

# Universal Jurisdiction & Drug Trafficking: A Tool for Fighting One of the World's Most Pervasive Problems

Anne H. Geraghty<sup>1</sup>

## I. Introduction

Drug trafficking is a problem of serious concern to all nations. Despite massive efforts<sup>2</sup> to combat the drug trade, the United States and other countries have been unable to effectively bring major perpetrators to justice. Traffickers often operate with impunity in areas where governments are unwilling or unable to prosecute.<sup>3</sup> Countries that do wish to prosecute are frequently helpless because they cannot establish personal jurisdiction over suspected traffickers located outside of their borders.<sup>4</sup> The problems associated with prosecuting those involved in the international drug trade are of such complexity and gravity that they defy easy solution. There are tools, however, that the international community can employ to hold traffickers accountable.

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<sup>1</sup> Law clerk to the Honorable Marvin E. Aspen, District Judge, United States District Court for the Northern District of Illinois; J.D. 2003, Georgetown University Law Center. The author would like to thank Professor David Luban for his thoughtful comments on several drafts of this article.

<sup>2</sup> In 2004, the requested budget for drug control in the United States is \$11.7 billion. OFFICE OF NAT'L DRUG CONTROL POLICY, EXECUTIVE OFFICE OF THE PRESIDENT, DRUG DATA SUMMARY 6 (March 2003).

<sup>3</sup> Columbia is just one example of a country that is unwilling and unable to prosecute its citizens. See Alan Seagrave, *Conflict in Colombia: How Can Rebel Forces, Paramilitary Groups, Drug Traffickers, & Government Forces Be Held Liable for Human Rights Violations in a Country Where Impunity Reigns Supreme?* 25 NOVA L. REV. 525, 527 (2001) (noting that less than three percent of crimes are successfully prosecuted in Columbia).

<sup>4</sup> Another major problem is bringing perpetrators into the state that wishes to prosecute, through extradition or otherwise. Although this is an issue of major concern, it is beyond the scope of this paper and will not be addressed.

One possible tool that has been suggested, although never widely embraced, is to allow states to prosecute drug traffickers using universal jurisdiction. Universal jurisdiction allows any state to exercise jurisdiction to prosecute a suspect wherever he is found, regardless of the location of his crimes, his nationality, or any other contacts with the prosecuting state.<sup>5</sup> This paper argues that the international community should embrace drug trafficking as a universal jurisdiction crime in two ways. First, states should adopt an additional protocol to the 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (hereinafter “the 1988 Convention”)<sup>6</sup> clearly establishing universal jurisdiction for drug trafficking and thereby filling jurisdictional gaps in existing treaty law. Second, states, and the United States in particular, should amend their municipal legislation on drug trafficking to reflect an acceptance of universal jurisdiction. These two actions, if undertaken by a sufficient number of states, will create universal jurisdiction over drug trafficking as a matter of customary international law. Once established as customary international law, it will truly become possible for any state to establish universal jurisdiction over members of the international drug trade, regardless of whether or not that state is a party to the 1988 Convention or the additional protocol. It is only at this point that drug trafficking will become a true universal jurisdiction crime and that traffickers will not be immune from prosecution, regardless of their location.

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<sup>5</sup> RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, cmt. a § 403 (1987) (“international 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).”).

<sup>6</sup> United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, December 19, 1988, S. TREATY DOC. NO. 4 (1990), 28 I.L.M. 493.

This paper does not suggest that universal jurisdiction should be asserted over anyone who brings any quantity of drugs, no matter how small, across an international boarder. Rather, universal jurisdiction should be exercised only in the most serious drug cases involving large quantities of narcotics or people involved in the upper echelons of a widespread trafficking network. In order to clearly set out the difference between what crimes could be subject to prosecution under a universal jurisdiction theory and what crimes would not, the additional protocol to the 1988 Convention should define “serious” drug trafficking offenses. The protocol should require that before a state can exercise universal jurisdiction, it must present preliminary evidence of drug trafficking plus one of the following factors: 1) “involvement in the offense of an organized criminal group to which the offender belongs;” 2) “involvement of the offender in other international organized criminal activities;” 3) “the involvement of the offender in other illegal activities facilitated by the commission of the offense;” 4) “the use of violence or arms by the offender;” or 5) “the fact that the offender holds a public office and that the offence is committed with the office in question.”<sup>7</sup> These categories draw on the already existing list of “particularly serious” drug trafficking offenses found in Article 3(5) of the 1988 Convention and will ensure that small time drug dealers are not subject to prosecution under a universal jurisdiction theory.

Of course, universal jurisdiction is by no means a panacea for the enormous problems faced by the international community with regard to drug trafficking. This paper makes no claims that the assertion of universal jurisdiction against drug traffickers

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<sup>7</sup> United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, December 19, 1988, art. 3(5)(a)-(e), S. TREATY DOC. NO. 4 (1990), 28 I.L.M. 493.

will be such a powerful deterrent force that it will convince drug traffickers to discontinue their work and to find a new trade. Universal jurisdiction is, however, one tool that can be placed in the arsenal of states wishing to confront drug traffickers and hold them accountable for their crimes. Given the enormous difficulties faced by the international community in controlling the international drug trade, states should not disregard any useful tool that will help bring drug traffickers to justice.

Part II of this paper describes the serious problems presented to the world community by the drug trade. Part III sets out the general requirements for the establishment of a universal jurisdiction crime. Part IV examines whether or not drug trafficking fits the requirements that are outlined in Part III. Ultimately, Part IV concludes that although some states may currently exercise universal jurisdiction over drug traffickers, the international community should solidify and clarify this power by enacting an additional protocol to the 1988 Convention. Part V examines the arguments against expanding universal jurisdiction and concludes that these arguments are not of sufficient magnitude to bar the assertion of universal jurisdiction over drug traffickers. Finally, Part VI argues that the United States should lead the effort to recognize drug trafficking as a universal jurisdiction crime because it has a special interest in combating drug trafficking throughout the world.

## **II. The Global Menace of Drug Trafficking**

Drugs are obviously dangerous to those who use them. In the United States alone, 19,698 people died from causes related to the consumption of narcotics during 2000.<sup>8</sup>

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<sup>8</sup> OFFICE OF NAT'L DRUG CONTROL POLICY, EXECUTIVE OFFICE OF THE PRESIDENT, DRUG DATA SUMMARY 2 (March 2003).

Intravenous drug use is responsible for the transmission of the AIDS virus, causing an estimated five percent of the total number of new AIDS cases.<sup>9</sup> Yet those who use drugs are by no means the only people negatively affected by drug trafficking. The global drug trade destabilizes governments, corrupts officials, funds terrorist organizations, breeds large-scale organized crime, and results in significant loss of human life. Indeed, drugs are linked to serious violence, organized crime, and political strife throughout the world.

Drug trafficking provides a valuable source of funding to insurgent movements and thus often undermines the stability of national governments. In Columbia, for example, violent paramilitary groups rely on cocaine production to fund their decades-old civil war.<sup>10</sup> One writer estimates that Columbia's war has displaced more than one million civilians and has killed 35,000 people in the past ten years.<sup>11</sup> The Shining Path organization, a violent guerilla organization funded by cocaine and designed to overthrow the government of Peru, killed an estimated 30,000 people during the late 1980's and early 1990's. Although disbanded 1992, the organization has recently resurfaced and is again posing a threat to stability in Peru today.<sup>12</sup> Drugs can also be a destabilizing force within existing governments because of their incredible power to corrupt. The United States has identified corruption among judges, who are bribed to release prominent drug traffickers rather than prosecute them, as one of the major problems posed by the drug

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<sup>9</sup> UNITED NATIONS, OFFICE ON DRUGS AND CRIME at [http://www.unodc.org/unodc/en/drug\\_demand\\_hiv\\_aids.html](http://www.unodc.org/unodc/en/drug_demand_hiv_aids.html) (last visited April 22, 2003).

<sup>10</sup> BUREAU FOR INT'L NARCOTICS & L. ENFORCEMENT AFF., U.S. DEP'T ST., 2002 INTERNATIONAL NARCOTICS CONTROL STRATEGY REPORT, ch. 2 at 3 (2003).

<sup>11</sup> Alan Seagrave, *Conflict in Colombia: How Can Rebel Forces, Paramilitary Groups, Drug Traffickers, & Government Forces Be Held Liable for Human Rights Violations in a Country Where Impunity Reigns Supreme?* 25 NOVA L. REV. 525, 528 (2001).

<sup>12</sup> BUREAU FOR INT'L NARCOTICS & L. ENFORCEMENT AFF., U.S. DEP'T ST., 2002 INTERNATIONAL NARCOTICS CONTROL STRATEGY REPORT, ch. 2 at 4 (2003).

industry.<sup>13</sup> Those who are not corrupted by drug traffickers face serious consequences: in Columbia, “[n]umerous government officials, including a minister of justice, an attorney general, a dozen Supreme Court judges, and a former head of the Antinarcotics Police, have been murdered for their efforts to enforce the country’s narcotics laws.”<sup>14</sup>

Even in those countries that are not completely destabilized by the drug trade, the link between crime and drugs is indisputable. Within the United States, an estimated 795 people were murdered as a result of their participation in drug use or sales in 1998.<sup>15</sup> In 1998, 138,000 convicted inmates in the U.S. reported that they were under the influence of drugs when they committed the crimes for which they were imprisoned and 61,000 reported that they committed their crimes in order to obtain money for drugs.<sup>16</sup> The list of drug trafficking related crimes seems endless, including, “murder, firearms offenses, racketeering, conspiracy, bribery, tax evasion, banking violations, and money laundering.”<sup>17</sup> Drugs also create enormous financial costs to society. In 2000, the United States Office of National Drug Control Policy estimated that the total cost to society of drug use in the United States was \$160.7 billion.<sup>18</sup>

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<sup>13</sup> BUREAU FOR INT’L NARCOTICS & L. ENFORCEMENT AFF., U.S. DEP’T ST., 2002 INTERNATIONAL NARCOTICS CONTROL STRATEGY REPORT, ch. 2 at 7 (2003).

<sup>14</sup> Sharon A. Gardner, *A Global Initiative to Deter Drug Trafficking: Will Internationalizing the Drug War Work?* 7 TEMP. INT’L & COMP. L. J. 287, 292 (1993) (citing LIBRARY OF CONGRESS, COLUMBIA, A COUNTRY STUDY 307-08 (1990)).

<sup>15</sup> OFFICE OF NAT’L DRUG CONTROL POLICY, EXECUTIVE OFFICE OF THE PRESIDENT, DRUG-RELATED CRIME 4 (2003).

<sup>16</sup> OFFICE OF NAT’L DRUG CONTROL POLICY, EXECUTIVE OFFICE OF THE PRESIDENT, DRUG DATA SUMMARY 2 (2003).

<sup>17</sup> Molly McConville, *A Global War on Drugs: Why the United States Should Support the Prosecution of Drug Traffickers in the International Criminal Court*, 37 AM. CRIM. L. REV. 75, 76-77 (2000).

<sup>18</sup> OFFICE OF NAT’L DRUG CONTROL POLICY, EXECUTIVE OFFICE OF THE PRESIDENT, DRUG DATA SUMMARY 2 (2003).

The effects of the global drug trade reach beyond the human realm; researchers also point to the enormous environmental consequences of drug trafficking. The U.S. government estimates that over six million acres of rainforest have been destroyed in the past twenty years in order to clear farmland for cocoa production.<sup>19</sup> Farmers who grow narcotics focus on optimum yield and thus are largely negligent about following environmental regulations regarding fertilizers and pesticides.<sup>20</sup> The production of cocaine also requires several toxic chemicals. The waste from the process is often dumped onto the ground or into local waterways,<sup>21</sup> causing environmental damage that affects both humans and wildlife.

