

## SYMPOSIUM ON PROSPER WEIL, “TOWARDS RELATIVE NORMATIVITY IN INTERNATIONAL LAW?”

### THE SUPER-NORMATIVITY OF INTERNATIONAL CRIMINAL LAW

*Paola Gaeta*\*

Nowadays, Prosper Weil’s concerns about the emergence of international rules protecting so-called community values, and thus being endowed with special normative force in comparison to “ordinary” international rules, cannot but appear excessive. The existence of such rules as *jus cogens* or as rules establishing *erga omnes* obligations is undisputed.<sup>1</sup> And yet Prosper Weil’s prediction of their negative impact on the essential functions of international law has not materialized.<sup>2</sup> Weil’s concerns acquire instead significance in the field of international criminal law, whose development in the last decades is premised on the need to protect values fundamental to the international community as a whole through the threat of a criminal sanction against individual transgressors.

#### *The (Un)Fulfilled Potential of Jus Cogens and Erga Omnes Obligations*

There may be a variety of reasons explaining why, in spite of the advent of international rules protecting community values, international law continues to perform its essential functions, with its usual failures and successes. Among them, there is arguably the unfulfilled potential of those rules in the field of state responsibility. Witness the aborted attempt in the International Law Commission (ILC) to strengthen the concepts of *jus cogens* and *erga omnes* obligations through the establishment of a separate regime of state responsibility for so-called “international crimes” of states as opposed to “international delicts,” which was among Weil’s main concerns.<sup>3</sup> In the ILC Draft Articles on State Responsibility, violations of *jus cogens* do not trigger specific legal obligations on the transgressing state but only generate (if serious) a set of new obligations of very limited scope for all other states.<sup>4</sup> At the same time, in the ILC Draft Articles the notion of *erga omnes* obligations only serves to extend to non-injured states the right to invoke the international responsibility of the relevant state and to resort to “lawful” measures against it.<sup>5</sup> Admittedly, recent practice might lead to recognition that non-injured states are entitled under the rules of state responsibility to resort to counter-measures against the state responsible for violations of *erga omnes* or *jus cogens*

\* *Professor of International Law, Graduate Institute of International and Development Studies (Geneva).*

<sup>1</sup> There is, however, a certain degree of confusion in drawing a clear distinction between the two. It is generally agreed that the notion of obligations *erga omnes* serves to identify the legal entitlement to invoke the international responsibility of the relevant State, while the notion of *jus cogens* establishes a limit on the free will of states in treaty-making.

<sup>2</sup> Prosper Weil, *Towards Relative Normativity in International Law?*, 77 AJIL 413, 418–19 (1983).

<sup>3</sup> For a short summary of the work of the ILC on the matter, see James Crawford, *International Crimes of States*, in THE LAW OF INTERNATIONAL RESPONSIBILITY 405 (James Crawford et al. eds., 2010).

<sup>4</sup> Int’l Law Comm’n, *Draft Articles on State Responsibility*, UN Doc. A/56/10, arts. 40 and 41 (2001).

<sup>5</sup> *Id.* arts. 48 and 54.

obligations, to induce that state to comply with its “secondary” obligations.<sup>6</sup> Should this be the case, the risks of abusive recourse to these measures by powerful states pretending to be acting on behalf of the international community as a whole to defend its fundamental values are apparent and cannot be minimized.<sup>7</sup> This eventuality could thus make Weil’s uneasiness with the vague contours of the notion of the “international community as a whole” reasonable.<sup>8</sup>

