act of 1993/1999) to include genocide and crimes against humanity in the list. Described by commentators as ‘the most progressive of its kind’,\(^{(8)}\) the Act of 1993/1999 not only established universal jurisdiction over the listed crimes, not all of which were subject to the principle of *aut dedere aut judicare* provided in the relevant treaties.\(^{(9)}\) It also contained several rules that derogated from the general principles of criminal law, such as the inapplicability of any statute of limitations or amnesties and the rejection of immunity attached to an official capacity of a person. In addition, the Belgian criminal justice system adopted the mechanism of *constitution de partie civile*, by which a victim may trigger the opening of a preliminary investigation and commence

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\(^{(6)}\) Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field (First Convention), 75 UNTS 31; Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea (Second Convention), 75 UNTS 85; Convention relative to the Treatment of Prisoners of War (Third Convention), 75 UNTS 135; Convention relative to the Protection of Civilian Persons in Time of War (Fourth Convention), 75 UNTS 287; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Additional Protocol I), U.N. Doc. A/32/144 (15 August 1977); Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Additional Protocol II), U.N. Doc. A/32/144 (15 August 1977).


\(^{(8)}\) S. Smis and K. Van der Borght, ‘Introductory Note to the Act Concerning the Punishment of Grave Breaches of International Humanitarian Law (10 February 1999)’, *38 International Legal Material* (1999), at 920.

\(^{(9)}\) The most notable was the fact that the ‘grave breaches’ to which the Act was applicable not only covered the crimes under the four Geneva Conventions of 1949 and their Additional Protocol I, but also the Additional Protocol II. This meant that the scope of crimes subject to universal jurisdiction was extended to include violations of humanitarian law in non-international armed conflicts, which was not assumed in the regime of Geneva Conventions. In fact, pursuant to Articles 49 (First Convention), 50 (Second Convention), 129 (Third Convention) and 146 (Fourth Convention) of the Geneva Conventions and Article 85 §1 of Additional Protocol I, the term ‘grave breaches’ is only applicable to international armed conflicts. The violations of humanitarian law in non-international armed conflicts (Additional Protocol II) do not fall within the ambit of the undertaking referred to in the above mentioned articles.
criminal proceedings in certain circumstances.\(^{(10)}\) Many such complaints were brought under the Act of 1993/1999 before its amendment by the Act of 2003.\(^{(11)}\) These acts were made against former as well as incumbent foreign heads of states, heads of governments, and other high officials.\(^{(12)}\) One complaint actually resulted in the issuance of an arrest warrant to the incumbent foreign minister of the Democratic Republic of the Congo, Mr Abdulaye Yerodia Ndombasi.

In 1985, Spain enacted the Organic Law of the Judicial Power (Ley Orgánica del Poder Judicial /LOPJ). Article 23(4) of this law empowered Spanish authorities to investigate, prosecute, and adjudicate certain crimes including genocide,\(^{(13)}\) even if these crimes had no connection with Spain. The only statutory limitation was that prosecution should not be pursued if the criminal has been acquitted, convicted, or pardoned abroad (Article 23(2)(c)). Spanish universal jurisdiction received considerable international attention in October 1998, when a Spanish investigative judge issued an arrest warrant for Chile’s former President, Augusto Pinochet, who was at the time visiting the United Kingdom. Following this high-profile case, Spanish tribunals dealt with a significant number of allegations concerning

\(^{(10)}\) Victims may, by making him/herself a civil party, seize an investigating judge (juge d’instruction), if the public prosecutor in the exercise of his discretion decides not to prosecute or is still considering his/her position.


\(^{(12)}\) They include: the Cuban President Fidel Castro, the Ivory Coast President Laurent Gbagbo, the Iraqi President Saddam Hussein, the Rwandan President Paul Kagame, the Mauritanian President Maaouya Iuld Sid’Ahmed Taya and the Israeli Prime Minister Ariel Sharon. See Smis and Van der Borght, *supra* note 8, at 743. Complaints were also made against former U.S. President George H. W. Bush, Vice President (and former Secretary of Defense) Dick Cheney, Secretary of State (and former chairman of the joint chiefs of staff) Colin Powell, and retired general Norman Schwarzkopf for allegedly committing war crimes during the 1991 Gulf war. See S. Ratner ‘Belgium’s War Crimes Statute: A Postmortem’, 97 *American Journal of International Law* (2003), at 889–891.

\(^{(13)}\) Those crimes are: (a) genocide; (b) terrorism; (c) sea or air piracy; (d) counterfeiting; (e) offences in connection with prostitution and corruption of minors and incompetents; (f) drug trafficking, (g) any other offence which Spain is obliged to prosecute under an international treaty or convention.
international crimes in the exercise of universal jurisdiction\(^{(14)}\) before retreating from the frontline after the amendment of Article 23(4) by the Organic Law 1/2009 of 3 November 2009.\(^{(15)}\)

At the same time, the promotion of universal jurisdiction required a theoretical innovation, especially in the period of its genesis. This assertion of jurisdiction not only lacked the jurisprudential links that traditional assertion of jurisdiction had, it also lacked grounding in the conventional regimes or customary law. On the one hand, some of the crimes subject to the assertion of universal jurisdiction had no corresponding conventional regime as such (crimes against humanity), or were not covered by the jurisdictional grounds provided by relevant conventional regimes (genocide\(^{(16)}\) and a part of violation of humanitarian law\(^{(17)}\)). On the other hand, state


\(^{(15)}\) Organic Law 1/2009 Complementary to the Law Reforming the Procedural Legislation for the Implementation of the New Judicial Office. The law, while adding crimes against humanity, illegal traffic or clandestine immigration of persons, and crimes related to female genital mutilation to the catalog of crimes covered by the principle of universality, made the exercise of jurisdiction subject to the following conditions: that the alleged perpetrators are present in Spain, that the victims are of Spanish nationality, or that there is some demonstrated relevant link to Spanish interests. In any case, the Spanish courts have no jurisdiction when other competent courts or international tribunals have begun proceedings that constitute an effective investigation and prosecution of these punishable acts. For an overview of the development toward the amendment, see de la Rasilla del Moral ‘The Swan Song of Universal Jurisdiction in Spain’, 9 International Criminal Law Review (2009), at 802–805. See also, Rojo, supra note 14, at 713.

Most recently, it was reported that the arrest warrants were issued on 19 November 2013 against Former Chinese president Jiang Zemin and ex prime minister Li Peng, for their alleged commission of genocide in Tibet. The case was brought by two Tibetan support groups and a monk with Spanish nationality, which allowed suspects to be tried under the Spanish law based on the victim’s nationality. See ‘Chinese leaders face Spain arrest warrant over Tibet’, available at http://www.reuters.com/article/2013/11/19/us-china-tibet-spain-idUSBRE9AI0XA20131119 (as of 31 October 2014).

\(^{(16)}\) Article VI of the Genocide Convention refers only to a competent tribunal of territorial state and international penal tribunals as a venue for the trial of genocide.

\(^{(17)}\) See footnote 9 for the Belgian Act 1993/1999’s dealing with the violation of humanitarian law in non-international armed conflicts.
practices were either scarce or inconsistent, which would not be sufficient for a customary rule to be confirmed.

There are mainly two approaches that seek to overcome this scarcity of state practice. The first one emphasizes the nature of crimes that are targeted by the assertion of universal jurisdiction and seeks to deduce a jurisdictional ground for universal jurisdiction from the very nature of the crimes (deductive approach). The second one is more in line with traditional scholarship and seeks to establish a customary rule which provides a ground for universal jurisdiction (inductive approach); at the same time it applies less strict conditions in one way or another in confirming customary rules than required in traditional view.

While both approaches may capture some aspects of jurisdiction, they are without problems. By critically examining these two approaches’ significance and drawbacks, this article seeks a way to overcome a dichotomy of deductive and inductive approaches, which will lead to a more workable framework of jurisdiction.