According to the United States government, the problem of drugs has recently taken on new dimensions because of the link between drug trafficking and terrorism.<sup>22</sup> Terrorists and drug traffickers often have common interests. For example, both benefit from “military skills, weapons supply, and access to clandestine organizations.”<sup>23</sup> Likewise, “[t]errorists gain a source of revenue and expertise in illicit transfer and laundering of money for their operations.”<sup>24</sup> Both terrorists and drug traffickers attempt

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<sup>19</sup> BUREAU FOR INT’L NARCOTICS & L. ENFORCEMENT AFF., U.S. DEP’T ST., 2002 INTERNATIONAL NARCOTICS CONTROL STRATEGY REPORT, ch. 2 at 10 (2003).

<sup>20</sup> BUREAU FOR INT’L NARCOTICS & L. ENFORCEMENT AFF., U.S. DEP’T ST., 2002 INTERNATIONAL NARCOTICS CONTROL STRATEGY REPORT, ch. 2 at 10 (2003).

<sup>21</sup> BUREAU FOR INT’L NARCOTICS & L. ENFORCEMENT AFF., U.S. DEP’T ST., 2002 INTERNATIONAL NARCOTICS CONTROL STRATEGY REPORT, ch. 2 at 10 (2003).

<sup>22</sup> BUREAU FOR INT’L NARCOTICS & L. ENFORCEMENT AFF., U.S. DEP’T ST., THE NEXUS BETWEEN DRUG TRAFFICKING AND TERRORISM at <http://www.state.gov/g/inl/rls/fs/9242.htm> (last visited April 10, 2003).

<sup>23</sup> BUREAU FOR INT’L NARCOTICS & L. ENFORCEMENT AFF., U.S. DEP’T ST., THE NEXUS BETWEEN DRUG TRAFFICKING AND TERRORISM at <http://www.state.gov/g/inl/rls/fs/9242.htm> (last visited April 10, 2003).

<sup>24</sup> BUREAU FOR INT’L NARCOTICS & L. ENFORCEMENT AFF., U.S. DEP’T ST., THE NEXUS BETWEEN DRUG TRAFFICKING AND TERRORISM at <http://www.state.gov/g/inl/rls/fs/9242.htm> (last visited April 10, 2003).

to corrupt officials for the purpose of clandestinely crossing international borders. Finally, both benefit from and often choose to operate in countries with weakened political infrastructures so that they can carry out their plans with impunity. For example, prior to the United States' invasion, Afghanistan was used as a staging ground for terrorist training and served as one of the world's largest supplier of heroin.<sup>25</sup> These common interests often result in direct links between drug traffickers and terrorists because each can benefit from the operations of the other.

There is no question that the international drug trade creates serious human and financial costs worldwide. As the Bureau of International Narcotics and Law Enforcement Affairs recently wrote:

As the single greatest source of illegal revenue, the drug trade has long been the mainstay of violent political insurgencies, rogue regimes, international terrorist organizations, and terrorists of every stripe. Whether through heroin that financed the former Taliban regime in Afghanistan or the cocaine that sustains the decades old insurgency in Colombia, the drug trade generates the money that is the lifeblood of the violence that increasingly threatens global peace and security.<sup>26</sup>

As a result, the international community has long searched for effective means of combating the drug trade. This paper discusses one possible mean for bringing international drug traffickers to justice: the exercise of universal jurisdiction over persons accused of serious drug trafficking crimes.

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<sup>25</sup> BUREAU FOR INT'L NARCOTICS & L. ENFORCEMENT AFF., U.S. DEP'T ST., 2002 INTERNATIONAL NARCOTICS CONTROL STRATEGY REPORT, ch. 2 at 5 (2003).

<sup>26</sup> BUREAU FOR INT'L NARCOTICS & L. ENFORCEMENT AFF., U.S. DEP'T ST., 2002 INTERNATIONAL NARCOTICS CONTROL STRATEGY REPORT, ch. 2 at 3 (2003).

### III. The Requirements for Establishing a Universal Jurisdiction Crime.

Universal jurisdiction is the right of a state to “define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern”<sup>27</sup> regardless of whether the prosecuting state can establish a connection with the perpetrator, victim, or location of the offense. As is the case with much of international law, it is often difficult to discern clear principles with respect to universal jurisdiction. There is no set test for when an offense ripens into a universal jurisdiction crime. Thus, there is constant scholarly and legal debate over what crimes should be afforded universal jurisdiction status.<sup>28</sup> Despite this lack of clarity, an examination of acts that are generally accepted as universal jurisdiction crimes suggests some coherent guidelines.

As a general matter, the crime must be one of such international concern that it invokes one of the two traditional theoretical rationales for universal jurisdiction. The first rationale is pragmatic in that it “provides a basis for jurisdiction when jurisdiction is hard to be found.”<sup>29</sup> Under this theory, universal jurisdiction responds to the danger that no state will be able to establish jurisdiction by traditional means (such as through a

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<sup>27</sup> RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 403 (1987).

<sup>28</sup> For example, there has been much debate over whether genocide is a universal jurisdiction crime. On the one hand, legal scholars widely agree that genocide is a universal jurisdiction crime as a matter of customary international law. *See, e.g.*, PRINCETON PROJECT ON UNIVERSAL JURISDICTION, PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION princ. 2(1) (2001) (listing genocide as a universal jurisdiction crime). On the other hand, the genocide convention does not provide for universal jurisdiction. Convention on the Prevention and Punishment of the Crime of Genocide, December 9, 1948, art. 6, 78 U.N.T.S. 277. Thus, the question arises, is genocide a universal jurisdiction crime because of the status afforded to it by scholarly consensus or does the lack of jurisdiction provided in the treaty reflect such a rejection by states as to render void any claims that genocide is subject to universal jurisdiction as a matter of customary international law?

<sup>29</sup> Jon B. Jordan, *Universal Jurisdiction in a Dangerous World: A Weapon for All Nations Against International Crime*, 9 MICH. ST. U. DCL J. INT’L L. 1, 31 (2000).

territorial link between the offender and the prosecuting state). This “pragmatic rationale” therefore ensures that criminals do not go free merely because no state is able or willing to assert subject matter jurisdiction.

The second rationale for universal jurisdiction is humanitarian; if a crime is considered so heinous or detrimental to the world community, then any member of the world community has a right to prosecute that crime to ensure that perpetrators do not go unpunished.<sup>30</sup> This second type of universal jurisdiction is based not on a territorial link with the prosecuting state; rather it is the nature of the crime itself that provides a basis for the exercise of universal jurisdiction.<sup>31</sup>

Piracy, which is recognized as the first universal jurisdiction crime, is an example of a crime that has become subject to prosecution by any state for practical reasons.<sup>32</sup> States have long recognized universal jurisdiction in the case of piracy because of difficulty in establishing jurisdiction over pirates by traditional, territorial means.<sup>33</sup>

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<sup>30</sup> Thus, “precisely because a state exercising universal jurisdiction does so on behalf of the international community, it must place the overall interests of the international community above its own.” M. Charif Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives & Contemporary Practice*, 42 VA. J. INT’L L. 81, 89 (2001).

<sup>31</sup> “[U]niversal 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.” PRINCETON PROJECT ON UNIVERSAL JURISDICTION, PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION princ. 1(1) (2001).

<sup>32</sup> M. Charif Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives & Contemporary Practice*, 42 VA. J. INT’L L. 81, 109 (2001) (noting that Grotius viewed the problem of piracy pragmatically, suggesting that universal jurisdiction be used as a means of establishing freedom on the high seas).

<sup>33</sup> One author asserts that states have exercised universal jurisdiction over pirates for the past 500 years. See Monica Hans, *Providing for Uniformity in the Exercise of Universal Jurisdiction: Can Either the Princeton Principles on Universal Jurisdiction or An International Criminal Court Accomplish This Goal?* 15 TRANSNAT’L LAW. 357, 365 (2002).

Pirates caught on the high seas often did not fly the flag of any state and were therefore beyond the jurisdictional reach of most states.<sup>34</sup> As a means of ensuring that pirates were held accountable for their acts, the international community declared them to be *hostis humani generis*<sup>35</sup> (enemies of all mankind) and agreed that they could be prosecuted in any state without establishing specific jurisdictional ties to that state.

Piracy is therefore the paradigm example of the pragmatic rationale for universal jurisdiction. It is not a universal jurisdiction crime because it is particularly heinous when compared with other crimes.<sup>36</sup> For example, piracy today probably kills less people than car jacking, but car jacking is not considered a universal jurisdiction crime because there is clear territorial jurisdiction based on a link between the perpetrator and a state that is willing to prosecute in car jacking cases. Rather, to fit into the pragmatic rationale for universal jurisdiction the crime must be one that would be otherwise difficult or impossible to prosecute.

During the twentieth century, the pragmatic approach largely gave way to a second basis for universal jurisdiction. Beginning with the prosecutions against former Nazis in Nuremberg<sup>37</sup> and continuing with the establishment of criminal tribunals to deal

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<sup>34</sup> Of course, the state of the victim could always establish jurisdiction; thus universal jurisdiction was not necessary in all cases. Still, jurisdiction was difficult to extend because “[p]irates operated on the high seas, which lay outside the territorial jurisdiction of any nation, a sort of global commons.” Eugene Kontorovich, *The Piracy Analogy: Modern Universal Jurisdiction’s Hollow Foundation*, at [http://ssrn.com/abstract\\_id=385900](http://ssrn.com/abstract_id=385900) (last visited April 3, 2003).

<sup>35</sup> See *United States v. Smith*, 18 U.S. (5 Wheat.) 153 (1820).

<sup>36</sup> Eugene Kontorovich, *The Piracy Analogy: Modern Universal Jurisdiction’s Hollow Foundation*, at [http://ssrn.com/abstract\\_id=385900](http://ssrn.com/abstract_id=385900) (last visited April 3, 2003).

<sup>37</sup> See Monica Hans, *Providing for Uniformity in the Exercise of Universal Jurisdiction: Can Either the Princeton Principles on Universal Jurisdiction or An International Criminal Court Accomplish This Goal?* 15 *TRANSNAT’L LAW*. 357, 365-66 (2002).

with the atrocities committed in Rwanda and Yugoslavia,<sup>38</sup> a consensus began to build that the exercise of universal jurisdiction is permissible to prosecute crimes that constitute gross human rights violations.<sup>39</sup> The new crimes that became subject to universal jurisdiction were those that had risen to the level of *jus cogens*<sup>40</sup> violations in international law, including genocide, war crimes, and torture. In these cases, the rationale for the exercise of universal jurisdiction is based on the consensus that these crimes are so egregious that they offend the entire world community and therefore any member of the world community is entitled to prosecute perpetrators.

There may be pragmatic reasons for allowing states to exercise universal jurisdiction in the case of human rights-based universal jurisdiction crimes. For example, war crimes may go unprosecuted because they are committed entirely within one state, against that state's nationals, by a state that has no interest in bringing itself to justice for crimes that it committed.<sup>41</sup> In that case, there would be no jurisdictional basis other than universal jurisdiction for an outside country to intervene. Universal jurisdiction in this case would be based on two possible rationales: the pragmatic rationale that criminals will go free if there is no country that is willing or able to prosecute and the human-rights based rationale that war crimes are so atrocious that they are a matter of concern to all

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<sup>38</sup> *Id.* at 367.

