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# Universal Crime, Jurisdiction and Duty: The Obligation of *Aut Dedere Aut Judicare* in International Law

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This Note focuses on the arbitrary distinction in international human rights and humanitarian law between heinous crimes committed in international configurations and those committed in the course of an internal conflict. The authors present an argument for the existence of a general duty in international law of *aut dedere aut judicare*, that is, the obligation of states to extradite or prosecute perpetrators of universally condemnable crimes irrespective of the context in which they occur. In this Note, the duty of *aut dedere aut judicare* is expanded to include the duty of non-asylum.

The effective promotion and protection of human rights, as mandated specifically by article 55(c) of the *UN Charter*, not only requires the creation of substantive norms, *i.e.* prohibitions, but procedural norms as well. Such implementation mechanisms are necessary corollaries of interdictions and are found in every system of law. For the effective treatment of universally condemnable crimes, a duty must be found that requires states to take some form of action against the perpetrators of such offenses.

The authors apply a three part analysis, beginning with an examination of the notions of universal crime and jurisdiction. They conclude that in the presence of armed conflict, the customary law making process, the *UN Charter*, and compelling principles and elementary considerations of humanity all establish the obligation of *aut dedere aut judicare* as a general precept within international law — a principle which can and must be applied to both international and internal armed conflicts.

Cette note se concentre sur la distinction arbitraire, en droit international de la personne et en droit humanitaire, entre les crimes haineux commis dans des conflits internationaux et ceux perpétrés lors d'hostilités d'envergure nationale. Les auteurs sont d'avis qu'en droit international, le devoir *aut dedere aut judicare* devrait exister. Ainsi, les États se verraient dans l'obligation soit d'extrader ou de traduire en justice les auteurs de crimes universellement condamnables, peu importe le contexte dans lequel ils ont été commis. Dans cette note, le devoir *aut dedere aut judicare* est compris comme incluant le devoir de non-asile.

La promotion et la protection efficaces des droits de la personne, telles que requises par l'article 55(c) de la *Charte de l'ONU*, ne commandent pas seulement la création de normes substantielles, c'est-à-dire de prohibitions. Elles exigent aussi des règles procédurales. Les mécanismes d'application sont des corollaires nécessaires à toute interdiction et sont partie intégrante de tout système de droit. Pour atteindre un traitement efficace des crimes universellement condamnables, il doit y avoir un devoir incombant aux États d'agir de quelque manière vis-à-vis les coupables de tels crimes.

Par une analyse en trois parties débutant avec l'examen des notions de crime et juridiction universels, les auteurs concluent qu'en présence de conflits armés, le droit coutumier, la *Charte de l'ONU* et de convainquants principes humanitaires fondamentaux soutiennent l'existence de l'obligation *aut dedere aut judicare* en tant que précepte général de droit international. Ce dernier peut et doit être appliqué aux conflits tant nationaux qu'internationaux.

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## Introduction

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## Introduction

In this century, perhaps more than at any other time in the history of the modern world, armed conflict between peoples has occurred within state borders, rather than between countries.<sup>1</sup> The internal nature of these armed conflicts does not in any way mean that the world has become less violent. Internal conflicts, no less so than their international counterparts, imply that “there will be civilian casualties, that there will be terror and torture ... that there will be exceptional detention as well as attacks on prisons, and that food supplies and medical services will be disrupted.”<sup>2</sup> Given the toll that such conflicts take upon human life and property, three salient questions emerge: i) Is there any persuasive legal reason for viewing reprehensible acts through a different legal lens depending on whether they are committed in an international or internal conflict? Specifically, should such acts be viewed as non-criminal simply because they occur in a domestic conflict?; ii) In the absence of a direct link to the perpetrator or victim of a heinous act which has occurred in a situation of internal conflict, can third party states claim criminal jurisdiction over the perpetrators of such acts?; and iii) If it is determined that a universally condemnable crime has been committed and that all states may exercise jurisdiction over the perpetrator of the act, is there a concomitant duty to bring the offender to justice?

The first two questions will be analyzed narrowly as the focus of this Note is the determination of the third: whether or not there is a general duty in international law to extradite or prosecute perpetrators of universally condemnable crimes irrespective of where they occur. In other words, is there a duty of *aut dedere aut judicare* in international law?

### I. Universal Crime

Traditionally, internationally agreed upon standards have only applied to conflicts between states due to the widespread adherence to the principle of state sovereignty. International conflagrations invoke specific guidelines to which the warring parties have agreed as members of the international community. When an international armed conflict arises, the engagement is governed by these rules, the object being the “regulation” of the conflict and palliation of its impact on those not taking an active role in it. However, in light of the changing context of armed conflict, with its increasing emphasis on intraborder crises, the international legal community has been given an imperative for the development of a new way of thinking about the application of the laws of war.

With increasing public access to information about atrocities committed within the borders of any particular country, the impetus for the progressive development of

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<sup>1</sup> See L.C. Green, “The Man in the Field and the Maxim *Ignorantia Juris Non Excusat*” in *Essays on the Modern Law of War* (Dobbs Ferry, N.Y.: Transnational, 1985) 27 at 36.

<sup>2</sup> D. Forsythe, “Human Rights and Internal Conflicts: Trends and Recent Developments” (1982) 12 *Cal. W. Int'l L.J.* 287 at 290.

international law is augmented. The images of terrible human suffering which emerged from Rwanda, following the events of April 1994, shocked the consciences of people everywhere. This shock triggered, within a short span of time, several major legal developments including the promulgation by the Security Council — acting under Chapter VII of the *Charter of the United Nations*<sup>3</sup> — of the *Statute of the International Criminal Tribunal for Rwanda*,<sup>4</sup> and the adoption by the International Law Commission (ILC) of a treaty-based statute for an international criminal court.<sup>5</sup> These developments have been very important in the evolutionary stride of international law with respect to the involvement of the international community in conflicts of a domestic nature.

It has been suggested that international humanitarian law has provided the only viable legal basis for classifying and assigning responsibility for civilian casualties, as well as objectively assessing the conduct of hostilities by the various parties to internal armed conflicts.<sup>6</sup> As rule-making which pertains to both international and internal armed conflict has the same underlying *ratio legi* — the humane treatment of, and respect for the well-being of non-combatants<sup>7</sup> — the applicability of this doctrine to internal conflicts is theoretically apposite.

In addition to humanitarian law,<sup>8</sup> human rights law is also important in determining whether international remedies may be applied in cases of internal armed conflict. Human rights law is derived from international agreements such as the *Universal*

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<sup>3</sup> *Charter of the United Nations*, 26 June 1945, Can. T.S. 1945 No.7, 59 Stat. 1031, 145 U.K.R.S. 805 [hereinafter *UN Charter*].

<sup>4</sup> *United Nations Security Council Resolution 955 (1994) on Establishing the International Tribunal for Rwanda*, SC Res. 955, UN SCOR, 49th Sess., UN Doc. SC/955 (1994), 33 I.L.M. 1598 [hereinafter *Statute of the International Tribunal for Rwanda*].