1. The Deductive Approach
   1.1. Piracy as an Analogy

One of the viewpoints that support deducing the basis of universal jurisdiction from the nature of a crime makes an analogy of piracy. In light of pirates being historically referred to as *hostis humani generis* (‘enemy of mankind’), and the fact that any state can seize them on the high seas and bring them to trial before their domestic court, this view argues that the exercise of jurisdiction over persons who have committed a crime with no direct link with the prosecuting state can be justified by the heinousness of the crime in question.\(^{(19)}\)

However, it seems inadequate to infer the nature of crime from the term *hostis humani generis*. The view that refers to pirates as *hostis humani generis* dates back to ancient Rome, a time when the term ‘pirates’ was


used primarily in reference to political communities in the Eastern Mediterranean.\(^{(20)}\) Although these pirates attacked other vessels without any Roman-style declaration of war, they were still regarded as an agent of ‘war’ for which the law of war was applicable. They were referred to as *hostis*, which made them distinct from criminals under Roman law.\(^{(21)}\) Additionally, these communities were in an enduring state of war against neighbouring states due to this non-declaration of war. Thus formulated, this term was originally used to indicate a common belligerent to people in Rome and its allies, and accordingly it did not carry any connotation associated with the nature of the crime. Although the term *hostis humani generis* survived in the course of the later development in the conceptualization of piracy, it has lost substance and has gradually become subordinate to the concept of acts of piracy.\(^{(22)}\)

As for the concept of acts of piracy itself, the scale of activity ranged from mere theft to massive battles throughout the history of piracy until the 19th century, and not all acts of piracy were regarded to be as heinous as genocide or other serious international crimes. Additionally, they could not be indiscriminately subject to universal jurisdiction. Indeed, via a gradual process and by the 19th century, acts of piracy had gradually been conceptualized as being subject to the exercise of universal jurisdiction. The justification for it was not based on the nature of the crime, but was to be found in the fact piracy was committed on the high seas and ‘under conditions that render it impossible or unfair to hold any state responsible for its commission’.\(^{(23)}\) In other words, the grounds for justifying universal


\(^{(21)}\) Ibid., at 16–19.

\(^{(22)}\) In fact, in *In re Piracy Jure Gentium* [1934] A.C. 586 which has often been cited as a precedent denouncing acts of piracy as ‘*hostis humani generis*’, the Privy Council did not use that label to mean that an act of piracy was of particularly heinous nature. Actually, act in question was merely a robbery, and according to the Privy Council, recognition of them as constituting crimes was left to the municipal law of each country. It was rather submitted that the criminal jurisdiction of municipal law would be extended to piracy committed on the high seas by any national on any ship, ‘because a person guilty of such piracy has placed himself beyond the protection of any State’.

jurisdiction over acts of piracy in the 19th century was based on the fact that pirates were not under the authority and protection of any state, rather than the gravity or nature of the crime itself. In fact, similar depredations were conducted by privateers who had first obtained a license from a state (a letter of marque), but these were not regarded as acts of piracy by virtue of the permission given by the state.

Given the points set out above, the exercise of universal jurisdiction over pirates in the 19th century was based on two rationales: first, that enforcement took place on the high seas and beyond the reach of any sovereign; and second, that enforcement occurred on a subject that was not under the protection of any state. In other words, as it was built on the fact that the exercise of jurisdiction over pirates would not be in conflict with any other state's claim, it was therefore not based on the nature of the crime itself. The structure of such an exercise of jurisdiction was later adopted in the provisions for the repression of piracy under the Convention on the High Seas and the United Nations Convention on the Law of the Sea (UNCLOS). Both conventions provide two requirements for illegal acts of violence, detention, or depredation to constitute an act of piracy: first, the act was committed on the high seas, against another ship or aircraft in a place outside the jurisdiction of any state; and second, the act was committed for private ends by the crew of a private ship or a private aircraft (Article 15 of the Convention on the High Seas, Article 101 of UNCLOS). It should be noted that due to this formulation, the exercise of jurisdiction over an act of piracy would not coincide with the claim of another state. This by no means denies that the interest protected by the repression of piracy — namely, the security of maritime transportation — is an interest common to all nations. In fact, the common interest of nations

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25 Hall, *supra* note 23, at 317. Actually the remedy was obtained from the State issued a letter of marque when the privateer acted beyond the extent of permission.
27 1833 UNTS 3.
28 450 UNTS 11.
became more clearly acknowledged\(^{(30)}\) with regard to the repression of piracy after the demise of privateers and their authorised attacks on the merchant vessels of other nations,\(^{(31)}\) which consequently nullified the need to distinguish between permissible private depredations and acts of piracy. However, it should be recognized that even under modern international law in which such common interest is acknowledged, the structure of the exercise of jurisdiction remains unchanged; i.e. the exercise of universal jurisdiction is accepted when there is no concurrence with another state’s claim.

1.2. The Jus Cogens Nature of Crimes

Another view based on the nature of crime relies on the concept of *jus cogens*. This view is premised on the recognition of values shared by the international community, which cannot be reduced to the interests or values of individual states.\(^{(32)}\) The *jus cogens* norm is regarded as embodying such collective value interest \(^{(33)}\) and accordingly, it is alleged that all states as members of international community are entitled to punish conduct that violates *jus cogens* norms.\(^{(34)}\)

At the outset, it is necessary to clarify the concept of *jus cogens* and its role and context in the existing international legal system. While the literature of the pre-WWII era made references to the concept,\(^{(35)}\) it was the

\(^{(29)}\) Since a vessel engaging in an act of piracy does not automatically lose its nationality (Article 18 of the Convention on the High Seas, Article 104 of UNCLOS), it is not appropriate to equate a pirate ship with a ship without nationality (Cf. G. Schwarzenberger ‘The Problem of an International Criminal Law’, 3 Current Legal Problems (1950), at 269.) Rather, it should be submitted that the certain kind of act for which the flag state would not be willing to claim its exclusive jurisdiction had been historically established as an act of ‘piracy’ which is subjected to the universal jurisdiction and was later adopted in the international agreements.


\(^{(31)}\) The Declaration on the Abolishment of Privateers was adopted in 1856, and it was observed that the practice of privateers became obsolete by the early 20th Century. L. Hannikainen, *Peremptory Norms (Jus Cogens) in International Law: Historical Development, Criteria, Present Status* (1988), at 71.


\(^{(33)}\) Hannikainen, ibid., at 2.
Vienna Convention on the Law of Treaties\(^{(36)}\) (VCLT) that introduced the concept of *jus cogens* to the realm of positive international law. Article 53 of the Convention defines *jus cogens* as ‘a norm accepted and recognised by the international community of states as a whole as a norm from which no derogation is permitted’ and ‘a treaty is void if it conflicts with a peremptory norm’.

The significance of the concept of *jus cogens* thus formulated should not be underestimated. Its power to *invalidate* an agreement is premised on — and indeed cannot be explained without — the existence of a certain public order. This can be well understood by comparing the proposition of Fitzmaurice and that of Waldock, both of whom were serving as special rapporteurs in the International Law Commission (ILC) for the work on the codification of the law of treaties. Fitzmaurice postulated that the mutual consent of the parties was an essential condition for the validity of any treaty. Thus, while observing the nature of *jus cogens* as ‘absolute and imperative’, he submitted that a treaty which was in conflict with *jus cogens* norms could only become unenforceable *between parties*, as there was no flaw with respect to their mutual consent.\(^{(37)}\) In contrast, Waldock postulated a certain legal order — imperfect though it might be in Waldock’s own words — from which states could not at their own free will contract out.\(^{(38)}\) A *jus cogens* norm is regarded as embodying such an order, and as such it makes a treaty *void* when the latter is in conflict with it. Note that Waldock’s view was reflected in the provisions of the VCLT.

Conceptualized in this manner, the notion of *jus cogens* has been regarded


\(^{(36)}\) 1155 UNTS 331.


as embodying a certain public order that cannot be reduced to the will of individual states, thus going beyond the scope of application of treaty law. Accordingly, *jus cogens* has been understood as having a function that *prohibits* acts that infringe on the values which it intends to protect.\(^{(39)}\)

Based on this assumption, doctrines have sought to identify the special effect of violations of *jus cogens* norms and how *jus cogens* are to be situated in the international legal system, premised on that violation of such rules that serve for the maintenance of the public order must be dealt with differently from that of ordinary rules.\(^{(40)}\)

In the field of international criminal law, this special effect is succinctly illustrated by the oft-cited passage of the *Furundžija* case in the International Criminal Tribunal for the former Yugoslavia (ICTY). After observing that the prohibition of torture is a norm of *jus cogens* that enjoys ‘a higher rank in the international hierarchy’,\(^{(41)}\) the Trial Chamber added:

Furthermore, at the individual level, that is, that of criminal liability it would seem that 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 or extradite individuals accused of torture who are present in a territory under its jurisdiction. Indeed, it would be inconsistent on the one hand to prohibit torture to such an extent as to restrict the normally unfettered treaty-making power of sovereign States and on the other hand bar States from prosecuting and punishing those torturers who have engaged in this odious practice abroad.\(^{(42)}\)


\(^{(40)}\) No doubt the distinction between international crimes and ordinary international wrongs in the field of state responsibility that had been introduced by the ILC is the most discussed issue in this regard. While the notion of ‘international crime’ was not included as such in the Article on State Responsibility finally adopted, the distinction between the *jus cogens* (peremptory) norms and any other rules was retained, the serious violation of the former being attached special consequences.


