THE INTERNATIONAL COURT OF JUSTICE'S DECISION IN *CONGO v. BELGIUM*: HOW HAS IT AFFECTED THE DEVELOPMENT OF A PRINCIPLE OF UNIVERSAL JURISDICTION THAT WOULD OBLIGATE ALL STATES TO PROSECUTE WAR CRIMINALS?

Mark A. Summers*

* Associate Professor of Law, Florida Coastal School of Law; B.A., Washington and Jefferson College, *cum laude*; J.D., West Virginia University College of Law; LL.M., University of Cambridge (international law).

I. INTRODUCTION

A. *Background*

Since World War II, the international legal standards that hold individuals responsible for violations of international criminal law have developed rapidly. The Nuremberg and Tokyo War Crimes Tribunals signaled the beginning of this growth period. Shortly thereafter, international conventions intended to outlaw war crimes[1] and genocide[2] were ratified by an overwhelming majority of the states comprising the international legal community.[3] The United Nations General Assembly declared that the offenses prosecuted at Nuremberg were "crimes under international law" and that individuals who committed such crimes were "responsible therefor and liable to punishment."[4] Within a remarkably short period of time, war crimes and genocide were regarded not only as crimes under treaties banning such acts, but also as crimes under customary international law, prohibited even in states which had not adopted those treaties.[5]

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[1] *See, e.g.*, Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31 [hereinafter First Geneva Convention]; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 6 U.S.T. 3217, 74 U.N.T.S. 85 [hereinafter Second Geneva Convention]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug. 12, 1949, 6 U.S.T. 3316, 74 U.N.T.S. 135 [hereinafter Third Geneva Convention]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Fourth Geneva Convention]. Protocol Additional to the Geneva Conventions of Aug. 12, 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I), U.N. GAOR, 32nd Sess., Annex 1, at 10, U.N. Doc. A/32/144 (1977) [hereinafter Protocol I]; Protocol II Additional to the Geneva Conventions of Aug. 12, 1949, *opened for signature* Dec. 12, 1977, 1125 U.N.T.S 609 [hereinafter, collectively, 1949 Geneva Conventions].

[2] Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 278 [hereinafter Genocide Convention].

[3] Today, ratification of these conventions is nearly universal. As of Feb. 1997, 188 nations had ratified the four 1949 Geneva Conventions (156 without qualification); 117 had ratified the Genocide Convention (95 without qualification). BURNS H. WESTON ET AL., SUPPLEMENT OF BASIC DOCUMENTS TO INTERNATIONAL LAW AND WORLD ORDER 1277-79, 1292 (3d ed. 1997).

[4] *Principles of the Nuremberg Charter and Judgment, Formulated by the International Law Commission*, 5 U.N. GAOR, Supp. No. 12, at 11-14, ¶ 99, U.N. Doc. A/1316 (1950).

[5] *E.g.*, Reservations to the Genocide Convention, 1951 I.C.J. 15, 23 (May 28) (finding that "the principles underlying the Convention are principles which are recognized by civilized nations as binding on States, even without any conventional obligation.").

By 1954, the International Law Commission (ILC) completed work on its first Draft Code of Offences Against the Peace and Security of Mankind (Draft Code or Code).[6] In 1996, the ILC completed the most recent iteration of the Draft Code.[7] Individual responsibility for international crimes is one of its bedrock principles.[8]

With the increase in terrorist acts in the 1960s and 1970s directed against states, their property and their citizens, a series of multilateral conventions outlawing conduct associated with terrorism was widely adopted.[9] These conventions also punish individuals who violate their provisions.

Finally, at the end of the twentieth century, the U.N. Security Council created the International Criminal Tribunals for the Former Yugoslavia and for Rwanda[10] to prosecute those individuals responsible for war crimes, crimes against humanity and genocide committed during the conflicts which took place in those countries. The statutes of those tribunals, along with the statute of the more recently established International Criminal Court (ICC),[11] have added to the list of, and advanced the process of codifying, international crimes. These statutes, of course, presuppose individual responsibility for offenses that are now viewed as crimes against the entire international community.[12] Individuals who commit these crimes are regarded as *hostis humanii generis*, enemies of all mankind, a term once applied only to pirates and slave traders.[13]

With these developments in the substantive law came developments in the jurisdictional theories by which individual states, as opposed to international tribunals, established their competency to enforce and adjudicate violations of international criminal law. From the very beginning it was clear that international tribunals would prosecute only the most important offenders, leaving the bulk of the cases to be tried in state

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[6] International Law Commission Report, *1996 Draft Code of Crimes Against the Peace and Security of Mankind*, intro. ¶ 32, *available at* http://www.un.org/law/ilc/reports/1996/chap02.htm [hereinafter ILC Report].

[7] *Id.*

[8] *Id.* art. 2.

[9] *See infra* notes 16, 59, 60-61.

[10] *Statute of the International Criminal Tribunal for the Former Yugoslavia*, S.C. Res. 808, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/808 (1993), annexed to *Report of the Secretary-General Pursuant to Paragraph 2 of U.N. Security Council Resolution 808* (1993), U.N. Doc. S/25704 & Add. 1 (1993) [hereinafter ICTY Statute]; Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955, U.N. SCOR, 49th Sess., 3453d mtg., Annex, U.N. Doc. S/RES/955 (1994) [hereinafter ICTR Statute].

[11] Rome Statute of the International Criminal Court, Jul. 17, 1998, U.N. Doc. A/CONF.183/9 [hereinafter ICC Statute], *reprinted in* 37 I.L.M. 999 (1998).

[12] *See* Theodor Meron, *International Criminalization of Internal Atrocities*, 89 AM. J. INT'L L. 554 (1995).

[13] *See infra* note 137.

tribunals.[14] This has been the case with all of the post-war, ad hoc international criminal tribunals and will continue with the ICC, whose statute vests primary jurisdiction in the states part to the treaty.[15]

Most post-war conventions require that the state parties make such offenses part of their national criminal codes and compel the states to establish jurisdiction over the offenses prohibited by the convention.[16] Most conventions also require that a state in whose territory a defendant is found either prosecute or extradite the offender.[17] The obligation to extradite or prosecute, *aut dedere aut judicare*,[18] "is often referred to as 'the principle of universality' or 'universal jurisdiction.'"[19]

It remains unclear, however, whether there is an international legal principle giving states criminal law jurisdiction that is truly "universal," for example jurisdiction to prosecute an individual who commits an international crime in circumstances where neither the accused, nor the crime, nor its victims has any physical contact with the prosecuting state.[20]

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[14] The International Military Tribunal at Nuremberg convicted nineteen defendants. By contrast, the tribunal established by the United States to try war criminals within its "zone" convicted 1416 defendants. France, Great Britain and the Soviet Union controlled the other zones into which Germany was divided in the immediate post-war period and established similar tribunals. These zonal tribunals were the equivalent of state courts. PAUST ET AL., INTERNATIONAL CRIMINAL LAW: CASES AND MATERIALS 630-35 (2d ed. 2000).

[15] ICC Statute, *supra* note 11, at Preamble ¶ 10, art. 1; *see also* ILC Report, *supra* note 6, art. 8, cmt. (4). The comment states:

> Thus, the international community has recognized the important role to be played by an international criminal court in the implementation of international criminal law while at the same time recognizing the continuing importance of the role to be played by national courts in this respect. As a practical matter it would be virtually impossible for an international criminal court to single-handedly prosecute and punish the countless individuals who are responsible for crimes under international law not only because of the frequency with which such crimes have been committed in recent years, but also because these crimes are often committed as part of a general plan or policy which involves the participation of a substantial number of individuals in systematic or massive criminal conduct in relation to a multiplicity of victims.

Id.

[16] *See* International Convention Against the Taking of Hostages, Dec. 17, 1979, 1316 U.N.T.S. 205, 207 (1979) [hereinafter Hostages Convention] (containing typical examples of these provisions); M. Cherif Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives and Contemporary Practice*, 42 VA. J. INT'L L. 81, 115-35 (2001) (analyzing jurisdictional provisions of all the post-war multilateral criminal conventions).

[17] *See infra* note 65 and accompanying text.

[18] *See infra* note 66. The same principle is sometimes phrased *aut dedere aut prosequi.*

[19] *See, e.g.*, ILC Report, *supra* note 6, art. 9, cmt. (7).

[20] In order to differentiate this type of universal jurisdiction from "extradite or prosecute" universal jurisdiction, the text shall refer to this type of universal

B. Congo v. Belgium[21]

In 1999, Belgium amended its 1993 law criminalizing war crimes, crimes against humanity, and genocide to confer competence on the Belgian courts to "deal with breaches provided for in the present Act, irrespective of where such breaches have been committed."[22] This law and a similar statute enacted in Spain appear to be the only two national laws granting their courts "pure" universal jurisdiction over international crimes.[23] In April 2000, Belgium issued an international arrest warrant for the then-foreign minister of the Republic of the Congo, Abdulaye Yerodia Ndombasi.[24] This was the first time the Belgian statute had been invoked when the crime did not take place in Belgium, the defendant was not a Belgian national and none of the victims were Belgian. Thereafter, in June 2001, a number of civil plaintiffs filed a complaint in Belgium charging Ariel Sharon, the Prime Minister of Israel, and others with war crimes and crimes against humanity in connection with the 1982 massacre of Palestinian refugees in the Sabra and Shatilla camps in southern Lebanon.[25]

In the meantime, in October 2000, Congo instituted proceedings in the International Court of Justice (ICJ), seeking to annul the international arrest warrant issued for Yerodia.[26] Congo contended, *inter alia*, that:

> [t]he *universal jurisdiction* that the Belgian State attributes to itself . . . constituted a [v]iolation of the principle that a State may not exercise its authority on the territory of another State and of the principle of sovereign equality among all Members of the United Nations, as laid down in Article 2, paragraph 1, of the Charter of the United Nations.[27]

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jurisdiction as "pure" universal jurisdiction. *See, e.g.*, *The Princeton Principles on Universal Jurisdiction*, Principle 1(1), *at* http://www.princeton.edu/~lapa/unive_jur.pdf (last visited August 24, 2002). The Princeton Principles note:

> For purposes of these Principles, universal jurisdiction is criminal jurisdiction based solely on the nature of the crime, without regard to where the crime was committed, the nationality of the alleged or convicted perpetrator, the nationality of the victim, or any other connection to the state exercising such jurisdiction.

Id.

[21] *Concerning the Arrest Warrant of 11 April 2000* (Congo v. Belgium), 2002 I.C.J. __ (Feb. 14), *at* http://www.icjcij.org/icjwww/idocket/iCOBE/iCOBEframe.htm [hereinafter Congo v. Belgium].

[22] Act Concerning the Punishment of Grave Breaches of International Humanitarian Law, Feb. 10, 1999, art. 7. English translation at 38 I.L.M. 918, 924 (1999) [hereinafter the 1999 Belgian Law].

[23] Bassiouni, *supra* note 16, at 136-37.

[24] Congo v. Belgium, 2002 I.C.J. at __ (¶ 13).

[25] The Complaint Against Ariel Sharon, *at* http://www.lawsociety.org/Sharon/complaint.htm (translating the complaint to English).

[26] Congo v. Belgium, 2002 I.C.J. at __ (¶ 17).

[27] *Id.* (internal quotations omitted).