<sup>5</sup> See T. Meron, "International Criminalization of Internal Atrocities" (1995) 89 A.J.I.L. 554 at 554.

<sup>6</sup> See R.K. Goldman, "International Humanitarian Law: Americas Watch's Experience in Monitoring Internal Armed Conflicts" (1993) 9 Am. U. J. Int'l L. & Pol'y 49 at 88.

<sup>7</sup> See W. Walker, "The International Law Applicable to Guerrilla Movements in Internal Armed Conflicts: A Case Study of Contra Attacks on Nicaraguan Farming Cooperatives" (1988) 21 N.Y.U.J. Int'l L. & Pol. 147 at 176. Generally, when analysing an internal conflict, the primary instruments which are used are Common Article 3 and *Protocol II* (Common Article 3 of the *Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field*, 12 August 1949, 75 U.N.T.S. 31, 6 U.S.T. 3114 [hereinafter *I Geneva Convention*]; *Geneva Convention for the Amelioration of the Armed Forces at Sea*, 12 August 1949, 75 U.N.T.S. 85, 6 U.S.T. 3217 [hereinafter *II Geneva Convention*]; *Geneva Convention Relative to the Treatment of Prisoners of War*, 12 August 1949, 75 U.N.T.S. 135, 6 U.S.T. 3316 [hereinafter *III Geneva Convention*]; *Geneva Convention Relative to the Protection of Civilian Persons in Time of War*, 12 August 1949, 75 U.N.T.S. 287, 6 U.S.T. 3516 [hereinafter *IV Geneva Convention*]; *Protocol II Additional to the Geneva Conventions of August 12, 1949 and Relating to the Protection of Victims of Non-International Armed Conflicts*, 8 June 1977, UN Doc. A/32/144 (1977), 16 I.L.M. 1442 [hereinafter *Protocol II*]).

<sup>8</sup> The main conventional sources of Humanitarian Law are the four 1949 Geneva Conventions, *ibid.*, and the two 1977 Additional Protocols thereto. They have traditionally applied to situations of international armed conflict and contain rules restricting the means and methods of combat in order to ameliorate the conditions of incapacitated soldiers and to spare the civilian population from the adverse effects of hostilities. See Goldman, *supra* note 6 at 51.

*Declaration of Human Rights*,<sup>9</sup> the *International Covenant on Civil and Political Rights*,<sup>10</sup> the *Convention for the Protection of Human Rights and Fundamental Freedoms*,<sup>11</sup> and the *American Convention on Human Rights*.<sup>12</sup> Such declarations give voice to collective values, expressing how the signatories believe individuals ought to be treated. In times of crisis states may derogate from the more suppletive obligations. However, in all cases some individual rights remain inviolable, and the prohibition against their breach is imperative under international law. In most human rights documents, the rights to life, freedom from torture and degrading treatment, and freedom from slavery and forced labour will be found as examples of such non-derogable rights.<sup>13</sup> Non-derogable rights are those human rights that are “so fundamental to protect the human person ... that they may never be legitimately violated. These rights are based on rules of universal validity which cannot be ignored, even without treaty obligations or any explicit commitments to obey them.”<sup>14</sup>

While human rights law “technically” applies during periods of armed conflict, the principal flaw in its application is that it prescribes no criteria to establish the “means and methods” of warfare, given the fact that it was designed to govern in times of peace.<sup>15</sup> Although human rights law is not accorded the same stature under international law as humanitarian law, it is important to consider the former as a serious complement to the latter, as humanitarian law is not without gaps. This notion of universal validity is supported by Dupuy in *Droit International*, who posits: “Cette convergence est en tous cas significative; elle indique ceux qui, parmi les droits en cause, constituent les attributs inaliénables de la personne humaine, fondés comme tels sur des valeurs que l’on retrouve en principe dans tous les patrimoines culturels et les systèmes sociaux.”<sup>16</sup> Human rights and humanitarian law share a common nucleus

<sup>9</sup> GA Res. 217 (III), UN GAOR, 3d Sess., Supp. No. 13, UN Doc. A/810 (1948) 71.

<sup>10</sup> 19 December 1966, 999 U.N.T.S. 171, Can. T.S. 1976 No. 47 [hereinafter *I.C.C.P.R.*].

<sup>11</sup> 4 November 1950, 213 U.N.T.S. 221, Eur. T.S. 5 [hereinafter *Convention on Human Rights*].

<sup>12</sup> OR OEA/Ser.K/XVII/1.1.1/Doc.65 rev. 1 (1969), 9 I.L.M. 673, O.A.S.T.S. No. 361.

<sup>13</sup> The right to life as a non-derogable right is found in art. 4 of the *I.C.C.P.R.*, *supra* note 10, art. 15 of the *Convention on Human Rights*, *supra* note 11, and art. 27 the *American Convention on Human Rights*, *ibid.*

<sup>14</sup> Walker, *supra* note 7 at 153. This proposition is further supported by J.-M. Dupuy in his book *Droit International Public*, 3rd ed. (Paris: Dalloz, 1995) at 172 [hereinafter *Droit International*] where he states:

Ainsi, l'article 3 commun aux quatre conventions de Genève de 1949 portant sur le droit humanitaire (c'est-à-dire en définitive le droit de la protection de la personne humaine en cas de conflits armés non internationaux), mais aussi l'article 4, alinéa 2 du Pacte international relatif aux droits civils et politiques, ou l'article 12, alinéa 2 de la convention européenne, de même que l'article 27 de la convention américaine des droits de l'homme, énoncent les uns et les autres un certain nombre de droits *qui doivent être respectés en tous lieux et toutes circonstances, et ne sont par conséquent susceptibles d'aucune dérogation*: il s'agit en particulier du droit à la vie, du droit à ne pas être soumis à la torture ni à des peines ou traitements inhumains ou dégradants [emphasis in original].

<sup>15</sup> See Goldman, *supra* note 6 at 50.

<sup>16</sup> *Droit International*, *supra* note 14 at 172.

of non-derogable rights and a common purpose of protecting human life and dignity. The specific provisions of humanitarian law, however, seem to afford victims of armed conflict far greater protection than general human rights guarantees.<sup>17</sup>

In the context of an internal armed conflict, however, human rights law compensates for the gaps inherent in humanitarian law which arise as a result of the fact that Common Article 3<sup>18</sup> and *Protocol II*<sup>19</sup> are much less far-reaching than the law applicable to international armed conflicts, even though the incidence of internal conflict is so pervasive and its effect so devastating. Although human rights instruments are not directly legally enforceable, they are indicative of international norms and thus hold suasive power. Given that human rights law is primarily concerned with behavior within a state, it is possible that resistance by states to further international responsibility in internal armed conflicts will be eroded by human rights pressure.<sup>20</sup>

In addition to humanitarian and human rights law being applicable to internal conflicts, the International Court of Justice has held that customary law and the laws of humanity may also be applied to internal armed conflicts. In *Military and Paramilitary Activities In and Against Nicaragua (Nicaragua v. United States)*,<sup>21</sup> the Court held that "elementary considerations of humanity" could apply to a situation of internal armed conflict and that the Conventions were "in some respects a development, and in other respects no more than the expression" of fundamental general principles of humanitarian law.<sup>22</sup> These fundamental principles, found in Common Article 3, are to be applied *de minimis* to both internal armed conflicts and international armed conflicts: "the minimum rules applicable to international and to non-international conflicts are identical."<sup>23</sup> While Common Article 3 applies explicitly to situations of internal armed conflict, the Court implied that other provisions of the Conventions, such as

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<sup>17</sup> See Goldman, *supra* note 6 at 53.