<sup>39</sup> See M. Charif Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives & Contemporary Practice*, 42 VA. J. INT'L L. 81, 82 (2001) (noting that "[t]he exercise of universal jurisdiction is generally reserved for the most serious of international crimes.").

<sup>40</sup> *Jus cogens* rules are those that are "of paramount importance for world public order, and cannot be set aside or modified in a subsequent treaty." Edward M. Wise, *Aut Dedere Aut Judicare: The Duty to Prosecute or Extradite*, in INTERNATIONAL CRIMINAL LAW: PROCEDURE & ENFORCEMENT MECHANISMS 15, 21 (M. Cherif Bassiouni ed., 1999).

<sup>41</sup> Christopher C. Joyner, *Arresting Impunity: The Case for Universal Jurisdiction in Bringing War Criminals to Accountability*, 59 LAW & CONTEMP. PROBS. 153, 153 (1996).

nations.<sup>42</sup> In short, although the two bases of universal jurisdiction are conceptually independent of each other, they often overlap in practice. This paper will examine both rationales separately as applied to the case of drug trafficking. It is worth bearing in mind, however, that the use of one rationale does not exclude the other and that the two may be combined in any argument that drug trafficking should be a universal jurisdiction crime.

With these two theoretical bases in mind, it is also important to examine the means by which a crime develops into a universal jurisdiction crime. First, a crime can become subject to universal jurisdiction through the development of customary international law, as evidenced by domestic legislation, international agreements, and the commentary of international law scholars.<sup>43</sup> Today, crimes that have become subject to universal jurisdiction as a matter of customary international law include: piracy, slavery,

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<sup>42</sup> Indeed, the human rights based rationale for war crimes can be traced back to the age of chivalry in the early fourteenth century. At that time, “criminal liability applied to any member of the knighthood on the basis of custody over the offender regardless of his nationality. A breach of the codes and customs of the *jus militare* resulted in a universality of jurisdiction. Honour was fundamental to the military profession and anyone who violated the rules of war or used prohibited weaponry could be tried and punished because of the dishonour caused. Violations included acts such as the use of poison.” LYAL S. SUNGA, INTERNATIONAL RESPONSIBILITY IN INTERNATIONAL LAW FOR SERIOUS HUMAN RIGHTS VIOLATIONS 104 (Dordrecht: Martinus Nijhoff, 1992) (*citing* KEEN, THE LAWS OF WAR chs. II & III (1965)). Thus, the humanitarian rationale for universal jurisdiction dates back even further than the pragmatic rationale associated with piracy.

<sup>43</sup> RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 403 cmt. a (1987).

war crimes, crimes against peace, crimes against humanity, genocide, and torture.<sup>44</sup> As is true with all of customary international law, this list is not static. As the law develops, it is possible for other offenses to become widely accepted as subject to universal jurisdiction as a matter of customary international law.<sup>45</sup>

Second, countries may establish universal jurisdiction over an offense by treaty. Such treaties contain a requirement that state parties “extradite or prosecute” offenders (in technical parlance, this requirement is often referred to as *aut dedere aut judicare*).<sup>46</sup> Those states are then required to enact legislation giving themselves jurisdiction in any case where the state chooses not to extradite. In other words, state parties are required to assert jurisdiction over the parties whether or not they have any link with the suspect or with the crime. This is a form of universal jurisdiction; however it is not as complete as universal jurisdiction established by customary international law because it does not extend to states that are not parties to the treaty, nor does it allow any state to prosecute - it only extends universal jurisdiction to the state where the accused is found. If a treaty is widely enough accepted and implemented in state practice, however, the universal

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<sup>44</sup> See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 403 (1987); PRINCETON PROJECT ON UNIVERSAL JURISDICTION, PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION, princ. 2(1) (2001).

<sup>45</sup> See PRINCETON PROJECT ON UNIVERSAL JURISDICTION, PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION, princ. 2 (2001) (“The application of universal jurisdiction to the crimes listed in paragraph 1 is without prejudice to the application of universal jurisdiction to other crimes under international law.”); see also *Id.* at princ. 13(3) (“These Principles shall not be construed as limiting the continued development of universal jurisdiction in international law.”).

<sup>46</sup> Treaties that contain such provisions include treaties on hijacking, terrorism, torture, and apartheid. Jon B. Jordan, *Universal Jurisdiction in a Dangerous World: A Weapon for All Nations Against International Crime*, 9 MICH. ST. U. DCL J. INT’L L. 1, 7 (2000).

jurisdiction requirement can become binding as a matter of customary international law upon all states, whether or not they are parties to the treaty.<sup>47</sup>

In sum, there are four relevant considerations in determining whether a particular crime is subject to universal jurisdiction. The first two relate to whether or not a crime fits the theoretical bases for universal jurisdiction: 1) whether universal jurisdiction is required as a pragmatic matter and/or 2) whether universal jurisdiction is required in order to ensure that gross human rights violations do not go unpunished. Although meeting either of these theoretical requirements does not automatically confer authority upon a state to exercise universal jurisdiction, it is unlikely that a crime could attain universal jurisdiction status without meeting one of these traditional justifications. Next, a crime must meet one of two requirements before a state can exercise universal jurisdiction: the crime must either be 1) universally condemned by states and therefore subject to universal jurisdiction as a matter of customary international law; or 2) subject to universal jurisdiction by international treaty. Again, these categories are not completely self-contained; they overlap. Many of the factors that go into one go into the others. At least in theory, however, fulfillment of one of the latter two categories will confer authority to exercise universal jurisdiction.

#### **IV. Could Drug Trafficking Be a Universal Jurisdiction Crime?**

With this general framework in mind, this paper next addresses the question of whether a state could prosecute a drug trafficker based on universal jurisdiction. This

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<sup>47</sup> Jon B. Jordan, *Universal Jurisdiction in a Dangerous World: A Weapon for All Nations Against International Crime*, 9 MICH. ST. U. DCL J. INT'L L. 1, 24 (2000) (“Treaties and the doctrine of jus cogens can provide arguments for nonparty nations to exercise universal jurisdiction over crimes not subject to universal jurisdiction as a matter of customary law.”).

section will consider whether drug trafficking fits any of the four categories outlined above. It will first conclude that drug trafficking fits the two traditional justifications for universal jurisdiction: it is both necessary as a pragmatic matter and it is a matter of international concern because of the human rights problems associated with drug trafficking. Next, this paper will conclude that although there is some indication that the international community has moved toward accepting drug trafficking as a matter of customary international law, that trend has not yet gained enough momentum so that a state could base an exercise of universal jurisdiction over a drug trafficker on customary international law today. Furthermore, although the 1988 Convention allows for universal jurisdiction in some cases, that treaty is limited in certain serious respects. Thus, the international community needs to take some action before universal jurisdiction is truly possible over drug traffickers.

As a practical matter, it is unrealistic to suggest that the international community has or should simply accept universal jurisdiction over drug traffickers in all situations as a matter of customary international law. Customary international law cannot be made overnight; it takes the slow development of the law to ripen. The most direct means of establishing universal jurisdiction over drug trafficking is to clearly provide for universal jurisdiction by treaty. As suggested in the introduction to this paper, such a treaty could take the form of an additional protocol to the 1988 Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. If enough states adhere to this protocol, then drug trafficking may become a universal jurisdiction crime as a matter of customary international law.

**A. Is Universal Jurisdiction Over Drug Trafficking Necessary As Pragmatic Matter?**

The world clearly faces a problem with bringing international drug traffickers to justice. There are a multitude of reasons why drug traffickers may not be prosecuted. States that are crippled by drug problems are often unable or unwilling to enforce their own drug laws, especially if organized drug trafficking groups are able to bribe or terrorize the judiciary.<sup>48</sup> Drug traffickers can take advantage of these gaps in enforcement by establishing themselves in countries that lack the capability or willingness to enforce laws against trafficking.<sup>49</sup> Countries that cannot prosecute but that are otherwise willing to extradite drug traffickers may refuse to do so out of concern that the requesting country will impose harsh prison sentences or death.<sup>50</sup> States may also be unable to extradite drug traffickers if there is no extradition treaty between the state where the drug trafficker is present and the prosecuting state. Other states may have trouble establishing a jurisdictional link to drug traffickers that they wish to prosecute.

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<sup>48</sup> With respect to war criminals, it has been argued that, “[s]ince war criminals often operate with the knowledge and assistance of local political and legal authorities, domestic law does little to deter these actors. Prevention and punishment of war crimes thus become legal concerns and moral obligations, not just for those governments in whose territory crimes occurred, but for all states.” Christopher C. Joyner, *Arresting Impunity: The Case for Universal Jurisdiction in Bringing War Criminals to Accountability*, 59 LAW & CONTEMP. PROBS. 153, 153 (1996). The same argument can be made in the case of drug trafficking.

<sup>49</sup> Molly McConville, *A Global War on Drugs: Why the United States Should Support the Prosecution of Drug Traffickers in the International Criminal Court*, 37 AM. CRIM. L. REV. 75, 81 (2000).

<sup>50</sup> This is a matter of particular concern to the United States. See discussion *infra* Part IV.

Finally, drug traffickers caught on the high seas are like pirates in the sense that there may be no country that is able to prosecute them.<sup>51</sup>

Universal jurisdiction would provide a remedy to all of these problems because it would provide for the prosecution of traffickers by any state. States that are unwilling or unable to prosecute drug traffickers could extradite suspects to countries that wish to prosecute under a universal jurisdiction theory.<sup>52</sup> Universal jurisdiction may also solve the problem that occurs where a requesting state and an extraditing state do not have a mutual extradition treaty. In that case, the extraditing state could extradite to some third state (with whom it does have an extraditing treaty) regardless of that third state's jurisdictional links to the suspect or to the crime. The third state could then prosecute under a universal jurisdiction theory. The state where the accused is found could also prosecute on its own, regardless of whether it has any other jurisdictional ties to the suspect. Finally, providing states with a tool to prosecute drug traffickers may send an important message to drug traffickers that there are no safe havens for their behavior and ultimately may deter some from engaging in large-scale drug trafficking at all.<sup>53</sup>

Of course, this does not solve the problem of a state that is simply unwilling to prosecute or extradite a drug trafficker to *any* state. This may be a very real concern in countries where drug traffickers have a stranglehold on the judiciary. In that case, unless

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<sup>51</sup> Christina E. Sorensen, *Drug Trafficking on the High Seas: A Move Toward Universal Jurisdiction Under International Law*, 4 EMORY INT'L L. REV. 207, 226-30 (1990) (arguing that drug trafficking on the high seas should be subject to universal jurisdiction because it is analogous to piracy).

<sup>52</sup> Of course, states may still be unwilling to extradite if the drug trafficker has bribed or terrorized members of the judiciary.

<sup>53</sup> This argument has been made in supporting the exercise of universal jurisdiction over terrorists. James D. Fry, *Terrorism as a Crime Against Humanity and Genocide: The Backdoor to Universal Jurisdiction*, 7 UCLA J. INT'L L. & FOREIGN AFF. 169, 197-98 (2002).

a state uses questionable “self-help” (i.e. kidnapping) practices, the fact that a state may assert universal jurisdiction will not solve the problem of getting a suspected drug trafficker within its grasp. As stated above, universal jurisdiction will not solve all of the practical problems associated with bringing drug traffickers to justice. It will, however, allow states to prosecute where they could not prosecute before.