Belgium conceded that all acts referred to in the warrant took place outside of Belgium; that the defendant, Yerodia, was not a Belgian national and was not in Belgium at the time the warrant was issued and circulated; and none of the victims were Belgian nationals.[28]

Thus, the issue whether a state can exercise "pure" universal jurisdiction would have been squarely before the ICJ if only Congo, in its Memorial and during the oral arguments, had not abandoned that position and instead relied exclusively on its other claim: that the Belgian warrant violated the defendant's "'absolute inviolability and immunity from criminal process of incumbent foreign ministers.'"[29] The opportunity for the Court to rule on the question of a state's exercise of "pure" universal jurisdiction was thus lost, although the ICJ, in order to reach Congo's immunity claim, had to assume that Belgium "had jurisdiction under international law to issue and circulate the arrest warrant of 11 April 2000."[30] The Court, however, eschewed any further comment, even in *dicta*, regarding the basis for Belgium's jurisdiction.[31] Nonetheless, several members of the Court wrote separately and contradictorily regarding their views on universal jurisdiction.[32]

The split among the members of the ICJ mirrors the division between scholars (who generally support the existence of universal jurisdiction) and state practice (which generally does not recognize the principle). Ultimately, the principle's existence will depend upon the outcome of the clash between states that assert the right to prosecute international offenses and states that assert their traditional territorial prerogatives. That sort of conflict is at the heart of *Congo v. Belgium*, and the purpose of this article is to determine how the separate opinions of the judges in that case have impacted the debate over whether an international legal principle of "pure" universal jurisdiction exists and, if so, what limitations constrain its use, if any.

The article starts with an exposition of the various ways the term universal jurisdiction is used and how the multiplicity of uses confuse the issue. It then examines accepted theories of extraterritorial jurisdiction to see whether they provide for "universal" jurisdiction, as is sometimes claimed. Then the article will analyze the development of "extradite or

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[28] *Id.* at __ (¶ 15).

[29] *Id.* at __ (¶ 21) (quoting Congo's Memorial, ¶¶ 11,12). *See also id.* at __ (¶ 70) (ultimately deciding the case in Congo's favor on those grounds).

[30] *Id.* at __ (¶ 46).

[31] *See id.* at __ (¶¶ 41-43). The Court did not address the issue even though it observed that the *non ultra petita* rule, while preventing the Court from deciding the question of the legality of Belgium's assertion of universal jurisdiction, did not prevent it from "deal[ing] with certain aspects of that question in the reasoning of its Judgment, should it deem this necessary or desirable." *Id.*

[32] *Id.*; Compare the Separate Opinion of President Guillaume with the Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, *supra* part IV.

prosecute" jurisdiction in a series of post-war, multilateral conventions, and try to answer the question whether, either as the result of these conventions or separate from them, a principle of universal jurisdiction over certain core international crimes (such as war crimes, crimes against humanity, and genocide) has emerged. Finally, the article considers how the separate opinions in *Congo v. Belgium* affect these developments and what the current state of the law is.

The fact that there is a new International Criminal Court with jurisdiction over the same core crimes makes this issue even more important. There are significant gaps in the ICC's jurisdiction which states must fill by prosecuting international crimes in national courts. How effectively states will be able to perform this task depends upon whether they can assert jurisdiction over offenses and offenders outside their territorial boundaries. The stakes are high. The failure to arrive at a workable principle of universal jurisdiction will mean the most serious breaches of international criminal law will be beyond the reach of any prosecuting authority.

II. UNIVERSAL JURISDICTION: THE DEFINITIONAL PROBLEM

Any discussion of "universal jurisdiction" is complicated by the different ways in which the term is used. In its most general sense, universal jurisdiction refers to an assertion of jurisdiction over an actor whose conduct occurred in whole or in part outside the prosecuting state's territorial boundaries.[33] Territory, of course, is the bedrock of criminal law jurisdiction; however, state interests in criminal law enforcement are not so limited. As the Permanent Court of International Justice (PCIJ) stated in the famous *Lotus* case:

> Though it is true that in all systems of law the principle of the territorial character of criminal law is fundamental, it is equally true that all or nearly all these systems of law extend their action to offences committed outside the territory of the State which adopts them, and they do so in ways which vary from State to State. The territoriality of criminal law, therefore, is not an absolute principle of international law and by no means coincides with territorial sovereignty.[34]

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[33] *See* RESTATEMENT (THIRD) OF THE LAW OF FOREIGN RELATIONS OF THE UNITED STATES, § 401, intro. (1987) [hereinafter RESTATEMENT THIRD]. The jurisdictional assertions may take several forms:

> (a) *jurisdiction to prescribe, i.e.,* the authority of a state to make its law applicable to persons or activities; (b) *jurisdiction to adjudicate, i.e.,* the authority of a state to subject particular persons or things to its judicial process; and (c) *jurisdiction to enforce, i.e.,* the authority of a state to use the resources of government to induce or compel compliance with its law.

Id.

[34] The S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10 at 20 (Sept 7).

Extraterritorial assertions of state criminal jurisdiction have led to the use of the term "universal" to describe jurisdiction in at least three different circumstances.[35] The circumstances include when a state prosecutes an individual (1) for violating the state's criminal laws by conduct which took place in whole or in part outside the state; (2) for conduct which occurred outside the state's territory based on an international treaty obligation; (3) for committing an "international crime."[36]

In addition to the different applications of the term universal jurisdiction, the definitional problem is further complicated because in many cases the facts lend themselves to different interpretations;[37] thus, what a court or commentator means when referring to universal jurisdiction is often unclear.[38] The lack of a clear definition of the term universal jurisdiction in turn results in a corresponding lack of clarity as to whether a principle of "pure" universal jurisdiction even exists. The confusion becomes evident when one analyzes the various types of "universal" jurisdiction to determine whether any of them actually provides for "pure" universal jurisdiction.

III. EXTRATERRITORIAL JURISDICTION

It is self-evident that a state's interest in enforcing its criminal laws does not always end at its borders. First, a state's border is not a static barrier. Manifestations of the state in the form of its citizens, its ships

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[35] Bassiouni, *supra* note 16, at 152. Bassiouni identifies five instances to which the term "universality" applies:

> (1) universality of condemnation for certain crimes;
> (2) universal reach of national jurisdiction, which could be for the international crime for which there is universal condemnation, as well as others;
> (3) extraterritorial reach of national jurisdiction (which may also merge with universal reach of national legislation);
> (4) universal reach of international adjudicative bodies that may or may not rely on the theory of universal jurisdiction; and
> (5) universal jurisdiction of national legal systems without any connection to the enforcing state other than the presence of the accused).

Id.

[36] *See* IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 303-09 (5th ed. 1998). In this article, the term "extraterritorial jurisdiction" refers to cases falling within category 1; "contractual or consensual jurisdiction" to category 2; and "universal jurisdiction" to category 3.

[37] *See, e.g.*, United States v. Yunis, 924 F.2d 1086, 1091 (D.C. Cir. 1991).

[38] Bassiouni, *supra* note 16, at 103. Bassiouni found that:

> [t]here is sometimes no clear distinction between the principle of universality and other principles on which extraterritorial jurisdiction is based, such as the "representation" principle or the principle of protection. There are often differences of opinion as to which principle should form the basis of a particular term of extraterritorial jurisdiction.

Id. (quoting Extraterritorial Criminal Jurisdiction: Report of the European Committee on Crime Problems, Council of Europe (1990)).

and its aircraft transcend its borders constantly. Second, crime is not static. The actors who commit crimes are mobile, so a crime can begin in one state and end in another. Even crimes that take place wholly outside a state may have an impact felt within that state. Finally, states have interests that must be protected whether the crimes that affect those interests take place at home or abroad. Thus, a state cannot and should not restrict enforcement of its criminal laws only to those instances where the offense takes place entirely within its territory.

Accordingly, there are four recognized theories that permit extraterritorial assertions of state jurisdiction over municipal criminal law violations.[39] The theories are as follows: 1) the territorial principle applies when some or all of the conduct takes place within the state's territory, including on board its ships and airplanes,[40] or where extraterritorial conduct has an effect within the state;[41] 2) the nationality principle applies when the criminal actor is a national of the prosecuting state;[42] 3) the protective principle is applicable when the extraterritorial conduct threatens some vital state interest;[43] 4) the passive personality principle is

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[39] While courts or commentators may recognize the existence of these theories, they do not necessarily agree that all of them are equally sound. This is especially true of the passive personality principle. Wade Estey, *The Five Bases of Extraterritorial Jurisdiction and the Failure of the Presumption Against Extraterritoriality*, 21 HASTINGS INT'L & COMP. L. REV. 177, 204 (1997).

[40] RESTATEMENT THIRD, *supra* note 33, § 402(1)(a)-(b); *see also* BROWNLIE, *supra* note 36, at 303-04 (explaining that the territorial principle is sometimes subdivided into the "subjective" and "objective" territorial principles: the former applies when the crime is started in the prosecuting state and completed in another; the latter is when any essential element of the crime takes place within the territory of the prosecuting state).

[41] The most extreme form of the territorial principle is the "effects" doctrine whereby wholly extraterritorial conduct may be prosecuted if it "has or is intended to have substantial effect" within the territory of the prosecuting state. RESTATEMENT THIRD, *supra* note 33, § 402(1)(c). In the United States, the effects doctrine is most commonly used in antitrust, securities and trademark cases. *See, e.g.*, United States v. Nippon Paper Industries Co. Ltd., 109 F.3d 1 (1st Cir. 1997), *cert. denied*, 523 U.S. 1044 (1998) (upholding criminal Sherman Act prosecution where all the conduct constituting the conspiracy in restraint of trade took place outside the United States but where the effect of the conspiracy was to raise prices for thermal fax paper in the United States).

[42] RESTATEMENT THIRD, *supra* note 33, § 402(2); BROWNLIE, *supra* note 36, at 306 (observing that "since the territorial and nationality principles and the incidence of dual nationality create parallel jurisdiction and possible double jeopardy, many states place limitations on the nationality principle and it is often confined to serious offences"). Nationality jurisdiction is typically used in the United States in tax, treason and relations with enemy nations cases. Estey, *supra* note 39, at 182.

[43] RESTATEMENT THIRD, *supra* note 33, § 402(3), cmt. f. The Restatement Third summarizes the category as follows:

invoked when a national of the prosecuting state is the victim of the crime.[44]

In each of these situations the interests of more than one state are involved, so there is a risk of conflicting jurisdictional claims.[45] An unjustified assertion of jurisdiction by one state is treated as a violation of the territorial integrity and the sovereign equality of the aggrieved state.[46] The drafters of the Restatement Third of Law and Foreign Relations of the United States recognized the likelihood of such inter-state conflicts and provided that "[e]ven when one of the bases for jurisdiction . . . is present, a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable."[47] Reasonableness is determined by assessing a state's jurisdictional claim in light of certain factors which value that state's interest in prosecuting the case.[48] These factors emphasize the links (for example where the conduct took place or its

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> offenses committed outside [a state's] territory by persons who are not its nationals—offenses directed against the security of the state or other offenses threatening the integrity of governmental functions that are generally recognized as crimes by developed legal systems, *e.g.*, espionage, counterfeiting of the state's seal or currency, falsification of official documents, as well as perjury before consular officials, and conspiracy to violate the immigration or customs laws.

Id.

[44] Estey, *supra* note 39, at 204; *see also* RESTATEMENT THIRD, *supra* note 33, § 402, cmt. g (stating "[t]he [passive personality] principle has not been generally accepted for ordinary torts or crimes, but it is increasingly accepted as applied to terrorist and other organized attacks on a state's nationals by reason of their nationality, or to assassination of a state's diplomatic representatives or other officials."); *see also* United States v. Yunis, 924 F.2d 1086, 1091 (D.C. Cir. 1991).

[45] *Cf.* S.S. Lotus, 1927 P.C.I.J. (ser. A) No. 10 at 18-19 (Sept 7). The Court found that

> [t]he first and foremost restriction imposed by international law upon a State is that – failing the existence of a permissive rule to the contrary – it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or from a convention.

Id.

[46] *See, e.g.*, Congo v. Belgium, 2002 I.C.J. at __ (¶ 17).

[47] RESTATEMENT THIRD, *supra* note 33, § 403(1). Compare § 403 that deals specifically with prescriptive jurisdiction with § 431 that applies the rule of reasonableness to enforcement jurisdiction. Section 421 lists the criteria used to determine whether a state's exercise of adjudicatory jurisdiction is reasonable.

