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# The Penal Characteristics of Conventional International Criminal Law

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# The Penal Characteristics of Conventional International Criminal Law

by M. Cherif Bassiouni\*

**I**nternational criminal law is a product of the convergence of two different legal disciplines which have emerged and developed ostensibly along different paths to be complementary but co-extensive, and separate.<sup>1</sup> These two disciplines are the criminal aspects of international law and the international aspects of national criminal law.<sup>2</sup>

The criminal aspects of international law consist of a body of international proscriptions which criminalize certain types of conduct irrespective of particular enforcement modalities and mechanisms.<sup>3</sup> A study of the origins and development of the criminal aspects of international law reveals that it deals essentially, if not exclusively, with substantive international criminal law or international crimes.<sup>4</sup> As codified by this writer,<sup>5</sup>

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<sup>1</sup> See M. C. BASSIOUNI, *INTERNATIONAL LAW: A DRAFT INTERNATIONAL CRIMINAL CODE* 19 (1980) [hereinafter cited as *DRAFT CODE*].

<sup>2</sup> See, e.g., 1 *A TREATISE ON INTERNATIONAL CRIMINAL LAW* (M.C. Bassiouni & V.P. Nanda eds. 1973) [hereinafter cited as 1 *TREATISE*]; Jescheck, *International Criminal Law: Its Object and Recent Developments*, in 1 *TREATISE*, *supra*, at 49; Ryu & Silving, *International Criminal Law—A Search for Meaning*, in 1 *TREATISE*, *supra*, at 22; *DRAFT CODE*, *supra* note 1, at 27 n. 3. See also, e.g., H. DONNEDIEU DE VABRES, *LES PRINCIPES MODERNES DU DROIT PENAL INTERNATIONAL* (1928); N. LEVI, *DIRITTO PENAL INTERNAZIONALE* (1944); H. JESCHECK, *DIE VERANTWORTLICHKEIT DER STAATSORGANE NACH VOLKERSTRAFRECHT* (1952); S. GLASER, *INTRODUCTION A L'ETUDE DU DROIT INTERNATIONAL PENAL* (1954); A. QUINTANO-RIPOLES, *TRATADO DE DERECHO PENAL INTERNACIONAL E INTERNACIONAL PENAL* (2 vols. 1955-1957); *INTERNATIONAL CRIMINAL LAW* (G. Mueller & E. Wise eds. 1965); D. OEHLER, *INTERNATIONALES STRAFRECHT* (1973); C. LOMBOIS, *DROIT PENAL INTERNATIONAL* (2d ed. 1979).

<sup>3</sup> Such enforcement mechanisms are: (1) the direct enforcement scheme which recognizes the establishment of an international criminal court, and (2) the indirect enforcement scheme which relies upon the processes of extradition, prosecution, and judicial assistance for the enforcement of international proscriptions. See *DRAFT CODE*, *supra* note 1, at 22-27. See also Mueller & Besharov, *The Existence of International Criminal Law and Its Evolution to the Point of its Enforcement Crisis*, in 1 *TREATISE*, *supra* note 2, at 5.

<sup>4</sup> *DRAFT CODE*, *supra* note 1, at 3-19. See also *supra* notes 2 and 3.

<sup>5</sup> *DRAFT CODE*, *supra* note 1. See also S. GLASER, *DROIT INTERNATIONAL PENAL CONVENTIONNEL* (2 vols. 1977-1979); V. PELLA, *LA CODIFICACION DU DROIT PENAL INTERNATIONAL* (1922).

these crimes are: aggression, war crimes, unlawful use of weapons, crimes against humanity, genocide, *apartheid*, slavery and slave-related practices, torture, unlawful medical experimentation, piracy, hijacking, kidnapping of diplomats, taking of civilian hostages, unlawful use of the mails, drug offenses, falsification and counterfeiting, theft of archeological and national treasures, bribery of public officials, interference with submarine cables, and international traffic in obscene publications. Although some of these crimes emerge from customary international law, they are also included in one form or another in conventional international criminal law.

