Erga Omnes Obligations Of States: A Critical Study of the Extended Jurisdiction of International Criminal Court over *Jus Cogens* crimes

THESIS STATEMENT

The jurisdiction of International Criminal Court extends *erga omnes* to the States which are not parties to its Statute, in cases of the violations of peremptory norms of human rights law and International humanitarian law.

INTRODUCTION TO THE RESEARH TOPIC

Public International law is a set of rules for the regulation of the conduct of States in their mutual relations to one another.[1] It provides a broad mechanism for the carrying out of amicable and friendly relations by the civilized nations of the world. Since the establishment of United Nations (UN) in 1945, the world has taken the shape of International community. It may be noted that the ultimate purpose of the establishment of UN is to organize the nations of the world into a single community for the welfare and benefit of the mankind, as International law is a mean and not an end in itself.[2]

International Criminal Law (ICL) is a complex and one of the most controversial area of International law in respect of the establishment of International Criminal Court (ICC), the

[1] Sir Robert Jennings and Sir Arthur Watts, *Oppenheim's International Law,* 9th ed, Vol 1, (U.K: Longman Group Limited, 1992), 16.

[2] Modern International law has many branches dealing with different kinds of States relations. Such as International Humanitarian law (IHL) provides for the conduct of war and protection of specific persons and properties; International human rights law (IHRL) put obligations on States for the protection, promotion and fulfillment of human rights of individuals; International trade law and investment law deals with the trade and investment related matters between States and investor-State disputes; International environmental law provides for the protection of environment by the States; and similarly International criminal law (ICL) that deals with suppression and punishment of International crimes. There are so many other branches of public International law which are applicable in their respective fields and areas.

ratification of ICC statue[3], the jurisdiction of the court, the classification of International crimes and the determination of the *jus cogens* nature of the International crimes. The components of ICL are generally derived from International law, national criminal laws, comparative criminal laws and procedures and international and regional human rights law.[4] The penal aspect of International law has its roots in conventions, customs and general principles of law, all of these are the sources of ICL but subject to the principle of legality based on the concepts of *nullum crimen sine lege*[5] and *nulla poena sine lege.*[6] The principle of legality is however fundamental to the criminal justice either on national level or international.

The International aspect of penal law is based on extra jurisdictional norms, conflicts of criminal jurisdiction between States and between a State and an international legal organ[7], and the international sources of law applicable to the modalities of international cooperation in criminal matters.[8] Further, the substantive and procedural rules applicable to the proceedings of ICC, ICTR and ICTY are originally derived from the 'general principles of law', also found in national legal systems. Moreover, the general part of the ICL applies to the proceedings of international legal institution in the context of the 'direct enforcement system', while general principles applicable in the national legal systems constitute 'indirect enforcement mechanism'.[9]

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[3] Rome Statute or the Statute of International Criminal Court 1998.
[4] M. Cherif Bassiouni, *Introduction To International Criminal Law: Second Revised Edition,* (The Netherland: Martinus Nijhoff Publishers, 2012), 1.
[5] See Article 22 of the ICC Statute, nullum crimen sine lege (no crime without law).
[6] See Article 23 of the ICC statue, nulla poena sine lege (no punishment without law).
[7] M. Cherif Bassiouni, *Interrnational Extradition: United States Law And Practices,* (USA: Oxford University Press, 2007), 425.
[8] Bassiouni, *International Criminal Law*, 10.
[9] Ibid. 12.

To date, twenty seven categories of international crimes exists, not all of them comes under the jurisdiction of ICC. These categories of international crimes are evidenced by 276 conventions concluded between 1815 and 1999.[10] These international crimes are: aggression, genocide, crimes against humanity, war crimes, crimes against the UN and associated personnel, unlawful possession and/or use of weapons, theft of nuclear materials, mercenarism, apartheid, slavery and slave-related practices, torture, unlawful human experimentation, piracy, aircraft hijacking, unlawful acts against civil maritime navigation, unlawful acts against internationally protected persons, taking of civilian hostages, unlawful use of the mail, nuclear terrorism, financing of international terrorism, unlawful traffic in drugs and dangerous substances, destruction and/or theft of national treasures and cultural heritage, unlawful acts against the environment, international traffic in obscene materials, falsification and counterfeiting of currency, unlawful interference with submarine cables, and bribery of foreign public officials.[11] 'Among the criminal provisions in these agreements there are provisions on penal jurisdiction, and, of these, only thirty-two conventions contain a reference to a jurisdictional theory and among them only a few can be construed explicitly or implicitly as reflecting universal jurisdiction. Conversely, ninety-eight provisions reflect the obligation to prosecute and sixty-eight to extradite, evidencing the legislative choice of this enforcement technique over that of conferring universal jurisdiction to any and all states'.[12]

ICC JURISDICTION

[10] Bassiouni, "Universal Jurisdiction," 13.
[11] Bassiouni, *International Criminal Law*,Chapter III.
[12] Bassiouni, "Universal Jurisdiction," 13.

The ICC is an autonomous international body, established under the auspices of the United Nation.[13] The Court has jurisdiction over certain crimes in pursuance of Article 5, 6, 7 and 8 of the Rome Statute of International Criminal Court.[14] Under the ICC statute, the Court can assume jurisdiction under article 13, 14 and 15 of the ICC statute over international crimes such as crime of aggression (not yet defined precisely), genocide, crimes against humanities and war crimes.

There are certain pre-conditions for exercise of the Court jurisdiction as enunciated in Article 12 of the ICC statue;[15]

> 1. A State which becomes a Party to this Statute thereby accepts the jurisdiction of Court with respect to the crimes referred to in article 5.
> 2. In the case of article 13, paragraph (a) or (c), the Court may exercise its jurisdiction if one or more of the following States are Parties to this Statute or have accepted the jurisdiction of the Court in accordance with paragraph 3:
> (a) The State on the territory of which the conduct in question occurred or, if the crime was committed on board a vessel or aircraft, the State of registration of that vessel or aircraft;
> (b) The State of which the person accused of the crime is a national.
> 3. If the acceptance of a State which is not a Party to this Statute is required under paragraph 2, that State may, by declaration lodged with the Registrar, accept the exercise of jurisdiction by the Court with respect to the crime in question. The accepting State shall cooperate with the Court without any delay or exception in accordance with Part 9.

[13] 'It is notable that although the Court is not an integral part of the United Nations (i.e. the ICC does not organically belong, nor is it subject, to the UN, in the sense that the International Court of Justice is), provisions have been made so that the ICC takes into consideration the workings of the UN (in particular, of the Security Council) and the UN recognizes the ICC as the official body in the area of prosecuting individuals for international criminal law violations. The cooperation of the Court and the UN is therefore expected in certain fields, in order that the Court's functions be facilitated and carried out seamlessly. In this sense, the ICC and the UN are organizations not exclusive of one another but complementary to each other'. *See* D. Dimitrakos, "The Principle of Universal Jurisdiction & the International Criminal Court", 26, accessed November 10th, 2015: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2383587.

[14] ICC Statute.

[15] Ibid.

According to Article 13 of the ICC statue states that;

> The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if:
> (a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14;
> (b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or
> (c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.[16]

Article 14 of the ICC statute deals with referral of a situation by the state party to the court and it follow as;[17]

> 1. A State Party may refer to the Prosecutor a situation in which one or more crimes within the jurisdiction of the Court appear to have been committed requesting the Prosecutor to investigate the situation for the purpose of determining whether one or more specific persons should be charged with the commission of such crimes.
> 2. As far as possible, a referral shall specify the relevant circumstances and be accompanied by such supporting documentation as is available to the State referring the situation.

Under Article 13(b) the Security Council can refer a situation for investigation to the Court, while Article 16 provides for the deferral of investigation or prosecution on the request of the UN Security council resolution passed by it for the period of twelve months. In those cases of Democratic Republic of Congo, Uganda and Central African Republic before ICC, the referral so made was by states, while in the case of Sudan the Security Council referred the issue for Court consideration.[18] It is now obvious that the Court has exclusive jurisdiction over the crimes defined by the ICC statue. The issue of the Universal Jurisdiction of the ICC in cases of non-parties States, is one of the most controversial area of this International legal arena.

[16] Ibid.
[17] ICC Statute.
[18] Xavier Philippe, "The Principles Universal Jurisdiction And Complementarity: How Do The Two Principles Intermish?" International Review of the Red Cross, Volume 88 Number 862, (2006): 389.

UNIVERSAL JURISDICTION AND STATE SOVEREIGNTY

According to Professor Bassiouni, 'Universal jurisdiction is not as well established in conventional and customary international law as its ardent proponents, including major human rights organizations, profess it to be'.[19] The concept of universal jurisdiction is founded in national legal systems and its relation with international legal issues is not yet clear.[20] While dealing with certain international crimes, since the Nuremburg Charter[21] and the judgments of International Military Tribunal at Nuremburg, the notion of immunity has stood excluded from the sphere of special defenses in criminal prosecution.[22] Article 4 of the 1948 Genocide Convention, Article 3 of the Apartheid Convention 1973, and the 1984 Torture Convention in Articles 4 and 12 provides for the removal of the head of State and other public officials immunity from criminal prosecution.[23]

[19]M. Cherif Bassiouni, "Universal Jurisdiction for International Crimes: Historical Perspectives And Contemporary Practice", Virginia Journal of International Law Association, (2001): 3.