\(^{(42)}\) Ibid., para. 156.
However, it is not clear from this statement how the power of *jus cogens* to restrict ‘the treaty-making power of sovereign states’, in which an addressee seems to be a state,\(^{(43)}\) may also serve to authorize the exercise of criminal jurisdiction by other states over an individual who acted in violation of the norm. To put it another way, there are two distinct questions relevant here: whether – and how – an individual can be an addressee of *jus cogens* norms; and, if so, whether this will entail every state’s entitlement to punish. These questions are addressed in order below.

### 1.2.1. Can Individual be an Addressee of *Jus Cogens* Norms?

In order to address the first question, it is necessary to begin by asking whether an individual can be an addressee of the rules of international law, the scope of which include *jus cogens* norms. If so, how is the basis for an individual addressee of *jus cogens* to be established? In this regard, it should be recalled that under the classical doctrine, it was assumed that only a state could be held liable at international law and responsibility of individuals remained a matter of domestic law.\(^{(44)}\) This principle negates the very capability of an individual to be an addressee of international duties. However, the post-WWII prosecution of war leaders at the International Military Tribunals (IMTs) set a precedent that international law could impose duties on individuals directly, with regard to crimes against peace, crimes against humanity, and war crimes. It also suggested that these individuals would not be immune from their responsibility due to the fact that they were acting on behalf of the states they belonged to.\(^{(45)}\)

\(^{(43)}\) Admittedly, the Trial Chamber in *Furundžija* seems to assume that it is individuals that are an addressee of *jus cogens* prohibition. However, it requires further clarification, since as far as the restriction of treaty-making power of states is concerned, an addressee of ‘no derogation’ from *jus cogens* is states.


\(^{(45)}\) The oft-cited statement of the International Military Tribunals succinctly but eloquently illustrated the rational: ‘Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provision of international law be enforced’. *Trial of the Major War Criminals before the International Military Tribunal*, Vol. I (1947), at 223.

propositions were later confirmed by the Formulation of Nurnberg Principles prepared by the International Law Commission (ILC).\(^{(46)}\)

It is important to note that before these prosecutions by the IMTs, the three categories of crimes had had only an ambiguous or even non-existent status on the international plane. As for war crimes, while states had customarily punished nationals of belligerent states for acts committed before capture, there was no consensus among commentators on whether it was done in direct application of international customary law, or domestic laws of a state of the prisoner, or a custodial state. The Formulation of Nurnberg Principles had thereby the effect of endorsing their status as crimes under international law. As for crimes against humanity, elements of crimes constituting them (murder, extermination, enslavement, deportation and other inhuman acts) had already been criminalised in many municipal legal systems, but they were unknown to international law as such. Thus, the Formulation served to legitimise the concept within the realm of international law.\(^{(47)}\) In contrast, crimes against peace as a crime for individuals had been unknown both to international and domestic law before World War II (WWII). Commentators thus observed that the Charters of the IMTs were the application of *ex post facto* law.\(^{(48)}\) While the implication of the confirmation of status of these crimes thus varies from one category to another depending on the place that they had had before, the significance of the precedent laid down by the IMTs and the Formulation lies in the fact that it elevated these three categories of crimes into the international level, by labelling them ‘crimes under international law’, for which individuals could be held responsible directly under international law.

However, this precedent did not necessarily mean that ‘crimes under international law’ became firmly established within the realm of positive international law. For such a concept to be entrenched, not only must substantive norms have direct binding force on individuals in the absence of


intermediate provisions of municipal law being established on the international plane, but the corresponding procedure must also be available in the form of an international criminal court, or if before a municipal court, in accordance with the principle of universal jurisdiction.\(\textsuperscript{49}\) Moreover, those regimes establishing individual liability would have to be binding on the great majority of states, for ‘only then would the international status of the relevant penal provision be assured’.\(\textsuperscript{50}\) In light of this, the precedent of the IMTs and the Formulation could be seen as validating the existence of those substantive norms,\(\textsuperscript{51}\) yet those norms remained to be complemented by the corresponding procedure, because the character of those tribunals as truly international courts was highly questionable.\(\textsuperscript{52}\) As the discussion below will show, the practice during the Cold War era demonstrated that the international society had not been united enough to provide the procedure and judicial entities for this purpose. The question of the capability of individuals to be addressees of international duties, therefore, had remained unresolved during that era.

The most notable example of this lack of resolution can be observed in the procedure in practice for the punishment of crimes of genocide. The Convention on the Prevention and Punishment of the Crimes of Genocide\(\textsuperscript{53}\) (Genocide Convention) (1948) declares genocide as a crime under international law.

\(\textsuperscript{49}\) H.-H. Jescheck (1985), ‘International Crimes’, 8 Encyclopedia of Public International Law (1985), at 333. See also P. Gaeta, ‘International Criminalization of Prohibited Conduct’, in A. Cassese (ed.), Oxford Companion to International Criminal Justice (2009), at 63 (arguing that certain conduct is criminalized not only if that conduct is prohibited by law, but also if the threat of a criminal sanction is attached to it in case of transgression).

\(\textsuperscript{50}\) Jescheck, ibid., at 333.

\(\textsuperscript{51}\) K. Parlett, The Individual in the International Legal System (2011), at 258, 274–277 (arguing that the Nuremberg Principles were a strong indication that individuals could be held responsible directly under international law for certain violations of international law, while admitting that jurisdiction to enforce was absent around that time).

\(\textsuperscript{52}\) Both judges and prosecutors were appointed by each of the victor Powers, the latter even being acted under the instruction of each appointing state. Therefore, it is argued that ‘the two military Tribunals were not independent international courts proper, but judicial bodies acting as organs common to the appointing states’. Cassese and Gaeta, supra note 4, at 257–258.

\(\textsuperscript{53}\) 78 UNTS 277.
law (Article I), and also designates an international penal tribunal along with a tribunal of territorial state as a venue for it to be tried (Article VI), which is observed by commentators as reflecting ‘the truly international legal character of the crime’.(54) However, the Convention does not expressly refer to individual obligations but rather imposes obligations on states to give effect to the prohibition in domestic law. More importantly, an attempt to establish an international criminal court soon became stymied,(55) and indeed the prosecution of crimes of genocide at the international level did not take place until the 1990s. As for universal jurisdiction, it was not included in the Convention: an Iranian proposal to introduce universal jurisdiction(56) met with strenuous objection especially from major powers(57) and was eventually rejected. While the chief reason of the objection was not that the exercise of universal jurisdiction would be in breach of international law,(58) this example succinctly illustrates the lack of will among states around the time to establish a procedure that would adequately match the status of crimes of genocide as ‘crimes under international law’.

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(55) The ILC was referred to work on the prospect of establishing an international criminal court in 1948, and it produced the Draft Statutes in 1951 and 1953 (Report of the Committee on International Criminal Jurisdiction, UN Doc. A/2136 and Report of the 1953 Committee on International Criminal Jurisdiction, UN Doc. A/2638). However, work was deferred pending the adoption of a definition of aggression and was only referred back to the ILC in 1989 (GA Res. 44/39, 4 December 1989). It was only in 1994 that the Draft Statute was finally adopted.

(56) UN GAOR, 6th Comm., 3d Sess., 3d Annexes, at 20. It was proposed that a custodial state would be conferred a right, hence not a duty, to try an alleged perpetrator provided no request had been made.

(57) UN Doc. A/C.6/SR.100 (USA), at 398–399 (arguing that at that stage of development of international law, it was dangerous to extend the jurisdiction of national courts to include the punishment of offences committed on the territory of others); UN Doc. A/C.6/SR.100 (USSR), at 403 (arguing that the territorial state where documents and witnesses are found ‘would not consent to surrender its penal jurisdiction to another State’, being ‘jealous of its sovereignty’).

(58) UN Doc. A/C.6/SR.100, at 406.