[48] *Id.* §§ 403(2), (3). The Restatement Third sets forth the factors to be taken into consideration:

> (2) Whether exercise of jurisdiction over a person or activity is unreasonable is determined by evaluating all relevant factors, including, where appropriate:
> (a) the link of the activity to the territory of the regulating state, *i.e.*, the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory;

connection to nationality, residence or economic activity) that the regulated activity has to the state asserting jurisdiction to prosecute it.[49] The state with the lesser interest is expected to defer to the state with the greater interest.[50]

Extraterritorial jurisdiction thus depends upon some form of territorial link, either by virtue of the location of the offense or its territorial effects; the nationality of the offender or victim; or the threat to the vital interests of the prosecuting state. Moreover, a state's assertion of extraterritorial jurisdiction can be defeated by another state, potentially having a superior right to prosecute based on its connection with the same crime or offender. Thus, this form of jurisdiction is clearly not "universal" if that term implies that all states are affected by, and have the same interest in prosecuting, the offense.[51]

IV. CONTRACTUAL OR CONSENSUAL EXTRATERRITORIAL JURISDICTION

A. *The Post-War Conventions*

One of the more significant developments in international law since World War II has been the use of multilateral conventions both to brand

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(b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect;
(c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted;
(d) the existence of justified expectations that might be protected or hurt by the regulation;
(e) the importance of the regulation to the international political, legal, or economic system;
(f) the extent to which the regulation is consistent with the traditions of the international system;
(g) the extent to which another state may have an interest in regulating the activity; and
(h) the likelihood of conflict with regulation by another state.
(3) When it would not be unreasonable for each of two states to exercise jurisdiction over a person or activity, but the prescriptions by the two states are in conflict, each state has an obligation to evaluate its own as well as the other state's interest in exercising jurisdiction, in light of all the relevant factors, Subsection (2); a state should defer to the other state if that state's interest is clearly greater.

Id.

[49] *Id.*

[50] *Id.*

[51] *Cf. id.* §§ 403, 404 (stating that "Universal" jurisdiction is exempted from the reasonableness test imposed by § 403, implying that the Restatement drafters felt that any state's assertion of "pure" universal jurisdiction, regardless of links to the state, is *prima facie* reasonable).

as illegal practices affecting the entire international community and to set up state-based systems to enforce these prohibitions.[52] As a result, there is nearly unanimous agreement among scholars[53] that war crimes,[54] crimes against humanity,[55] and genocide[56] are universally condemned as a matter of customary international law.[57] Indeed, these crimes are widely considered to have attained the status of *jus cogens*, or peremptory international norms.[58]

Conventions have also been used to define other international crimes, including criminal acts associated with terrorism,[59] torture,[60] and drug

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[52] Kenneth C. Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785, 815-20 (1988).

[53] *See, e.g.*, Bassiouni, *supra* note 16, at 135-36.

[54] The 1949 Geneva Conventions, *supra* note 1.

[55] There is no separate convention dealing with crimes against humanity. However, this category was first elaborated in the Nuremberg Charter, art. 6(c) as:

> murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal whether or not in violation of the domestic law of the country where perpetrated.

Charter of the International Military Tribunal, Aug. 8, 1945, 59 Stat. 1544, 82 U.N.T.S. 279 [hereinafter IMT Charter]. Since 1945, crimes against humanity have successively been incorporated as offenses in the statutes of the ad hoc, and now permanent, international criminal tribunals. ICTY Statute, *supra* note 10, at art. 5; ICTR Statute, *supra* note 10, at art. 3; ICC Statute, *supra* note 11, art. 7.

[56] The Genocide Convention, *supra* note 2.

[57] The Statute of the International Court of Justice, art. 38(1) [hereinafter ICJ Statute] establishes a hierarchy of international legal rules that the Court will apply in resolving disputes between states. The second category of such rules is "international custom, as evidence of a general practice accepted as law." *Id.* art. 38(1)(b). If a rule contained in a treaty states a principle of customary international law it is binding on the international community as a whole, even states that are not parties to the treaty. MICHAEL AKEHURST, A MODERN INTRODUCTION TO INTERNATIONAL LAW 26-27 (6th ed. 1987).

[58] Vienna Convention on the Law of Treaties, May 23, 1969, U.N. Doc. A/Conf. 39/27, art. 53 (stating that "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."); Meron, *supra* note 12, at 558 (stating "[t]he core prohibitions of crimes against humanity and the crime of genocide constitute *jus cogens* norms.")

[59] There is no international convention banning terrorism itself because of the difficulty in agreeing on a definition of the term. *See, e.g.*, Louis René Beres, *The Meaning of Terrorism– Jurisprudential and Definitional Clarifications*, 28 VAND. J. TRANSNAT'L L. 239, 239-40 (1995). The approach taken thus far has been to adopt separate treaties that deal with acts associated with terrorism, such as airplane hijackings and hostage takings. *See, e.g.*, Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 565, 974 U.N.T.S.

trafficking.[61] While the status of these crimes as violations of customary international law is less clear, all of the conventions contain similar provisions designed to ensure that the state parties have broad jurisdiction to prosecute the offenses defined by the treaties, so as to ensure that there are no safe havens for offenders.[62] These provisions include: 1) each state party must incorporate the offenses defined in the convention into its national criminal law;[63] 2) each state party must establish jurisdiction over those offenses when one of the bases for extraterritorial jurisdiction (territory, nationality, protective or passive personality) is present;[64] 3) each state party must establish jurisdiction over the offenses "in cases where the alleged offender is present in its territory and it does not extradite him . . .;"[65] and 4) each state party must, "without exception whatsoever and whether or not the offence was committed in its territory," prosecute an offender present in its territory when it does not extradite that person to a state with territorial or extraterritorial jurisdiction.[66]

The shared provision most commonly referred to as providing for universal jurisdiction[67] is the obligation to prosecute an offender rather than

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177 [hereinafter the Montreal Hijacking Convention], and The Hostages Convention, *supra* note 16.

[60] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 12, 1984, 1465 U.N.T.S 112.

[61] *See, e.g.*, Single Convention on Narcotic Drugs, 1961, 520 U.N.T.S. 151, 18 U.S.T. 1407.

[62] *Cf. infra* note 135.

[63] *See, e.g.*, Hostages Convention, *supra* note 16, art. 2, 1316 U.N.T.S 205, 207 (stating "each State Party shall make the offences set forth in art. 1 punishable by appropriate penalties which take into account the grave nature of those offences.").

[64] *Id.* art. 5(1). This provision or a close variant of it is found in nearly all of the conventions:

> 1. Each State Party shall take such measures as may be necessary to establish its jurisdiction over any of the offences set forth in article 1 which are committed:
> (a) In its territory or on board a ship or aircraft registered in that State;
> (b) By any of its nationals or, if that State considers it appropriate, by those stateless persons who have their habitual residence in its territory;
> (c) In order to compel that State to do or abstain from doing any act; or
> (d) With respect to a hostage who is a national of that State, if that State considers it appropriate.

Id.

[65] *Id.* art. 5(2).

[66] *Id.* art. 8. The obligation to extradite or prosecute is often expressed in Latin as *aut dedere aut judicare.*

[67] The comparable provisions in the 1949 Geneva Conventions provide that each party is obligated to "search for persons alleged to have committed, or to have ordered to be committed . . . grave breaches [of the conventions], and . . . bring such persons, regardless of their nationality, before its own courts." First Geneva Convention, *supra* note 1, art. 49; Second Geneva Convention, *supra* note 1, art. 50; Third Geneva Convention, *supra* note 1, art. 129; Fourth Geneva Convention, *supra* note 1, art. 146. The International Law Commission views these provisions as the

extradite because, in the former case, the prosecuting state is exercising jurisdiction over a non-national for a crime committed elsewhere.[68]

The *aut dedere aut judicare* provisions in the 1949 Geneva Conventions were the basis for the "pure" universal jurisdiction incorporated in the 1999 Belgian Law.[69] The Geneva Conventions' provisions are, therefore, the starting point in the analysis of what effect the post-war conventions have had on the development of an international legal principle of "pure" universal jurisdiction.

B. *Is* Aut Dedere Aut Judicare *Conventional Universal Jurisdiction?*

The 1949 Geneva Conventions obligate each state party "to search for persons alleged to have committed, or to have ordered to be committed, such grave breaches, and [to] bring such persons, regardless of their

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equivalent of the extradite or prosecute provisions in the other post-war conventions. ILC Report, *supra* note 6, art. 9, comm. (3). On the other hand, the jurisdictional reach of the Genocide Convention appears to be strictly territorial:

> Persons charged with genocide or any of the other acts enumerated in article III shall be tried by a competent tribunal of the State in the territory of which the act was committed, or by such international penal tribunal as may have jurisdiction with respect to those Contracting Parties which shall have accepted its jurisdiction.

Genocide Convention, *supra* note 2, art. VI. Nonetheless, the ILC concluded that extending universal jurisdiction, *aut dedere aut judicare,* to the crime of genocide "was fully justified in view of the character of the crime of genocide as a crime under international law for which universal jurisdiction existed as a matter of customary law for those States that were not parties to the Convention. . . ." ILC Report, *supra* note 6, art. 8, comm. (8); *see also* RESTATEMENT THIRD, *supra* note 33, § 404, rptr's notes 1.

[68] Randall, *supra* note 52, at 819. Randall states that

> A common thread in all the conventions relates to the universality principle. The hijacking, terrorism, and torture conventions all contain the following provision, with insignificant variation:
>
> > 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 offense 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.

Id. (quoting the Hostage Convention, *supra* note 16).

[69] The 1999 Belgian Law, supra note 23; Stefaan Smis & Kim Van der Borght, *Introductory Note, Belgium: An Act Concerning the Punishment of Grave Breaches of Humanitarian Law*, 38 I.L.M. 918, 920 (1999).

> The Act recognizes a universal competence for the Belgian courts to deal with grave breaches irrespective of the place where the criminal offense has been committed, the nationality of the offender or the victim. This universal competence is based on . . . Articles of the Geneva Conventions and Additional Protocol I that are a reflection of the principle of *aut dedere aut judicare*, obliging the High Contracting Parties to extradite or prosecute the offenders of grave breaches.

Id.

nationality, before its own courts."[70] Notably, the obligation to "search for persons alleged to have committed . . . grave breaches" is not territorially limited. The 1949 Geneva Conventions arguably provide for even broader jurisdictional competence than later post-war conventions, which may be read as imposing the obligation to prosecute only if extradition does not take place.[71] But the *aut dedere aut judicare* provision in the Geneva Conventions has been read both as requiring no territorial connection and, thus, providing for "pure" universal jurisdiction, or requiring a territorial connection and thus providing only for extraterritorial jurisdiction over persons found in the prosecuting state.[72] No court has directly considered this issue.[73]

The Case of *Regina v. Pinochet* (*Pinochet II*),[74] however, involved a closely related issue that arose when Spain requested the extradition of the former Chilean dictator from Great Britain for violations of the Torture Convention that had occurred primarily in Chile. The case has a rather convoluted procedural history, having been argued twice before Britain's highest court, the House of Lords.[75] By the time it reached the House of Lords the second time, the central issues were whether any of the charged offenses were extraditable and, if so, whether Pinochet was immune from prosecution for any of those offenses.[76]

Spain asserted that its jurisdiction over Pinochet for crimes committed in Chile was based on universal jurisdiction.[77] Pinochet did not challenge the validity of this jurisdictional claim as a ground for denying extradition.[78] Of the eleven Law Lords who authored separate opinions in the

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[70] First Geneva Convention, *supra* note 1, art. 49; Second Geneva Convention, *supra* note 1, art. 50; Third Geneva Convention, *supra* note 1, art. 129; Fourth Geneva Convention, *supra* note 1, art. 146.

[71] *See infra* note 112 and accompanying text.

[72] *See* Congo v. Belgium, 2002 I.C.J. at __ (¶ 3) (Feb. 14) (Separate Opinion of Judge Higgins), *at* http://www.icjcij.org/icjwww/idocket/iCOBE/iCOBEframe.htm.

[73] *Id.* at __ (¶ 32).

[74] Regina v. Bartle and the Commissioner of Police for the Metropolis and Others Ex Parte Pinochet, 38 I.L.M. 581 (H.L. 1999) [hereinafter *Pinochet II*]; Regina v. Bow Street Stipendiary Magistrate and Others Ex parte Pinochet Ugarte, [2000] 1 A.C. 61 (H.L. 1998) [hereinafter *Pinochet I*].