[20] Ibid.

[21] Article 7 of the Nuremburg Charter removed the immunity of the heads of state from criminal prosecution

[22] Bassiouni, *International Criminal Law*, 75.

[23] 'The Pinochet case, in which the UK House of Lords allowed an extradition application by Spain in respect of the former Chilean president to proceed, remains the leading case on such an exception. The case concerned allegations of widespread and systematic torture carried out in Chile and various ordinary crimes of murder and conspiracy to murder, including conspiracy to murder in Spain. The court confirmed that, if he had been a serving head of state, Augusto Pinochet would have been entitled to an absolute personal immunity on all the charges and, as a former head of state, he would as a general rule continue to enjoy functional immunity in respect of acts carried out in his official capacity as head of state. All but two of the judges took the view that Pinochet enjoyed immunity for the 'ordinary' crimes on the ground that the acts alleged, although criminal, had been governmental and must therefore give rise to functional immunity. The court broke new ground, however, in considering whether there could be an exception to functional immunity where the international crime of torture was involved.

The UN Convention against Torture, to which Chile, the United Kingdom and Spain were all parties at the material time, lies at the heart of the judgment. The Convention sets up a system of extra-territorial criminal jurisdiction for torture, as defined in Article 1, but makes no mention of state immunity. But by definition, the international crime of torture must be committed by or with the acquiescence of a public official or other person acting in a public capacity. All defendants will therefore be state officials or former state officials or agents and will have carried out the torture as an official act for which they could claim immunity. In reality, it appears to have been the tension between this fact and the object and purpose of the Convention that prompted the majority to conclude that there could be no immunity for the international crimes of torture and conspiracy to torture'. https://www.chathamhouse.org/sites/files/chathamhouse/public/Research/International%20Law/bp1111_foakes.pdf last accessed on 10th November, 2015.

In the near past, the United Nation Security Council in pursuance of its power under chapter VII of the UN Charter, established two *ad hoc* tribunals, the International Criminal Tribunal for Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR). Article 7(2) and 6(2) of the ICTY and ICTR respectively provides for the removal of the head of State immunity from criminal prosecutions. Generally, ICL removes both substantial and temporal immunity for all public officials for genocide, crimes against humanity and war crimes. On the contrary, the International Court of Justice (ICJ) in Congo v. Belgium (2002) recognized the temporal immunity of the incumbent officials.[24] The ICC statute in Article 27 provides for the removal of immunity in criminal prosecution, which states:

> *Irrelevance of official capacity*
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> 1. This Statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.
> 2. Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.

One of the practices of the ICC in respect of the irrelevancy of immunity to criminal prosecution is the issuance of arrest warrant of Sudan's President Omar Hassan Ahmed Bashir.[25] Bashir was charged in the warrants for the crimes against humanity and war crimes for events in Darfur. Similarly, in 2011 the Court issued the arrest warrant for Libyan leader Muammar Gadhafi, his son Saif Al-Islam Gadhafi and Abdullah Al-Senussi for the crimes

[24] *Congo v. Belgium, 2002, ICJ.*
[25] https://www.icccpi.int/en_menus/icc/situations%20and%20cases/situations/situation%20icc%200205/Pages/situation%20icc-0205. aspx : Accessed 9th November, 2015.

against humanity.[26] The aforesaid jurisdictional practices of the ICC positively establishes the primacy of International norms over the national norms (i.e. head of state immunity). However, Article 98 of the ICC statute puts some limitations on the applications of Article 27. The referral by the Security Council to the ICC for the purpose of criminal investigation of certain crimes, thus implies the extended jurisdiction of the court in the territories of non-party States.

For ascertaining the theoretical basis of the universal jurisdiction two main theories are relevant. Professor M. Cherif Bassiouni,argued as;

> Two positions can be identified as the basis for transcending the concept of sovereignty. The first is the universalist position that stems from an idealistic weltanschauung. This idealistic universalist position recognizes certain core values and the existence of overriding international interests as being commonly shared and accepted by the international community and thus transcending the singularity of national interests. The second position is a pragmatic policy-oriented one that recognizes that occasionally certain commonly shared interests of the international community require an enforcement mechanism that transcends the interests of the singular sovereignty.[27]

The above two positions share common elements (i) the existence of commonly shared values of International community; (ii) a strong enforcement mechanism is needed for the protection of these common values; and (iii) that the expanded enforcement mechanism would possibly lead to the maintenance of peace and order in the world. Theoretically, the above positions reveals that a State or International organs can either individually or collectively takes measure for the suppression of international crimes.[28]

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[26] https://www.icccpi.int/en_menus/icc/situations%20and%20cases/situations/icc0111/Pages/situation%20index.aspx: Accessed 9th November, 2015.

[27] Bassiouni, "Universal Jurisdiction," 8.

[28] 'Universal jurisdiction has indeed been frequently confused with other theories of extraterritorial criminal jurisdiction. But, as discussed below, with few exceptions, the legislation and practice of states overwhelmingly evidences a connection between the crime and the enforcing state based on the crime's territorial impact or because of the nationality of the perpetrator or the nationality of the victim. As discussed below, explicit or implicit recognition of the theory of universal jurisdiction in conventional international law has been limited to certain international crimes. Nevertheless, the application of universal jurisdiction for certain international crimes does not necessarily mean that it should be devoid of any connection to the enforcing state, or that it has precedence over other theories of jurisdiction. Instead, universal jurisdiction for certain international crimes is a theory of

In many cases the principle of *aut dedere aut judicare* (Latin for either prosecute or extradite) remained purely theoretical to the states in their general practices. Some states that have in a very bold manner made efforts for the implementation the principle of universal jurisdiction and complementarity, but was unfortunately not realized due to the politics and diplomacy.[29] It should however, be noted that political considerations always prevailed over the legal reasoning in the course of history. Universal Jurisdiction can be defined as, 'a legal principle allowing or requiring a state to bring criminal proceedings in respect of certain crimes irrespective of the location of the crime and the nationality of the perpetrator or the victim'.[30] It follows that an offender can be prosecuted by the State or international judicial body regardless of the place and location of the offence. The theory of Universal Jurisdiction is based on the notion that certain crimes are so harmful to the interest of international community, which entitles and obliges states to bring proceedings against the perpetrators.[31]

jurisdiction that is predicated on the policy of enhancing international criminal accountability, whereby the enforcing state acts on behalf of the international community in fulfillment of its international obligations, and also in pursuit of its own national interest. But that does not mean that this enforcing exercise supplants the enforcing interests of other states, or for that matter, of international organs like the ICTY, ICTR, and ICC. That is why a balancing test must be applied in the exercise of universal jurisdiction'. See Bassiouni, "Universal Jurisdiction", 11-12.

[29] Xavier "Principle of Complementarity," 376.

[30] Kenneth C. Randall, "Universal Jurisdiction under International Law", Texas Law Review, No. 66 (1988): 785–8.

[31] 'Historically, universal jurisdiction can be traced back to the writings of early scholars of note, such as Grotius, and to the prosecution and punishment of the crime of piracy. However, after the Second World War the idea gained ground through the establishment of the International Military Tribunal and the adoption of new conventions containing explicit or implicit clauses on universal jurisdiction. The Geneva Conventions of 1949 are paramount in this regard, providing in unmistakable terms for universal jurisdiction over grave breaches of those Conventions. International crimes were no longer to remain unpunished.

The idea that in certain circumstances sovereignty could be limited for such heinous crimes was accepted as a general principle. Later on, other international conventions and, to some extent, rules of customary law enlarged the principle's scope of application. This was confirmed by a number of cases, starting with the Eichmann case in 1961, the Demanjuk case in 1985, and more recently the Pinochet case in 1999 and the Butare Four case in 2001, emphasizing that universal jurisdiction could lead to the trial of perpetrators of international crimes. International law empowered and in certain cases mandated states to prosecute crimes that were regarded as harming the whole international community'. See Xavier "Principle of Complementarity," 378.

'The principle of complementarity can be defined as a functional principle aimed at granting jurisdiction to a subsidiary body when the main body fails to exercise its primacy jurisdiction'.[32] This principle of complementarity is a sort of compromise between State sovereignty and universal jurisdiction, it implies that those who has committed international crimes may be punished through the International legal bodies in case of States failure to prosecute the criminal. The complementarity issue can only be raise when the crimes defined in Article 5 to 8 of the ICC statute falls within the court's jurisdiction for investigation and prosecution. Secondly, the Statute requires the fulfillment of certain conditions for the purpose of admissibility such as genuine investigation and prosecution, unwillingness and inability to prosecute. The lack of genuine investigation and prosecution can be form the only criterion for the assertion of jurisdiction by ICC.