(59) Rather, concern was made over the lack of impartiality of the national courts of a state in trying other states’ leaders. See UN Doc. A/C.6/SR.100 (Afghanistan), at 397; UN Doc. A/C.6/SR.100 (Egypt), at 398; UN Doc. A/C.6/SR.100 (Uruguay), at 398.
The procedure used in the context of war crimes requires a distinct examination, because the Geneva Conventions adopted in the same era mandate the High Contracting Parties to establish and exercise universal jurisdiction over ‘grave breaches’ of the Conventions.\(^{60}\) While there is little doubt that it is ‘the first treaty-based embodiment of an unconditional universal jurisdiction applicable to all states parties’,\(^{61}\) the question here is whether those grave breaches were meant to be ‘crimes under international law’, which would directly bind individual perpetrators to international norms. Regarding this, it is useful to analyse the relevant provisions in light of the travaux préparatoire.

The International Committee of the Red Cross’ (ICRC) proposals submitted to the Diplomatic Conference of Geneva of 1949 endorsed a relationship between the international character of crimes and the universality of jurisdiction. The proposal stated that ‘grave breaches of the Convention shall be punished as crimes against the law of nations by the tribunals of any of the High Contracting Parties or by any international jurisdiction the competence of which has been recognised by them’.\(^{62}\) It argued that the principle of the universality of jurisdiction was adopted for the purpose of repressing such acts,\(^{63}\) the immunity of which would lead to ‘the degradation

\(^{60}\) Article 49 of the First Geneva Convention, Article 50 of the Second, Article 129 of the Third and Article 146 of the Forth oblige the High Contracting Parties ‘to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to be committed, any of the grave breaches of [the] Convention defined in the following Article’. Each Article goes on commonly to provide: ‘Each High Contracting Party shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and shall bring such persons, regardless of their nationality, before its own courts’.

\(^{61}\) R. O’Keefe, ‘The Grave Breaches Regime and Universal Jurisdiction’, 7 Journal of International Criminal Justice (2009), at 811. In this regard, although only the nationality of the offender is mentioned as being irrelevant for the exercise of jurisdiction, it is implied that other jurisdictional grounds are also irrelevant. In fact, when the Italian Delegate proposed to limit the obligation of searching for alleged perpetrators and bringing them to justice to the Parties to the conflict, the Netherlands Delegate answered that each Contracting Party should be under this obligation, even if neutral in a conflict, hence the principle of universality being applied here. Italian proposal was finally withdrawn. See Final Record of the Diplomatic Conference of Geneva, Vol.2-B (1949), at 116.

\(^{62}\) ICRC, Remarks and Proposals (1949), at 18.
of human personality and a diminished sense of human worth'.

Nevertheless, these proposals faced with strong objections from the commencement of the Diplomatic Conference, and the Netherlands Delegation, which had first tried to give the proposals the chance of being discussed, decided to submit a new text made in collaboration with the delegations that had raised objections. In this new text, which would become the basis of the provisions finally adopted at the Conference, the term ‘crimes against the law of nations’ that had originally characterised the concept of ‘grave breaches’ was dropped. In addition, there was no longer any reference to international jurisdiction.

The intention not to vest the term ‘grave breaches’ with the status of crime under international law was further illustrated by the explanation of the Netherlands Delegate, in their answer to the USSR Delegate who proposed replacing the word breaches’ with ‘crimes’:

...The Conference is not making international penal law but is undertaking to insert in the national penal laws certain acts enumerated as grave breaches of the Convention, which will become crimes when they have been inserted in the national penal laws.

According to the Netherland Delegate, the inclusion of grave breaches would guarantee a certain amount of uniformity in the national laws, which was desirable as tribunals were also dealing with accused parties who were of other nationalities. Given all this, although the laws and customs of war embodied in the Conventions had been established as the rules to be observed, ‘grave breaches’ of the Conventions were not regarded as directly imposing obligations on individuals.

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(63) Ibid., at 21.
(64) Ibid., at 20.
(65) Final Record of the Diplomatic Conference of Geneva, Vol.2-B (1949), at 115. These delegations were Australia, Belgium, Brazil, France, Italy, Norway, United Kingdom, United States of America and Switzerland.
(68) Ibid., at 115.
In short, the Genocide Convention and the Geneva Conventions that were adopted immediately after the WWII failed to consolidate ‘crime under international law’ within the realm of positive international law, thereby rendering ambiguous the issue of whether individuals could be an addressee of international norms, not to mention *jus cogens* prohibitions. In fact, before the 1990s, most of the treaty practice in terms of international criminal law had taken place within the field of transnational criminal law, of which the suppression treaties are the typical examples. These treaties (and customary rules, if any) imposed obligations on states to criminalize certain conducts and enforce transgressions within their own legal orders.\(^{(69)}\) It is important to note that the main feature of transnational criminal law is that international legal obligations are imposed on states, rather than individuals. As Cryer states, ‘the essence of these offences is that the locus of the criminal prohibition on individuals is not the international legal order, but the municipal law of the State that prosecutes’.\(^{(70)}\) In light of this, many of the alleged ‘crimes under international law’ could in fact be categorized as crimes in the transnational criminal law, at least within the context they were dealt with during the Cold War era\(^{(71)}\): Genocide and apartheid\(^{(72)}\) without the establishment of international criminal tribunals may fit into this category; grave breaches of the Geneva Conventions in light of the drafters intention mentioned above demonstrates a feature of transnational criminal law; and as for crimes of torture, the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment\(^{(73)}\) (Convention Against Torture) remains faithful to the formula of suppression treaties.

Things had started changing at the conclusion of the Cold War. Faced


\(^{(70)}\) Cryer, *supra* note 47, at 109.

\(^{(71)}\) Gaeta, *supra* note 49, at 64.

\(^{(72)}\) Article V of the Convention on the Suppression and Punishment of the Crime of Apartheid provides: ‘Persons charged with the acts enumerated in article II of the present Convention may be tried by a competent tribunal of any State Party to the Convention which may acquire jurisdiction over the person of the accused or by an international penal tribunal having jurisdiction with respect to those States Parties which shall have accepted its jurisdiction’.

\(^{(73)}\) 1465 UNTS 85.
with the human atrocities in the conflicts that had erupted in the former Yugoslavia and Rwanda, the UN Security Council set up two ad hoc International Criminal Tribunals that became the first truly international tribunals: one tribunal was established for the former Yugoslavia in 1993 and another for Rwanda in 1994. The creation of these tribunals provided a vital starting point for the subsequent establishment of the International Criminal Court in 1998, and it also paved the way for the establishment of a group of 'hybrid' tribunals founded after 2000. It is important to note that the subject-matter jurisdiction of these tribunals generally includes crimes of genocide, crimes against humanity, and war crimes. These are crimes for which individual perpetrators are to be prosecuted and punished. The significance of their creation, therefore, was to provide a means of enforcing those criminal prohibitions at the international level, thereby consolidating the notion of 'crime under international law' for which individuals could be held responsible directly.\(^{(74)}\)

In sum, there is little doubt today that there are international norms that directly impose obligations upon individuals, of which genocide, crimes against humanity, and war crimes are the clearly accepted and recognized examples. It should be noted that the concept of 'crimes under international law' does not connote that they are vested with the character of jus cogens.\(^{(75)}\) Nevertheless, various tribunals, especially international or quasi-international criminal tribunals, have started affirming the peremptory nature of those crimes,\(^{(76)}\) thereby contributing not only to the identification of jus cogens norms, but also to confirming that individuals could certainly be an addressee

\(^{(74)}\) Parlett, *supra* note 51, at 277 (arguing that individual responsibility for international crimes has been affirmed by international prosecutions, while submitting that individual criminal responsibility exist absent jurisdiction to enforce).

\(^{(75)}\) Its underlying rational is, at least originally, not the nature of the interest to be protected, but the reality that it is individuals, not abstract entities, that committed a crime and 'only by punishing individuals who commit such crimes can the provision of international law be enforced'. *Trial of the Major War Criminals before the International Military Tribunal*, Vol. I (1947), at 223.

\(^{(76)}\) *Prosecutor v. Furundžija*, IT-95-17/1-T, Trial Chamber, Judgment, 10 December 1998, para. 153 (torture); *Prosecutor v. Kupreškić et al.* IT-95-16, Trial Chamber II, Judgment, 14 January 2000, para. 520 (genocide, crimes against humanity and war crimes).
of those norms (individualization of jus cogens). 

1.2.2. Can the Entitlement of Universal Jurisdiction be Deduced from Jus Cogens Norms?

Having confirmed that individuals can be addressees of jus cogens norms, the focus of the discussion now turns to the second question: whether the entitlement to universal jurisdiction can be deduced from the violation of those norms.