The bases for considering these twenty acts as international crimes according to the sources of international law are as follows: (1) existing international conventions which consider the act in question an international crime; (2) recognition under customary international law that such conduct constitutes an international crime; (3) recognition under general principles of international law that such conduct is or should be deemed violative of international law and about which there is a pending draft convention before the United Nations; and (4) prohibition of such conduct by an international convention though not specifically stating that it constitutes an international crime and which is also recognized in the writings of scholars as such. The last two rationales for inclusion of a certain type of act or conduct in international criminal law may be challenged on the grounds of the *lex lata* but could be considered as *de lege ferenda* until they are embodied in specific multilateral conventions having the penal characteristics of international criminal law described later in this article. These categories include: torture, unlawful human experimentation, and theft of archeological and national treasures in time of peace, and bribery of foreign public officials.

The very nature of all these acts and their definition in the applicable international instruments and under customary international law indicates that there are no common or specific doctrinal foundations that constitute the legal basis for including a given act in the category of international crimes. The only basis which now exists is empirical or experiential; conventional and customary international law implicitly or explicitly establish that a given act is part of international criminal law. Nevertheless, in examining separately the twenty international crimes previously mentioned, there are two alternative requirements for proscribed conduct; namely, it must contain either an international or transnational element in order for it to be included in the category of international crimes. In other words, the conduct in question must either rise to the level where it constitutes an offense against the world community *delicto jus gentium* or the commission of the act must affect the interests of more

than one state.<sup>6</sup> Regrettably, international criminal legal doctrine has not further defined the meaning and content of each of these two elements, and no specific criteria exist to determine whether a type of conduct raises to such a level of international opprobrium to be considered within the meaning of the "international" element. Similarly, the undefined "transnational" element could encompass a multitude of activities which may affect the interests of more than one state, involve transborder activities or involve nationals of more than one state. This is potentially a very elastic concept. Obviously, these elements need further doctrinal clarification, but it is not within the scope of this article to provide such clarification.

Regardless of how a given conduct becomes an international crime, an empirical or experiential observation supports the conclusion that an international crime is any conduct which is designated as a crime in a multilateral convention recognized by a significant number of states. Further, provided the international instrument contains one of the seven penal characteristics described later in this article, its existence must be evidenced by specific treaty provisions.

It must be observed that because there have been few efforts to create a direct enforcement system, all international criminal law conventions rely on the indirect enforcement system.<sup>7</sup> That system is predicated on the assumption, by each signatory state to an international criminal law convention, to enforce its provisions under its national criminal laws and to cooperate in the prosecution and punishment of such offenders. This system is predicated on the maxim of Hugo Grotius *aut dedere aut punire*,<sup>8</sup> which was rephrased by this writer as *aut dedere aut judicare*.<sup>9</sup> The object of international criminal justice is no different than that of any national criminal justice system: to prosecute those who are accused of criminal violations and eventually punish those found guilty, and not simply to punish all those accused of such violations as the words *aut punire* imply. Under such a scheme, international crimes established by conventional or customary international law must be enforced by the national criminal laws of the states. The concomitant duty to prosecute or extradite and to cooperate with other states in the prevention and suppression of such conduct is imposed upon the signatory states. In that respect, the enforcement of international criminal law has shaped the re-

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<sup>6</sup> See DRAFT CODE, *supra* note 1, at 40-44. But see O. TRIFFTERER, *DOGMATISCHE UNTERSUCHUNGEN ZUR ENTWICKLUNG DES MATERIELLEN VOLKERSTRAFRECHTS SEIT NURNBERG* (1966).

<sup>7</sup> See DRAFT CODE, *supra* note<sup>1</sup>, at 22-27. See also Mueller & Besharov, *supra* note 3.

<sup>8</sup> See H. GROTIUS, *DE JURE BELLI AC PACIS*, BOOK II, CHAP. XXI, § IV(1) (1624) in *THE RIGHTS OF WAR AND PEACE* (A. Campbell trans. 1901).

<sup>9</sup> See M.C. BASSIOUNI, *INTERNATIONAL EXTRADITION AND WORLD PUBLIC ORDER* 7 (1974); 1 M.C. BASSIOUNI, *INTERNATIONAL EXTRADITION IN U.S. LAW AND PRACTICE* ch. 1, § 2-1 (1983).

quired contents of an international criminal law convention, and it has determined in part its characteristics. Accordingly, an international criminal law convention which explicitly or implicitly recognizes certain conduct as an international crime establishes the duty upon signatory states to criminalize the prohibited conduct, to prosecute accused violators or to extradite accused violators to other states desirous of prosecuting them, and to cooperate with other states in the prevention and suppression of such conduct. Additionally, such a convention could also pre-cognize the establishment of a direct enforcement scheme, such as an international criminal court for the prosecution of such offenses.