Although these are clear pragmatic reasons for asserting universal jurisdiction over drug trafficking crimes, it is not at all clear that the practical need for universal jurisdiction in the case of drug trafficking is terribly pressing. The fact of the matter is that there will frequently be some state that can establish jurisdiction by traditional means that can prosecute. It may therefore be that universal jurisdiction would be so rarely invoked as to be of no real practical significance.

On the other hand, at least one scholar has pointed out that universal jurisdiction has rarely, if ever, been invoked in the case of piracy<sup>54</sup> - and it is widely accepted that piracy is a universal jurisdiction crime under the pragmatic rationale.<sup>55</sup> Thus, it does not seem to be a requirement of universal jurisdiction that it need be regularly invoked or regularly required in order to bring perpetrators to justice; it only need be theoretically required to solve practical problems that arise in ensuring prosecution. Indeed, universal jurisdiction, while widely accepted as being a viable tool for some crimes, has rarely ever

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<sup>54</sup> Eugene Kontorovich, *The Piracy Analogy: Modern Universal Jurisdiction’s Hollow Foundation* 10, at [http://ssrn.com/abstract\\_id=385900](http://ssrn.com/abstract_id=385900) (last visited April 3, 2003).

<sup>55</sup> Indeed, International Court of Justice President Guillaume asserted in his separate opinion in *Congo v. Belgium*, that “international law knows only one true case of universal jurisdiction: piracy.” *Case Concerning the Arrest Warrant of 11 April 2000 (Congo v. Belg.)*, 2002 I.C.J. (14 February) (separate opinion of president Guillaume).

been used.<sup>56</sup> It is, by definition, a tool that should only be used in extreme situations where there is truly no one else with a willingness or ability to prosecute.

Another possible problem is that the pragmatic justification for asserting universal jurisdiction seems to be a thing of the past. While it is quite clear that piracy continues to be recognized as a universal jurisdiction crime, that recognition originally came almost two centuries ago and is mostly of historical significance today. Since that time, the international community seems only to recognize new universal jurisdiction crimes when the crimes are extremely egregious and lead to significant human suffering or loss of life. This trend might close the door to recognizing universal jurisdiction in drug cases absent some evidence of the great harm caused by international drug trafficking.<sup>57</sup> At the same time, many scholars suggest that piracy is still not only viable but that it serves as a basis for all modern universal jurisdiction crimes.<sup>58</sup> If this is indeed the case, then piracy must also be a valid model for new universal jurisdiction crimes.<sup>59</sup>

In short, although the practical need for universal jurisdiction in drug trafficking cases is not always overwhelming, there is a need for states to be able to prosecute drug traffickers regardless of their territorial links to crimes, perpetrators, or effects. If indeed the international community still recognizes practicality as a basis for assertion of

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<sup>56</sup> M. Charif Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives & Contemporary Practice*, 42 VA. J. INT'L L. 81, 83 (2001).

<sup>57</sup> The question of whether drug trafficking is a great cause of human suffering is addressed *infra* Part II.

<sup>58</sup> Eugene Kontorovich, *The Piracy Analogy: Modern Universal Jurisdiction's Hollow Foundation*, at [http://ssrn.com/abstract\\_id=385900](http://ssrn.com/abstract_id=385900) (last visited April 3, 2003) (noting that states have established modern universal jurisdiction crimes “by invoking piracy as a justification, precedent and inspiration.”).

<sup>59</sup> At least one scholar has suggested that basing modern universal jurisdiction on the paradigm of piracy is a false premise given the different rationales underlying the two types of universal jurisdiction crime (pragmatic versus humanitarian). *Id.* This view, however, is not widely shared.

universal jurisdiction by states, then drug trafficking seems to fit under this theory as a universal jurisdiction crime.

**B. Is the Drug Trafficking So Egregious that it is a Matter of Concern to All Nations?**

States may assert universal jurisdiction in cases where the nature of the crime is so egregious that it is in the interest of entire the international community to bring perpetrators to justice.<sup>60</sup> Crimes such as genocide, torture, crimes against humanity, slavery, and war crimes all are subject to universal jurisdiction under this theory. This section addresses the question of whether drug trafficking is of sufficient humanitarian concern to justify the prosecution of offenders based on a universal jurisdiction theory.

The harms that drug trafficking causes across the world are well known.<sup>61</sup> Drug trafficking destabilizes governments, corrupts officials, results in the murder and deaths of tens of thousands of people every year, wreaks havoc on the environment and provides funding for terrorists. The international community has long recognized the grave consequences of drug trafficking on the world's population. Beginning with the enactment of the International Opium Convention in 1912,<sup>62</sup> states began a serious effort to combat the problems associated with drug trafficking on an international level. This united effort has continued with the enactment of the Single Convention on Narcotic

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<sup>60</sup> For example, one commentator has argued that universal jurisdiction should apply to war crimes because they “involve violent and predatory actions that descend to the level of gross bestiality.” Christopher C. Joyner, *Arresting Impunity: The Case for Universal Jurisdiction in Bringing War Criminals to Accountability*, 59 *LAW & CONTEMP. PROBS.* 153, 166 (1996).

<sup>61</sup> See *infra* Part II.

<sup>62</sup> Convention Relating to the Suppression of the Abuse of Opium and Other Drugs, January 23, 1912, 38 Stat. 1912, 8 L.N.T.S. 187.

Drugs in 1961,<sup>63</sup> the Convention on Psychotropic Substances in 1971,<sup>64</sup> and the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances in 1988.<sup>65</sup> Each of these Conventions contains language that recognizes the seriousness of the global drug problem and the need for the international community to work together to bring traffickers to justice. For example, the preamble to the 1988 Convention recognizes that the world is “[d]eeply concerned by the magnitude of and rising trend in the illicit production of, demand for and traffic in narcotic drugs and psychotropic substances, which pose a serious threat to the health and welfare of human beings and adversely affect the economic, cultural and political foundations of society.”<sup>66</sup> The convention goes on to recognize the link between drug traffic and organized crime, the “danger of incalculable gravity” posed by the use of children in the drug trade, and the harms caused to “society at all its levels” by drug trafficking.<sup>67</sup> Thus, it is clear that drug trafficking is well regarded by the international community as a matter of serious concern.

Despite the obvious harms caused by the drug trade, there is one major difference between the crime of drug trafficking and other crimes subject to universal jurisdiction based on the humanitarian rationale. There is a serious debate over whether

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<sup>63</sup> United Nations Single Convention on Narcotic Drugs, March 30, 1961, 18 U.S.T. 1407, 520 U.N.T.S. 204, *amended by* 1972 Protocol Amending the Single Convention on Narcotic Drugs, 1961, March 25, 1972, 26 U.S.T. 1439, 976 U.N.T.S. 3.

<sup>64</sup> United Nations Convention on Psychotropic Substances, February 21, 1971, 32 U.S.T. 543, 1019 U.N.T.S. 175.

<sup>65</sup> United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, December 19, 1988, S. TREATY DOC. NO. 4 (1990), 28 I.L.M. 493.

<sup>66</sup> United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, December 19, 1988, *pmb.*, S. TREATY DOC. NO. 4 (1990), 28 I.L.M. 493.

<sup>67</sup> *Id.*

decriminalization of the drug trade could solve many of the world's drug problems.<sup>68</sup> In theory, decriminalization would make drug trafficking less attractive to organized crime elements because it would do away with the "risk premium" associated with the trade.<sup>69</sup> Disassociating the drug trade from organized crime could therefore result in a large drop in the level of violence associated with narcotics.<sup>70</sup> This argument differentiates drug trafficking from other universal jurisdiction crimes in a significant sense. At least in theory, the drug trade can be disassociated from some of its terrible human rights consequences. Disassociation is simply not possible with other universal jurisdiction crimes. Decriminalization is not an option with a crime like genocide or crimes against humanity because the crime cannot be separated from the harm. In this sense, the humanitarian effects of drug trafficking are fundamentally different from those associated with universal jurisdiction crimes, such as genocide or torture. It is unclear whether this difference is sufficient to prevent drug trafficking from becoming a universal jurisdiction crime.

The reality is that the decriminalization argument is unlikely to succeed any time soon. Most countries, especially the United States, are steadfast in their belief that the

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<sup>68</sup> Robert MacCoun & Peter Reuter, *Cocaine, Marijuana, and Heroin*, 13 THE AMERICAN PROSPECT 10 (June 13, 2002) (discussing the legalization debate and concluding that, "legalization of cocaine, marijuana, and heroin would lead to large reductions in drug-related crime and mortality, but also to large increases in drug use and addiction.").

<sup>69</sup> Peter Reuter, TRANSNATIONAL CRIME: DRUG SMUGGLING (DRAFT), abstract, at <http://www.puaf.umd.edu/faculty/papers/reuter/cambridge.pdf> ("A kilo purchased for \$2,000 in Cali will sell for \$15,000 in Miami. This may be a return for taking the risks involved; perhaps 40 percent of all cocaine shipped is seized along the way, couriers require high payments for assuming risks and corrupt officials in producer and transshipment countries add further taxes.").

<sup>70</sup> Of course, decriminalization does not do away with all of the harms caused by the drug trade; it would do nothing to combat problems associated with addiction nor would it help lower the death rate associated with the ingestion of drugs.

drug trade should not be made legal and have signed international agreements pledging to criminalize and prosecute drug trafficking.<sup>71</sup> As long as the drug trade remains illegal, it will be inexorably linked with organized crime, murder, the degradation of government, human rights abuses, and even terrorism. These are the same types of human rights problems that are associated with other universal jurisdiction crimes. It does not make sense to treat drug trafficking differently based on what would happen if one day all states suddenly decided to decriminalize. The bottom line is that drug trafficking does cause great harm to the world, and the world should be able to use any of the tools at its disposal to eradicate those harms, including exercising universal jurisdiction. Thus, states could probably exercise universal jurisdiction over drug traffickers based on the theory that the narcotics trade is so egregious as to be a matter of concern to all nations.

### **C. Is Drug Trafficking Subject to Universal Jurisdiction As a Matter of Customary International Law?**

The international community recognizes that a principle can become international law if 1) it is demonstrated in state practice and 2) states believe that the practice is required by international law (*opinio juris*).<sup>72</sup> Once a principle has satisfied these two criteria, it is referred to as customary international law and is binding upon all states, regardless of whether or not the law is formally recognized by treaty or other international agreement. Evidence of customary international law is found in: 1) the

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<sup>71</sup> 166 States are currently parties to the 1988 Convention which requires criminalization of drug trafficking offenses. See United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, December 19, 1988, art. 3, S. TREATY DOC. NO. 4 (1990), 28 I.L.M. 493.

<sup>72</sup> Edward M. Wise, *Aut Dedere Aut Judicare: The Duty to Prosecute or Extradite*, in INTERNATIONAL CRIMINAL LAW: PROCEDURE & ENFORCEMENT MECHANISMS 15, 21 (M. Cherif Bassiouni ed., 1999) (citations omitted).

writings of legal scholars; 2) international conventions; and 3) national law.<sup>73</sup> One must therefore examine each of these sources in order to discover whether drug trafficking could be a universal jurisdiction crime as a matter of customary international law. Ultimately, this section concludes that while there is some evidence that the law has begun to develop, state practice and belief is not yet consistent enough to call drug trafficking a universal jurisdiction crime as a matter of customary international law.

First, although the writing of legal scholars suggests optimism over the prospects of subjecting drug traffickers to universal jurisdiction,<sup>74</sup> it is not widely accepted among legal scholars as one of the ‘main’ universal jurisdiction crimes. For example, one author suggests that drug trafficking, “like other crimes subject to universal jurisdiction, could be deemed a problem of all nation-states. Thus a drug trafficker could be deemed *hostis humani generis*, enemy of all mankind, for which universal jurisdiction should apply.”<sup>75</sup>

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<sup>73</sup> See M. Charif Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives & Contemporary Practice*, 42 VA. J. INT’L L. 81, 105 (2001).

