THE PROSECUTION OF WAR CRIMES AND GRAVE BREACHES: A *JUS COGENS* OBLIGATION

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ABSTRACT

States exercising considerable influence in the international realm have condemned the International Criminal Court's investigations into alleged wrongdoing by their citizens during times of conflict. To do so and enact barriers against ICC investigations threatens the sole international mechanism by which governments and their citizens may be held accountable for war crimes and grave breaches. This article considers in what circumstances the International Criminal Court can hold citizens of Third States accountable for actions that may violate the Geneva Conventions and asserts that the ICC may exercise jurisdiction over citizens of Third States – even without a referral from the United Nations Security Council – due to the development of the prosecution of such crimes into jus cogens. In addition to the jus cogens nature of the prosecution of war crimes and grave breaches, the ICC may also exercise universal jurisdiction due to its legal personality. The protestations against ICC investigations into alleged war crimes by citizens of Third States, such as the United States' condemnation of the ICC investigation into its servicemembers' activities in Afghanistan, cannot prevent the ICC from completing its directive due to the international legal authority of universal jurisdiction and jus cogens.

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I. INTRODUCTION

Sovereignty of the State on the international plane affords States the opportunity to choose in what forums they will be held accountable for their actions and policies. This often means that impunity is granted, willingly or not, by other members of the international community when States violate international obligations and covenants. The creation of the International Criminal Court, like the former international tribunals, was intended to prevent this impunity by sovereign States and individuals. The ICC has been hailed as a tool to achieve global peace and prevent impunities for the most heinous crimes, but, as we were reminded by Judge Sang Hyun-Song in 2011, the success of the ICC is dependent on the support and engagement of the State Parties.[1] And as we have seen recently, the support and cooperation by non-party States is just as significant for the success of the ICC.

The actions of the United States in opposing the ICC's investigation into alleged war crimes committed in Afghanistan illustrate the challenges facing the international criminal tribunal today. When the ICC prosecutor, Fatou Bensouda, was approved to begin an investigation into various war crimes committed in Afghanistan between 2003 and 2004, by the Taliban, Afghan officials, and United States' personnel, the United States reacted strongly.[2]

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[1] Judge Sang-Hyun Song, President, ICC, *Remarks at Ceremony on the Occasion of the Signature of the Agreement on the Enforcement of Sentences between the Republic of Colombia and the ICC*, ICC , May 17, 2011, *available at* https://www.icc-cpi.int/NR/rdonlyres/7A084556-59DA-4790-876C-30ACC52BB3DF/283321/110517ColombiaAgreementSentences SigningCeremony.pdf.

[2] David J., Scheffer, *The ICC's Probe into Atrocities in Afghanistan: What to Know*, COUNCIL ON FOREIGN RELS. (Mar. 6, 2020), https://www.cfr.org/article/iccs-probe-atrocities-afghanistan-what-know.

Victims of the United States claimed that they were tortured, raped, and suffered outrages upon their personal dignity.[3] The United States, referring not at all to their own obligation to investigate such crimes, went as far as revoking Bensouda's visa and applying financial sanctions against pertinent members of the ICC.[4] Further, the United States also suggested there would be consequences for States who extradite persons of interest to the ICC if they are on their territory.[5] These types of reactions threaten the validity and the function of the ICC, as well as the global interest in preventing those most grievous crimes that shock humanity.

This paper will focus on the obligatory nature of the prosecution of war crimes via universal jurisdiction in various forums, including international criminal tribunals, such as the International Criminal Court. Part one will discuss the evolution of the Geneva Conventions from treaty rules to customary international law. Part two will then focus on the use of universal jurisdiction based on the obligations of the Geneva Conventions. Part three will analyze the status of the United States as a persistent objector to the jurisdiction of the International Criminal Court. Part four will argue that the prosecution of war crimes, regardless of jurisdiction, has developed from customary international law of the Geneva Conventions into *jus cogens* from which the United States may not object. And finally, part five will build upon these analyses to show that the International Criminal Court is one forum which can exercise universal jurisdiction to fulfill the *jus cogens* obligation of prosecuting war crimes.

II. THE GENEVA CONVENTIONS HAVE DEVELOPED INTO CUSTOMARY INTERNATIONAL LAW

The Geneva Conventions have solidified themselves as primary sources of the law of war since they were penned in the twentieth century. Each Convention addresses a State's obligation towards different parties, both civilian and military alike. Indeed, violations of the Geneva Conventions constitute war crimes, according to Article 40 of Geneva Convention I for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field.[6] Geneva Convention I protects the sick and wounded in the field, as well as medical and religious personnel. In addition to proscribing general war

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[3] *Id.*

[4] *Id.*

[5] *See US: Lawsuit Challenges ICC Sanctions*, HUMAN RIGHTS WATCH (Oct. 2, 2020), https://www.hrw.org/news/2020/10/02/us-lawsuit-challenges-icc-sanctions#.

[6] Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field art. 40 (Aug. 22, 1864) 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter Convention I].

crimes, Article 50 of GCI also outlines offenses that constitute grave breaches against those individuals protected by the first Convention.[7] In fact, the differentiation between more general war crimes and grave breaches are echoed through all four of the Geneva Conventions but are specific to the category of protected persons the Convention addresses. Geneva Convention II affords similar protections to those armed forces at sea, as well as the same identification of grave breaches.[8] Protections for prisoners of war are outlined in Geneva Convention III, which also reflects the same considerations for grave breaches as the first two Conventions.[9] Finally, Geneva Convention IV Relative to the Protection of Civilian Persons in Time of War expands grave breaches significantly to include unlawful confinement of protected persons and taking of hostages, among other things. [10] Commentary on GCIV also indicates that grave breaches of the Conventions shall be punishable according to the law of nations in the tribunals of signatory states, or international tribunals whose competence has been recognized by States.[11] In distinguishing between general war crimes and grave breaches, paragraph three of the commentary on GCIV, delineates, in specific articles, the suppression of other breaches of the Geneva Conventions that were not specific as grave breaches.[12] While all signatories to the Conventions are obligated to suppress violations of the Geneva Conventions, they are also obligated to enact national legislation to prevent grave breaches.

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[7] The grave breaches regime includes "willful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly." *Id.*, art. 50.

[8] *See* Convention (II) for Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, art. 51 (Aug. 12, 1949) 6 U.S.T. 3217, 75 U.N.T.S. 85 [hereinafter Convention II].

[9] *See* Convention (III) Relative to the Treatment of Prisoners of War, art. 130 (Aug. 12, 1949) 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Convention III].

[10] The Convention identifies grave breaches as "[t]hose involving any of the following acts, if committed against persons or property protected by the present Convention: willful killing, torture or inhuman treatment, including biological experiments, willfully causing great suffering or serious injury to body or health, unlawful deportation or transfer or unlawful confinement of a protected person, compelling a protected person to serve in the forces of a hostile Power, or willfully depriving a protected person of the rights of fair and regular trial prescribed in the present Convention, taking of hostages and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly." Convention (IV) relative to the Protection of Civilian Persons in Time of War art. 147, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287, [hereinafter Convention IV],
https://ihl-databases.icrc.org/ihl/INTRO/380

[11] Commentary of 1958, *Convention (IV) relative to the Protection of Civilian Persons in Time of War*, 586 n.1 (1958).

[12] *Id.* ¶ 3.

And while war crimes and grave breaches are not synonymous, the two concepts are complementary, building upon one another to dictate international humanitarian law. It has also been suggested that all serious breaches of international law amount to war crimes, and thus war crimes are a broader category than the grave breaches regime originally imagined by the Geneva Conventions.[13] Article 8 of the Rome Statute supports this recognition of grave breaches under the Geneva Convention as the most severe war crimes. The Statute lists crimes including willful killing, torture or inhumane treatment, and willfully depriving a prisoner of war or other protected persons of the rights of fair and regular trial as specific grave breaches that can be prosecuted.[14] Continuing, the Statute also criminalizes "other serious violations" that are not recognized as grave breaches but are also considered war crimes.[15]

In implementing the Geneva Conventions obligations to illegalize grave breaches, the United States Code similarly identifies grave breaches of the four Geneva Conventions as a more severe subset of war crimes[16] which also include other law of war violations.[17] Additional Protocol I of the Geneva Conventions treats grave breaches of the Geneva Convention as war crimes.[18] For purposes of this paper, the grave breaches outlined in each of the Geneva Conventions will be the main focus of this discussion, which will center on the development of customary international law and its implications.