The prohibition of the use of force in Article 2(4) of the UN Charter and the obligations of peaceful international cooperation have a great influence on the nature and content of state sovereignty, due to interdependency of states on one another, there is a need of international enforcement mechanism for encountering international crimes as to protect the norms of peaceful coexistence of peoples.[33] According to Brenhard Graefrath,

1. many international treaties now provide for universal criminal jurisdiction for offences that endanger the international order,
2. there is increased recognition of the fact that offences against the peace and security of mankind are punishable even where they are not treated as crimes under national law;
3. a culprit's official position as government official or head of state no longer removes criminal responsibility; immunity therefore cannot be claimed.[34]

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32 Ibid, p. 380.

33 Bernhard Graefrath, "Universal Criminal Jurisdiction and an International Criminal Court", European Journal of International Law, 1(1), (1990): 72.

34 Bernhard, "Criminal Jurisdiction", 72-73. 'For a long time, the question of international implementation of criminal law was approached from the viewpoint of the need to prevent possible interference with state sovereignty and not from that of the need for coordinated struggle and cooperation in the fight against international crimes. Thus, states either cited the sovereignty principle as justification for objecting to the

The conclusion can be drawn from the above premises argued by Graefrath, that universal criminal jurisdiction over certain international crimes exists even the crimes are not punishable under the national laws of the State.

Today some States are categorically opposing the universal criminal jurisdiction of the ICC, due to the fear of losing diplomatic protection to their citizens abroad. Moreover, the industrially strong Western powers are not in a position to recognize the criminal judgments of states whose legal system they do not consider equal to them.[35] Furthermore, the States objections to the universal criminal jurisdiction of International organs is based on the principle of sovereignty.[36] A moderate way is the recognition of the universal jurisdiction of ICC over certain *jus cogens* crimes subject to the principle of complementarity. It is to be noted that ICC is an auxiliary or complementary to the national jurisdiction of States. In case of failure by the States to punish criminals who committed heinous crimes, the ICC may resume jurisdiction. Thus the original jurisdiction over certain crimes needs to be establish by the international community, otherwise who will guarantee the fair trial of international criminals at national

extension of universal criminal jurisdiction or as justification for rejecting the establishment of an international criminal court This situation continues to exist today, though in a different fashion; there is increasing recognition that national security is at present achievable only by way of international cooperation.

In this context, however, one cannot underestimate the importance of the fact that states are the essential structural elements of today's international legal order, that they represent the effective political organizational form of peoples and that they have particular protective functions which they actually exercise. However compelling the precept of cooperation may be, all states want to insure that other states will not be permitted to use criminal law to interfere with their sovereignty or to achieve goals incompatible with the interests of the international community and peoples' right to self-determination'.
Accessed 13th November, 2015: http://www.ejil.org/article.php?article=1146&issue=71.

[35] Bernhard, "Criminal Jurisdiction", 73.

[36] The concept of State 'absolute sovereignty', has almost sunk in the pacific with the establishment of UN. In the era of globalization and technology, how a state can be certain about its absolute sovereign status, where its territory can be easily accessed with space satellite surveillance technology. For Instance, due to Internet technology a citizen of Pakistan can without any hindrances approach the citizens of United States and so other countries in the absence of any formal visa. In such a situation, it is very difficult to determine the absolute sovereignty of state.

courts. The bitter reality is that States considers the law and justice subservient to the prevailing political and economic consideration in their international relations.

EXTENDED JURISDICTION

The ICC has the mandate under its statute to determine the individual criminal liability rather of State. The question whether a national of non-party State to ICC, who commits a certain International crime on the territory of the State who is party to the Statute, can be prosecuted by the Court, the answer is in affirmative. Because the State, on which territory the crime has taken place, has the universal jurisdiction under the customary international law to prosecute the criminal, therefore, the State of custody can delegate the criminal jurisdiction to ICC. As Akande rightly pointed out that, 'The natural assumption failing the existence of a specific rule to the contrary, should be that where states are acting individually to protect collective interests and values, they are not prohibited, and should rather be encouraged, to take collective action for the protection of those collective interests. Thus, the same principle permitting individual states to prosecute individuals for international crimes, on the basis of universal jurisdiction and without the consent of the state of nationality, suggests that those states should be able to act collectively to achieve those ends. This may be done by setting up an international tribunal which exercises the joint authority of those states to prosecute. In this sense, the rule permitting the delegation of jurisdiction to international courts can be regarded as 'structural' rule of international law that does not require the positive consents of states but rather is deduced from other clearly-established rules.'[37] The jurisdiction of ICC can be extended to the individual of non-parties States, in case where he/she commits crime on the territory of a party state, and moreover, even to the non-parties states in case referral made by

[37] Dapo Akande, "The jurisdiction of International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits", Journal of International Criminal Justice 1, Oxford University Press, (2003): 626.

Security Council in pursuant of its power under the UN Charter as defined by Article 13(b) of the Statute. Whether the jurisdiction of the Court can be extended to the non-party states when a *jus cogen* International crimes has been committed by its individual and the state has either failed or not willing to prosecute him, and are there any *erga omnes* obligations of those non-party states to International peremptory norms are the questions which needs to be dealt accordingly.

JUS COGENS AND ERGA OMNES

International crimes that rise to the level of *jus cogens* constitutes *obligatio erga omnes*[38]. International law has firmly dealt with the concepts of *jus cogens* and obligation *erga Omnes* but not in the context of ICL.[39] According to Bassiouni, 'the implications of *jus cogens* are those of a duty and not of optional rights, otherwise *jus cogens* would not constitute a peremptory norm of International law'.[40] These peremptory norms are nonderogable in both time of war and peace. 'The recognition of certain International crimes as *jus cogens*, involves the duty to prosecute and extradite, the nonapplicability of statutes of limitation for such crimes, and the universality of jurisdiction over such crimes, irrespective of where they are committed,, or by whom (including head of states), or against what category of victims, and irrespective of the context of their occurrence (peace and war)'.[41]

The *jus cogens* means the 'the compelling law' and it holds the highest hierarchal position among all other norms, which are deemed to be peremptory and non-derogable.[42]

[38] M. Cherif Bassiouni, "International Crimes: Jus Cogens and Obligatio Erga Omnes", 59 *L*aw and *C*ontemporary *P*roblems, (1996): 63, Accessed on 11th November 2015: http://scholarship.law.duke.edu/lcp/vol59/iss4/6 .
[39] Bassiouni, *International Criminal Law*, 237.
[40] Ibid.
[41] Ibid, 237-238
[42] M. Cheriff Bassiouni, "A Functional Approach to "General Principles of International Law", 11 Mich. J. Int'l L, (1990): 768.

Some scholars treat *jus cogens* and customary law as same thing, while some distinguishes them. The origin of the *jus cogens* can be traced in the writings of earlier naturalist writers such as Hugo Grotius. C. Wolff and E. de. Vattel in sixteenth century stated that, 'there existed "necessary law" which was natural to all States and that all treaties and customs which contravened this 'necessary law' were illegal'.[43] Grotius stated that principles of natural law are so immutable that even God cannot change it.

Most of the legal philosophers were in general agreement, that there exists principles of natural law to which all nations and sovereigns are subservient in the interest of common goods of humanity.[44] However, they divided the *jus gentium (*the law of Nations) into two sub parts; the *jus naturale necessarium* (necessary natural law) and *jus voluntarium* (voluntary law), they considered the *jus naturale necessarium* as immutable.[45] Jean Bodin, who was a main supporter of the theory of absolute sovereignty, that a state has absolute power over its citizen, but on the contrary he recognized that the sovereign was always subject to overriding laws of Nations or Natural law.[46]

To some writers *jus cogens* are the fundamentals of law such as Hans Kelson solicited the idea of 'Grund norm' or the Basic Norm, from which all other norms derive their authority and validity.[47] The crimes of aggression, genocide, crimes against humanity, war crimes, piracy, torture, slavery and slave-related practices are regarded as *jus cogens* crimes as shown

[43]Rafael Nieto-Navia, "International Peremptory Norms (Jus Cogens) And International Humanitarian Law", (2003): 3, Accessed 2nd November, 2015: www.iccnow.org/documents/WritingColombiaEng.pdf.
[44] Lauri Hannikainen, *Peremptory Norms (Jus Cogens) in International Law,* (Helsinki: Finnish Lawyer Publishing Company, 1988), 31.
[45] Alfred Verdross, *"*Jus Dispositivum and Jus Cogens in International Law*",* 60 American Journal of International Law, (1966): 56.
[46] Bassiouni, *International Criminal Law*, 4.
[47] Hans Kelsen, *General Theory of Law and State,* trans. Anders Wedberg (Cambridge: Harvard University Press, 1945), 110.

from the legal literature. There are certain legal basis on which a crimes can be concluded or declared as part of *jus cogens*. Professor Bassiouni discussed these legal basis as:

> (1) international pronouncements, or what can be called international *opinio juris*, reflecting the recognition that these crimes are deemed part of general customary law; (2) language in preambles or other provisions of treaties applicable to these crimes which indicates these crimes' higher status in international law; (3) the large number of states which have ratified treaties related to these crimes; and (4) the *ad hoc* international investigations and prosecutions of perpetrators of these crimes.[48]

He further argued that there are three additional factors which must be considers as to determine that whether a particular crime has reached to the level of *jus cogens*. First, the historical legal evolution of the crime; Second, the number of States that have incorporated the particular crimes in their domestic laws; and finally, the number of international and national prosecutions for that particular crime.[49] It should, however, be noted that *jus cogens* are not yet codified or enlisted in any International legal document, but are presumed to be a part of the general principles of law with an overriding effect on all other norms. The naturalists maintains that *jus cogens* are based on some higher legal values, while legal positivist advocates that the principle of legality-*nullum crimen sine lege*, should prevail.[50]

The formal recognition of the *jus cogens* took place after the latter half of Twentieth Century, before that the concept of peremptory norm was not accepted in International law. In 1905, Oppenheim stated that in his view 'a number of 'universally recognized principles' of international law existed which rendered any conflicting treaty void and that the peremptory effect of such principles was itself a 'unanimously recognized customary rule of International Law'.[51] *Jus cogens* norms were for the first time formally accepted as higher norms

[48] Bassiouni, "Jus Cogens," 68.
[49] Bassiouni, "Jus Cogens," 69.
[50] Bassiouni, "Universal Jurisdiction," 71-72.
[51] L. Oppenheim, *International Law*, Vol. 1, (London: Longmans, 1905), 528.