[75] *Pinochet II* became necessary after the judgment in *Pinochet I* was vacated because one of the members of the panel had served on the board of Amnesty International, an *amicii* in the case. Nehal Bhuta, *Justice Without Borders? Prosecuting General Pinochet*, 23 MELB. U. L. REV. 499, 519 (1999).

[76] *Pinochet II*, 38 I.L.M. at 582-83.

[77] The Spanish Court had held that it was "'competent to judge the events by virtue of the principle of universal prosecution for certain crimes [and] because more than 50 [Spanish] nationals were killed or disappeared in Chile . . . .'" *Pinochet I*, 1 A.C. at 69.

[78] Although the Chilean Senate "adopted a formal protest against the manner in which the Spanish courts had violated the sovereignty of Chile by asserting extra-

two appeals, not one questioned Spain's jurisdiction to investigate and prosecute Pinochet for offenses that were committed in Chile.[79] The consensus views of the two *Pinochet* courts on the nature of "extradite or prosecute" jurisdiction under the Torture Convention was perhaps best expressed by Lord Millet in *Pinochet II* who wrote:

> Chile insists on the exclusive right to prosecute [Pinochet]. The Torture Convention, however, gives it only the primary right. If it does not seek his extradition (and it does not) then the United Kingdom is obliged to extradite him to another requesting state or prosecute him itself.[80]

If Lord Millet is right about the obligations imposed on state parties by the Torture Convention's *aut dedere aut judicare* provision, then there already exists a conventional form of "pure" universal jurisdiction based on the inclusion of identical or equivalent "extradite or prosecute" provisions in other post-war conventions. Many of these conventions have been ratified by nearly all the members of the international community[81] and thus, *inter se*, jurisdiction to prosecute exists if an offender is found on any of their territories.[82]

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territorial jurisdiction," it does not appear from the reports of the case that Chile urged this on the British court as a ground to refuse the extradition request. *Id.* at 89.

[79] Only four of the law lords mentioned the jurisdictional issue at all. In *Pinochet I*, only Lord Slynn of Hadley discussed the jurisdictional issues. *Id.* In *Pinochet II*, Lord Browne-Wilkinson and Lord Millet addressed the issue at some length while Lord Saville of Newdigate mentioned it only in passing.

[80] *Pinochet II*, 38 I.L.M. at 651-652. *See also* the Speech of Lord Browne-Wilkinson, *id.* at 591, stating "[i]t is enough that it is clear that in all circumstances, if the Article 5(1) states [*i.e.*, states with territorial, nationality or passive personality jurisdiction] do not choose to seek extradition or to prosecute the offender, other states must do so"); *see also* the Speech of Lord Slynn of Hadley in *Pinochet I*, 1 A.C. 61, 83 (H.L. 1998) (stating "Chile was a state party to this Convention and it therefore accepted that, in respect of the offence of torture, the United Kingdom should either extradite [to Spain] or take proceedings against offending officials found in its jurisdiction.").

[81] *See, e.g.*, The Geneva and Genocide Conventions *supra* note 1.

[82] The ILC goes even further in its interpretation of the obligations imposed by the *aut dedere aut judicare* provisions in the Draft Code of Crimes Against the Peace and Security of Mankind, 1996. ILC Report, *supra* note 6, art. 10, comm. (3). Commentary 3 refers to paragraph 4 of art. 10, which reads "[e]ach of those crimes shall be treated, for the purpose of extradition between States Parties, as if it had been committed not only in the place in which it occurred but also in the territory of any other State Party." The comment to the article states:

> Paragraph 4 secures the possibility for the custodial State to grant a request for extradition received from any State Party to the Code with respect to the crimes covered in Part II. This broader approach is consistent with the general obligation of every State Party to establish its jurisdiction over the crimes set out in Articles 17 to 20 [*inter alia* genocide, crimes against humanity and war crimes] . . . and finds further justification in the fact that *the present Code does not*

This conclusion is far from certain. A trial chamber of the International Criminal Tribunal of the Former Yugoslavia, discussing the nature of the international prohibition against torture, stated:

> [A]t the individual level, that is, that of criminal liability, it would seem that one of the consequences of the *jus cogens* character bestowed by the international community upon the prohibition of torture is that every State is entitled to investigate, prosecute and punish or extradite individuals accused of torture, *who are present in a territory under its jurisdiction.*[83]

Similarly, the highest court in France, the Cours de Cassation, considered the closely related question whether the 1949 Geneva Conventions conferred jurisdiction on French prosecutors to pursue investigations of Bosnian Serb war crimes suspects, who were not then present in France, for offenses that had taken place during the conflict in Bosnia Herzegovinia.[84] The French Court held that, absent implementing legislation, the 1949 Geneva Conventions "have too general a character" to give the French courts jurisdiction.[85] The court also held that the French statute implementing the Torture Convention provided a basis for jurisdiction, "only where the accused is found on French territory."[86] Similarly, the German and Dutch courts have ruled that their authorities did not have jurisdiction to prosecute extraterritorial acts of genocide and torture, respectively, absent the territorial presence of the suspects.[87]

Finally, although the international arrest warrant at issue in *Congo v. Belgium* charged Yerodia with "offences constituting grave breaches of the Geneva Conventions of 1949 and of the Additional Protocols thereto, and with crimes against humanity,"[88] Belgium did not argue that the 1949

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confer primary jurisdiction on any particular States nor establish an order of priority among extradition requests.

Id. art. 10 ¶4, comm. (3) (emphasis added).

[83] Prosecutor v. Furundzija, Case No. IT-95-17/1-T (10 Dec. 1998), p. 60 (emphasis added).

[84] Brigette Stern, *Universal Jurisdiction Over Crimes Against Humanity Under French Law – Grave Breaches of the Geneva Conventions of 1949 – Genocide-Torture-Human Rights Violations in Bosnia and Rwanda*, 93 AM. J. INT'L L. 525, 527 (1999).

[85] *Id.*

[86] C. Pr. Pén., art. 689.

[87] *See* Redress: Universal Jurisdiction in Europe, Criminal Prosecutions in Europe since 1990 for War Crimes, Crimes Against Humanity, Torture and Genocide, Annex, p. 15, *at* htttp://www.redress.org/annex.html (last visted Jan. 27, 2003) [hereinafter *Redress*]; *see also* Tom L.W. Schiers, *Dutch Supreme Court Bars Prosecution of Former Surinamese Head of State Bouterse*, 17 No. 12 Int'l Enforcement L. Rep. 514 (2001); s*ee also* Luc Reydams, *Universal Criminal Jurisdiction: The Belgian State of Affairs*, 11 CRIM. L.F. 183, 211-12 (2000).

[88] Congo v. Belgium, 2002 I.C.J at __ (¶ 13) (Feb. 14), *at* http://www.icjcij.org/icjwww/idocket/iCOBE/iCOBEframe.htm.

Geneva Conventions[89] gave it jurisdiction over the offenses, or that Congo, also a party to the Conventions,[90] was thereby obligated either to extradite or prosecute him.[91] Instead,

> Belgium in its Counter-Memorial insisted that there was a general obligation on States under customary international law to prosecute perpetrators of crimes. It conceded, however, that where such persons were non-nationals, outside of its territory, there was no obligation but rather an available option. No territorial presence was required for the exercise of jurisdiction where the offence violated the fundamental interests of the international community. In Belgium's view an investigation or prosecution mounted against a person outside its territory did not violate any rule of international

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[89] Belgium is a party to all four Geneva Conventions. WESTON, *supra* note 3 at App. I, 1277-79 and to the two 1977 Additional Protocols, *available* at http://www.icrc.org/ihl.nsfl (last visited April 8, 2003).

[90] Zaire became a party to the four 1949 Geneva Conventions on Feb. 20, 1961. WESTON, *supra* note 3, at App. I, 1277-79. Zaire subsequently changed its name to the Democratic Republic of Congo, *see* http://www.cia.gov/cia/publications/factbook/geos/cg.html. (last visited Jan. 30, 2003). The Democratic Republic of Congo is a party to only the first of the two 1977 Additional Protocols, *see* http://www.icrc.org/ihl.nsfl (last visited Apr. 8, 2003).

[91] Only the second of the two 1977 Additional Protocols to the 1949 Geneva Conventions criminalizes grave breaches that occur in internal armed conflicts. Reydams, *supra* note 87, at 197. Therefore, since Congo is not a party to the Second Additional Protocol, it would not be obligated to extradite or prosecute unless the grave breaches took place during an international armed conflict, which the 1998 conflict apparently was. Human Rights Watch described the situation in Congo in 1998 as a struggle between the Democratic Forces for the Liberation of the Congo (ADFL), aided by its "allies from the Tutsi-dominated Rwandan Patriotic Army," and the recently established government of President Laurent Kabila. Kabila labeled "the rebellion an invasion of his country by Rwanda and Uganda" and the ouster of his government was averted only when "forces sent by the governments of Angola, Zimbabwe and Namibia came to [his] rescue." HUMAN RIGHTS WATCH WORLD REPORT 1999: THE DEMOCRATIC REPUBLIC OF CONGO, *at* http://www.hrw.org/worldreport99/africa/drc.html (last visited Jan. 28, 2003). *See, e.g.*, Prosecutor v. Delalic et.al., (Case no. IT-96-21-A) (Feb. 20, 2001) 6-8 (finding that "[t]he situation in which a State . . . resorted to the indirect use of force against another State . . . by supporting one of the parties involved in the conflict . . . may indeed be also characterized as a proxy war of an international character."). The speeches made by Yerodia in August 1998 resulted in the "massacre of several hundred Tutsis." Kevin R. Gray, *Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of Congo v. Belgium)*, 13 EUR. J. INT'L L. 723, ¶ 1 (2002), *available at* http://www.ejil.org/journal/Vol13/No3/sr1.html. Since the conflict appears to have been international and the alleged grave breaches took place during the conflict, Belgium had at least a colorable basis for claiming that its right to prosecute was pursuant to the four 1949 Geneva Conventions and Additional Protocol I to which it and Congo are both parties.

> law, and was accepted both in international practice and in the internal practice of States, being a necessary means of fighting impunity.[92]

As a result, neither the ICJ nor those judges who wrote separately in *Congo v. Belgium* addressed the issue of whether Belgium had jurisdiction pursuant to the 1949 Geneva Conventions and Additional Protocol I.[93] Instead, the ICJ assumed that Belgium had jurisdiction to issue and circulate the arrest warrant.[94] The judges who wrote separately treated the jurisdictional validity issue as one of customary international law.[95]

Thus, whether a state party to one of the post-war conventions may rely on "pure" universal jurisdiction to prosecute an offender present in the territory of another state party remains an open question. Since the scope of the "extradite or prosecute" obligation in the Torture Convention was not of central importance in *Pinochet*, the observations of those judges that did address the point would be characterized as *dicta*. Alternatively, the cases decided in France, Germany and the Netherlands did not involve an extradition request and thus do not signal what those courts might do if faced with such a request from another state party to one of the post-war conventions asserting universal jurisdiction. Nonetheless, it is still possible that the widespread adoption of the post-war conventions has resulted in the creation of a customary rule of "pure" universal jurisdiction for some international crimes, or that "pure" universal jurisdiction has achieved customary status on its own.

V. TREATY-DERIVED CUSTOMARY UNIVERSAL JURISDICTION

A. *Not All Treaty Provisions Are Created Equally*

International conventions can generate rules of customary international law.[96] Soon after the 1949 Geneva and Genocide Conventions

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[92] Congo v. Belgium, 2002 I.C.J. at __ (¶ 8) (Separate Opinion of Judge Higgins) (citations omitted).