It is a generally accepted theory that customary international law can be reflected and codified in a treaty or convention. Customary international law may also be developed due to a treaty or convention's influence on the international community[19] There are convincing arguments, therefore, that the Geneva Conventions are not simply treaty rules, but also rules of customary international law because they parallel customary international law existing at

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[13] Marko Divac Öberg, *The Absorption of Grave Breaches into War Crimes Law*, 91 INT'L REV. RED CROSS, 163, 169 (2009).

[14] Rome Statute of the ICC, art. 8 (July 17, 1998) 2187 U.N.T.S. 90 [hereinafter Rome Statute].

[15] *Id.*

[16] 18 USC § 2441(c)(1).

[17] 18 USC § 2441(c)(2) – (4).

[18] Oona A. Hathaway et al., *What is a War Crime?*, 44 YALE J. INT'L L., 53, 66 (2019); Protocol Additional to the Geneva Conventions of 12 August 1949, 1949 art. 85, June 10, 1997, US SOURCE, 1125 U.N.T.S. 3.

[19] Yudan Tan, *The Rome Statute as Evidence of Customary International Law*, LEIDEN UNIV. (Apr. 5, 2019).

the time of ratification and developed new norms of customary international law.[20]

The Geneva Conventions built upon and reflected existing conventions of international law, such as the Hague Conventions and the various agreements for the Amelioration of the Condition of the Wounded and Sick in Armies in the Field.[21] [22] In 2003, the Claims Commission in the Eritrea-Ethiopia Claims Commission case said,

> Treaties, like the Geneva Conventions of 1949, that develop international humanitarian law are, by their nature, legal documents that build upon the foundation laid by earlier treaties and by customary international law. These treaties are concluded for the purpose of creating a treaty law for the parties to the convention and for the related purpose of codifying and developing customary international law that is applicable to all nations. The Geneva Conventions of 1949 successfully accomplished both purposes.[23]

In analyzing the development of the Geneva Conventions into customary international law, consideration is given to *opinio juris* and state practice.[24] The International Law Commission indicated that identification of customary international law may begin with a general practice and then an inquiry into whether that practice is accepted as law.[25] Vice versa, identification can also

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[20] The Court stated, "this conventional law has become customary law, though some of it may well have been conventional law before being written into the predecessors of the present Geneva Conventions."

Prosecutor v. Tadic, 1995 I.C.J., ¶ 52 (1995); Jean-Marie Henckaerts, *The Grave Breaches Regime as Customary International Law*, 7 J. INT'L CRIM. JUST., 683 (2009); Eritrea-Ethiopia Claims Commission Claim 4 – Prisoners of War, REPS. INT'L ARBITRAL AWARDS, 73, ¶ 30 (2003), (The Commission stated, "These treaties are concluded for the purpose of creating a treaty law for the parties to the convention and for the related purpose of codifying and developing customary international law that is applicable to all nations. The Geneva Conventions of 1949 successfully accomplished both purposes."); *see* Theodor Meron, *The Geneva Conventions as Customary International Law*, 81 AM. J. INT'L L., 348 (1987) (hereinafter "The Geneva Conventions as Customary International Law").

[21] Henckaerts, *supra* note 20, at 685.

[22] *See* Theodor Meron, *The Geneva Conventions and Public International Law*, 91 INT'L REV. RED CROSS, 619, 620 (2009).

[23] Eritrea-Ethiopia Claims Commission*, supra* note 20, at para. 30.

[24] Stefan Talmon, *Determining Customary International Law: The ICJ's Methodology between Induction, Deduction and Assertion*, 26 EUR. J. INT'L L., 417, 420 (2015).

[25] *Draft Conclusions on Identification of Customary International Law, with Commentaries 2018*, 70 U.N. GAOR, ¶ 9, U.N. Doc. A/73/10 (2018), *reprinted in* 2 Y.B. INT'L L. COMM'N (2018).

stem from a written text, such as the Geneva Conventions, and then a survey of general practice corresponding to the legally binding text.[26]

In this analysis, the latter option is more appropriate considering the universality of the Geneva Conventions. State practice indicates that the Geneva Conventions are recognized as customary international law.[27] While state practice regarding compliance with the Geneva Conventions is certainly not universal, many states have taken steps to import portions of the convention into their domestic law. The United States criminalized war crimes in 18 USC § 244. Indeed, 138 States have enacted legislation criminalizing war crimes to some degree.[28] In *Prosecutor v. Tadic*, the International Criminal Tribunal for the Former Yugoslavia (ICTY) noted the significance of state domestic laws reflecting the Geneva Conventions while determining if there had been a violation of *nullum crimen sine lege*, and upon finding that domestic law also reflected the criminalization of Tadic's offenses, they found that both domestic law and customary international law allowed subject-matter jurisdiction to the tribunal.[29] The reflection of the Geneva Conventions in municipal laws in 138 states indicates that the state practice requirement of the determination of customary international law has likely been met. Moreover, the compliance of states to the Geneva Convention need not be universal, particularly in times of hostilities when breaches of the Geneva Conventions are more likely to occur. It has been suggested that a more appropriate analysis would include more emphasis on a state's military manuals and municipal legislation than upon the actual behavior of states.[30] Judge Richard Reeve Baxter said,

> [t]he actual conduct of States in their relations with other nations is only a subsidiary means whereby the rules which guide the conduct of States are ascertained. The firm statement by the State of what it con- siders to be the rule is far better evidence of its position than what can be pieced together from the actions of that country at different times and in a variety of contexts."[31]

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[26] *Id.*

[27] As of 2013, South Sudan became the latest and final State to become a signatory to the Geneva Conventions. Additionally, the Holy See, a quasi-State entity has also signed the Conventions. *See* Convention IV, *supra* note 10.

[28] GENOCIDE, CRIMES AGAINST HUMANITY, & WAR CRIMES JURISDICTION, LIBRARY CONG. (loc.gov).

[29] *Prosecutor v. Tadic*, Decision on the Defense Motion on Jurisdiction, 1995 I.C.J, ¶¶ 73-74 (1995).

[30] *E.g.*, *The Geneva Conventions as Customary International Law*, *supra* note 20, at 357-359.

[31] *Id.* at 362 (quoting J. Richard Reeve Baxter).

However, it can be said that despite past and continued state violations of the Conventions, the application of the Geneva Conventions in the International Court of Justice and international criminal tribunals shows that the Conventions are generally practiced and accepted.[32] Illustratively, the Claims Commission in the Eritrea-Ethiopia case said, "The mere fact that they have obtained nearly universal acceptance supports this conclusion." [33] Furthermore, the ICTY stated that the international laws applied in the Tribunal were no doubt part of customary international law, indeed the Geneva Conventions on international armed conflict were unquestionably customary international law.[34]

Having established that the Geneva Conventions, including the articles regarding grave breaches, are customary international law, we can turn to the predominant question: whether their status as customary international law has created a presumption in favor of universal jurisdiction.

III. THE GENEVA CONVENTIONS FAVOR THE PRACTICE OF UNIVERSAL JURISDICTION FOR VIOLATIONS OF ITS PROVISIONS

Article 146 of the Geneva Convention IV gives States the obligation, and power, to not only investigate grave breaches, but to bring the perpetrators of

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[32] The International Court of Justice emphasized that a derogation from the Geneva Conventions by one party could not impair the obligations of the parties under the Conventions "by virtue of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity and the dictates of the public conscience. The Court stated that obligations arising under the Geneva Conventions are not obligatory solely under the laws of treaties, but also as "general principles of humanitarian law to which the Conventions merely give specific expression." Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.), Judgment, 1986 I.C.J. 14 Judgment (Jun. 27, 1986).

[33] Eritrea-Ethiopia Claims Commission, *supra* note 24 ¶ 31 (extending the Geneva Conventions over Eritrea, which was not a signatory state at the time).

[34] "…It was intended that the rules of international law that were to be applied should be "beyond any doubt part of customary law", so that problems of non-adherence of particular States to any international Convention should not arise. Hence, no doubt, the specific reference to the law of the Geneva Conventions in Article 2 since, as the Report states in paragraph 35, that law applicable in armed conflict has beyond doubt become part of customary law."

Of the Geneva Conventions, the Tribunal went on to say, "the norms stated in Article 3(1)(a)-(c) are of such an elementary, ethical character, and echo so many provisions in other humanitarian and human rights."