(peremptory norms) in the Vienna Convention on the Law of Treaties, 1969. Article 53 of the Vienna Convention defines *jus cogens* as:

> A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.[52]

Further, Article 64 of the Vienna Convention provides for the emerging peremptory norms and its implications.[53] Article 71 of the said Convention deals with consequences of the validity of treaties which conflicts with the peremptory norms (*jus cogens*) of general International law[54]. Accordingly, *jus cogens* are those norms which renders all the treaties invalid that are in conflict with them. Moreover, the treaties which are in contrast with peremptory norms creates no rights and obligations. Similarly, a treaty will also be void if it is in conflict with the emerging *jus cogens* norms.

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[52] Vienna Convention on the Law of Treaties, 1969.

[53] Article 64, *Emergence Of A New Peremptory Norm Of General International Law ("Jus Cogens")*, 'If a new peremptory norm of general international law emerges, any existing treaty which is in conflict with that norm becomes void and terminates'.

[54] Article 71, *Consequences Of The Invalidity Of A Treaty Which Conflicts With A Peremptory Norm Of General International Law*

> 1. In the case of a treaty which is void under article 53 the parties shall:
> (a) Eliminate as far as possible the consequences of any act performed in reliance on any provision which conflicts with the peremptory norm of general international law; and
> (b) Bring their mutual relations into conformity with the peremptory norm of general international law.
> 2. In the case of a treaty which becomes void and terminates under article 64, the termination of the treaty:
> (a) Releases the parties from any obligation further to perform the treaty;
> (b) Does not affect any right, obligation or legal situation of the parties created through the execution of the treaty prior to its termination, provided that those rights, obligations or situations may thereafter be maintained only to the extent that their maintenance is not in itself in conflict with the new peremptory norm of general international law.

In *Nicaragua v. United States*, the ICJ in its opinion, relied on *jus cogens* as fundamental principle of International law.[55] Earlier in 1951, in advisory opinion of the ICJ on reservations to the Convention on the Prevention and the Punishment of the Crime of Genocide, the Court held that prohibition against genocide is a *jus cogens* norm that cannot be reserved and no derogation can be made from it.[56] To identify the *jus cogens* norms the following factors must be taken into consideration:[57]

1. The norm must be a norm of general International law.
2. The norm must be 'accepted and recognized by the International community of States as a whole'. It includes General treaties, International custom and general principles of law recognized by civilized nations.
3. The norm must be one from which no derogation is permitted and which can be modified only by a subsequent norm of general international law of the same character.

The *erga omnes* and *jus cogens* are often purported as two sides of one coin.[58] The term *Erga Omnes* literally means 'flowing to all'. It then means obligations arising out from *jus cogens* norms. Professor Bassiouni argued that:

> The problem with such a simplistic formulation is that it is circular. What "flows to all" is "compelling," and if what is "compelling" "flows to all," it is difficult to distinguish between what constitutes a "general principle" creating an obligation so self-evident as to be "compelling" and so "compelling" as to be "flowing to all," that is, binding on all states.[59]

[55] The Military And Paramilitary Activities In And Against Nicaragua (*Nicaragua V. United States Of America*), ICJ, 1986 (Merits).
[56] See Advisory Opinion of the International Court of Justice on Reservations to the Convention on the Prevention and the Punishment of the Crime of Genocide, 1951 I.C.J. 1, 15 (May 28).
[57] Rafeal, "Peremptory norms", 10-13.
[58] Bruno Simma, "From Bilateralism to Community Interest in International Law*",* (RDC 250, 1994), 229.
[59] Bassiouni, "Jus Cogens," 72.

International law scholars generally divided norms into two categories, 'two parties' norms and '*erga omnes'* norms.[60] It denotes that some obligations arising out from bilateral norms binds only the contracting parties because it has no legal effect on the third party. On the other hand those norms which effects the third party interest are *erga omnes* norms, and it carries obligations towards all. In respect of normative force of both notions *jus cogens* and *erga omnes,* the *jus cogens* are more serious than *erga omnes.*[61] Nearly all human rights norms are *erga omnes* while genocide for example is a *jus cogens* norm.[62]

In the *Barcelona Traction* case, the ICJ stated:

> 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.*[63]

The phrase 'obligations of a State towards international community', in the ICJ judgment connotes that obligations rising to the level of *erga omnes* must be obligations towards international community. Similarly, in paragraph 155 of the I.C.J. advisory opinion requested by the General Assembly on the "Legal Consequences of the

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[60] Eric A Posner, "Erga Omnes Norms, Institutionalization, And Constitutionalism In International Law", 1. John M. Olin Law & Economics Working Paper No. 419 (2d Series), 2. Public Law And Legal Theory Working Paper No. 224, (2008), 1.
Accessed 5th November, 2015: http://www.law.uchicago.edu/Lawecon/index.html

[61], "Jus cogens means compelling law. [The jus cogens concept refers to] peremptory principles or norms from which no derogation is permitted, and which may therefore operate to invalidate a treaty or agreement between States to the extent of the inconsistency with any such principles or norms.
While authoritative lists of obligations erga omnes and jus cogens norms do not exist, any such list likely would include the norms against hijacking, hostage taking, crimes against internationally protected persons, apartheid, and torture. Traditionally, international law functionally has distinguished the erga omnes and jus cogens doctrines, which addresses violations of individual responsibility. These doctrines nevertheless, may subsidiarily support the right of all states to exercise universal jurisdiction over the individual offenders. One might argue that "when committed by individuals," violations of erga omnes obligations and peremptory norms "may be punishable by any State under the universality principle". See Kenneth "Universal Jurisdiction", 786.

[62] Ibid.

[63] Barcelona Traction, Light and Power Co. Ltd. (*Belgium v. Spain*), 1970 I.C.J. 3, 32 (Feb. 5).

Construction of a Wall in Occupied Palestinian Territory" states that obligations *erga omnes* are the obligation to respect the right to self-determination and certain obligations under international humanitarian law.[64] *Obligatio Erga Omnes* in respect of human rights treaties are general in nature. The States are duty bound under the UN Charter, Universal Declaration on Human Rights, 1948 and so many other human rights documents to protect and promote human rights in their respective territories. Thus it means that no derogation is allowed from the human rights treaties.[65]

It can be firmly held that, international crimes which constitutes *jus cogens* norms carries *erga omnes* obligations towards states. Despite that, there is no authoritative list of peremptory norms, but can be identified with a given criteria. Human Rights are at the core of all these academic discussion. For instance the ultimate purpose of the International Humanitarian norms as contained in the four Geneva Conventions of 1949, is to protect human rights at any cost. While the rationale behind the establishment of International Criminal Court is to prosecute, prevent and punish those criminal who violates human rights norms. Systematically, the whole mechanism of International law is the protection and promotion of common goods (i.e. human rights) of the mankind in one way or other.[66]

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[64] I.C.J. Reports, 2003 (Advisory Opinion on Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory), paras. 88, 155, 156.

[65] The Convention on the Prevention and Punishment of the Crime of Genocide (1948); the International Convention on the Elimination of all Forms of Discrimination (1965); the International Convention on Economic, Social and Cultural Rights and that on Civil and Political Rights (1966); the Convention on the Elimination of all Forms of Discrimination against Women (1979); the Convention Against Torture and other Inhuman or Degrading Treatment or Punishment (1984); and the Convention on the Rights of Child (1989) puts special obligations on states from which no derogation is allowed, which otherwise mean *erga omnes* obligations of states. Reservations to Human Rights treaties impair the purpose of the Convention to establish the common and uniform standard of individual rights, Under Article 19(c) of the Vienna Convention on the Law of Treaties, 1969, if the reservation so made by the state to the treaty hits the very object and purpose of the treaty, such reservation is void.

[66] The very object of IHRL regime is to establish common and uniform standards of rights for individuals, irrespective of race, colour, sex, age and nationality, needs a special protection by the international judicial organs.