At the outset, it is necessary to make a brief observation on the distinction between substantive rules and procedural rules in the sphere of international law. Despite the strenuous objection from some commentators, this distinction has been retained in the proceedings before various courts, and is of particular importance in assessing the relation between the violation of jus cogens norms and the consequences it may entail. Basically, substantive rules are the rules that determine whether conduct is lawful or unlawful. Those rules prescribe rights, obligations, and standards of conduct; determine legal status, title, and conditions; and provide legal definitions. On the other hand, procedural rules, or rules that in the ICJ’s words are ‘procedural in nature’, are defined as the rules that govern the means to effectuate the contents of substantive rules. As such, they are made up of rules governing the jurisdiction of courts and tribunals, including rules on the immunity from jurisdiction in both criminal and civil proceedings, and

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(80) Jurisdictional Immunities of the State (Germany v. Italy: Greece Intervention), Judgment of 3 February 2012, ICJ Reports 2012, at 124, 140 (paras. 58, 93).

(81) Ibid, at 124, (para. 58).
rules on the admissibility of a claim or application.

In light of this distinction, the assertion that the entitlement of universal jurisdiction derived from the peremptory nature of the violated norms can be understood to imply that substantive *jus cogens* norms necessarily entail corresponding procedures that can effectuate the special nature of those norms.

In this regard, it can be observed that generally, and not confined to the field of international criminal law, prohibition of genocide, crimes against humanity, war crimes and torture have been affirmed as having a peremptory character in a number of recent cases in both international and domestic courts. Despite this, whether such substantial rules entail corresponding procedure is not self-evident. In fact, those very courts that recognized that the norms at issue were peremptory also refused to recognise specific effects that were alleged to be attached to the peremptory nature of those norms. For instance, in the *Armed Activities on the Territory of the Congo*, the ICJ recognized that the prohibition of genocide was assuredly of peremptory nature, but went on to state that the fact that a dispute related to the non-compliance with that norm could not of itself provide a basis for the jurisdiction of the Court to entertain that dispute. According to the court, 'jurisdiction is always based on the consent of the parties' under the Statute of the Court. In other words, the fact that the violation of peremptory norms is at issue does not confer itself the jurisdiction to

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entertain the dispute that it would not otherwise have had. In the Al-Adsani, the European Court of Human Rights observed that despite the special *jus cogens* nature of the prohibition of torture, no rule has yet been established to the effect that, when acts of torture are alleged to have been committed by a state, the state in question may not enjoy immunity from civil suit in the courts of another state. The Court thereby rejected the argument that the peremptory nature of the prohibition of torture would affect the principle pertaining to immunity established under customary international law. This rational was echoed in the *Jurisdictional Immunity of the State* case with a more detailed argument. In this case, the ICJ observed that there is no conflict between a rule of *jus cogens* and the rules on state immunity, because they address different matters. The rules on state immunity, as a rule that is procedural in nature, are neutral to the question of whether or not the conduct in respect of which the proceedings are brought is lawful or unlawful; rather, they concern the conditions for proceedings to be brought, and hence necessarily precede the determination of the lawfulness of the conduct in question. If there is no conflict, there is no prospect of a *jus cogens* rule affecting a rule on immunity with its

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88 Ibid., at 31–32, 52, (paras. 64, 125). Similarly, the Court had already declared in *East Timor* that the right of self-determination’s *erga omnes* character, which is also related to the idea of the protection of the interest of international community, does not affect the rule of consent to jurisdiction. It provides: ‘The Court considers that the *erga omnes* character of a norm and the rule of consent to jurisdiction are two different things. Whatever the nature of the obligations invoked, the Court could not rule on the lawfulness of the conduct of a State when its judgment would imply an evaluation of the lawfulness of the conduct of another State which is not a party to the case. Where this is so, the Court cannot act, even if the right in question is a right *erga omnes’*. *Case Concerning East Timor (Portugal v. Australia)*, Judgment, 30 June 1995, ICJ Reports 1995, at 102 (para. 29).


89 Ibid., at 140 (para. 93).

90 Ibid., at 136, 140–141 ( paras. 82, 94).
alleged ‘overriding’ or ‘non-derogable’ power.

This brief overview suggests that the peremptory nature of norms does not always achieve the virtually unlimited special effects that they are alleged to have, by ‘overriding’ or ‘trumping’ all other rules or regimes of international law.\(^{(91)}\) However deplorable as the act in question might be, *jus cogens* norms do not function as a panacea to remedy all situations of alleged injustice. It follows that the mere identification of some rules as having peremptory nature is not sufficient to determine what legal consequences they may entail.\(^{(92)}\) Moreover, this may lead to the negation of the validity of deductive approach as such, because drawing practical conclusions directly from the *jus cogens* concept without any need for state practice and *opinio juris* can be seen as a manifestation of the interpreter’s own approach.\(^{(93)}\)

That said, there is still considerable support for the proposition that an entitlement of universal jurisdiction over perpetrators of international crimes is a logical consequence of the peremptory nature of those crimes. This view seems to have gained support not only from doctrinal comments, but also from practices of various courts. While some commentators might argue that this is merely an achievement of the ordinary customary law-making process,\(^{(94)}\) a further assessment on this point is still warranted, as this proposition seems to have been retained for quite some time, irrespective of the fact that state practices did not seem to be matured enough to confirm customary international law.

The ICTY seems the most proactive in this respect. In the *Prosecutor v. Furundžija*,\(^{(95)}\) the Trial Chamber observed that ‘it would be inconsistent on the one hand to prohibit torture to such an extent as to restrict the normally


\(^{(93)}\) Ibid., at 446.


\(^{(95)}\) *Prosecutor v. Furundžija*, IT-95-17/1-T, Trial Chamber, Judgment, 10 December 1998.
unfettered treaty-making power of sovereign States and on the other hand bar States from prosecuting and punishing those torturers who have engaged in this odious practice abroad [emphasis added]'.

Put differently, the entitlement of universal jurisdiction can be viewed as a logical consequence of the peremptory nature of the prohibition of torture. In the *Prosecutor v. Tadić* (97) the Appeal's Chamber of the ICTY was tasked with ruling on the plea of sovereign equality raised by the appellant, who alleged that no state could assume jurisdiction to prosecute crimes committed on the territory of another state without any justification by a treaty or customary international law. Based on this proposition, the appellant argued that the same requirement applied to the exercise of jurisdiction of an international tribunal, which suggests the principle of state sovereignty would have been violated in that case. The chamber rejected this plea, relying instead on the nature of the crime, with explicit reference to the jurisprudence of the *Eichmann case*. (99) According to the court, the primacy of the international tribunal over domestic courts can be confirmed with regard to the crime, which was ‘universal in nature, well recognized in international law as serious breaches of international humanitarian law, and transcending the interest of any one state [emphasis added]’.

Similarly, the Special Court for Sierra Leone was faced with the challenge to its jurisdiction in the *Prosecutor v. Kallon & Kamara* (101) in light of the amnesty granted in the Lomé agreement. In rejecting this allegation, the court, while admitting that ‘the grant of amnesty or pardon is undoubtedly an exercise of sovereign power’, nevertheless concluded that the grant of amnesty would not amount to depriving another state of its

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(96) Ibid., para. 156.
(98) Ibid., para. 55.
(102) Ibid., para. 67.
jurisdiction where it is universal. Whether the crimes are crimes susceptible to universal jurisdiction depends on the nature of the crimes. Thus, ‘[o]ne consequence of the nature of grave international crimes against humanity is that States can, under international law, exercise universal jurisdiction over such crimes’.\(^{(103)}\)

Given all this, there seems to be at least a strong indication in the ‘case law’, that international crimes that amount to the violation of *jus cogens* norms may be subject to the assertion of universal jurisdiction. In fact, when Lord Brown-Wilkinson stated in *Pinochet (No. 3)*\(^{(104)}\) in the House of Lords that ‘[t]he *jus cogens* nature of the international crime of torture justifies states in taking universal jurisdiction over torture wherever committed’, he did not feel obliged to make detailed arguments but merely referred to *Furundžija* and *Demjanjuk*.

Nevertheless, one may still argue whether this is truly a logical consequence of the peremptory nature of these types of crimes. Regarding this, it should be noted at the outset that if one takes that view, the assertion of universal jurisdiction should be *mandatory*, rather than merely *permissive*. In fact, this view is premised on the postulation that since those offences by their very nature undermine the foundations of the international community, individual perpetrators — an addressee of the prohibition of *jus cogens* norms — must not go unpunished; hence, it has a strong overtone of retributive justice.\(^{(105)}\) Based on this proposition, it argues that offences that undermine the international order are the concern of all states; in order for the absolute nature of the prohibition to be effectuated, all states must

\[^{(103)}\] Ibid., para. 70.

\[^{(104)}\] *R. v. Bow Street Metropolitan Stipendiary Magistrate, Ex parte Pinochet Ugarte (No. 3)*, [1999] 2 All E.R. 97 (H.L.)


