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CALL FOR PAPERS

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Entering Law Students’ Ethical Stigma:  
A Proposal to Introduce the MPRE Along with the LSAT

Vidhya Venkatraman Iyer  
LL.M. Candidate  
University of Maryland Carey School of Law

This Note advocates that Multistate Professional Responsibility Exam should be introduced as a law school admission requirement because many prospective law students lack the importance of law school disclosure. This Note explains that early intervention of MPRE will undoubtedly provide awareness and concern of good moral character and the importance of law school disclosure before they get too late in the process.

I. THE CURRENT APPROACH

In the United States, academics and legal scholars have not much challenged the current approach of law school disclosure and the Multistate Professional Responsibility Exam (MPRE). These entities seemed to be assumed and understood that the current path might be an appropriate norm. Therefore, the prevailing assumption entices us to jump directly to the central question of “how” and “why” the current approach is not a better approach.¹ Understanding deleterious effect of the current approach starts with the American Bar Association’s (ABA) Model Rules. ABA rules require “an applicant to the bar or a lawyer in connection with a bar admission application or connection with a disciplinary matter, shall not make (1) . . . a false statement of material fact; or (2) fail to disclose a fact necessary

¹ See discussion infra parts II, III.
This rule extends mostly to those persons who are seeking admission to the bar who fail to admit any past disciplinary action or conduct that in their bar application.

The Model Rule, thus, represents an ambitious ethical foundation to admit or disclose any past or present acts, events or conducts that may raise some suspicion to the bar character and fitness committee. Therefore, law students character and fitness process starts well before the students are being admitted into the law schools. Ironically, the entering law students are mostly unaware of mandatory disclosure of character and fitness.

Under the current practice, however, all prospective law students must take the Law School Admission Test (LSAT), which tests applicants’ ability, before being admitted to law schools. The purpose of the LSAT is to determine whether students have the essential fundamental skills to become successful lawyers. One can reasonably say that the LSAT score determines prospective law students analytical reasoning, logical reasoning, and

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3 Id.

4 See id; See Deborah L. Rhode, Moral Character as a Professional Credential, 94 Yale L.J. 491, 521 (1985) [hereinafter RHODE] (describing that “Although the vast majority of schools are interested in adult (88%) or juvenile (81%) crimes and university disciplinary actions (81%), there is less consensus as to the relevance of physical and psychiatric problems (61%), arrests (14%) and charges (15%), pre-college academic discipline (41%), military offenses (55%), and personal references that speak to character issues (45%)”).

5 See, e.g., Russell McClain, Helping Our Students Reach Their Full Potentials, The Insidious Consequences of Ignoring Stereotype Threat, 17 RUTGERS RACE L. REV., (2016) (describing that “[a]fter students are admitted, law school provides fertile ground within which stereotype threat can flourish.”); Susan Saab Fotley, Law Students Admission and Ethics – Rethinking Character and Fitness Inquiries, 45 S. TEXAS L. REV. 983, 987 (2004) (“I typically read to students the bar application warning on full disclosure to underscore the fact that lack of candor during the admissions process reflects adversely on their fitness to practice.”).

6 See id; See also Elizabeth G. McCully, School of Sharks? Bar Fitness Requirements of Good Moral Character and The Role of Law Schools, 14 GEO. J. LEGAL ETHICS 839, 868 (2001).

7 Gutter v. Bollinger, 539 U.S. 306, 315 (2003) (“In reviewing an applicant's file, admissions officials must consider the applicant's undergraduate grade point average (GPA) and Law School Admission Test (LSAT) score because they are important (if imperfect) predictors of academic success in law school”).

8 See id.

(2017) J. JURIS. 102
reading comprehension skills. In short, law students lawyering abilities are measured based on LSAT.\textsuperscript{9} Besides the LSAT, many law schools also consider other variables “like the enthusiasm of the recommenders, the quality of the undergraduate institution, the standard of the applicant’s essay, residency, leadership and work experience, unique talents or interests, and the areas and difficulty of undergraduate course selection.”\textsuperscript{11}

On the other hand, Professional Responsibility (course) is taken mostly after the first year of law school and also considered an upper-level course in many law schools.\textsuperscript{12} The course provides knowledge of the law governing the conduct of lawyers and the disciplinary rules of professional conduct as outlined in the ABA Model Rules of Professional Conduct, the Code of Judicial Conduct, case laws, and procedural and evidentiary rules.\textsuperscript{13} The Multistate Professional Responsibility Exam (MPRE) is the test of the course taught in the law schools.\textsuperscript{14} Although the MPRE is administered three times per year, the vast majority of law students take the MPRE in their third year of law school or before taking their bar examination.\textsuperscript{15} However, the problem with the current practice is the law school disclosure, which the MPRE and the course emphasize and weave on.\textsuperscript{16}

\textsuperscript{9} Id.
\textsuperscript{11} Gutter v. Bollinger, 288 F. 3d 732, 736 (6th Cir. 2002), aff’d, Gutter v. Bollinger, 539 U.S. 306, 315 (2003); See Supra note 8 and accompanying text.
\textsuperscript{13} Id.
\textsuperscript{14} See id.
II. BURDEN ON AN APPLICANT: “FAIL TO DISCLOSE NECESSARY FACTS”

All states require that an applicant for admission to the bar be of good character. Character and fitness, however, is a two-step process. Character denotes that law school applicants must candidly disclose all past acts, events, or anything that may raise a red flag on their good moral or ethical character. The disclosure must be done when candidates apply to law school through their law school application. Additionally, candidates must disclose any acts or events that might occur while the candidates are in a law school. This two-part test requires that a law student must disclose any past, adverse events or acts that the candidate might have encountered through his/her birth to his/her journey to the law school. In the second part of the test, the test requires candidates to disclose to the state board of bar examiners of any past act or event when they apply for attorney licensing application.

Moral character is more an objective criterion while the ethical character is more formal and subjective criteria. Traditionally, moral character is “construed to include offenses concerning adultery and comparable offenses that have no specific connection to the fitness for the practice of law.” A moral character may also include violence, dishonesty, breach of trust, or serious interference with the administration of justice. For example, the national conference of bar examiners asks for "have you ever been suspended, censured, or otherwise reprimanded or disqualified as a member of another profession, or as a holder of public office?" Another question asks "within the last five years, have you

17 See supra discussion part I; See infra text and accompanying notes 19-23.
18 DZIENKOWSKI, supra note 2, at 103, comment 2.
19 Id.
exhibited any conduct or behavior that could call into question your ability to practice law in a competent, ethical, and professional manner?"21 Some of the other examples include

(1) Have you ever had a complaint or action (including, but not limited to, challenges of fraud, deceit, misrepresentation, forgery, or malpractice) initiated against you in any administrative forum?
(2) Have you ever been cited for, arrested for, charged with, or convicted of any alcohol or drug-related traffic violation other than an offense that was resolved in juvenile court?
(3) Have you ever been cited for, arrested for, charged with, or convicted of any alcohol or drug-related traffic violation other than an offense that was resolved in juvenile court?
(4) Have you ever been cited for, arrested for, charged with, or convicted of any violation of any law other than a case that was resolved in juvenile court?
(5) Have you ever been filed a petition for bankruptcy?
(6) Have you ever had a credit or charged account revoked?
(7) Have you ever defaulted on any other debts?
(8) Have you any indebtedness of $500 or more (including, credits cards, charge accounts, and student loans) that have been more than 90 days past due within the past three years?22

In the context of law school disclosure and bar character and fitness, “fitness” denotes that the bar authorities review the information provided by bar applicants, law schools, and other sources relating to an applicant's academic history, criminal background, employment, and financial history, and mental and physical health providers, and recommenders.23 The character and fitness committee uses this information to determine whether the applicant possesses the requisite "character and fitness" to practice law.24 The most popular notion is that past misconduct provides a prediction of the applicant’s future behavior that may jeopardize an applicant’s chances to practice law.25 For example, one court said that when applicants do not admit until their final semester of law school, then

21 Id.
22 Id.
23 LEVIN, infra note 48, at 785.
24 See id.
25 Id.
their late disclosure do weigh against them.\textsuperscript{26} Put it in another way. For example, if law schools and the bar examiners require disclosure in their application, then the entering law students must be well exposed to the course and should have tested their knowledge and familiarity of the course before they enter the law school because it is prime factor of what they are required to implement along the way -- that is the disclosure.

### III. CHALLENGES WITH THE CURRENT APPROACH

Many entering students, however, lack the knowledge of law school disclosure, especially, the diverse students,\textsuperscript{27} or educated international students, or foreign-trained lawyers. One scholar suggested a “curriculum reform, urging law schools to expand their international law offerings and professors to adopt a pervasive pedagogy by adding international law perspectives to their substantive courses.”\textsuperscript{28} However, such sweeping objective requires introducing international law courses after students being admitted to law schools. On the other hand, the introduction of international classes does not address the knowledge needed for law school disclosure.\textsuperscript{29} The purpose of this Note is not to weigh the current regime of administering the MPRE, but to weigh in one of the most compelling reasons to include the MPRE administration along with the LSAT.\textsuperscript{30} Such an attempt will likely foster an early intervention of implementing professional responsibility course associated

\textsuperscript{26} In Re Application of Silva, 685 N.W. 2d 592, 598 (Nebraska 2003) (stating that although the applicant’s prior conviction occurred a number of years previous to the bar applicant's request for admission, he failed to disclose in his law school application).

\textsuperscript{27} See Bollinger, 539 U.S. at 329 (stating that law school may assemble “a class that is both exceptionally academically qualified and broadly diverse,” the Law School seeks to “enroll a ‘critical mass’ of minority students.”). For this discussion, “diverse and ethnic students” means students who are born in a foreign country and later moved to the United States. These students culturally, socio-economic, and language competency wise significantly differ from the United States students body.


\textsuperscript{29} See id.

\textsuperscript{30} See supra/infra text and accompanying notes 32-48.
with the law school disclosure and overall responsibility of prospective lawyers towards the bar and society in general.

Then what are character and fitness? Why is important? The Supreme Court of the United States has articulated that “[t]he term ‘good moral character’ has long been used as a qualification for membership in the Bar and has served a useful purpose in this respect. However, the term, by itself, is unusually ambiguous.”\textsuperscript{31} The Court also noted that the good moral character “can be defined in an almost unlimited number of ways for any definition will necessarily reflect the attitudes, experiences, and prejudices of the definer.”\textsuperscript{32} Simply speaking, one core component of the earliest childhood lesson is that one must speak the truth to your parents. Likewise, the ABA and the state bars expect that the prospective law students must speak the truth in their character and fitness questionnaire while applying for a law school admission.\textsuperscript{33} Similarly, one of the requirements for admission to the bar is a demonstration of good moral character and fitness.\textsuperscript{34}

Interestingly, most law students are not exposed to the course well until the second or third year of their law school curriculum.\textsuperscript{35} Additionally, some states’ bar examiners, however, provide an exception for the MPRE if students can earn C or better in their law


\textsuperscript{32} Konigsberg, 353 U.S. at 263.

\textsuperscript{33} See supra text and accompanying notes 19-23.

\textsuperscript{34} See id; Michael C. Wallace, Sr., Moral Character and Fitness Means More than Just a Passing Score to the Board of Law Examiners, 7 Charlotte L. Rev. 157, 162 (2016) (“The exact meaning of good moral character and fitness is a mystery . . . Nevertheless, determining moral character and fitness is within the purview of the Boards, and . . . may vary from member to member as they assess an applicant's past and anticipated behavior.”).

\textsuperscript{35} M. Ann Miller, Learning from Our Elders: Teaching Professional Responsibility in an Elder Law Settings, 2 T. M. Cooley J. OF PRAC. & CLINICAL L., 59, 62 (1998) (“Professional responsibility is frequently viewed by students as one of the lighter courses in a law school curriculum. One way to underscore the importance of this subject area is to help students begin to apply the rules learned in a traditional classroom setting which allows them to recognize how difficult it may be to adhere to these rules in a practical setting”).
school’s course.\textsuperscript{36} But many state bar examiners still require taking MPRE, as a pre-condition, for the bar admission.\textsuperscript{37} Some state bar examiners do not need to pass the MPRE exam at all before taking the bar exam.\textsuperscript{38} Since there is no such rule that all law students must take the MPRE in their first years of law schools, students are free to take the MPRE at their convenience.\textsuperscript{39}

Most importantly, many law schools require submitting written materials before its’ consideration of admission.\textsuperscript{40} However, many law school applications do not ask character and fitness questions like any state bar examiners character and fitness questionnaire.\textsuperscript{41} Then it boils down to the question that how the entering student know what to disclose and what not to? Since these inquiries are open-ended questions, entering students, require having a thorough knowledge of ethics rules. Additionally, students can learn the nuances of law school disclosures can only if students get sufficient exposure to professional responsibility course before being admitted to the law schools.\textsuperscript{42} It is likely that entering

\textsuperscript{36} See, e.g., Bar Exam \& MPRE Resource Guide: New Jersey Bar Exam, WIDENER UNI. COMMONWEALTH LAW SCHOOL, available at http://libguides.law.widener.edu/c.php?g=772905&p=5544208 (stating that the state bar of NJ requires to take MPRE, but Maryland state bar does not to take MPRE before taking the bar examination).

\textsuperscript{37} See id.

\textsuperscript{38} Ian E. Scott, The Multi-State Professional Responsibility (MPRE) – What is it? (May 3, 2016), available at http://lawschoollowdown.tumblr.com/post/143808687301/the-multi-state-professional-responsibility-mpre (describing that the State of New York allows to complete the MPRE up to three years after sitting for the bar examination).

\textsuperscript{39} Paul T. Hayden, Putting Ethics to the (National Standardize) Test: Tracing the Origin of the MPRE, 71 Fordham L. Rev. 1299, 1306 (2003) (“the MPRE provides a much narrower assessment. At a minimum, the existence of the MPRE probably guarantees that the doctrine of professional responsibility will be taught in a separate course at most law schools”).

\textsuperscript{40} See supra text and accompanying note 27.

\textsuperscript{41} Linda McGuire, Lawyer or Lying? When Law School Applicants Hide Their Criminal Histories and Misrepresentations, 45 S. TEX. L. REV. 709, 725 (2004). (“Should We Ask About Criminal and Other Unfavorable History? If We Do Not Ask, They Cannot Lie”).

\textsuperscript{42} Leslie C. Levin, The MPRE Reconsidered, 86 Ky. L. J. 395, 400-01 (1997-98) (“[A]s a practical matter the current MPRE does no more than insure that bar applicants acquire and display some knowledge of the model professional responsibility . . . This familiarization with model rules is a job that is usually performed by law schools and it is a job they perform tolerably well.” (citation omitted)).
law students and foreign-trained lawyers may lack knowledge of the course. \textsuperscript{43} Additionally, any foreign country ethics rules may or may not be like those modeled by the ABA. Besides, the delayed disclosure by these applicants may be a problem for admission to the bar in the United States.

Similarly, some applicants may be ashamed and humiliated by being forced to provide details of the events they want to forget. \textsuperscript{44} Some applicants may not know where their act or omission will lead in the feature if they do not disclose. \textsuperscript{45} Because “disclosure” is a far-reaching term and require to understand the professional responsibility rules, comments, and case laws. \textsuperscript{46} If students do not disclose until a couple of years from their admission into the law schools, then that may cause some embarrassments, processing delays, and “no license” due to their lack of good moral character and fitness in their bar application process. \textsuperscript{47} The hidden truth of “not knowing” is the primary cause of the delay and is a significant flaw in the current approach.

\textsuperscript{43} See infra text and accompanying note 48.
\textsuperscript{44} See infra part IV;
\textsuperscript{45} Id.; See Bollinger, 539 U.S. at 333 (“Just as growing up in a particular region or having particular professional experiences is likely to affect an individual's views, so too is one’s own, . . . ”).
\textsuperscript{46} See, e.g., In re Converse, 602 N.W. 2d 500, 510 (Neb. 1999) (holding that the applicant lacked his good moral character because of his general turbulent and intemperate disposition); Matter of Moore, 303 S.E. 2d 810, 816-17 (N.C. 1983) (holding that applicant's threatening and belligerent statements within five years prior to the time of the petition was a reasonable basis from which the board could determine that the applicant did not possess the moral character necessary to stand for examination); Matter of Ronwin, 680 P. 2d 107, 118 (Ariz. 1983) (holding that the applicant did not establish that he was mentally fit to practice law, and manifestations of improper conduct included the filing of unwarranted legal actions against numerous individuals connected with the applicant's "unhappy experience" in applying for admission to the Arizona Bar).
\textsuperscript{47} Leslie C. Levin, The Folly of Expecting Evil: Reconsidering the Bar’s Character and Fitness Requirements, 2014 B.Y.U. L. Rev., 775, 785 (2014) [hereinafter Levin] (“The inquiry occurs 'too early' because it occurs before applicants have encountered the situational pressures of practice. It is “too late” because it occurs after applicants have invested thousands of dollars (now often more than $100,000) in their legal education, making it harder for bar authorities to deny admission to applicants who have invested three years in law school and have often incurred substantial student loan debt.” (citing Rhode, supra note 5, at 515).
IV. A PROPOSAL

When focusing on the balancing approach, the introduction of administering the MPRE as a pre-law benefit all the odd against the current regime. These benefits will be substantial because early administration of the MPRE will promote better understanding, will help to break down the pros and cons of non-disclosure, and will enable to understand the character and fitness better. These benefits are “important and laudable,” because fewer students will jeopardize by non-disclosure stigma, “more ethical lawyers the society will get, and simply more enlightening and interesting professionalism will flourish” when the students have the highest possible notion of good moral character and fitness.
A Minimalist International Legal Order:

Enforcing Jus Cogens Norms Through the Fiduciary Jurisdiction of

National Courts

Professor Thomas Boudreau
Department of Conflict Analysis and Dispute
Salisbury University

Ms Brittany Foutz
Ph.D. Student
Kennesaw State University

SUMMARY:

Since the Allies’ Moscow Declaration of 1943 concerning wartime atrocities, the “best practice” for adjudicating international criminal law has been the simultaneous use of international and national courts or tribunals in the prosecution of heinous crimes against civilians, prisoners of war, or other war crimes. This is especially true today in view of the use to the limited resources and scope (so far) of the International Criminal Court. Yet, there are vast and increasing casualties, especially innocent civilians in the modern world from the Middle East to Myanmar, while the infamous Torture Memos written in the United States under the second Bush Administration have gone legally unaddressed or investigated. With a few exceptions, universal jurisdiction is simply not providing the necessary judicial capacity to enforce the law. So, in order to end this current age of impunity, especially for great powers, much more needs to be done to insure the deterrent purpose of the international Rule of Law and, if this fails, then to enforce effectively the common fiduciary interests of peoples throughout the globe; these legal interests are largely the result of the promissory declarations, charters, treaties and trials of the Allied Powers during and after World War II that resulted in decolonization and a fiduciary Law
of Nations. Yet, while the scope and complexity of international law has greatly expanded — such as the Nuremberg legacy resulting from the war— there has not been a concurrent expansion of judicial capacity, especially at the national level, to insure the effective enforcement of this invaluable legal inheritance. So, the exercise of fiduciary jurisdiction by national courts, which is already often used in domestic matters, is now necessary to insure the international enforcement of the common fiduciary interests of peoples around the globe. In particular, the promissory based Law of Nations requires the appropriate fiduciary adjudication by national and domestic courts to end the current age of impunity in which terrorists and state leaders torture or kill with no legal consequences throughout the world. This is especially true of the unprecedented legal inheritance of the “Nuremberg legacy” and ensuing jus cogens norms, especially against torture, as cited in the famous third Pinochet case by the British House of Lords. Since much, if not most, of the World War II Corpus Juris is the result of declarations and agreements created directly between governments and their own and other peoples, including other allied, conquered, colonial or neutral peoples, and thus below the level of the legally defined “state,” the resulting fiduciary Law of Nations and jus cogens norms are self-executing within a national jurisdiction and now governs the legal relationships of a government to its own and other peoples. In view of this, this essay will specifically argue that national fiduciary jurisdiction and adjudication of jus cogens norms, especially those that resulted from the Nuremberg legacy, constitutes the absolute minimum international legal order and thus are critically necessary to the living rule of law in international affairs.