War crimes are being considered as *jus cogens,* which can be witnessed from the conventional position and customary practices of States.[67] Thus the violations of IHL norms also constitute as war crimes. In the *Nuclear Weapon* case, the ICJ specifically reaffirm the peremptory nature of the IHL norms, as it categorically stated:

> It is undoubtedly because a great many rules of humanitarian law applicable in armed conflict are so fundamental to the respect of the human person and 'elementary considerations of humanity' as the Court put it in its Judgment of 9 April 1949 in the *Corfu Channel* case (*I.C.J. Reports 1949,* p. 22), that The Hague and Geneva Conventions have enjoyed a broad accession. Further these fundamental rules are to be observed by all States whether or not they have ratified the conventions that contain them, because they constitute intransgressible principles of international customary law.[68]

In the above para the ICJ affirmed the sanctity of IHL norms, and these norms are so fundamental that must be observed by the States whether they have ratified the conventions or not, consequently the *erga omnes* obligations of States are identified. The peremptory nature of IHL norms can be further founded in the Article 1, paragraph 2 of the additional protocol I of 1977 which states as, "In cases not covered by this Protocol or by other international agreements, civilians and combatants remain under the protection and authority of the principles of international law derived from established custom, from the principles of humanity and from the dictates of public conscience". It signifies that derogation from *jus cogens* norms is not allowed even if there is no conventional law or any State practice.

For instance, where a person would go to seek remedy while he is deprived of his basic human rights by his state of nationality; or who will guarantee it that a person accused of war crimes or crimes against humanity or genocide would not be deprived of his right to fair trial; or whether the states would not derogate from the general principles of International law even at the expense of economic and political considerations, these are the questions which creates doubt regarding the protection of peremptory norms at national levels because it has been experienced form the state national practices in the history. Only International enforcement mechanism can be a proper solution to such issues.

[67] Rafeal, "Peremptory norms", 20.

[68] Legality of the Threat or Use of Nuclear Weapons: Advisory Opinion, ICJ Reports (1996) (the "Nuclear Weapons case"), para. 79.

CRIMES ARISING OUT FROM BOTH CONDUCT OF HOSTILITIES AND LAW ENFORCEMENT PARADIGMS

International crimes arising out from the mix situation of conduct of hostilities (i.e. IHL) and law enforcement (i.e. IHRL) paradigms, is however a serious question to be determined by ICL. For example, 'in a situation of non-international armed conflict, a demonstration of hundreds of people takes place on the main street of the capital against the government's ongoing measures against the insurgency, where the government troops are deployed. At first instance the protest is peaceful, but after some efforts of the troops to disperse the protesters with a loud speaker, the crowd becomes more aggressive and starts to throw rocks on the soldiers. In the meantime, fighters (the insurgents) takes advantage of the riot and attack the soldiers with rifles'.[69]

In such a mix situation which embodies both IHL and human rights regimes, whether the civilians (protestors) can be targeted as to prevent the insurgents from victory over the government troops. On the contrary, targeting civilians proportionally more than the military targets in the above situation constitute as war crimes, by the virtue of the principle of proportionality and distinction under IHL. In the context of IHL the civilians can be targeted as collateral damage subject to the principles of proportionality and precautions, while law enforcement regime would not allowed this[70]. Thus those offences constituting as war crimes taken place in the mixed situation of conduct of hostilities and law enforcements paradigms

[69] See ICRC Report on the Use of Force in Armed Conflicts: Interplay between the Conduct of Hostilities and Law Enforcement Paradigms, (2012), 24.
Available at: https://www.icrc.org/eng/resources/documents/publication/p4171.htm
[70] Ibid, 25

needs to be dealt in accordance with the principles of International criminal law, regardless of in which situation these are committed.[71]

International criminal law, conventionally a newly born branch of public international law is a very complex academic subject in respect of its applicability, nature and scope. Since the Nuremburg Trial 1945, the establishment of International Criminal Court has categorically opposed by most of the States of the world due to their certain political and economic priorities. ICC was established in 1998 by the adoption of the famous Rome Statute of International Criminal Court. The ICC has jurisdiction over certain international crimes by the virtue of ICC statute. Certainly, the crimes which falls under the jurisdiction of ICC are *jus cogens,* from which no derogation is allowed. Presently some 123 states have ratified the ICC statute, which establishes a sufficient *opinion juris* among the states for the ICC.

The question whether the court has extended jurisdiction over certain crimes which are *jus cogens,* despite that *jus cogens* are not authoritatively listed needs to be answered in an adequate manner.[72] Extended jurisdiction is desideratum concept in the presence of the theory of absolute State sovereignty. In the modern globalized world, the notion of sovereignty in *stricto sensu* cannot however be found. The elimination of the head of State and other public

[71] International crimes specifically arising out from the intermingled situation of the conduct of hostilities paradigm and law enforcement paradigm requires to be dealt in accordance with principles of ICL in a strict sense. In such a situation perpetrators can possibly take unfair advantage of either conduct of hostilities paradigm or law enforcement paradigms. In this regard the rules of ICL *stricto sensu* needs to be apply here, because the nature and elements of crime are always the same regardless of where and in which situation takes place.

[72] *Jus cogens* norms from which no derogation is available, carries *erga omnes* obligations towards States. *Jus cogens* are affirmed as conventional peremptory norms in the Vienna Convention on the Law of Treaties, 1969, before it these were deemed as part of customary law. The International Court of Justice in its several decision at different occasions also confirmed the sanctity of *jus cogens*. Hence, *jus cogens* are those common values or interests jointly owned by the world community of people and it involves *erga omnes* obligations towards the States for the protection of such norms. For the purpose of the protecting the universally recognized peremptory norms, the universal jurisdiction of the international judicial organs becomes relevant. Whether there are *erga omnes* obligations on States arising out from *jus cogens* norms in the absence of state consent to that very norm is a question which needs answer in a proper and realistic way.

officials immunity from criminal prosecution is a progressive development in the field of ICL. It thus follows that absolute State sovereignty is itself subservient to the social, political and economic realities of the technological world. Hence, the case for extended jurisdiction of ICC over certain crimes in the light of the principle of complementarity, in cases of States not parties to the ICC statute makes sound basis. The extended jurisdiction of International judicial organs shall be presumed for the common interest of the mankind, otherwise, International law will continue to practice outside the courts somewhere in embassies and hotels.

In circumstances of the referral made by UN Security Council to the ICC (as provided in Article 13(b)) for prosecuting certain International alleged criminals thus provides a sound basis for the extended jurisdiction of the ICC to States not even parties to its Statute. The Security Council resolution in this regard is considered as binding on all the members of the UN, regardless of whether they are parties to the ICC statute or not. In a case of arrest warrant issued by ICC against the Sudan president Al-Bashir was referred by the UN Security Council. The African Union Commission resisted to the ICC decision of arrest warrant and even some of African states threats the ICC to withdraw from its Statute. The case was one of an original precedent of extended jurisdiction, though that there is no formal concept of precedent in International law. Therefore, this study, aims to make comprehensive analysis of the extended jurisdiction of the ICC, in cases of *jus cogens* crimes over States not party to its Statute, and the States' *erga omnes* obligations of cooperation and assistance arising out from peremptory norms of International law.

LITERATURE REVIEW

M. Cherif Bassiouni's book, *Introduction to International Criminal Law: Second Revised Edition,* is a source of vast and comprehensive details about the International Criminal Justice system.[73] The book however, ignores the issues particularly related to the extended jurisdiction of the ICC and the *erga omnes* obligations of states in this context. The International criminal justice and human rights is covered by *M. Cherif Bassiouni,* another recently published book *Globalization and Its Impact on the Future of Human Rights and International Criminal Justice.*[74] The book gives a brief overview of the International criminal justice and human rights in the context of globalization. The main question regarding the extension of universal jurisdiction of ICC to the crimes constituting as *jus cogens* in territory of non-parties States remains unaddressed.

M. Cherif Bassiouni, work *Crimes Against Humanity in International Criminal Law*, provides very good account of the crimes against humanity in ICL is a specific account of certain crimes, which does not leads to a definite conclusion on the jurisdictional issue of the ICC (i.e. extension of jurisdiction). Similarly, the same writer in his another work *International Criminal Law: A Draft International Criminal Code,* gives a general overview on the subject, whereas the issue in question needs a specific study.[75] *M. Cherif Bassiouni* another book *International Criminal Law: Cases and Materials, co-edited with Jordan J. Paust, Sharon A. Williams, Michael Scharf, Jimmy Gurulé & Bruce Zagaris,* inform us about the application of ICL and the relevant case law and materials, but the information in this book does not specifically address the concerns of implied extended jurisdiction.[76] There is plenty of

[73] M. Cherif Bassiouni, *Introduction To International Criminal Law: Second Revised Edition,* (The Netherland: Martinus Nijhoff Publishers, 2012).
[74] M. Cherif Bassiouni, *Globalization And Its Impact On The Future Of Human Rights And International Criminal Justice*, (ed., Belgium: Brussels, Intersentia, 2015).
[75] M. Cherif Bassiouni, *International Criminal Law: A Draft International Criminal Code*, (The Netherlands: Sitjhoff-Noordhoff Publishers, 1980).
[76] M. Cherif Bassiouni, *International Criminal Law: Cases and Materials*, co-edited with Jordan J. Paust, Sharon A. Williams, Michael Scharf, Jimmy Gurulé & Bruce Zagaris (Durham: Carolina Academic Press, NC, 1996); (2d rev. ed., 2000); (3d rev. ed. 2007).