While discussing grave breaches, the Tribunal agreed that the conventional law of the Geneva Conventions had "become customary law" and was not "the establishment of some eccentric and eccentric and novel code of conduct or some wholly irrational criterion." *Prosecutor v. Tadic*, 1995 I.C.J., ¶ 19, 51-52, 67 (1995).

such criminal acts before their own courts, regardless of their nationality.[35] Additionally, Article 146 gives states the power to send the perpetrator to another state for trial in that jurisdiction if that state has made a *prima facie* case.[36] This suggests that the prosecution of grave breaches is not only a treaty obligation among signatories of the Geneva Conventions, but also customary international law given the Geneva Conventions status.

Additionally, the ability of states to prosecute war crimes regardless of the nationality of the perpetrator is an indication that prosecution of such crimes has become customary international law. The criminalization of war crimes through municipal law in 138 states shows the universality of the prosecution of such crimes.[37] Indeed, the recognition of a state's right to create legislation allowing for the prosecution of war crimes and other grave breaches in their own courts has been recognized for some time.[38] A US Court of Appeals in 1985, hearing the *Demjanjuk* case, recognized that Israel could exercise universal jurisdiction to try a non-Israeli person accused of war crimes. The Court stated,

> The universality principle is based on the assumption that some crimes are so universally condemned that the perpetrators are the enemies of all people. Therefore, any nation which has custody of the perpetrators may punish them according to its law applicable to such offences … Israel or any other nation … may undertake to vindicate the interest of all nations by seeking to punish the perpetrators of such crimes.[39]

Years later, in 2003, the US Second Circuit Court of Appeals acknowledged that customary international law supports universal jurisdiction for acts of piracy, war crimes, and crimes against humanity.[40] In practice, several States have exercised universal jurisdiction while prosecuting non-nationals for war crimes.[41] Illustratively, a military tribunal in Switzerland tried Goran Grabez, a Bosnian national seeking asylum in

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[35] Convention IV, *supra* note 10, art. 146; *see also* Convention I, *supra* note 6; Convention II, *supra* note 8; Convention III, *supra* note 9.

[36] Convention IV, *supra* note 10, art. 146.

[37] GENOCIDE, CRIMES AGAINST HUMANITY, & WAR CRIMES JURISDICTION, *supra* note 28.

[38] *See* Henckaerts, *supra* note 21.

[39] *Practice Relating to Rule 157. Jurisdiction Over War Crimes*, INT'L COMM. RED CROSS, https://ihl-databases.icrc.org/customary-ihl/eng/docs/v2_cou_us_rule157.

[40] *Id.*

[41] *Id.*

Switzerland, in 1995 for war crimes committed against prisoners in two northern prison camps in Bosnia-Herzegovina.[42]

In 2008, Spain attempted to try four former Nazis who were allegedly guards at a concentration camp in Austria. The alleged perpetrators were residing in the United States at the time and Spain attempted to extradite them.[43] Later, in 2011, Spain sent out an arrest warrant for John Demjanjuk, accused Nazi war criminal and one of the four accused in 2008, who was on trial in Germany for war crimes committed at a concentration camp in Poland.[44] The United Kingdom and Spain also cooperated in the extradition of former Chilean dictator Augusto Pinochet, despite the fact that Pinochet's crimes took place in Chile during his interim as president, once again exhibiting international cooperation and reliance on universal jurisdiction.[45] The United States convicted Chuckie Taylor in 2009 for crimes of torture committed between 1999 and 2003 in Liberia. This conviction was the first to be brought under a United States law that allowed for the prosecution of perpetrators of torture who are either US citizens or non-nationals who are present in the United States. The Acting Assistant Attorney General Matthew Friedrich said, "Our message to human rights violators, no matter where they are, remains the same: We will use the full reach of U.S. law, and every lawful resource at the disposal of our investigators and prosecutors, to hold you fully accountable for your crimes."[46]

In 2005, Belgium requested the extradition of Hissèn Habré from Senegal to Belgium to stand trial for war crimes, including torture, committed in Chad.[47] Belgium is currently engaged in a stalled prosecution against another Liberian war criminal, Martina Johnson, for war crimes committed in Liberia.[48] Johnson was living in Belgium at the time of her arrest but is not a Belgian citizen, nor were her crimes committed in Belgium or against Belgian

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[42] Auditeur du Tribunal militaire de division 1 v. G.G, Case No. 705, Judgment, (Swiss Tribunal Sept. 5, 1997).

[43] *Spain to Try Four Alleged Nazi War Criminals*, THE LOCAL (July 19, 2008) , https://www.thelocal.de/20080719/13157.

[44] *Spain Seeks Arrest Warrant for John Demjanjuk*, BBC NEWS (Jan. 14, 2011), https://www.bbc.com/news/world-europe-12194991.

[45] *How General Pinochet's Detention Changed the Meaning of Justice*, AMNESTY INT'L (Oct. 16, 2013) available at https://www.amnesty.org/en/latest/news/2013/10/how-general-pinochets-detention-changed-meaning-justice/.

[46] Roy Belfast Jr., *Sentenced on Torture Charges*, U.S. DEP'T JUST. (Jan. 9, 2009) https://www.justice.gov/opa/pr/roy-belfast-jr-aka-chuckie-taylor-sentenced-torture-charges.

[47] *Ex-Chad Dictator Indicted in Belgium*, HUMAN RIGHTS WATCH (Sep. 29, 2005, 3:53PM EDT) https://www.hrw.org/news/2005/09/29/ex-chad-dictator-indicted-belgium-0.

[48] Juergen Baetz & Robbie Corey-Boulet, *Belgium Arrests Liberian Ex-Rebel Commander*, AP NEWS (Sep. 18, 2014) https://apnews.com/article/748abb0ce6044fa0a722ae880ab776c0.

citizens.[49] Indeed, Belgium appears to be relying on universal jurisdiction to bring claims against Johnson, even after its universal jurisdiction law was repealed under political pressure from the United States.

Beyond individual prosecutions, statements from States and national policy can also be an indicator of State practice. The United States has established a policy of rewarding information that leads to the arrest or conviction, in any international criminal tribunal, of non-nationals accused of war crimes, crimes against humanity, or genocide. Prior to 2013, the War Crimes Rewards Program was limited to specific international tribunals, but the US has since expanded the accepted jurisdiction. Indeed, the US has stated, "…[w]e will continue to support institutions and prosecutions that advance this important interest (holding war criminals accountable)."[50] The Restatement (Third) of the Foreign Relations Law of the United States also identifies customary jus cogens prohibitions, including slavery, enforced disappearance, torture or other cruel, inhumane or degrading treatment, and arbitrary detention, among others.[51] Therefore, the prosecution of non-nationals accused of actions that constitute grave breaches is unquestionably an element of customary international law which States enjoy.

Further, the creation of international tribunals like the International Criminal Tribunal for Yugoslavia, the Nuremburg Trials, and the Tokyo Trials persuasively support the development of the prosecution of war crimes into customary international law. Specifically, the recognition of the validity of such courts to prosecute war crimes regardless of the nationality of the offender, illustrates that States have long believed that such crimes are so grave they must be prosecuted in whatever jurisdiction is most competent and that such crimes should not go unpunished. Indeed, when the UN Security Council referred Darfur to the International Criminal Court, the United States said, "[v]iolators of international humanitarian law and human rights law must be held accountable…By adopting today's resolution, the international community had established an accountability mechanism for the perpetrators of crimes and atrocities in Darfur."[52] The intention to mete justice to violators of grave breaches and perpetrators of war crimes has existed since WWII,

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[49] Monica Mark, *Martina Johnson's Liberian War Crimes Trial is a Milestone In Quest For Justice*, THE GUARDIAN (Oct. 7, 2014, 9:39 EDT) available at https://www.theguardian.com /global-development/2014/oct/07/martina-johnson-liberia-war-crimes-trial.

[50] *Key Topics – Office Of Global Criminal Justice - United States Department Of State*, U.S. DEP'T OF STATE (last visited Oct. 1, 2021).

[51] Jordan J. Paust, *Recent Development, Applicability of International Criminal Laws to Events in the Former Yugoslavia*, 9 AM. U. J. INTL. L. & POL'Y 499, 505-n.21 (1994).