INTRODUCTION:
AN OVERVIEW OF A MINIMALIST INTERNATIONAL LEGAL ORDER.

The initial axiom of this paper is that a new Law of Nations was created in international law due to the solemn promises made in good faith by the Allied powers during World War II to their own, neutral, conquered and colonial peoples of the world. Specifically, this New Law of Nations emerged out of the Atlantic Charter, the Declaration of [the]
United Nations on January 1, 1942, the Moscow Declaration and other promissory statements made by Allied governments especially during the darkest times of the war. These declarations contained solemn promises that, in essence, created fiduciary obligations, duties, interests, and norms that were to be recognized on the international level by governments and enjoyed by the peoples of the world if the war was won.

This fiduciary Law of Nations now governs the relationship of governments to their own and other peoples and enunciates the rights of such nations to, among other things, human rights, humanitarian law, self-determination, trusteeship and collective security as embodied in the Charter of the United Nations and other post war documents. The Law of Nations enunciates the legal rights and protections that the peoples within a state and throughout the world possess in relation to their own and other governments. In particular, the modern Law of Nations limits and sharply curtails the unilateral violence that a government can legitimately use against its own or other peoples as the Nuremberg Charter, the four new Geneva Conventions (1949), the Convention on the Crime and Punishment of Genocide and as other subsequent legal conventions attest. In short, if there are new or unprosecuted laws on the books, courts should have the concurrent effective judicial capacity to enforce them.

Yet, while the scope and complexity of international law have greatly expanded — such as the vital Nuremberg legacy\(^1\) resulting from World War II— *there has not been a concurrent expansion of judicial capacity, especially at the national level, to insure the effective enforcement of this priceless legal inheritance*. While the recent creation of the International Criminal Court (ICC) is a promising beginning, the ICC with its limited resources simply can’t do this—effective

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enforcement—alone; so, the Rome Statute (2002) specifically call for the critical and complimentary role of national courts in enforcing international criminal law.²

The pioneering Pinochet case, coming some 55 years after the World War II, was still seen by many as a novelty since a national court was interpreting international law; so, this case, while cogently decided by the House of Lords,³ nevertheless illustrates the compelling need for much greater use of national courts to decide international law. Lord Browne-Wilkinson makes this very clear when he states in the decisive Pinochet III decision that:

My Lords, this is an area where international law is on the move and the move has been effected by express consensus recorded in or reflected by a considerable number of international instruments. Since the Second World War states have recognised that not all criminal conduct can be left to be dealt with as a domestic matter by the laws and the courts of the territories in which such conduct occurs. There are some categories of crime of such gravity that they shock the conscience of mankind and cannot be tolerated by the international community. Any individual who commits such a crime offends against international law. The nature of these crimes is such that they are likely to involve the concerted conduct of many and liable to involve the complicity of the officials of the state in which they occur, if not of the state itself. In these circumstances it is desirable that jurisdiction should exist to prosecute individuals for such conduct outside the territory in which such conduct occurs. [Emphasis Added]⁴

This emerging “best practice” of the judiciary can most effectively be achieved by expanding the necessary judicial capacity of national courts through appropriate national legislation or customary law to decide such questions of international law. In this context, judicial capacity can be preliminarily defined in three interrelated ways; in the first instance, judicial capacity simply refers to the entire judicature collective capacity to enforce the laws on the books; this could actually be considered global in scope. Second, and more

² United Nations Treaty Database entry regarding the Rome Statute of the International Criminal Court.
⁴ Ibid.
importantly for our purposes, judicial capacity refers to a national judiciary’s authority and ability to enforce effectively the law and legal norms that actually exists in international law, either in written form or in customary law, especially jus cogens norms.\(^5\)

As such judicial capacity is obviously a separate issue from judicial competence in administering the law or independence from the political branch, though all of these are related to the basic question concerning the best practice of a judiciary. On a more specific level, thirdly, judicial capacity involves a particular court’s capacity to adjudicate effectively the cases that come before the presiding judge. Yet, in all three instances, the judicial capacity to enforce effectively basic jus cogens norms necessary for the maintenance of a minimal international legal order is largely missing, as modern atrocities continue to be committed largely with legal impunity. For instance, due to this lack of appropriate national capacity, war crimes and torture continue to be committed up to current times, as even tomorrow’s headlines may reveal.

A key theme of this article is that international and national courts must be simultaneously involved in adjudicating the appropriate law, especially fundamental jus cogens norms, in order to secure the effective rule of law in international affairs. Since 2002, International Court (ICC) has operated yet still unfortunately has too limited scope and resources to do this effectively. So the national judicial capacity to enforce international law must be increased to match the growth of international norms during and after World War II; this is also essential in order to match the increasing degree of apparent law breaking in international affairs, such as the drafting of the infamous “torture memos,” with still apparent legal impunity from due process or a day in court for the advisors, authors and co-signers of these documents in the second Bush Administration; we will come back to this issue shortly.\(^6\)


\(^6\) See infra at note 7-9.
Furthermore, with so many wars and massive civilians casualties from raging conflicts, the ICC apparently can’t keep up with the demand; for instance, the lack of such judicial capacity to enforce the laws on the books can be seen in the seemingly endless current attacks and atrocities committed against civilians, soldiers and “enemy combatants” throughout the world during the early part of the 21st without any apparent legal repercussions or consequence. Two genocides are occurring as this article is being written in Yemen and in Myanmar. The civilian leadership of the United States decided to attack a country in the spring of 2003 that never attacked it, namely Iraq, which subsequently descended into death and mass destruction; almost every city there has been leveled, either in the original US invasion, or in the subsequent war against ISIL which took over much of the countryside as a result. After the drafting of the infamous “Torture Memos” by a coterie of American lawyers within the second Bush Administration, there were subsequent widespread and credible reports and photographic evidence of torture being used by Americans in Abu Ghraib as well as other Iraqi prisons or so-called “safe houses in other countries to which illegal renditions occurred.\(^7\)

These memos occurred due in part to the legal advocates of torture within the second Bush administration tried to distinguish torture from other cruel, degrading and unusual punishment, even though the Convention is entitled in the conjunctive, as follows: Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;\(^8\) furthermore, any such action is specifically prohibited by the U.S


Constitution. Yet, none of these legal advisors have been charged or brought into a court of law anywhere in the world to have their day in court to face the facts and legally determine their innocence or guilt. The American international legal community, including scholars and policymakers, have been largely silent, or even complicit, as the drafters of these memos travel to law conferences in the US and even abroad with impunity or even professional scrutiny from their peers; so obviously others must act first, in other lands, as Lord Browne-Wilkinson states if the rule of law is to be upheld. In the Pinochet III case, brought about due to the request for Pinochet to Spain by the great Spanish Judge Baltasar Garzon, Lord Browne-Wilkinson specifically focuses upon the allegations concerning the act of torture, stating “to regard the rule against torture as *jus cogens* and *erga omnes* underlines its fundamental pace in the public policy of international law.”

So, without the appropriate expansion of national judicial capacity, the post war *Corpus Juris* is in danger of becoming a dead letter and a meaningless legal footnote in history. In particular, the resulting modern and fiduciary Law of Nations during and after the war at first, especially after the Nuremberg trials, promised to place on trial those individuals accused or suspected of committing the most heinous crimes imaginable, especially those crimes that violate the most serious crimes defined in the Nuremberg Charter and trials.

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9 The histories of the prohibitions of cruel and unusual punishments found in the English Bill of Rights of 1689 and in the eighth amendment to the United States Constitution make it clear that torture and other barbarous treatment of prisoners such as inflicting severe pain or other inhumane mistreatment is simply not acceptable under any definition of “cruel and unusual” punishment. See, for example: Granucci, A. F. (1969). "Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning. *California Law Review, 57*(4), 839-865.


12 See supra at note 3
including the critical Allied Control Council Law No.10;\textsuperscript{13} so, these crimes now include, as we will see below, widely accepted and critical \textit{jus cogens norms} concerning crimes against peace, war crimes, crimes against humanity and torture.\textsuperscript{14} In fact, the statue of Rome creating the ICC specifically calls for parallel national court action to insure the effective enforcement of international criminal law.

Such blatant dismissal of the law governing even the use of torture is a betrayal of the World War II and post War era in which governments promised in a series of declarations, charters, treaties and trials that peoples throughout the world would be protected by a new international legal order. Yet, the reverse has occurred; as one commentator notes:

\begin{quote}
Armed conflicts and serious violations of human rights and humanitarian law continue to victimize millions of people throughout the world. As a result, more than 86 million civilians have died, been disabled or been stripped of their rights, property and dignity since the end of World War II. The world community has done very little for them or their families. Most victims have been forgotten and few perpetrators have been brought to justice. A culture of impunity seems to have prevailed.\textsuperscript{15}
\end{quote}

The contemporary world is seemingly embarked on an apparently endless orgy of violence as lawless states and terrorists \textbf{KILL INCREASING NUMBERS OF INNOCENT CIVILIANS} with apparent impunity.

In view of this, we will argue in the following paper that the Allies during World War II were, in essence, creating a new international legal order that \textit{has yet to be fully observed or effectively enforced}. In particular, \textit{the necessary international and national judicial capacity to investigate and if necessary, enforce basic \textit{jus cogens norms} still does not exist in the still emergent international legal}

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\textsuperscript{13} See, Supra, at note 1: Sfekas, “Taming the Furies;” hereafter ACC10.
\textsuperscript{14} Ibid., Torture is specifically mentioned at Nuremberg in ACC 10; see Sfekas, “Taming the Furies;”
\end{flushleft}
order in the contemporary world. Yet, such judicial enforcement of any violation of basic *jus cogens* norms, especially those that emerged from the priceless Nuremberg legacy,\(^\text{16}\) must be rigorously enforced to insure a merely minimum international legal order. So a new age of apparent impunity for terrorists and state leaders who order unprovoked attacks or invasions on other peoples or countries seems to be upon us, despite the invaluable legal inheritance of Nuremberg and the post-World War II Corpus Juris.

Until individuals begin to fear that their portending criminal conduct will lead to their actual prosecution in a court of law for committing such crimes, outrages against civilians and surrendered or captured soldiers will continue. Universal jurisdiction, while a powerful potential tool, has not simply worked since so many states simply opt out of signing or ratifying the necessary enabling legislation to grant their courts the authority to exercise this jurisdiction, which remains woefully underutilized as a result. Individual states that try to implement universal jurisdiction are often bullied by powerful lawless states to withdraw or simply not invoke such jurisdiction again.\(^\text{17}\) As a result, the Age of Immunity for terrorists, war-lords and their advisors or states continues apparently with no fear of effective judicial intervention and investigation into, or enforcement of, international criminal law. If this continues, any hope of a real rule of law in international as well as domestic affairs will die a slow and underserved death.

So, in view of this enduring lawlessness, international and national judicial capacity must be enlarged in scope and effectiveness in order to match and enforce the massive growth of international norms or laws, described here as the wartime and post-World War II Corpus Juris which resulted from the largest war in human history. *In particular, enforcing*


those principles of the Nuremberg legacy which has now reached the level of Jus Cogens norms, is absolutely essential to maintain and preserve a minimal international legal order. Enforcing such basic jus cogens norms is a duty, not a right, of international and national courts.\(^8\) Otherwise, international relations descends into chaos into a Hobbesian world in which life is nasty, brutish and short. We are seeing such a world emerge now.

So, for those who seek an effective rule of law in international affairs, there should be little or no ambivalence or argument on this point; for instance, the third Pinochet decision by the British House of Lords affirms that the Nuremberg legacy has become a commanding and controlling set of legal norms through positive and customary international law. This extraordinary astute decision, written by Lord Browne Wilkinson also affirmed that, with the passage and acceptance of the Convention against the Crime of Torture,\(^9\) even former heads of states could be held legally accountable for ordering or allowing such horrific behavior on the part of the state or its agents. Yet, such crimes still continue, if we are to believe the almost daily news reports in the United States about renditions and the use of torture under the Bush administration after 9/11 in Gitmo, Iraq Afghanistan and, literally throughout the world in so called “safe houses” where suspects we first subjected to, first rendition and then, once there or torture, euphemistically called “enhanced interrogation.”

Italy was the first state in which national courts issued indictments for those US officials responsible for such criminal conduct on its soil; it should not be the last.\(^{20}\) Yet, the

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authority of the Italian courts to do so was questioned, creating some uncertainty, even though the rendition that led to torture began on its own soil.

So, obviously an enhanced international and national judicial capacity is needed to enforce effectively the massive post World War II Corpus Juris and thus help end this new era of apparent impunity for those individuals who order or participate in crimes against humanity, war crimes, crimes against humanity or torture. Furthermore, in view of the well-established evidence of draconian Nazi reprisals during the war, as well as fundamental violations of the Geneva Conventions, we will also argue that disproportionate reprisals or attacks against civilians, described here as El Diablo proportionality, violates a fundamental jus cogens norm as well. Finally, as we shall see, the distinguished international Judge Nieto-Navia argues that common article 3 of the 1949 Geneva Conventions, written in response to Nazi atrocities, be adjudicated as a fundamental jus cogens norm as well. These are the core jus cogens norms that need to be preserved and, if need be, enforced by every national court in the world.

International crimes that rise to the level of jus cogens threaten the entire international legal and political order and, as such, constitute obligatio erga omnes which are inderogable.\(^{21}\) In essence, violations of such basic jus cogens norms are an attack on every nation and on everyone. So, this paper will argue that national courts must be given or acquire the requisite authority, either through enabling domestic legislation or customary international law, to exercise the appropriate fiduciary jurisdiction over the World War II and Nuremberg legacy of jus cogens norms in order to insure, at the very least, a minimum international legal order. Such fiduciary jurisdiction is necessary since, as argued elsewhere, these modern legal norms, that resulted from World War II, especially the Nuremberg legacy, constitute a modern and fiduciary Law of Nations that created, once the war was won, enduring fiduciary interests possessed by the people or nation, and fiduciary duties for governments.

\(^{21}\) See supra, note18.
or the courts to uphold and enforce. As already argued elsewhere, this modern fiduciary Law of Nations originated as a result of solemn promises made by the Allied powers to their own and others peoples in order to mobilize the millions needed to fight, kill and die in order to defeat our mortal fascist enemies. It the resulting Corpus Juris is not fully enforced by international and national courts, then the millions who served, suffered and died in the greatest war in human history were and are being betrayed by us, the living, who refuse to insure a minimal international legal order that was promised by the Allied powers in view of the victim’s massive, horrific and unparalleled suffering in that last World War….

BACKGROUND: THE BEGINNINGS DURING WORLD WAR:

During World War II, the three great Allied Powers --the United States, the United Kingdom and the Soviet Union-- announced in the Moscow Declarations of October 1943 their intention to prosecute the leading Nazis responsible for war crimes and other atrocities at the end of the war. Specifically, in the “Statement of Atrocities” signed by Churchill, Roosevelt and Stalin—and attached to the Moscow Declarations, the Allied leaders announced their intention to try captured Nazi warlords in the national courts of the countries where the offenses occurred. They also announced their intention to try the leading Nazis “whose offenses have no particular geographical localization” …who will be punished by joint decision of the government of the Allies. This latter statement was the basis of the Nuremberg Charter and trials. Yet, though victory finally seemed in sight, there were still a lot of battles to be won and blood to be spilt before the war could be won.

23 Ibid., Boudreau, T. (2017) “Promise to Keep.” Advances in International Law”
Due to the sheer and almost unimaginable magnitude of the Nazi crimes, acts so heinous that Churchill described them early in the war as “crimes without a name,”²⁴ the Allies’ actions at Moscow were by that point in the war, were absolutely necessary and perhaps inevitable; innovative and historical provisions for strengthening and enforcing the international legal order to try Nazi criminal suspects had to be made as the full scope and extent of their atrocities were becoming apparent during war as occupied territories were liberated; so, by the time of the Moscow 1943 Declarations, the Allied leaders were increasingly aware of the vast scope of Axis war crimes against entire peoples and religious groups and thus called for the simultaneous use of national and international trials. Such developments were fully anticipated by the courageous Raul Wallenberg who wrote to the SS General in charge of Budapest Hungary and warned of the consequences of such war crimes thus, as described by Prof Minow years later: “I will see that you will be charged and hanged as a war criminal if you follow Adolf Eichmann’s order and direct the massacre of the over 60,000 Jews remaining in the Budapest Central Ghetto.”²⁵

His message to General Schmidthuber, remarkably, worked: the Jews in the Budapest Ghetto survived. We remember and honor Raoul Wallenberg for this and countless other acts of courage that directly saved thousands of lives during the Holocaust. A man then in his early thirties, Wallenberg used delay, persuasion, threats, bribes, and his invented “protective passes” to save a large remnant of Hungarian Jewry. As Irwin Cotler observed in his address marking the opening of an exhibit on the life and work of Wallenberg, his


example and his memory teach us that “[n]eutrality and indifference by individuals or neutrality and indifference by state[s] must be rejected.”