literature available on the universal jurisdiction, the best among is *Kenneth Randall, Universal Jurisdiction Under International Law* which states a historical and theoretical account of the universal jurisdiction under International law, yet the book is an attempt to define universal jurisdiction in general under International law, whereas a deductive method is required through which the desired goals of this research can be met.[77]

M. Cherif Bassiouni, another work is *Interrnational Extradition: United States Law And Practices,* in this book the author explained the traditional and conventional concepts of extradition as a modality of International criminal justice system.[78] The book though informs the reader about the working modalities of ICL, the work is explicit on the issue of extradition and does not evaluate the principles of ICL in the context of its universal applications. The general overview regarding ICL and its application and enforcement mechanism can be found in *International Criminal Law* by *Antonio Cassese,* this work is of general nature and seldom examine ICL in the light of the principle of universality.[79] Similarly, the doctrine of legality and the universal jurisdiction of ICC has been discussed by *David Stewart* in his book *International Criminal Law in a Nutshell,* the work is descriptive analysis of different concepts in ICL, and the core area concerning the universal scope of ICL is not answered.[80] How International criminal justice system works; what are the essential elements of crimes and what acts constitute International crimes are relevantly argued by *Elizabeth Van Schaack and Ronald C. Slye* in their book *International Criminal Law: The Essentials,* the book is a collection of different international crimes and their elements, whereas the issue of extended

[77] Kenneth C. Randall, *'Universal jurisdiction under international law'*, Texas Law Review, No. 66 (1988).
[78] M. Cherif Bassiouni, *Interrnational Extradition: United States Law And Practices,* 5th ed., (USA: Oxford University Press, 2007).
[79] Antonio Cassese, *International Criminal Law,* 2 ed. (Oxford University Press, 2008).
[80] Stewart David, *International Criminal Law in a Nutshell,* 1st ed. (West Academic Publishing, 2013).

jurisdiction is not precisely considered.[81] Another decent and valuable book regarding the substantive as well the procedural aspect of ICL is *An Introduction to International Criminal Law and Procedure* by *Robert Cryer* co-author, the book sheds light on the procedural aspect of International criminal justice system in detail, although the jurisdictional issues in ICL has not been addressed in theoretical and juridical manner.[82]

The general principles of International criminal law are comprehensively discussed by *Gerhard Werle* in his outstanding work *Principles of International Criminal Law*.[83] The book discuss the fundamental issues such as evolution, sources and enforcement of ICL. Further Gerhard, analyzes the Rome statute and customary sources of ICL. The case law of ICTY and ICTR are specifically taken into account in the book, nonetheless the questions of implied jurisdiction of ICC and the states obligations are not tackled in a precise manner. Issues related to the non-parties states under ICC statute and the jurisdiction of ICC has been discussed in an articulated manner by *Claus KreB* in his article *The International Criminal Court and Immunities under International Law for States Not Party to the Court's Statute,* published in a book *State Sovereignty and International Criminal Law*.[84] The book is a series of articles on ICL, and other related issues such as State sovereignty and universal jurisdiction. However, the article is a specific account of state sovereignty and International criminal law in the context of ICC issuance of warrant against the Sudan President, and no special reference is made to the extended jurisdiction of the Court. The issue of delegated and extended jurisdiction of ICC is tackled by Dapo Akande in his article, *The jurisdiction of International Criminal Court over*

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[81] Elizabeth Van Schaack and Ronald C. Slye, *International Criminal Law: The Essentials*, (Aspen Publishers, 2008).

[82] Robert Cryer, co-authors Hakan Friman, Darryl Robinson, Elizabeth Wilmshurst, *An Introduction to International Criminal Law and Procedure* , 2nd ed. (Cambridge University Press, 2010).

[83] Gerhard Werle, *Principles of International Criminal Law*, (Cambridge University Press, 2005).

[84] *State Sovereignty and International Criminal Law,* (Torkel Opsahl Academic EPublisher, Beijing, 2012).

Nationals of Non-Parties: Legal Basis and Limits, but the stance taken by him is limited as it does not address the *erga omnes* obligations of States under ICL.[85]

D. Dimitrakos's, in *The Principle of Universal Jurisdiction & The International Criminal Court,* is an important work in the area of ICL, it examine the universal jurisdiction in a historical and theoretical context, while the main emphasis of this work is universal jurisdiction of national courts rather than ICC.[86] *M. Cherif Bassiouni,* in his article *Universal Jurisdiction For International Crimes: Historical Perspectives And Contemporary Practice,* has precisely articulated the evolution of the doctrine of universal jurisdiction and its application in ICL, but the case for extension of universal jurisdiction is not well established in International context.[87] The reader is not however, fully satisfied with the approach taken by *Xavier Philippe*, in *The Principles of Universal Jurisdiction And Complementarity: How Do The Two Principles Intermesh*?, the work is relatively helpful for ascertaining definite results about the competing theories such like state sovereignty and universal jurisdiction in the light of complementarity, as it is comparative study of harmonizing these two principles and does not provides for a contextual approach.[88] For somehow practical approach in the doctrine of universal jurisdiction is discussed in the relevant work *Universal Criminal Jurisdiction and an International Criminal Court* by *Bernhard Graefrath*, the work seldom

[85] Dapo Akande, "The jurisdiction of International Criminal Court over Nationals of Non-Parties: Legal Basis and Limits", Journal of International Criminal Justice 1, Oxford University Press, (2003).
[86] D. Dimitrakos, "The Principle Of Universal Jurisdiction & The International Criminal Court", accessed November 10th, 2015: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2383587.
[87] M. Cherif Bassiouni, "Universal Jurisdiction For International Crimes: Historical Perspectives And Contemporary Practice" Virginia Journal Of International Law Association, (2001).
[88] Xavier Philippe, "The Principles Universal Jurisdiction And Complementarity: How Do The Two Principles Intermish?" International Review of the Red Cross, Volume 88 Number 862, (2006).

establishes the relevancy of *erga omnes* obligations of States towards universal jurisdiction of ICC.[89]

M. Cherif Bassiouni, article *International Crimes: Jus Cogens and Obligatio Erga Omnes,* provides for a comprehensive and practical account of the International peremptory norms and *erga omnes* obligations.[90] It gives the reader a brief overview of the nature and scope of *jus cogens* and *erga omnes* norms in ICL perspective, where its complete relevancy to the establishment of ICC's jurisdiction over International crimes are not elaborated. Another notable work by Bassiouni, is *A Functional Approach to "General Principles of International Law",* which argues the application of general principles in International law, however the work is helpful in determining some theoretical basis for the research topic.[91] The historical evolution of the peremptory norms in International law and its contemporary status is discussed in *International Peremptory Norms (Jus Cogens) And International Humanitarian Law* by *Rafael Nieto-Navia,* the said piece of work is particularly in the field of IHL, and does not address human rights violations.[92]

L. Hannikainen's, book *Peremptory Norms (Jus Cogens) in International Law,* examine the status and overriding effects of peremptory norm over other norms in International law, it only examines the hierarchical position of *jus cogens* in International law and does not

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[89] Bernhard Graefrath, "Universal Criminal Jurisdiction and an International Criminal Court", European Journal of International Law, 1(1), (1990).

[90] M. Cherif Bassiouni, "International Crimes: Jus Cogens and Obligatio Erga Omnes", 59 *L*aw and *C*ontemporary *P*roblems, (1996): Accessed on 11th November 2015: http://scholarship.law.duke.edu/lcp/vol59/iss4/6

[91] M. Cheriff Bassiouni, "A Functional Approach to "General Principles of International Law", 11 Mich. J. Int'l L, (1990).

[92] Rafael Nieto-Navia, "International Peremptory Norms (Jus Cogens) And International Humanitarian Law", (2003): Accessed 2nd November, 2015, www.iccnow.org/documents/WritingColombiaEng.pdf.

satisfy the reader in the context of ICL.[93] Similarly, *Alfred Verdross;s, Jus Dispositivum and Jus Cogens in International Law* is also a source of information on the nature and application of peremptory norms, where the issue of extended/delegated jurisdiction of ICC in respect of *jus cogens* crimes is not taken into consideration.[94] However, the standing of *erga omnes* obligations of states under International law has been analyzed by *Eric A. Posner,* in his article *Erga Omnes Norms, Institutionalization, And Constitutionalism In International Law*, the article is a brief overview of *erga omnes* obligations, but not specifically considering peremptory obligations of States in the perspective of ICL.[95] *Roger O'Keefe,* in *Universal jurisdiction: Clarifying the basic concept,* evaluate the principle of universal jurisdiction in more theoretical and jurisprudential manner, though its application in International sphere is missing.[96]

The concept of *erga om*nes obligations in International law is further highlighted by *Ardit Memeti and Bekim Nuhija,* in their article *The concept of erga omnes obligations in international law*, which is one of a good contribution in this legal area, whereas the application and scope of *erga omnes* obligations under ICL is not taken into account.[97] The distinguished work on peremptory obligation is *New Trends in the Enforcement of Erga Omnes Obligations* by *Karl Zemanek*, it is pertinent to mention that this article is specific to the nature and