[52] *Security Council Refers Situation in Darfur, Sudan, to Prosecutor of International Criminal Court*, UN (Mar. 31, 2005), https://www.un.org/press/en/2005/sc8351.doc.htm [hereinafter "Sudan Press Release"].

when the Charter for the Military Tribunals for the Far East explicitly stated that the Allied powers intended to mete out justice against war criminals and declared such intentions in the Charter and in their own statements.[53]

But such international tribunals are not without limitations. The recently formed International Criminal Court, or ICC, is restricted in a manner consistent with the considerations of State sovereignty. The Rome Statute restricts the exercise of ICC functions in Article 12, stating that the ICC only has jurisdiction over crimes committed by nationals of member states, or upon the jurisdiction or territory of member States by citizens of non-signatory states.[54] Further, Article 1 states that the power of the Court should be complementary to national criminal jurisdiction.[55] In addition, the Rome Statute contemplates issues of inadmissibility, indicating that the powers and purposes of the ICC are not universal nor are they unrestricted.[56] The ICC may only exercise jurisdiction over crimes outlined in the Rome Statute when States refer the case to the ICC, or when it has been determined that the State is unwilling or unable to prosecute the alleged perpetrator. The Rome Statute clearly indicates that the ICC does not have exclusive jurisdiction over the most serious crimes, but rather that the ICC is a complementary tool to fulfill its purposes.[57] Another international criminal tribunal, the ICTY, was challenged in *Tadic* when the defendant argued that the UN Security Council had exceeded its powers in establishing the ICTY. The Court stated that the UN Security Council, while possessing broad powers, was subject to constitutional limitations.[58] Similarly, the ICC is restricted by the provisions within the Rome Statute, though not restricted to such an extent that the ICC could not exercise jurisdiction of US nationals for crimes committed on the territory of a party to the Rome Statute. Furthermore, the Court in *Tadic* determined that the Security Council was within its powers to establish the international tribunal because the internal conflict in the Former Yugoslavia was of the sort that was a threat to the peace as described in Article 39 of the UN Charter.[59] The consideration of the ICTY's limitations and jurisdiction is an appropriate standard by which critics of the ICC's jurisdictional breadth can measure the ICC.

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[53] *Establishment of an International Military Tribunal for the Far East*, INT'L MIL. TRIB. FAR E. (Jan. 19, 1946), https://www.un.org/en/genocideprevention/documents/atrocity-crimes/Doc.3_1946%20Tokyo%20Charter.pdf.

[54] Rome Statute, *supra* note 14, art. 12.

[55] *Id.* at 2.

[56] *See id.* at 10.

[57] *Id.* at 1.

[58] *Prosecutor v. Tadic*, 1995 I.C.J. (1995).

[59] *Id.*

By creating international mechanisms with which to prosecute perpetrators of war crimes and grave breaches, States illustrate once again that the prosecution of such crimes has developed into customary international law. No longer are such violations restricted to the States whose nationals are accused of atrocities. Now, theoretically, any State can prosecute those suspected of war crimes that amount to grave breaches. Indeed, States are obligated to investigate and prosecute such persons under the Geneva Conventions – now customary international law. And, since the middle of the twentieth century, States have recognized the authority of international tribunals under universal jurisdiction to try persons accused of war crimes and grave breaches. For example, the use of the Nuremberg Trials and the Tokyo Trials to prosecute those individuals accused of war crimes after the conclusion of World War II, and States' subsequent acceptance of the jurisdiction of the sister tribunals and their judgements, show that the international community has acknowledged the ability of international tribunals – regardless of the consent of the State whose nationals are accused – to try individuals.

Customary international law has developed a means of accountability for perpetrators of war crimes. It is no longer a question of whether a state may try a non-national, or whether an international tribunal may try a citizen of a non-signatory State. I suggest that the application of universal jurisdiction to grave breaches and war crimes exceeds the question of nationality or signatory. When a State objects to such practice by States and international criminal tribunals, the purpose of the Geneva Conventions, and indeed, much of international law, becomes frustrated.

IV. THE US AS A PERSISTENT OBJECTOR

The United States has a somewhat turbulent history with the International Criminal Court and international criminal tribunals generally. In the past, the United States supported and advocated for international criminal tribunals, both those established by the UN Security Council (UNSC) and those established by multinational agreement, such as the Nuremburg Trials.[60] But the United States changed its tune after the final draft of the Rome Statute, establishing its position as opposed to the ICC prosecutor's ability to initiate investigations and prosecutions against individuals without the consent of States or direction by the UNSC and as a persistent objector to the idea of the exercise of universal jurisdiction by the ICC.

Prior to the drafting of the Rome Statute, the United States was a strong advocate in the establishment of the United Nations War Crimes

[60] The Nuremberg Trials were established through a multinational treaty, the London Agreement, comprised of the Allied victors.

Commission.[61] Between 1943 and 1948, this commission investigated and reported on 36,000 cases involving international atrocities.[62] While the Commission was not empowered to try the alleged perpetrators itself, it did coordinate closely with states in the prosecution of the individuals.[63] The United States was also a strong proponent for the establishment of the Nuremburg Trials, which were created prior to the foundation of the United Nations.[64] The Nuremburg Trial's sister tribunal, the Tokyo Trials, was created by an order from General McArthur, the Allied Powers Supreme General. Subsequent international criminal tribunals, such as the ICTY and the ICTR were established by the United Nations Security Council.[65]

While a strong advocate for the establishment of the former international criminal tribunals and the Rome Statute at the outset, the United States began to balk at the formation of the Rome Statute. Only a few months after President Clinton advocated for the ICC, saying, "Rwanda and the difficulties we have had with this special tribunal underscores the need for such a Court. And the United States will work to see that it is created," the United States voted against the final draft of the Rome Statute.[66] Since then, the United States has consistently objected to the exercise of jurisdiction over citizens of non-signatories states by the ICC, with few exceptions.

Although the United States continued to play an active role in the draft of the Rome Statute, as well as the Rules of Procedure, and also became a signatory to it, the United States continues to insist that it will not recognize the jurisdiction of the ICC. Indeed, in 1999 after voting against the final draft, the United States passed the Foreign Relations Authorization Act, which prohibited any financial support from the United States to the ICC and the extradition of any U.S. citizen to a foreign country that may surrender them to the ICC.[67]

One of the United States' objections to the jurisdiction of the ICC is that the ICC does not have comparable or sufficient constitutional protections United States' citizens enjoy.[68] However, the United States was an active participant in the drafting of the Rules of Procedure for the ICC and

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[61] *The US-ICC Relationship*, ABA-ICC PROJECT, https://www.aba-icc.org/about-the-icc/the-us-icc-relationship/ (last visited Oct. 1, 2021).

[62] Dan Plesch, *About*, HUMAN RIGHTS AFTER HITLER, http://www.unwcc.org/about/ (last visited Oct. 1, 2021).

[63] *Id.*

[64] *The US-ICC Relationship*, *supra* note 61.

[65] *Id.*

[66] *Id.*

[67] *Id.*

[68] JENNIFER K. ELSEA, ET. AL., CONG. RSCH. SERV., U.S. POLICY REGARDING THE ICC, 9 (2006) https://fas.org/sgp/crs/misc/RL31495.pdf.

Ambassador David Scheffer, representing the United States in the drafting commission, said, "[w]e strongly believe the Elements of Crimes and the Rules of Procedure will stand the test of time, as they are consistent with customary international law and international standards of due process."[69] Indeed, the Rome Statute is largely consistent with the procedural protections safeguarded in the Constitution.[70] One of its greatest obstacles in regards to constitutional protections is the Sixth Amendment. But, it has been argued that the right to trial by jury does not create constitutional hurdles for the ICC because the US Supreme Court has held that unlawful combatants are not entitled to trial by jury.[71] And while unlawful combatants are typically not citizens of the United States, the US Supreme Court found that there was nothing to preclude a citizen from being held an unlawful combatant.[72] Furthermore, the constitutional protections of American citizens do not always apply when Americans are tried in foreign courts.[73] Finally, if the United States were a party to the Rome Statute and enacted legislation criminalizing violations identified in the Rome Statute, its nationals would not be brought before the ICC and lacking in constitutional protections unless the United States was unwilling or unable to prosecute those perpetrators for violations.[74]

Ambassador Scheffer emphasized that the United States desires to be "a good neighbor" to the ICC and "undertake important cooperative measures with the court."[75] Since then, the United States has done little to fulfill its goal of being a good neighbor to the ICC. In 2002, the United States passed the American Servicemembers Protection Act, which prohibited service members and agencies of the United States from participating voluntarily with ICC investigations.[76] The Act remains in force today and was invoked by President

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[69] *The US-ICC Relationship*, *supra* note 61; David J. Scheffer, Ambassador-at-Large for War Crimes Issues, Statement Before the Sixth Committee of the UN General Assembly (Oct. 18, 2000), https://1997-2001.state.gov/www/policy_remarks/2000/001018_scheffer_icc.html.

[70] Teresa Young Reeves, *A Global Court? U.S. Objections to the International Criminal Court and Obstacles to Ratification*, 8 HUM. RTS. BRIEF 15, 18 (2000).

[71] *See generally Ex parte Quirin*, 317 U.S. 1, 45 (1942).

