

The “Modern” Concept of *Erga Omnes* to Establish the Obligation of Impunity Eradication: Towards the Primacy Jurisdiction of the International Criminal Court

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Abstract

Despite the fact that there is no universally accepted definition, international crimes are related closely to civilian casualties and mass destruction, armed conflict, patriotism, and involvement of state. Consequently, domestic jurisdictions often fail to prosecute perpetrators, leaving international law enforcement as the only option for accountability. However, international law remains incarcerated within state-centric image. In the absence of their consent, states do not perceive that they have a duty to prosecute perpetrators of international crimes. This situation triggers impunity. On the other hand, there is a long-standing recognition of *jus cogens* as a universal and superior norm and the concept of *erga omnes* obligation for violation on important rights. These two concepts are based on the interest of ‘the whole international community’. All states are required to comply the concepts despite of their willingness to be bound by these concepts. This study was conducted to identify the characters of *erga omnes* obligation and to examine the possibilities of their application to prosecute international crimes. It also discusses the difficulties of the current *erga omnes* concept to enforce obligation of impunity eradication, especially for International Criminal Court (ICC). As the one and only permanent international criminal court, ICC received accusations and criticisms for being ‘a selective justice’. Hence, this study puts forward a ‘modern’ *erga omnes* concept as shift of paradigm from ‘state sovereignty’ to ‘humanity-based approach’. This modern concept is a significant theoretical foundation for the primacy jurisdiction of the ICC because this primacy is the only option that the ICC can apply universally to achieve global justice.

Keywords: *erga omnes* obligation, obligation to prosecute, impunity.

Konsep *Erga Omnes* “Modern” dalam Penegakan Kewajiban untuk Menghapuskan Impunitas: Menuju ‘Primacy Jurisdiction’ International Criminal Court

Abstrak

Meskipun tidak ada definisi yang disepakati secara internasional, kejahatan internasional seringkali dikaitkan dengan korban sipil, kehancuran luar biasa, konflik bersenjata dan semangat patriotisme serta keterlibatan negara. Akibatnya, hukum nasional seringkali gagal dalam menuntut pelaku sehingga mekanisme internasional menjadi satu-satunya cara untuk menuntut pertanggungjawaban pidana pelaku. Namun, hukum internasional masih terpenjara dalam sistem yang terpusat pada negara, sehingga tanpa adanya kesepakatan, negara tidak merasa harus patuh pada kewajiban untuk menuntut pelaku. Hal ini melahirkan iklim impunitas. Sementara itu, hukum internasional sejak lama telah mengakui keberadaan

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sebuah norma yang universal dan superior yakni jus cogens serta konsep kewajiban erga omnes sebagai sebuah konsekuensi pelanggaran dari suatu “hak-hak yang penting”. Kedua konsep hukum tersebut mendasarkan pada kepentingan masyarakat internasional secara keseluruhan sehingga mengharuskan semua negara untuk patuh terlepas dari keinginan mereka untuk terikat atau tidak dengan norma tersebut. Artikel ini mengidentifikasi karakter dari kewajiban erga omnes dan menelaah apakah karakter tersebut terpenuhi dalam sifat dari kewajiban untuk menghapuskan impunitas. Artikel ini kemudian memaparkan kesulitan-kesulitan yang dihadapi bagi konsep erga omnes saat ini dalam perannya menegakkan kewajiban untuk menghapuskan impunitas khususnya bagi International Criminal Court (ICC) untuk berlaku universal. Sebagai satu-satunya mahkamah pidana internasional permanen, ICC telah mendapat banyak kritikan karena dianggap masih “pilih-pilih” dalam menerapkan keadilan. Artikel ini menawarkan konsep erga omnes ‘modern’ sebagai dasar untuk merubah paradigma dari pendekatan berbasis kedaulatan negara menjadi berbasis umat manusia. Konsep modern ini dapat menjadi landasan teori bagi ICC untuk memberlakukan primacy jurisdiction kepada seluruh negara dan mewujudkan keadilan global.

Kata kunci: *impunitas, kewajiban erga omnes, kewajiban penuntutan.*

“The great temptation of crimes is based on impunity”

– Cicero–

A. Introduction

Some states of the world have granted amnesty and absolute official immunity to numerous leaders and commanders that tortured and killed thousands of civilians, thus preventing them from prosecution. The international law also confirms these domestic practices. The International Court of Justice (ICJ) has confirmed that absolute immunity is a general principle of international law and, hence, it is applied in certain cases towards serving Ministers of Foreign Affairs, even in the case of international crimes.¹ The United Nations (UN) also has pushed for and endorsed the granting of amnesty as a means of restoring peace and democratic government.² Since domestic jurisdictions have often failed to fulfil their function to prosecute certain parties, the international community established the Rome Statute of the Establishment of International Criminal Court (ICC) to handle the perpetrators regardless of the risks of undermining sovereignty and immunity of states. However, the Rome Statute is only a treaty. It only binds state parties. It prevents the ICC from functioning universally and results selective justice. This phenomenon triggers

¹ The principle of immunity of state officials in certain circumstances has commonly accepted in international law as can be seen in 2002 ICJ Judgment in the Arrest Warrant Case whereby the Court held that incumbent head of state and ministers of foreign affairs are protected by immunity rationae personae. See International Court of Justice, Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v Belgium), Judgment, 2002 (Arrest Warrant case), pp. 22-23, paras. 54-55 and p. 25, para. 61.

² This has been practiced by the UN to Cambodia, El Salvador, Haiti and South Africa. See Naomi Roht-Arriaza, “State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law”, *California Law Review*, Vol. 78, Issue 2, 1990, p. 451; pp. 458-461; p. 484; and p. 187.

a climate of impunity for international criminals and raises questions related to the prosecution of the perpetrators.

Impunity means “*freedom from punishment, harm, or loss*”.³ In the context of Human Rights protection, impunity can be regarded as:

“... the impossibility, *de jure* or *de facto*, of bringing the perpetrators of violations to account -whether in criminal, civil, administrative or disciplinary proceedings- since they are not subject to any inquiry that might lead to their being accused, arrested, tried and, if found guilty, sentenced to appropriate penalties, and to making reparations to their victims.”⁴

In the case of international crimes, impunity needs to be ended because it potentially encourages future heinous violations.⁵ The prohibition of international crimes has gained its *jus cogens* status since substantively it is a rule of conduct to prohibit intolerable characteristics because of the threat such crimes present to the survival of States and their peoples and to the endurance of the most basic human values.⁶ Therefore, *jus cogens* crimes gain their superior and universal authority from their substantive and establish protections and the mandatory obligation to prosecute.