[93] In this regard, it is noteworthy that, in resolving disputes brought before the ICJ, the Court first looks to "international conventions, whether general or particular, establishing rules expressly recognized by the contesting states." ICJ Statute, *supra* note 57, art. 38 (1) (a), T.S. No. 993, 59 Stat. 1031. It does so precisely because such conventional rules are more easily ascertained and applied than other sources of international law, such as custom or general principles of law. *Id.* art. 38(b)-(c); *see also* MARK JANIS, AN INTRODUCTION TO INTERNATIONAL LAW 11 (3d ed. 1999) (stating "most treaties . . . plainly show both the terms of international legal rules and the consent of states to be bound by such rules. Indeed, every other sort of international law is usually much more troubled than are treaties by questions of rule specificity and state consent.").

[94] Congo v. Belgium, 2002 I.C.J. at __ (¶ 46).

[95] *See, e.g., id.* at __ (¶ 10) (Separate Opinion of President Guillaume); *id.* at __ (¶ 19) (Separate Opinion of Judge Higgins)

[96] The North Sea Continental Shelf Cases (F.R.G. v. Denmark; F.R.G. v. Neth.), 1969 I.C.J 3, ¶ 71 (Feb. 20):

were adopted, their prohibitions against war crimes and genocide were regarded as customary international law.[97] That does not mean the jurisdictional rules found in those conventions are also regarded as customary law. As the ICJ's opinion in *The North Sea Continental Shelf Cases* teaches, the customary status of conventional rules must be assessed individually because such rules may be at different stages of development.[98] For example, a treaty may be "declaratory of existing rules" or it may "crystallize" emerging custom.[99] The prohibitions against war crimes and genocide were likely in one of these stages at the time the 1949 Geneva and Genocide conventions were drafted. By contrast, other provisions in conventions are merely *de lege ferenda*, or proposed new rules of international law that bind only the parties to the convention.[100]

The nature of a conventional rule may also affect whether the rule is, or can become, customary international law. Broad, general legal standards, such as the prohibition of the use of force contained in the United Nations Charter, are more likely to achieve customary law status, whereas the rules "concerned with constitutional questions concerning competence of organs, and the like," are less likely to reach customary international law status.[101] Perhaps this explains why the status of the jurisdictional rules in the 1949 Geneva and other post-war conventions is controversial,[102] despite nearly universal ratification, while many of the normative rules contained in the same conventions are firmly entrenched in customary law. The jurisdictional rules contained in the post-war conventions are more akin to the equidistance principle[103] that was at issue in the *North Sea Continental Shelf Cases* than they are to the proscriptions banning war crimes and genocide, which are of the same stature as the rules regulating the use of force contained in the U.N. Charter.

> In so far as this contention is based on the view that Article 6 [of the 1958 Geneva Convention on the Continental Shelf] has had the influence, and has produced the effect described, it clearly involves treating that Article as a norm-creating provision which has constituted the foundation of, or has generated a rule which, while only conventional or contractual in its origin, has since passed into the general corpus of international law, and is now accepted as such by the *opinio juris*, so as to have become binding even for countries which have never, and do not, become parties to the convention *There is no doubt that this process is a perfectly possible one and does from time to time occur: it constitutes indeed one of the recognized methods by which new rules of customary international law may be formed.*

Id. at 41 (emphasis added).

[97] *See supra* notes 53-57 and accompanying text.

[98] North Sea Continental Shelf, 1969 I.C.J. at 37.

[99] *Id.* at 38.

[100] *Id.*

[101] BROWNLIE, *supra* note 36, at 12.

[102] *See, e.g.,* Bassiouni, *supra* note 16, at 136.

[103] The equidistance principle is one of the formulas states use to resolve disputes as to sovereignty over portions of the continental shelf.

In addition, rules that regulate the use of armed force or command respect for human rights are necessary to maintain international stability.[104] Consequently, they are rapidly accepted as universal.[105] Conversely, some have suggested that, rather than adding to international stability, expansive assertions of universal jurisdiction might well have the opposite effect:

> Opponents of the application of universal jurisdiction in national courts argue that such trials will not deter crimes, but will instead create an even more dangerous and volatile international milieu by eroding the necessary comity in relations between sovereign states. Some detractors of universal jurisdiction have gone so far as to warn that these trials could dismantle the Westphalian system of sovereign nation-states itself.[106]

There has been an understandable reluctance to elevate universal jurisdiction to customary status because it would give states a powerful weapon that could be used against other states.[107] Moreover, non-state parties could wield this weapon without having to accept other procedural safeguards built into the conventions.[108]

B. *State Practice: The Significance of Ratification*

The formation of any rule of customary international law requires a confluence of state practice and *opinio juris*, the subjective element that demonstrates that state conduct results from a sense of "legal obligation, as opposed to motives of courtesy, fairness or morality . . . ."[109] There is no particular timetable for the maturation of a conventional rule into cus-

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[104] *See* Frederic L. Kirgis, Jr., *Custom on a Sliding Scale*, 81 AM. J. INT'L L. 146, 147-49 (1987).

[105] Acceptance of such rules as customary law fosters stability because it extends the rules to those countries most likely to abstain from ratifying the multilateral conventions that contain them. The recalcitrant states are, in turn, those most likely to be rule breakers.

[106] Laurie King-Irani, *Universal Jurisdiction: Still Trying to Try Sharon*, MERIP Press, Middle East Report On-line, July 30, 2002, *at* http:// merip.org/mero/ mero073002.html.

[107] For example, a hostile state could indict another's prime minister merely to affect her ability to travel internationally. *Cf. Court Ruling Frees PM to Visit Belgium*, HA'ARETZ, ENGLISH EDITION, March 7, 2002, *at* http://www.haaretzdaily.com.

[108] For example, the post-war conventions also contain provisions that require that other interested states be notified when an offender is taken into custody and that guarantee the suspect the right to contact his diplomatic representative in the arresting state. *See, e.g.*, Hostages Convention, *supra* note 16, art. 16, 1316 U.N.T.S at 208. Finally, it is important to remember that many states regard prosecution under the conventions as obligatory only if extradition to a state with territorial or extraterritorial jurisdiction does not take place.

[109] BROWNLIE, *supra* note 36, at 7.

tomary law, nor is there any formulaic mixture of practice and *opinio juris*.[110] Even widespread ratification of a convention by a large number of states does not necessarily indicate that the ratifying states regard the conventional rules as generally binding legal rules. However, "a very widespread and representative participation in the convention might suffice of itself [to produce customary rules], provided it included that of States whose interests were specially affected."[111]

Given the above, it is easy to see why the *aut dedere aut judicare* provisions in the 1949 Geneva and other post-war conventions are not widely regarded to be rules of customary international law. The ratifying states may have seen these provisions as obligating them only to prosecute offenders when extradition to a state with territorial or extraterritorial jurisdiction did not take place.[112] In this sense, the jurisdiction of the prosecuting state is not "universal" at all. Instead, the prosecuting state merely exercises the territorially-linked jurisdiction that another party to the convention actually has.[113]

Another equally plausible interpretation of the "extradite or prosecute" provisions in these treaties is that jurisdiction is contractual; put another way, the parties to the convention have waived any objections they might have to the exercise of jurisdiction by the prosecuting state.[114] Finally, ratification of one or more of these treaties does not manifest a

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[110] *See, e.g., North Sea Continental Shelf Cases,* 1969 I.C.J. at 43. The court found that:

> [a]lthough the passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law on the basis of what was originally a purely conventional rule, an indispensable requirement would be that within the period in question, short though it might be, State practice, including that of States whose interests are specially affected, should have been both extensive and virtually uniform in the sense of the provision invoked; and should moreover have occurred in such a way as to show a general recognition that a rule of law or legal obligation is involved.

Id.

[111] *Id.* at 42.

[112] The plain language of the post-war conventions supports this conclusion. For example, Article 5(2) of the Hostages Convention obligates the state party to "establish jurisdiction over the offences . . . in cases where the alleged offender is present in its territory *and* it does not extradite him . . ." Hostages Convention, *supra* note 16, at 207-08 (emphasis added).

[113] Congo v. Belgium, 2002 ICJ at __ (¶ 14) (Separate Opinion of Judge Higgins) (stating that "[b]y loose language the latter [*aut dedere aut judicare*] has come to be referred to as 'universal jurisdiction,' though this is really an obligatory territorial jurisdiction over persons, albeit in relation to acts committed elsewhere.").

[114] Randall, *supra* note 52, at 819-20 (finding that "[a]n analysis of these treaties [war crimes, hijacking, terrorism, apartheid, and torture] does not necessarily include any reference to the universality principle. Under an alternative analysis, the treaties may simply obligate the parties to assume 'jurisdiction based solely on custody of the defendant pursuant to a convention.'").

state's recognition of, or intention to be bound by, a rule of "universal" jurisdiction.[115]

By contrast, the proscriptions against war crimes and genocide contained in the 1949 Geneva and the Genocide Conventions came to be regarded as rules of customary international law after the passage of very little time and unsupported by any state practice other than nearly universal ratification of the conventions, because they ban practices that "specially [*i.e.,* negatively] affect" the entire community of nations. Indeed, it is difficult to imagine how a state could ratify one of these conventions without its ratification being construed as "a general recognition that a rule of law or legal obligation is involved."[116]

Consequently, since *aut dedere aut judicare* may plausibly (and perhaps preferably) be interpreted as either a derivative of territorial jurisdiction or as a contractual obligation, it is necessary to examine post-treaty state practice, beyond the ratification of the treaties themselves, to see if it reflects an understanding among the states that "universal" jurisdiction is customary international law.

C. *State Practice: National Legislation*

Encouraging states to incorporate universal jurisdiction provisions into their national criminal codes is another shared feature of the post-war conventions.[117]

Despite this invitation, Belgium and Spain are the only states to have enacted national legislation providing for "pure" universal jurisdiction,[118]

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[115] This is especially true since

> [m]any states, in fact, deny that extradition is a subject-matter falling within customary international law, and therefore argue that no international obligations exist other than those specific duties created by treaty or through reciprocal practice between states. Even then, these duties are interpreted in accordance with the judicial or political standards of the states involved.

M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE 828 (3d ed. 1996).

[116] According to the ICJ in The Reservations to the Genocide Convention case, *supra* note 5 at 23, universality was the purpose of the Convention:

> A second consequence is the universal character both of the condemnation of genocide and of the co-operation required 'in order to liberate mankind from such an odious scourge' (Preamble to the Convention). The Genocide Convention was therefore intended by the General Assembly and by the contracting parties to be definitely universal in scope.

[117] *E.g.,* Hostages Convention, *supra* note 16, art. 5(3) (stating that "[t]his Convention does not exclude any criminal jurisdiction exercised in accordance with internal law"). Referring to nearly identical language, Bassiouni concluded that "[i]t therefore implicitly allows national legislation to provide for universal jurisidiction." Bassiouni, *supra* note 16, at 125. Similar provisions are not found in the 1949 Geneva Conventions, the 1977 Additional Protocols or the Genocide Convention.

[118] Belgium adopted the Act Concerning the Punishment of Grave Breaches of International Humanitarian Law (the 1999 Belgian Law) on which the Yerodia and

and Belgium is the only state to have initiated a case based solely on such jurisdiction.[119]

In a recent article, Professor Bassiouni thoroughly examined state practice regarding "pure" universal jurisdiction and found "there are only two cases known to this writer, namely Belgium and Spain, in which universal jurisdiction was applied without any nexus to the enforcing state."[120] Similarly, the judges, who discussed current state practice in their separate opinions in *Congo v. Belgium*, came to substantially the same conclusion. After analyzing a number of state statutes and cases, President Guillaume (who ultimately decided that territorial presence is a prerequisite to the exercise of national criminal law jurisdiction[121]), stated that "[n]umbers of other examples could be given, and the only country whose legislation and jurisprudence appear clearly to go the other way [in favor of "pure" universal jurisdiction] is the State of Israel, which in this field obviously constitutes a very special case."[122] Judges Higgins, Kooijmans and Buergenthal (who concluded that states were not precluded from voluntarily exercising universal jurisdiction)[123] also analyzed national legislation finding "none of [the national laws], nor the many others that have been studied by the Court, represent a classical assertion of a universal jurisdiction over particular offences committed elsewhere by persons having no relationship or connection with the forum state."[124]

Sharon prosecutions are predicated, because, although from a "strictly technical viewpoint, a new Act was not required in order to comply with the international legal obligations," the Belgian legislature wanted to achieve the "dual aim of punishment and prevention" of grave breaches of international humanitarian law. Smis & Van der Borght, *supra* note 69, at 919; *see also* Reydams, *supra* note 87, at 195 (concluding that "[w]ith the 1999 amendment, the legislature has deliberately chosen to close any possible jurisdictional loophole regarding the most serious international crimes.").