<sup>18</sup> *Supra* note 7.

<sup>19</sup> *Ibid.*

<sup>20</sup> See L. Doswald-Beck & S. Vité, "International Humanitarian Law and Human Rights Law" (1993) 293 *Int'l Rev. Red Cross* 94. This journal is available on the Red Cross homepage online: <<http://www.icrc.ch>> (date accessed: 23 September 1998). One block of states has been particularly reticent to extend the principles of human rights protection very far. Philip Alston notes in his article "The UN's Human Rights Record: From San Francisco to Vienna and Beyond" (1994) 16 *Hum. Rts. Q.* 375 at 382, that:

the signatories to the *Bangkok Declaration*, adopted at the World Conference Regional Preparatory Meeting in April 1993 recognize that while human rights are universal in nature, they must be considered in the context of a dynamic and evolving process of international norm-setting, bearing in mind the significance of national and regional particularities and various historical, cultural and religious backgrounds (*Final Declaration of the regional meeting for Asia of the World Conference on Human Rights (Bangkok Declaration)*), A/CONF.1571 PC/59, (1993) 14 *HRLJ* 370 at para. 8).

The fact that some commentators view the support of human rights as a culturally relative concept militates against their universal application.

<sup>21</sup> [1986] I.C.J. Rep. 14 at 98 [hereinafter *Nicaragua Case*].

<sup>22</sup> *Ibid.* at 113.

<sup>23</sup> *Ibid.*

Common Article 1, which applies explicitly to international conflict, may still apply to internal conflict if its *ratio legis* fits situations in internal armed conflicts.<sup>24</sup>

In the same way that decisions of the International Court of Justice are useful and often referred to in determining the state of international law in a particular instance, resolutions of the General Assembly of the United Nations are similarly important. While the General Assembly is empowered to make recommendations which are not considered binding *per se*, it is important to note the formative influence of such resolutions in the development of international law.<sup>25</sup> Oscar Schachter asserts that "interpretations and declarations of law by the Assembly are official expressions of the governments concerned and consequently are relevant and entitled to be given weight in determinations of the law in question."<sup>26</sup> It is in this suasive light that General Assembly Resolution 2444, *Respect for Human Rights in Armed Conflicts*<sup>27</sup> must be viewed. This Resolution specifically recognizes the idea that internal armed conflicts are subject to legal restraints. *Respect for Human Rights* brings the law governing internal conflict in line with that governing international strife, as it recognizes the customary rule of civilian immunity and its corollary, the distinction between civilians and combatants.<sup>28</sup>

The principle of restraint in internal armed conflict as demonstrated by the International Court of Justice and the General Assembly is further strengthened by the Preamble to *Protocol II*, which links the protection of human rights and the international law governing internal armed conflicts by stating that "international instruments relating to human rights offer a basic protection to the human person."<sup>29</sup> In addition, the Preamble incorporates the Martens Clause,<sup>30</sup> which recognizes that even with

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<sup>24</sup> See Walker, *supra* note 7 at 151.

<sup>25</sup> See O. Schachter, "International Law in Theory and Practice, General Course in International Law" (1982) 178 *Rec. des Cours* 9 at 111-21.

<sup>26</sup> *Ibid.* at 117.

<sup>27</sup> GA Res. 2444 (XXIII), UN GAOR, 23d Sess., Supp. No 18, UN Doc. A/7218 (1968) [hereinafter *Respect for Human Rights*] states in part:

[The] following principles for observance by all governmental and other authorities for action in armed conflicts:

- (a) That the right of the parties to a conflict to adopt means of injuring the enemy is not unlimited;
- (b) That it is prohibited to launch attacks against the civilian population as such;
- (c) That distinction must be made at all time between persons taking part in the hostilities and members of the civilian population to the effect that the latter be spared as much as possible.

<sup>28</sup> See Goldman, *supra* note 6 at 61.

<sup>29</sup> *Protocol II*, *supra* note 7 at para. 2.

<sup>30</sup> For a good explanation of the background to the naming of this clause, see Walker, *supra* note 7 at 154. The provision originally appeared in the Hague Conventions where it affirmed: "[In] cases not included in the regulations ... the inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the *laws of humanity, and the dictates of the public conscience*" [emphasis added].

documents such as Common Article 3 and international human rights instruments, there are still cases that may fall into a gap not provided for under the *Protocol*. The Preamble emphasizes that such cases are still subject to the principles of humanity and the dictates of public conscience.

There is pressure to expand the influence of the Martens Clause.<sup>31</sup> An International Committee for the Red Cross Commentary notes that:

[If] a case is "not covered by the law in force," whether this is because of a gap in the law or because the parties do not consider themselves to be bound by Common Article 3, or, are not bound by Protocol II, this does not mean that anything is permitted. The human person remains under the protection of the principles of humanity and the dictates of the public conscience. This clarification prevents an *a contrario* interpretation. Since they reflect public conscience, the principles of humanity actually constitute a universal reference point and apply independently of the Protocol.<sup>32</sup>

This assertion is reinforced by the wartime holding of a U.S. Military Tribunal in *United States v. Krupp*, which determined that the Martens Clause (in its Hague Convention incarnation)

is much more than a pious declaration. It is a general clause, making it, the usages established among civilized nations, the *laws of humanity* and the *dictates of public conscience* into the legal yardstick to be applied if, and when, the specific provisions of the [Hague] Convention and the regulations annexed to it do not cover specific cases occurring in warfare, or concomitant to warfare.<sup>33</sup>

This convergence of the fundamental principles of the laws of humanity and the dictates of public conscience which form the basis of humanitarian and human rights law shows that:

war and peace, civil wars and international conflicts, international law and internal law, all have increasingly overlapping areas. It follows that the law of war and the law of peace, international law and internal law, the scopes of which were at first clearly distinct, are today often applicable at the same time side by side. Thus, the Geneva Conventions and the human rights conventions may often be applied in cumulative fashion.<sup>34</sup>

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<sup>31</sup> Some commentators have noted that principles contained in this Clause are binding only as customary law in the context of international armed conflicts (see Walker, *supra* note 7 at 155).

<sup>32</sup> I.C.R.C., *Commentary on the Additional Protocols of 8 June 1977 to the Geneva Conventions of 12 August 1949* at 1341 [hereinafter *Protocols Commentary*].

<sup>33</sup> *United States v. Krupp* (1949), 9 Trials of War Criminals Before the Nuremberg Military Tribunals 1341, as cited in Walker, *supra* note 7 at 155.