A textual analysis of some relevant treaty provisions in the twenty categories of international crimes reveals that the objectives of an international criminal law convention are: (1) to explicitly or implicitly declare certain conduct a crime under international law; (2) to criminalize the conduct under national law; (3) to provide for the prosecution or extradition of the alleged perpetrator; (4) to punish the person found guilty; (5) to cooperate through the various modalities of judicial assistance in the enforcement of the convention; (6) to establish a priority in theories of jurisdiction and perhaps recognize the applicability of universal jurisdiction; (7) to refer to an international criminal jurisdiction; and, (8) to exclude the defense of superior orders.

All these characteristics, which ideally should be contained in every international criminal law convention, are not found in every international criminal law convention. The conclusion of this writer is, however, that due to the decidedly penal nature of these features, the existence of any one of these features in a particular convention makes the convention part of international criminal law.

The various conventions on international criminal law do not all follow the same pattern of imposing upon signatory states the identical duty to criminalize the prohibited conduct under their national laws, to prosecute or extradite, or to cooperate with other states in the prevention and suppression of such conduct. Additionally, these conventions do not commonly define such conduct as an international crime or require the establishment of an international criminal court for the prosecution of such offenses. This lack of consistency is in part due to the fact that these conventions have been elaborated over a period of more than 220 years, in different venues and with different participants who frequently have not taken cognizance of the developing techniques of international criminal law.<sup>10</sup> It must be emphasized that the drafters of these conventions, with the exception of those in the area of the regulation of armed con-

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<sup>10</sup> See, e.g., DRAFT CODE, *supra* note 1, at 2-3. For a historical analysis, see M. TRAVERS, *LE DROIT PENAL INTERNATIONAL ET SA MISE EN OEUVRE EN TEMPS DE PAIX ET EN TEMPS DE GUERRE* (5 vols. 1920-1922). See also note 35 *infra*.

flicts, have been mostly diplomats or political representatives of their respective governments. There has been limited participation in the drafting processes from specialists in the field of criminal law, and even lesser participation by the few specialists in international criminal law.<sup>11</sup> Consequently, political considerations may be more prevalent in the drafting of these conventions. For example, if at a given time a representative of a state determines that the notion of universal jurisdiction is not politically palatable to his decisionmakers, he might influence his colleagues not to include such a provision irrespective of its merits in international criminal law doctrine. This is particularly true when the provision specifically provides that the prohibited conduct constitutes "a crime under international law;" the political considerations attaching to the use of this nomenclature have been a deterrent to its inclusion in international criminal law conventions. Thus, what seemed to be acceptable terminology in the days of the Nuremberg and Tokyo war crimes trials, and certainly until the 1948 Genocide Convention,<sup>12</sup> is no longer readily used.<sup>13</sup>

In international criminal law conventions of the 1970's, starting with the Hague Convention on the Suppression of Unlawful Seizure of Aircraft of December 16, 1970,<sup>14</sup> the tendency has been to include very short provisions relating to prosecution, extradition, jurisdiction and judicial assistance, and to place these provisions toward the end of the convention as secondary procedural matters. Nevertheless, while the development of a pattern and similarity of language would be more helpful in establishing international custom,<sup>15</sup> consistency in terminology would not be sufficient to provide the specificity necessary to enforce penal provisions in a manner that produces uniform application in the different legal systems of the world.

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<sup>11</sup> See DRAFT CODE, *supra* note 1, at 19-20. This is what led the author to prepare the draft international criminal code, which addresses itself to the problems of harmonization and consistency in international obligations arising under international criminal law conventions.

<sup>12</sup> Convention on the Prevention and Punishment of the Crime of Genocide, December 9, 1948, 78 U.N.T.S. 277.

<sup>13</sup> For example, the Working Group on the Draft Convention on the Prevention and Suppression of Torture of the Commission on Human Rights, while it has not reported out the Draft Convention, has already deleted Article I which states that "torture is a crime under international law." See Draft Convention on the Prevention and Suppression of Torture, U.N. Doc. E/CN.4/NGO/213 (1978). See also Bassiouni & Derby, *An Appraisal of Torture in International Law and Practice*, 48 REVUE INTERNATIONALE DE DROIT PENAL [R.I.D.P.] 17, 284 (1977) (commentary on Article I).