A terribly cruel irony is that, while Wallenberg managed to save thousands of endangered Hungarian Jews, he disappeared from sight soon after the liberation of Budapest and was never heard from again. Yet his memory ensures of what one righteous person can do in times of deadly peril.

As Wallenberg anticipated, the Allies decided that individuals as well as “states” would be placed on trial in a court of law; this was duly reflected in the resulting post World War II trials held in Berlin and throughout Europe after the War was won. So, after the Nazis finally surrendered, these promised domestic trials occurred simultaneously with or after the Nuremberg trials of the major Nazi warlords or groups in Berlin.

The Nuremberg Charter and subsequent Allied Control Council (ACC) decrees announced the Allies’ intention to prosecute Nazi warlords for crimes against peace, war crimes, crimes against peace and torture; as such, these key criminal categories established

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27 Ibid.

28 Ibid., SeeSteinhouse and Shapiro.


the juridical foundation what will be described here as the post-World War II *jus cogens norms* as the integral core of the Nuremberg legal legacy.\(^{31}\) In a profound legal innovation as articulated in the Nuremberg Charter, individuals were held legally accountable, and subsequently put to death, for acts formerly considered crimes of the state; individual Nazi leaders were tried at the international tribunal held at Nuremberg as well as in each of the Allied sections of Berlin.

The first Nuremberg trial, the International Military Tribunal consisting of judges and prosecutors from the four major allied powers, is justly famous for putting the most senior Nazi warlords on trial to see the long litany of their horrendous atrocities, culminating in the Holocaust.\(^{32}\) Less well known are the national trials held throughout the previously occupied territories in Europe and the Soviet Union. Yet, such national trials are an indispensable element in insuring that international justice was achieved. As we shall see, such concurrent national trials to enforce international norms is fully consistent with the Blackstone’s definition and traditional understanding concerning the requisite domestic jurisdiction to aid and enforce the law of nations, as a part of the common law; as

\(^{31}\) Ibid. The idea of a Nuremberg legacy is certainly not new; besides Tara Helfman’s excellent article on this topic, see supra at note 7, also see for instance: Michael J. Kelly and Timothy L.H. McCormack, Contributions of the Nuremberg Trial to the Subsequent Development of International Law in David A. Blumenthal and Timothy L.H. McCormack (eds), *The Legacy of Nuremberg: Civilising Influence or Institutionalised Vengeance?* (2008) 101, 103; M. Cherif Bassiouni, The ‘Nuremberg Legacy’ in Guénaël Mettraux (ed), *Perspectives on the Nuremberg Trial* (2008) 577, 583. (As Prof. Helfman notes, It is hardly surprising then that Nuremberg, as the first champion of the principle of individual criminal responsibility for violations of international law, retains an exalted status. Citations thanks to the research of Prof. Helfman in her article “Awaking the Human Conscience); Also: The Special Collections Research Center of the Syracuse University Library in New York houses the Francis Biddle Collection of International Military Tribunal Nuremberg Trial Documents and Related Materials consisting of chronological trial documents: notes and minutes, indictments, 11 volumes of evidence notes, defense documents, about 50 volumes of trial proceedings, memoranda, and appeals.Also includes published material on aspects of international law as related to the trial, and Biddle’s Personal papers including a priceless journal, correspondences and notes for his autobiography, a photograph album and 5 scrapbooks. Inspired by the collection, I spend hours poring systematically over this collection as a graduate student at the Maxwell school at Syracuse University.

Blackstone states: “therefore the law of nations (wherever any question arises which is properly the object of its jurisdiction) is here adopted in its full extent by the common law, and is held to be a part of the law of the land.” 33

THE NUREMBERG LEGACY AND THE FIDICUARY LAW OF NATIONS:

So, the modern Law of Nations limits and sharply curtails the unilateral violence that a government can legitimately use against its own or other peoples as the Nuremberg Charter, the Convention on the Crime and Punishment of Genocide and other subsequent legal conventions attest. By doing so, the emergence of the Law of Nations resulted in a fundamental realignment of the legal relationship between the nation and the state, terms that are usually conflated in the legal lexicon.34

Specifically, the new Law of Nations reconfigures the legal relationship between the nation and state by recognizing the international rights of the people within the state and, in the case of Nuremberg Charter, the rights of the nation against the state. These legal innovations result in a profound shift in the fundamental and historically competing sources of legitimacy and sovereignty away from the state to the nation or people of the polity.35

The legal definition of the nation, unlike that of the state, has always been problematic and underdeveloped in international law.36 For our purposes, the nation here is legally defined as a jural community consisting of a distinctive people, some or most of whom occupy a

specific territory, who shares a sense of moral and legal obligation towards one another; as Michael Barkun explains in his book *Law Without Sanction*, the concept of “jural community” means the “widest grouping within which there are a moral [or legal] obligation and a means of ultimately to settle disputes peacefully” (Barkun, 1968). As such, the existence and extent of such a “nation” can be empirically tested. According to Prof. Barkun, such jural communities can be found in so called “primitive” societies as well as in international law. In this sense, the nation as a jural community exists as a legal pact and an ongoing normative narrative even between the dead, the living and the unborn since it can keep legal obligations, such as public or private trusts, between preceding, present and pending generations. As we shall see, because of legal developments during World War II, such nations had rights recognized prior to statehood, such as self-determination, and even against their own governments, as embodied in the Nuremberg Charter. In essence, the people of each state must now decide through their domestic courts if their own or other governments and leaders are recognizing and respecting the international fiduciary rights of human beings won in the bloodiest war in human history.

In short, the nations of the world took on extraordinary significance during World War II as the Allied governments made solemn promises to peoples throughout the globe in an ongoing attempt to mobilize the millions needed to defeat the Axis powers. These steps included the making of promissory declarations to millions of people under European colonial control in an effort to gain their supreme allegiance or, at least, not support the Axis side. The future fiduciary acts promised by the Allied governments included the promise of human rights, protections against violence –especially against the unilateral violence of states, self-determination, systems of trusteeship and collective security when and if the war was won. In essence, the Allies were promising, especially in the early years

38 See Supra, notes 10-12.
of the war, a new legal order that would especially protect civilian populations from the ravages of war after the beckoning yet still distant victory.

PROMISES TO KEEP: THE FORMATION OF A FIDUCIARY LAW OF NATIONS

This not to claim that the development of the Law of Nations in the crucible of World War II was a deliberate war aim; on the contrary, it evolved as a result of complex, contested and often convoluted interactions, interests or compromises among the Allied powers fighting the war, some of whom had vast colonial holdings overseas and wanted to preserve these after the war, and those that detested colonialism, especially the Americans or Soviets; specifically, the American government under Roosevelt wanted the termination of world-wide colonialism as one of the clear war aims to rally the conquered, colonial, neutral and allied peoples of the world to the anti-Axis coalition or, at the very least, not join the Axis cause at a time of mortal danger to the Allied nations.39 At the same time, the Allied leaders knew that coercion alone would not win this war; their peoples had to be powerfully motivated by solemn promises of a better world in which a new international legal order would preserve the peace; such a beckoning vision of a world at peace was specifically promised through international law and collective security; as we shall see, the United Nations and the Nuremberg Charter and trials were two results of these wartime promises, made when bloody struggles and sacrifices still laid ahead for soldiers, sailors or marines and their families back home. So, as argued elsewhere, these

governments were made directly between their governments and their own and other people allied in the greatest war in human history.

Three arguments make clear the promissory and fiduciary nature of this new Law of Nations. First, since many hundreds of thousands of soldiers were going to die to fulfill these solemn promises and pledges, these government declarations can’t simply be characterized as mere propaganda on the one hand, or simple contractual statements between the living on the other. Instead, these wartimes promises and pledges – made simultaneously to the allied, colonial, conquered and neutral nations of the world – created fiduciary rights, duties, norms and interests to be exercised and enjoyed by these peoples as a whole -if they first helped to win the war. In short, the nation or people as a whole became the trustees and beneficiaries of these fiduciary norms. These promises, made and accepted in good faith, helped to mobilize the millions of people necessary to fight and defeat the mortal threat of global fascism. In essence, governments became the trustors of this new fiduciary legal order when the war was finally won.

Second, these fiduciary rights make fully explicit an often implicit and implicate international fiduciary legal order that has traditionally existed consisting of norms, duties, customs and territories held in common by humanity. This traditional fiduciary legal order consists of the global commons, as well as customary and includes some general principles of international law. With the advent of the post-World War II fiduciary norms, duties, relationships and interests, such as the observance of international human rights, this fiduciary legal order becomes fully explicit as it evolves and hence has or will be more contested in international and national jurisdictions. Third, the best way to characterize this new fiduciary legal order that resulted from the Allied victory in that war is to describe

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it in terms of the ancient Roman and Byzantine idea of Jus Gentium defined as the “Law of Nations…common to humanity.” This is refinement of the ancient Roman idea of Jus Gentium founded in Justinian Institutes, and elsewhere in the classical world (Maine, 1906). Due to the new Law of Nations, the people are now, at least implicitly, the imperium et imperia (sovereign within the sovereign) of the newly legally limited state. The new Law of Nations does not necessarily favor the nation over the state; it simply makes explicit the legal tensions and contested nature inherent in the relationship between the people and statist structures, powers and policies. As a result of the Allied victory in World War II, this law is available and common to all the peoples of the world as a way of recognizing human rights and universal jurisdiction for war crimes or genocide that legally constrain the once absolute state prerogative to use unilateral force or commence war.

This argument concerning the expansion of an already existing though often implicate international fiduciary legal order parallels the theoretical argument made by John Locke concerning the founding of government in the domestic sphere. For Locke, the society is far more important and enduring while the government represents simply a trusteeship that results from the limited fiduciary interests granted to it by the people. As such, government is essentially a trust. Of course, Locke theory on the formation of government has significant historical import. As Ebenstein notes, by “committing themselves to Locke’s theories of government the British supplied the case for the American Revolution and for the later—peaceful—indecent of other colonies and India.”

42 See Boudreau, “Promises to Keep.” Supra at note 22.
43 Ibid., See This is at least how governments, according to Locke, are supposed to operate; Locke of course was an optimist!
legitimacy of international law are the peoples as the imperium et imperia, or the “sovereign within the sovereign” of the now legally constrained state and government.45

Third, what makes these pledges such an international concern is that the promises made to its own people by a government are simultaneously made to other nations as well. Because these fiduciary rights, interests and norms were, in the first instance created between a government facing a mortal threat and its own as well as other nations, the resulting contested nature of any of these rights and obligations are to be adjudicated by a nation’s own judiciary. These are, in the first instance, fiduciary interests and norms and not treaties that may require further legislative action before becoming self-executing. This is especially relevant in U.S. Constitutional law and courts since many other governments and courts directly incorporate international law into their domestic law that governs their national jurisdictions.

Hence, this type of fiduciary pact is essentially below, or more accurately, begins below the threshold of traditional interstate treaties. The original promises and solemn declarations of the Allied powers made in the early desperate days of World War II often resulted in eventual treaties after the war was won, and thus often became, like the Charter of the United Nations, hybrid agreements consisting of both treaty and trust law. Yet, the origins of the trusteeship relationship began within the state, as a matter between the mortally threatened government and its own and other peoples. As such, the resulting trust—often consisting of contested fiduciary rights, interests and relationships, such as human rights—are or should be self-executing within the nation’s own nation and judiciary.

This last point is critical in recognizing the national judicial capacity to enforce the Nuremberg legal legacy. As argued in the article “Promises to Keep” and elsewhere, the

Nuremberg legal legacy was an integral aspect of the fiduciary Law of Nations that emerged out of the promise and declaration that the Allied governments made to their own and other peoples in a time of mortal peril to their own existence.\textsuperscript{46} The Moscow Declarations were illustrative of this emergent fiduciary Law of Nations. The three allied powers specifically made to all the governments and peoples fighting the Nazis two critical promises; first, if they won the war, the Allies were committed to creating a new international organization, eventually called the United Nations. Secondly, after the war was won, the allies would put on trial all the Nazi leaders, warlords, and henchmen in what later became known as the Nuremberg trials. As General Telford Taylor—America’s chief counsel and prosecutor at Nuremberg after Justice Jackson left—states:

The United Nations and the Nuremberg trials were initially twin offspring of the Allied negotiations and agreements with respect to the peace that would follow victory...

Different as the twins were, they shared the same two basic purposes: promoting peaceful rather than warlike settlements of international disputes, and humanitarian governmental policies.... Essentially, the Nuremberg trials were intended to bring the weight of law and criminal sanctions to bear in support of the peaceful and humanitarian principles that the United Nations was to promote by consultation and collective action.\textsuperscript{47}

This "twin offspring" of World War II questions to its very core the previous state-centric legal order; specifically, the sovereign state’s once absolute legal right to decide the preeminent issue of war was sharply curtailed in favor of international recognition of human rights and collective security. The advent of such a system involved, at the time, the near universal recognition of human rights, collective norms, rights, obligations and sanctions contained in the U.N. or Nuremberg Charters. This development marked a watershed, a virtual revolution, in the international legal order. In particular, the Allied governments of World War II, after their experiences with Germany and Japan, were

\textsuperscript{46} See supra at note 22, and 44
\textsuperscript{47} Telford Taylor, Nuremberg and Vietnam: American Tragedy. Quadrangle

(2017) J. JURIS. 132
simply not content to leave the ultimate question of war solely to the unilateral decision of the sovereign state. Because of this, the existing legal order was largely replaced, or supplanted, by a new order that placed, for the first time, legal limits to a sovereign state's once absolute right to legitimate and wage war.

Nuremberg was necessary because of the unparalleled horrors of the Holocaust,\textsuperscript{48} including Hitler’s war against his own nation -- i.e. other Germans, especially German Jews (some of who served honorably in World War I), as well as against the gypsies and other civilians in other occupied territories. Hitler’s war against entire civilian populations made it evident that nations as legally distinct entities need protection from states, including their own.

The following Nuremberg trials, which fully documented and presented in the courtroom the horrors of the Holocaust and other Nazi wartime atrocities, significantly contributed to the development of subsequent declarations, conventions and treaties, such as the Universal Declaration of Human Rights, Convention on the Crime and Punishment of Genocide and the revised Geneva Conventions of 1949.\textsuperscript{49} In this regard, the solitary work and efforts of Raphael Lemkin, who tirelessly advocated for the adoption of the Genocide Convention, stands out as a beacon of inspiration and deserves special mention here; a Polish lawyer from a Jewish family, Lemkin prophetically began his efforts to prevent mass murder in the 1930s at the League of Nations before the outbreak of World War II.\textsuperscript{50} The Great Lemkin even coined the term “genocide,” meaning the killing of an entire group, or


\textsuperscript{49}See \textit{Supra} at note 22.

contributing to conditions leading to its demise. He continued his tireless work to protect entire peoples continued during World War II, during which he lost most of his family in the Holocaust. Despite his devastating loss, Lemkin persevered and was finally successful in getting the Convention adopted in 1948. As such, he is a true hero of humanity and provides an enduring inspiration to work for a lawful world for generations to come.

This new emphasis in international law on legally protecting entire groups of peoples, first emerging out of the Nuremberg Charter, and subsequently in the Convention on the Prevention and Punishment of Genocide (that criminalized genocide) was the first recognition on an international plane that individuals and groups and entire nations had essential innate and legal rights, in essence, against their own government or other states. Perhaps most important for our present purposes is that national courts throughout Europe, concurrently with the main International military tribunal in Berlin after the end of the war.

THE IMMEDIATE IMPERATIVE: NATIONAL JURISDICTION OVER THE NUREMBERG LEGAL LEGACY

As a result of the Moscow Declarations of 1943, three sets of trials consisting of international and sector courts held in Berlin, while national courts throughout the liberated countries prosecuted hundreds of Nazi warlords on the basis of the Nuremberg legal legacy. Yet, at the same time, it is interesting to point out that there is simply no legal basis or consistency in Jeremy Bentham’s positivist conception of international law -- existing as essentially agreements between sovereign states-- concerning the ensuing Nuremberg criminal charges against individuals for crimes against peace or crimes against humanity unless one weakly and habitually argues that such rights duties, punishments or protections are essentially gratis, or the agreed upon as gifts of the state. These legal innovations of
World War II simply don’t “fit” into Bentham’s positivist and conveniently “colonial” conception of inter-state law, except as ancillary or almost historically accidental events.51

So, the national trials in Europe of Nazis warlords was an important historical and legal innovation; in fact, most Nazi defendants were tried in front of national courts, not the International Military Tribunal. Yet, still the outcomes were often disappointing; while there was often overwhelming evidence of guilt against specific Nazis, many Nazis could not be located or—as we shall see in the next section—escaped completely—, and the national trials that did occur sometimes varied greatly in legal process and outcomes. Finally, there was overt political interference in carrying out the sentences of the Courts, whether those conducted in Berlin or in European countries, especially, after 1948. For instance, as explained in the book Blind Eye to Murder: Britain, America and the Purging of Nazi Germany—a Pledge Betrayed, many court decisions were vacated by the High Commissioner of Germany, the controversial General Clay or John McCloy who seemed to hate their recent Russians allies more than the Nazis. As a result, relatively few Nazis, even when proven guilty, were executed or served the full extent of their sentences. So, while the idea of using national courts to prosecute individuals was established as part of the Nuremberg legacy, much more could be done by national jurisdiction to adjudicate the violation of now established jus cogens norms.

This is especially true since, except in a few exceptional cases throughout history, traditional international law, as articulated before the war, seemed simply inadequate to the pressing task and necessity of prosecuting so many individuals for mass murder; very rarely in the past were leaders, let alone individuals within the state, tried and convicted for the mass killing of human beings.52 Yet, in view of the sheer magnitude of the Nazi


crimes, such exculpatory individual defenses were clearly inexcusable. So, was the only legal option to set such murderous henchmen free? Or should have the Allies after the war simply resorted to “Victor’s Justice,” and summarily execute hundreds, if not thousands of Nazis, as the Soviets and earlier in the war the Americans wanted to do, for their responsibility for, or participation in, their massive atrocities culminating in the Holocaust?53

The dilemma facing the Allied leaders concerning what to do with the guilty henchmen was due in part to the now outdated and obsolete definition of international law. Specifically, as traditionally defined by Jeremey Bentham international law, with exceptions of practically only pirates, made no allowances or provisions for trying individuals in international law for mass murder of civilians; before World War II, most previous trials of individuals were for soldiers or warlords for violation of war crimes, and these were very few and far between. So, the leaders and policymakers who actually initiated an attack and took the plunge into the abyss of war often always escaped. Under the old conception of international law, states could do almost anything they wanted to their own, subjected or colonial populations with total apparent legal immunity.