<sup>34</sup> D. Schindler, "The International Committee of the Red Cross and Human Rights" (1979) 208 *Int'l Rev. Red Cross* 5, as cited in Forsythe, *supra* note 2 at 288.



## II. Universal Jurisdiction

Regardless of whether an act is deemed criminal within the internal/international armed conflict debate as discussed in Part I, the ability of a state to exert jurisdiction with respect to cases of certain identified crimes has a strong foundation in existing international law. It is clear that the line between international and internal armed conflict is becoming increasingly unsustainable, therefore an act which is condemnable under international humanitarian law as criminal should not be ignored if it occurs in a situation of internal conflict.

States may exert jurisdiction over perpetrators of universally condemnable crimes irrespective of the context in which they occur. When a state exerts jurisdiction over a case involving persons or property outside that country's territorial boundaries, however, the claim must be based on some principle of international jurisdiction.<sup>35</sup>

One such principle, the principle of universal jurisdiction, "assumes that every state has an interest in exercising jurisdiction to combat egregious offenses that states universally have condemned."<sup>36</sup> Although the interest may be of an economic or social nature, it may be argued that the extension of the principle of universality is a reflection of international values whose protection is of interest to all members of the world community. Accordingly, a state prosecutes an offense because the object of legal protection is particularly worthy of protection according to customary or treaty law, and the injury is generally recognized as punishable.<sup>37</sup>

Although the political will of countries unaffected by the conflict to exercise jurisdiction is not likely to be in the same evidence,<sup>38</sup> there is modern support for the notion that traditionally defined war crimes as well as an increasingly acknowledged category of universal crime should also be punishable when committed in internal armed conflicts. Until the 1990s, the international prosecutions of perpetrators of war crimes and crimes against humanity during World War II remained the major instances of criminal prosecution of offenders of the fundamental norms of international humanitarian law. Since then, however, additional treaties which include areas such as hijacking, hostage taking, crimes against internationally protected persons, apartheid, torture, and genocide have been adopted, and provide for national prosecution of offenses of international concern through the mechanism of universal jurisdiction. This expansion derives from the growing world consensus condemning such crimes. Writers have compared terrorists and human rights offenders to pirates, slave traders and

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<sup>35</sup> While domestic jurisdiction may rest on reconciling one state's interest in a particular offense with another state's interests in the same offense, five general principles of subject-matter jurisdiction are recognized under international law: nationality, passive, objective territorial, protective and universality. Only the principle of universality will be discussed in this Note. For a thorough summary of the five principles see C. Sorensen, "Drug Trafficking on the High Seas: A Move Toward Universal Jurisdiction Under International Law" (1990) 4 *Emory Int'l L.R.* 205 at 213.

<sup>36</sup> K.C. Randall, "Universal Jurisdiction Under International Law" (1988) 66 *Texas L.R.* 785 at 788.

<sup>37</sup> See R. Wolfram, "The Decentralized Prosecution of International Offenses Through National Courts" (1995) 24 *Israel Y.B.H.R.* 183 at 185.

<sup>38</sup> See generally Meron, *supra* note 5 at 574ff.

war criminals, the former having provided the historical basis for the development of the modern notion of universal crime: "[T]heir offenses involve particularly reprehensible acts that often indiscriminately endanger human lives and property interests. Terrorism and human rights violations are thus the concern of the world's legal system rather than the sole province of individual states."<sup>39</sup> Although these treaties have not been commonly followed,<sup>40</sup> this is not to say that the potential for their observation and for the continued expansion of the doctrine of universality is unlikely. On the contrary, there is nothing static about the state of international law, as it must evolve to meet changing political needs.<sup>41</sup>

When particular acts become a concern of the world's legal system, and states adopt a multilateral treaty to define a specific activity as criminal, this act of agreement forwards the notion that a particular offense is generally punishable, and that the perpetrator has become, like the pirate, *hostis humani generis*. This universal consensus lends credence to a state's claim that it is prosecuting an individual (or extraditing to a country that will prosecute) on the basis of inherent jurisdiction. In this sense, "the courts of a particular nation act in the interest of the international community or the respective treaty membership, as instruments of the decentralized enforcement of international law."<sup>42</sup>

The Geneva Conventions provide a salient example of the expanded nature of universal jurisdiction, in the sense that all signatories to the Conventions are implicated in the prosecution or extradition of a perpetrator of specific international crimes.<sup>43</sup> If a state does not wish to prosecute the alleged offender, then the Conventions leave open the option of extraditing the individual to a state that will prosecute. The agreement of signatories to the Conventions to enact the legislation necessary to provide effective domestic jurisdiction underlines the consensus among nations with respect to the universally condemned nature of the crimes.

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<sup>39</sup> Randall, *supra* note 36 at 815.

<sup>40</sup> See Meron, *supra* note 5 at 554.

<sup>41</sup> The ability of courts to recognize the evolution of international law has been most eloquently stated by Lord Denning in *Trendtex Trading Corporation v. Central Bank of Nigeria*, [1977] Q.B. 529 at 554, [1980] 3 All E.R. 721 (C.A.) [hereinafter cited to Q.B.]:

It is certain that international law does change. I would use of international law the words which Galileo used of the earth: "But it does move." International law does change: and the courts have applied the changes without the aid of any act of Parliament. Thus, when the rules of international law were changed (by the force of public opinion) so as to condemn the slaver, the English courts were justified in applying the modern rules of international law.

<sup>42</sup> Wolfram, *supra* note 37 at 186.

<sup>43</sup> "[E]ach [party] shall be under the obligation to search for persons alleged to have committed, or to have ordered to be committed ... grave breaches and shall bring such persons, regardless of their nationality, before its own courts." *I Geneva Convention*, art. 49; *II Geneva Convention*, art. 50; *III Geneva Convention*, art. 129; *IV Geneva Convention*, art. 146, *supra* note 7.

In addition, article III of the *Convention on the Prevention and Punishment of the Crime of Genocide*<sup>44</sup> defines certain forms of repression of an ethnic or cultural grouping as a crime under international law. The commission of particular acts “with intent to destroy in whole or in part, a national, ethnical, racial or religious group” is a conceptual derivative of crimes against humanity<sup>45</sup> which may be “committed in time of peace or in time of war.”<sup>46</sup> With respect to the finding of international legal responsibility for these crimes, whether a state is a signatory to the *Genocide Convention* is, for the purpose of international law, irrelevant.<sup>47</sup>

There may be little debate that crimes against humanity, and the crime of genocide, allow for the extension of the principle of universal jurisdiction. An excellent example of the trend to extend the principle of universality to “war crimes” which have occurred in a non-international context may be found in article 22 of the ILC’s *Draft Code of Crimes Against the Peace and Security of Mankind*.<sup>48</sup> This article, which is entitled “Exceptionally Serious War Crimes”, is applicable to armed conflict of both international and internal nature, and lists serious violations of the laws and customs applicable in armed conflict. This trend is typified by the recently enacted Belgian *War Crimes Law*<sup>49</sup> which provides for the criminal jurisdiction of Belgian

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<sup>44</sup> GA Res. 260(A)(III), UN GAOR, 3d Sess., Supp. No. 1021, 78 U.N.T.S. 277 (1948), GA Res. 260(II) No. 1021, 78 U.N.T.S. 277 [hereinafter *Genocide Convention*].