Nonetheless, it would be incorrect to conclude that the concepts of *jus cogens* and *erga omnes* obligations are almost empty shells or—to paraphrase Ian Brownlie—new cars that often have not left the garage.<sup>9</sup> The most relevant legal consequences have in fact occurred in a field not envisaged by Prosper Weil when he warned against the rise of relative normativity in international law: namely, international criminal law. Building upon the so-called Nuremberg legacy, this branch of international law has developed at a fast pace since the early 1990s thanks to favorable political conditions in the international arena. Criminal responsibility of individuals under international law is now firmly embedded in the idea that there are certain values so fundamental to the international community of states as a whole that they must be protected by the threat of criminal sanction against individual transgressors. International rules on so-called international crimes have developed to directly ground the criminal responsibility of individuals, regardless of the existence of an applicable corresponding national criminal rule at the time when the relevant incriminating conduct took place. This means, among other things, that individuals cannot invoke the violation of the fundamental guarantee against retroactive criminal legislation when tried by an international court or tribunal with *ex post facto* jurisdiction, provided that such court or tribunal applies criminal rules corresponding to customary international law as it existed at the pertinent time. The same is true at the national level: retroactive domestic criminal legislation does not contradict the principle of legality in criminal matters as enshrined in human rights instruments if the former simply codifies the content of international rules of customary nature that were in effect at the moment of the conduct. The international and hybrid criminal tribunals that have been set up to prosecute perpetrators of “the most serious crimes of concern to the international community as a whole” have further contributed to expanding and clarifying the content of international criminal law, and have paved the way for the idea that a *jus commune* in criminal matters could eventually materialize through international customary law.

At the same time, the international prohibition of the aforementioned crimes is widely deemed to be enshrined in rules of *jus cogens*, which consequently establish *erga omnes* obligations.<sup>10</sup> In the view of many commentators, these normative features would necessarily create a right for any state to exercise criminal jurisdiction based on the so-called universality principle, give rise to the duty to extradite or prosecute individuals allegedly responsible for international crimes found in their territories, invalidate national amnesties, and render inapplicable the international rules on immunities, to mention a few effects. There are discernible trends in international practice that

<sup>6</sup> Martin Dawidowicz, *Public Law Enforcement Without Public Law Safeguards? An Analysis of State Practice on Third-Party Countermeasures and Their Relationship to the UN Security Council*, 77 BRIT. Y.B. INT’L L. 333 (2007); see also Martin Dawidowicz, *Third-Party Countermeasures: A Progressive Development of International Law?*, 29 QUESTIONS INT’L L. 3 (2016) (examining state practice reacting to the brutal repression of civil protest in Libya by the regime of Gheddafi in 2011; the massive violations of human rights and international humanitarian law by the Syrian regime since May 2011; and the role of Russia in the Ukrainian crisis).

<sup>7</sup> See, e.g., Martti Koskeniemi, *Solidarity Measures: State Responsibility as a New International Order?*, 71 BRIT. Y.B. INT’L L. 337 (2001).

<sup>8</sup> Weil, *supra* note 2, at 426–27.

<sup>9</sup> Ian Brownlie, *Comment*, in CHANGE AND STABILITY IN INTERNATIONAL LAW-MAKING 110 (Antonio Cassese & Joseph H.H. Weiler eds., 1988).

<sup>10</sup> Cherif Bassiouni, *International Crimes: Jus Cogens and Obligatio Erga Omnes*, 59 L. & CONTEMP. PROBS. 63 (1996). See also Conclusion 17 of the ILC’s [draft conclusions](#) on *jus cogens*.

would support some of these claims, but an uncontroversial conclusion on the customary status of any of the aforementioned cannot yet be sustained.

### *Super-Normativity in International Criminal Law*

Be that as it may, the revolutionary reach of the doctrine of individual criminal responsibility for crimes under international law lies elsewhere. This doctrine applies to all persons, including (and I would add, especially) the “responsible rulers” of states and regardless of whether they acted in compliance with or pursuant to the domestic law of the relevant state. The international rules on international crimes are thus endowed with “super-normative” force, regardless of whether one claims their character as *jus cogens* or obligations *erga omnes*. These rules set legal standards that cannot be transgressed by domestic legislation; if non-compliant domestic law is nonetheless enacted, individuals enforcing it will be subject to criminal responsibility under international law. To avoid criminal punishment under international law, individuals thus must refuse to obey their municipal laws, even though legitimately enacted, to the extent that such laws contradict the prohibition of international crimes. There are no other international rules that produce such significant legal consequences on individuals, private or senior state officials alike.