In the aftermath of World War II, the practices from Nuremberg Trial of the International Criminal Court show that prosecution is an effective means to combat impunity and to prevent future crimes.⁷ Some of international community’s legal responses to the commission of international crimes cover, among others, universality of jurisdiction⁸, the principle of *aut dedere aut punare*, non-applicability of statutes of limitation⁹, and non-recognition of superior defense. These responses are culminated in prosecution and are aimed to combat impunity for the perpetrators.

³ Merriam-Webster Dictionary, “Impunity”, <http://www.merriam-webster.com/dictionary/impunity>, accessed on July 2018.

⁴ Diane Orentlicher, “Promotion and Protection of Human Rights”, *Report of the independent expert to update the Set of Principles to combat impunity*, United Nations Economic and Social Council, 2005, p. 6.

⁵ United Nations Commission on Human Rights on the Reports on the Consequences of Impunity concluded that impunity is major reason for continuing human rights violations of throughout the world. See UN Document E/CN.4/1990/13 reproduced in Michael P. Scharf, “The Amnesty Exception to the Jurisdiction of International Criminal Court”, *Cornell International Law Journal*, Vol. 32, Issue 3, 1999, p. 512.

⁶ In the absence of definition of *jus cogens* in Vienna Convention on the Law of Treaties 1969 (VCLT), Article 40 on Draft Articles on Responsibility of States in International Wrongful Act 2001 (ARSIWA 2001) tried to explain the criteria of *jus cogens* “...substantive rules of conduct that prohibit what has come to be seen as intolerable because of the threat it presents to the survival of States and their peoples and the most basic human value”.

⁷ Supreme Court Justice Robert Jackson, the Chief Prosecutor at Nuremberg reported the most important legacy of the Nuremberg trial was the documentation of Nazi atrocities “with such authenticity and in such detail that there can be no responsible denial of these crimes in the future”. Furthermore, Scharf also confirmed that “prosecution and punishment can reinforce the value of law by displacing personal revenge and failure to punish former leaders responsible for widespread human rights abuses encourages cynicism about the rule of law and distrust toward the political system”. See Michael P. Scharf, *Loc.cit.*

⁸ See Princeton Principles on Universal Jurisdiction 2001.

⁹ See Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity 1970.

Therefore, this study is limited to the issue of obligation of prosecution that shall be applied universally because, otherwise, the prohibition of international crimes would not constitute a peremptory norm (*jus cogens*). Nevertheless, under international law, the existing international obligation to prosecute is based on treaty and customary law, where compliance profoundly relies on state consent. Consequently, in the absence of its conventional and customary obligation to prosecute, state does not oblige to prosecute perpetrators of international crimes.

These facts show that international laws still place traditional sovereign prerogatives matter at the position that is higher than to limit those prerogatives, even in the case of international crimes. This is a paradox between theory and practice of international criminal law (ICL) that is reflected in the establishment of ICC. On the one hand, it encompasses moralist agenda that is the protection of fundamental values of human being that has been undermined by international crimes by holding the most responsible person accountable for international crimes. On the other hand, it remains incarcerated within a state-centric image of international law that limits its jurisdiction only toward states.¹⁰ This paradox leads to the establishment of impunity.

In the search of a theoretical basis for universal application of obligation to prosecute, the 1970 ICJ Judgment of Barcelona Traction case¹¹ has introduced *erga omnes* obligation. The *erga omnes* is a universal character obligation that protects important values. However, there are no further details on how an obligation can be regarded as *erga omnes*. Thus, the first section of this article highlights the relationship between *jus cogens* and *erga omnes* and the position of *erga omnes* obligation among other international obligations. It is followed by revealing whether the *erga omnes* concept can be practically applied for the obligation to prosecute. The *erga omnes* is distinguished from other obligations by its collective nature that all states can have legal interest in its protection. Consequently, the obligation binds all states without any conventional obligations and gives rise to a right of all states to put forward claim against the perpetrators. The second section elaborates the possibilities of application to prosecute international crimes. It also discusses the difficulties of the current *erga omnes* concept to enforce obligation of impunity eradication since it was introduced in 1970. *Erga omnes* concept should have played a significant theoretical basis for international court to work globally. However, in reality, the ICC remains incarcerated by the power structures in the primacy of states. This research thus offers the “modern” concept of *erga omnes* obligation as a theoretical foundation to enable the ICC to gain primacy in the application of its jurisdiction. This primacy jurisdiction can prompt ICC to achieve global justice.

¹⁰ Article 13 of the Rome Statute of the International Criminal Court 1998 (Rome Statute) provides that ICC may only exercise its jurisdiction toward non-state parties based on referral from United Nations Security Council (UNSC).

¹¹ International Court of Justice, *Barcelona Traction, Light and Power Company, Limited (Belgium v Spain)*, Judgement, 1970 (*Barcelona Traction case*), p. 3, para. 33.

B. The *Erga Omnes* Characters in the Obligation of Impunity Eradication for International Crimes and Its Consequences

1. *Erga Omnes* Obligation and Its Position under International Law

Erga omnes is a Latin expression which means ‘towards all or against all’.¹² In paragraph 33 of Barcelona Traction Judgment, the Court announced that

“an essential distinction should be drawn between the obligations of a State towards the international community as a whole, and those arising vis-à-vis another State in the field of diplomatic protection. By their very nature the former are the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations erga omnes..”