<sup>74</sup> M. Charif Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives & Contemporary Practice*, 42 VA. J. INT’L L. 81 (Fall 2001) (recognizing that the prosecute or extradite provisions in international drug conventions provides for universal jurisdiction); Jon B. Jordan, *Universal Jurisdiction in a Dangerous World: A Weapon for All Nations Against International Crime*, 9 MICH. ST. U. DCL J. INT’L L. 1, 29-30 (2000) (“With the United States pressure on its war against drugs, drug trafficking may become the newest crime subject to universal jurisdiction. . .” “a drug trafficker could be considered *hostis humani generis*, enemy of all mankind, for which universal jurisdiction should apply); Christina E. Sorensen, *Drug Trafficking on the High Seas: A Move Toward Universal Jurisdiction Under International Law*, 4 EMORY INT’L L. REV. 207 (1990) (arguing that universal jurisdiction should be extended to prosecute drug smugglers on the high seas); Molly McConville, *A Global War on Drugs: Why the United States Should Support the Prosecution of Drug Traffickers in the International Criminal Court*, 37 AM. CRIM. L. REV. 75 (2000); Christopher L. Blakesley, *Extraterritorial Jurisdiction*, in INTERNATIONAL CRIMINAL LAW: PROCEDURE & ENFORCEMENT MECHANISMS 33 (M. Charif Bassiouni ed., 1999) (noting that “[t]here is a growing trend to include traffic in narcotic drugs” as a universal jurisdiction crime).

<sup>75</sup> Jon B. Jordan, *Universal Jurisdiction in a Dangerous World: A Weapon for All Nations Against International Crime*, 9 MICH. ST. U. DCL J. INT’L L. 1, 30 (2000).

Yet this author buries his suggestion among a list of offenses that could potentially be accepted as a universal jurisdiction crime – it is not listed as one of the crimes for which universal jurisdiction is widely accepted. Several other scholars have suggested that drug trafficking is well enough established as a matter of treaty law that it has become applicable to all states as a matter of customary international law.<sup>76</sup> Again, however, this view is not widely enough shared that drug trafficking can be definitively categorized as a universal jurisdiction crime under customary international law.

Despite assertions by some legal scholars, there is certainly no general consensus that drug trafficking should be afforded universal jurisdiction. Scholarly works abound which discuss the application of universal jurisdiction to genocide or war crimes,<sup>77</sup> but drug trafficking has only been mentioned peripherally, if at all. During drafting of the Rome Statute, which established the International Criminal Court,<sup>78</sup> parties debated, but ultimately rejected a proposal to include drug trafficking in the Court’s jurisdiction.<sup>79</sup>

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<sup>76</sup> See, e.g., Edward M. Wise, *Aut Dedere Aut Judicare: The Duty to Prosecute or Extradite*, in INTERNATIONAL CRIMINAL LAW: PROCEDURE & ENFORCEMENT MECHANISMS 15, 18 (M. Cherif Bassiouni ed., 1999).

<sup>77</sup> See, e.g., Yoram Dinstein, *The Universality Principle and War Crimes*, in THE LAW OF ARMED CONFLICT INTO THE NEXT MILLENNIUM 17 (Michael N. Schmitt & Leslie C. Green ed., 1998).

<sup>78</sup> The International Criminal Court cannot exercise universal jurisdiction over any crime. Thus, even if drug trafficking had been established as one of the crimes punishable by the ICC, the ICC still would not have been able to exercise universal jurisdiction over drug traffickers. The rejection of drug trafficking by the drafters of the Rome Statute is still significant for the purposes of this paper because the crimes that do fall under the jurisdiction of the Court – such as crimes against humanity, genocide, and war crimes – are the types of crimes that tend to be clearly established as subject to universal jurisdiction under customary international law.

<sup>79</sup> Molly McConville, *A Global War on Drugs: Why the United States Should Support the Prosecution of Drug Traffickers in the International Criminal Court*, 37 AM. CRIM. L. REV. 75, 92 (2000) (citations omitted) (“Although the Draft Statute specifically included ‘crimes involving the illicit traffic in narcotic drugs and psychotropic substances, interest in a Court with jurisdiction over narcotics trafficking waned during the concluding days

Likewise, the drafters of the Princeton Principles on Universal Jurisdiction chose not to include drug trafficking in its list of crimes that all states should accept as universal jurisdiction crimes,<sup>80</sup> although there was serious debate over whether or not drug crimes should be included.<sup>81</sup> The fact that drug trafficking was included in the debate at all suggests that it may be developing into a well-recognized universal jurisdiction crime. The fact that it was rejected by both the drafters of the Princeton Principles and by the drafters of the statute of the International Criminal Court suggests, however, that universal jurisdiction over drug trafficking has not quite reached the level of customary international law.

In addition to the works of legal scholars, international law also provides some evidence that the world community considers drug trafficking to be so egregious that states may prosecute suspected traffickers under a universal jurisdiction theory. The 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances creates obligations among party states to criminalize drug trafficking.<sup>82</sup> The convention clearly allows some states to prosecute drug traffickers

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of the conference. The delegates could not agree on a generally acceptable definition of the crime, and they removed drug trafficking from the final Statute.”).

<sup>80</sup> Principle 2(1) lists the following crimes: 1) piracy; 2) slavery; 3) war crimes; 4) crimes against peace; 5) crimes against humanity; 6) genocide; and 7) torture. PRINCETON PROJECT ON UNIVERSAL JURISDICTION, PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION princ. 2(1) (2001). The Principles make it clear, however that they do not interfere with the further development of universal jurisdiction under customary international law. *See id. at* princ. 2(2) & 13(3). Thus, the drafters of the Principles contemplated the development of new universal jurisdiction crimes.

<sup>81</sup> PRINCETON PROJECT ON UNIVERSAL JURISDICTION, PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION cmt. 48 (2001) (noting that “drug crimes were raised as candidates for inclusion” in the Principles.).

<sup>82</sup> *See* United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, December 19, 1988, art. 3, S. TREATY DOC. NO. 4 (1990), 28 I.L.M. 493.

based on a universal jurisdiction theory.<sup>83</sup> Currently, 166 nations are parties to the 1988 Convention.<sup>84</sup> The sheer number of countries that are parties to the treaty suggests a consensus that it is acceptable for states to exercise universal jurisdiction over a suspect within its territory.

State practice also suggests that drug trafficking is generally recognized as a universal jurisdiction crime as a matter of customary international law. An examination of state legislation over drug trafficking reveals that many states allow prosecution of drug traffickers under a universal jurisdiction theory. For example, France's code allows universal jurisdiction if such jurisdiction is contained in a treaty to which France is a party.<sup>85</sup> Because France is a party to the 1988 Convention, French law thus provides for universal jurisdiction over drug traffickers in some situations. Germany's law contains a provision stating that German law will apply to certain acts regardless of a territorial link to the crime, the victim, or the perpetrator. The list of specific acts provided for under this law includes unauthorized distribution of narcotics.<sup>86</sup> The law of Australia clearly provides for universal jurisdiction over drug traffickers where the suspect is present in Australia and decides not to extradite.<sup>87</sup> The laws of Portugal,<sup>88</sup> Thailand,<sup>89</sup> and

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<sup>83</sup> *Id.* at art. 4. *See also infra* Part IV(D).

<sup>84</sup> UNITED NATIONS OFFICE ON DRUGS & CRIME, HIV/AIDS PREVENTION, *at*: [http://www.unodc.org/unodc/en/drug\\_demand\\_hiv\\_aids.html](http://www.unodc.org/unodc/en/drug_demand_hiv_aids.html). (last visited April 17, 2003).

<sup>85</sup> C. PR. PÉN. art. 689-2 to 689-7.

<sup>86</sup> § 6 para. 1 & 9 StGB; § 7 para. 2 StGB.

<sup>87</sup> Crimes (Traffic in Drugs and Psychotropic Substances) Act., 1990, No. 97 (Austl.). That provision, entitled "Dealing in drugs outside Australia," provides that:

- (1) A person is guilty of an offence against this section if:
  - (a) the person engages, outside Australia, in conduct that is a dealing in drugs; and
  - (b) the conduct constitutes an offence against the law of a foreign country;
- and

Bahrain,<sup>90</sup> to name a few examples, contain similar provisions. Several of these statutes were enacted as implementing legislation for the 1988 Convention. This is evidence of

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(c) the conduct would constitute an offence against a law in force in a State or Territory if it were engaged in by the person in that State or Territory

(2) A person may be charged with an offence against this section only if:

(a) the person is present in Australia; and

(b) if the person is not an Australian citizen:

(i) no steps have been taken by foreign country referred to in paragraph (1)

(b) for the surrender of the person to that country; or

(ii) proceedings taken by that country under the *Extradition Act 1988* have not resulted in the person being surrendered to that country.

<sup>88</sup> Diário da República, art. 49 (1991). Assembly of the Republic Resolution No. 29/91 and Decree of the President of the Republic No. 45/91:

For the purposes of this text, Portuguese criminal law shall also apply to acts committed outside the national territory:

(a) By a foreigner, provided that the perpetrator is in Portugal and not extradited;

(b) Aboard a vessel against which Portugal has been authorized to adopt the measures provided for in article 17 of the 1988 United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.

<sup>89</sup> General Provisions, c. 1, § 5.

Any person who commits an offence relating to narcotics, despite the fact that an offence is committed outside the Kingdom, shall be punished in the Kingdom, if it appears that:

(1) the offender or any one of his accomplices is a Thai person or has a place of residence in Thailand;

(2) the offender is an alien and intends its consequence to occur within the Kingdom or the Thai Government is the injured person; or

(3) the offender is an alien and such offence is an offence under the law of the State in the jurisdiction of which the commission has occurred, if such offender appears to be in the Kingdom and has not been extradited under the law on extradition;

provided that, section 10 of the Penal Code shall apply *mutatis mutandis*.

<sup>90</sup> Controlling the Use and Circulation of Narcotic Substances and Preparations, No. 4 (1973):

## **Article 29**

*opinio juris*, or a belief that states must allow for universal jurisdiction over international narcotics dealers. Thus, it is clear that many states recognize universal jurisdiction over drug trafficking as a matter of state practice.

On the other hand, some states expressly declined to allow for universal jurisdiction over drug traffickers. In the United States is a prime example. There is no statutory law providing for universal jurisdiction. Furthermore, a federal court specifically stated that “[d]rug trafficking is not recognized as being subject to universal jurisdiction”<sup>91</sup> in interpreting the Marijuana on the High Seas Act. When viewed as a whole, state practice indicates that while several states have enacted legislation embracing universal jurisdiction over drug trafficking, that trend is not yet firmly enough established to suggest that states feel compelled to recognize universal jurisdiction over drug traffickers in the long run.

In sum, although drug trafficking seems to be emerging on the international scene as potentially subject to universal jurisdiction, there is simply not enough evidence of state practice and *opinio juris* to assert that drug trafficking is currently a universal jurisdiction crime as a matter of customary international law. It is unrealistic and unhelpful to simply assert that states should push for the development of customary international law in this area. Customary international law cannot be formed overnight.

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The provisions of this Law shall apply to any person who commits outside the territory of the State of Bahrain an act that makes him a principal perpetrator of or participant in a crime specified in this Law which occurs totally or partially in the State of Bahrain.