<sup>45</sup> See Randall, *supra* note 36.

<sup>46</sup> *Supra* note 44, art. I

<sup>47</sup> The UN Commission of Experts which reported on the situation in Rwanda found that the prohibition on genocide has achieved the status of *jus cogens* and accordingly binds all members of the international community, regardless of whether their states have ratified the *Genocide Convention*. See art. 55(c) of the *UN Charter*, *supra* note 3.

<sup>48</sup> UN GAOR, 46th Sess., Supp. No. 10, UN Doc. A/46/10 (1991), 30 I.L.M. 1584, art. 22 states:

2. [A]n exceptionally serious war crime is an exceptionally serious violation of principles and rules of international law applicable in armed conflict consisting of any of the following acts:

(a) acts of inhumanity, cruelty or barbarity directed against the life, dignity or physical or mental integrity of persons [in particular wilful killing, torture, mutilation, biological experiments, taking of hostages, compelling a protected person to serve in the forces of a hostile Power, unjustifiable delay in the repatriation of prisoners of war after the cessation of active hostilities, deportation or transfer of the civilian population and collective punishment];

(b) establishment of settlers in an occupied territory and changes to the demographic composition of an occupied territory;

(c) use of unlawful weapons;

(d) employing methods or means of warfare which are intended or may be expected to cause widespread, long-term and severe damage to the natural environment;

(e) large-scale destruction of civilian property;

(f) wilful attacks on property of exceptional religious, historical or cultural value.

<sup>49</sup> *Loi relative à la répression des infractions graves aux Conventions internationales de Genève du 12 août 1949 et aux Protocoles I et II du 8 juin 1977, additionnels à ces Conventions*, Moniteur Belge

courts over certain breaches of the Geneva Conventions and Additional Protocols, irrespective of whether there are any other traditional principles of jurisdiction upon which a court may establish its jurisdiction.<sup>50</sup>

The law which gives the Belgian courts universal jurisdiction over certain crimes — irrespective of whether Belgium has a traditional nexus with that crime, the criminal or the victim — parallels the ability of the War Crimes Tribunal for Rwanda to prosecute persons who have committed genocide and crimes against humanity. “Crimes against humanity” (which has not been redefined since its conception in the Nuremberg Charter<sup>51</sup> and which was established on the basis of an international conflagration<sup>52</sup>) has thus been legally extended to the level of internal conflict as well. This extension of jurisdiction is particularly significant as the crime of “crimes against humanity” was defined by the *Nuremberg Charter* to include “murder, extermination, enslavement, deportation, and other inhuman acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds.”<sup>53</sup>

With respect to “newer” offenses such as hijacking, hostage-taking and torture, the principle of universality under customary law may be extended. Each of the illicit activities mentioned has multiple international conventions which pertain to it,<sup>54</sup> and which provide varying degrees of international consensus for the sanctions that should be forthcoming. Many of the conventions governing hijacking, hostage taking, and

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(5 August 1993). See E. David, “La Loi Belge Sur les Crimes de Guerre” (1995) Rev. Belge D.I. 668 for an article-by-article analysis of the Act.

<sup>50</sup> Meron writes that on the basis of this law, on 29 May 1995, the Brussels prosecutor’s office issued several international arrest warrants against persons involved in the atrocities in Rwanda. One of the three warrants was issued against a Rwandan responsible for massacres of other Rwandans in Rwanda. See Meron, *supra* note 5 at 577.

<sup>51</sup> Meron, *ibid.* at 556.

<sup>52</sup> The Belgian development and the jurisdiction developed by the Rwandan Tribunal may find their beginnings in post-World War II pronouncements. As early as 1949, war crimes tribunals were stating that “murder, torture, enslavement, and similar crimes which heretofore were enjoined only by the respective nations now fall within the prescription of the family of nations. Thus, murder becomes no less murder because [it is] directed against a whole race instead of a single person.” (*United States v. von Leeb* (1949), 11 Trials of War Criminals Before the Nuremberg Military Tribunals at 497, as cited in Meron, *ibid.* at 567).

<sup>53</sup> *Charter of the International Military Tribunal*, 8 August 1945, 82 U.N.T.S. 280, art. 6(c).

<sup>54</sup> With respect to hijacking, two conventions are particularly relevant: *Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation*, 23 September 1971, 974 U.N.T.S. 177, 24 U.S.T. 565, T.I.A.S. No. 7570 [hereinafter the *Safety of Civil Aviation Convention*] and the *Convention for the Suppression of Unlawful Seizure of Aircraft*, 16 December 1970, 860 U.N.T.S. 105, 22 U.S.T. 1641, T.I.A.S. No. 7192 [hereinafter *Unlawful Seizure of Aircraft Convention*]. In hostage taking situations, the *International Convention Against the Taking of Hostages*, 4 December 1979, 18 I.L.M. 1456, adopted by GA Res. 34/146, 34 UN GAOR, Supp. No. 39, UN Doc. A/C.6/34/L.23 (1979) [hereinafter *Hostage Convention*] is applicable. Torture is defined in the following Convention: *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, adopted by GA Res. 39/46, UN GAOR, 1985, Supp. No. 51, UN Doc. A/Res/39/46/ at 197 [hereinafter *Torture Convention*].

torture contain a version of the following provision which is found in the *Hostage Convention*:

The State Party in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution, through proceedings in accordance with the laws of that State.<sup>55</sup>

This expression of *aut dedere aut judicare* emphasizes the universal nature of the crimes, entreating the international legal community to punish the offenders. Irrespective of where the perpetrators reside or where the crime takes place, the acts committed are considered universally condemnable.

Once an act which falls within the category of "universal crime" is committed, irrespective of where the act is committed or who the victims are, the ability of all states to exert jurisdiction logically follows. Once it has been established that universal jurisdiction has been extended, a further question must be asked: is a state that finds within its borders a perpetrator of a universal crime mandated, by international law, to act in order to bring about justice?

### III. Universal Duty

#### A. *The Obligation to Take Action is Fundamental*

Part II established the rationale for asserting that every state may exercise jurisdiction over individuals who have committed universal crimes. Once the ability to act is established, the question becomes whether states are obliged to exercise that jurisdiction. In Part III, the principle of *aut dedere aut judicare* will be shown to form the basis of a general obligation within international law which applies to universally condemnable crimes.

The *UN Charter*<sup>56</sup> is a document that is "both the constitution of the United Nations Organization and a constitutional substitute for the international legal system."<sup>57</sup> It sets out "the foundational concepts of international law."<sup>58</sup> Article 55(c) of the *UN Charter* states that the United Nations has, as a mandate, the promotion of "the universal respect for, and observance of" human rights.<sup>59</sup> Practically, efforts of this nature included statements on the prohibition of genocide, which have led to the categoriza-

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<sup>55</sup> *Hostage Convention*, *ibid.* art. 8(1). With respect to the other acts, similar provisions may be found in *Torture Convention*, *ibid.* art. 7(1), *Safety of Civil Aviation Convention*, *ibid.* art. 7 and the *Unlawful Seizure of Aircraft Convention*, *ibid.* art. 7.