The words “In view of the importance of the rights involved, all States can be held to have a legal interest in their protection” signify that the essential idea of the innovation of *erga omnes* concept is that in case of breach of such obligation the “corresponding rights of protection” are in possession of each state.¹³ In other words, *erga omnes* is a consequence of a breach of fundamental importance rights.¹⁴ This identifies that ICJ does not focus on the primary rules but it focus on the secondary rules.¹⁵

As a secondary rule, there are two significant features of *erga omnes* obligation in the Barcelona Traction dictum as follows.

a. Non-reciprocal character

The Court made essential distinction between obligation towards the international community as a whole (*erga omnes*) and those arising towards states (in this case, the diplomatic protection). This distinction implies that the nature of *erga omnes* obligation is non-reciprocal/non-bilateralizable. The performance of *erga omnes* obligations is in relation to all states and hence it creates legal interest of all states in its observance.¹⁶ According to Tams, the nature of these obligations transcend the reciprocal (or bilateral) relations between pairs of States.¹⁷

For the same reason, Simma states that *jus cogens* and *erga omnes* rules

¹² P.G.W Glare, *Oxford Latin Dictionary*, Oxford: Oxford University Press, 1982, pp. 1248-1249.

¹³ In para 34 of the *Barcelona Traction* case, the Court stated that “...Some of the corresponding rights of protection have entered into the body of general international law...”

¹⁴ See André de Hoogh, *Erga Omnes and International Crimes: A Theoretical Inquiry Into the Implementation and Enforcement of the International Responsibility of States*, The Hague: Kluwer, 1996, p. 53. Theodor Meron also states that “Moreover, being *erga omnes* a consequence, not the cause, of a right’s fundamental character” in Theodor Meron, “On a Hierarchy of International Human Rights”, *American Journal of International Law*, Vol. 80, Issue 1, 1986, p. 9.

¹⁵ According to theory of state responsibility, primary rules define the rules of international law which impose particular obligations on State. Meanwhile, secondary rules cover the field of responsibility that concern the consequences of failure to fulfil obligations established by the primary rules. See Roberto Ago, “Second Report on State Responsibility”, *Yearbook of the International Law Commission*, Vol. 2, A/CN.4/233, 1970, p. 179.

¹⁶ *Barcelona Traction* case, para. 35.

¹⁷ Christian J. Tams, *Enforcing Obligations Erga Omnes in International Law*, Cambridge: Cambridge University Press, 2005, p. 130.

represent the antithesis of bilateralism.¹⁸ Although bilateral legal relationship can be multiplied so that similar relationships exist between all states and thus the rules become general in application, it does not apply to *erga omnes* since the violation of such rules does not automatically establish rights of all states to claim. However, the mere 'non-reciprocal' nature is not sufficient for one obligation to be regarded as *erga omnes*. This is because there are several other obligations that have a "non-reciprocal" character since it involves collective interest of group but does not automatically entitle all states to put forward claim against the violators, such as *erga omnes partes*.¹⁹ Therefore, the following paragraphs discuss other criteria that should be fulfilled.

b. Protection of Important Rights

In defining *erga omnes*, the ICJ focused on the consequence of the breach of an important right that all states have legal interest in their protection. If *erga omnes* is connected to the realm of secondary rule in international law, then what is the criterion of primary rule that may impose *erga omnes* obligation? In other words, how an international obligation may be regarded as being *erga omnes*?

In paragraph 34, the ICJ provides non-exhaustive list of examples of obligations that have *erga omnes* characters, namely prohibiting aggression, genocide, slavery, and racial discrimination.²⁰ This has raised question of whether or not one can extract the criteria of *erga omnes* from those four obligations listed by the Court. According to de Hoogh, there is no criterion of *erga omnes* that can be extracted due to the different character of the examples given by the Court.²¹ However, important rights that are reflected in those four examples of obligations pertain to the prime examples of *jus cogens* during the Vienna Conference on the Law of Treaty. Although ICJ never explicitly pronounces the relationship between *jus cogens* and *erga omnes*, it has given impression that *jus cogens* is the primary rules of *erga omnes*.

The Article 53 of Vienna Convention on the Law of Treaties (VCLT) defines *jus cogens* as a universal and non-derogable norm. As a primary rule, *jus cogens* norm determines that there are rules that, in fact, do not exist to satisfy the needs of individual state. However, the rules are the higher interest of the whole international community.²² Thus, the breach of higher interest is considered as the breach

¹⁸ See Bruno Simma, "Bilateralism and Community Interest in the Law of State Responsibility" in Yoram Dinstein (ed.), *International Law at a Time of Perplexity: Essay in Honour of Shabtai Rosenne*, Dordrecht: Martinus Nijhoff Publishers, 1989, p. 822.

¹⁹ Obligation *erga omnes partes*/contactes is provided in Article 48(1) ARSIWA 2001.

²⁰ Para. 34 of the *Barcelona Traction* case stated "Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of human person, including protection from slavery and racial discrimination..."

²¹ André de Hoogh, *Op.cit.*, p. 54.

²² The first precursor of modern *jus cogens* can be seen in Roman civil law which recognized the distinction between *jus strictum* and *jus dispositivum* to partially limit private autonomy. See Lauri Hannikainen, *Peremptory Norms (Jus cogens) in International Law: Historical, Development, Criteria, Present Status*, Helsinki: Lakimiesliiton Kustanus Finish Lawyers' Publishing Company, 1988, p. 30.

toward international community as a whole that renders all states to claim against the responsible state (*erga omnes*). This is in line with the criteria of *erga omnes* obligation that is non-reciprocal and universal. Indeed, *jus cogens* norms probably are not the only norms that their violations may give rise to universal character of *erga omnes* obligations. However, no sufficient international practice indicates other norms as the *jus cogens* norm. In addition, protection of important rights reflects the function of *erga omnes* obligation to protect and to promote important values and interest.²³

In conclusion, referring to Barcelona Traction Case dictum, there are two significant characteristics features of *erga omnes* obligation. First, the obligation is to acquire *erga omnes* status if they are ‘non-reciprocal or non-bilateralizable’ since all states have legal interest in their observance.²⁴ Second, the primary rules of this norm is important value, in the sense that they protect common interest that every state is deemed to have legal interest in their protection. Of these two characteristics, the former provides the universal applicability of *erga omnes* obligations. Meanwhile, the latter pertains to the primary rules of *erga omnes* that fulfil the *jus cogens* nature.