Some legal protections admittedly existed prior to World War II, as expressed in The Hague Conventions, the Geneva Conventions of 1864 and 1929, or the Kellogg-Briand Pact of 1928.54 These

before Nuremberg, mostly for war crimes committed as soldiers or warlords, as well as during and after the Nuremberg trials. Also: Boudreau, T. (2016). Paradigms Lost and Found: The Emergent International Legal Order. J. Juris, 30, 65.


provided the basic legal core for much of the Nuremberg Charter, especially the first two articles.\(^55\) *But these treaties were simply observed in the breach by the Nazis. So during and after the war, the surviving and victorious nation of the world agreed upon a new set of declarations and ensuing treaties or conventions that created, in essence a fiduciary Law of Nations.*\(^56\)

In short, such an antiquated understanding of Bentham’s outdated definition of international law is clearly no longer adequate or even an accurate description concerning the pressing and overwhelming necessity of holding people accountable for the monstrous mass murder of civilians or crimes against peace. *In particular, due to the World War II and post war legal developments in treaty as well as trust law, peoples and individuals now have significant legal and thus enforceable protections against the violence perpetrated by their own and other governments, as well as state sponsored or sub state terrorism.*\(^57\)

**THE GREAT ESCAPE: DELICTI JURIS GENTIUM (OFFENSES AGAINST THE LAW OF NATIONS)**

**DESPITE THE OVERWHELMING EVIDENCE OF THEIR MONSTROUS CRIMES**, the Nazi warlords and their murderous henchmen, for the most part, tried and often succeeded in evading their “day in court” as well as the possible and pressing justice of the Allied Powers; at least the Allied courts were offering a public trial, which was still much more than they gave to their millions of victims throughout Europe.\(^58\) *Specifically, it is a sad and sobering fact that HUNDREDS, IF NOT*

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55 Ibid., Also see Quincy Wrights article in this regard; as a member of Justice Jackson legal team, he had intimate knowledge of the drafting and implementation of the Nuremberg Charter. See: Wright, Q. (1947). The law of the Nuremberg trial. *Am. J. Int'l L.*, 41, 38.


THOUSANDS, of SUSPECTED NAZI WAR CRIMINALS WERE NEVER BROUGHT TO TRIAL. Despite convulsing the world with murderous war, and killing millions as a result, many of the very men who helped to launched and participated in the resulting and unprecedented mass murder simply escaped and disappeared from view after the war was “won.” Thousands went on to live very prosperous lives—living the lives that they denied to their thousands upon thousands, millions upon millions, of their victims. We described this in Part I as the “Great Escape,” and should never be allowed to be repeated; as the Holocaust Encyclopedia states:

“Following [the] postwar trials of Nazis, the search continued for perpetrators of the Holocaust. Only a small percentage of these criminals have been brought to justice. The search for and prosecution of Holocaust criminals raises complex moral questions, as well as tangled problems of international law and jurisdiction. As they reach the end of their lives, the vast majority of Nazi offenders have escaped punishment.”


60 Ibid. Also see, supra, at note 58.

61 Ibid. The term for the shameful series of these postwar escapes, which I describe here as the “Great Escape,” is based upon a famous 1960 movie of the same title concerning a true story concerning the escape of Allied POW from a German POW camp in WW II; the Nazi escape from justice was tragically far, far greater than the one portrayed in this movie…. This vast exodus of Nazi criminals from Europe is now well documented. See, for example, Weber, R. (2011). The Lisbon route: entry and escape in Nazi Europe. Government Institutes. Also see: Steinacher, G. (2006). "The Cape of Last Hope": The Postwar Flight of Nazi War Criminals through South Tyrol/Italy to South America. Bower, T. (1981). Finally see: Simpson, C. (1988). Blowback: The First Full Account of America’s Recruitment of Nazis and Its Disastrous Effect on Our Domestic and Foreign Policy. New York: Weidenfeld & Nicolson.

In short, thousands of Nazis suspected or actually involved in the Holocaust or other crimes escaped justice and were never prosecuted or punished; this defies the moral and legal imagination…. In view of this, judges and the global jural communities should resolve “Never Again!” There can NEVER be even the modicum of Rule of Law if those accused of the worst criminal offenses against other human beings are given sanctuary by states, or simply are “allowed” to disappear into a normal life somewhere in the world; the Allied leaders promise in the Moscow Declarations that “most assuredly, [they] the three Allied powers will pursue them to the uttermost ends of the earth and will deliver them to their accusers in order that justice may be done.” 63 Due to prevailing dogmas of statism and political intrigues by the former Nazis themselves in conjunction with new found supporters, this was one Allied promise that was not fully kept after World War II and resulted in this grotesque “Great Escape;” this is a profoundly shameful episode of international law, life and justice. 64 It must NEVER happen again.

Fortunately, the subsequent Nuremberg legal legacy and other national trials of Nazis, set the juridical prototype or paradigm that, if expanded, can provide ample judicial capacity for all subsequent possible jurisdictional, prosecutorial and enforcement issues or actions under the modern Law of Nations.65 In particular, as pioneered by the Moscow Declarations, the Law of Nations requires a robust international and national enforcement regime in order that the Law of Nations and specifically the Nuremberg principles are fully and effectively enforced in our current time as well.


To insure this, there needs to be national as well as concurrent international courts simultaneously pursuing and bringing suspected perpetrators to justice. The Rome Statute creating the International Criminal Court (ICC) even calls for such complimentary approach; yet, in view of this history of the Great Escape, the current International Criminal Court (ICC) should not and probably can’t, be expected to do this alone. As the Rome Statute itself states national courts and jurisdictions have to play a vital role as well in enforcing the emergent norms and law of the World War II legal legacy; specifically, the Rome Statute states in its Preamble, emphasizing “that the International Criminal Court established under this Statute shall be complementary to national criminal jurisdictions.” Only in this way, can the danger of states becoming safe havens for suspected war criminals or torturers be addressed or finally avoided.

To prevent such “Great Escapes” in the future, the judges and magistrates of the national and international judicature must work together to close the still significant legal and jurisprudential gaps preventing the prosecution and possible punishments of those who violate the World War II legal legacy—outlined above in Part I—and especially what we now call jus cogens norms. It simply makes no sense—no sense at all—to draft and adopt profoundly important new laws on such critical topics as war crimes, genocide and torture and then not provide for the progressive and evolving means of truly effective legal enforcement for violations of these international crimes at the international or national level. Otherwise, the painful legal lessons learned during and after the greatest war in human history come to


68 As we shall see, these include instituting or conducting wars of aggression, the Common Article 3 of the Geneva Conventions (1949), individual culpability for such crimes, including war crimes, and *other erga omnes* obligations, infra;
naught, and its invaluable legal legacy is left in limbo, an unfulfilled promise to the peoples who fought and won that war at such enormous cost in treasure and blood.

NEVER AGAIN! CLOSING THE JURIDICAL LOOHOLES THAT ENABLED THE GREAT ESCAPE

“People like myself want not a world where murder no longer exists (we are not as crazy as that!) but rather one in which murder is not legitimate.”

Albert Camus’ *Neither Victims nor Executioners*

The world still wars today and gravely suffer from terrorist attacks, or from unprovoked state attacks against other states; inevitably in such attacks, innocent civilians suffer, sometimes in unimaginable ways and circumstances. Tomororrw’s headlines may yet again declare that terrorists, or an entire state or states have once more killed massive amounts of innocent civilians.

So, to insure such a “Great Escape” from justice never again happens, the ensuing section will highlight and review three key aspects of a necessary, indeed critical, legal enforcement regime resulting from the World War II legal legacy. First, in order to close the yawning juridical gaps that allows potential war criminals to easily escape, current national and international courts must exercise original and fiduciary jurisdiction over any violations or violator of the Law of Nations that constitute jus cogens norms, especially those—such as crimes against humanity, genocide or prohibitions against torture -- that emerged as a result of World War II. Such fiduciary jurisdiction for jus cogens norms is thus unique in

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69 The war against innocent seems to continue unabated, if not accelerated since I wrote “Protecting the Innocent” in 1983 and presented the first copy to the then UN Secretary-General Javier Perez de Cuellar. If anything, the violence against innocent civilians seems to be growing and becoming the norm—a sign of barbarism and that the world is descending into a new Dark Age of unbridled terrorism and unrestrained statism. See Protecting the Innocent: Enhancing the Humanitarian Role of the United Nations in natural or Other Disaster Situations. (New York: the Carnegie Council, 1983).
that it applies only to those suspected of being *Hostis humani generis* (Latin for "enemy of mankind") for committing the worst crimes imaginable against human beings as illustrated by the Nuremberg and post-World War II legal legacy; the Nuremberg legacy includes ACC10 that specifically lists torture as a crime within preview of the court which was subsequently adjudicated in the sector trials in Nuremberg and Berlin. Such crimes also deserve special consideration by the world’s judicature, since they are, in effect, attacks upon the entire international legal order as such, and threaten to tear asunder the very fabric and existence of the Rule of law in international affairs. Thus, such fiduciary jurisdiction must be original and completely independent, allowing the court to hear cases, examine evidence, issue indictments if warranted and request extradition or actually adjudicate the case before it. Even so, fiduciary jurisdiction is undoubtedly best exercised, especially at first—before customary international law is established concerning its use—when concurrent with other principles of extraterritorial criminal jurisdiction such as territorial or nationality, especially if victims or their relatives can be found within the territory of the state. Second, unlike universal jurisdiction, fiduciary jurisdiction is *self-executing* within the nation’s judiciary; as we have seen, the fiduciary Law of Nations has its origins in the solemn promises made in good faith by governments to their own and other peoples during the mortal struggles of World War II. In short, these promises were *made below the level of the state* between the threatened government and its own and other peoples; in contrast, the legal definition of such a state is that it consists of both a government AND its people. In view of this, we will argue in this section that the fiduciary obligations of the modern Law of Nations, especially Nuremberg-based jus cogens norms are critically necessary to maintain a minimal international legal order, are *self-executing* in domestic courts of the nation.

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70 See supra at note 30. The Nuremberg legacy includes ACC10 that specifically lists torture as a crime within preview of the court which was subsequently adjudicated at Nuremberg; see Sfekas, S. J. (2017). “Taming the Furies: the Justice Trials at Nuremberg.” In Boudreau and Sainz-Borgo, *Advances in International law and Jurisprudence*. 

(2017) J. JURIS. 142
Third, in view of the fiery origins of the fiduciary Law of Nations in World War II, the Courts must play a more active role in applying the new norms of governmental or state restraint at home as well as abroad; once created, these fiduciary norms and duties can’t remain lifeless law, and unable to be enforced by any court in the world. This is especially true of prosecuting those individuals or groups that initiate wars of aggression, approve torture or violate other *jus cogens* norms and then have, so far, escaped from their day in court or justice. To end this era of lifeless law and individual impunity, the courts must act as an *active check and balance, one of their main reasons for existence*, to the abuses of executive or even legislative powers in their own or other lands. This is, as we have argued, the ultimate expression of sovereign self-determination.71 We will examine each of these critical elements in a fiduciary regime in the following sections.

So, we will review how such a truly effective minimal international legal order can be established. The law on the books must be fully enforced, or the national judicial capacity must be developed to do so by appropriate legislation, customary law and the comity of the courts to enable judges to do their job and ascertain the often compelling facts of a case. *Never again* should anyone suspected or seen to be committing war crimes, genocide or torture be able to hide behind the shameful shield of national sovereignty from prosecution in a court of law.

**ENFORCING EFFECTIVELY THE NUREMBERG LEGACY OF JUS COGEN NORMS: THE FIDUCIARY JURISDICTION OF THE COURTS.**

“*Under the Nuremberg trials process the vast majority of people were tried before the national courts of their own states.*”

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In order to enforce the fiduciary Law of Nations, the common legal inheritance from World War II of peoples from around the globe, national courts can and must exercise fiduciary jurisdiction to ensure full compliance with international law. *Simply stated, a fiduciary Law of Nations, now common to humanity and thus to all international, national or domestic courts, obviously requires the requisite fiduciary jurisdiction to ensure its enforcement.* It simply doesn’t make sense to have critical new laws on the book and no effective enforcement mechanisms; this is especially true of the gravest crimes imaginable as expressed in the Nuremberg legacy and other Post World War II legal developments.

In particular, enforcement of the Nuremberg legacy and *jus cogens* norms must become more effective to insure the international rule of law over the all too often international “law” of the fang and claw. The exercise of fiduciary jurisdiction by domestic courts can be one appropriate and evolutionary way to expand the necessary judicial capacity to ensure the enforcement of this law effectively. In turn, fiduciary jurisdiction is already exercised by many courts within the domestic arena and consist of the authority

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72 See Supra, “Promises to Keep” at note 22.
of the court to adjudicate cases that involve a contested fiduciary duty or trust or a question of fiduciary law. In fact, there is growing evidence that the international exercise of international fiduciary jurisdiction by domestic courts is already emerging, especially in reference to trade, human rights, aboriginal peoples, and shared public trusts.

So, the idea of fiduciary jurisdiction is certainly not new; domestic courts in a variety of countries have often asserted such jurisdiction for decades in individual, corporate or aboriginal nations and public trust cases. Many courts’ decisions typically deal with specific fiduciary duties, breaches of such duties, due process, statutory construction or unjust enrichment. In short, the fiduciary jurisdiction of the courts to adjudicate trusts and trust law—as well as the ensuing fiduciary responsibilities— is now a well-accepted practice of the judicature on the domestic level; in view of this, the same domestic courts can and must exercise a similar international fiduciary jurisdiction to insure that the rights of present


78Ibid. Also supra, at notes 73-75
and future peoples as both trustors and beneficiaries, as provided in the Law of Nations, are fully protected as well. Otherwise, the fiduciary legal inheritance of the World War II and the ensuing Law of Nations becomes a lifeless body of law, incapable of being observed or enforced except in very narrow and often random circumstances.

So, with the advent of the wartime and post-World War II revolution in international treaty and trust law, which significantly expanded international law as embodied in the Law of Nations, there must be a concomitant and enlarged juridical capacity to adjudicate effectively the vastly extended range of international law. Thus, the extension of fiduciary jurisdiction, already enjoyed by many courts within their domestic domains, into international law is a necessary implication of insuring effective legal and specifically judicial capacity to adjudicate and enforce, if necessary the greatly expanded range and scope of current and still evolving international legal norms.

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79 John Locke’s argument in his Second Treatise; the same individual as trustor and beneficiary is found since Roman law; see Boudreau, T,” (2012) The Law of Nations and John’s Locke’s Second Treatise: The Emergence of the Fiduciary Legal Order during World War II,” D’Souza, A. P. (Ed.), The Journal Jurisprudence, Volume Fifteen.

80 See Boudreau, “Promises to Keep,” supra., note 22 which argues that trusts are a source of international law.


Such a juridical capacity in fiduciary jurisdiction is already evolving, especially within the context of public trusts, and will undoubtedly continue; specific legislation by national authorities can certainly accelerate this trend to give judges the jurisdictional capacity they need to prosecute effectively the currently evolving and expanding wartime and post-World War II fiduciary \textit{Corpus Juris}. Specifically, national courts must exercise, by the appropriate legislative enactment or progressive customary law, the necessary international fiduciary jurisdiction required to adjudicate effectively and enforce the most grievous violations of the new international norms, as well as the traditional areas of public trusts. Only in this way can a global society of nation–states enjoy and actually experience the Rule of Law and not simply succumb to the rule of fear or might, which still prevails in many places throughout the world.

In short, such fiduciary jurisdiction of domestic courts will insure that the momentous legal legacy of World War II is alive and flourishing as the living law of the land; In particular, as we will argue below, every national court in the world already possesses, or should possess, the fiduciary jurisdiction to prosecute specifically \textit{jus cogens} violations of international law, especially those identified after World War II as the legal legacy of the fiduciary Law of Nations. This is especially true if there exists victims, survivors or relatives of the victims of war crimes or torture within the territorial jurisdiction of a state,


\textsuperscript{86} See supra, note 22.

\textsuperscript{87} Ibid., Andrei. Boudreau, “Promises to Keep,” in \textit{Advances in International Law}, supra at note 17
or if any of the above are nationals of a specific state. Beyond these concurrent jurisdictions, national courts must have the original authority from their legislative bodies or through customary international law to indict or request extradition for anyone suspected of violated the fiduciary Law of nations and specifically jus cogens norms.

These crimes include, as part of the Nuremberg legacy crimes against peace, war crimes and crimes against humanity. In this regard, it is important to note, as Judge Stephan Sfekas does in his excellent article “Taming the Furies,” that Allied Control Council (ACC) Order # 10 expanded the list of crimes to be tried at Nuremberg to include torture.88 We will go over a more complete list shortly. In this regard, it is important to note that, as we have seen, Blackstone envisioned such a role for domestic courts to uphold the Law of Nations prior to the narrowing definition of “international law” by Bentham, which gradually precluded such common domestic judicial review or engagement.89

Most importantly, such fiduciary jurisdiction of potential violators who are accused of violating jus cogens norms—as argued below—will insure, as the Allied promised in the context of Nazi atrocities in World War II at Moscow in 1943, that the arm of the law “will pursue them to the uttermost ends of the earth.” Yet, unlike the thousands of Nazis that successfully fled from justice after World War II, no one today suspected or accused of violating the most important norms of international law should enjoy safe haven within any domestic national jurisdiction (especially within their own!). In short, there is now a manifest erga obligo norm to prosecute or extradite such criminal suspects, or face international sanctions. When combined with the appropriate and important safeguards for the defense, which we will review below, the exercise of fiduciary jurisdiction within national courts could help close the legal gaps in the international enforcement of the hard-earned protections and rights embodied within the Law of Nations, consisting of both

88 See Sfekas, “Taming the Furies,” in Advances in International law and Jurisprudence, supra, note 2.
Treaty and Trust law, created as a result of the bloodiest war in human history. Otherwise, the post-World War II Corpus Juris, purchased at such a terrible price, becomes a “toothless tiger,” and lifeless law.

Since Roman times, traditional international law has laws recognized the existence of “Hostis humani generis,” or the enemy of humanity. Beginning with pirates, this category of individuals to be arrested on sight expanded over the ages to slavers and those engaged in the slave trade. In modern times, it undoubtedly include those who violate jus cogens norms, including any or all of the three criminal categories established at Nuremberg, as well as avowed Nazis and Drug lords or the illicit kingpins who organize criminal cartels that include the drug trade, white slavery and the underground sale of arms. In particular, Hostis humani generis applies to terrorists or state leaders who kill innocent civilians or prisoners of war. Furthermore, sanctions against states for harboring known or suspected criminals, such as violators of jus cogens, norms should be robust, swift and certain. The contemporary nightly news broadcasts of bombed out cities, terrorist attacks, or dozens of more dead civilians including women, children the old and the infirmed are simply unacceptable as the current or continuing “norm” of international life. Those responsible for such ongoing outrages must be brought into a court of law to face justice anywhere in the world.