The super-normativity of international rules on international crimes may go well beyond the aforementioned consequences. As Dinah Shelton has aptly argued, international criminal norms can theoretically also apply to individuals who have acted in compliance with an international rule, but contrary to the rule prohibiting an international crime.<sup>11</sup> The *Al Hassan* case, currently pending at the International Criminal Court (ICC), presents a good example.<sup>12</sup>

Al Hassan was the de facto head of the Islamic police of Ansar Eddine, a Tuareg non-state armed group affiliated with Al Qaeda in the Islamic Maghreb. The ICC Prosecutor charged him, among other things, with the war crime set out in Article 8(2)(c)(iv) of the Rome Statute (which establishes the ICC). That crime consists of “the passing of sentences and the carrying out of executions without previous judgment pronounced by a *regularly constituted court*, affording all judicial guarantees which are generally recognized as indispensable.”<sup>13</sup> The accused was allegedly responsible for having participated as head of the police in the activities and enforcement of the decisions of the Islamic Tribunal in Timbuktu, which the Prosecution argued “was not a regularly constituted court affording all judicial guarantees which are generally recognized as indispensable.”

The war crime provision in the Rome Statute borrows its language from the prohibition contained in Common Article 3 of the 1949 Geneva Conventions, which expressly requires a state prosecuting crimes during an armed conflict to use “a regularly constituted court.” This automatically renders all courts constituted by non-state armed groups “irregular courts,” if the term “regularly” means “in accordance with domestic law,” as suggested by the International Committee of the Red Cross in its Study on Customary International Law.<sup>14</sup> Consequently, all

<sup>11</sup> Dinah Shelton, *Normative Hierarchy in International Law*, 100 AJIL 316, 318 (2006).

<sup>12</sup> *Prosecutor v. Al Hassan Ag Abdoul Aziz Ag Mohamed Ag Mahmoud*, Case No. ICC-01/12-01/18.

<sup>13</sup> *Rome Statute of the International Criminal Court* art. 8(2)(c)(iv), July 17, 1998, 2187 UNTS 38544 (emphasis added) [hereinafter Rome Statute].

<sup>14</sup> The commentary to Rule 100 of the International Committee of the Red Cross Study on Customary International Law states that a “regularly constituted court” means a court that “has been established and organized in accordance with the laws and procedures already in force in a country.” The ICC’s Elements of Crimes, however, defines a “regularly constituted” court by reference to “the essential guarantees of independence.” The International Committee of the Red Cross’s 2016 Commentary to Common Article 3 expressly endorses this latter formulation. The exact meaning of the term is therefore uncertain. By following the Committee Study, one could even argue that the customary rule does not fully correspond to the content of Common Article 3 *qua* treaty law.

individuals participating in the judicial activities and enforcement of sentences of a court established by non-state armed actors may face a war crime charge under the Rome Statute. So far so good. The point, however, is that under Article 6 of 1977 Additional Protocol II, which governs non-international conflicts having the features of the one occurring in Mali, there is no requirement for a court to be “regularly constituted,” implicitly recognizing that non-state armed groups can constitute courts affording all judicial guarantees generally recognized as indispensable. In addition, some argue that under international humanitarian law non-state armed actors are required to establish such courts, including to prevent and punish violations of international humanitarian law itself. In this scenario, how is it possible that individuals may face a war crime charge at the ICC if they act in compliance with rules of international humanitarian law? The super-normative force of international rules on international crimes vis-à-vis other international rules is clearly at play here.