2. Erga Omnes Character in the Obligation of Impunity Eradication for International Crimes

After the World War II, the *International Military Tribunal* (IMT) Nuremberg and Tokyo introduced the term “*major war criminals*”²⁵ for crimes under their jurisdiction that covers war crimes, crimes against peace, and crimes against humanity. The International Criminal Tribunal for the Former Yugoslavia (ICTY) and International Criminal Tribunal for Rwanda (ICTR) use the term “*serious violations*”²⁶ for crimes against humanity, war crimes, and genocide. The 1998 Rome Statute of International Criminal Court is the only multilateral treaty that specifies war crimes, genocide, crimes against humanity, and crimes of aggression as ‘*the most serious crimes*’²⁷ but this catalogue is not profound.²⁸ Although there is no universally accepted term

²³ According to Christian J Tams, “Material Approach” is one of the approaches to distinguish *erga omnes* obligations from other customary obligations because of the importance of the substance of those norms. By the same token, Ragazzi enumerates five common elements of *erga omnes* obligations listed by ICJ particularly the fact that the four examples deriving from *jus cogens* and they are instrumental to the main preservation of peace and promotion of fundamental human rights. See Christian J. Tams, *Op.cit.*, p. 129.

²⁴ Christian J. Tams, *Loc. cit.*

²⁵ Article 6 of The Charter of the International Military Tribunal – Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis 1945 (Nuremberg Charter).

²⁶ Article 1 of the Statute of the International Criminal Tribunal for the Former Yugoslavia 2009 (ICTY Statute) and Article 1 of the Statute of the International Tribunal for Rwanda 2002 (ICTR Statute).

²⁷ Article 5(1) of the Rome Statute provided that: “*The jurisdiction of the Court shall be limited to the most serious crimes of concern to the international community as a whole...*”

²⁸ Stefan Kadelbach mentions that “*it is arguable that conventions against terrorist acts may serve as additional reference*”. See Christian Tomuschat and Jean-Marc Thouvenin (Eds.), *The Fundamental Rules of The International Legal Order: Jus cogens and Obligations Erga Omnes*, Leiden: Martinus Nijhoff Publishers, 2006, p. 39.

for crimes under the tribunals' jurisdiction, they are designed to punish malicious crimes. Given that they are subject matter of most international criminal tribunals,²⁹ the crimes are also known as '*tribunal crimes*'. However, some scholars prefer to call them 'pure' or 'core' international crimes or 'proper' international crimes since their criminal character is originated in international, rather than domestic, law and institutions.³⁰

In other words, all these international criminal tribunals (and mixed criminal court³¹) exercise jurisdictions over individuals who may be indicted for truly international nature of crimes. They also indicate that there are subclasses of international crimes. The international crimes are in the strict sense because they are matters of fundamental principle –truly international nature– that such crimes are internationally.³² Pure international crimes also evidence that, in order to answer what makes international crimes 'proper', one has to refer to both descriptive and normative accounts. The thresholds of 'properness' for crimes to be internationally also lead to the exclusion of piracy as a 'proper' international crime and the inclusion of certain crimes not having 'underlying offences' under domestic legal systems.³³

The prohibition of international crimes is therefore important for life, security, and peace of the international community. Paragraph 3 of Preamble of the 1998 Rome Statute of ICC explicitly states that war crimes, crimes against humanity, genocide, and crimes of aggression threaten the peace, security, and well-being of mankind. Therefore, the rule has achieved the status of *jus cogens*. It can also be

²⁹ From various international tribunal courts, such as International Military Tribunal Nuremberg, International Military Tribunal for the Far East (Tokyo War Crimes Tribunal), International Criminal Tribunal for the Former Yugoslavia (ICTY), International Criminal Tribunal for Rwanda (ICTR), Special Court for Sierra Leone, Cambodia and East Timor, and International Criminal Court (ICC).

³⁰ David Luban mentions that the term 'tribunal crimes' is not entirely accurate. This is because those crimes are also criminalized under the municipal laws and hence can be prosecuted before the municipal court. See David Luban, "Fairness to Rightness: Jurisdiction, Legality, and the Legitimacy of International Criminal Law", https://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?referer=http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1069&context=fwps_papers&httpsredir=1&article=1069&context=fwps_papers, downloaded on June 2018, p. 5.

³¹ Special Court for Sierra Leone, Extraordinary Chambers in the Court of Cambodia (ECCC), Timor-Leste Tribunals (Special Panels of Dilli District Court) are the examples of mixed or internationalized court, which is also known as hybrid court. Such courts are hybrid because they consist of mix national and international components. The judges and prosecutors include both national and international representatives and the rules regulating such courts include national and international regulations.

³² In this regard, I agree with Win-Chiat Lee that uses the term 'international crime proper' for pure international crimes. See Win-chiat Lee, "International Crimes and Universal Jurisdiction" in Larry May and Zachary Hoskins (eds.), *International Criminal Law and Philosophy*, Cambridge: Cambridge University Press, 2010, p. 16.

³³ According to Cassese, there are two main features characterize international crimes proper. First, state criminality that is the conduct/act performed by state officials or by private individuals for as long as it is either (a) linked to international or internal armed conflict or, absent of such conflict, (b) has political or ideological dimensions or is linked to the behavior of state authorities. Second, the conduct is not only criminal offence under municipal law but also a breach of universal value in the world community and enshrined in international customary rules and treaty. Antonio Cassese and Paola Gaeta, *International Criminal Law*, 3rd edition, Oxford: Oxford University Press, 2013, pp. 53-55.

seen from the drafting history (*travaux préparatoire*) of Article 53 VCLT that records several serious breaches such as aggression, genocide, and slavery as *jus cogens*.³⁴

The breach of universal value plays a significant role to distinguish pure international crimes and other crimes that are considered international because of their transnational dimensions. Nevertheless, it is more important to consider that the crimes are serious crimes, which are failed to be prosecuted by the states within their respective national jurisdictions, and notably they are committed systematically by or with the tacit support of state officials. Consequently, the perpetrators will not be punished and this justifies other states to intervene by claiming universal jurisdiction over such crimes. This is also the reason that the international criminal tribunals, ad-hoc and permanent, cover only war crimes, crimes against humanity, genocide, and aggressions as their jurisdictions.