### **Article 30**

Any person in Bahrain shall be punishable by the penalties prescribed in this Law who commits an act outside the territory of the State of Bahrain that is considered a crime according to the provisions of this Law.

<sup>91</sup> United States v. James-Robinson, 515 F. Supp. 1340, 1344 n. 6 (S.D.Fl. 1981).

Thus, the next section suggests that reforms should be attempted via treaty and state action, rather than through the nebulous world of customary international law. Ideally, these reforms will be comprehensive enough to result in the development of customary international law with regard to universal jurisdiction over drug traffickers.

#### **D. Is Drug Trafficking Subject to Universal Jurisdiction By Treaty?**

As discussed above, a treaty may provide for universal jurisdiction. In the case of drug trafficking, the 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs allows for the exercise of universal jurisdiction in some situations. Specifically, Article 4, paragraph 2(b) provides that any state *may* establish jurisdiction over a suspect when the suspect is within the territory of that state and where that state decides not to extradite the suspect to a third state.<sup>92</sup> There is no requirement that the state have any link with the offender (other than the offender's presence), with the crime, or with the victims or effects of the crime. In that sense, paragraph 2(b) is a clear statement of universal jurisdiction designed to ensure that a foreign criminal cannot "peacefully enjoy the fruits of his crimes" in any state.<sup>93</sup> Article 4, paragraph 3 of the treaty also provides that the convention "does not exclude the exercise of any criminal jurisdiction established by a Party in accordance with its domestic law."<sup>94</sup> Thus, if a party's domestic law

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<sup>92</sup> United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, December 19, 1988, S. TREATY DOC. NO. 4 (1990), art. 4, para. 2(b), 28 I.L.M. 493.

<sup>93</sup> Case Concerning the Arrest Warrant of 11 April 2000 (Congo v. Belg.), 2002 I.C.J. (14 February) (separate opinion of president Guillaume).

<sup>94</sup> United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, December 19, 1988, S. TREATY DOC. NO. 4 (1990), art. 4, para. 3, 28 I.L.M. 493.

establishes universal jurisdiction over drug trafficking offenses, presumably the treaty does not preclude that exercise of universal jurisdiction.

The 1988 Convention, however, is limited in major respects and thus does not grant true universal jurisdiction. First, the universal jurisdiction provisions technically only apply to states that are parties to the treaty.<sup>95</sup> States that are not parties have no authority under international law to exercise universal jurisdiction over drug traffickers found within their borders.<sup>96</sup> Likewise, it is unclear whether state parties can exercise universal jurisdiction over nationals of states that are not parties to the treaty.<sup>97</sup> There is no easy solution to these problems; they cannot be solved by amending the treaty because those states who do not adhere to the amendment still would not be governed by it. Some scholars have suggested that if the provision is so widely recognized as to have become customary international law, states may be bound by the treaty regardless of whether or

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<sup>95</sup> “The case for an international *civitas maxima* supporting the duty to prosecute or extradite is valid; it is doubtful, however, that it includes universal jurisdiction other than a subsidiary jurisdictional basis to enforce the attainment of these goals. In fact, *aut dedere aut judicare* may well be argued as the substitute for a theory of universal jurisdiction. In this writer’s opinion, universal jurisdiction complements *aut dedere aut judicare* in that whenever a state does not extradite and proceeds to prosecute it may need to rely on universality.” M. Charif Bassiouni, *Universal Jurisdiction for International Crimes: Historical Perspectives & Contemporary Practice*, 42 VA. J. INT’L L. 81, n. 57 (2001).

<sup>96</sup> *But see* Jon B. Jordan, *Universal Jurisdiction in a Dangerous World: A Weapon for All Nations Against International Crime*, 9 MICH. ST. U. DCL J. INT’L L. 1, 25 (2000). Jordan notes that “adoption of a general multilateral treaty through the process of international organization” demonstrates that states accept universal jurisdiction over the offense. Therefore, he argues that these conventions “could be deemed to represent the authority of any nation’s right to prosecute offenders, with the only difference being that parties to a treaty have an obligation to prosecute or extradite such offenders, while nonparties simply have the right to prosecute such offenders.” (*citations omitted*).

<sup>97</sup> Michael P. Scharf, *Application of Treaty-Based Universal Jurisdiction to Nationals of Non-Party States*, 35 NEW ENG. L. REV. 363, 366 (2001).

not they are parties.<sup>98</sup> Yet, as the preceding section suggests, states do not recognize universal jurisdiction over drug traffickers as a matter of customary international law and it is difficult to simply suggest that it should be recognized as such. The establishment of a new protocol with respect to universal jurisdiction, if widely accepted by states and incorporated into their domestic legislation, will, however, assist in the development of customary international law over drug trafficking.

Next, it is not clear that the 1988 Convention allows for universal jurisdiction where a party does not wish to prosecute a suspect within its own territory but wishes to extradite to a third state party who would then prosecute on the basis of universal jurisdiction. Although a state could argue that Article 4, paragraph 3 (“This Convention does not exclude the exercise of any criminal jurisdiction established by a Party in accordance with its domestic law”) provides authority to exercise universal jurisdiction in such a situation, the authority is not clearly or affirmatively stated. As pointed out by President Guillaume in his separate opinion in the case of *Congo v. Belgium*, the 1988 Convention and other treaties with prosecute or extradite requirements do not contemplate “establishing jurisdiction over offences committed abroad by foreigners against foreigners when the perpetrator is not present in the territory of the State in question. Universal jurisdiction *in absentia* is unknown to international conventional law.”<sup>99</sup>

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<sup>98</sup> See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 403 (1987) (“Universal jurisdiction for additional offenses is provided by international agreements, but it remains to be determined whether universal jurisdiction over a particular offense has become customary law for states not party to such an agreement.”).

<sup>99</sup> Case Concerning the Arrest Warrant of 11 April 2000 (*Congo v. Belg.*), 2002 I.C.J. (14 February) (separate opinion of president Guillaume).

Furthermore, as a matter of international law, a state may not exercise universal jurisdiction unless it has explicit authority to do so either based on a treaty or based on customary international law. The 1988 Convention recognizes this premise is by stating that the “[p]arties shall carry out their obligations under this Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and that of non-intervention in the domestic affairs of States.”<sup>100</sup> The general tradition against recognizing true universal jurisdiction in treaty law creates a presumption that the treaty does not confer true universal jurisdiction, regardless of its general statement that the convention “does not exclude the exercise of any criminal jurisdiction established by a Party in accordance with its domestic law.”<sup>101</sup> A treaty must contain a clear statement of intent in order to overcome this presumption against imposition of universal jurisdiction. The proposed additional protocol to the 1988 Convention should contain such a statement of intent so that there is no question that the protocol confers true universal jurisdiction over drug traffickers in all situations.

Finally, the 1988 Convention differs in a significant respect from other treaties that establish universal jurisdiction over other offenses. The 1988 Convention provides that a state where the suspect is found *may* prosecute under a universal jurisdiction theory; the language of the treaty is permissive rather than mandatory. In this sense, the 1988 Convention differs from several other treaties with similar prosecute or extradite language. For example, the Convention Against Torture provides that “[e]ach State

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<sup>100</sup> United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, December 19, 1988, S. TREATY DOC. NO. 4 (1990), art. 2(2), 28 I.L.M. 493.

<sup>101</sup> United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, December 19, 1988, S. TREATY DOC. NO. 4 (1990), art. 4, para. 3, 28 I.L.M. 493.

Party *shall* likewise take measures as may be necessary to establish its jurisdiction over such offences in cases where the alleged offender is present in any territory under its jurisdiction and it does not extradite him.”<sup>102</sup> In other words, a state that has the accused in its territory *must* prosecute if it chooses not to extradite. The language in the 1970 Hague Hijacking Convention is even stronger. That Convention states that, “[t]he Contracting State 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.”<sup>103</sup> The 1988 Convention, on the other hand, provides that states are only *required* to prosecute (if they do not extradite) in cases where they can establish territorial jurisdiction.<sup>104</sup> The choice to exercise universal jurisdiction if there is no other jurisdictional link, on the other hand, is permissive.

These shortcomings in the 1988 Convention leave several gaps in states’ ability to prosecute suspected drug traffickers. Adopting an additional protocol establishing true universal jurisdiction would close some of these gaps by ensuring that there would always be a state that is willing and able to prosecute. This protocol would need to clearly establish jurisdiction by any state, regardless of where the suspect is located, and

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<sup>102</sup> Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 23 I.L.M. 1027, art. 5, para. 2, (1985) (*emphasis added*).

<sup>103</sup> Convention for the Suppression of Unlawful Seizure of Aircraft (Hague Hijacking Convention) 22 U.S.T. 1641, 860 U.N.T.S. 105, art. 7 (1970). The Convention for the Suppression of Unlawful Acts Against the Safety of Maritime Navigation contains substantially the same language. 27 I.L.M. 668, art. 7(5)(1).

<sup>104</sup> United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, December 19, 1988, S. TREATY DOC. NO. 4 (1990), art. 4, para. 1(a), 28 I.L.M. 493 (requiring states to establish jurisdiction where “(i) The offence is committed in its territory; (ii) The offence is committed on board a vessel flying its flag or an aircraft which is registered under its laws at the time the offence is committed.”

regardless of other connections between the perpetrator, the crime, and the prosecuting state. At the very least, the international community could bring the 1988 Convention in line with other international agreements, such as the Convention Against Torture, to require that prosecution be mandatory in a case where the state where the accused is found chooses not to extradite.

#### **IV. Arguments Against the Establishment of Universal Jurisdiction Over Drug Trafficking Offenses.**

No discussion of universal jurisdiction is complete without some recognition of the substantial body of opinion that universal jurisdiction is unwise and should not be expanded. Although these arguments are valid in some situations, they are not strong enough in the case of drug trafficking to counterbalance the potential harms caused by the international drug trade. Furthermore, the development of uniform rules on universal jurisdiction, such as those contained in the Princeton Principles on Universal Jurisdiction, provide adequate solutions to most of the arguments against universal jurisdiction.

Drafters of the protocol to the 1988 Convention could insert rules like those contained in the Princeton Principles to ensure clear and fair application of universal jurisdiction in the specific context of drug trafficking.

Perhaps the most significant reason why states are resistant to the exercise of universal jurisdiction is concern that it will interfere with national sovereignty. Indeed, the integrity of national sovereignty is one of the most basic principles underlying international law and jurisdictional rules are intended to maintain that integrity. For this reason, the rules of jurisdiction generally require that only states with some territorial link to a crime, to a perpetrator, or to a victim may prosecute offenders. Universal jurisdiction

is an exception to this rule, reserved for extreme cases that are well established under customary international law.<sup>105</sup>

On the other hand, there is evidence that customary international law may be beginning to change. In an era where human rights abuses have become a matter of international concern, states have begun to recognize “an obligation on the part of state officials to cooperate in assuring the repression of offenses harmful to the international community.”<sup>106</sup> To that end, the world community has entered into numerous treaties requiring states to prosecute or extradite offenders found in their territories. These treaties are a recognition that universal jurisdiction over some offenses, including drug trafficking, may be necessary to combat transnational crime. The sheer number of treaties with prosecute or extradite requirements may signal a change in the way in which states view power to prosecute. Some commentators even argue that the prosecute or extradite requirement has become a rule of customary international law for any serious transnational crime.<sup>107</sup> As the law develops, states’ arguments based on traditional concepts of national sovereignty weaken.<sup>108</sup> Once universal jurisdiction is accepted as a matter of customary international law over a particular offense, the international

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<sup>105</sup> See *R. v. Bartle (Ex parte Pinochet)*, H.L. (1998) (separate opinion of Lord Slynn of Hadley).