Dissenting Opinion of Judge Van den Wyngaert in Arrest Warrant mirrors this idea: ‘the *ratio legis* of universal jurisdiction is based on the international reprobation for certain very serious crimes such as war crimes and crimes against humanity. Its *raison d’être* is to avoid impunity, to prevent suspects of such crimes finding a safe haven in third countries’. *Case concerning the Arrest Warrant of 11 April 2000*, Dissenting Opinion of Judge *ad hoc* Van den Wyngaert, ICJ Reports 2002, at 166–167 (para. 46).
cooperate in bringing those perpetrators into justice. Such cooperation requires states to either prosecute or extradite perpetrators if they are found in their territory; this can be seen as a requirement of mandatory universal jurisdiction in the sense that states are obliged to exercise their jurisdiction when they do not extradite the alleged offender even if the offense does not have any link with the forum state other than the presence of that person. In fact, proponents of the deductive approach express support for the idea of mandatory universal jurisdiction. For example, Stevens impassionedly argues that:

the only way the prohibition of genocide can have any concrete meaning as a *jus cogens* norm — that is, as a rule of paramount importance to the maintenance of the international order and from which no derogation is allowed — is if this norm is supported by a *jus cogens* duty to extradite or prosecute. The absolute prohibition of genocide has no meaning unless all states have an absolute obligation to bring offenders to justice’.\(^{(106)}\)

Orakhelashivili, applying the all-embracing superiority of *jus cogens* norms, concludes that ‘[i]f *jus cogens* crimes are peremptorily outlawed as crimes, then the duty to prosecute or extradite their perpetrators must be viewed as peremptory’.\(^{(107)}\) Judge Ferrari Bravo, in his dissenting opinion in *Al-Adsani*, albeit not in the criminal law context, insists that the *jus cogens* nature of the prohibition of torture entails that ‘every State has a duty to contribute to the punishment of torture’\(^{(108)}\).

The proponents of mandatory universal jurisdiction thus infer the duty to prosecute or extradite from the peremptory nature of the prohibition of crimes in question. As observed above, there is a growing consensus today that certain crimes are established as *jus cogens* crimes. However, the addressee of the peremptory prohibition is individuals, not states. If one


argues that the effect of such a prohibition stretches to states, it would amount to situate individuals and states in the same sphere, and argue that states would act in complicity with those individual perpetrators by not punishing them. Yet it does not seem to match the current legal system of international law.

Admittedly, states may assume an obligation in relation to the acts of individuals, but it does not derive from the complicity of states with individuals. On the one hand, a state may be held responsible for an act of genocide committed by individuals if their conduct is attributable to it. However, it is because that states themselves are bound not to commit genocide, through the actions of individuals or certain entities whose acts are attributable to them. On the other hand, a state is held responsible for the violation of the obligation to prevent or punish certain conducts committed by individuals under certain circumstances. However, this obligation derives from norms that address and regulate states’ acts and omissions, which are conceptualized distinctly from a conduct of individuals. In any event, while there is a growing support among doctrines that territorial states and national states of the offender assumes an obligation to investigate and prosecute as far as international crimes or serious human rights violations are concerned, it does not automatically apply to third states.


(110) While the theory of complicity was prevailing in 19th century’s doctrines and practices, it was criticized by some modern theorists such as Anzilotti as situating a private person and a state in the same sphere. According to them, a state is internationally responsible solely for its conduct, and not for that of private persons. See D. Anzilotti, ‘La responsabilité international des états: a raison des dommages soufferts par des étrangers’, 13 Revue générale de droit international public (1906), at 13. This was adopted by the General Claims Commission in Janes v. Mexico, where the Commission found that ‘[t]he international delinquency in this case [the failure to investigate and prosecute] is one of its own specific type, separate from the private delinquency of the culprit’. See, Janes v. Mexico, General Claims Commission, Opinion and Decision of 16 November 1926, 26 American Journal of International Law (1927), at 362-371. The distinction between state responsibility and individual liability established in this opinion marked the turning point in the sense that it conceptualized the duty to prosecute, which has been adopted by doctrines and practices since then.
Hence, the proposition of mandatory universal jurisdiction does not seem to have gained enough support to be a mainstream argument. In contrast, an examination of international practice shows a strong indication in favour of the permissive nature of universal jurisdiction. Above all, those statements made in the case law highlighted above typically spoke of ‘entitlement’ or ‘interest’ of the assertion of universal jurisdiction, and in doing so hints at the permissive nature of universal jurisdiction. In the same vein, many instruments adopted by the association of experts employ permissive terms when they define the concept of universal jurisdiction. Doctrinal statements also conform to this trend.

In conclusion, the approach that infers the basis of universal jurisdiction directly from the peremptory nature of the crimes does not appear to provide a feasible explanation for the current state of practice. It is true that certain crimes are recognized as *jus cogens* crimes that directly impose obligation upon individuals. It is also true that there is a growing support for the idea that those crimes are subject to the assertion of universal jurisdiction. Nevertheless, the latter proposition cannot be seen as an automatic consequence of the former. If one infers the foundation for universal jurisdiction from the peremptory nature of the crimes, it suggests that one begins from the absolute nature of individual criminal responsibility, which would inevitably lead to the argument that individuals must be held accountable wherever they are and states must act to hold individuals accountable. No considerable support for such an absolute duty of states can be found in the current developments with respect to the assertion of universal jurisdiction.

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2. The Inductive Approach

2.1. Development of State Practice

As opposed to the deductive approach, the inductive approach, that is, inducing the basis for universal jurisdiction by confirming ordinary customary rules, seems to have gained support. This is by no means without reason. While the retreat of Belgium and Spain from their spearheading course on universal jurisdiction led some commentators to declare the ‘fall’\(^\text{(113)}\) or even the ‘death’\(^\text{(114)}\) of universal jurisdiction, there has been a number of developments which seem to provide ample evidence for assessing the operation universal jurisdiction in the context of customary international law.

For instance, a growing number of states have adopted legislation that empowers their courts to exercise universal jurisdiction over core crimes. According to the Amnesty International’s survey of national legislation published in 2012, 147 (approximately 76.2%) out of 193 UN member states have made provisions for universal jurisdiction over one or more of ‘crimes under international law’ (war crimes, crimes against humanity, genocide and torture), and 16 (approximately 8.29%) out of 193 states can exercise universal jurisdiction over conduct that amounts to a crime under international law, albeit only as an ordinary crime. The survey concludes that a total of 163 states (approximately 84.46%) can exercise universal jurisdiction over one or more crimes under international law.\(^\text{(115)}\) It is important to note that the list includes many African states, which have been known for their critical attitude towards the assertion of universal jurisdiction.

Moreover, criminal proceedings have actually started in some states. For instance, in *R. v. Munyaneza*\(^\text{(116)}\), Quebec Superior Court found Munyaneza


guilty of the seven counts of genocide, crimes against humanity and war crimes. It was the first time that a Canadian court convicted a person of such crimes in the exercise of universal jurisdiction. It was also the first prosecution under Canada’s Crimes Against Humanity and War Crimes Act\(^{(117)}\) in order to implement the Rome Statute. In Germany, the trial of two Rwandan Hutu leaders accused of masterminding atrocities in eastern Democratic Republic of Congo started in Stuttgart in 2011.\(^{(118)}\) It was the first prosecution under the Code of Crimes against International Law adopted in June 2002.\(^{(119)}\) Likewise, in 2012, a South African court ordered the national police and prosecutor to open an investigation based on universal jurisdiction of allegations of torture by Zimbabwean security officials.\(^{(120)}\)

Along with those national legislation and judicial practices, many states have made declarations in favour of universal jurisdiction. Of particular importance are those that were made during a debate of the General Assembly’s Sixth Committee on the agenda of the scope and application of the principle of universal jurisdiction. Overall, it has been generally acknowledged that universal jurisdiction is enshrined in international law\(^{(121)}\) and/or an important tool for the fight against impunity, while concerns has been constantly raised on the possibility of its abusive use.

However, a closer look at those practices leads one to question to what extent and in what sense it can be said that universal jurisdiction has been established. With regard to national legislation, the same survey of Amnesty International reveals that while at least 136 (approximately 70.5\%) UN member states have made provisions for universal jurisdiction over war


\(^{(120)}\) Southern African Litigation Centre v. National Director of Public Prosecutions, Case Number: 77150/0, Judgment of 8 May 2012.