The binding force of *jus cogens* crimes should not be challenged. No state recognizes such crimes and claim special exemptions from moral absolute norms. However, *jus cogens* nature of such crimes does not automatically give privilege to all states (or entities) to exercise obligation to prosecute. Therefore, it is necessary to examine the provision under international law, which determines the obligation to prosecute for international crimes. Several international conventions clearly provide obligation to extradite or to prosecute (*aut dedere aut judicare*) crimes that are covered therein. They include 1949 Geneva Conventions,³⁵ 1948 Genocide Conventions,³⁶ and 1984 Convention against Torture (CAT). Granting of amnesty to persons responsible for committing such crimes is a violation of the treaties’ obligations without excuse or exception.³⁷

Obligation to prosecute can also be derived from other sources of international laws like customary. Unlike serious violations of Geneva Conventions like genocide, the obligation to prosecute crimes against humanity and crimes of aggression are not provided in any specific conventions. They are purely creatures of customary international law. The Nuremberg Charter is the first international instrument that codifies crimes against humanity. States exercise the principle of *aut dedere aut punare* against perpetrators of crimes against humanity based on universal jurisdiction. However, there are two positions of scholars with regard to the

³⁴ During the negotiations, various examples were referred to as reflecting rules of *jus cogens* character such as the prohibition of slave trade, prohibition of slavery, prohibition of genocide, the protection of fundamental rights, prohibition of forced labor, etc. See Oliver Dorr and Kirsten Smalenbach (eds.), *Vienna Convention on the Law of Treaties: A Commentary*, London: Springer, 2012, p. 905.

³⁵ Each of the Four Geneva Conventions contains a specific enumeration of grave breaches, which are war crimes under international law for which states have a corresponding duty to prosecute or extradite. See Article 49 of the Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field of 12 August 1949 (Geneva Convention 1).

³⁶ Article 7 of the Convention against Torture and Other Cruel Inhuman Degrading Treatment and Punishment 1984 (CAT).

³⁷ Article 26 of the VCLT.

obligation to prosecute based on customary international law.³⁸

First, the idealist position perceives this principle to be mandatory because of moral reason. A duty to prosecute crimes against humanity must be applied in all cases and situations. Bassiouni is one of the proponents of this idealist position. For Bassiouni, the principle of *aut dedere aut judicare*, as a general principle of international law, is attached to crimes against humanity, arising from *jus cogens* nature.³⁹

Second, the realist position rejects the idealists' claim that customary international law recognizes an obligation to prosecute crimes against humanity. There are insufficient evidences to assert its existence. According to Scharf, a realist scholar, in the last three decades, there have been extensive uses of amnesties as means to resolve internal conflicts, particularly in Latin America and Africa.⁴⁰ For Scharf, notwithstanding an array of General Assembly resolutions calling for the prosecution of crimes against humanity, some states' practices have not yet supported the existence of an obligation under customary international law to refrain from conferring for such crimes.⁴¹

Even if it is accepted commonly that prohibition of *jus cogens* crimes is absolute, the debate between realist and idealist positions above proves that obligation to prosecute does not automatically flow from universal prohibition of *jus cogens* crimes. As a procedural obligation, most scholars rely on states' practices, based on treaty and customary law, to determine the existence of this obligation. Both treaty and customary law are based on consent. Consequently, they can never be applied universally. Treaty only binds its state parties and the status of customary international law still can elude states from not being bound to rules of which it persistently objects (by protest). Moynier correctly says

*"a treaty was not a law imposed by superior authority on its subordinate (but) only contract whose signatories cannot decree penalties against themselves since there would be no one to implement them. The only reasonable guarantee should lie in the creation of international jurisdiction with the necessary power to compel obedience, but in this respect, the Geneva Convention shares an imperfection that is inherent in all international treaties."*⁴²

³⁸ See further discussion regarding these two positions in Miles M Jackson, "The Customary International Law Duty to Prosecute Crimes Against Humanity: A New Framework", *Tulane Journal of International and Comparative Law*, Volume 16, No. 1, 2007, pp. 121-125.

³⁹ According to Bassiouni "The crimes establish inderogable protection and the mandatory duty to prosecute or to extradite accused perpetrator, and to punish those found guilty" in M. Cherif Bassiouni, "Searching for Peace and Achieving Justice: The Need for Accountability", *Law and Contemporary Problems*, Vol. 59, No. 4, 1996, p. 17.

⁴⁰ Michael P. Scharf, "The Amnesty Exception to the Jurisdiction of International Criminal Court", *Op.cit.*, p. 36.

⁴¹ Michael P. Scharf, "The Letter of the Law : The Scope of the International Legal Obligation to Prosecute Human Rights Crimes", *Law and Contemporary Problems*, Vol. 59, No. 4, 1997, p. 58.

⁴² English translation of the quotation in Pierre Boissier, *From Solferino to Tsushima: History of the International Committee of the Red Cross*, Geneva: Henry Dunant Institute, 1963, p. 282.

The inclusion of *jus cogens* ascertains that this norm is superior to both customary law and treaty since *jus cogens* is higher than (existing or new) treaty and can render it void in its entirety. *Jus cogens* norms, in practice, are not just a matter of invalidating or rendering a treaty void. It also includes the effect of non-derogation for these norms. Obligation to prosecute is derived from primary rules that has developed into peremptory norms, the *jus cogens* crimes. The authority of this norm arises from those substantive rules of conduct that prohibit what has come to be seen as intolerable because of the threat it presents to the survival of states and their people and the basic human values. It is also known as *jus cogens* substantive.⁴³ The *jus cogens* natures of the crimes establish inderogable protections in the form of mandatory obligation to prosecute. The *erga omnes* status that is attached to the obligation to prosecute enables this obligation to be an absolute universal obligation. In other words, *erga omnes* holds a superior position among other international obligations; and it should be prevailed in the case of conflict between those obligations. Therefore, it is irrelevant to refer to treaty or customary law as legal basis for obligation to prosecute *jus cogens* crimes even if, it is arguable, that customary international law is necessary for a norm to achieve *jus cogens*.

As a consequence, the applicability of other international obligations that lead to the prevention of the applicability of *erga omnes* obligation to prosecute, such as amnesty or applicability of absolute immunity for officials, are inconsistent with international law and shall be deemed as international wrongful act. The invocation of *erga omnes* obligation of impunity eradication is further assessed in the next part.