[72] David Scheffer & Ashley Cox, *The Constitutionality of the Rome Statute of the International Criminal Court*, 98 J. CRIM. L. & CRIMINOLOGY 983, 1041 (2007-2008).

[73] "In this line of cases, as amplified by Boumediene, the Supreme Court has left the door open for a case-by-case examination of when and under what circumstances (guided by "practical considerations") a U.S. citizen acting outside the United States would be entitled to a jury trial before American authorities seeking to try the case abroad." *Id.* at 1044.

[74] *Id.* at 1038.

[75] Statement Before the Sixth Committee of the UN General Assembly, *supra* note 69.

[76] Alex Whiting, *An ICC Investigation of the U.S. in Afghanistan: What Does it Mean?* JUST SEC. (Nov. 3, 2017), https://www.justsecurity.org/46687/icc-investigation-u-s-afghanistan-mean/.

Donald Trump in his statement against the recent investigation initiated by the ICC Prosecutor into crimes committed by US military and CIA personnel in Afghanistan, a party to the Rome Statute.[77] Additionally, the United States "unsigned" the Rome Statute during the Bush administration by sending a note to the UN announcing that it considered itself released from all obligations of the original signature.[78]

While in the past, legislation restricting cooperation with the ICC has been relaxed under the Bush Administration and Obama Administration, the United States has since reaffirmed its position as an objector to the jurisdiction of the ICC over citizens of third states without a referral by the United Nations Security Council. In 2005, the United Nations Security Council referred Darfur to the ICC, but the United States abstained from voting, saying, "The United States continues to fundamentally object to the view that the Court should be able to exercise jurisdiction over the nationals, including government officials, of States not party to the Rome Statute."[79] In 2011, the United States shifted its position and voted to refer Libya to the ICC.[80] The current position of the United States is that absent a referral by the UN Security Council, the ICC should not have jurisdiction over nationals of non-signatory states.[81] Additionally, President Trump announced in 2018 that if the ICC Prosecutor continued to investigate the United States in connection with crimes committed in Afghanistan, the United States would respond with travel bans, financial sanctions, and even criminal prosecutions.[82] Following through on this assertion, the Trump Administration revoked the ICC Prosecutor's visa in 2019, and, in 2020, instituted financial sanctions against the ICC and its staff members.[83]

Despite some changes in US policy with changing administrations, the United States has, by and large, continued to object almost entirely to the jurisdiction of the ICC over American citizens, and other citizens of non-member states. Opposition to the ICC exercising jurisdiction over US citizens despite the US being a signatory to the Geneva Conventions and therefore

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[77] *See* Exec. Order No. 13,928, 85 Fed. Reg. 36,139 (June 11, 2020).

[78] *Q&A: the International Criminal Court and the United States*, HUMAN RIGHTS WATCH, ¶ 2, https://www.hrw.org/news/2020/09/02/qa-international-criminal-court-and-united-states#:~:text=US%20President%20Bill%20Clinton%20signed,to%20the%20Senate%20for%20ratification.&text=Bush%20effectively%20%E2%80%9Cunsigned%E2%80%9D%20the%20treaty,have%20any%20obligations%20toward%20it.

[79] *Sudan Press Release*, *supra* note 52.

[80] *The US-ICC Relationship*, *supra* note 61.

[81] *See generally*, *US Opposition to the International Criminal Court*, GLOB. POL'Y F., https://www.globalpolicy.org/international-justice/the-international-criminal-court/us-opposition-to-the-icc.html (last visited Oct. 2021).

[82] *The US-ICC Relationship*, *supra* note 61.

[83] *Id.*

obligated to investigate and prosecute war crimes, may create obstacles to the validity and use of universal jurisdiction by States and other entities. Thus, while universal jurisdiction would generally allow any State to prosecute alleged perpetrators of war crimes, the US's actions in regard to the practice by an international criminal tribunal may further erode the international community's capacity to fulfill their obligations under the Geneva Conventions, particularly in respect to citizens of the United States.

V. VIOLATIONS OF HUMANITARIAN LAW THAT RISE TO THE LEVEL OF WAR CRIMES ARE JUS COGENS AND CANNOT BE OBJECTED TO

The concepts of grave breaches and war crimes have converged to largely interchangeable phrases. Article 8 of the Rome Statute defines war crimes as grave breaches under the Geneva Convention, include willful killing, torture or inhumane treatment, and willfully depriving a prisoner of war or other protected persons of the rights of fair and regular trial. The United States Code identifies war crimes with similar language, as well as Article 3 violations.[84] Additional Protocol I of the Geneva Conventions also indicates that the grave breaches of the Geneva Convention should be regarded as war crimes.[85] It has also been suggested that all serious breaches of international law amount to war crimes, and thus war crimes are a broader category than grave breaches regime originally imagined by the Geneva Conventions.[86]

The prevention and prosecution of grave breaches, and war crimes by association, are more than customary international law, they are peremptory norms of international law and thus non-derogable.[87] The Geneva Conventions, universally signed and ratified, require domestic legislation for breaches, as well as investigation and prosecution for alleged perpetrators, but they also consider the capacity of international tribunals.[88] Therefore, the prosecution of war crimes at any level is also contemplated as a peremptory norm. Indeed, war crimes create individual liability, just as grave breaches do.[89]

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[84] Article 8 of the Rome Statute gives the ICC jurisdiction over crimes "defined as a grave breach in any of the international conventions signed at Geneva 12 August 1949, or any protocol to such convention to which the United States is a party." Rome Statute, *supra* note 14, art. 8.

[85] Hathaway, et. al, *supra* note 18, at 66.

[86] Öberg, *supra* note 13, at 171-173; *See* OFF. OF GEN. COUNS., U.S. DEP'T OF DEF. L. WAR MANUAL §18.9.5.2, WAR CRIMES – SERIOUS VIOLATIONS OF THE LAW OF WAR (June 2015) (The US military sometimes uses war crimes to refer to any serious violation of the law of war.).

[87] *See* Oren Gross, *The Grave Breaches System and the Armed Conflict in the Former Yugoslavia*, 16 MICH. J. OF INT'L L. 783, 826 (1995).

[88] *Id.* at 792.

[89] *Id.* at 793.

In identifying peremptory norms, the norm in question must meet specific criteria. One, it is a norm of general international law, and two, accepted and recognized by States as a norm which cannot be derogated from.[90] To the first point, the prohibition and prosecution of war crimes is certainly a norm of general international law. Indeed, many war crimes have arguably already been categorized as peremptory norms, including the prohibitions of genocide, torture and inhumane treatment, and prolonged arbitrary detention.[91] Further, the absorption of war crimes into the grave breaches regime also constitutes the generally accepted nature of the prohibition of war crimes as an international norm. Many of the Geneva Conventions, including Common Article 3 and the Additional protocols, are recognized as *jus cogens*.[92] The International Court of Justice in the *Nicaragua* case stated that the rules of Common Article 3 are a minimum yardstick of customary international law reflecting the elementary considerations of humanity.[93] Moreover, *jus cogens* are most commonly developed from customary international law, of which the grave breaches of the Geneva Convention have become.[94]

Second, acceptance and recognition by a large majority, but not all, of States is required for a general norm to become *jus cogens* and create non-derogable obligations.[95] The United Nations has identified forms of acceptance and recognition, such as public statements made on behalf of States, decisions of national courts, treaty provisions, etc.[96] Subsidiary means of acceptance can also include decisions of international courts and tribunals, most notably the International Court of Justice, as well as works of expert bodies established by States or international organizations.[97]

State practice regarding the prosecution of war crimes, as discussed in this paper already, can be a challenge to the identification of customary international law and *jus cogens* because so few war criminals are tried by national courts. Indeed, the United States has refused to prosecute citizens

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[90] *See* Int'l L. Comm'n, Rep. on the Work of Its Seventy-Fourth Session, U.N. Doc. A/74/10, §(C)(1)(56) (2019) [hereinafter, Int'l L. Comm'n].

[91] REST. (THIRD) FOREIGN REL. L. U.S. § 702 (1987).

[92] Mark R. von Sternberg, *Yugoslavian War Crimes and the Search for a New Humanitarian Order: the Case of Dusko Tadic*, 12 J. C.R. & ECON. DEV. 351, 362, 378 (1997).

[93] Vincent Chetail, *The Contribution of the International Court of Justice to International Humanitarian Law*, 85 INT'L COMMITTEE OF THE RED CROSS, 235, 260-261 (2003).