<sup>14</sup> 22 U.S.T. 1641, T.I.A.S. No. 7192, 860 U.N.T.S. 105. See also R. FRIEDLANDER, *TERRORISM: DOCUMENTS OF INTERNATIONAL AND LOCAL CONTROL* (3 vols. 1979-82).

<sup>15</sup> See A. D'AMATO, *THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW* (1971). See also D'Amato, *The Concept of Human Rights in International Law*, 82 COLUM. L. REV. 1110 (1982).

Each category of international crimes seems to have developed a life and pattern of development of its own.<sup>16</sup> In some cases, such as the regulation of armed conflict, the prohibition against slavery and slave-related practices and international control of drugs, there has been not only a number of succeeding conventions (each one relying on its predecessor to reinforce its provisions or to develop more specialized conventions on more specific aspects of the prohibited practice), but there has also been an attempt to develop some direct mechanism of enforcement. To a large extent, the International Committee of the Red Cross is a very workable and effective example of a quasi-direct enforcement mechanism regarding the regulation of armed conflict.<sup>17</sup> The international narcotics system with the existence of a commission and other structures is another example of direct enforcement. However, political considerations have largely hampered the opportunities for rendering that system more effective.<sup>18</sup> In the slavery area, the International Labour Organisation's development of additional instruments for the prevention, suppression and control of slave-related practices is another example of progressive development.<sup>19</sup> Perhaps the difference between these areas of international criminal law and others which have not developed progressively, is that these three areas have had existing international structures which furthered the advancement of the areas relative to their work. Thus the critical factor in the progressive development of international criminal law is the existence of institutional structures that spur such growth and development.<sup>20</sup>

As a corollary to this observation, it can be observed that where there has been a progressive development of international instruments there has also been a progressive development of legal provisions reflecting more specificity in their content and in the duties they establish. Thus, where there are more conventions on a particular subject, the likelihood is greater that the terminology embodying specific legal obligations concerning criminalization, prosecution, punishment, extradition, judicial assistance and jurisdiction is more specific in each succeeding convention.

It is interesting to note that the evolution of the two schemes for the enforcement of international criminal law, the direct and indirect enforce-

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<sup>16</sup> See DRAFT CODE, *supra* note 1, at 3-19.

<sup>17</sup> See, e.g., Pilloud, *The Geneva Conventions—An Important Anniversary 1949-1969*, in INTERNATIONAL REVIEW OF THE RED CROSS 399 (1969). The ICRC publishes annual reports of its activities in the INTERNATIONAL REVIEW OF THE RED CROSS.

<sup>18</sup> See, e.g., Bassiouni, *The International Narcotics Control System: A Proposal*, 46 ST. JOHN'S L. REV. 713 (1972). The Commission on Narcotic Drugs publishes annual and periodic reports, as does the Division of Narcotic Drugs of the United Nations.

<sup>19</sup> See, e.g., Bassiouni & Nanda, *Slavery and Slave Trade: Steps Toward Eradication*, in 1 TREATISE, *supra* note 2, at 504.

<sup>20</sup> See Saba, *The Quasi Legislative Activities of Specialized Agencies*, 111 RECUEIL DES COURS 281 (1964).



ment schemes, have also conceptually shaped international criminal law. Historically, the direct enforcement system was predicated on a vision of world order which sought to transcend political and ideological barriers. After World War II, the hopes and expectations of many in the world community were for the development of a direct-control system involving the creation of an international criminal court and an international machinery of criminal justice.<sup>21</sup> The first effort, excluding the Nuremberg and Tokyo war crimes trials, was in the Convention for the Creation of an International Criminal Court of November 16, 1937,<sup>22</sup> which precognized the establishment of an international criminal court. The Convention was only ratified by India and it never entered into effect. Thereafter, there were two efforts by the United Nations, in 1951 and 1953, to prepare a draft statute for an international criminal court.<sup>23</sup> The drafts were tabled and no further effort has been made to revive them. In a very modest way, the Convention on the Prevention and Suppression of Genocide of