C. The Role of “Current” Concept of *Erga Omnes* in Enforcing Obligation to Combat Impunity for International Crimes

The fact that *erga omnes* obligation grants collective rights of states (entities) to protect their fundamental values does not necessarily mean that all states have equal rights to invoke the obligation.⁴⁴ This section discusses how international law provides rules on the invocation of *erga omnes* obligation, in this case *erga omnes* obligation to prosecute because of violation of peremptory norm. It also highlights the role of “current” *erga omnes* status in enforcing obligation to prosecute. As a universal character, the obligation belongs to the whole international community. The *erga omnes* provides authorization for international community to hold primary responsibility to put forward claim against the perpetrators. In the case of international crimes, the *erga omnes* serves a basis for international community to exercise obligation to prosecute.

⁴³ See Commentary to Article 40 of the ARSIWA 2001

⁴⁴ By giving example with regard to prohibition of acts of aggression that under Article 51 of UN Charter, the right of collective self-defense requires the consent of the State under attack, Cimiotta argues that entitlement to collective right such a counterpart of an *erga omnes* obligation and the empowerment to exercise such right are two different concept. See Emanuele Cimiotta, “The Relevance of Erga Omnes Obligations in Prosecuting International Crimes”, *Heidelberg Journal of International Law*, Vol. 76, 2016, p. 689.

The Article 40 ARSIWA 2001 stipulates serious breach of general international law without providing further explanation regarding who has primary right to take actions. The Article 42 and 48 define injured state and non-injured state but they are silent concerning their relationship in terms of the invocation. However, ARSIWA seems to give impression that injured state enjoys stronger position to invoke the obligations.⁴⁵ Not surprisingly, opponent to *erga omnes* obligations to combat impunity may hold that *erga omnes* conception under Barcelona Traction case is pertained to examine the law relating to diplomatic protection and state responsibility, and not assertion of criminal jurisdiction against private individuals.⁴⁶

However, obligation to prosecute international crimes is not just a matter of asserting criminal jurisdiction, this is a universal obligation to repress international crimes, and it belongs to international community as a whole.⁴⁷ Therefore, there are two possibilities to fall within the definition of injured state. The first cover every member of international community (states or other entities) given the fact that international crimes undermine the fundamental values protected by the international community. The second is territorial state or home state of suspect since they have interest in safeguarding their sovereignty. The proponent of the latter considers that *erga omnes* obligation might be qualified as “functional power”, which states with stronger nexus to a certain wrongful act may exercise on behalf of the international community for the protection of general interest.⁴⁸ However, in the case of international crimes, state with stronger nexus is most probably the most responsible violators. Therefore, the one and only ‘injured state’ in the case of international crimes is international community because international crimes are crimes against the whole international community. This is also in line with the *actio popularis* and *erga omnes* rationales. Furthermore, Ago also argues that the possible bearer of a right of reaction to this serious breach is the international community.⁴⁹

The *erga omnes* concept is originated from Barcelona Traction Judgment. It serves a theoretical basis for international community to hold primary responsibility of prosecution obligation. At national level, the *erga omnes* provides authorization for all states on behalf of international community to apply universal criminal jurisdiction only if the state with the strongest nexus with the offences fails to prosecute the criminals. At the international level, the *erga omnes* status provides authorization for the ICC to exercise jurisdiction as a complementary to domestic

⁴⁵ For example Article 48 of ARSIWA where states cannot seek reparation in their own name but in the interest of injured state or of the beneficiaries of the obligation breached.

⁴⁶ See Olaluwa Olusanya, *Double Jeopardy Without Parameters : Re-Characterization in International Criminal Law*, Antwerp-Oxford: Intersentia, 2004, p. 188.

⁴⁷ Michael P. Scharf, “The Letter of the Law : The Scope of the International Legal Obligation to Prosecute Human Rights Crimes”, *Loc.cit.*

⁴⁸ See Emanuele Cimiotta, *Op.cit.*, p. 690.

⁴⁹ Roberto Ago, “Obligation *Erga Omnes* and the International Community” in Joseph H. Weiler, (et.al.), *International Crimes of State: A Critical Analysis of the ILC’s Draft Article 19 on State Responsibility*, Berlin: Walter de Gruyter, 1989, p. 238.

jurisdiction that fails to prosecute the perpetrators.

The authorization of states to exercise universal jurisdiction is limited. A State cannot exercise trial *in absentia*. It has to apply subsidiarity principle in the case that there are more than one state willing to prosecute the same perpetrator.⁵⁰ In other words, universal jurisdiction can only be applied if a state with stronger nexus to the offences is unable to prosecute in a proper way based on minimum standard.⁵¹ It is known as universality with conditions.⁵² The concept of universal jurisdiction is applied as the last option to eradicate impunity, then it is called ‘default jurisdiction’. This concept is also in line with criminal jurisdiction theory that gives primacy to a state with stronger nexus to prosecute.⁵³ The establishment of ICC has triggered many states to enact or to amend their legislation concerning universal jurisdiction in order to be consistent with the ICC’s jurisdiction. They include German, Spain, Austria, Australia, Belgium, Canada, French, The Netherlands, and New Zealand.⁵⁴ These states require the presence of alleged perpetrators in their territory and preliminary discussion with the origin state of the perpetrators prior to investigation.⁵⁵

The ICC, as a judicial institution representing international community as a whole, also exercises its obligation to prosecute based on the *erga omnes* concept. However, similar to universal jurisdiction applied between states, the ICC shall be complementary to national criminal jurisdiction.⁵⁶ In other words, the ICC can only apply its jurisdiction if a state is unwilling or unable to exercise its duty.⁵⁷ This principle is an evidence that the ICC’s functional obligation to prosecute is delegated from the failure of the national court of its member states to exercise their territorial or personal criminal jurisdiction.⁵⁸ The complementarity principle acts as the last choice to hold someone accountable for *jus cogens* crimes. The details procedure of exercising complementarity principle can be found in Article 17, 18, and 19 of the Rome Statute.

⁵⁰ Antonio Cassese, “Is the Bell Tolling for Universality? A Plea for a Sensible Notion of Universal Jurisdiction”, *Journal of International Criminal Justice*, Vol. 1, Issue 3, 2003, p. 593. See also Emanuele Cimiotta, *Op.cit.*, p. 696.