In the meantime, rogue states that harbor such suspected war criminals or known penetrators of jus cogens violations are, in essence, de facto states in deep violation of post-World War II international law and their subsequent legal obligations under the Charter of the United Nations especially “with respect to the maintenance of international peace and security.” As such, a de facto state should, under Article 18 of the UN Charter, temporarily or indefinitely lose their voting rights in the United Nations—at the very least—until such persons are tried domestically, or extradited for an impartial trial in a place
agreed to by all parties concerned. In the end, war criminals will be accusing each other of deep violations of jus cogens norms, which should be better than simply doing or enforcing nothing, nothing at all, in international law, especially as poor or powerful states continue to rain bombs and terror down upon innocents. This is especially true if such a rogue state harbors hundreds of suspected or actual war criminals, which actually happened in the harboring of Nazi henchmen after World War II. Humanity simply can’t afford such a “Great Escape” again……

To prevent such a dismal recurrence, national courts must exercise the appropriate fiduciary jurisdiction to adjudicate cases involving contested domestic or international fiducial duties, norms or obligations, not only of corporations, but also of states, or individuals, including residents or temporary residents within each’s respective requisite territory. Such international jurisdiction must include any contested issue or interpretation of the fiduciary Law of Nations, as Blackstone intended before Bentham’s conveniently colonial conception of international law; this is especially true concerning the Courts’ enforcement of jus cogens norms that emerged to legal prominence only after World War II; so, if an individual or group of suspects enter into the territory of a state, even as temporary residents or tourists, the respective national court must exercise fiduciary jurisdiction to order the arrest or extradition of such an person or persons as an obligation erga omnes duty to its own people, as well to the international community as a whole. If such court authority is doubted, then national legislatures should give this specific power of fiduciary jurisdictions to their courts which in the judgment of these authors national courts already possess. The “era of

90 UN Charter, Article 18 states, in part: “Decisions of the General Assembly on important questions shall be made by a two-thirds majority of the members present and voting. These questions shall include: recommendations with respect to the maintenance of international peace and security… the suspension of the rights and privileges of membership [which includes voting], the expulsion of Members, questions relating to the operation of the trusteeship system, and budgetary questions. Such states should first be given a warning, and a chance to redeem themselves, before any provisions of Article 18 of the Charter are invoked.

91 See, supra, notes 61-63.

“immunity” by powerful leaders, drug or war lords as well as terrorists from killing large numbers of civilians must end by the requisite national legislative approval or the judiciary’s subsequent use of the appropriate authority such as customary international law to use fiduciary jurisdiction in national courts.

So, it seems to be natural and necessary development of judicial capacity, as part of the legal legacy of World War II, that every national court in the world can now exercise fiduciary jurisdiction to investigate and, if warranted, indict, request extradition, adjudicate or refer to the ICC any individual suspected of committing a violation of a fundamental *jus cogens* norm, especially those norms resulting from the priceless Nuremberg legacy. Such fiduciary jurisdiction is already emerging and being actively used in courts throughout the world, especially in reference to trade, human rights, aboriginal and public trusts. Thus, the evolution and expansion of fiduciary jurisdiction to adjudicate fundamental *jus cogens* norms by national courts can be, or soon will be, seen as a natural development of customary international law. This is especially true if national courts first use fiduciary jurisdiction concurrently with their treaty obligations under the Rome Statute to investigate suspected violations against *jus cogens* norms and, if warranted, report their findings and request the ICC’s involvement under Article 14 of the Rome Statute. Only in this way will the Rule of Law in international affairs be fully and finally obtained.

Traditional international lawyers and scholars might scoff as such an idea; but the law is and must be evolving all the time, or it slowly dies from an undeserved death.

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Furthermore, the jurisdictional authority and power of the court is always evolving as well; there is perhaps no greater example of this in recent legal history than the transformation of equity courts into the fiduciary jurisdiction of regular courts.\textsuperscript{95} Until relatively recently, most courts in the common law or United States legal tradition recognized traditional courts of equity that, in turn exercised explicit equity jurisdiction over fiduciary issues; specifically, courts of equity existed in the United Kingdom and the United States right up to modern times and \textit{often adjudicated cases involving trust law or fiduciary responsibilities}.\textsuperscript{96} For instance, the Court of Chancery operated also as a court of Equity throughout the Middle Ages in England and up to modern times.\textsuperscript{97} Favored by the people who often felt left out by the regular courts, the Court of the Chancery gradually assumed equitable jurisdiction; so, The Court dealt with verbal contracts,\textsuperscript{98} matters of land law and matters of trusts.\textsuperscript{99}

In short, the various types and scope of jurisdictions exercised by courts are not a fixed feature the history of the law; a court authority to exercise jurisdiction has evolved, changed and expanded sometimes due to legislative action and other times due to the inherent demands of establishing or improving a judicial system to meet the demands faced by the court in effectively enforcing the law.\textsuperscript{100} Such a transformation occurred with
the example of the equitable jurisdiction, which was traditionally exercised, as we have seen, by the Chancery Court or other courts of equity; the equity jurisdiction of these courts in a variety of countries was gradually turned over during the past 100 years and assimilated into other courts.\textsuperscript{101} Thus, most contested equity issues involving fiduciary or trust law now comes under the authority or the fiduciary jurisdiction within the already existing and regular local, regional or national courts.

This is a significant historical evolution of the court’s power since fiduciary law is certainly not static; in fact, it is one of the growth areas of court case loads and adjudication; as Tamar Frankel states: “fiduciary law is becoming more important as it responds to basic changes in…society. Courts, legislatures, and administrative agencies increasingly draw on fiduciary law to answer problems caused by social changes.”\textsuperscript{102} This is especially true in international law as well when the courts are, very suddenly presented (historically speaking) with a vast new \textit{Corpus Juris} and the fiduciary Law of Nations as the legal legacy from World War II.\textsuperscript{103} As such, the fiduciary jurisdiction of the national court must, once again, be enlarged and expanded to encompass and legally regulate the very worst crimes and outrages in international law, especially if the suspected perpetrators are found within their territory or immediate reach.

In other words, the scope and complexity concerning the rule of law grew as courts became responsible for the observation and enforcement of the vast new World War II

\textsuperscript{101} Ibid, see, supra, notes 96-99
\textsuperscript{103} See, supra, note 22
So, as the reach of the law expands, so too must the court’s jurisdiction, or else the Rule of Law becomes a dead letter, impotent and incapable of full or effective adjudication or enforcement. It simply makes no sense, legal or otherwise, to recognize or adopt a vast body of new laws, either as treaty or trust law, and then provide or employ the pre-World War II now antiquated and extremely limited jurisdictional capacity, as well as clearly outdated and inadequate juridical authority, to prosecute possible violations of such law, especially those shocking violations that are so egregious that they threaten the very fabric of the international community. So, to establish a minimal international legal order, national courts must possess the requisite authority from their national legislature or customary law to exercise the fiduciary jurisdiction necessary to investigate, adjudicate and decide the most critical questions of domestic or international law, namely the suspected violation of jus cogens norms, especially those based on the Nuremberg legacy.

DE JURE JUDICES: “THE JUDGES ANSWER TO THE LAW.”

NATIONAL FIDUCIARY JURISDICTION OVER JUS COGENS NORMS.

“To regard the rule against torture as jus cogens and erga omnes underlines its fundamental place in the policy of international law.”

Lord Browne-Wilkinson, Ex parte Pinochet 3, p 21

104 Ibid.
Since the end of World War II, the legal definition and scope of *jus cogens* norms have been increasingly investigated by legal scholars, states and policymakers.\(^{106}\) In fact, one of my legal mentors, Professor and later legal counsel to the United Nations, Eric Suy, believed that: “namely, to consider *jus cogens* not [simply]… as law but as the social infra-structure providing the basis of a real international public order.”\(^{107}\) As we shall see, his idea has far reaching implications and consequences concerning a state’s basic legitimacy as a *de jure* sovereign state; specifically, the observance and enforcement of *jus cogens* norms as well as the fiduciary Law of Nations are now the basic preconditions of a state’s legitimacy as a *de jure* state. Other scholars have significantly progressed this idea further and argued that *the very definition of sovereignty in international affairs depends on a state observing *jus cogens* norms.*\(^{108}\) Advancing this idea, I argue here that true *sovereignty is defined by progressive degrees of self-determination, culminating in a truly independent judiciary that insures the observation and enforcement, if necessary, of *jus cogens* norms*. We will come back to this idea shortly.

\(^{106}\)See, for example: Suy, E. (1967). The concept of *jus cogens* in public international law. In *Conference on International Law, Papers and Proceedings-The Concept of Ius Cogens in International Law*. Eric Suy was a true legal scholar and gentleman who helped to mentor my first publication in international relations and law in 1980 while he was legal counsel and Under Secretary-General of the United Nations, serving as Chief of the UN Legal Affairs Office, The United Nations. Also: Fitzmaurice, *The General Principles of International Law Considered from the Standpoint of the Rules of Law*, 92 RECUEL DES COURS 120 (1957). Further, see Fitzmaurice’s view on *jus cogens* set forth as a Special Rapporteur to the International Law Commission of the United Nations, infra note 35. Also: Verdross, *Jus Dispositivum* and *Jus Cogens in International Law*, 60 AM. J. INT’L L. 55, 58 (1966) [hereinafter cited as Verdross]. Also see, infra, note 186 and192-193

\(^{107}\) Ibid. also see: Eric Suy: Carnegie Endowment for International Peace, *Conference on International Law, Lagonissi, April 3-8, 1966, Papers and Proceedings, THE CONCEPT OF JUS COGENS IN PUBLIC INTERNATIONAL LAW* 85, 103 (1967) (Summary Record). Finally see: Whiteman, M. M. (1977). *Jus cogens* in international law, with a projected list. *Ga. J. Int’l & Comp. L.*, 7, 609. I am in debt to Prof. Whitman for her historical summary of legal scholarship on *jus cogens*, including then Prof. Suy’s contributions. Eric Suy was best of friends with my international law professor in grad school, Fred Goldie, who introduced me to Mr. Suy in 1980. We then worked together all during my subsequent work for the Carnegie Council in NYC as Director of, first, the “UN Research Project” and then the “Crisis Control Project (1982-1985).”

\(^{108}\) See: For an interesting, independent and similar argument that uses Kant, not Locke and doesn’t refer to Fiduciary Jurisdiction, see: Criddle, E. J., & Fox-Decent, E. (2009). A fiduciary theory of *jus cogens*. *Yale J. Int’l L.*, 34, 331
Despite its recent (Post World War II) prominence in international law, the idea of *jus cogens* has an ancient pedigree in international law;\(^{109}\) specifically, in his excellent article INTERNATIONAL PEREMPTORY NORMS (*JUS COGENS*) AND INTERNATIONAL HUMANITARIAN LAW, Judge Rafael Nieto-Navía\(^*\) points out that the idea of *jus cogens* in international law has a long legal pedigree dating back to the Roman Stoics.\(^{110}\) However, as the Judge points out, the origins of the modern legal recognition of *jus cogens* norms is Vienna Conference held in 1969 where a Consensus was finally reached as to a definition during the (“the Vienna Conference”) and this was codified in Article 53 of the Vienna Convention on the Law of Treaties 19695 (“the Vienna Convention”), which states:

> For the purposes of the present Convention, a peremptory norm of general International law is a norm accepted and recognized by the international Community of States as a whole as a norm from which no derogation is permitted. And which can be modified only by a subsequent norm of general international law having the same character.\(^{111}\)

In his article and analysis, the Judge is reflecting upon the role of humanitarian law as *jus cogens* norm; this is not an academic question for him. Judge Nieto-Navía was part of the distinguished panel of judges that presided over the Appeals Chamber for the International Criminal Tribunals for the former Yugoslavia (ICTY) and Rwanda (ICTR). During the tribunal, he proved to be a powerful juridical personality and an insightful adjudicator of complex legal questions.\(^{112}\) So, undoubtedly, this article represents a personal and professional quest to probe deeper into the legal legacy of World War II, as embodied in the 1949 Geneva Conventions.

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\(^{110}\) Ibid.

\(^{111}\) Ibid.

\(^{112}\) See, for instance: R, Nieto-Navía, Introductory Notes (to the Jurisprudence of the ICTY in 2006), 7 Global Community YILJ 367 (2007-1)
In Judge Nieto-Navia’s article, after conducting a rigorous analysis concerning the 1949 Geneva Conventions, he concludes that based on a strict interpretation of *jus cogens*, only those Humanitarian Law principles underlying Common Article 3 of the Conventions, can be identified as having reached the relevant standard of *jus cogens*; specifically, common Article 3 deals with the most important protections for both civilians and combatants who have laid down their arms, or wounded and detained including freedom from violence to life and person, in particular murder of all kinds, mutilation, cruel treatment and torture, outrages upon personal dignity, in particular humiliating and degrading treatment, and the passing of sentences and the carrying out of extra judicial executions.\(^{113}\) It goes without saying that Bosnian Serbs and their supporters committed outrages and violations of all of these protections in their genocidal assault against the Bosnian people.\(^{114}\)

The Bosnian War served as the grim inspiration for the subsequent exploration and legal archeological analysis that led to the current exposition of this essay and subsequent book on the Law of Nations as well.\(^{115}\) Another person who played a critical legal role during the Bosnian War is Prof. M. Cherif Bassiouni who served as Former Chairman, United Nations Commission of Experts Established Pursuant to Security Council Resolution 780 (1992) to Investigate Violations of International Humanitarian Law in the former Yugoslavia.\(^{116}\) Like Judge Nieto Navia, Prof. Bassiouni is an accomplished international jurist and his voluminous works have been quoted in court cases around the world. Prof.

\(^{113}\) Ibid.


\(^{115}\) My savage inspiration for writing the Law of Nations and co-authoring this essay was the Bosnian War from 1992-95.).

Bassiouni has also extensively analyzed the nature of *jus cogens* norms, especially those situations that deal with criminal violations in his article *INTERNATIONAL CRIMES: JUS COGENS AND OBLIGATIO ERGA OMNES*.\(^{117}\) In this article, Prof. M. Cherif Bassiouni elaborates upon the meaning and nature of Jus Cogens, norm stating that:

International crimes that rise to the level of *jus cogens* constitute *obligatio erga omnes* which are inderogable. Legal obligations which arise from the higher status of such crimes include the duty to prosecute or extradite, the non-applicability of statutes of limitations for such crimes, the non-applicability of any immunities up to and including Heads of State, the non-applicability of the defense of “obedience to superior orders” (save as mitigation of sentence), the universal application of these obligations whether in time of peace or war, their non-derogation under “states of emergency,” and universal jurisdiction over perpetrators of such crimes.\(^{118}\)

These are critical implications of the obligation to prosecute violators of *jus cogens*; but it doesn’t yet answer: “What precisely are the modern category of *jus cogens* norms? Unfortunately, international scholars and states can’t agree on the specific and inclusive content of such a list of *jus cogens* norms.\(^{119}\) In contrast, we can and do argue for a minimalist core content or list, at least for now, that contains the critical principles contained in the World War II *Corpus Juris*, identified in Part I, constitute an indisputable basis for identifying Jus Cogen including the norms such as Self Determination, as articulated in the Atlantic Charter, plus all three crimes identified in Article Six of the Nuremberg Charter, as well as the underlying principles of the Genocide or Torture Conventions.\(^{120}\) In addition, a “Minimal Core Group (MCG) of *jus cogens* norms must include, as argued by Judge Nieto-


Navia, the legal norms and principles found in Common Article 3 of the Geneva
Conventions. Furthermore, the various types of “Crimes against Humanity” listed and
elaborated upon in Article 7 the Rome Statue, including racial discrimination as the
inevitable evolution of the living legal of World War II should be recognized as *jus cogens*

norms as well.

Finally, beyond this compelling and convincing list, we would also argue that, the wartime
pristine norm of strict “proportionality” is *jus cogens*, based in part on the iron law of
“reciprocity” in international politics and affairs; this primitive reasoning can be simply
stated as “What-ever right you claim to have or actually exercise, at that very same time
and moment, you also give your worst enemy.” For instance, this ‘iron law’ of
reciprocity provides much of the incentive to observe the 1949 Geneva Conventions
among the militaries of the world since their own soldiers may fall into the hands of their
enemies. This is, admittedly, a political “law” of last resort, which attempts to limit—even
marginally, the savagery of war. So, “disproportionate proportionate response” to a
military attack or provocation is, I would argue, a violation of a basic *jus cogens* norm;
so, when one side in an armed conflict grotesquely and disproportionately attacks or retaliates
against the civilians of one enemy—as the Nazis did throughout Europe and especially in

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121 Such a minimalist list can, in the nature of law, be capable of growth, evolution and development.
Also, to see how the “Meta Rules of Reciprocity shapes international law, read the insightful article at: Fon,
139(1), 76-92. Finally, the US military has traditionally recognized the importance of reciprocity and the
observance of the Geneva Conventions to the safety of its own personnel: Seesupra, note 7. See, for example:
The *American Journal of International Law*, 46(3), 393-427.
124 For the origins of this principle or proportionate response or reciprocity in law, see: Carnahan, B. M.
*American Journal of International Law*, 213-231.Also see: Brown, B. L. (1976). The Proportionality Principle in
the Humanitarian Law of Warfare: Recent Efforts at Codification. *Cornell Int’l L.J.*, 10, 134.; Finally, see the
Press.
Yugoslavia—then the offending state, or sub state actor is violating a *jus cogens* norm as well.\textsuperscript{125}

The idea of strict “proportionality” in war is actually a throwback to the barbaric code of the blood feud practiced by clans, tribes and even kingdoms since time immortal—namely, that ‘if you kill one of mine, I have the right to kill one of yours.’ The moral maxim for such retaliation is expressed in the ancient idea of an “eye for an eye.” This is the iron law of reciprocity at it most primitive at work, where further harm is sought as justice for harm done. As such, though it is supposedly based on the grim arithmetic of just retaliation, the practice was seen as somehow “fair” in barbaric societies; even so, given human beings’ become emotionally engaged as non-rational beings, to say the least, such blood feud justice often lead to escalation and almost endless retaliation that could span generations.