[93] Lauri Hannikainen, *Peremptory Norms (Jus Cogens) in International Law,* (Helsinki: Finnish Lawyer Publishing Company, 1988).
[94] Alfred Verdross, *"*Jus Dispositivum and Jus Cogens in International Law*",* 60 American Journal of International Law, (1966).
[95] Eric A. Posner, "Erga Omnes Norms, Institutionalization, And Constitutionalism In International Law", 1. John M. Olin Law & Economics Working Paper No. 419 (2d Series), 2. Public Law And Legal Theory Working Paper No. 224, (2008).
[96] Roger O'Keefe, "Universal jurisdiction: Clarifying the basic concept", Journal of International criminal justice 2, Oxford University Press, (2004).
[97] Ardit Memeti & Bekim Nuhija, "The concept of *erga omnes* obligations in international law", New Balkan Politics Issue 14, (2013).

application of *erga omnes* obligations under International law, and nothing is there about its applications in the area of ICL.[98] How International criminal justice system evolved and how the customary practices of states took the shape of conventions and treaties in ICL has nicely articulated by *M. Cherif Bassiouni,* in his notable work *Perspectives on International Criminal Justice*[99]*,* however, the article give a general overview on the topic rather than specific on the issues of extended jurisdiction of ICC.. Another noteworthy work of *M. Cherif Bassiouni,* is *The Future of International Criminal Justice,* which provides for a brief detail on the different modalities working in International criminal justice system and their application in national jurisdiction of States, the point of departure is that, it is based on hypothetical supposition.[100] International crimes arising out from mixed situation of IHRL and IHL regimes are categorically evaluated in the *ICRC Report on the Use of Force in Armed Conflicts: Interplay between the Conduct of Hostilities and Law Enforcement Paradigms*, published in 2012, which is a good account of different situations and expert opinions on it.[101]

Various scholars has written on the universal jurisdiction and *erga omnes* obligations of states, however no work has been done so far in the context of International criminal justice system in order to analyze the systematic evaluation of universal jurisdiction of ICC extendable to the States not parties to its statute in case of certain International crimes. This study seeks to contextualize the extended jurisdiction of ICC in the light of States *erga omnes* obligations, and argues that although universal jurisdiction is not recognized at International sphere, yet *jus*

[98] Karl Zemanek, "New Trends in the Enforcement of Erga Omnes Obligations", Max Planck Yearbook of United Nations Law, Kluwer Law International, (2000).
[99] M. Cherif Bassiouni, "Perspectives On International Criminal Justice", Virginia Journal Of International Law, (2010).
[100] M. Cherif Bassiouni, "The Future of International Criminal Justice", 11 Pace Int'l L. Rev. 309 (1999) Available at: http://digitalcommons.pace.edu/pilr/vol11/iss2/1.
[101] *https://www.icrc.org/eng/resources/documents/publication/p4171.htm*

cogens and *erga omnes* norms are incumbent and in this context, ICC shall have the extended jurisdiction over International crimes regardless of the territorial limitations as to implement global peace and security effectively.

SIGNIFICANCE OF THE RESEARCH

This study aims to analyze the notions of extended jurisdiction and State sovereignty in the context of *jus cogens* and *erga omnes* norms. This work will be of greater importance for the victims of international crimes, to whom either no remedies are available in the national criminal justice systems or the states have failed to punish the offenders. Further, it will also leads to the clarification of different notions such as, the concept of universal jurisdiction, classical and modern notions of states sovereignty, principle of complementarity, *jus cogens* norms and *erga omnes* obligations in the context of both national and international legal doctrines. The study would also leads to the theoretical basis of the different notions relevant to this work. Moreover, it will has great impact on the permanent determination of the functions and powers of ICC.

FRAMING OF THE ISSUES

1. What are the provisions in the ICC statute which can form the basis for extended jurisdiction of ICC to the States which are not party to its Statute?
2. What provisions in the UN Charter, other International treaties as well as customary International law and general principles of law substantiate this extended jurisdiction of ICC?
3. How the notions *erga omnes* obligations and rules of *jus cogens* support the extended jurisdiction of the ICC?

4. How the concepts of State sovereignty and universal jurisdiction can be harmonized on the basis of the principle of complementarity and in what way the notion of absolute State sovereignty has changed in the context of the modern world as a global village?
5. What is the nature, scope and applicability of *jus cogens* and *erga omnes* norms and are there any exceptions to *jus cogens* norms at the expense of state sovereignty and is there any derogation allowed from *erga omnes* obligations of States?
6. Is there any express or implied powers of International Criminal Court to take cognizance of gross human rights violations?
7. What is the status of international crimes arising out from a mixed situation of conduct of hostilities and law enforcements paradigms?

RESEARCH OBJECTIVES

1. To analyze the provisions of ICC statute which form the basis for the extended jurisdiction of ICC to non-parties States to the ICC statute.
2. To evaluate the provisions of UN Charter, International treaties as well as customary International law and general principles of law which provides for the extended jurisdiction of ICC.
3. To conduct investigation to the effect that how the *jus cogens* norms and *erga omnes* obligations support the extended jurisdiction of ICC.
4. To critically evaluate the traditional and modern notions of State sovereignty, universal jurisdiction and the principles of complementarity under modern International law and to discuss the theoretical basis of universal jurisdiction and principles of complementarity.

5. To examine the nature and scope and application of *jus cogens* norms and to highlight the *erga omnes* obligations of States and its limitations in respect of *jus cogens* International crimes.
6. To argue for universal jurisdiction of ICC in respect of gross human rights violations and to analyze extension of the universal jurisdiction of ICC in taking cognizance of human rights violations.
7. To find out the status of International crimes arising out from mixed situation of IHL and IHRL regimes.

HYPOTHESIS

i. International crimes constituting as *jus cogens* are not outside the ambit of International Criminal Court on the basis of extended universal jurisdiction, therefore the notions of universal jurisdiction and State sovereignty in the light of the principle of complementarity needs effective harmonization as to establish acceptable international enforcement mechanism for the suppression of international crimes for the maintenance of International peace and security. Quite the opposite, the victims of International crimes will be subject to political and economic considerations of States.

ii. States have *erga omnes* obligations arising out from *jus cogens* norms to co-operate with international community and institutions in prosecution, prevention and punishment of international criminals. By following such obligations the rights of the victims are to be protected.

THEORETICAL FRAMEWORK

International criminal justice system has its roots in other branches of International law, such as IHL and IHRL. IHL applies in war times, while IHRL is applicable both in war and peace

times. In armed conflicts the provisions of IHRL stands suspended and derogations are allowed from it as exception. The nature of warfare has changed in the context of modern non-international armed conflicts. For instance, military operations are mainly conducted amongst the population, where non-state armed groups intermingle with the civilian population. In such a complex situation, it may be, therefore, difficult to distinguish combatants, fighters or civilian directly participating in hostilities from rest of the civilian population. Even the situation of civilian unrest such as riots may arise while military operations against the non-state armed groups are going on[102].

According to conduct of hostilities (IHL) paradigm the fighters are legitimate military targets, while law enforcement (IHRL) paradigm would only as a last resort allow killing or targeting fighters in order to maintain law and order or restore peace and security. In a situation where fight against militancy takes place far away from the war zone, when fighters are not actually conducting hostilities, law enforcement paradigm seems appropriate to be applicable in order to minimize damages. International law does not provides clear guidance to these issues. IHRL tends to apply law enforcement rationale to the use of force in non-international armed conflicts. On the other hand IHL would allow targeting fighters as legitimate targets[103].

Whether the conduct of hostilities paradigm is the *lex specialis* (special law prevails over general law) regarding the use of force which precludes the law enforcement paradigm in non-international armed conflict despite that there is a single provision regarding non-international armed conflict in each of the Geneva Conventions of 1949, i.e. common article

[102] See ICRC Report on the Use of Force in Armed Conflicts: Interplay between the Conduct of Hostilities and Law Enforcement Paradigms, (2012), 1.
Available at: https://www.icrc.org/eng/resources/documents/publication/p4171.htm
[103] Ibid.

3[104]. On the contrary, in situations of non-international armed conflicts the rules pertaining to the conduct of hostilities are not precise and clear enough and that, therefore, it may be said that law enforcement paradigm prevails. The degree of control and intensity of violence, where the force is used in the area are relevant circumstances for the application of these paradigms. In this context, International criminal law is the combination and outcome of IHL and IHRL. Thus, the violations of IHL and IHRL norms, therefore, constitute international crimes which comes under the purview of ICL.