<sup>56</sup> *Supra* note 3.

<sup>57</sup> H.M. Kindred *et al.*, *International Law: Chiefly as Interpreted and Applied in Canada*, 5th ed. (Toronto: Emond Montgomery, 1993) at 19, para. 9.

<sup>58</sup> *Ibid.*

<sup>59</sup> *Supra* note 3.

tion of that crime as a *jus cogens* norm under international law.<sup>60</sup> Article 56 indicates that “[a]ll Members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Art. 55.”<sup>61</sup> By applying these two articles, a foundational concept of international law may be derived: states are required to act in a certain manner when confronted with violations of human rights norms.

The promotion of human rights not only requires the existence of substantive norms, *i.e.*, prohibitions, but of procedural norms as well. Without mechanisms for implementation, prohibitions become empty vessels. Implementation mechanisms are necessary corollaries of prohibitions. For the effective treatment of universal crimes, a duty must be found that requires states to take some form of action against the perpetrators of the offenses envisaged in article 55(c). Without the recognition of such an obligation, the perpetrators of heinous crimes are effectively acquitted. Such inaction promulgates the impression that others will have no consequences to face if they act in similar ways. Therefore, in the context of crimes which are condemnable at an international level, there must be a duty of non-asylum incumbent on the host state.<sup>62</sup> The notion of non-asylum flows naturally from article 56 of the *UN Charter* and includes deportation, extradition, exclusion, prosecution, and any other method of removing an individual from a host state’s territory. Non-asylum is a comprehensive duty of *aut dedere aut judicare*.

The components of the obligation of *aut dedere aut judicare* may be viewed as disjunctive, that is, a state has the option either to extradite or prosecute an alleged criminal. In this way, a host state can prosecute the individual without examining the possibility of extradition. Even in the cases in which no extradition treaty has been signed between the host state and the state requesting the return of the alleged offender, an obligation on the part of the host state to take action is present. If extradition is not a viable option, then the second element of *aut dedere aut judicare* imposes an obligation on the host state to begin criminal proceedings against the alleged perpetrator of the universal crime.

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<sup>60</sup> See *supra* note 44.

<sup>61</sup> *UN Charter*, *supra* note 3.

<sup>62</sup> While the principle of *aut dedere aut judicare* may be read strictly as “extradite or prosecute”, for the purposes of this Note, it may also be regarded as a duty of non-asylum. The term “non-asylum” is attributable to Professor Y. Dinstein, president of Tel-Aviv University (Interview with Prof. Yoram Dinstein, 29 July 1996, Tel-Aviv, Israel). The authors have expanded on its definition and scope of application.

## 1. Custom as Derived from Convention

### a. Traditional Paradigm

Any discussion which invokes international law must involve an analysis of relevant customary law, since it is considered to be a formal source thereof.<sup>63</sup> Traditionally, customary norms can only be established if two factors are met. First, there must be a general practice among states as evidenced by state action, and second, this conduct must result from the belief by the state that it is required to act in a manner prescribed by international law — *opinio juris*. In keeping with this view, in order to assert that the principle of *aut dedere aut judicare* is a customary norm when dealing with heinous crimes, examples must be given of what was done with perpetrators of other similar incidents by both state parties to the governing treaties, as well as non-state parties.

Although state practice has been strictly characterized as being composed of the conduct of states without regard to their public pronouncements, a better view seems to be that “state practice consists not only of what states do, but also of what they say.”<sup>64</sup> States “in conjunction with a significant number of legal scholars (and arguably the International Court of Justice), [have] asserted that these resolutions and declarations [of international organizations, particularly those of the U.N.] are important instances of state practice which create, or at least indicate, rules of customary interna-

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<sup>63</sup> Art. 38(1)(b) of the *Statute of the International Court of Justice*, 59 Stat. 1055, online: International Court of Justice <<http://www.icj-cij.org>> (date accessed: 23 September 1998) [hereinafter *Statute of the ICJ*] reads as follows: “The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: ... (b) international custom, as evidence of a general practice accepted as law.” The expression *aut dedere aut judicare* is found in numerous conventions which deal with issues of international concern. Although there are nuances to the obligation found in the various treaties, the essence of the obligation is found in each, that is to say, that the components of mandatory extradition or prosecution are present. For an extensive list see R. Jennings & A. Watts, eds., *Oppenheim’s International Law*, vol. 1, pt. 2, 9th ed. (London: Longman, 1992) at 953-54; Bassiouni and Wise add to this list the *Organization of American States Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion that are of International Significance*, 2 February 1971, 10 I.L.M. 255, 27 U.S.T. 3949, the *International Atomic Energy Agency Convention on the Physical Protection of Nuclear Material*, 3 March 1980, 18 I.L.M. 1419, and the *Genocide Convention*, *supra* note 44. See M.C. Bassiouni & E.M. Wise, *Aut Dedere Aut Judicare: The Duty to Extradite or Prosecute in International Law* (Dordrecht: Martinus Nijhoff, 1995) at 121-23 and 3, n. 1 [hereinafter *Aut Dedere Aut Judicare*]. In E.M. Wise, “The Obligation to Extradite or Prosecute” (1993) 27 *Isr. L. Rev.* 268 at 270 it is noted that “the only post-Hague treaty defining an ‘international offense’ that does not include an obligation to extradite or prosecute is the Apartheid Convention of 1973” (*International Convention on the Suppression and Punishment of the Crime of Apartheid*, 30 November 1973, GA Res. 28/3068 (XXVIII), UN GAOR, 28th Sess., Supp. No. 30, UN Doc. A/Res/3068 (1973), 1015 U.N.T.S. 243, 13 I.L.M. 50).

<sup>64</sup> M. Akehurst, *A Modern Introduction to International Law*, 6th ed. (London: Routledge, 1992) at 29. See also R.R. Baxter, “Multilateral Treaties as Evidence of Customary International Law” (1968) 66 *Brit. Y.B. Int’l L.* 275 at 300.

tional law.”<sup>65</sup> There is strong support for the notion that state practice can come in the form of both state action or state assertions, the latter emerging primarily in the form of written documents.

There are principally three theories on the role state assertions have in the creation of international law. First, both state action and public assertion in and of themselves can be equally considered instances of state practice. Second, statements made by states indicate customary norms, but cannot be considered by themselves as state practice. Third, state declarations constitute instances of state practice, carrying less weight, however, than the traditional forms of state behaviour in establishing customary norms.<sup>66</sup> For the purposes of this Note, it is the first position that will be applied within the context of the development of international human rights and humanitarian law.<sup>67</sup>

In the *Nicaragua Case*, the International Court of Justice stated that in order for statements made by states to attain customary norm status there must be evidence of action.<sup>68</sup> Although the Court declared that *opinio juris* must be confirmed by state action,<sup>69</sup> it also found *opinio juris* in verbal statements.<sup>70</sup> If, on the one hand, the Court stated that *opinio juris* must be confirmed by state action, and then on the other, found that *opinio juris* may emerge simply from statements made by states, it appears that what the Court is supporting is the proposition that what a state says is equivalent to what a state does with respect to the determination of the content of state practice.