Despite this disreputable pedigree, the idea of strict “proportionality” endures today and is often cited or used as a basis for “just” or even “legal” retaliation” in war. It is essentially repaying an evil with an evil. As such, this type of measured reciprocal and non-escalatory retaliation can be described by the Latin words: *Ad quod damnum* or *ad damnum* which means "according to the harm" or "appropriate to the harm" since, based on the iron law of reciprocity in international relations and law, states can’t claim a right to kill or torture that they then deny their worst enemies. So, strict or ad damnum proportionality is retaliation by a state against another state or sub state actor that retaliates “appropriate to the harm.”

\textsuperscript{125} “In some occupied areas in which the Nazis had to contend with well-organized and active guerrilla units, they applied a simple rule: they would massacre one hundred nearby civilians for every German soldier killed; fifty for every one wounded. Often this was a minimum that might be doubled or tripled. They thus killed vast numbers of innocent peasants and townsfolk, possibly as many as 8,000 in Kragujevats,\textsuperscript{5} 1,755 in Kraljevo,\textsuperscript{6} and overall 80,000 in Jajinci,\textsuperscript{7} to name just in a few places in Yugoslavia alone.” Quoted from DEMOCIDE: NAZI GENOCIDE AND MASS MURDER at: https://www.hawaii.edu/powerkills/NAZIS.CHAP1.HTM.From: From Chapter 1 in R.J. Rummel, Democide: Nazi Genocide and Mass Murder, 1993. Transaction Publishers.
But if the state or terrorists go far beyond this original number of victims and claims the right, either intentionally or as “collateral damage,” to kill dozens or hundreds in response, and then actually does so—killing hundreds if not thousands of the attacking state’s civilians—then a jus cogens crime has most certainly been committed and should be prosecuted by any national or international court in the world. For instance, the Saudi lead coalition is starving an entire civilian population of millions of civilians—infants, pregnant women, fathers, mothers and children—in Yemen, and there is hardly a peak of protest in the West. Unless adequate aid—food, water, medical supplies and gasoline is allowed to enter the country, this is a massive war crime in the making.

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127 See: This is in danger as becoming the norm as military strategies, use of “Shock and Awe,” in the US invasion of Iraq in 2003, approved by senior civilian leaders in the second Bush administration, (entitled “Shock and Shame” by its critics), or the Israeli policy of the Dahiya or Dahya doctrine used in Lebanon (2006) or in the subsequent attacks on the Gaza in 2008-9, 2011 and 2014. At the same time, rocket attacks into Israel fired by forces under Hamas control from the Gaza were indiscriminate attacks against civilians and undoubtedly constitute war crimes as well. Also see: Goldstone, R. (2009). United Nations Fact Finding Mission on the Gaza Conflict. Goldstone later modified his remarks, which were seen as a retraction by some, but the other three authors of the report stand by the report. See: "UN Gaza report co-authors round on Goldstone", *The Guardian, 11 April 2011*; Also see: Amos Harel (5 Oct 2008). "ANALYSIS / IDF plans to use disproportionate force in next war". *Haaretz* Erakat, N. (2014). Five Israeli Talking Points on Gaza—Debunked. *The Nation, 25*.; Khalidi, R. I. (2014). From the Editor: The Dahiya Doctrine, Proportionality, and War Crimes. *Journal of Palestine Studies, 44*(1), 5-13.; Finally, see: Byman, D. (2011). *A high price: the triumphs and failures of Israeli counterterrorism*. Oxford University Press.

128 See: Civilian Deaths Surge Amid Wars In Syria and Yemen - Newsweek


Apr 12, 2018;UN Warns of Increasing Civilian Deaths in Yemen Violence | Al Bawaba

https://www.albawaba.com/.../un-warns-increasing-civilian-deaths-yemen-violence-10...

129 See, for example, US senators, among others, brought these issues up before rather sanguine administration officials during recent hearings on Yemen; US FOREIGN RELATIONS COMMITTEE
Such murderous attacks causing wildly disproportionate civilian casualties is sadly becoming the norm in so called modern warfare, as recent “wars” in Iraq, Syria, Lebanon, Gaza and now Yemen grimly attest. The rise of ISIL in Iraq and Syria after the invasion of Iraq in 2003 and its withdrawal in 2011 added thousands more civilian casualties to the ghastly toll. The Latin term most apropos here for describing the willful destruction of an enemy through wildly disproportionate and excessive retaliation is "debellatio" or "debellation" meaning the "defeating, or the act of conquering or subduing," literally "warring (the enemy) down", from Latin bellum "war"). 130 (Or, in Spanish, it could be simply described as El Diablo proportionality.) So, the retaliatory state seeks not a numerically-basedstrict or ad damnum proportionality; rather, it seeks to inflict such massive death and death and destruction upon an opposing state or people that goes far beyond any measured or “proportionate” response to the original provocation; such massive civilians casualties are meant to deter and thus seeks other and greater military objectives such as future preemption through the debellaltio and disproportionate destruction of another state or people; in short, the attacker often hopes to deter future and thus hypothetical attacks by inflicting massive civilian causalities as well as damage or destruction of the social infrastructure, such as water supplies, power, etc. that makes any social life possible.

At the same time, military leaders usually have other admittedly painful options including the use of ground troops in many planned attacks, but advanced weaponry states seem to be using bombs especially in urban areas rather than risk more military casualties. They can certainly choose to do this, but then they must be ready for the rather ruthless math

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130 See: Benvenisti, Eyal (2012), The International Law of Occupation, OUP Oxford, p 161. In modern terms, such debellation designates the end of war caused by complete destruction of a hostile people or state, which is not what the original meaning in Latin; yet, the oroginal meaning is emphasized here, of warring or wearing the enemy down by seeking its destruction.
of proportionate causalities that provides the primary “facts” of ad damnum proportionality; yet, if such attacks are factually found to be wildly disproportionate, they must expect to face the ensuing charges of war crimes against innocent civilians as a *jus cogens* norm.

These constitute the bare minimum of any kind of world or livable international order; without observing these basics preemptory norms, *or prosecuting and punishing those that violate them*, no civilized world is possible, none at all; instead, we have a Hobbesian “war of one against all” in which no life, liberty or family or social life is possible; international relations would then descend into ceaseless war and preparation for war on greater and far more destructive levels than the world has so far seen. Without these minimum and enforceable norms, the world becomes a wasteland of warlords presiding over states or terrorist groups, as well the dead, mangled and tortured or wounded with lifelong scars. So, to help prevent this, at the very minimum, national regional courts throughout the world should have fiduciary jurisdiction over these *jus cogens* norms.

Added to these are the ones identified by Blackstone as the “principle offenses against the Law of Nations where he states: “THE principal offense against the law of nations, animadverted on as such by the municipal laws of England, are of three kinds; 1. Violation of safe-conducts; 2. Infringement of the rights of ambassadors; and, 3. Piracy.”

Prof. Bassiouni came up with a very similar list of Jus Cogen norms (to those listed above), and even indicates a method for identifying them as such, stating:

> The legal literature discloses that the following international crimes are *jus cogens*: aggression, genocide, crimes against humanity, war crimes, piracy, slavery and slave-related practices, and torture. Sufficient legal basis exists to reach the

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conclusion that all these crimes are part of *jus cogens*. This legal basis consists of the following: (1) international pronouncements, or what can be called international *opinio juris*, reflecting the recognition that these crimes are deemed part of general customary law;21 (2) language in preambles or other provisions of treaties applicable to these crimes which indicates these crimes’ higher status in international law;22 (3) the large number of states which have ratified treaties related to these crimes;23 and (4) the *ad hoc* international investigations and prosecutions of perpetrators of these crimes.” 132

It is worthy of notice that many of these crimes identified above were also listed in the World War II Corpus Juris outlined above, including the Nuremberg Charter, such as crimes against peace – listed as “aggression” here- or crimes against humanity, the Geneva Conventions i.e. Torture, and Genocide.133

At the same time, it should be pointed out that the Rome Statute’s statement on the contents and characteristics of Genocide, while reflecting the language found in the Genocide Convention, is rather limited and confining, especially in terms of the original intent of it progenitor’s Raphael Lemkin.134 Lemkin tirelessly lobbied for a more encompassing definition of Genocide that included “the destruction of racial, religious, or national groups” that had occurred in the immediate past.135 In fact, Lemkin believed that


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the concept of genocide, which he coined and pioneered, was much more encompassing that the limiting language that ended up in the Convention the Prevention or Punishment of Genocide. Specifically, he thought that Genocide should include any act by a state designed to “cripple permanently” a human group including the destruction of its cultural or artistic works,” or “a coordinated plan of different actions aiming at the destruction of [the] essential foundations of the life of national group,” \(^{136}\) with the ultimate aim of annihilating the group in whole or in part; such coordinate plans are carried out separately or together in such a way that denies any such group the daily requirements for life ethnic groups, such as the Armenians.\(^{137}\) Unfortunately, the “partial” aspect of a genocidal assault seems to be largely left out of any subsequent legal discussions or cases.

This wider scope of Lemkin original intent is represented rather weakly in the Rome Statute in Article 6 which includes paragraph (b) Causing serious bodily or mental harm to members of the group (c) “Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part.” In other words, the ‘coordinated plan by a state party need not result in the destruction of the entire group; it can be aimed at making life unbearable for a part of the group under its control, inflicting traumatic mental or bodily harm upon members of a group, and thus causing their destruction, even in “part,” as a functional society.

This same language is also found in the Genocide Convention; so, in honor of the original intent of Raphael Lemkin, creator and founder of the Genocide Convention, his original intent—to the extent that it is recognized in the Convention to Prevent or Punish Genocide as well as the Rome Statute -- should be regarded as jus cogens norms as well. In short, the idea that the entire group must be facing intentional physical destruction in order for it to be called

\(^{136}\) See supra at note 136. These were certainly factors as well in the Bosnian War; See, Lemkin (1947) and Cooper (2008).

\(^{137}\) Ibid.
“genocide” is simply false, as the language of the Rome Statute and Genocide Convention clearly states. Yet, the “intent” to destroy the whole group became a misguided legal issue in the ICJ adjudication of war criminal suspects in the aftermath of the Bosnian War of 1992-1995.138

Given this, Prof. Bassiouni then asks the key question: With respect to the consequences of recognizing an international crime as *jus cogens*, the threshold question is whether such a status places *obligations erga omnes* upon states or merely gives them certain rights to proceed against perpetrators of such crimes? He then answers this critical inquiry, stating:

This threshold question of whether *obligatio erga omnes* carries with it the full implications of the Latin word *obligatio*, or whether it is denatured in international law to signify only the existence of a right rather than a binding legal obligation, has neither been resolved in international law nor addressed by ICL doctrine. {So} To this writer, the implications of *jus cogens* are those of a duty and not of optional rights; otherwise *jus cogens* would not constitute a peremptory norm of international law. Consequently, these obligations are non-derogable in times of war as well as peace.

Thus, recognizing certain international crimes as *jus cogens* carries with it the duty to prosecute or extradite, the non-applicability of statutes of limitation for such crimes, and universality of jurisdiction over such crimes irrespective of where they were committed, by whom (including Heads of State), against what category of victims, and irrespective of the context of their occurrence (peace or war). Above all, the characterization of certain crimes as *jus cogens* places upon states the obligation *erga omnes* not to grant impunity to the violators of such crimes.139 [Emphasis Added]


139See supra, note 134.
In view of this, the global judicature has the absolute DUTY to prosecute or extradite, at the very least, suspected violators of *jus cogens* norms; in fact, this is a primary justification for national courts to exercise fiduciary jurisdiction to enforce the relevant World War II *Corpus Juris*; this is a type of “local” jurisdiction—though he did not call it this—as originally envisioned by Blackstone. Furthermore, this duty to prosecute locally is logically and legally implied, and even necessary, in Prof. Bassiouni’s argument namely that: “the implications of *jus cogens* are those of a duty and not of optional rights; otherwise *jus cogens* would not constitute a peremptory norm of international law. Consequently, these obligations are non-derogable in times of war as well as peace.” In short, if we are deadly serious about insuring the observance of the most basic, preemptory norms of national life and international law, then the appropriate international or national court must have the necessary judicial capacity, such as original and fiduciary jurisdiction to prosecute basic *jus cogens* norms. Otherwise, we are simply facilitating another “Great Escape” of suspected or actual war criminals who have violated fundamental peremptory norms.

In short, under the current Law of Nations, the courts in every nation has *obligation erga omnes* to exercise *original and fiduciary jurisdiction when the issues involves the upholding the Minimum Core Group of *jus cogens* norms*—many of which evolved directly out of the humanity’s horrifying experiences in World War II. As originally promised by the Allied governments in the Moscow Declarations of 1943, there should be nowhere on Earth where suspects of such violations can hide. To prevent this, individuals or entire groups suspected of such outrageous crimes must be held legally liable and accountable in a court of law anywhere in the world.

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140 Ibid.
141One Scholar argues for a special international court of Genocide as both an enforcement and deterrent purposes; see: CAN SOVEREIGNS BE BROUGHT TO JUSTICE? THE CRIME OF GENOCIDE’S EVOLUTION AND THE MEANING OF THE MILOSEVIC TRIAL. Advancing this further, I am arguing here that a *combination* of such international and national courts is the best way to achieve enforcement and deterrence.
Thus, every state, every municipality and every national court has an obligation **erga omnes** to either *try in its own jurisdiction or extradite* those, who upon preliminary proof (that overcomes the fiduciary shield-below), are suspected of violating jus cogens norms.\(^{142}\) Another option is to refer the case to the Prosecutor of the ICC with, if warranted, a recommendation to prosecute, in accordance with Article 14 of the Rome Statute. Thus, the lack of an extradition treaty is or should be no bar to a regional, national or municipal court from exercising original and fiduciary jurisdiction over suspects accused of violating peremptory legal norms. In particular, fiduciary jurisdiction provides the courts with original jurisdiction involving the violations of *jus cogens* norms or other serious violations that threaten the very existence of the international legal order. So, in this sense, fiduciary jurisdiction is almost exactly similar to universal jurisdiction except *that it is self-executing within a country's own courts.* (We will review this argument in the next section.) Such jurisdiction is absolutely essential for the courts to realize observance of and, if need be, compliance with the Law of Nations, as well as to insure punishment of its transgressors.

Only by the full and rigorous observance, adjudication and, if necessary, enforcement of such norms is any kind of meaningful domestic and international social or political life possible. So, all societies share this basic interest in the rule of law, even though their governments may not; if the latter is the case, such a lawless government thus pushes their state into a *de facto* status deserving of diplomatic, economic or added sanctions and progressive isolation from the world. If their leaders or citizens want to travel abroad, for instance, the *de facto* state must insure that it follows the relevant Rule of Law.

\(^{142}\)For an interesting, independent and similar argument that uses Kant, not Locke and doesn’t refer to Fiduciary Jurisdiction, see: Criddle, E. J., & Fox-Decent, E. (2009). A fiduciary theory of jus cogens. *Yale J. Int’l L.*, 34, 331.
This is especially true in the so called “Modern Age;” in view of the growing atrocities of the modern world, this emerging Age of Extremes, the international, regional, national and indigenous courts must seek reliable evidence and when warranted, indict those individuals responsible for such violent atrocities.\textsuperscript{143} The terrible era of state or individual impunity for killing innocent civilians and other war crimes must end, or the world could slip into a new and deeper dark age from which only more blood, bones and ruins will emerge. As Gideon Gottlieb once stated, the “decline of our civilization may well be measured by reference to the growing gap between professed human ideas solemnly affirmed in international instruments and the growing brutalization of civilians in armed conflict.”\textsuperscript{144}

So, the invocation of domestic courts of fiduciary jurisdiction is necessary and fully warranted in order to end the apparent impunity of leaders of state sponsored or group terrorism who violate basic \textit{jus cogens} norms. Of course, the administration of law can be abused; yet, with due diligence and the ensuing comity of the court systems throughout the world, this is a fixable problem and does not in anywhere compare with the continuing carnage and horrible spectacle of lifeless and broken bodies of innocent men, women and children in a current war zone such as Syria, Yemen or Myanmar.

Yet, admittedly, the invocation of fiduciary jurisdiction can also be a dangerous two–edged sword, and used to hunt down state enemies, political opponents or people unpopular with the prevailing regimes. So, in order to help prevent this, the relevant regional or domestic court invoking such jurisdiction to prosecute for the possible violation of \textit{jus cogens} norms must then insure that the defendant or defendants enjoy full constitutional or international rights to a counsel, as well as the pre-trial presentation of clear and

\textsuperscript{143}I first use the term “Age of Extremes” in Paradigms Lost and Found: the Emergent International Legal Order. Supra, at note 70.

\textsuperscript{144}Cited in Thomas Boudreau, Protecting the Innocent: Enhancing the Role of the United Nations in Natural Disasters and other Disaster Situations. Carnegie Council, 1983. The first copy given to UN Secretary-General who then used some of the legal methodologies advocated in the booklet in the Iran-Iraq war. This story is told in my subsequent book Sheathing the Sword, Greenwood, 1991.
compelling public evidence. If this suffices, then the defendant or defendants, who must be present within the territory of the adjudicating court, if only temporarily, are entitled to all the rights of defense governed by the international norms of due process in a public trial accessible to a free press; we will review these safeguards in the following section on the Fiduciary Shield.

THE FIDUCIARY SHIELD: PROTECTIONS AND DUE PROCESS FOR THE ACCUSED

Fiduciary jurisdiction is not a legal license to run amok in domestic or international affairs, and try anyone or anyone that a current ruling elite of a country may dislike. It can become a dangerous weapon for a rogue regime if there aren’t carefully applied principles and guidelines that govern its use; otherwise, its invocation [of fiduciary jurisdiction] is a non-legal act and invites, at the very least, diplomatic or economic reprisal. In view of this, the contested yet useful legal doctrine of the Fiduciary Shield (FS) can provide one set of invaluable safeguards to the courts’ possible jurisdiction, as well as provide internationally recognized legal rights and safeguards to the accused. Such a FS is often used in domestic jurisdictions. Specifically,

In essence, the inquiry as to whether a court may assert fiduciary jurisdiction over a resident or nonresident defendant temporarily within the territory governed by the state of the adjudicating court, entails a four-fold analysis. First, a court must determine in a public pre-trial hearings subject to cross examination and expert witnesses for the potential defense whether the applicable Law of Nations or a state long-arm statute authorizes the assertion of such jurisdiction under the given set of facts. Second, the application of those facts must satisfy the constitutional

demands of due process as a General Principle of International Law. Third, does the defendant or defendants possess any current absolute or functional international immunities that the court in question must defer to or respect? Fourth, does the defendant enjoy the same rights as someone being indicted or prosecuted domestically or in a regional Court? Such rights must include internationally recognized protections including the right to a public trial, the right to counsel, cross examination, and appeal.146

To insure this fourfold test of fiduciary jurisdiction, any court must first obviously ask a series of critical factual and due process questions, including: Is there compelling factual evidence already in existence and publicly available that could convince any such court that the depositions obtained so far clearly warrant an indictment of a resident defendant, prepared after public pre-trial hearings, for the violation of jus cogens norms? After an indictment is issued, does the court recognized the concomitant duty of extradition, if warranted, requested and possible?