The conventional aspect of international law binds parties only, whereas international customary law binds all and its norms extends *erga omnes* to all states[105]. The statute of International Criminal Court binds state parties only according to its provisions. Under article 12(1) of the ICC statute, the court have an exclusive jurisdiction over the state parties. Certain provisions of the ICC statute are part of International customary law and thus constitute as peremptory norms of International law, and from which no derogation is allowed, such as crimes enlisted in article 5 of the statute[106]. Consequently, the ICC statute reflects both the conventional and peremptory aspects of International law. As a general rule, peremptory norms

[104] ICRC, International Humanitarian Law and the Challenges of Contemporary Armed Conflicts, Geneva, Switzerland, October 2011, pp. 14-15 (hereafter: ICRC Report on International Humanitarian Law and the Challenges of Contemporary Armed Conflicts) : "There are, […], important differences of a general nature related to the interplay between international humanitarian law (IHL) and human rights law that should be mentioned. The first is that human rights law *de iure* binds only states, as evidenced by the fact that human rights treaties and other sources of human rights standards do not create legal obligations for non-state armed groups. […] It should, however, be noted that the exception to what has just been said are cases in which a group, usually by virtue of stable control of territory, has the ability to act like a state authority and where its human rights responsibilities may therefore be recognized *de facto*." https://www.icrc.org/eng/resources/documents/publication/p4171.htm

[105] Malcom N. Shaw, *International Law*, 6th ed., (New York: Cambridge University Press, 2008), 125.

[106] Jean-Marie Henckaerts and Louise Doswald-Beck, *CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, VOLUME I: RULES*, (New York: Cambridge University Press, 2005), 1-1i.

prevails over all other norms and which must be observed by the states in their mutual relations[107].

There are certain provisions of ICC statute which extends the jurisdiction of the court even to the states which are not parties to its statute, such as article 13(b) provides for the referral of situation by the Security Council in pursuance of its powers under the UN Charter to the court against the states[108]. The referral by the Security Council against the non-party states to the court can be made where crimes defined under article 6, 7 and 8 of the ICC statute has been committed. It implies the peremptory nature of such crimes and for such a purpose reliance can be made on the aforesaid provisions for the extension of ICC jurisdiction to the violations of humanitarian and human rights norms. The decisions and recommendations made by the Security Council under Chapter VII of the UN Charter are binding on members states, and it certainly give rise to *erga omnes* obligations of the states towards a particular act or omission. Thus, a referral by the Security Council to the ICC in respect of international crime under Chapter VII of the UN Charter is also binding and, therefore, extends the jurisdiction of ICC to the states not parties to its statutes.

RESEARCH METHODOLOGY

This work will present the critical analysis of the extended jurisdiction of ICC in the context of *erga omnes* obligations of the States. For the purpose of this study, the doctrinal research

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[107] Peter Malanczuk, *AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW,* Seventh revised ed., (New York: Routledge, 2002), 58.

[108] Article 13 (*Exercise of jurisdiction)*

'The Court may exercise its jurisdiction with respect to a crime referred to in article 5 in accordance with the provisions of this Statute if:

(a) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by a State Party in accordance with article 14;

(b) A situation in which one or more of such crimes appears to have been committed is referred to the Prosecutor by the Security Council acting under Chapter VII of the Charter of the United Nations; or

(c) The Prosecutor has initiated an investigation in respect of such a crime in accordance with article 15.'

method will be followed, for which data will be taken from primary and secondary sources. In chapter one of the dissertation descriptive and historical method will be followed in order to analyze the International Criminal Justice system, the different modalities working in International criminal law. In this context, the notion of universal jurisdiction, state sovereignty and complementarity and as well as the idea of extended jurisdiction will be examined as to find out the scope and application of the different concepts related to ICL. The descriptive analysis of the state practices and decisions of International courts and tribunal will be conducted in the second chapter. Therefore, the jurisprudence of International courts and tribunals such as International Military Tribunal Nuremburg, ICTY, ICTR, ICC and as well ICJ will be taken into consideration, moreover, the State practices regarding general international law of crimes needs thorough examination.

The third chapter of the proposed dissertation is descriptive in nature and explains the doctrines of universal jurisdiction, state sovereignty and as well the principles of complementarity. It also examine the theoretical and conventional foundation of these concepts under International law. The analysis of such a chapter requires examination and scrutiny of the aforesaid doctrines under International law, therefore, analysis of International conventions, treaties, reports of experts, decisions of International Courts will be consulted. Further, chapter four will address the nature, scope and application of *jus cogens* norms and as well *erga omnes* obligations under International law. Moreover, the analytical and critical approach will be followed in fifth chapter, and critical analysis of the *erga omnes* obligations of the States in the context of ICL will be conducted. The Sixth chapter will take a theoretical account of the human rights peremptory norms and its violations. It will examine that whether ICC has any jurisdiction in cases of the violations of peremptory norms of human rights law.

The Seventh chapter of the study is critical appraisal of the extended jurisdiction of ICC to the states which are not parties to its statute. It will highlight the substantive and procedural aspects of obligations and challenges in international law with respect to ICC jurisdiction. Chapter eight will critically evaluate the status of International crimes arising out from law enforcements and conduct of hostilities paradigms, as a consequence of the violations of human rights law and IHL norms. It will also address the impact and effect of humanitarian and human rights obligations. Finally, conclusions will be drawn and recommendations will be given.

As this study is analytical and critical in nature, for which material will be taken from sources, such as, Books, articles, reports, International conventions, declarations, additional protocols, national statutes and Acts and finally technological sources. Further, this study would undertake a critical appraisal of the judgments of International Courts and tribunals, decisions of national courts, various scholarly writings on the issue, and the reports furnished by various human rights watchdogs, international organizations and United Nations would also be essential for study of the situation.

TENTATIVE OUTLINE

Introduction

CHAPTER ONE: LITERATRE REVIEW

1.1 International Criminal Law & Criminal Justice system
1.2 Universal Jurisdiction, State Sovereignty and principle of Complementarity
1.3 The Notion of Extended Jurisdiction
1.4 *Jus Cogens* norms and *Erga Omnes* obligations

CHAPTER TWO: INTERNATIONAL CRIMINAL LAW AND CRIMINAL JUSTICE SYSTEM

2.1 Historical evolution of International Criminal Justice system
2.2 Legal and philosophical foundations of International criminal law
2.3 Modalities in International Criminal Law
2.4 State practices in respect of ICL: Customary and conventional
2.5 The Jurisprudence of Nuremburg trial
2.6 The Jurisprudence of International Criminal Tribunal for Yugoslavia
2.7 The Jurisprudence of International Criminal Tribunal for Rwanda
2.8 The International Criminal Court
2.9 Conclusion

CHAPTER THREE: ANALYSIS OF THE CONCEPT OF STATE SOVEREIGNTY, UNIVERSAL JURISDICTION AND PRINCIPLE OF COMPLEMENTARITY

3.1 Introduction
3.2 The Concept of State Sovereignty and its components under International Law
  3.2.1 Classical and modern forms and application of Sovereignty
  3.2.2 Limitations on State Sovereignty
  3.2.3 The customary and conventional status of State Sovereignty
  3.2.4 State sovereignty and Globalization
3.3 The Doctrine of Universal Jurisdiction
  3.3.1 Universal Jurisdiction: A Historical analysis
  3.3.2 Theoretical basis of Universal Jurisdiction
  3.3.3 Universal Jurisdiction in National and International Laws
  3.3.4 The Modern application of Universal Jurisdiction
  3.3.5 Universal Jurisdiction of International judicial organs
3.4 The Principle of Complementarity and its application
3.5 Conclusion

CHAPTER FOUR: THE STATUS, NATURE AND APPLICATION OF *JUS COGENS AND ERGA OMNES* NORMS UNDER INTERNATIONAL LAW

4.1 Introduction
4.2 *Jus cogens*
4.2.1 Historical evolution of peremptory norms
4.2.2 Legal and Philosophical foundations of peremptory norms
4.2.3 Customary and conventional status of *jus cogens*
4.2.4 Application of *jus cogens* in International Law
4.2.5 International crimes constituting *jus cogens*
4.3 *Erga Omnes* Obligations
4.3.1. The meaning and concept of *Erga Omnes*
4.3.2. Theoretical basis of *Erga Omnes* obligations
4.3.3. *Erga Omnes* and *jus cogens*
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CHAPTER FIVE: THE *ERGA OMNES* OBLIGATIONS OF STATES FROM THE PERSPECTIVE OF INTERNATIONAL CRIMINAL LAW

5.1 Introduction
5.2 *Erga Omnes* Obligations under International Law
5.2.1 Theoretical analysis of States *Erga Omnes* Obligations
5.2.2 International *jus cogens* crimes and States obligations
5.2.3 The scope of *erga omnes* obligations under International law
5.3 *Erga Omnes* obligations and State Sovereignty
5.4 Analysis of International Judicial decisions in respect of *erga omnes* obligations
5.5 Is there any exception to *erga omnes* obligations?
5.6 *Erga Omnes* obligations and Extended Jurisdiction of ICC
5.7 Conclusion

CHAPTER SIX: THE STATUS OF INTERNATIONAL CRIMES ARISING OUT FROM GROSS HUMAN RIGHTS VIOLATIONS AND EXTENDED JURISDICTION OF ICC

6.1 Introduction
6.2 The meaning and concept of Human Rights
6.3 Core International Instruments regulating the regime of IHRL
6.4 Human rights and *jus cogens*
6.5 The application of *Erga omnes* in Human Rights treaties obligations
6.6 Human rights violations constituting International crimes
6.6.1 Genocide
6.6.2 Crimes Against Humanity
6.6.3 War Crimes
6.6.4 Crime of Aggression

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