[119] In the *Pinochet* cases, Spanish authorities sought the extradition of the former Chilean dictator from Great Britain for violations of the Torture Convention that took place in Chile. There were, however, Spanish citizens who allegedly were victims of these crimes, thus making the passive personality principle an alternative basis for jurisdiction. *See supra* note 77.

[120] Bassiouni, *supra* note 16, at 137.

[121] Congo v. Belgium, 2002 I.C.J at __ (¶ 15) (Feb. 14) (Separate Opinion of Judge Guillaume), *at* http://www.icjcij.org/icjwww/idocket/iCOBE/iCOBEframe.htm.

[122] *Id.* at __ (¶ 12).

[123] *Id.* at __ (¶ 58) (Separate Opinion of Judge Higgins).

[124] *Id.* at __ (¶ 21) (Separate Opinion of Judge Higgins). In 1987, the drafters of the Restatement Third reached an identical conclusion: "[t]hat genocide and war crimes are subject to universal jurisdiction was accepted after the Second World War, although apparently *no state has exercised such jurisdiction in circumstances where no other basis for jurisdiction under § 402 was present.*" RESTATEMENT THIRD, *supra* note 33, § 404, comment (b), rptr's notes 1 (emphasis added).

Given the unanimity and certainty of these conclusions, there is little doubt that there is insufficient state practice upon which to base the existence of a customary principle of "pure" universal jurisdiction. Nonetheless, there is a substantial body of scholarly[125] and judicial[126] opinion that some form of universal jurisdiction is customary international law.

VI. CUSTOMARY LAW UNIVERSAL JURISDICTION

A. *Piracy*

Prior to the twentieth century, universal jurisdiction existed for two international crimes: piracy and slavery.[127] Customary universal jurisdiction over piracy was codified in the 1958 Geneva Convention on the Law of the High Seas:

> On the high seas, or in any other place outside the jurisdiction of any State, every State may seize a pirate ship or aircraft, or a ship taken by piracy and under the control of pirates, and arrest the persons and seize the property on board. The courts of the State which carried out the seizure may decide upon the penalties to be imposed, and may also determine the action to be taken with regard to ships, aircraft or property, subject to the rights of third parties acting in good faith.[128]

This provision contains the essential feature of universal jurisdiction: every state has jurisdiction without regard to territorial or other links.

Universal jurisdiction was extended to piracy, in part because pirates operated outside the established legal order and, consequently, victim

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[125] *See* Bassiouni, *supra* note 16, at 149 (stating that "the writings of the most distinguished publicists also support the proposition that *jus cogens* crimes [which include war crimes, genocide and crimes against humanity] require the application of universal jurisdiction when other means of carrying out the obligations deriving from *aut dedere aut judicare* have proven ineffective.").

[126] *E.g.*, Demjanjuk v. United States, 776 F.2d 571, 582-83 (6th Cir. 1985). The court held that

> [f]urther, the fact that the State of Israel was not in existence when Demjanjuk allegedly committed the offenses is no bar to Israel's exercising jurisdiction under the universality principle. When proceeding on that jurisdictional premise, neither the nationality of the accused or the victim(s), nor the location of the crime is significant. The underlying assumption is that the crimes are offenses against the law of nations or against humanity and that the prosecuting nation is acting for all nations. This being so, Israel or any other nation, regardless of its status in 1942 or 1943, may undertake to vindicate the interest of all nations by seeking to punish the perpetrators of such crimes.

Id.

[127] *See* Bassiouni, *supra* note 16, at 108-15.

[128] Convention on the Law of the High Seas, Apr. 25, 1958, 1 U.S.T. 2312, 450 U.N.T.S. 82, art. 19 [hereinafter High Seas Convention]. The same language was reiterated in the United Nations Convention on the Law of the Sea, art. 105, U.N.Doc. A/CONF.62/122 (1982).

states could not seek reparations from other states for damages suffered at the hands of pirates.[129] Pirates became "stateless" when they renounced their citizenship by not flying the flag of their state of origin. Their crimes generally took place on the high seas, which were not within the jurisdiction of any state.[130] Moreover, by definition, piracy was committed for "private ends,"[131] and, therefore, no state could be held responsible for pirates' acts. Thus, since one state could not seek reparations from another after a pirate attack, it was pragmatic to give all states the authority to arrest and punish pirates.

This same pragmatic consideration does not apply to war crimes, crimes against humanity and genocide. These crimes are almost always committed for some (however odious) public purpose; therefore, state responsibility exists.[132] There is also a recognized jurisdictional basis for prosecuting the individuals who perpetrate these crimes on behalf of a state: the crimes take place within a state (territorial jurisdiction); they are committed by someone (nationality jurisdiction); and they produce victims (passive personality jurisdiction). Unlike piracy then, war crimes,

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[129] Malvina Halberstam, *Terrorism on the High Seas: The Achille Lauro, Piracy and the IMO Convention on Maritime Safety*, 82 AM. J. INT'L L. 269, 288 (1988) (stating "[w]here the actor was not potentially a threat to all states or the act was done under the authority of a state, universal jurisdiction was denied. Thus, acts by state vessels, by recognized belligerents or by those on board a ship that continued to accept the authority of the flag state were not piratical.").

[130] From an early twenty-first century perspective the flaws are obvious. A pirate vessel does not necessarily lose its nationality merely by lowering its flag. *See, e.g.*, High Seas Convention, *supra* note 128, art. 18, 1 U.S.T. at 2317 (stating that "[t]he retention or loss of nationality [of a pirate ship] is determined by the law of the State from which such nationality was derived."). Thus, it could be argued that the flag state had jurisdiction under the nationality principle. Similarly, the ship attacked by the pirate was an extension of the territory of its flag state. A piratical attack, therefore, produced an "effect" on the flag state's territory. *See* Lotus, 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7) at 23. But these jurisdictional theories did not exist at the time piracy was in its heyday.

[131] In part because of the "private ends" requirement, it has been hotly debated whether incidents, like the seizure of the cruise ship Achille Lauro and the killing of one of its passengers by Palestininan terrorists in 1985, could be prosecuted as acts of piracy. *See, e.g.*, Halberstam, *supra* note 129.

[132] *See* ILC Commentaries to the Draft Articles on Responsibility of States for Internationally Wrongful Acts, art. 1, cmt. 3, 56 U.N. GAOR, 56th Sess., Supp. No. 10 57, U.N. Doc. A/56/10, (2001), stating

> [t]hat every internationally wrongful act of a State entails the international responsibility of that State, and thus gives rise to new international legal relations additional to those which existed before the act took place, has been widely recognized both before and since article 1 was first formulated by the Commission.

Id.

crimes against humanity and genocide are not "outside the jurisdiction of any state."[133]

There is, however, a shared practical problem that, partially, justifies the extension of customary universal jurisdiction from piracy to other serious international crimes, especially war crimes, crimes against humanity and genocide. That problem is impunity. In the case of piracy, impunity results from the difficulty in apprehending a rogue vessel that freely roams the high seas. For modern international crimes, impunity exists because rogue states shield those who commit them.[134] Thus, there is a practical justification for giving other states jurisdiction in the event that the offender can be captured outside the rogue state.

This practical need alone probably would not justify customary universal jurisdiction, even over heinous international crimes. However, just as piracy threatened the international economic order, the most serious modern international crimes threaten the international legal order.[135] Those who perpetrate modern international crimes are, like pirates, regarded as *hostis humanii generis*, the enemies of all mankind.[136] Accordingly, the drafters of the Restatement Third of the Law of Foreign Relations of the United States concluded:

> [I]nternational law permits any state to apply its laws to punish certain offenses although the state has no links of territory with the offense, or of nationality with the offender (or even the victim). Universal jurisdiction over the specified offenses is a result of universal condemnation of those activities and general interest in cooperating to suppress them, as reflected in widely accepted international agreements and resolutions of international organizations. These

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[133] High Seas Convention, *supra* note 128, art. 19.

[134] *Cf.* Redress, *supra* note 87, at annex, 15-16 (discussing Public Prosecutor v. Djajic, Bayrishces Oberlandesgericht, 23 May 1997). Djajic was prosecuted in Germany for war crimes committed during the conflict in Bosnia. The Djajic Court was quoted in Redress as stating, "[i]t would be intolerable if the perpetrator of a crime under international law committed against civilians, who had moved into German territory, would be . . . left in peace or extradited to a state that is patently not willing to prosecute him."

[135] Congo v. Belgium, 2002 I.L.J. at __ (¶ 24), (Feb. 14), (Separate Opinion of Judge Van den Wyngaert), *at* http://www.icjcij.org/icjwww/idocket/iCOBE/iCOBEframe.htm. In her separate opinion (¶ 24), Judge Van den Wyngaert wrote:

> [d]espite uncertainties that may exist concerning the definition of universal jurisdiction, one thing is very clear: the *ratio legis* of universal jurisdiction is based on the international reprobation for certain very serious crimes such as war crimes and crimes against humanity. Its *raison d'être* is to avoid impunity, to prevent suspects from finding a safe haven in third countries.

Id.

[136] *See* Randall, *supra* note 52, at 794; Bassiouni, *supra* note 16, at 108.

offenses are subject to universal jurisdiction as a matter of customary law.[137]

Nonetheless, and despite the Restatement's position that universal jurisdiction is customary law, there is an important distinction between piracy and even the most heinous of modern international crimes that might militate against extending to them piracy-type universal jurisdiction.

B. Hostis Humanii Generis *Meets Territorial Sovereignty*

Prosecution of a pirate by one state cannot violate the territorial integrity of another state[138] because universal jurisdiction over piracy extends only to those acts committed "outside the jurisdiction of any state" or on the high seas.[139] Conversely, since there is always a territorial state with jurisdiction over a war crime, another state's attempt to prosecute an offender based on universal jurisdiction can result in a jurisdictional conflict.[140] Thus, despite the fact that the label *hostis humanii generis* applies equally to pirates and war criminals, another fundamental international legal principle—territorial sovereignty-conflicts with the exercise of universal jurisdiction over the latter.

Perhaps deference to the principle of territorial sovereignty explains why some courts apply a stricter standard when "pure" universal jurisdiction is the basis for the prosecution than they do when one of the more traditional forms of extraterritorial jurisdiction is asserted. Courts in France and Germany have halted investigations into war crimes and crimes against humanity on jurisdictional grounds when the defendants were not already within their territories.[141] The German courts have specifically held that this territorial link is necessary in order to prevent violating the related principles of non-interference in the affairs of and respect for the sovereignty of other states.[142]

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[137] RESTATEMENT THIRD, *supra* note 33, cmt. a. The specified offenses include "[p]iracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism." *Id.* § 404.

[138] Randall, *supra* note 52, at 792.

[139] High Seas Convention, *supra* note 128.

[140] *See supra* notes 45-48 and accompanying text.

[141] *See* Congo v. Belgium, 2002 I.C.J. at __(¶ 12) (Separate Opinion of President Guillaume).