⁵¹ One of the example of universal jurisdiction with condition is South Africa, Implementation of the Article 27 of the Rome Statute Art 4.3; Uruguay, Proyecto de Ley sustitutivo de la Comision, Art 4; Canada, Crimes Against Humanity and War Crimes Act 2000, Art 8(b), quoted from Dylan Bushnell, “Re-thinking International Criminal Law: Re-Connecting Theory with Practice in the Search of Justice and Peace”, *Australian Year Book of International Law*, Vol. 28, 2009, p. 143.

⁵² *Ibid.*, p. 82 and Emanuele Cimiotta, *Op.cit.*, p. 697.

⁵³ “A State contemplating bringing criminal charges based on universal jurisdiction must first offer to the national State of the prospective accused person the opportunity itself to act upon the charges concerned” in Judges R. Higgins, P. Kooijmans and T. Burghental, Joint Separate Opinion of *Arrest Warrant* case, p. 80, para. 59.

⁵⁴ Amnesty International, “Universal Jurisdiction: A Preliminary Survey of Legislation around the World”, <https://www.amnesty.org/en/documents/ior53/019/2012/en/>, accessed on June 2018.

⁵⁵ Those conditions are based on rules provided in Institute de Droit International (IDI) Resolution concerning *Universal Criminal Jurisdiction* regarding Genocide, Crimes against Humanity and War Crimes. It is adopted in 2005 during Krakow Session. See Emanuele Cimiotta, *Op.cit.*, p. 697.

⁵⁶ Preamble para. 10 and Article 17 of Rome Statute.

⁵⁷ *Ibid.*

⁵⁸ Article 12(a) of Rome Statute.

The existing ICL's practices regarding the invocation of *erga omnes* obligation to prosecute confirm the significant role of the *erga omnes* character to prosecute international crimes. The *erga omnes* serves a theoretical breakthrough that the primary holder of obligation to prosecute is the international community as a whole. However, the "current" *erga omnes* still perceives international community as a group of states since this concept is originated from ICJ Barcelona Traction dictum whereas its jurisdiction only covers dispute between states. The international law still perceives state as the one and only complete community that have power to prosecute, even in the case of international crimes. The "current" *erga omnes* concept that is based on sovereignty approach fails to explain why a state can delegate its power to prosecute to an international judicial body, the ICC. If a state is authorized to delegate its jurisdiction to prosecute, it can also delegate to any other states or entity it prefers to. The Rome Statute as a basis of the ICC establishment has made it powerless to compel all states obedience. Many heinous crimes committed in Syria, Myanmar, Palestine, and Iraq, which may fulfill *jus cogens* crimes, cannot be brought before the ICC due to the mere fact that the states are not parties to the ICC, or the status of the states are unclear under the international law. The consent-based system has made the ICL remains incarcerated within power structures grounded in the primacy of the state; and the global justice can never be achieved.

D. "Modern" Concept of *Erga Omnes* Obligations: Towards the Primacy Jurisdiction of the ICC

For reasons that have been discussed in the previous parts, this article suggests the modern concept of *erga omnes* as a theoretical basis of a shift of paradigm from sovereign-based approach to humanity-based approach. There is no international law without international community and there is no international community without international social consciousness.⁵⁹ International social consciousness is the minds of actual human beings because social system (like a state) cannot make a society. Therefore, international society is not a group of states but it rather the other society from which the state-societies derive their social power.⁶⁰

In the case of obligation to prosecute crimes with transnational dimension, a state can effectively exercise prosecution. Hence, it will be unjust for international community to intervene the process.⁶¹ However, international crimes are not just transnational crimes; they are crimes against international community as a whole causing the emergence of international criminal law. The ICL provides sufficient evidences that state, as a lower association of international community,

⁵⁹ Philip Allott, "Reconstituting Humanity – Modern International Law", *European Journal of International Law*, Vol. 3, 1992, p. 250.

⁶⁰ *Ibid.*, p. 251.

⁶¹ International law recognizes the principle of subsidiarity. This principle emphasizes that it is unjust for international community to arrogate for itself those functions which are most efficiently achieved by any form of lower association. See Dan Dubois, "The Authority of Peremptory Norms in International Law: State Consent or Natural Law?", *Nordic Journal of International Law*, Vol. 78, Issue 2, 2009, p. 153.

cannot effectively prosecute the violators. One of the basic principles of Grotius idea regarding common good⁶² is that international crimes are ‘threat to the peace, security, and well-being of mankind. Therefore, they should be punished according to the law.’⁶³ Since the violations targets common goods, the commission of international crimes leads to the authorization of international community, as a larger association, to take actions to repress and to prosecute perpetrators of international crimes through its supranational judicial institution.

Therefore, international community has to be defined as a group of individuals that holds primary responsibility to prosecute international crimes. The group of individuals then authorizes supranational judicial institution as its representative to exercise the prosecution. In this case, we already have the one and only permanent International Criminal Court that has a mandate to prosecute *jus cogens* crimes. By this logic, there is no reason for ICC to work only as a complementary to national jurisdictions. The ICC should be given a primacy to exercise jurisdiction in the case of *jus cogens* crimes. Only by that primacy, ICC can compel the obedience of every state in the world.

1. The Primacy Jurisdiction of ICC

The primacy of International Criminal Law, in this case the ICC, is therefore a paramount in bridging the gap between theory and practice of the ICL that often contributes to the climate of impunity. The primacy of ICL is important because the obligation of impunity eradication shall be addressed to all parties, not only to powerless states. The obligation to prosecute cannot be flexible and adjusted by the norms and customs of certain area because it means an impunity. Justice cannot be selective. International justice is demanded by moral imperative.

Therefore, using the basis of ‘modern’ concept of *erga omnes*, the ICC should urgently apply its primacy jurisdiction to prosecute international crimes. This is mostly because of the nature of the *jus cogens* crimes themselves as follows.

- International crimes, particularly war crimes, are crimes between two or more states during armed conflict. They are considered crimes under international law; and only international judges can adjudicate the offenses. Rolling states, “For the very reason that war crimes are violations of the law of war, that is international law, an international judge should try the international offences. He is the best qualified”.⁶⁴
- International justice proceeding will harm national feelings less. According to Kelsen, the punishment of war crimes by an international tribunal, and

⁶² According to John Finnis, common can be defined as “a set of conditions which enables the members of a community to attain for themselves reasonable objectives, or to realize reasonably for themselves the values, for the sake of which they have reason to collaborate with each other (positively and/or negatively) in an community.” See John Finnis, *Natural Law and Natural Rights*, Oxford: Oxford University Press, 2011, p. 155.