Furthermore, are constitutional and international demands for, and international standards of due process,147 being observed and upheld as a basic condition of the court’s legitimate jurisdiction? Yet, as the Pinochet III case makes clear, violation of the Jus Cogen norm can never be argued or construed as part of one’s official duties as the head or agent of a state.148 (Saepe malum wears faciem ius ......: “Evil often wears the face of law......”).

During any subsequent public trial, the defendant or defendants so accused must enjoy the full legal rights demanded by international legal standards of due process, accorded to any such accused, including the right to legal counsel of one’s choice, cross examination, discovery, the public presentation of counterfactual...

146 Ibid.
148 See Pinochet Precedent, supra at note 3. ex parte Pinochet Ugarte (No. 3) [1999]
evidence in a court of law and the right to appeal. The press must be invited to attend though, in order to insure court decorum and prevent public disruptions, the judge or judges are the immediate authorities of public participation in their court room.

Of course, the preference of all judges or legal scholars is for a court to exercise territorial or nationality jurisdiction over a citizen accused of violent and vicious international crimes; yet, such domestic prosecutions are often politically charged and difficult to obtain.149 Furthermore, as history sadly tell us, far too many Nazis escaped prosecution and the righteous wrath of their victims; as outrageous as the historic reality is, many went on after the war to lead rather prosperous lives in other countries.150 The latest example of this is the infamous Finta case in Canada decided in the 1990s.151

So, a key rationale for fiduciary jurisdiction is that no one accused of violating the critical Nuremberg legal legacy such as crimes against peace, war crimes, crimes against peace or torture should ever be able to escape their day in court and possible prosecution in a court of law. As the great English jurist Blackstone argued, and it bears repeating, “where the individuals of any state violate this general law, it is then the interest as well as duty of the government, under which they live, to animadvert upon them with a becoming severity, that the peace of the world may be maintained.”152 As we argued above, the Law of Nations can be once again—as it was in Blackstone’s time—fully adjudicated by the domestic courts of a country. In this way, the most egregious violators of the fiduciary Law of Nations, as well as jus cogens norms as erga omnes obligations must be prosecuted to the


152 See Blackstone, supra,
fullest extent of the law anywhere in the world. Only in this way can the ongoing Age of Impunity i.e. only recently challenged, finally end.

Such prosecutions, when legally warranted, would give needed added life to the “twin offspring” of the war enunciated earlier by General Telford Taylor, the United States’ Chief Prosecutor during the later Nuremberg trials; according to General Taylor, if the United Nations system of collective security fails, then the Nuremberg Charter and subsequent trials were meant to be the next step to insure that those suspected of violating international peace and security or brought to trial to face justice. In this way, there was never again to be immunity or impunity for those leaders or individuals who aided, advised or assisted them, to carry out heinous and inhumane acts that shock the conscience of the world. In short, a collective or shared obligation means that, if one court fails to act, others are still obligated to do so to bring the guilty to justice, especially when jus cogens norms are involved. The Nuremberg Charter and trials mean that no individual, no one, is now immune from the consequences of his or her decisions or actions, even when or especially when acting for a government. One way to do this that should command almost universal consensus among peoples, governments and, most importantly, judges and their judicial institutions, is to insure a minimal international legal order, as promised by the Allied leaders during World War II, based upon the Nuremberg Charter and subsequent trials, including not only the original IMT but the subsequent ones by Allied constituted national courts in Berlin as well.

The basic elements for this post war and minimalist international legal order in which any court anywhere has original and fiduciary or common jurisdiction over crimes against the

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Law of Nations consist of the fiduciary norms, obligations, sanctions and institutions created by this World War II *corpus juris*.¹⁵⁴

Furthermore, applying international legal sanctions simply to the leaders of developing states or Third World or African countries is simply not enough or acceptable any longer. In an ethnocentric world, selective suffering or blame is often morally troubling and suspect; ALL human beings bleed a deep red when wounded or killed in unprovoked or unjustified attacks, and thus their attackers must be held accountable, regardless of race, religion or nationality, even if they are viewed as somehow privileged or powerful.

“BY ANY OTHER NAME:"¹⁵⁵ THE TORTURE MEMOS:

The world is still deceived with ornament.

In law, what plea so tainted and corrupt,

But, being seasoned with a gracious voice,

Obscures the show of evil?

(*The Merchant of Venice*, 3.2.80), Bassanio

In particular, highly developed states are still very much on the warpath, and their leaders must be held accountable as well for unwarranted and murderous attacks.¹⁵⁶ This is needed for leaders of states¹⁵⁷ as well as of terrorist groups when they violate the laws of war as

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¹⁵⁵From *Romeo and Juliet* by William Shakespeare (1597) [Act 2, Scene 2]. Available on MIT’s website.
¹⁵⁶Speaking as an American, our country has attacked at least three countries in this new century— Iraq, Libya and now Syria—that never attacked us; the last two were by presidential order without even consulting Congress, despite the Congressional and, indeed, constitutional requirements that Congress will ultimately decide, and declare, issues of war. See, for example, Founding Father Patrick Henry objection to the US Constitution specifically on these grounds, that the president in the field at the head of his army “squints towards monarchy….” See Speech of Patrick Henry, June 7, 1788 at: http://www.let.rug.nl/usa/documents/1786-1800/the-anti-federalist-papers/speech-of-patrick-henry-(june-7-1788).php. It seems that his articulate fears, which I originally thought overstated, are becoming real.
¹⁵⁷Ibid. The recent US presidents seem to squinting towards uncontested monarchy right now and barely a pip from Congress or the American community of international law scholars. See supra, note 152, quote by
well as peace and kill innocent civilians. Only the painting *Guernica* by Picasso can vaguely approximate and illustrate the magnitude of such murderous destruction.

War unleashes the greatest evils and often the greatest acts of heroism in humanity; yet, the damage in flesh and blood and bones endures, not to mention the often-severe anguish suffered by survivors long after fighting and killing ends. Prisoners of the fighting who then endure torture, either as civilians or soldiers, often face a lifetime of what is now called Post Traumatic Stress Disorder (PTSD).

Yet, some misguided souls seek to add to the destructiveness of war. In particular, the infamous Torture Memos, written by a coterie of lawyers in the Bush Administration prior to the 2003 US attack on Iraq, unleashed an unparalleled period in US history in which torture seemed to be officially sanctioned by the highest officials in the land, and subsequently used and documented, even photographically in horrific detail. As such, there is reasonable cause for legal action against those who wrote these memos for precipitating a cause of action that lead to the use of torture, especially in view of the ample

Patrick Henry) Yet, the rest of the world or international legal community is not so complacent or complicit:See, for example: Should Bush, Blair be tried for war crimes? Pakistan Observer, September 10, 2012 Monday; Also see: Invasion can't be justified, New Straits Times (Malaysia), April 9, 2009 Thursday, LOCAL; Pg. 19 Also see: Iraq invasion a war crime The Dominion Post (Wellington, New Zealand), July 9, 2016 Saturday, FEATURES; NATIONAL; Pg. 4.


PUBLIC evidence that torture was, in fact used subsequent to the drafting, approval and issuance of these torture memos.\textsuperscript{161}

Furthermore, ever since the Nuremberg Charter and subsequent trials, individuals can and must be prosecuted for international crimes, \textit{including torture}, which is an integral part of the Nuremberg legal legacy since it was which was specially mentioned as a crime in ACC Decree # 10 which governed the subsequent trials of Nazi warlords and others in the four sectors of Allied occupied Berlin. As Judge Sfekas makes clear in his recent and excellent article \textit{“Taming the Furies”} about the Nuremberg trials of the Nazi legal profession: The principle underlying the Court’s judgment at the time was simple but significant: any person who furnishes the lethal weapon for the purpose of the crime may be guilty of the crime, and that can include the lawyer who furnishes legal advice.\textsuperscript{162}

In fact, the eloquent decision by Lord Browne-Wilkinson in the Pinochet III case cites with approval existing international law when he states:

\begin{quote}
Clearly, the \textit{jus cogens} nature of the prohibition against torture articulates the notion that the prohibition has now become one of the most fundamental standards of the international community. Furthermore, this prohibition is designed to produce a deterrent effect, in that it signals to all members of the international community and the individuals over whom they wield authority that the prohibition of torture is an absolute value from which nobody must deviate.\textsuperscript{163}
\end{quote}

Lord Browne-Wilkinson then quotes the Demjanjuk case, stating: International law provides that offences \textit{jus cogens} may be punished by any state because the offenders are

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{161} Ibid.
\item \textsuperscript{162} See Judge Sfekas article \textit{“Taming the Furies?”}, supra at note 1. Also see: Sands, P. (2008). Torture team: the responsibility of lawyers for abusive interrogation. \textit{Melb. J. Int’l L.}, 9, 365. As someone who has consulted national law enforcement officials on such matters, I know that the Pentagon and the Federal Bureau of Investigation opposes on principle the use of torture as not only being illegal, repugnant and offensive to any sane American, it is also ineffective as well. It only seems to fulfill some sadistic need on the part of the torturer and those that condone it for total control over another human being and, as such, is condemned by every civilized nation and court in the world, as the House of Lords’ decision in \textit{re Pinochet 2} (1999) makes abundantly clear.
\item \textsuperscript{163} See supra note 3 at: \textit{ex parte Pinochet Ugarte} (No. 3) (1999)
\end{itemize}
\end{footnotesize}
"common enemies of all mankind and all nations have an equal interest in their apprehension and prosecution." \(^{164}\)

In *Pinochet III*, he further writes:

Ever since 1945, torture on a large scale has featured as one of the crimes against humanity: see, for example, U.N. General Assembly Resolutions 3059, 3452 and 3453 passed in 1973 and 1975; Statutes of the International Criminal Tribunals for former Yugoslavia (Article 5) and Rwanda (Article 3).

Moreover, the Republic of Chile accepted before your Lordships that the international law prohibiting torture has the character of jus cogens or a peremptory norm, i.e. one of those rules of international law which have a particular status. In *Furundzija* (*supra*) at para. 153, the Tribunal said:

"Because of the importance of the values it protects, [the prohibition of torture] has evolved into a peremptory norm or jus cogens, that is, a norm that enjoys a higher rank in the international hierarchy than treaty law and even 'ordinary' customary rules. The most conspicuous consequence of this higher rank is that the principle at issue cannot be derogated from by states through international treaties or local or special customs or even general customary rules not endowed with the same normative force. Clearly, the jus cogens nature of the prohibition against torture articulates the notion that the prohibition has now become one of the most fundamental standards of the international community. Furthermore, this prohibition is designed to produce a deterrent effect, in that it signals to all members of the international community and the individuals over whom they wield authority that the prohibition of torture is an absolute value from which nobody must deviate." (See also the cases cited in Note 170 to the *Furundzija* case.)

So, not even an ad hoc group of lawyers serving the US government under the Bush Administration can simply and blithely redefine torture in extremely narrow terms that involve only that action which may result in death or severe injury, or the fear of such results, on the part of the victim; since the Nuremberg legacy and certainly sense *Pinochet II*, *TORTURE ALWAYS BEEN MUCH BROADLY DEFINED IN INTERNATIONAL LAW* to correspond to the eventual definition in the Torture

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\(^{164}\)See supra at note 3. *In re Pinochet III* (1999); also see: Demjanjuk v. Petrovsky (1985) 603 F. Supplement 1468; 776F 2d. 571

\(^{165}\)Ibid., *In Re Pinochet III* case.
convention which Lord Browne-Wilkinson also cites, namely: “Article 1 of the Convention defines torture as the intentional infliction of severe pain and of suffering with a view to achieving a wide range of purposes ‘when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.’"

So, causing severe pain and suffering, as experienced by the victim and inflicted by a public official “with the consent or acquiescence of a public official or other person acting in an official capacity,” constitutes torture. For instance, waterboarding is designed to stimulate the physiological response of the body to drowning and thus simulate the overwhelming fear of immediate death; to say this is not painful and induces severe suffering upon an unknowing victim is ludicrous, since the fear of immediate death by drowning is, by any criteria, inflicting “severe pain and suffering” according to which the later Torture Convention mentions as an act of torture. At the Tokyo trials, the United States decided that waterboarding was an act of torture and put to death Japanese warlords who used it against Americans.

So, clearly, those that advise, advocate or approve the use of torture “by any other name” set into motion the entire train of outrageous injustices that are clearly not limited, in practice to merely cruel or unusual punishment. This was certainly true of the authors, advisors and those that actually approved the infamous Torture Memos. People who don’t think that these memos resulted in grotesque acts of subsequent torture as amply documented in verbal, documented and photographic form need to get out and about more often to see how their advice and approval translates into ruthless action in the real world. In fact, prior to the second Bush Administration, US courts had been extremely clear and firm concerning their universal condemnation of torture.

166 See supra at 162 and 163.
As such these memos written by officials of the second Bush Administration clearly went far beyond the acceptable or legal bounds of prohibiting torture. In view of this any suspected torturers and the lawyers who advise them that what they are doing is legal need to be investigated and, if the facts warrant, prosecuted to the fullest extent of the law anywhere in the world.

Beyond this, there are other relevant Conventions governing the treatment of civilians, prisoners of war or other enemy combatants by an occupying power. For instance, as we have seen, Article 3 of all four post World War II Geneva Conventions (1949) legally obligates and requires all signatories states to enforce or prosecute violations of the Conventions in any or all circumstances. It is particularly odious when officers of the court, such as lawyers, are suspected or accused of violating the most basic Jus Cogens norms whose observance is essential to the rule of law. So, the lawyers who advised, wrote or approved these so-called torture memos should have their day in court, somewhere in the world. While progress has been made in the prosecutions of individuals suspected of violating international humanitarian law, much more can and should be done by international, regional national, or domestic courts to enforce the international rule of law. As Joaquin Gonzales states, after World War II and Nuremberg, “the Age of Impunity” for those leaders and decision makers who cause or commit serious international crimes needs to end.\footnote{See Gonzalez Ibanez, Joaquin. “International Rule of Law and Human Rights: the Aspiration of an Essential Work in Progress,” Boudreau and Sainz-Borgo, Advances in International Law, supra, note 1}

A final point should be made about comparing fiduciary jurisdiction to its more famous cousin, universal jurisdiction. Fiduciary jurisdiction as part of the modern Law of Nations is very similar in scope and reach to universal jurisdiction, though there are important differences as well. Universal jurisdiction refers to the well-established doctrine that a national court may prosecute individuals for any serious crime against international law —

\footnote{See Gonzalez Ibanez, Joaquin. “International Rule of Law and Human Rights: the Aspiration of an Essential Work in Progress,” Boudreau and Sainz-Borgo, Advances in International Law, supra, note 1}
such as crimes against humanity, war crimes, genocide, and torture — based on the principle that such crimes harm the international community as a whole or threaten international order itself, which individual States may act to protect. 169 This is the compelling rationale for fiduciary jurisdiction as well. There is also the emergent practice of Universal Tort jurisdiction which is a doctrine that would permit victims of the most serious violations of international law to bring tort claims for damages in any national jurisdiction, regardless of the location of the conduct or the nationality of the victim or defendant.170

So national courts should be authorized by their state’s legislatures or by customary international law to exercise fiduciary jurisdiction to investigate and, if warranted, indict a suspect or request his or her extradition for adjudication, or refer the case to the prosecutor of the ICC for further action under Article 14 of the Rome Statute.171 Yet, a key difference is that fiduciary jurisdiction is *self-executing* with a nation’s domestic courts while universal jurisdiction usually requires a treaty or subsequent legislative approval to make it operative within a country. As promising as this sounds, universal jurisdiction is still relatively unused due, in part, to powerful states putting pressure on allies or non-align and smaller states not to invoke, or amend, subsequent legislative approval that enables the exercise of


subsequent court’s authority.\textsuperscript{172} Finally, the greatest states-- the United States, Russians or Chinese simply don’t accept such universal jurisdiction effectively exercised against their own nationals or, at least haven’t so far. In short, universal jurisdiction is still woefully underused in state practice due to some of its inherent limitations. Fortunately, as we will argue below, it is not the only basis for a court’s jurisdiction in cases involving alleged violations of the preemptory norms of \textit{jus cogens} which, if unchecked or unadjudicated, will threaten the entire international legal and social order.

\textbf{THE INTERNATIONAL COMITY OF THE COURTS: INSURING BEST PRACTICE IN ENFORCING CRIMINAL LAW}

The shocking depiction of abject human suffering and death as portrayed by Picasso classical painting of \textit{Guernica} is still tragically true today as terrorists, states or parties to an inter-state or even an intra state conflict regard civilians as legitimate “targets.” The 1990s were particularly alarming: Genocidal assaults were launched and waged against the people of Bosnian, Rwanda and Darfur. National or international courts have had trouble adjusting or keeping up with the crimes being committed; so, special arrangements by the Security Council were made in the 1990s and these were often seen as underfunded and inadequate to the task.\textsuperscript{173} So, once again, the world confronted the awful specter of


suspects of the gravest crimes against humanity never being persecuted and going free to lead full and prosperous lives. So, the International Court of Justice (ICC) was created in the aftermath of the genocidal assaults in Bosnia and Rwanda in order to insure, among other things, that such suspects never go free again.\textsuperscript{174}

Yet, the ICC simply can’t do this alone; at best, its small budget allows for two or three prosecutions per year; meanwhile, the world still wars with increasingly savage attacks against civilians occurring early in this new century, alone, in Iraq (2003-current) Lebanon (2006), Syria, (2011-current), Israel (2006, 2011, 2014-current), Gaza (2007, 20011, 2014-current), and the unfolding genocidal assaults in Myanmar AND Yemen in the spring of 2017.\textsuperscript{175} To insure the indictment, adjudication, prosecution or extradition of those state leaders, terrorists or rogue individuals suspected of killing these civilians, war crimes and the grossly disproportionate use of force or committing mass murder, there must be a simultaneous and shared juridical responsibility of international, regional, national, or domestic courts that is now common throughout the world. At the very least, national courts can help the ICC by conducting preliminary investigations and then make references under fiduciary jurisdiction as well as Article 14 of the Rome Statute to the ICC; such investigations, alone, will save the ICC millions of dollars as well as significantly extend the deterrent and enforcement as well as impact of international criminal law.