In the context of humanitarian treaties, state action and *opinio juris* have been essentially ignored.<sup>71</sup> In addition, the International Court of Justice “while supporting the concept of *opinio juris* in principle, has repeatedly ignored it in practice.”<sup>72</sup> The context of both human rights and humanitarian law challenges traditional assumptions with respect to the creation of customary law. It is antithetical to the foundational objectives of international humanitarian and human rights law to wait for a significant number of atrocities to occur before customary rules may be established.<sup>73</sup> It is likely due to the pressing need to address grave violations of human rights and humanitarian law that the International Court of Justice has diminished the exclusive importance of

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<sup>65</sup> M. Byers, “Custom, Power, and the Power of Rules: Customary International Law from an Interdisciplinary Perspective” (1995) 17 Mich. J. Int’l L. 109 at 118.

<sup>66</sup> See *ibid.*

<sup>67</sup> Nevertheless, the above propositions will be reached whether or not the first or third positions are applied.

<sup>68</sup> See *Nicaragua Case*, *supra* note 21 at 98.

<sup>69</sup> See *ibid.*

<sup>70</sup> See T. Meron, *Human Rights and Humanitarian Norms as Customary Law* (Oxford: Clarendon, 1989) at 41-43 [hereinafter *Humanitarian Norms*]. See also G.M. Danilenko, *Law-Making in the International Community* (Dordrecht: Martinus Nijhoff, 1993) at 92-94.

<sup>71</sup> See *Humanitarian Norms*, *ibid.* Although Meron indicates that *opinio juris* has been repeatedly ignored in practice, its relevance will not be dismissed in this Note.

<sup>72</sup> Byers, *supra* note 65 at 140. See also Danilenko, *supra* note 70 at 93-94.

<sup>73</sup> As would be required applying a traditional view of how customary norms are established.



state action and *opinio juris* in the creation of customary law, and found evidence of custom in the public statements of states.

At its most basic, *opinio juris* means that state practice is motivated by a sense of obligation. Regarding state action, it may be said that the conduct is motivated by a sense of legal obligation. *Opinio juris* can be informed by "compelling principles of humanity."<sup>74</sup> However, when examining state pronouncements, it may be argued that a statement made by a state is not made because it feels that it has the legal duty to do so, but rather, the state makes the statement because it believes that a particular proposition needs to be articulated.

Given the foregoing, it is reasonable to assert that if a state has signed and ratified a significant number of treaties containing the *aut dedere aut judicare* formula,<sup>75</sup> then that state has demonstrated through this practice that *aut dedere aut judicare* is a customary norm. The state, through the act of signing related international agreements, articulates the belief that *aut dedere aut judicare* is an accepted norm and that it is the most effective way of preventing certain forms of conduct. This belief satisfies the requirement of *opinio juris* when establishing customary norms. If a state accedes to a large number of international treaties, all of which have a variation of the *aut dedere aut judicare* principle, there is strong evidence that it intends to be bound by this generalizable provision, and that such practice should lead to the entrenchment of this principle in customary law. By agreeing to the formula of *aut dedere aut judicare* in multiple treaties that are concerned with international offenses, a state has indicated that with respect to international offenses it believes that the best way to ensure compliance is to impose such an obligation.

### b. Non-Traditional Analysis

While *aut dedere aut judicare* may be found in a careful analysis of what has been considered the "traditional process" of formation of customary law, an additional persuasive hypothesis exists that has moved away from this approach.

Advocates of this hypothesis focus on the global objectives of a particular treaty. The idea behind the concept of global treaties is similar to the notion of international offenses in that there are certain problems that require universally binding norms in order to address them effectively. Accordingly, there needs to be a way to bind all states to certain treaty norms without having to undergo the traditional process of observing state practice through action or repeated pronouncement.

It is argued that ... objective community interests and the will of the international community should prevail over the interests and will of individual states. As a result, there is a legal duty to act in accordance with at least the basic norms established by global treaties.<sup>76</sup>

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<sup>74</sup> *Humanitarian Norms*, *supra* note 70 at 53.

<sup>75</sup> See *Aut Dedere Aut Judicare*, *supra* note 63.

<sup>76</sup> Danilenko, *supra* note 70 at 66-67.

Proponents of this approach suggest that custom may arise through the creation of global treaties,<sup>77</sup> *i.e.* treaties that a significant number of members of the international community have ratified. The legitimacy of the universal application of the principles contained within these treaties is supportable when dealing with treaties of a humanitarian character.<sup>78</sup> Baxter maintains that “the adhesion of the great majority of the important states of the world to such an agreement may act in such a way as to impose the standards of the treaty on non-parties.”<sup>79</sup>

It is not sufficient for prohibitions found in treaties to be considered basic norms, as to do so would defeat the underlying universally binding rationale of global treaties. To have any real impact, the duty of members of the international community cannot end with the mere identification of problematic areas, but must extend to the exercise of action to address the violations of those prohibitions. Mechanisms to deal with universal crimes must also constitute basic norms. If *aut dedere aut judicare* is the most effective way of dealing with perpetrators of universal crimes, it ought to be regarded as a legal norm established by treaties, even though it is not established by one treaty, but by a group of treaties.<sup>80</sup>

Although it may be argued that the traditional law-making process will be contravened, and that what constitutes a global interest will be shrouded by political interests and subjectivity, the interest of punishing perpetrators of universal crimes is an overarching interest each state has.<sup>81</sup>

In such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the *raison d'être* of the convention. Consequently, in a convention of this type one cannot speak of individual advantages or disadvantages to States.<sup>82</sup>

Although the will of the international community for a host state to act may be rooted in political goals relating to international relations, and not from a sense of an international community, a state's motivation with respect to the implementation of *aut ded-*

<sup>77</sup> *Ibid.* at 64-68.

<sup>78</sup> See Baxter, *supra* note 63 at 286. Baxter's discussion is in the context of prohibitions, however, the idea behind “global treaties” calls for more than prohibitions to emerge as customary norms. It demands that the problems be addressed not merely pronounced. See also Akehurst, *supra* note 64 at 29.

<sup>79</sup> Baxter, *ibid.* at 299. Although the widespread application of specific conventions may vary, the number of signatories and quality of reservations provide strong evidence of customary law. For example, the hijacking conventions which are widely accepted may have generated customary rules applicable to non-parties, whereas the *Torture Convention* (see *supra* note 54 and accompanying text) which is less well accepted and has been in existence for less than two decades is less likely to create customary law.

<sup>80</sup> At the very least, it is apposite to maintain that the mechanism section of the *Genocide Convention*, *supra* note 44, should be considered as binding on all states as it is a “global treaty”.