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<sup>21</sup> The direct enforcement scheme is predicated on the establishment of an international criminal court and has been discussed and suggested by many publicists and international organizations. See Historical Survey of the Question of International Criminal Jurisdiction, London International Assembly, Memorandum by the Secretary-General (1949), reprinted in 1 B. FERENCZ, AN INTERNATIONAL CRIMINAL COURT, A STEP TOWARD WORLD PEACE—A DOCUMENTARY HISTORY AND ANALYSIS 399 (1980); Kos-Rabcewicz-Zubkowski, *The Creation of an International Criminal Court*, in INTERNATIONAL TERRORISM AND POLITICAL CRIMES 519 (M.C. Bassiouni ed. 1975); Dautricourt, *The International Criminal Court: The Concept of International Jurisdiction—Definition and Limitation of the Subject*, in 1 TREATISE, supra note 2, at 636; Nepote, *The Role of an International Criminal Police in the Context of an International Criminal Court and Police Cooperation with Respect to International Crimes*, in 1 TREATISE, supra note 2, at 676; J. STONE & R. WOETZEL, TOWARD A FEASIBLE INTERNATIONAL CRIMINAL COURT (1970); P. CARJEU, PROJET D'UNE JURISDICTION PENALE INTERNATIONALE (1953); Bassiouni & Derby, *Final Report on the Establishment of an International Criminal Court for the Implementation of the Apartheid Convention and Other Relevant Instruments*, 9 HOFSTRA L. REV. 523 (1981); Kos-Rabcewicz-Zubkowski, *La Creation d'une Cour Penale Internationale et l'Administration Internationale de la Justice*, 1977 CAN. Y.B. INT'L L. 253 (1977); *La Creation d'une Jurisdiction Penale Internationale*, 45 R.I.P.D. (nos. 384 1974); Grebing, *La Creation d'une Cour Penale Internationale: Bilan et Perspectives*, 45 R.I.D.P. 435 (1974); Miller, *Far Beyond Nuremberg: Steps Toward International Criminal Jurisdiction*, 61 KY. L.J. 925 (1973); Ambion, *Organization of a Court of International Criminal Jurisdiction*, 29 PHIL. L.J. 345 (1954); Finch, *Draft Statute for an International Court*, 46 AM. J. INT'L L. 89 (1952); Glaser, *Vers une Jurisdiction Criminelle Internationale*, 67 SCHWEIZERISCHE FESTSCHRIFT FÜR STRAFRECHT 281 (1952); Wright, *Proposal for an International Criminal Court*, 46 AM. J. INT'L L. 60 (1952); Yeum-Li, *The Establishment of an International Criminal Jurisdiction: The First Phase*, 46 AM. J. INT'L L. 73 (1952); Advisory Opinion of the International Court of Justice on Reservations to the Convention on the Prevention and Punishment of Genocide, 1951 I.C.J. 15.

<sup>22</sup> Part I (2) of the Final Act of the International Conference on the Repression of Terrorism, League of Nations Official No. C. 548. M. 385. 1937. V.

<sup>23</sup> 7 U.N. GAOR Supp. (No. 11), U.N. Doc. A/2136 (1951); 9 U.N. GAOR Supp. (No. 12), U.N. Doc. A/2645 (1953); see also citations listed in note 21 supra.

December 9, 1948<sup>24</sup> specified in Article VI that there should be established an international penal tribunal which would have the authority to adjudicate violations of the Convention. Only the Convention on the Prevention and Suppression of *Apartheid* of November 30, 1973<sup>25</sup> specified in Article V for the creation of an "international penal tribunal." It was not until 1980 that the Ad Hoc Working Group on South Africa of the Commission on Human Rights commissioned this writer to prepare a Draft Statute for an international penal tribunal. This draft statute was accepted by the Working Group and circulated by the Commission on Human Rights to member states in 1981. Unfortunately, there has been no visible progress on the subject.<sup>26</sup> There have been efforts by some publicists to advance this idea, but their views have not yet been embodied in international instruments.<sup>27</sup>

The inability of the world community to reach political consensus on the creation of an international criminal court or on the development of alternative mechanisms that would have the features of a direct enforcement system has led to the furthering of the indirect enforcement system. This explains why an increasing number of conventions dealing with international crimes or multilateral and bilateral conventions relating to transnational and common crimes have adopted the conceptual formula *aut dedere aut judicare*.

The significant recurrent use of the explicit or implicit duty to prosecute or extradite in conventional international criminal law raises the question of whether this establishes a *jus cogens* principle with respect to international crimes.<sup>28</sup> In this event, the duty becomes a binding international obligation, irrespective of whether or not it is explicitly stated in any particular convention or a customary norm. This is true so long as the convention or customary norm explicitly or implicitly recognizes that the conduct in question constitutes an international crime.<sup>29</sup> The policy supporting the imposition of this duty is that there is no established international criminal court and therefore the only available mechanism for enforcement is the indirect enforcement scheme based on the duty to prosecute or extradite. Clearly, in the absence of such a duty and in light

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<sup>24</sup> 78 U.N.T.S. 277.