[94] *See* Sean D. Murphy, *Crimes against Humanity and Other Topics: The Sixty-Ninth Session of the International Law Commission*, AM. J. INT'L L. 1, 21 (2017).

[95] Int'l L. Comm'n, *supra* note 90, § (C)(1)(56).

[96] *Id.*

[97] *Id.*

alleged to have committed war crimes in Afghanistan.[98] In 2019, a US military tribunal found alleged war criminal, Edward Gallagher, guilty of photographing an enemy fighter's corpse, an act that may amount to a violation of the Geneva Conventions, but acquitted him on other more serious breaches of the Conventions, including killing a wounded enemy fighter and purposefully targeting civilians.[99] Moreover, President Trump overturned the jury's recommended sentencing, allowing Gallagher to retire with anchors and a pension.[100] Particularly during the Trump administration, but also in the past, American allies and servicemen have expressed concern about the current administration's propensity to pardon those soldiers accused of crimes amounting to grave breaches.[101]

However, national legislation indicates the illegal nature of war crimes across the globe.[102] The United States, for example, has codified war crimes as any conduct "defined as grave breaches in any of the international

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[98] *See generally Q&A: the International Criminal Court and the United States*, HUMAN RIGHTS WATCH ¶ 6 (2018), https://www.hrw.org/news/2020/09/02/qa-international-criminal-court-and-united-states#5.

[99] Carl Prine, *SEAL War Crimes Suspect not Guilty on Murder Charge*, NAVY TIMES (Jul. 2, 2019), https://www.navytimes.com/news/your-navy/2019/07/02/seal-war-crimes-suspect-not-guilty-on-murder-charge/

[100] Geoff Ziezulewicz, *Retired SEAL Chief Eddie Gallagher Sues Navy Secretary and New York Times*, NAVY TIMES (June 1, 2020), https://www.navytimes.com/news/your-navy/2020/06/01/retired-seal-chief-eddie-gallagher-sues-navy-secretary-and-new-york-times/.

[101] Waitman Wade Beorn, *I Led a Platoon in Iraq. Trump is Wrong to Pardon War Criminals*, WASH. POST (May 9, 2019), https://www.washingtonpost.com/outlook/i-led-a-platoon-in-iraq-trump-is-wrong-to-pardon-war-criminals/2019/05/09/15b10430-71d5-11e9-9eb4-0828f5389013_story.html ("Leaders are constantly making policy, by what they do — and by what they don't do. Trump's posture endangers our deployed men and women by betraying the trust of host nations that we will prosecute those rare individuals who commit crimes against their people."); Todd South, *Hearing Cancelled for Green Beret Major Facing Murder Charge. Is a Court-Martial Next?*, MILITARY TIMES (Mar. 8, 2019), https://www.armytimes.com/news/your-army/2019/03/08/hearing-cancelled-for-green-beret-major-facing-murder-charge-is-a-court-martial-next/ (citing a tweet by President Trump in 2018, calling Major Matt Golsteyn, accused of murdering an unarmed enemy combatant after being released from Afghan authorities, a 'U.S. Military hero'); Barbara Demick, *50,000 in Korea Protest U.S. Policies*, L.A. TIMES (June 14, 2003), https://www.latimes.com/archives/la-xpm-2003-jun-14-fg-korea14-story.html (describing two American military members acquitted of manslaughter charges after two young girls were crushed by U.S. Army minesweeping vehicle, resulting in widespread protests in South Korea); Holly Richardson, *Holly Richardson: The No Gun Ri Massacre and 'Collective Forgetting*, SALT LAKE TRIBUNE (Mar. 23, 2019), https://www.sltrib.com/opinion/commentary/2019/03/22/holly-richardson-no-gun/ (In July 1950, US military members massacred a group of civilian refugees for fear of enemy infiltration. President Clinton apologized in 2000 for the massacre but no military tribunals were held, and no charges were brought against the soldiers involved.).

[102] *See* GENOCIDE, CRIMES AGAINST HUMANITY, & WAR CRIMES JURISDICTION, *supra* note 29.

conventions signed at Geneva…or any protocol to such convention to which the United States is a party."[103] Common Article III of the Geneva Conventions prohibits actions such as rape, torture or inhumane treatment, intentionally causing serious bodily harm, etc.[104] Moreover, despite the somewhat low number of criminal trials for war crimes, when they do occur, they typically involve some measure of international cooperation and universal jurisdiction, as discussed above.

The identification of *jus cogens* does not call for the entirety of the international community to recognize a norm, but rather a large majority.[105] In 2012, 136 states had municipal legislation accommodating the use of universal jurisdiction for war crimes.[106] This certainly suggests that the international community has largely accepted the concept of universal jurisdiction, and as we have seen, exercises their rights to it individually. Indeed, under Article 146 of the Fourth Geneva Convention, States have the obligation to investigate and prosecute war crimes. The United States, when the UN referred Darfur to the ICC, said that it didn't oppose the resolution because "violators of international humanitarian law and human rights law must be held accountable."[107] Similarly, Japan, which voted in favor of the referral, explained that grave violations of human rights must not be allowed with impunity.[108] France even indicated that the international community had a duty to act against the violations in Darfur.[109] Indeed, France has a committed investigatory unit, the Central Office to fight Crimes against Humanity, Genocide and War Crimes, dedicated to investigating international criminals and perpetrators of war crimes.[110] A Swiss military tribunal, exercising universal jurisdiction, tried and convicted a Rwandan national in Switzerland for, among other things, war crimes committed in Rwanda in 1994, in what is regarded as an internal armed conflict.[111] The tribunal stated, "It is now accepted without contention that genocide and other crimes against

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[103] 18 USC § 2441.

[104] *The Geneva Conventions of 1949 and their Additional Protocols*, INT'L COMM. RED CROSS (Oct. 29, 2010), https://www.icrc.org/en/doc/war-and-law/treaties-customary-law/geneva-conventions/overview-geneva-conventions.htm.

[105] INT'L L. COMM'N, *supra* note 90, § (C)(1)(56).

[106] UNIVERSAL JURISDICTION: A PRELIMINARY SURVEY OF LEGISLATION AROUND THE WORLD, AMNESTY INT'L (2012).

[107] Sudan Press Release, *supra* note 52.

[108] *Id.*

[109] *Id.*

[110] Franck Petit, *International War Crimes: Spotlight on France's War Crime Unit*, JUSTICE INFO (Dec. 17, 2018) https://www.justiceinfo.net/en/tribunals/national-tribunals/39791-international-crimes-spotlight-on-france-s-war-crimes-unit.html.

[111] Chile Eboe-Osuji, '*Grave Breaches' as War Crimes: Much Ado About…'Serious Violations'?*, ICC-9-10 n.24.

humanity… are matter of obligation *erga omnes*, engaging universal jurisdiction."[112] Genocide and other crimes against humanity are commonly associated and overlap with war crimes when conducted in times of armed conflict, suggesting that the *erga omnes* obligation can also apply to war crimes and grave breaches. The existence of *erga omnes* obligations in this realm further indicates that such obligations derive from a character of *jus cogens*.[113] And, as State practice indicates and was discussed earlier in this paper, States have regularly prosecuted non-nationals for war crimes and grave breaches. Moreover, the perspective of States not involved in the prosecution of war crimes, particularly in the exercise of universal jurisdiction, may not be as significant to the identification of *jus cogens* as the activities of the international community as a whole.[114]

Further consideration of *jus cogens* norms leads to an analysis of international tribunals and the prosecution of war crimes at the international level, either by a treaty body, UN Security Council resolution, or even a coalition of States such as the one that established the first International Military Tribunal and the Nuremburg Trials. International tribunals indicate that the prosecution of war crimes has become a peremptory norm of international law. Illustratively, In establishing the jurisdiction of the International Criminal Court, Article 8 of the Rome Statute indicates the criminality of a variety of war crimes, including grave breaches of the 1949 Geneva Conventions.[115] The International Criminal Court's authority derives from its treaty body, the Rome Statute, signed by over 160 countries. In contrast, the Nuremberg Trials were established by the London Agreement between the Allied Powers.[116] Thus, the authority of the Nuremberg Trials, internationally esteemed as the beginning of an era of international accountability, were established by a few victors, rather than consensus of the international community. And yet their legacy and authority hold today. Judge Philippe Kirsch said of the Nuremberg Trials,

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[112] *Id.* at 9.

[113] Craig Eggett & Sarah Thin, *Clarification and Conflation: Obligations Erga Omnes in the Chagos Opinion* EUROPEAN J. INT'L L. BLOG (May 21, 2019), https://www.ejiltalk.org/clarification-and-conflation-obligations-erga-omnes-in-the-chagos-opinion/#:~:text=Jus%20cogens%20refers%20to%20particular,relationship%20between%20the%20two%20conceps.