<sup>81</sup> In particular, the crime of genocide involves “a denial of the right of existence of entire human groups, a denial which shocks the conscience of [hu]mankind” (*Reservations to the Convention on Genocide*, Advisory Opinion, [1951] I.C.J. Rep. 15 at 23 [hereinafter *Genocide Case*]).

<sup>82</sup> *Ibid.* at 23.

*ere aut judicare* is irrelevant. Each state must equally take steps to prevent internationally condemnable crimes from going unpunished as the principle of *aut dedere aut judicare* may be found to be a customary norm of international law using both traditional and non-traditional analysis.

### C. Aut Dedere Aut Judicare as a General Principle of International Law

*Aut dedere aut judicare* may also be found to be a general norm in international law.<sup>83</sup> The meaning of article 38(1)(c) of the *Statute of the ICJ*<sup>84</sup> has been the subject of much debate between legal theorists. Naturalists contend that "general principles of international law" as a source of international law, encompass mores that are intrinsic to the promotion of peace and to the well-being of humankind.<sup>85</sup> Positivists argue that such prescripts envisage principles of law that are accepted in domestic legal systems.<sup>86</sup>

Applying the first view, the goal of international law is to advance international peace and security within a framework of principles of justice.<sup>87</sup> The recognition that a small number of values and principles are common to every state, however, is not novel in the field of international law. From such values flow notions such as universal jurisdiction, *erga omnes* and *jus cogens*. In addition, the idea that legal prohibitions must be enforceable is a further logical extension of these values, as without enforcement mechanisms, grand statements of principle are rendered effectively useless. The principled adoption of *aut dedere aut judicare* ensures the promotion of peace and well-being of humankind, thus becoming a general principle of international law.

Applying the latter view regarding the meaning of article 38(1)(c), legal prohibitions must be coupled with enforcement mechanisms in any criminal law regime, including the international criminal law system. A regime which fails to impose even potential consequences on violators of prohibitions is lacking a prerequisite component of a valid legal system.<sup>88</sup> If the principle of *aut dedere aut judicare* is not consid-

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<sup>83</sup> Kindred, *supra* note 56 at 78, para. 6, cautions significantly that the sources of international law set out in article 38(1) of the *Statute of the ICJ*, *supra* note 63, are all of equal authority. Article 38(1)(c) reads as follows: "1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply: ... (c) the general principles of law recognized by civilized nations." Danilenko, *supra* note 65 at 181-82, states that article 38(1)(c) is infrequently used on its own to establish international norms, however, the authors of this Note contend that there is no persuasive reason why it could not be used in such a manner.

<sup>84</sup> *Supra* note 62.

<sup>85</sup> Danilenko, *supra* note 69 at 175-76.

<sup>86</sup> *Ibid.* at 176.

<sup>87</sup> Wording borrowed from the *UN Charter*, *supra* note 3, art. 1, para. 1.

<sup>88</sup> This idea is not grounded in the realm of legal principles, but rather legislative principles. Both categories of principles are included in art. 38(1)(c) of the *Statute of the ICJ*, *supra* note 63. Legislative principles underlie a legal system or, more precisely, a criminal law regime. The Positivist view is focused on principles of law which arise after a legal system is in place. An examination of legal principles presupposes sound legislative principles. For example, before examining if the rule which militates against multiple convictions for the same crime (*nemo debet bis puniri pro uno delicto*) is a

ered a norm in international law, what results is the unlikelihood of punishment of a perpetrator of a universally condemnable crime where the host state is not a party to a treaty which contains an obligation to take action. The obligation to take action is a condition precedent for any criminal legal system's validity, particularly in respect of the validity of a given prohibition.<sup>89</sup>

It is clear that the obligation of *aut dedere aut judicare* is fundamentally rooted in the *UN Charter*. It can be considered a norm in international law by virtue of 38(1)(c) of the *Statute of the International Court of Justice*, as well as through traditional and non-traditional processes of the formation of customary international law.

## Conclusion

Historically, the principles of sovereignty, equality and political independence of states have imposed a duty to refrain from intervention in the internal affairs of other states. According to these first principles, no intervention is permitted in matters which each state has a sovereign right to decide freely, *i.e.*, no state may interfere in areas which fall within another state's domestic jurisdiction. This non-interventionist approach has meant practically that unless a conflict took on international dimensions which threatened to infringe on the domestic jurisdiction of other states, all other states would refrain from taking action, even in the face of gross human rights violations. This total "hands-off" approach is being viewed increasingly by the international community as unacceptable. Recently, within the structure of the United Nations, the Security Council has expanded new grounds for international jurisdiction based on humanitarian law. The corollary of this jurisdictional widening is a decline in absolute domestic jurisdiction.<sup>90</sup>

Although a persistent concern is that the prosecution of criminals by states that have little or no connection with the prosecuting country limits the principle of equality of sovereign states, if a diminished scope of exclusive sovereignty is accepted, a strong justification can be forwarded to establish that grave violations of human rights (such as kidnapping and murder) are no longer exclusively the internal affairs of individual states.<sup>91</sup> The objective of international laws relating to the protection of fundamental human rights cannot be met "if international law impedes the penalization of such crimes because of the notion of equality of sovereign states."<sup>92</sup>

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valid legal principle, a working system needs to be established that allows for the opportunity to prosecute someone.

<sup>89</sup> The potential for punishment must be kept conceptually distinct from the actual occurrence or implementation of punishment mechanisms. Although there may be infrequent occurrences of enforcement, the possibility for such exists. It is both the potential for enforcement and the presence of such enforcement mechanisms that validate a legal regime.

<sup>90</sup> Ruth Gordon notes, however, that domestic jurisdiction is a malleable concept, based on the current state of international relations. See R. Gordon, "United Nations Intervention in Internal Conflicts: Iraq, Somalia, and Beyond" (1994) 15 Mich. J. Int'l. L. 519 at 524.

<sup>91</sup> See Wolfram, *supra* note 37 at 197.

<sup>92</sup> *Ibid.*

The universal duty represented by the principle *aut dedere aut judicare* does not present any considerable threat to state sovereignty because there is no hierarchy between the inherent options to either extradite or prosecute the individual. *Aut dedere aut judicare* only minimally forces the will of the international community on an individual state. The host state is merely obligated to act in a certain way. Within a situation of internal conflict, where crimes are committed which admit of universal jurisdiction, if a state's extradition legislation does not provide for the exercise of this option, then the state must prosecute the perpetrator.

The distinction between international and internal conflict in the context of human rights and humanitarian law is not only theoretically unsupportable but is also increasingly subject to challenge. As such, the obligation of *aut dedere aut judicare* must be viewed not only as a norm in international law but also as a fundamental element in all conflicts from which emerge universal crimes and universal jurisdiction. The customary law-making process, the *UN Charter*, compelling principles, and elementary considerations of humanity all establish the obligation of *aut dedere aut judicare* as a general precept within international law, which can and must be effectively applied within both international and internal contexts of armed conflict.

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