<sup>106</sup> Edward M. Wise, *Aut Dedere Aut Judicare: The Duty to Prosecute or Extradite*, in *INTERNATIONAL CRIMINAL LAW: PROCEDURE & ENFORCEMENT MECHANISMS* 15, 17 (M. Cherif Bassiouni ed., 1999).

<sup>107</sup> Edward M. Wise, *Aut Dedere Aut Judicare: The Duty to Prosecute or Extradite*, in *INTERNATIONAL CRIMINAL LAW: PROCEDURE & ENFORCEMENT MECHANISMS* 15, 19-20 (M. Cherif Bassiouni ed., 1999).

<sup>108</sup> “The policy of holding persons accountable for international crimes has become more widespread and, in turn, has led to an increased use of universal jurisdiction by third party states.” Monica Hans, *Providing for Uniformity in the Exercise of Universal Jurisdiction: Can Either the Princeton Principles on Universal Jurisdiction or An International Criminal Court Accomplish This Goal?* 15 *TRANSNAT’L LAW*. 357, 367 (2002).

community has already made a judgment that the prosecution of certain offenses trumps traditional notions of state sovereignty.

A related objection to the use of universal jurisdiction is the concern that it will create conflict between states.<sup>109</sup> The United States and other countries have appealed to traditional notions of sovereignty in expressing apprehension that overzealous prosecutors will use universal jurisdiction to “flex their muscles against anyone and hope, through extradition proceedings, to obtain personal jurisdiction to put their targets on trial.”<sup>110</sup> Indeed, there is a common concern that “the universal jurisdiction concept is subject to potential manipulation and abuse”<sup>111</sup> and that government officials might be subject to prosecution for political reasons.

Although overzealous prosecutors present a problem, the solution should not be to bar universal jurisdiction per se. Instead, the international community should establish clear principles regarding when and where universal jurisdiction can be used. Well-established principles would leave universal jurisdiction as a viable tool for states while ensuring that prosecutors use universal jurisdiction uniformly and without bias toward any particular nation.<sup>112</sup> For example, laying out a clear hierarchy of which state(s) will have the first opportunity to prosecute in cases where more than one state wishes to prosecute will deter

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<sup>109</sup> Madeline Morris, *Universal Jurisdiction in a Divided World: Conference Remarks*, 35 NEW ENG. L.REV. 337, 340 (2001).

<sup>110</sup> David Scheffer, Ambassador at Large for War Crimes Issues, *Opening Address, Symposium, Universal Jurisdiction: Myths, Realities, and Prospects*, 35 NEW ENG. L. REV. 233, 238 (2001).

<sup>111</sup> Curtis A. Bradley, *Universal Jurisdiction and U.S. Law*, 2001 U. CHI. LEGAL F. 323, 325 (2001).

<sup>112</sup> See generally, Monica Hans, *Providing for Uniformity in the Exercise of Universal Jurisdiction: Can Either the Princeton Principles on Universal Jurisdiction or An International Criminal Court Accomplish This Goal?* 15 TRANSNAT'L LAW. 357 (2002) (arguing for uniformity in the exercise of universal jurisdiction).

potential conflict. The Princeton Principles on Universal Jurisdiction has already proposed model rules with regard to universal jurisdiction.<sup>113</sup> In specifically responding to the issue of prosecutorial abuse, the Introduction to the Principles notes that it placed “throughout the Principles legal and judicial safeguards to help deter potential abuses.”<sup>114</sup> Any other concerns that are specific to the case of drug trafficking could likewise be addressed in an additional protocol to the 1988 Convention. Although not a fail-safe solution, these attempts at codification largely address the states’ concerns about interference with state sovereignty and overzealous prosecutors.

A third concern with universal jurisdiction is that there is “no assurance that the prosecuting nations will apply fair standards of criminal procedure in adjudicating these cases.”<sup>115</sup> Likewise, some commentators have noted the potential for double jeopardy in cases where any state has the ability to prosecute.<sup>116</sup> Again, states can deal with these problems by establishing clear due process rules up front. Treaty provisions allowing for universal jurisdiction can provide that the right to exercise universal jurisdiction extends only states that are willing to prosecute in accordance with internationally accepted due process principles.

One issue that cannot be dealt with by establishing guidelines on how to implement universal jurisdiction rules is the question of why drug trafficking should be marked as

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<sup>113</sup> PRINCETON PROJECT ON UNIVERSAL JURISDICTION, PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION (2001).

<sup>114</sup> Mary Robinson, *Forward* to PRINCETON PROJECT ON UNIVERSAL JURISDICTION, PRINCETON PRINCIPLES ON UNIVERSAL JURISDICTION 26-27 (2001).

<sup>115</sup> Curtis A. Bradley, *Universal Jurisdiction and U.S. Law*, 2001 U. CHI. LEGAL F. 323, 325, 325 (2001).

<sup>116</sup> Yoram Dinstein, *The Universality Principle and War Crimes*, in THE LAW OF ARMED CONFLICT INTO THE NEXT MILLENNIUM 17, 31 (Michael N. Schmitt & Leslie C. Green ed., 1998).

the next universal jurisdiction crime rather than other international crimes, such as trafficking in women, money laundering, or arms trafficking. As more crimes are added to the list, there is no logical limit to what crimes are and are not subject to universal jurisdiction. This question goes to the very heart of the debate over universal jurisdiction. Universal jurisdiction is supposed to be a very narrow exception to traditional jurisdictional rules, used only as an “exceptional measure,”<sup>117</sup> because it does transcend traditional notions of state sovereignty. If universal jurisdiction were expanded to “a broad range of ordinary crimes, there would be no *raison d’être* for the other bases of jurisdiction”<sup>118</sup> and traditional notions of jurisdiction would fly out the window.

In theory, this is a legitimate concern. As discussed above, however, the international community has already embraced universal jurisdiction over drug trafficking to a certain extent and there is a trend toward the development of customary international law with respect to universal jurisdiction over drug trafficking. Thus, debates over whether the acceptance of universal jurisdiction over drug traffickers will lead to a slippery slope are in reality detached from trends that are actually occurring in the international community. If the international community were indeed concerned about a slippery slope, it could work to halt universal jurisdiction over drug trafficking. Instead, states have gone out of their way to expand the availability of universal jurisdiction over drug traffickers.

In the end, all of these arguments against the use of universal jurisdiction must be weighed against the potential benefits of ensuring that drug traffickers are prosecuted. As

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<sup>117</sup> Yoram Dinstein, *The Universality Principle and War Crimes*, in *THE LAW OF ARMED CONFLICT INTO THE NEXT MILLENNIUM* 17, 19 (Michael N. Schmitt & Leslie C. Green ed., 1998).

<sup>118</sup> Yoram Dinstein, *The Universality Principle and War Crimes*, in *THE LAW OF ARMED CONFLICT INTO THE NEXT MILLENNIUM* 17, 18-19 (Michael N. Schmitt & Leslie C. Green ed., 1998).

noted above, drug trafficking has appalling consequences for people throughout the world. There may be risks in embracing universal jurisdiction, but the international community must ask itself whether those risks are sufficient enough to justify allowing kingpins and murderers to go free.

## **V. The United States Should Support the Exercise of Universal Jurisdiction Over Drug Trafficking.**

The United States has a strong interest in bringing international drug traffickers to justice.<sup>119</sup> It has long been the largest consumer of narcotics<sup>120</sup> and has long been the leader in the global war on drugs.<sup>121</sup> Given the link between narcotics trafficking and terrorism, the United States has a greater interest than ever before in seeing that perpetrators are brought to justice. The State Department has identified extradition of offenders to face prosecution in the U.S. as “one of the most effective tools to help other governments break up trafficking organizations”<sup>122</sup> because of the deterrent effect of strict penalties enforced in the U.S. The ability to exercise universal jurisdiction would

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<sup>119</sup> “The United States has a strong interest in seeing that more international drug traffickers are brought to justice, whether in the United States, in other national justice systems, or in an international court.” Molly McConville, *A Global War on Drugs: Why the United States Should Support the Prosecution of Drug Traffickers in the International Criminal Court*, 37 AM. CRIM. L. REV. 75, 76 (2000).

<sup>120</sup> Peter Reuter, TRANSNATIONAL CRIME: DRUG SMUGGLING (DRAFT), 1, at <http://www.puaf.umd.edu/faculty/papers/reuter/cambridge.pdf> (noting that the United States is the largest market for drugs in the world). See also Sharon A. Gardner, *A Global Initiative to Deter Drug Trafficking: Will Internationalizing the Drug War Work?* 7 TEMP. INT’L & COMP. L. J. 287, 306-07 (1993) (describing U.S. involvement in the international drug trade).

<sup>121</sup> “With the United States pressure on its war against drugs, drug trafficking may become the newest crime subject to universal jurisdiction.” Jon B. Jordan, *Universal Jurisdiction in a Dangerous World: A Weapon for All Nations Against International Crime*, 9 MICH. ST. U. DCL J. INT’L L. 1, 29 (2000).

<sup>122</sup> BUREAU FOR INT’L NARCOTICS & L. ENFORCEMENT AFF., U.S. DEP’T ST., 2002 INTERNATIONAL NARCOTICS CONTROL STRATEGY REPORT, ch. 2, 8 (2003).

assist the United States in obtaining jurisdiction to extradite suspected drug traffickers, regardless of whether or not the U.S. can establish a definitive link between the accused trafficker and the U.S.

Recognizing universal jurisdiction will also benefit to the United States indirectly. Many states are unwilling to extradite their nationals to the United States for prosecution because of the harsh laws in place here<sup>123</sup> or for other political reasons.<sup>124</sup> As one author notes, “[a]n obstacle often overlooked is that states requesting extradition are generally ‘consumers,’ such as the U.S., and the ‘producer’ states view such consumers as the cause of the drug trade.”<sup>125</sup> Providing those countries with the option of extraditing to a third country that is willing to exercise universal jurisdiction may solve this problem.

Other states may be unwilling to extradite because of the harsh punishments, including the death penalty, faced by drug traffickers in the United States. One example of this trend is presented by the Mexican Supreme Court’s recent holding that Mexico may not extradite nationals who face life sentences in other countries.<sup>126</sup> Because U.S. law provides such harsh penalties for drug traffickers, this would effectively prevent extradition of suspects from Mexico to the United States.<sup>127</sup> If Mexico accepts drug

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<sup>123</sup> Molly McConville, *A Global War on Drugs: Why the United States Should Support the Prosecution of Drug Traffickers in the International Criminal Court*, 37 AM. CRIM. L. REV. 75, 82-83 (2000) (discussing the difficulties that the United States has had in the past in extraditing nationals from other countries to the United States).

<sup>124</sup> *Id.*

<sup>125</sup> Molly McConville, *A Global War on Drugs: Why the United States Should Support the Prosecution of Drug Traffickers in the International Criminal Court*, 37 AM. CRIM. L. REV. 75, 82-83 (2000).

<sup>126</sup> J.S.C. 2001. This decision is referenced in: BUREAU FOR INT’L NARCOTICS & L. ENFORCEMENT AFF., U.S. DEP’T ST., 2002 INTERNATIONAL NARCOTICS CONTROL STRATEGY REPORT, ch. 2, 8 (2003).