\(^{(121)}\) Australia (UN Doc. A/C.6/66/SR.12, paras. 6–8) (on behalf of CANZ); Canada, (UN Doc. A/C.6/65/SR.10, paras. 63–67) (on behalf of CANZ);
crimes, the number drops to 80 (approximately 41.5%) for crimes against humanity, 94 (approximately 48.7%) for genocide and 85 (approximately 44%) for torture.\(^{(122)}\) Moreover, it should be noted that most of the states that have already provided for universal jurisdiction over war crimes and torture are also parties to the Geneva Conventions and the Convention Against Torture, both of which require state parties to establish universal jurisdiction. While the ICJ mentioned in the *North Sea Continental Shelf* case the possibility that ‘a very widespread and representative participation in the convention’\(^{(123)}\) might transform a conventional rule into a rule of customary international law, this fact makes it difficult to characterise the enactment of these national statutes as a practice that in and of itself creates customary international law. In fact, enactment is generally regarded as an implementation of treaty obligation rather than an acting out of *opinio juris sive necessitatis*. In any event, those figures are far from being capable of generating customary international law in the first place. Rather, they merely reveal a deplorable fact of non-compliance with relevant treaties, particularly when one recalls that the number of contracting state parties had amounted to more than 190 for the Geneva Conventions and more than 150 for the Convention Against Torture at the time of the survey.

The same applies to judicial practices. Apart from the fact that the number of proceedings is still limited compared to that of legislation, many proceedings have been conducted to carry out treaty obligations, as observed in the trial of Hissène Habré in Senegal.\(^{(124)}\)

With regard to state declarations, while considerable support has been given to the idea of universal jurisdiction as an ‘important tool’,\(^{(125)}\) ‘effective


\(^{(124)}\) Actually, it can be seen not only as a performance of treaty obligation but also partly as a response to the judgment of the ICJ that required Senegal to submit the case, without further delay, to its competent authority for prosecution as a remedy to its breach of the obligation under the Convention. *Questions Relating to the Obligation to Prosecute or Extradite* (Belgium v. Senegal), Judgment, 20 July 2012, at 463 (operative paragraph (6)).

instrument’, or ‘[essential] mechanism’ for the fight against impunity, emphasis has often been made as to the absence of a common understanding with regard to the scope, definition, and condition for the application of universal jurisdiction.\(^{(126)}\) Moreover, describing universal jurisdiction as a ‘tool’, ‘instrument’ or ‘mechanism’ in itself renders its legal status rather ambiguous.

2.2. Efforts to ‘Mitigate’ the Scarcity of State Practice

On balance, it can be pointed out that uncertainty remains as to the scope, application, and conditions for the exercise of universal jurisdiction as far as its customary law status is concerned, despite the fact that there is a growing support for the idea of universal jurisdiction as a tool for the fight against impunity. For the purpose of this study, there is no need to determine at this stage whether and to what extent universal jurisdiction is established in customary international law. Rather, it may be sufficient to observe how commentators evaluate the current state of affairs.

Some commentators have taken a strict approach in which only a considerable amount of state practice and opinio juris can be counted as factors generating customary international law. These commentators suggest that only national legislation and judicial practices, and/or state declarations made as official statements, may be relevant. They suggest that the practice of international criminal courts may not be counted, on the grounds that that their development was precisely in order to provide a remedy for the deficiencies of national courts.\(^{(128)}\) Those commentators tend to deny the customary status of universal jurisdiction, observing that ‘the evidence of state practice on this matter is not yet substantial so as to afford the finding of a customary international law rule in its favour’,\(^{(129)}\) or that ‘[such category of jurisdiction] is unknown to international law’\(^{(130)}\)

\(^{(126)}\) Democratic Republic of the Congo, (UN Doc. A/C.6/65/SR.11, paras. 29–31)
\(^{(127)}\) Thailand (UN Doc. A/C.6/65/SR.11, paras. 11–12); UK (UN Doc. A/C.6/66/SR.13, paras. 24–26) (arguing that universal jurisdiction is clearly established only for piracy, war crimes, there being no consensus on genocide and crime against humanity)
Other commentators have taken a more lenient approach, which in many cases results in the affirmation of a right of universal jurisdiction under customary international law. There are mainly two distinct strands for this perspective.

The first strand argues that a smaller amount of practice is sufficient to establish a right to exercise universal jurisdiction, as distinguished from a duty to do so. This has the effect of mitigating the requirement for the establishment of customary law. Premised on this view, Cryer concludes that 'increasing support' for the assertion of universal jurisdiction by states is sufficient to suggest that the customary case for universal jurisdiction over core crimes may be made, and, with some caution, the same conclusion can be made with regard to universal jurisdiction in absentia. In this regard, reference can also be made to the joint separate opinion of Judges Higgins, Kooijmans and Buergenthal, in the Arrest Warrant case, which Cryer explicitly relies on. While admitting an apparent lack of evidence to support the status of universal jurisdiction in absentia, the judges concluded that 'there is no rule of international law ... which makes illegal co-operative acts designed to secure the presence within a State wishing exercise jurisdiction [in this case, co-operative acts denote a request of extradition in the application of universal principle, which is seen as the exercise of universal jurisdiction in absentia]'. While this statement in itself can be criticized as being premised on an erroneous distinction between universal jurisdiction in general and universal jurisdiction in absentia, it is still worth noting because it appears to apply a less strict condition — the absence of prohibition which could be confirmed more easily than the establishment of right — in affirming universal jurisdiction in absentia.

While being in line with the mainstream argument that universal

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(130) Case concerning the Arrest Warrant of 11 April 2000, ICJ Reports 2002, Opinion individuelle de M. Guillaume, président, ICJ Reports 2002, at 44 (para. 12). This statement was made with regard to universal jurisdiction in absentia, though. See also, L. Reydams, Universal Jurisdiction (2003), at 224.

(131) Cryer, supra note 112, at 89–94.

jurisdiction over core crimes is permissive and not mandatory, this view cannot be entirely free from criticism. First of all, it raises the question of why an establishment of right can be treated differently from that of duty: A right entails that someone else has a duty to ensure the state of affairs envisaged by that right to be brought about.\(^{(133)}\) In other words, the creation of a right entails the creation of a corresponding duty. It follows that, normally, the conditions for the establishment of right should be as strict as that of duty. Moreover, this view seems self-contradictory: on the one hand, it is premised on that the ground of jurisdiction must be established under international law, thereby rejecting the Lotus presumption,\(^{(134)}\) which they regard as denoting that what is not explicitly prohibited is permitted;\(^{(135)}\) on the other, it infers, at least presumptively, the existence of right from the absence of prohibition, thereby implicitly endorsing the same Lotus presumption.

In contrast, the second strand of reasoning broadens the scope of ‘practice' to be considered, thereby making it easier to affirm the customary status of universal jurisdiction without a large amount of state practice *lato sensu*. Conveying a strong overtone of ‘modern positivism',\(^{(136)}\) this view attaches significant weight to ‘verbal' state practice, along with ‘hard' state practice, and deduces detailed rules from general principles.\(^{(137)}\) In his influential article, Kreß draws attention to the Preamble of the ICC Statue.


\(^{(134)}\) *The Case of the S.S. 'Lotus' (France v. Turkey)* , PCIJ Series A, No.10, at 19.

\(^{(135)}\) In fact, *Lotus* presumption has been regarded as reflecting a ‘high water mark of laissez-faire in international relations' resting upon the principle of sovereignty and consent, and commentators maintain that it has not survived the substantive changes that international society has achieved since then. *Case concerning the Arrest Warrant of 11 April 2000*, Joint Separate Opinion of Judges Higgins, Buergenthal and Kooijmans, ICJ Reports 2002, 78 (para. 51); Dissenting Opinion of Judge ad hoc van den Wyngaert, ibid., 169 (para. 51). See also, *Legality of the Threat or Use of Nuclear Weapons*, Declaration de president Bedjaoui, ICJ Reports 1996, 270–271 (para. 13); Dissenting Opinion of Judge Shahabuddeen, ibid., 394–396.


\(^{(137)}\) On the deduction of concrete rules from general principles, see, Simma and Alston, supra note 54, at 102–106.
in which states solemnly declare that such crimes ‘must not go unpunished’ and that ‘their effective prosecution must be ensured by taking measures at the national level’. Postulating this necessity for the routine enforcement of international criminal law as a goal of the emerging system of international criminal justice for which universal jurisdiction plays a part, he concludes:

...the categorization by states of conduct as a crime under international law must, for reasons of principles and consistency, be seen as a strong indication in favour of a customary state competence to exercise universal jurisdiction. Accordingly, the same amount of precise and ‘hard’ state practice demanded by the Continental Shelf test may not be necessary to affirm the existence of a permissive international legal rule in this case.