### *Tensions Between Substantive Justice and Legality*

In light of the super-normativity of the rules on international crimes, Prosper Weil’s call for “vigilance” towards international rules protecting values fundamental to the international community as a whole acquires specific relevance.<sup>15</sup> It is well-known that at the ad hoc tribunals created by the Security Council, the expansion of the doctrine of individual criminal responsibility for international crimes has occurred mainly through the assertion of the existence of applicable customary rules on a variety of matters, such as the legal ingredients of the specific prohibited conduct, the criminalization as war crimes of violations of rules of international humanitarian law, and the identification of expansive modes of criminal liability to capture the collective dimension of international crimes. Commentators have noted that the legal reasoning applied by the tribunals to demonstrate the existence of customary rules is not always compelling; they have thus questioned those tribunals’ respect for the principle of legality in criminal matters. The ad hoc tribunals have repeatedly reinforced their legal reasoning with the assertion that there is a need to ensure that those perpetrating heinous crimes are punished, thus providing ethical foundations for their case law. These statements clearly echo reliance on the so-called principle of substantive justice, according to which criminal punishment is grounded in the need to protect the society from those who have transgressed its fundamental values regardless of the existence of applicable criminal rules at the time of the event. But should considerations of substantive justice prevail over a rigorous application of the principle of legality? In liberal and democratic societies, the principle of legality is a fundamental guarantee of the rights of the individual against the risks of the exercise of abusive power by legislators and judges. Would it not be crucial to ensure that the development and enforcement of international criminal law is predicated upon the strict respect of such fundamental guarantees?

Nor should one trust that at the ICC the likelihood of a relaxed application of the principle of legality has decreased because the Rome Statute is the primary applicable law and recourse to custom is provided only “where appropriate.”<sup>16</sup> The ICC decision in the *Ntaganda* case<sup>17</sup> demonstrates that a humanitarian-driven interpretation of the Rome Statute’s establishment as a war crime of sexual crimes in non-international armed conflicts, although laudable, has brought judges to disconnect that war crime from the extent and scope of the underlying

In the decision on the confirmation of charges (redacted version delivered on November 13, 2019), the ICC Pre-Trial Chamber has not clarified the matter. It has simply relied on the terms of the ICC’s Elements of Crimes (§§ 376–377), which do not require a court to be established by the law in force in a country.

<sup>15</sup> Weil, *supra* note 2, at 423.

<sup>16</sup> Rome Statute, *supra* note 13, art. 21(1)(b).

<sup>17</sup> *Prosecutor v. Bosco Ntaganda*, Case No. ICC-01/04-02/06 OA5, Appeals Judgment (June 15, 2017).

prohibition in international humanitarian law.<sup>18</sup> As a consequence, the ICC has broadened the application of the war crime prohibition in the Rome Statute beyond its possible criminalization under customary international law, with all of the ensuing consequences for respect of the principle of legality.<sup>19</sup>

Admittedly, these are thorny issues that have already been addressed by tribunals and are not new. They were, for instance, at the core of the concerns of the possible retrospective application of the criminal charges of crimes against peace at the Nuremberg and Tokyo Tribunals. More recently, Justice Robertson of the Special Court of Sierra Leone thoroughly discussed them in his dissenting opinion in the *Norman* case, which concerned the alleged existence at the time of the events of a customary rule on the war crime of enlistment of child soldiers.<sup>20</sup> The tension between the requirements of strict legality and considerations of substantive justice has been inherent at all times in the different phases of the development of international criminal law. It would nonetheless be paradoxical if international criminal law were to continue to develop by reference to the protection of values fundamental to the international community as a whole by trampling upon the principle of legality, which is itself a fundamental value of liberal and democratic societies, set forth to guarantee that individuals are not subject to the exercise of arbitrary and abusive power in the name of other proclaimed values. This is the reason why Prosper Weil's warnings are of continued relevance today, although from a different perspective.

<sup>18</sup> Kevin Jon Heller, *ICC Appeals Chamber Says a War Crime Does Not Have to Violate IHL*, OPINIO JURIS (June 15, 2017).

<sup>19</sup> For a discussion about whether the ICC must interpret the Rome Statute's substantive provisions in conformity with customary international law at the time when the prohibited conduct has taken place, see Marko Milanović, *Is the Rome Statute Binding on Individuals and Why Should We Care?*, 9 J. INT'L CRIM. JUST. 25 (2011).

<sup>20</sup> *Prosecutor v. Sam Hinga Norman*, Case No. SCSL-04-14-Ar72(E), Dissenting Opinion of Justice Robertson (May 31, 2004).