\textit{(2017) J. JURIS. 182}
If a crime against basic jus cogens norms is suspected, then such investigations by state parties to the Rome Statute should become automatic under fiduciary jurisdiction and part of international customary law. No individual or country should be exempt from such investigations. This is especially true of terrorists who seek out civilians in their hideous attacks. States attack other states or peoples with the same effect and often hide behind claims of military necessity, though there seems to cause for thousands of civilians dying, as they did in the U.S. attack and invasion of Iraq in 2003. Inevitably, highly educated partisans of all sides will give radically different accounts of such civilian carnage, a phenomenon described as epistemic pluralism; 176 meanwhile continuous murder is often rationalized as the seemingly normal business of modern statecraft, or even the terrorists. As a result, the supposed line between state actions and acts of sheer terrorism blurs as the bodies of thousands of innocent civilians pile up in Iraq, Syria, Lebanon, Gaza and now Yemen, where the starvation of thousands of families including children, the elderly and the infirmed seems to be the favorite tactic of the assaulting terrorists or states.

In this sense, terrorism is defined as attacks against innocent civilians or prisoners of war. The law and the global judicature simply can’t be silent and passively accept the highly partisan narratives of any side participating in such continuous death of innocents. In view of such increasing civilians deaths and destruction, either by states or by terrorists, the courts must act as the literally the last bastion of civilization against such a seemingly endless onslaught in the daily news of the killing and death of innocents, either by terrorism or state sponsored violence. Terrorists and terrorism strike civilians as their primary or only “targets” and, as such, are enemies of all humanity. They don’t often

surrender peacefully but when they do, such individuals should be prosecuted to the fullest extent of the law as well.

In particular, the court room is uniquely created and designed to sort out the inevitable claims of epistemic pluralism and conflicting legal narratives concerning any suspected crime. As such, the courtroom is a unique precious and fragile creation of humanity, and must be fully utilized to adjudicate such competing domestic or international criminal claims. As such, the judges in his or her courtrooms are often the last hope and bastion of humanity’s hope for a world characterized by criminal justice as the basic bedrock of civilization. As Albert Camus once said, “we hope not for a world without murder (we are not as crazy as that!); yet we do hope for a world where murder is not legitimate.”

Yet, the court room is only as good as the people and laws applied in it. To enhance impact and fairness of the courts—that similar cases are handled somewhat similar fashion—the emergent trend concerning the international comity of the courts should be encouraged and expanded by the global judiciary. In view of this, such courts are and must increasingly cooperate and communicate with each other, as part of professional best practices, to insure that no one suspected of jus cogens violations or terrorist attacks can seek sanctuary in a de facto state without appropriate adjudication and legal process; the court’s responsibility in such situations where a suspect is found within its jurisdiction is to insure the appropriate legal proceeding characterized by international standards of due process and, if warranted, the actual issue of an indictment, a bench warrant if necessary and an actual trial within the appropriate courts’ specific territorial, national, universal or fiduciary jurisdiction. Or, the court has a solemn duty to honor and enforce the appropriate legal proceedings including arrest and deportation if there is a valid extradition request. In view of this, international comity of the courts can be generally defined as continuous communication and cooperation between judges representing all levels of

177 Albert Camus, Neither Victims nor Executioners, (1946-7) at: http://www.ppu.org.uk/e_publications/camus.html
International, regional and national courts which, in this globalizing world, is becoming an essential element in insuring local, regional as well as global justice.

More precisely, the term “comity of the courts” is thus meant in the two primary senses of the word “comity”: a) first, as a widespread community of similar institutions, as well as the traditional legal sense of: b) cooperation or due deferment between or among courts. Specifically, the latter involves the informal and voluntary recognition by courts of one jurisdiction of the laws and each other’s judicial decisions.

As scholars point out, national courts are increasingly cooperating and, using comparative legal research, citing each other’s case law across borders.\(^{178}\) So, we use the “comity” of the courts here in both of its meanings, and point out that its first definition—as a community of similar social institutions—(though often overlooked) -- is as relevant to this discussion as its second meaning, that of the professional cooperation and courtesy given to the recognition of one’s court’s jurisdiction, laws and judicial decisions by another local or national judiciary. At the same time, there is an increasing differential or domestic diffusion of international norms into local court rooms as questions as diverse as of economic globalization, torture or crimes against humanity emerge in the relevant court’s jurisdiction and case load.\(^{179}\)


Differential diffusion is characterized by the incorporation of the World War II fiduciary norms that are now a pre-condition for legitimate state authority.\(^{180}\) So, there is now a new hierarchical and historically determined dimension to international law due to the unique nature of certain fiduciary and often non-derogatory norms that constitute an important part of the modern Law of Nations.\(^{181}\) Specifically, such hierarchical legal norms consist of the wartime and post-World War II fiduciary Law of Nations including norms and laws against torture, war crimes, crimes against peace and crimes against humanity.\(^ {182}\) These new and hierarchical norms result in a complex process of judicial incorporation which we describe here as differential diffusion.

Yet, every court and jurisdiction is historically and culturally unique. As such, different cultures and jurisdictions and even political histories will often critically influence what is incorporated with a nation’s jurisdiction, and what is left out from consideration. Thus, every domestic or national jurisdiction is uniquely situated and developed, and contoured by its own historical, legal and even geographical features. Dean Juan Carlos Sainz Borg eloquently developed and illustrated this idea in his article on the unsuccessful attempt in Venezuela to characterize the international drug trade as a “Crime against Humanity.”\(^{183}\) He conclusively demonstrates that each national court must be able ultimately to decide the law and, specifically, if the resulting norms from World War II apply in each unique circumstance or case.


\(^{181}\) Ibid. Andrei

\(^{182}\) Ibid.

\(^{183}\) Ibid., See Dr. Juan Carlos Sainz-Borgo “The International Criminal Court, Drug Trafficking and Crimes against Humanity: A Local Interpretation of the Rome Statute,” *Advances in International law and Jurisprudence*, p. 177
At the same time, the domestic diffusion of legal norms being shared among differing national jurisdiction is unquestionably occurring, if not accelerating and thus is a significant phenomenon;\textsuperscript{184} in view of this, such normative diffusion is helping to create the phenomenon of global legal pluralism which presents some of the same “challenges of legal globalization closely resemble those formulated earlier for legal pluralism: the irreducible plurality of legal orders, the coexistence of domestic state law with other legal orders, [and] the absence of a hierarchically superior position transcending the differences.”\textsuperscript{185}

In short, this emergent and complex phenomenon of global legal pluralism caused, in part, by the domestic or differential diffusion of legal norms, is evidence of the necessity for the international comity of courts in which judges in very different jurisdictions are able to reach out to colleagues in other jurisdictions or countries to explore together urgent common problems, issues and decisions. In view of this emergent and expanding trend,\textsuperscript{186} it possible to say such comity and cooperation in cases across jurisdictions is becoming a professional norm of “Best Practices” within the global judicature and legal professions. If this trend and trajectory of such comity continues, it will be the rare judge and the rather isolated courtroom that does not seek, using comparative legal research if necessary, to help decide pressing cases in his or her courtroom, especially those cases that have a pressing international legal issue. \textit{Furthermore, to insure that one national judiciary or state is not bullied by a powerful offending state, the courts of several countries might want to conduct investigations or issue arrest warrants, when the evidence is overwhelming and compelling, simultaneously from different corners of the world. This is especially true if someone suspected of committing a war crime of a violation of}

\textsuperscript{184} See, supra, note 306
\textsuperscript{186} Ibid.
jus cogens norms shows up unexpectedly, or simply lives within, the territory of the respective court’s jurisdiction.

Simply stated, such suspects of intolerable international crimes should never be able to claim refugee within any national legal jurisdiction in the globe. The duty of any de jure state is to investigate and publically exonerate or indict such suspects, then ensure a public and fair trial or extradite them to a state jurisdiction and court that will, if the facts warrant, prospective those individuals suspected of violating jus cogens norms to the fullest extent possible under the law. Only in this way will a minimalist international legal order emerge, and the Nuremberg legacy finally be respected as well as upheld by all states or peoples throughout the world.

CONCLUSION: A MINIMALIST INTERNATIONAL LEGAL ORDER

As we have seen, the simultaneous judicial exercise of the appropriate jurisdiction by international as well as national courts of authority of over suspected war criminals was originally envisioned in the Moscow Declarations of 1943. Historically speaking, this simultaneous exercise of international and national jurisdiction was actually implemented in many subsequent Nuremberg, Berlin and national court trials in Europe.\textsuperscript{187} As we have seen, still far too many Nazi warlords escaped from their day in court, and a judicial reckoning. Even so, after World War II and the resulting decolonization, international law became truly global in scope and the equality of states insured that all national courts have a vital role to play in upholding the enormously expanded post war corpus juris.

Yet, the world still wars as states or terrorists attack each other with increasing frequency and ferocity. The 1990s were particularly alarming. Genocidal assaults were launched and waged against the people of Bosnian, Rwanda and Darfur. National or international courts have had trouble adjusting or keeping up with the crimes being committed; so, special arrangements by the Security Council were made in the 1990s and these were often seen as underfunded and inadequate to the task.\textsuperscript{188} So, once again, the world confronted the awful specter of suspects of the gravest crimes against humanity never being persecuted and going free to lead full and prosperous lives. So, the International Court of Justice (ICC) was created in the aftermath of the genocidal assaults in Bosnia and Rwanda in order to insure, among other things, that such suspects never go free again.\textsuperscript{189}

Even so, the ICC simply can’t do this alone; at best, its small budget allows for two or three prosecutions per year; meanwhile, the world still wars with increasingly savage attacks against civilians occurring early in this new century, alone, in Iraq (2003-current) Lebanon (2006), Syria, (2011-current), Israel (2006, 2011, 2014-current), Gaza (2007, 20011, 2014-current), and the unfolding genocidal assault in Yemen in the spring of 2017.\textsuperscript{190} To insure the investigation and, if warranted, indictment, adjudication,


prosecution or extradition of those state leaders, terrorists or rogue individuals suspected of killing innocent civilians, or committing other war crimes, including mass murder, there must be a simultaneous and shared juridical responsibility of international, regional, national, or domestic courts to insure the judicial capacity to investigate and, if justified, adjudicate or extradite such individuals to the appropriate court of law throughout the world.

So, the underlying legal maxim of any court’s possible jurisdiction over such international crimes should simply be the judicature’s collective determination World War II, the Holocaust and the “Great Escape of Nazis from justice to highly resolve: “Never Again!” In other words, the global judiciary must resolve and then cooperate to insure that, despite the historical and current administrative differences as well as diversity of national jurisdictions across the globe, there are certain basic legal norms that serve as the bedrock of any social or legal community. The great American legal jurist Oscar Schachter argued that there were certain general principles as basic legal norms that were essential to observe to maintain any system of law or legal community. In this regard, every court jurisdiction can agree that murder is wrong and, if proven in a court of law, should be punished.

Extrapolating from this, the time is now—if not overdue—when all courts across the global can also agree that mass murder, the initiation of war, torture or human trafficking are a fundamental threat to domestic legal and political fabric of any society or nation as well. To end this murderous Age of Impunity, judges and courts can and must exercise territorial, national, universal or fiduciary jurisdiction over international jus cogens norms to insure that such a suspect is indicted, tried or extradited to a country with a more pressing legal claim concerning the suspect’s alleged conduct or costs in human destruction and damages.

Only in this way will the Rule of Law fully extend to the international as well as national affairs.

To do this, this article has argued that, as part of the legal legacy of World War II, every national court in the world now enjoys fiduciary jurisdiction to investigate and, if warranted, indict, request extradition, adjudicate or refer to the ICC any individual suspected of committing a violation of a fundamental *jus cogens* norm, especially those norms resulting from the priceless Nuremberg legacy. Such fiduciary jurisdiction is already emerging and being actively used in courts throughout the world, especially in reference to trade, human rights, aboriginal and public trusts.\(^{193}\) Thus, the evolution and expansion of fiduciary jurisdiction to adjudicate fundamental *jus cogens* norms by national courts can be, or soon will be, seen as a natural development of customary international law. This is especially true if national courts first use fiduciary jurisdiction concurrently with their treaty obligations under the Rome Statute to investigate suspected violations against *jus cogens* norms and, if warranted, report their findings and request the ICC’s involvement under Article 14 of the Rome Statute.

Most importantly, any suspected or actual violation of fundamental *jus cogens* norms or the Rome statute are, in essence, attacks against *all of humanity*; the Pinochet Case (1999) made this crystal clear in reference to torture, and the same can be said of any of the principles contained in the entire Nuremberg legacy. As Lord Browne-Wilkinson points out, quoting the Demjanjuk case, that: “International law provides that offences *jus cogens*...”

may be punished by any state because the offenders are ‘common enemies of all mankind and all nations have an equal interest in their apprehension and prosecution.’”194

So, to insure a minimalist international legal order, national as well as international courts must have the appropriate, original and fiduciary jurisdiction to insure the specific adjudication of jus cogens norms, especially those originating from the priceless Nuremberg legacy.195 As such, the promise first made in the Moscow Declarations should finally be fulfilled: namely, that anyone suspected of committing such atrocities should be chased to the ends of the earth until justice is achieved. To finally do this requires that the judicial capacity of national courts incorporate fiduciary jurisdiction specifically to aid in the search, investigation and, if warranted, of anyone suspected of violating fundamental jus cogens norms including war crimes, crimes against peace, crimes against humanity,

So, with the advent of the Law of Nations after World War II, it is becoming increasingly necessary for international, regional national, and domestic courts to exercise appropriate and original fiduciary jurisdiction over these expanded range of international law that now percolated deeper and deeper into domestic jurisdictions.196 This increasing and international comity of the courts is a function of both the large legal legacy of World War II as well as the of the increasing globalization of communication resulting, in part in the increasing global legal pluralism; in turn, such pluralism results from the rather unique and often unexpected discovery that a single act or actor is potentially regulated by multiple legal or quasi-legal regimes imposed by state, sub-state, transnational, supranational courts and non-state communities.197

194 See supra at note 3: In re Pinochet 3 (1999); also see: Demjanjuk v. Petrovsky (1985) 603 F. Supplement 1468; 776F 2d. 571
195 See supra at note 1.
Despite what the advocates of the Hobbesian state as a ‘law unto itself’ may claim, such international comity of the courts does not presuppose at all the “cosmopolitan law” as envisioned by Immanuel Kant. Unlike in Kant, the courts are not being asked to enforce a ‘world law’ that is available to everyone, anywhere, as a world citizen. This is an eminent aspiration of one of the world’s great philosophers, at least for his time. As desirable as a “Perpetual Peace” based on such cosmopolitan law among republics may be, domestic or international society is simply not there yet, and never has been. So, as Professor Michael Barkun points out, there is simply no one “world” or single law to adjudicate. Fortunately, due to the world’s diversity of peoples, cultures and geography, the legal realities that each national court faces are much more pluralistic and complex.

So, in direct contrast to this Kantian ideal, the current and emerging international comity of courts is based upon the post-World War II recognition of the equality of peoples, numerous new states and ensuing national jurisdictions, each being legally necessary and historically unique developments in domestic and international law. Because of the now global reality of differing sovereign states, and very diverse legal jurisdictions, it is possible, as discussed above, to describe a fiduciary Law of Nations as the legal legacy of World War II. Such a law may be increasingly characterized by the ancient Justinian idea of a “Law of nations common to humanity, yet the diversity of such law and ‘plurality of nations’ is an irreducible reality of the modern world”

In this regard, the ancient Roman and Byzantium jurisprudence rightly emphasized and even celebrated the fundamental legal importance of the “nation” or “nations” in its concept of

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201 See Justinian, quoted in Boudreau, T., The law of nations and John Locke's Second Treatise: the emergence of the fiduciary legal order during World War II., the Journal Jurisprudence, Summer 2012, vol. 15.
**Jus Gentium;** the precision of the Latin language leaves no doubt that the Roman and later the Byzantines were referring to nations in the gerundive case.\(^{202}\) This was not “Jus inter Gentes,” or the law *between* peoples or states, which the European international legal system bequeathed by Bentham actually represented. Thus, *each nation with its own unique people or peoples and its own sui generis legal system of courts* is essential in this characterization of this emergent international legal order. Thus each unique court the world over must ultimately decide what cases to adjudicate and what law applies. This is, as we have seen, no longer the legal order of Jeremey Bentham and the Europeans in “colonial confrontation” with the rest of the world.\(^{203}\) Perhaps for the first time in human history, it is now legally possible to discuss the international comity of the courts, legally recognized as co-equal to one another across the globe, meaning first and foremost, no state has the right to prey upon another nation or people. This is the historic significance of the almost complete global decolonization throughout the world that resulted from the Allied victory in World War II.

At the same time, each nation has historically developed its own unique society, jurisprudence and legal system.\(^{204}\) Often the society’s legal system predates even the western concept of the “state.”\(^{205}\) Many of these nations, though not all, joined the world community as states. As such, they all have authoritative ways or methods of resolving conflicts, often by the historically developed legal systems.\(^{206}\) As part of the community of states, such nations as a state have solemn legal responsibilities to their own sovereign people or peoples, as well as profound legal obligations to the newly formed and now truly global legal community. A key legal obligation in this regard is to uphold the essential *jus*

\(^{202}\) Ibid.
\(^{204}\) See Juan Carlos Sainz Borge, supra, *Journal Jurisprudence,* (2012)
\(^{205}\) See, Michael Barkun, (1968) *Law without Sanctions:*
\(^{206}\) Ibid., Michael Barkun is an unsung genius of international law; he was also my mentor and later colleague at the Maxwell School at Syracuse University.
cogens norms domestically and internationally by adjudication and swift and certain enforcement, if necessary when the facts and suspect combine to appear “guilty” in a national court.

So, now that truly independent legal systems free from European colonials as well as regional domination have emerged throughout the world and now successfully operate on every inhabited continent, including the American republics, Europe and the states in Africa and Asia; in view of this, it is now possible to speak of an international rule of law that is truly global in scope. This the prized anti-colonial legal legacy of the World War II, and post war Law of Nations. As a result, as we have argued, those accused or suspected of committing violations of jus cogens norms should have no political sanctuary ANYWHERE in the world that need be recognized by the courts. At the very least, the international comity of courts requires that such individuals are identified, investigated and, if the facts warrant, indicted, publically tried or extradited as a first resort. To do this effectively requires the comity and simultaneous efforts of international, regional, national and indigenous courts to insure that, while such a suspect or suspects can run or try to evade his or her day of reckoning in a court of law, they can’t hide for long anywhere on the planet. When this is achieved, at least a minimalist International legal order essential to the Rule of Law will finally exist on Earth.

We must all work to bring this day to past. So, until that day…. 