The merits of this view lies in that it may offer a way for integrating various ‘verbal’ state practices that are generally made in relation to concluding treaties (conclusion of treaties, voting records, and expression of states’ wish in the preamble) or other proclamations made in international fora on customary international law, thereby capturing or catching up the trend that is changing rapidly today. This method seems to be particularly promising for the field of international criminal law, because international criminalization takes place at international level, which, as was shown above, has been taking a different path from an ordinary customary law creation.

However, this approach nevertheless raises some problems. If states truly wish to see the regular enforcement of international criminal law, in the sense that individual perpetrators are held accountable wherever they are, the exercise of universal jurisdiction must be mandatory, not merely permissive. In fact, the Preamble of the ICC Statute speaks of ‘the duty of

\[138\] All citation are from the fourth preamblar paragraph of the Statute of the ICC.
\[140\] Ibid., at 575.
\[141\] Simma and Alston, supra note 54, at 308–316. See also, Kreß, ibid., at 571–572.
every State to exercise its criminal jurisdiction over those responsible for international crimes [emphasis added].\(^{(142)}\) although jurisdiction here is not necessarily means universal jurisdiction. However, universal jurisdiction has been constantly conceived as permissive, as far as its customary status is concerned. Moreover, as Amnesty International’s figures (cited above) demonstrate, not all states are willing to provide universal jurisdiction over all crimes under international law: verbal state practice is contradicted by material state practice. It may be argued that the modern positivist approach functions at the level of international criminalization, but not at the level of its national enforcement.\(^{(143)}\) In this regard, the application of modern positivism to universal jurisdiction seems to share the same problems with the deduction of universal jurisdiction from *jus cogens* prohibition. Whether relying on *jus cogens* prohibition or verbal state practice, there is little doubt today that individual criminal responsibility is established over war crimes, crimes against humanity, and genocide. However, this fact, or the method that is applied to establish individual criminal responsibility, does not necessarily apply to or affect the national enforcement of those prohibitions.

**Concluding Remarks**

Overall, the deductive approach and the inductive approach each have their own significance and problems. It can be noted that both of approaches agree that individuals are held responsible directly under international law with regard to ‘crimes under international law’, and there should be no impunity for the individual perpetrators of those crimes, for which universal jurisdiction may play a part. Simultaneously, state practices that provide universal jurisdiction over those crimes are apparently not sufficient or coherent enough to establish customary rules in light of the strict conditions

\(^{(142)}\) Citation is from the sixth preamblar paragraph of the Statute of the ICC.

\(^{(143)}\) Admittedly, Kreß is explicitly aware of this distinction, when he argues: ‘It is not necessarily inconsistent for states, on the one hand, to pronounce themselves in favour of the international criminalization of certain conduct because such conduct if of ‘concern to the international community as a whole’, and on the other hand, to deny a state’s competence to exercise universal jurisdiction over such a crime [citation omitted]’.

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demanded by the *Continental Shelf* test.

Against this backdrop, doctrines have sought to overcome this apparent deficiency in one way or another, thereby establishing the ground of universal jurisdiction in order to meet the need of the fight against impunity. On the one hand, the deductive approach (especially in the context of the *jus cogens* doctrine) puts emphasis on the absolute nature of individual responsibility from which the ground of universal jurisdiction can be deduced, thereby eliminating the need to rely on state practice or *opinio juris*. While this view may capture the reality of those crimes being increasingly condemned as the violation of *jus cogens* rules, it has its own drawbacks. In order for this approach to retain a logical coherency, universal jurisdiction must be structured as a duty, not a right. However, this is not observed in the current context. On the other hand, the inductive approach tries to mitigate the strict conditions for the establishment of customary international law, thereby confirming the ground of universal jurisdiction. This approach may provide a description of *how* those conditions are mitigated, but does not seem to provide a persuasive explanation for the question of *why* these conditions can be mitigated in those cases.

Somewhat paradoxically, it can be argued that the problem lies not necessarily in methodology, but to the conception of jurisdiction. Both approaches are, at least implicitly, premised on that the basis for universal jurisdiction must be provided by permissive rules of international law, because jurisdictional claims without linkage to a crime is an excessive claim that constitutes interference with the domestic matters of territorial state or national state of the offender. That is why the deductive approach makes recourse to the peremptory nature of crimes, which allegedly is vested with a power to *transcend* sovereignty. That is also the reason why the inductive approach seeks to mitigate the conditions for the establishment of customary international law, based on the understanding that the ground of universal jurisdiction must be established in international law that governs relations between states.

However, it can be argued that that very premise should be questioned. In fact, it is quite unlikely — if not unthinkable — that the application of criminal law to conduct that occurred in the territory of another state constitutes a violation of the principle of non-interference.
First of all, a state’s law ordinarily prescribes acts of individuals, not of states, and its application does not compel a state to do or not do certain acts.

On the other hand, some may still argue that by attaching legal consequences to conduct in another state, a state exercises control over that conduct, which may constitute an interference with the sovereign rights of that foreign state, when such control affects the latter’s essential interest.\(^{(144)}\)

While this view may fit in the field of economic law, things may not be the same in the field of criminal law. In the field of criminal law, it is only the state that holds the alleged perpetrator in custody that can effectively enforce its law. Accordingly, a prescriptive statement in itself would not affect individuals’ behaviour, in so far as they remain within the territorial bounds of another state. Admittedly, the possibility that individuals may be subject to territorial enforcement after they enter into the proscribing state, may induce compliance with that law, or deter them from traveling to that state. In the former case, their behaviour could be regarded as a violation of their home country’s law. If it is an isolated case, which is very likely in the case of criminal law, it would hardly constitute a threat to that local state. In the latter case, the possibility of territorial enforcement may be perceived as a restraint on their freedom to move (not a right, as individuals do not have a right to enter foreign territories in general). However, it would not be a matter of international law, unless the individual in question enjoys immunity as a state official, which is not an instance that involves the principle of non-interference. For instance, in the Arrest Warrant case, the ICJ held that Belgium’s international circulation of arrest warrant might have affected Yerodia’s capacity to undertake travel in the performance of his duties as an incumbent foreign minister, thereby constituting a violation of an obligation of Belgium towards the Congo. However, it was the infringement of the immunity of incumbent foreign minister from criminal jurisdiction and the inviolability enjoyed by him under international law and not the principle of non-intervention that was at stake.\(^{(145)}\)

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To sum up, the prescription of foreigner’s conduct taking place in the territory of another state does not, in itself, constitute interference with the domestic matters of the territorial or national state of the offender. To expand on this, the ground of universal jurisdiction does not need to be established under international law in order for it to be justified vis-à-vis territorial or national states. Put differently, a state may exercise universal prescriptive jurisdiction without violating other states’ rights under international law.

A state’s ability to exercise universal prescriptive jurisdiction without violating another state’s rights, however, does not mean that a state has a right to prescribe conduct that takes place within the territory of another state, at least not in the sense that the latter has a corresponding duty to accept or at least acquiesce to such a prescription from an outside state. Rather, it means that international law is simply neutral on this point. Nor can the prescribing state always achieve the objective of such extraterritorial prescription. In fact, while territorial jurisdiction does not make other states’ extraterritorial prescriptions illegal, it still functions as a de facto restraint upon other states’ assertion of jurisdiction. Because states are generally prohibited from enforcing their law within the territory of other states, prescribing states cannot exercise their jurisdiction effectively without the cooperation of territorial states in collecting evidence and obtaining custody of individual perpetrators.

Moreover, the rights of accused individuals also constitute a restraint on states’ extraterritorial application of criminal law. In the case of extraterritorial application of criminal law, the accused are not subject to the public authority of the asserting state—unless, of course, they are nationals of that state—and hence they are not expected to have knowledge about the criminal law in that forum. This appears to be incompatible with the requirement of the specificity of criminal rules under the principle of legality, which is a substantive restraint on the authority of a state to impose punishment upon individuals.

This apparent discrepancy leads us to the need for a thorough review of the system of jurisdiction in general and universal jurisdiction in particular. While existing approaches seek to establish an entitlement to jurisdictional claims, the above observation suggests that the question should be instead
what sort of restraints jurisdictional claims are subject to and if and how international law is relevant in removing or easing such restraints. It is in light of those restraints that a new approach of universal jurisdiction should be sought.