[142] *Id.*; *see also* Redress, *supra* note 87, at annex, p.15 (finding that "mere temporary presence of a suspect in Germany would not by itself be sufficient basis for a prosecution in Germany"). On the other hand, the same courts have approved prosecutions *in absentia* when jurisdiction is based on the passive personality principle. Captain Alfredo Asitz, an Argentine national, was prosecuted in France in connection with the torture and disappearance of two French nuns in Argentina. He was tried, convicted and sentenced *in absentia*. *Id.* at annex, p.13. French authorities also requested the provisional arrest of General Pinochet for torture and crimes

Assertions of "pure" universal jurisdiction also increase the prospects of tension between the prosecuting state and the defendant's nationality state.[143] Thus, the hesitation of states to prosecute in cases based on "pure" universal jurisdiction may be explained by the potential destabilizing effect of such prosecutions on the international legal order;[144]

> [b]ut universal jurisdiction must not be allowed to become a wildfire, uncontrolled in its application and destructive of the international legal processes. If that were the case, it would produce conflicts of jurisdiction between states that have the potential to threaten world order, subject individuals to abuses of judicial processes, human rights violations, politically motivated harassment, and work denial

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against humanity of which French nationals were victims that took place in Chile during Pinochet's regime. *Id.* Germany also initiated an investigation of Pinochet because some of his alleged victims were German nationals. *Redress, supra* note 87, at annex, p. 28. Moreover, it is difficult to see why an investigation premised on universal jurisdiction is a greater interference in the affairs of another state than is one based on the passive personality principle. In neither case is there a territorial link to the crime, the perpetrator or the defendant. In both, the evidence gathering process will take place principally in the state where the offense took place and presumably where the defendant resides. Trial in a foreign state will also present the same problems—witnesses must be transported to the forum state; the defendant, assuming she/he is present, will face the same inconveniences in mounting a defense. *Cf.* Congo v. Beligum, 2002 I.C.J. at __ (¶ 56) (Separate Opinion of Judge Van den Wyngaert).

[143] Here again, assertions of universal jurisdiction create no more friction than assertions of passive personality jurisdiction. For example, even though both jurisdictional predicates were present in the *Pinochet* case, Chile strenuously protested Spain's attempt to prosecute because "there are grave concerns in Chile that the continued detention and attempted prosecution of Senator Pinochet in a foreign court will upset the delicate political balance and transition to democracy that has been achieved since the institution of democratic rule in Chile." *Pinochet I*, [2000] 1 A.C. 61, 89 (H.L. 1998). *See also* Naomi Roht-Arriaza, *The Pinochet Precedent and Universal Jurisdiction*, 35 NEW ENG. L. REV. 311, 315 (2001) (stating "[t]he Chilean and Argentine governments based much of their opposition to Spanish jurisdiction on the argument that extra-territorial adjudication of crimes committed within Chile and Argentina would upset a delicate political consensus regarding the proper balance between truth, justice and amnesty.").

[144] However, the fact that a state does not prosecute cannot be seen as state practice supporting the non-existence of a customary rule of "pure" universal jurisdiction unless the inaction stems from the state's belief, *opinio juris*, that it is legally bound to forego prosecution. Lotus, 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7) at 28. That, in fact, appears to be Germany's position in the cases discussed above. *See supra* note 142 and accompanying text. *But see* Congo v. Belgium, 2002 I.C.J. at __ (¶ 45) (Separate Opinion of Judge Higgins) (finding that "there is equally nothing in this case law which evidences an *opinio juris* on the illegality of such a jurisdiction. In short, national legislation and case law,—that is, State Practice – is neutral as to the exercise of ["pure"] universal jurisdiction.")

> of justice. In addition, there is the danger that universal jurisdiction may be perceived as hegemonistic jurisdiction exercised mainly by some Western powers against persons from developing nations.[145]

The conflict between an assertion of "pure" universal jurisdiction and territorial sovereignty was at the heart of the dispute in *Congo v. Belgium*. Congo initially claimed that when Belgium issued and circulated an arrest warrant charging its former foreign minister with war crimes it had violated "'the principle that a State may not exercise its authority on the territory of another State and . . . the principle of sovereign equality among all Members of the United Nations . . . .'"[146] Belgium responded that "an investigation or prosecution mounted against a person outside its territory did not violate any rule of international law . . . ."[147] Because the judges on the ICJ clashed over whether the territorial integrity of another state was violated by the issuance of an international arrest warrant predicated on "pure" universal jurisdiction, their opinions may well foreshadow the future of a customary principle of "pure" universal jurisdiction.[148]

VII. A COURT DIVIDED: THE SEPARATE OPINIONS IN *CONGO V. BELGIUM*

A. *Overview*

In *Congo v. Belgium*, three judges, Guillaume, Ranjeva, and Rezek, concluded, in the words of Judge Guillaume, that "[i]f the Court had addressed these questions [regarding universal jurisdiction] . . . it ought therefore to have found that the Belgian judge was wrong in holding himself competent to prosecute Yerodia Ndombasi by relying on a universal jurisdiction incompatible with international law."[149] Three other judges, Higgins, Kooijmans and Buergenthal, wrote that "[i]t would seem . . . that the acts alleged [in Belgium's arrest warrant] do fall within the concept of 'crimes against humanity' and would be within that small category in respect of which an exercise of universal jurisdiction is not precluded under international law."[150] Stated differently, the Guillaume group of

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[145] Bassiouni, *supra* note 16, at 154-155 (citations omitted).

[146] Congo v. Belgium, 2002 I.C.J. at __ (¶ 17).

[147] *Id.* at __ (¶ 8) (Separate Opinion of Judge Higgins).

[148] For purposes of this article, only the separate opinions of the permanent members of the court have been analyzed, since those of the ad hoc members of the court cannot be seen a predictors of future court behavior.

[149] Congo v. Belgium, 2002 I.C.J. at __ (¶ 17) (Separate Opinion of President Guillaume); *see also* Declaration of M. Ranjeva, *id.* at __ (¶ 11); Opinion Individuelle of M. Rezek, *id.* at __ (¶ 6).

[150] *Id.* at __ (¶ 65) (Joint Separate Opinion of Higgins). A fourth judge (Koroma) opined that "Belgium is entitled to invoke its criminal jurisdiction against anyone, save a Foreign Minister in office" and therefore that "the [ICJ's] Judgment cannot be seen either as a rejection of the principle of universal jurisdiction, the scope of which

judges found Belgium's issuance of an international arrest warrant for Yerodia to be illegal absent a positive rule of international law authorizing it; while the Higgins group saw it as a voluntary act unrestricted by international law.[151]

B. *The Positivist View: No Universal Jurisdiction* In Absentia

President Guillaume, and the judges who concurred with him, regarded the issuance and circulation of an international arrest warrant as a judicial act that could not take place without the presence of the accused. President Guillaume used the phrase *in absentia* several times when referring to Belgium's actions, ultimately concluding that "[u]niversal jurisdiction *in absentia* as applied in the present case is unknown to international law."[152]

Insofar as this statement suggests that a state's assertion of any form of universal jurisdiction *in absentia* violates international law, it is overly broad and ignores the fact that international law recognizes that acts of prescriptive and adjudicatory jurisdiction[153] can occur when a defendant is not present within the territory of the prosecuting state.

First, the post-war conventions clearly grant states the authority to prescribe violations *in absentia.* Otherwise, state prosecutions of offenses based on the conventions would run afoul of the principle *nullem crimen sine lege.*[154] That is to say that without a prior law prescribing the con-

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has continued to evolve, or as an invalidation of that principle." *Id.* at __ (¶ ¶ 8 , 9) (Separate Opinion of Judge Koroma).

[151] According to Professor Schachter, these contrary positions have their roots in the PCIJ's decision in the *Lotus* case:

> In a particular case this will usually take the form of a presumption in favour of State freedom to act with the burden placed on the challenging State to show that a customary law rule exists and is binding on the other State to limit the freedom in question. However, if one takes the opposing view, the State asserting jurisdiction must show that its conduct was compatible with a jurisdictional ground (or "base") recognized by international law. The difference in the two positions will often be of minor consequence, but it may be critical in these cases where the law is still uncertain or fragmentary.

OSCAR SCHACHTER, INTERNATIONAL LAW IN THEORY AND PRACTICE 252 (1991).

[152] Congo v. Belgium, 2002 I.C.J. at __ (¶ 12) (Separate Opinion of President Guillaume).

[153] RESTATEMENT THIRD, *supra* note 33, at Pt. 4 – Jurisdiction and Judgments, intro. The Restatement Third provides that

> this Restatement deals with jurisdiction under the following headings: (a) *jurisdiction to prescribe, i.e.,* the authority of a state to make its law applicable to persons or activities; (b) *jurisdiction to adjudicate, i.e.,* the authority of a state to subject particular persons or things to its judicial process; and (c) *jurisdiction to enforce, i.e.,* the authority of a state to use the resources of government to induce or compel compliance with its law.

Id.

[154] Roht-Arriaza, *supra* note 143, at 314.

duct, any subsequent prosecution would be inconsistent with the notion of the rule of law. Second, the process of international extradition exists in order to accomplish the transfer of individuals from a state with custody of an offender to another state in which a prosecution has been initiated. Except in those cases where the defendant has fled the prosecuting jurisdiction after charges were brought, the state requesting extradition has already begun the adjudicatory process by issuing an arrest warrant *in absentia*. Finally, there are other cases that support the conclusion that, relying at least in part on universal jurisdiction, states have already begun the adjudicatory process *in absentia*.[155]

Although in many of these cases states have emphasized that their nationals were victimized, states make such assertions more for political than for legal reasons, in order to avoid (or to blunt) charges that they violated the territorial sovereignty of another state by exercising "pure" universal jurisdiction.[156]

To the extent that President Guillaume's opinion suggests that what Belgium did in the Yerodia case was unheard of in international law, these cases contradict such a blank assertion, as well as his conclusion that Belgium's conduct violated international law. On the other hand, it is equally clear that these cases do not support the existence of an international customary rule of "pure" universal jurisdiction, since in each of

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[155] *See, e.g.*, United States v. Yunis, 924 F.2d 1086, 1091 (D.C. Cir. 1991) (finding that based on universal and passive personality jurisdiction, U.S. courts could indict a defendant *in absentia* for airline hijacking offenses); Demjanjuk v. United States, 776 F.2d 581 (6th Cir. 1985) (finding extradition from the United States to Israel proper based on an indictment for war crimes and crimes against humanity committed during Nazi holocaust even though none of the crimes took place in Israel and the defendant had never been there); Roht-Arriaza, *supra* note 143, at 312 (discussing Spanish prosecution of Pinochet *in absentia* based on universal jurisdiction); Reydams, *supra* note 87, at 206-210 (finding that universal jurisdiction authorized Belgian investigating magistrate to pursue crimes against humanity charges against Pinochet *in absentia*.)

[156] Naomi Roht-Arriaza, *supra* note 143, at 314-15. Roht-Arriaza noted that

> [a] related issue concerns the way universal jurisdiction has been combined with other possible jurisdictional bases in the cases. While the letter of the law did not require it, the Pinochet case and related cases were careful to include and prominently feature victims who were citizens of the forum state. Thus, in the Spanish cases the original list of victims was made up of Spanish citizens and descendants of Spanish citizens who had been killed or disappeared in Argentina. Only later, after the case had been accepted for investigation, were non-Spanish victims added. This was done in part for political reasons—to avoid charges of Spanish court meddling—and in part to take advantage of Spanish constitutional mandates to the courts to do justice for Spanish citizens. The Belgian case against Pinochet, also based on universal jurisdiction, involved Chilean citizens living in Europe; there was always a tie to the forum state.