[114] "While the positions of other actors may be relevant in providing context and for assessing acceptance and recognition by the international community of States as a whole, these positions cannot, in and of themselves, form part of such acceptance and recognition." INT'L L. COMM'N, *supra* note 90.

[115] Rome Statute, *supra* note 14, art. 8.

[116] *Nürnberg Trials,* ENCYCLOPEDIA BRITANNICA, https://www.britannica.com/event/Nurnberg-trials (last visited Oct. 13, 2022).

> 'Crimes against international law are committed by men, not by abstract entities, and only by punishing individuals who commit such crimes can the provisions of international law be enforced.' Ensuring accountability is important in itself, but it is also important because allowing impunity for widespread or systematic atrocities can have serious consequences for international peace.[117]

Since the Nuremberg Trials, other international criminal tribunals have exercised jurisdiction over perpetrators of war crimes and grave breaches, including the International Criminal Tribunal for Yugoslavia and the International Criminal Tribunal for Rwanda. Moreover, regional criminal tribunals, as well as specialized criminal tribunals such as the Extraordinary Chambers in the Courts of Cambodia, have also been established.[118] Further, States that are not signatories to the Rome Statute have been urged by the UN Security Council to cooperate with the ICC[119], and such States have, in the past, done so.[120]

To overcome a peremptory norm, a subsequent norm of equal of greater *jus cogens* character must be established.[121] *Jus cogens* norms do not rely on the consent of States.[122] In the examination of the prosecution of war crimes as *jus cogens*, a persistent objection to such prosecution at any level by any jurisdiction is incompatible with the character of the norm. Meaning, simply, that the United States' objections to the jurisdiction of the International Criminal Court over the alleged war crimes committed by US military members in Afghanistan cannot prevent the ICC from investigating and prosecuting the perpetrators when the United States and Afghanistan are unwilling or unable. Indeed, the International Criminal Court is a court of last resort, a final stand against unpunished, grave crimes.[123] Principles of sovereignty, including sovereignty of the state, are not *jus cogens* norms because *jus cogens* norms "protect universally observed, fundamental human

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[117] *See* Judge Philippe Kirsch, President of the International Criminal Court, Applying the Principles of Nuremberg in the ICC, ICC, 3 (2006),

[118] *International and Hybrid Criminal Courts and Tribunals*, U.N. & THE RULE OF LAW https://www.un.org/ruleoflaw/thematic-areas/international-law-courts-tribunals/international-hybrid-criminal-courts-tribunals/.

[119] Sudan Press Release, *supra* note 52.

[120] *Key Topics – Office of Global Criminal Justice - United States Department Of State*, *supra* note 51 (discussing US cooperation during the Obama administration).

[121] INT'L L. COMM'N, *supra* note 93.

[122] *See* James A. Green, *Questioning the Peremptory Status of the Prohibition on the Use of Force*, EUROPEAN J. OF INT'L L. BLOG (Mar. 17, 2011), https://www.ejiltalk.org/questioning-the-peremptory-status-of-the-prohibition-of-the-use-of-force/.

[123] Kirsch, *supra* note 117, at 5.

rights. In particular, they prohibit the type of conduct viewed as the most abusive of human rights and dignity."[124] Further, sovereign immunity, while typically practiced by a majority of states and recognized as a general principle of international law, can be waived by the State. For example, the United States has municipal legislation indicating when its sovereign immunity can be waived.[125] The 160 member States of the Rome Statute have waived the immunity of their high-level officials to the jurisdiction of the ICC.[126] Additionally, resolutions by the UN Security Council referring third states to the ICC for breaches of international law also indicate that sovereign immunity can be waived, not by the State in question, but by a larger international body for preservation of international norms.[127] Various treaties and conventions also indicate the obligation of states to investigate and prosecute certain violations, including the Geneva Conventions and the Convention Against Torture.[128]

The prosecution of war crimes and grave breaches has likely reached the status of a peremptory norm, creating an obligation for states to prosecute or extradite alleged perpetrators. The ICJ in the *Corfu Channel* decision described peremptory norms as "elementary considerations of humanity, even more exacting in peace than in war."[129] Due to the development of *jus cogens* norms from customary international law, it is evident that the prosecution of grave breaches and war crimes by an international tribunal is an act that is supported by international law.

The ICC Can Exercise Right of Universal Jurisdiction

The International Criminal Court, while condemned by the United States as a "kangaroo court"[130] and illegitimate[131], can exercise universal jurisdiction over non-signatory States in its pursuit of justice against perpetrators of war crimes. The development of the prosecution of war crimes into *jus cogens*, as well as the customary international law status of the Geneva Conventions and the obligation to investigate and prosecute perpetrators of grave breaches

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124 Graham Ogilvy, Belhas v. Ya'Alon*: The Case for a Jus Cogens Exception to the Foreign Sovereign Immunities Act*, 8 J. INT'L BUS. L. 169, 180 (2009).

125 28 USC § 1346.

126 Ogilvy, *supra* note 124, at 181.

127 *Id.* at 188.

128 INT'L L. COMM'N, *The Obligation to Extradite or Prosecute* (Aut Dedere Aut Judicare*): Final Rep*., 2 (2014).

129 Corfu Channel *(UK v. Albania)*, Judgment, 1949 (Apr. 9), I.C.J. 4, 22 (Apr. 9).

130 *Pompeo on ICC: U.S. Won't Be Threatened by 'Kangaroo Court'*, REUTERS (June 11, 2020) https://www.reuters.com/article/us-warcrimes-afghanistan-trump-pompeo/pompeo-on-icc-u-s-wont-be-threatened-by-kangaroo-court-idUSKBN23I2AJ.

131 Laurel Wamsley, *Trump Administration Sanctions ICC Prosecutor Investigating Alleged U.S. War Crimes*, NPR, (Sep. 2, 2020), https://www.npr.org/2020/09/02/908896108/trump-administration-sanctions-icc-prosecutor-investigating-alleged-u-s-war-crim.

(now absorbed into war crimes), strongly suggests that the International Criminal Court has the jurisdiction and legal personality to exercise its authority to investigate and prosecute the crimes outlined in Article 8 of the Rome Statute – even over citizens of Third States. Indeed, the *jus cogens* character of the prosecution of war crimes also indicates that the United States and other non-cooperative States cannot object to the jurisdiction of the ICC, regardless of the nature of sovereignty in the international realm.

Although the Rome Statute does not expressly give the ICC universal jurisdiction, the development of the Geneva Conventions into customary international law, ability of States to prosecute alleged perpetrators of war crimes, and the use of historic international criminal tribunals all suggest that the ICC can exercise universal jurisdiction over certain crimes.

First, the Geneva Conventions are well accepted as customary international law. Not only have they been universally ratified, signifying the general acceptance by the international community, but practice by the international community – both States and international tribunals – shows the customary international law nature of the Conventions. As discussed above, 138 states have criminalized war crimes to some degree, fulfilling their obligations under the Geneva Conventions. Further, some states exercise jurisdiction over non-national for crimes that took place in other jurisdictions.[132] Indeed, the United States exercises jurisdiction over non-nationals for tort claims arising from breaches of international law.[133]

Moreover, the use of the Geneva Conventions in the International Court of Justice and international criminal tribunals such as the International Criminal Tribunal for Yugoslavia also indicates their nature as customary international law creating universal jurisdiction. The UN Secretary General explained that the laws applied in the tribunal, including the Geneva Conventions, were customary international law, going so far as to say that the Geneva Conventions on international armed conflict were *undoubtedly* customary international law.[134] Because international tribunals have exercised jurisdiction over non-nationals in the past[135], it is appropriate for the modern international criminal tribunal, the ICC, to exercise universal jurisdiction over citizens of non-signatory States. The use of UN Security Council referrals to justify the implementation of past international tribunals cannot prevent the

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[132] *Spain to Try Four Alleged Nazi War Criminals*, *supra* note 44; *Spain Seeks Arrest Warrant for John Demjanjuk*, *supra* note 43; *How General Pinochet's Detention Changed the Meaning of Justice*, *supra* note 45; *Roy Belfast Jr., Sentenced on Torture Charges*, *supra* note 46; Baetz, et. al., *supra* note 48; Mark, *supra* note 49.

[133] 28 USC § 1350.

[134] *Prosecutor v. Tadic*, 1995 I.C.J. (emphasis added).

[135] *Id.*; Eritrea-Ethiopia Claims Commission Claim 4, *supra* note 23; *Practice Relating to Rule 157 Jurisdiction Over War Crimes*, *supra* note 39.