<sup>127</sup> BUREAU FOR INT’L NARCOTICS & L. ENFORCEMENT AFF., U.S. DEP’T ST., 2002 INTERNATIONAL NARCOTICS CONTROL STRATEGY REPORT, ch. 2, 8(2003).

trafficking as a universal jurisdiction crime, Mexico would be able to extradite those suspects to third countries (if unwilling to prosecute themselves) for prosecution. Of course, this is a less than ideal solution to the problem from the perspective of the United States because it may mean that drug traffickers will be dealt with less harshly. Yet it is unlikely that countries like Mexico will be willing to back down from their policies regarding extradition to the United States just because universal jurisdiction is unavailable to them. The availability of universal jurisdiction is unlikely to influence the debate over whether countries should extradite suspected drug traffickers to the United States. What universal jurisdiction will provide is another option for prosecution when a state decides not to extradite to the United States. In the long run, allowing for universal jurisdiction will ensure that that suspected criminals will not go free, and that is clearly in the United States' interest.

The United States' interest in accepting universal jurisdiction is clearly presented in a case that came before the District Court for the Northern District of Florida in 1981, *United States v. James-Robinson*.<sup>128</sup> In that case, the U.S. Coast Guard stopped a stateless ship in international waters 400 miles off of the coast of the United States.<sup>129</sup> The ship was filled with drugs. Upon a motion to dismiss the indictment, the court considered whether, under the Marijuana on the High Seas Act, the United States had jurisdiction to prosecute those on board where there was no allegation (aside from the ship's location) that the drugs on the ship were intended for distribution in the U.S.<sup>130</sup> Noting that "[d]rug trafficking is not recognized as being subject to universal

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<sup>128</sup> *United States v. James-Robinson*, 515 F.Supp. 1340 (S.D.Fl. 1981).

<sup>129</sup> *James-Ronbinson*, 515 F.Supp. at 1340.

<sup>130</sup> *Id.*

jurisdiction,”<sup>131</sup> the court granted a motion to dismiss the indictment on the grounds that there was no nexus with the United States and therefore no subject matter jurisdiction over the perpetrators.<sup>132</sup> The result of this case is clear: the United States was unable to prosecute suspected drug traffickers because it was unable to establish jurisdiction. Had the U.S. recognized drug trafficking as a universal jurisdiction crime, these alleged traffickers would have faced trial and punishment in the United States.

In general, the United States has declared itself to be against the concept of universal jurisdiction.<sup>133</sup> However, this has never been a consistent position. In fact, the only consistent statement that can be made about the United States’ approach to universal jurisdiction is that it supports it when to do so is within the United States’ best interests; it rejects universal jurisdiction where the exercise of such jurisdiction could have detrimental effects on the U.S. David Scheffer, Ambassador at Large for War Crimes Issues under President Clinton openly stated that, “[a]s a government, the United States recognizes universal jurisdiction for certain crimes under certain circumstances.”<sup>134</sup> If for no other reason, the U.S. government should thus choose to support the exercise of universal jurisdiction over drug trafficking because it is in the country’s best interests to do so.

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<sup>131</sup> *Id.* at n. 6.

<sup>132</sup> *Id.* at 1347.

<sup>133</sup> Curtis A. Bradley, *Universal Jurisdiction and U.S. Law*, 2001 U. CHI. LEGAL F. 323, 347 (2001) (“[t]here is substantial treaty and statutory authority for exercising universal jurisdiction in the criminal context, yet the United States has rarely if ever exercised universal criminal jurisdiction.”).

<sup>134</sup> David Scheffer, Ambassador at Large for War Crimes Issues, *Opening Address, Symposium, Universal Jurisdiction: Myths, Realities, and Prospects*, 35 NEW ENG. L. REV. 233, 234 (2001).

There are several situations in which the United States has accepted universal jurisdiction in the past. For example, the United States has always supported the exercise of universal jurisdiction with respect to piracy.<sup>135</sup> The federal piracy statute provides for prosecution of anyone who is a pirate, as defined by the laws of nations.<sup>136</sup> The Hostage Taking Act provides for U.S. jurisdiction over anyone who “whether inside or outside the United States, seizes or detains and threatens . . . another person in order to compel a third person or governmental organization” to do something.<sup>137</sup> The United States has also recognized universal jurisdiction with regard to the crime of torture.<sup>138</sup> Recently, the United States government actively sought out and encouraged states to exercise universal jurisdiction to prosecute Pol Pot, Kurdish rebel leader Ocalan, senior leaders of the Iraqi regime, and former Chilean Dictator Augusto Pinochet.<sup>139</sup> In the case of *In the Matter of Demjanjuk*,<sup>140</sup> a U.S. District Court approved extradition of an alleged Nazi conspirator based on the fact that “[i]nternational law provides that certain offenses may be punished by any state because the offenders are ‘common enemies of all mankind and all nations have an equal interest in their punishment.’” The fact that the United States does accept

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<sup>135</sup> Jon B. Jordan, *Universal Jurisdiction in a Dangerous World: A Weapon for All Nations Against International Crime*, 9 MICH. ST. U. DCL J. INT’L L. 1, 11 (2000) (citing *United States v. Brig Malek Adhel*, 43 U.S. (2 How.) 210, 232 (1844).

<sup>136</sup> Piracy and Privateering Act, 18 USC § 1651 (1948).

<sup>137</sup> 18 U.S.C. § 1203(a) (1988).

<sup>138</sup> 18 USC § 2340 A(b) (1994) (providing for jurisdiction over alleged offenders if “present in the United States, irrespective of the nationality of the victim or alleged offender.”).

<sup>139</sup> David Scheffer, Ambassador at Large for War Crimes Issues, *Opening Address, Symposium, Universal Jurisdiction: Myths, Realities, and Prospects*, 35 NEW ENG. L. REV. 233, 236 (2001) (noting further that the United States could not exercise universal jurisdiction in these cases itself because of applicable statutes of limitations and gaps in the United States’ law).

<sup>140</sup> 603 F. Supp.1468 (N.D. Ohio), affirmed, 776 F.2d 571 (6th Cir. 1985), *certioari denied*, 457 U.S. 1016 (1986).

universal jurisdiction in some cases is reflected in the Restatement of Foreign Relations Law, which states that the United States recognizes universal jurisdiction over “offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism.”<sup>141</sup> Thus, it is by no means clear that the United States is against the exercise of universal jurisdiction in all matters.

In the case of drug trafficking specifically, the Maritime Drug Enforcement Act extends personal jurisdiction within U.S. courts to “a vessel without nationality” and to a “vessel registered in a foreign nation where the flag nation has consented or waived objection to the enforcement of the United States law by the United States.”<sup>142</sup> There is no requirement of a nexus with the United States. In the case of a vessel without nationality, this is a clear acceptance of universal jurisdiction in drug trafficking cases on the high seas, at least where the U.S. first obtains consent. Commentators have also suggested that U.S. courts have stretched other principles of jurisdiction so far that that these courts recognized the exercise of universal jurisdiction as a de facto matter,<sup>143</sup> even if they claim that they are exercising other types of jurisdiction.<sup>144</sup>

All of these examples demonstrate that, while the United States may officially declare universal jurisdiction to be a bad thing, it has actually embraced universal

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<sup>141</sup> RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES, § 403 (1987).

<sup>142</sup> Curtis A. Bradley, *Universal Jurisdiction and U.S. Law*, 2001 U. CHI. LEGAL F. 323, 328-29 (2001) (*citing* United States v. Caicedo, 47 F3d 370, 372 (9th Cir. 1995)).

<sup>143</sup> Christina E. Sorensen, Drug Trafficking on the High Seas: A Move Toward Universal Jurisdiction Under International Law, 4 EMORY INT’L L. REV. 207, 215-19 (Spring 1990).

<sup>144</sup> See Christopher L. Blakesley, *Extraterritorial Jurisdiction*, in INTERNATIONAL CRIMINAL LAW: PROCEDURE & ENFORCEMENT MECHANISMS 33, 82 (M. Cherif Bassiouni ed., 1999).

jurisdiction in practice. This does not mean, however, that the United States is for universal jurisdiction in all situations. The evidence only seems to demonstrate that the U.S. does not mind exercising universal jurisdiction *itself* or when it benefits the United States' agenda in some way. The government may be less thrilled at the prospect of *other countries* exercising universal jurisdiction in all situations, mainly because of concerns over overzealous prosecutors.

The United States' concerns regarding potential abuse of prosecutorial discretion are not as relevant in the context of drug trafficking as they are in the case of other international crimes. First, while countries like the United States may be legitimately concerned about high-ranking officials being targeted by prosecutors for some universal jurisdiction offenses, such as war crimes, presumably, high-ranking officials in the U.S. government are not involved in drug trafficking.<sup>145</sup> Even if prosecutors were to find drug trafficking going on at such high levels, “[p]resumably, the U.S. would not object to rooting out major international drug traffickers holding official positions within the U.S. government.”<sup>146</sup> The United States' strong commitment to bringing narcotics traffickers to justice weighs heavily against the slight potential that a high ranking United States government official could be prosecuted for involvement in international drug trafficking. Thus, the United States should accept universal jurisdiction over drug traffickers even

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<sup>145</sup> There have been allegations in the past of CIA involvement in drug trafficking. *See* CONG. REC. H5,847-48 (1998) (Congresswoman Waters calling for the immediate release of the CIA Investigator General's Classified Report on potential CIA involvement with Contra drug traffickers in Nicaragua). These allegations, however, are twenty years old and there have not been recent allegations of such conduct.

<sup>146</sup> Molly McConville, *A Global War on Drugs: Why the United States Should Support the Prosecution of Drug Traffickers in the International Criminal Court*, 37 AM. CRIM. L. REV. 75, 96 (2000).

where it is not willing to accept universal jurisdiction over other types of international criminals, such as war criminals.

The United States can take several actions to move the international community toward accepting drug trafficking as a universal jurisdiction crime. As suggested above, the U.S. can propose an additional protocol to the 1988 Convention clearly extending universal jurisdiction over drug traffickers and champion the effort to bring other states on board. The United States has such influence in this area that it is likely to succeed in its efforts. Accepting universal jurisdiction over drug trafficking crimes will provide an overall benefit to the United States by ensuring a credible threat of prosecution of drug traffickers no matter where they are found and thereby creating an effective deterrent throughout the world.

## **V. Conclusion**

The human consequences of drug trafficking are appalling and, for the past century, states have widely agreed that they must work together to combat the evils caused by the international narcotics trade. Despite massive investments of time and resources, this international effort has not been easy. The promise of prosecution has not always been an effective deterrent to drug traffickers because they tend to operate beyond the reach of criminal jurisdiction. Providing states with the ability to exercise universal jurisdiction over drug traffickers will provide a tool that will help states in ensuring that traffickers are faced with a real threat of prosecution.

Although there is some international treaty law conferring universal jurisdiction, that law is not comprehensive enough such that any state can prosecute drug traffickers wherever they are found. States can fill this gap by enacting an additional protocol to the

1988 Convention conferring true universal jurisdiction and making it mandatory that states where drug traffickers are found *must* prosecute if they do not extradite. If this additional protocol is widely enough accepted and enforced in state practice, customary international law will develop making drug trafficking a true universal jurisdiction crime. The United States should lead this effort because of its particularly strong interest in deterring drug trafficking.

These reforms will not be a panacea for the problem of international narcotics trafficking. They will, however, provide a tool that states can use to deter and punish traffickers. Ideally, the ability to exercise universal jurisdiction will ensure that those who destabilize governments, who enlist children in the drug trade, who use drugs as a means of funding terrorism, and who commit heinous crimes in pursuit of the drug trade will not operate with impunity but will face punishment, no matter where they are found.