Id.

them the state acted pursuant to a jurisdictional provision in its national laws.[157]

C. *Voluntary vs. Obligatory Universal Jurisdiction*

The separate opinion of Judges Higgins, Kooijmanns and Beurgenthal likewise cannot be read as an endorsement of the existence of a customary principle of "pure" universal jurisdiction. Their opinion limits itself to a finding that the issuance and circulation of an international arrest warrant did not violate the prohibition against one state exercising its criminal jurisdiction, without permission, in the territory of another state. While the *aut dedere aut prosequi* provision in the post-war treaties "*[d]efinitionally . . . envisages presence on the territory*," and such presence is necessary prerequisite to an "obligatory exercise of *aut dedere aut prosequi* jurisdiction," that "cannot be interpreted *a contrario so as to exclude* a voluntary exercise of jurisdiction."[158]

This is no more than a reformulation of a principle from the *Lotus* case, which says that in applying their criminal laws extraterritorially states have a "wide measure of discretion only limited in certain cases by prohibitive rules . . . ."[159] The only "prohibitive rule" that could have limited Belgium's freedom to act is that "criminal jurisdiction should not be exercised, without permission, within the territory of another State."[160] And, simply put,

> [t]he Belgian arrest warrant envisaged the arrest of Yerodia in Belgium, or the possibility of his arrest in third States at the discretion of the States concerned. This would in principle seem to violate no existing prohibiting rule of international law.[161]

For Judges Higgins, Kooijmanns and Buergenthal, exercising extraterritorial jurisdiction is obligatory when the conditions of the post-war conventions are met. Apart from that, states are also free to assert "pure" universal jurisdiction, so long as in doing so they do not transgress any other established international legal rule.[162] This, however, is a far cry

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[157] *See, e.g., Yunis*, 924 F.2d at 1091 (finding that "the statute in question [the Hostage Taking Act, 18 U.S.C. § 1203] reflects an unmistakable congressional intent, consistent with treaty obligations of the United States, to authorize prosecution of those who take Americans hostage abroad no matter where the offense occurs or where the offender is found. Our inquiry can go no further.").

[158] Congo v. Belgium, 2002 I.C.J. at __ (¶ 57) (Joint Separate Opinion of Higgins).

[159] Lotus, 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7) at 19.

[160] Congo v. Belgium, 2002 I.C.J. at __ (¶ 54) (Joint Separate Opinion of Higgins).

[161] *Id.*

[162] For example, in addition to not acting without permission in the territory of another state, exercises of criminal jurisdiction must respect the inviolability and not infringe the immunity of the person concerned. *Id.* ¶ 59. Other suggested limitations on the exercise of "pure" universal jurisdiction are: 1) the nationality state should be given the opportunity to prosecute; 2) charges should be brought by an independent

from stating there is a positive rule of customary international law obligating all states to exercise "pure" universal jurisdiction over international crimes.

VIII. CONCLUSIONS

Though the International Criminal Court is now in existence, it does not have "pure" universal jurisdiction to prosecute the offenses defined it its statute.[163] Instead, it has jurisdiction over offenses committed within the territory or by a national of a state party or a state that has specially accepted its jurisdiction.[164] Alternatively, the court may be seized with a case based on a resolution from the United Nations Security Council,[165] acting pursuant to its power under Chapter VII of the UN Charter to "decide what measures shall be taken . . . to maintain or restore international peace and security."[166] However, the Council's ability to act is limited by the veto power of its permanent members.[167] Finally, the ICC Statute does not apply to offenses committed before it came into effect on July 1, 2002.[168]

Consequently, state prosecutions of international crimes will be necessary if the goal of eliminating impunity is to be accomplished in those instances in which the state where the crime was committed or whose national committed the crime is not a party to the ICC statute and there is no referral by the Security Council; or the crime was committed before the ICC statute took effect; or the charges involve other serious international crimes, such as hostage taking or airline hijacking, that are not within the ICC's jurisdiction.[169] Thus, it remains vital that states be will-

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prosecutor and not by the government of a state; and 3) the exercise of such jurisdiction should be limited only to "those crimes regarded as the most heinous by the international community." *Id.* at ¶¶ 59, 60.

[163] ICC Statute, *supra* note 11, art. 5. The ICC has jurisdiction over war crimes, crimes against humanity, genocide and aggression, which has yet to be defined. *Id.*

[164] *Id.* art. 12; *see also* Daniel T. Ntanda Nsereko, *The International Criminal Court: Jurisdictional and Related Issues*, 10 CRIM. L.F. 87, 105 (1999).

[165] ICC Statute *supra* note 11, art. 13(b).

[166] UN Charter, art. 39.

[167] *See, e.g.*, Mark A. Summers, *A Fresh Look a the Jurisdictional Provisions of the Statute of the International Criminal Court: The Case for Scrapping the Treaty*, 20 WIS. INT'L L.J. 57, 75 (2001) (stating "it is also unlikely that the Security Council will vote to refer cases to the ICC, especially when two of its permanent members – China and the United States – oppose the Court as currently structured.").

[168] ICC Statute, *supra* note 11, art. 11(1).

[169] *See* Nsereko, *supra* note 164, at 120. Nsereko found that:

> [t]he Court lacks universal jurisdiction wherewithal to track down and try perpetrators of heinous crimes irrespective of their nationality and the place where they committed the crimes. This is a particularly severe handicap for the Court. It will not be able to try dictators whose countries, for obvious reasons, may not accede to the [ICC] Statute. These dictators will be able to roam the

ing to prosecute international crimes. Questions whether states can or will prosecute persist. If the past is prologue, the situation is not hopeful.

In order to prosecute crimes against humanity committed before the ICC Statute came into effect,[170] or crimes not covered by the statute, states that do not have territorial or extraterritorial jurisdiction must rely on a principle of universal jurisdiction in its developmental stages. While there is consensus that states are free (and even encouraged) to prescribe international crimes, it is less clear whether international law allows them to take even preliminary steps in their prosecution, absent at least the territorial presence of the offender. Even the voluntary use of "pure" universal jurisdiction, as recognized by the Higgins group of judges on the ICJ, leaves the prosecuting state in the position of waiting for the defendant to leave his safe haven and enter its territory or that of another state that would extradite him. In other words, in the absence of an affirmative rule of "pure" universal jurisdiction, the prosecuting state has no right to insist that the asylum state either extradite or prosecute the offender.

Nor is there any reason to be optimistic that states will start to incorporate universal jurisdiction provisions into their state laws. Were states to do so, it would increase the number of states that could assert "pure" universal jurisdiction and would constitute state practice that such jurisdiction exists as a matter of customary international law. If anything the ICJ's decision in *Congo v. Belgium* seems to presage an opposite trend. In the decision's immediate aftermath, the Court of Appeals in Belgium interpreted the 1999 Belgian law to require the territorial presence of the offender as a prerequisite to the exercise of the universal jurisdiction provided for in the statute.[171]

With regard to offenses covered by and committed after the effective date of the ICC Statute, it could be argued that there is no real impunity problem at least with regard to war crimes and genocide. Given the nearly universal ratification of the 1949 Geneva and Genocide Conventions, either the ICC or a state would likely have jurisdiction to prosecute. However, with the notable exception of the *Pinochet* case, states have narrowly interpreted the obligation to "extradite or prosecute" as limited to those instances where the offender is already within the terri-

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globe assured that the arm of international justice will not be long enough to reach them.

Id.

[170] Most states would have jurisdiction to prosecute war crimes and genocide committed before the ICC Statute went into effect based upon their ratifications of the 1949 Geneva and the Genocide Conventions.

[171] Gareth Smyth, *Belgian Court Drops Sharon Human Rights Case*, The FINANCIAL TIMES, June 26, 2002, *available at* http://indictsharon.net/press/020626ft.shtml. Subsequently, Belgium's highest court, the Cour de Cassation, reversed the ruling of the Court of Appeals, holding that after Sharon's term as prime minister of Israel ends he may be prosecuted in Belgium. BADIL Resource Center, Press Release dated Feb. 15, 2003, *available at* www.badil.org.

tory of the prosecuting state. To put it even more bleakly, "[s]ome treaties were adopted that provide for national prosecution of offenses of international concern and, in many cases, for universal jurisdiction; but, with a few exceptions, these treaties were not observed."[172]

Similar reasoning applies to crimes against humanity committed after July 1, 2002, the date the ICC Statute took effect. The widespread belief that such crimes are universal, and that jurisdiction to prosecute them is also universal, has not resulted in prosecutions where there are no territorial links to the offense, the offender, or the victims. The arrival of the ICC does little, if anything, to change this picture. The ICC has jurisdiction only if a state with territorial or nationality jurisdiction chooses not to prosecute.[173] State parties may choose to refer such cases to the ICC, but if a non-party state has jurisdiction over the offense or the offender the case can come before the ICC only via a referral from the U.N. Security Council. While there will surely be instances in which the Council will act as it did to create the Yugoslavia and Rwanda tribunals, there will be other situations in which the veto will prevail, resulting in impunity.

Nevertheless, it is undeniable that some progress has been made toward achieving a system without gaping loopholes through which war criminals can slip without a trace. The debate over the existence or non-existence of "pure" universal jurisdiction is a real one. Perhaps it is true that some scholars have couched the rule as a reality, whereas most states continue to view the exercise of criminal jurisdiction as territorially linked. Inevitably, states will continue to prosecute international crimes. The further states stretch their jurisdictional reach over such crimes, the greater the likelihood of offending some other state's prerogatives. This will lead to other cases where the courts will be called upon to define the perimeters of universal jurisdiction. The question is: How will the balance be struck between eliminating impunity and respecting state sovereignty?

The separate opinions in *Congo v. Belgium* begin to grapple with this issue. All of the judges agreed that there is, as yet, no customary law rule of "pure" universal jurisdiction that obligates states to prosecute war crimes, crimes against humanity and genocide, absent some territorial link to the offense or the offender. The judges are divided over whether

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[172] Meron, *supra* note 12, at 554.

[173] This is referred to as the principle of complementarity. ICC Statute, *supra* note 11, art. 1. (providing that the Court "shall have the power to exercise its jurisdiction over persons for the most serious crimes of international concern . . . and shall be complementary to national criminal jurisdictions."). *Id.* And, significantly, the obligation to defer to state prosecutions is not limited to those initiated by state parties to the ICC Statute. Article 17(1)(a) provides that "the Court shall determine that a case is inadmissible where: (a) The case is being investigated or prosecuted by a State which has jurisdiction over it." Thus, any state has jurisdictional priority over the ICC.

the existence of such a rule is a necessary prerequisite to any prosecutorial act. If the Guillaume view prevails, a state must abstain from any adjudicatory act until the offender is present on its territory. If the Higgins view prevails, then states may investigate and charge violations of serious international crimes, regardless of the location of the offense or the nationality of the offender or of the victims. Any such state acts are "voluntary" and unsupported by an affirmative international legal principle. Thus, the prosecuting state may not exercise any authority on the territory of another state by, for example, insisting that an asylum state extradite or prosecute the offender.

This limitation on the exercise of "pure" universal jurisdiction also results in a limited form of impunity; the offender is safe so long as he does not leave the asylum state. On the other hand, even with this limitation, states can condemn publicly those who commit serious international crimes, and pressure other states not to grant asylum to war criminals. At the same time, the sovereignty of those states that choose to harbor war criminals remains intact, despite the fact that they may be branded as outlaw or rogue states for doing so. Such stigmatization increases the pressure on those states to change their policies so that they may rejoin the community of nations.[174]

There are, of course, proposals for more nuanced approaches to weighing the conflicting interests involved in assertions of "pure" universal jurisdiction.[175] It is unlikely that such solutions can be accomplished

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[174] Libya's surrender of the Lockerbie bombers to an ad hoc international criminal tribunal and Yugoslavia's surrender of Milosevic to the ICTY are two recent examples of how effective this sort of pressure can be.

[175] *See, e.g.*, *The Princeton Principles of Universal Jurisdiction*, *supra* note 20, at 22. The Princeton Principles note that:

> Where more than one state has or may assert jurisdiction over a person and where the state that has custody of the person has no basis for jurisdiction other than the principle of universality, that state or its judicial organs shall, in deciding whether to prosecute or extradite, base their decision on an aggregate balance of the following criteria:
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> a) multilateral or bilateral treaty obligations;
>
> b) the place of the commission of the crime;
>
> c) the nationality connection of the alleged perpetrator to the requesting state;
>
> d) the nationality connection of the victim to the requesting state;
>
> e) any other connection between the requesting state and the alleged perpetrator, the crime, or the victim;
>
> f) the likelihood, good faith, and effectiveness of the prosecution in the requesting state;
>
> g) the fairness and impartiality of the proceedings in the requesting state;
>
> h) convenience to the parties and witnesses, as well as the availability of evidence in the requesting state; and
>
> i) the interests of justice.

Id.

through the evolution of customary international law. Instead, a comprehensive solution to the problem awaits an international law making treaty.