ICC, a treaty body, from working similarly. Indeed, the two most historic international criminal tribunals, the Nuremberg Trials and the Tokyo Trials, were not implemented through universal treaty or Security Council referral, rather by an agreement by a small number of States.[136] The universal acceptance of the ability of the sister tribunals to try alleged war criminals without universal treaty acceptance or the direction of a larger, executive body indicates that the international community, then and now, recognizes the significance of prosecuting individuals whose crimes are so grievous that they amount to war crimes and breaches of international humanitarian law. Indeed, Judge Kirsch stated, "The world has come too far, and the consequences of failure are too great. We must continue to carry forth the Nuremberg legacy and make an effective, permanent international court a lasting reality."[137] Finally, the Rome Statute has been signed by 123 States[138], while the number does not show universal acceptance, it does show that a large majority of the international community recognizes its authority to prosecute war criminals should the signatory states be unable or unwilling.

Further it can be argued that the International Criminal Court has achieved a distinct status of legal personality, affording it the capacity to perform legal action in the international community without the express authorization or consent of a state. In the Advisory Opinion, *Certain Expenses of the United Nations,* by the ICJ, the Court determined that actions of international organizations "must be tested by their relationship to the purposes" of the organization in question.[139] The test being that if the action were made for a purpose which was not one of the purposes of the organization as identified in the charter or treaty body, then it could not be considered an appropriate action of the organization.[140] Meaning, simply, that the purposes of the ICC and its procedures are central to the question of whether it has attained legal personality.

Article 4 of the Rome Statute explicitly states that the ICC will have legal personality and the capacity necessary to fulfill its purposes and its

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136 *See* International Military Tribunal for the Far East, *supra* note 53; *Nürnberg Trials*, *supra* note 116.

137 Kirsch, *supra* note 117.

138 *The States Parties to the Rome Statute*, INT'L CRIM. COURT, https://asp.icc-cpi.int/en_menus/asp/states%20parties/pages/the%20states%20parties%20to%20the%20rome%20statute.aspx#:~:text=123%20countries%20are%20States%20Parties,Western%20European%20and%20other%20States (last visited Oct. 2021).

139 Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter), Advisory Opinion of 20, July 1962: I.C.J. Reports 1962, 151, 167, https://www.icj-cij.org/public/files/case-related/49/049-19620720-ADV-01-00-EN.pdf (last visited Nov. 2022).

140 *Id.*

functions.[141] Signed by a large majority of nations, this suggests that the legal personality of the ICC is recognized by most of the international community. Additionally, in the Advisory Opinion, *Reparation for Injuries Suffered in the Service of the United Nations*, the ICJ stated that the United Nations had attained international legal personality when it was signed by merely fifty States, saying, "fifty States, representing the vast majority of the members of the international community, had the power, in conformity with international law, to bring into being an entity possessing objective international personality, and not merely personality recognized by them alone, together with the capacity to bring claims."[142]

In contrast to the UN signatories at the time, the Rome Statute has been signed by over one hundred States,[143] a clear indication that the ICC has met the same standards of recognition and authority as the UN in regard to international legal personality. The ICC was instituted with the purposes of ending impunity for the perpetrators of serious crimes and as a complementary institution to work alongside national jurisdictions, which have an obligation to investigate and prosecute such serious crimes.[144] In contested cases referred to the ICC by the Security Council, by States, or through investigation by the Prosecutor, the ICC is merely fulfilling its explicit purpose of ending impunity and exercising jurisdiction only where States fail their own obligations. Indeed, the investigation of war crimes committed by US citizens in Afghanistan is a function explicitly authorized by the Rome Statute[145] because Afghanistan is a party to the ICC and the crimes took place in Afghan territory. Further functions and procedures authorized to the ICC by the Rome Statute strongly suggest that the actions of the ICC thus far have fallen within the realm of their legal personality.

The ICC, much like the Security Council in *Tadic* and *Certain Expenses by the United Nations*, is also acting within its powers when it investigates, prosecutes, or receives cases from the Security Council and States. All of which indicate that the ICC does indeed retain legal personality on the international plane and can exercise such personality as States do, consistent with the restrictions within the Rome Statute. Further, nothing in the Rome Statute demonstrates that the ICC cannot exercise jurisdiction over citizens of Third States when such crimes occur upon the territory of parties to the Rome Statute, regardless of how much a Third State may object to such action. Indeed, it is directly contrary to the purposes of the ICC to grant impunity to

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141 Rome Statute, *supra* note 14, art. 4.

142 Talmon, *supra* note 24, at 420.

143 ICC, *supra* note 138.

144 *See* Kirsch, *supra* note 117.

145 Rome Statute, *supra* note 14, art. 15 ("The Prosecutor may initiate investigations proprio motu on the basis of information on crimes within the jurisdiction of the Court.").

alleged criminals when they fall within the jurisdiction of the ICC simply because of objectionable actions by non-consenting States. The ICC was developed to be a permanent institution that would punish and prevent those most serious crimes which "deeply shock the conscience of humanity" and "threaten the peace, security, and well-being of the world."[146] Indeed, the ICC is aimed at "enhancing international cooperation" and complementarity.[147] Allowing non-consenting States to undermine the purpose of the ICC will only erode the ability of the international community to demonstrate that war crimes will not be tolerated.

Its international legal personality also indicates that like States, the ICC may also have the right of exercising universal jurisdiction. If the scope of its powers as outlined in the Rome Statute fails on issues of consent and objection, the ability of States to exercise universal jurisdiction over grave breaches and war crimes as outlined by the Geneva Conventions, may also fall upon the ICC. In practice, States have exercised universal jurisdiction over alleged war criminals for crimes outlined within the Rome Statute as falling within the jurisdiction of the ICC.[148] Indeed, when international organizations attain legal personality, they may also raise legal claims in the international sphere. Illustratively, in the Advisory Opinion, *Reparation for Injuries Suffered in the Service of the United Nations*, the ICJ stated that international organizations have the capacity to bring independent claims on the international plane, including claims against nonmembers.[149] In regard to the United Nations, the court said, "…its members, by entrusting certain functions to it, with the attendant duties and responsibilities, have clothed it with the competence requires to enable those functions to be effectively discharged."[150] The concept of a foreign court retaining jurisdiction over a national of another State, such as the US, is neither new nor novel, indeed, this jurisdiction has been exercised numerous times, most notably in the attempted prosecution of Pinochet in Spain. While it is generally well accepted that States can exercise universal jurisdiction, I would submit that the ICC is also entitled to exercise this jurisdiction due to its international

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146 *Id*.

147 *Id.*

148 *See generally* note 131.

149 The United Nations sought to bring legal claims against Israel for the assassination of Count Folke Bernadette, the U.N. Security Council's mediator for the Arab-Israeli conflict. Talmon, *supra* note 24, at 425. The ICJ determined that the U.N. could bring such a claim because of its purposes and functions outlined in its Charter, concluding that the U.N. could not fulfill its purposes without international legal personality. *Id.* at 420.

150 Reparation of Injuries Suffered in Service of the U.N., Advisory Opinion, 1949 I.C.J. 174 (Apr. 11).

legal personality and its purpose as a court of last resort for States in order to end impunity.

VI. CONCLUSION

This paper has asserted, in sum, that the prosecution of war crimes and grave breaches is *jus cogens*, and therefore does not require consent, regardless of forum. Such a status would be compatible with *jus cogens* norms, which are meant to protect universal and fundamental human rights.[151] Justice and reparations through prosecution of those norms, as obligated by the Geneva Conventions, is a modern development of international law. Such a development illustrates that the international community prioritizes prevention of those most heinous and shocking crimes.

To reach this conclusion, this paper has discussed the evolution of the Geneva Conventions into customary international law, including the obligations to persecute alleged war criminals. The use of universal jurisdiction by States in this endeavor has been considered. This paper has further argued that the prosecution of war crimes and grave breaches is *jus cogens*, meaning that States cannot object to the obligation to investigate and prosecute war crimes. Further, this paper asserted that the concept of universal jurisdiction extends to the forum of international tribunals, including the International Criminal Court. Finally, it has been argued in this paper that the International Criminal Court is a forum which can prosecute citizens of non-signatory States due to the jus cogens nature of the obligation and its legal personality which allows it to act similarly to States on the international plane.

Ending impunity for war crimes and grave breaches by allowing the ICC to fulfill its role as a court of last resort will, and I write this with perhaps too much optimism, encourage international peace.

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[151] Ogilvy, *supra* note 124.