<sup>25</sup> G.A. Res. 3068, 28 U.N. GAOR Supp. (No. 50), U.N. Doc. A/9233/Add. 1.

<sup>26</sup> Report of M.C. Bassiouni to the Ad Hoc Working Group of Experts for the Commission on Human Rights, U.N. Doc. E/CN/4/1426 (1981), reprinted in part as Bassiouni & Derby, *Final Report on the Establishment of an International Criminal Court for the Implementation of the Apartheid Convention and Other Relevant International Instruments*, 9 HOFSTRA L. REV. 523 (1981).

<sup>27</sup> See citations listed in note 21 *supra*.

<sup>28</sup> See Bassiouni, *World Public Order and Extradition: A Conceptual Evaluation*, in AKTUELLE PROBLEME DES INTERNATIONALEN STRAFRECHTS 10 (D. Oehler & P. Potz eds. 1970).

<sup>29</sup> See Bassiouni, *infra* note 34.

of the nonexistence of an international criminal court which would have jurisdiction over such offenses, there would be no international criminal law.<sup>30</sup> Thus the duty to prosecute or extradite is concomitant to the indirect enforcement scheme without which there would be no enforceable international criminal law, regardless of the efficacy of this mechanism.

Historically the duty to prosecute or extradite, as it emerged and developed in the writings of scholars, was not limited only to international crimes. Indeed, it was advocated as a *civitas maxima* among states as part of their duty to cooperate in the preservation of their national order as well as in the preservation of world public order.<sup>31</sup> More recently it has been advocated to apply to transnational crimes.<sup>32</sup>

The duty to prosecute or extradite, even in the writings of scholars, is an imperfect obligation with respect to non-international crimes since these required either the existence of extradition treaties, national legislation or both.<sup>33</sup> In the course of the evolution of international criminal law, the duty can also be construed as imperfect because it emerged on an *ad*

<sup>30</sup> Professor G.O.W. Mueller is fond of quoting an unidentified "pundit" to the effect that "there must be an international criminal law, it is taught in universities by professors." See Mueller & Besharov, *supra* note 3, at 5. Hopefully the reality of enforcement can make international criminal law more than an academic subject, as Mueller and Besharov point out in their study. *Id.*

<sup>31</sup> See H. GROTIUS, *supra* note 8, § IV(1). For a philosophical perception, see Murphy, *The Grotian Vision of World Order*, 76 AM. J. INT'L L. 477 (1982); E. DE VATTEL, *LE DROIT DES GENS*, BOOK II, CHAP. VI, §§ 76, 77 (1978), in *CLASSICS OF INTERNATIONAL LAW* (Fenwick, trans. 1916); WOLFF, *JUS GENTIUM METHODO SCIENTIFICA PER TRACTATUM* § 152 (1764), in *CLASSICS OF INTERNATIONAL LAW* (Drake trans., 1934). S. Puffendorf, who relied on the work of Grotius, was more of a positivist on this question, in *THE ELEMENTS OF UNIVERSAL JURISPRUDENCE*, BOOK II, CHAP. III, § 23-24 (1672, W. Oldfather trans. 1931). See generally 1 M.C. BASSIOUNI, *INTERNATIONAL EXTRADITION IN U.S. LAW AND PRACTICE* ch. 1, § 2-1 (1983); M.C. BASSIOUNI, *INTERNATIONAL EXTRADITION AND WORLD PUBLIC ORDER* 607 (1974); C. VAN DE WIJNGAERT, *THE POLITICAL OFFENCE EXCEPTION TO EXTRADITION: THE DELICATE PROBLEM OF BALANCING THE RIGHTS OF THE INDIVIDUAL AND THE INTERNATIONAL PUBLIC ORDER* 8, 132-40 (1980); Derby, *Duties and Powers Respecting Foreign Crimes*, 30 AM. J. COMP. L. 523, 530 n. 40 (Supp. 1982). My friend and colleague, Professor E.M. Wise, had also postulated this hypothesis in Wise, *Some Problems of Extradition*, 15 WAYNE L. REV. 709, 720-23 (1968), and Wise, *Prolegomenon to the Principles of International Criminal Law*, 16 N.Y.L.F. 562, 575 (1970), but he made clear thereafter that it was only a hypothesis which he rejected, see Wise, *Book Review*, 30 AM. J. COMP. L. 362, 370 n. 64 (1982).