⁶³ M. Cherif Bassiouni and Edward M. Wise, *Op.cit.*, pp. 24-25.

⁶⁴ B.V.A Röling, “The law of War and the National Jurisdiction since 1945”, in Antonio Cassese, Florian Jeßberger, et.al (eds.), *Op.cit.*, 2015, p. 176.

particularly the punishment of crimes which have the character of acts of state (i.e. crimes committed by state agents like military personnel), would certainly meet with much less resistance (than national punishment), since it would hurt national feelings much less..."⁶⁵

- International criminal justice can ensure uniformity in making punishment. In Kelsen words, "Internalization of the legal procedure against war criminals would have the advantage of making the punishment, to a certain extent, uniform. If war criminals are subjected to various national courts, as provided for in Article 229 of the Treaty of Versailles (of 1919), it is very likely that these courts will result in conflicting decisions ad varying penalties."⁶⁶
- International justice is one of various means of achieving peace. It can create a general atmosphere of lawlessness and impunity. It also perpetuates the mentality of conflict and division, which therefore discourages refugees from returning.⁶⁷

2. The Amendment of the Rome Statute

The amendment of the Rome Statute is conceived as the concrete step to make the modern concept of *erga omnes* practical. The Rome Statute is categorized as a treaty that provides very sophisticated provisions, particularly concerning crimes, general principles of law, and the rules of procedure.

The Rome Statute does not give so much room for judges to interpret rule. Compared to ICTY/ICTR, the ICC has its very detail elements of each crimes under its jurisdiction. Consequently, any kind of decisions that leads to the changing of the ICC rules should involve all member states to include the amendment of provisions from complementarity principles to primacy jurisdiction.

The Rome Statute provides complicated procedures for the amendment as follows.

1. No amendment until the Rome Statute reaches its seven years after its entry into force.⁶⁸
2. Proposal of amendment proposal will be discussed during every review conference.
3. Proposal of amendment will be adopted after 2/3-member states presents.
4. Amendment will entry into force after minimum 7/8 states ratify it.
5. States, which is not happy with the amendment, may request its withdrawal from ICC.

Some specific provisions that should be amended for the 'modern' *erga omnes* to be successfully applied are Articles 12, 13, 17, and 18 of the Rome Statute. The

⁶⁵ H. Kelsen, *Op.cit.*, p. 115.

⁶⁶ *Ibid.*

⁶⁷ Antonio Cassese, "Reflections on International Criminal Justice", in Antonio Cassese, Florian Jeßberger, *et.al* (eds), *International Criminal Law : Critical Concepts in Law, Op.cit.*, p. 178.

⁶⁸ Article 121 of Rome Statute.

ICL has recognized this primacy jurisdiction since ICTY and ICTR. Those two Ad-Hoc Tribunals require a failure of national court or the existence of strong relations between the court and the crimes as a basis to exercise its primacy jurisdiction.⁶⁹

The existing consent-based system built on ICC’s mechanism should be perceived as a tool to prompt the applicability of ICC’s primacy jurisdiction. It should be believed that the majority of the ICC members will agree with this amendment. 20 years ago, we believed that there would be a permanent International Criminal Court that has power to prosecute all leaders. It only needed less than four years for the Rome Statute to come into force after more than 60 states became state parties to the Statute. It is considered as a very short period for treaty to enter into force especially for the treaty that legitimizes an international court to prosecute their leaders.

Thus, primacy here offers one way to rethink the ICL and reconnect the practices of ICL with its theory as a system of law encompassing global ideals. It does not need to invent a new theory to seek a basis for the primacy of ICL. The *erga omnes* concept is a sufficient legal basis for this primacy. It just needs to rethink and to re-conceptualize the existing *erga omnes* concept in ways that enable us to behave in spaces beyond the arbitrarily constructed boundaries of state; and to explore the possibilities for something other than the traditional ways of depicting international laws and politics. Modern *erga omnes* can be applied practically as long as lawyers are willing and able to make possible the social constitution of truly universal human reality in which humanity can and will act to transform its past into the future. It is the potential of human beings. In a new international society, it is the task of a new breed of international lawyers.

D. Conclusion

An obligation should meet two significant features to be categorized as *erga omnes*. They are non-reciprocal and protection of important rights. The non-reciprocal feature pertains to the legal standing of all states to put forward claim against perpetrators because the *erga omnes* is an obligation toward international community as a whole. Protection of important rights is related to the primary rules of *erga omnes* obligation. By extracting common characteristics of four obligations of *erga omnes* enumerated in Barcelona Traction dictum, it is concluded that the primary rules meet the *jus cogens* characters. Thus, the breach of higher interest is considered as the breach towards the whole international community that renders all states to claim against responsible state. This has granted *erga omnes* superior status and has to be prevailed in the case of conflict with other international obligations.

Obligation to prosecute cannot be flexible and adjusted by the norms and customs of certain area because it means an impunity. It should be addressed to all alleged perpetrators of international crimes. This obligation is derived from the

⁶⁹ Rules 9, 10 and 11 of International Criminal Tribunal for Rwanda (ICTR) and International Criminal Tribunal for the former Yugoslavia (ICTY) Rules of Procedure and Evidence.

universal prohibition of international crimes. *the erga omnes* should be automatically attached to the obligation to prosecute, otherwise the aim of universal prohibition of international crimes to protect fundamental values that have been undermined by international crimes will be meaningless.

The “current” *erga omnes* obligation of impunity eradication still perceives international community as a group of states. The ICL remains incarcerated within power structures grounded in the primacy of states. However, this “current” concept still plays important role as a basis for exercising universal jurisdiction and the ICC’s complementarity principles. It will never be able to achieve global justice. The challenge is to rethink and to re-conceptualize *erga omnes* obligation to prosecute in ways that enable international law to apply a truly universal and superior norms beyond the sovereignty of states. the modern *erga omnes* concept can serve a basis to shift the paradigm from sovereign-based approach to humanity-based approach. Nevertheless, it establishes a primacy of the ICL. This concept will enable the ICC to exercise primacy jurisdiction toward all individuals in the world. The, the ICC’s position as a true global justice can be achieved.

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