<sup>32</sup> See Bassiouni, Working Paper on International Norms and Standards in International Criminal Law, presented to the Meeting of the U.N. Committee of Experts convening at the International Institute of Higher Studies in Criminal Sciences (Siracusa), January 10-15, 1983, in connection with the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders, on Crime Prevention and Criminal Justice in the Context of Development: Challenges for the Future (1982) (unpublished) (copy on file with Case Western Reserve Journal of International Law).

<sup>33</sup> See M.C. BASSIOUNI, *INTERNATIONAL EXTRADITION AND WORLD PUBLIC ORDER* 1-23 (1974); 1 M.C. BASSIOUNI, *INTERNATIONAL EXTRADITION IN U.S. LAW AND PRACTICE* ch. 1, § 3 (1983).

*hoc* basis in international criminal law conventions: some conventions do not explicitly state the duty. Only now, after consistent re-affirmation of the duty to prosecute or extradite in conventional international criminal law, can it be argued that this principle constitutes a *jus cogens* principle. The duty itself has not been expressed with sufficient specificity to indicate whether it is an alternative or co-existent duty. Whatever little doctrine there is on the subject, it is unclear whether the duty to prosecute or extradite is disjunctive or co-existent. As stated by this writer:

Doctrine is unclear as to the meaning of "alternative" or "disjunctive" and "coexistent" obligations to extradite. The following distinction is suggested. If the duty to extradite or prosecute is an alternative or disjunctive one, then there is a primary obligation to extradite if relevant conditions are satisfied, and a secondary obligation to prosecute under national laws if extradition cannot be granted. Thus, the duty to prosecute when it arises under national law leaves the requesting state with no alternative recourse.

If the duty to extradite or prosecute is co-existent rather than alternative or disjunctive, then the requested state can choose between extradition or prosecution at its discretion. As a result, the state may refuse to extradite the relator to one state, but later agree to extradite him or her to another state or to prosecute. In any event when a state elects to prosecute then discretion plays a broader role, and can be invoked without a breach of treaty or other international obligations.

The doctrine usually expressed is that the international obligation to extradite or prosecute if it exists would be construed as a co-existent duty provided that national law permits it.

There is a general doctrinal failure to consider states' international obligations deriving from treaties regarding international crimes, such as war crimes, slavery and slave-related practices, aircraft hijacking, and the kidnapping or taking as hostage of diplomats or civilians, etc. Almost all of the multilateral conventions regarding these international crimes specifically require signatory states to extradite or prosecute violators of the treaties' proscriptions: in other words, they place upon states the alternative duty *aut dedere aut judicare*. Thus, a signatory state to such conventions that refuses to extradite an alleged offender of one of these proscriptions, when the conventions constitute the legal basis for the extradition request, is under a positive duty to prosecute the individual. Failing this, the requested state is in violation of its obligations under the conventions.<sup>34</sup>

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<sup>34</sup> Bassiouni, *General Report on the Juridical Status of the Requested State Denying Extradition*, in PROCEEDINGS OF XI<sup>TH</sup> INTERNATIONAL CONGRESS OF COMPARATIVE LAW OF 1982 (in print).

## CONCLUSION

For a given act or conduct to be deemed an international crime is by virtue of its inclusion in an international convention containing one or more of the eight penal characteristics previously described. While this article examines the characteristics of international criminal law, it also raises the question of defining the rationale of international crimes; namely, the international and transnational elements. Presently neither international instruments nor contemporary doctrine has provided a satisfactory framework for defining these elements and identifying their content and parameters. This remains a task to be accomplished.<sup>35</sup>

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<sup>35</sup> The some 325 conventions having any of the eight penal characteristics outlined in this article will be the object of a book by this author entitled *INTERNATIONAL CRIMES: A DIGEST/INDEX OF CONVENTIONS AND RELEVANT PENAL PROVISIONS* (Oceana 1984). It will contain a list of these conventions and their appropriate references and alternative citations as well as a chart detailing these seven characteristics outlined herein and excerpts of these provisions from the conventions.

