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AN ANALYTICAL FRAMEWORK FOR INTERNATIONAL CRIMINAL LAW: Realism and Interest Alignment

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INTRODUCTION

Dictionaries generally define law as a body of rules regarded as binding. Jurists find such a simplistic approach troubling, but most of their concerns can be addressed by adding two qualifications: that rules often require principled interpretation, and that frequent violations do not *per se* negate the binding quality of these rules.[1] Within the legal systems of states, such a qualified definition works rather well because there is solid consensus as to the sources of rules of law and what kinds of interpretations are proper, and the binding quality of rules is routinely passed upon by decision-makers exercising demonstrable power under that system.

In the realm of international law, however, derivation and interpretation of rules is more complex, subtle and controversial. This Article examines one field of international law—international criminal law—and looks for rules that qualify as rules of law. It notes that there is reason to wonder not only about the meanings or binding qualities of particular rules, but even which sets of rules are properly

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* Associate Professor, Touro College School of Law. The published and unpublished insights of Professor M. Cherif Bassiouni, whose dogged pursuit of policy structure in this undisciplined discipline have made him its leader, have been of incalculable value in generating this work. The contribution of Peter Tilles (J.D. cand., Touro College School of Law) in preparing this manuscript is gratefully acknowledged. Virtually all of this article is derived from two chapters to appear in a treatise, *International Criminal Law* (M.C. Bassiouni, ed. 1985), and is subject to copyright of Transnational Publishers, Inc.

1. That law involves binding force is accepted by proponents of all three major branches of jurisprudence. *See generally* G. CHRISTIE, JURISPRUDENCE 751-56 (1973) (discussing in particular, A. HAGERSTROM, INQUIRIES INTO THE NATURE OF LAW AND MORALS (1953)) [hereinafter cited as CHRISTIE]. That violations or other neglect of law might undermine its status as law presents problems only for realists, but they deal with behavior deviating from law by rejecting such behavior when it is not predictive as to general behavior in the future. *See, e.g.*, A. ROSS, ON LAW AND JUSTICE (1958), *excerpted in* CHRISTIE, *supra* at 759-85. The need for interpretation is admitted by all three branches, but is given particularly structured treatment by modern writers. *See, e.g.*, E. LEVI, AN INTRODUCTION TO LEGAL REASONING 1-9 (1948); Llewellyn, *A Realistic Jurisprudence: The Next Step*, 30 COLUM. L. REV. 431 (1930) [hereinafter cited as Llewellyn].

grouped under that label, and whether they are best viewed as rules grounded in international law or as rules grounded in legal systems of states.

This Article notes the usefulness of the conceptual approaches of the jurisprudential school of legal realism as tools for classifying legal rules according to their functions, then uses them in an examination of existing models of international criminal law. Serious shortcomings of these models are identified and their inadequacy for guiding pending efforts to formulate and effectuate legal rules in this realm is illustrated.

Finally, an effort is made to specify the essential features of an adequate model and to describe a framework for development of that model.

I. THE PROBLEM OF AN INTERNATIONAL CRIMINAL LAW — 1984

The legal force[2] of international law has been questioned due to the general unavailability of institutional enforcement mechanisms. Skeptics have questioned whether international law should be treated as "law" rather than morality,[3] but those involved in this realm are confident that it shapes the behavior of states in ways morality alone would not.[4] However, even the most dedicated scholars of international law admit that the lack of enforcement creates a situation in which the many ambiguities in international law norms and the problems of information management leave states with regrettably great freedom of action. This is because only when the well established facts concerning their conduct fall within the core of consensus as to the meaning of an international law proscription will states

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2. The term "legal force" is intended as a shorthand reference to the status of a rule as binding, particularly its validity for prediction of legal behavior in accordance with the approach of legal realism.

3. The most notable recent remarks to this effect may be the following:

> As I have already intimated, the law obtaining between nations is law (improperly so-called) set by general opinion. The duties it imposes are enforced by moral sanctions: by fear on the part of nations, or by fear on the part of sovereigns, of provoking general hostility, and incurring its probable evils, in case they shall violate maxims generally received and respected.

J. AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 201 (1954).

4. The argument that international law is a distinctive force has been advanced by several commentators. *See, e.g.*, H. HART, THE CONCEPT OF LAW 222 (1961) [hereinafter cited as HART]; J. BRIERLY, THE LAW OF NATIONS 54-55 (1963); *cf.* Williams, *International Law and the Controversy Concerning the Word "Law"*, 22 BRIT. Y.B. INT'L L. 146 (1972) (dismissing the controversy as a semantic problem).

feel the consequences of their actions as violations of international law.[5]

The legal force of international criminal law poses special problems. The most dramatic manifestation was at the post-World War II Nuremberg trials, but these have been attacked as mere examples of "victors' justice."[6] Even those sympathetic to both the goals of these trials and the idea of an international criminal law have conceded that municipal enforcement rather than international law was their crucial characteristic.[7] Another example is provided by

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5. For a full discussion of ambiguities in principles and facts, see L. HENKIN, HOW NATIONS BEHAVE 25-26, 320-21 (2d ed. 1979) [hereinafter cited as HENKIN], *excerpted in* INTERNATIONAL LAW (L. Henkin, R. Puch, O. Schacter & H. Smit eds. 1980) [hereinafter cited as INTERNATIONAL LAW], in which the matters discussed in this and the preceeding two notes is explored.

6. The criticism is reflected in an early text, M. HANKEY, POLITICS, TRIALS AND ERRORS (1950) [hereinafter cited as HANKEY], and is so well recognized that it is acknowledged as a background consideration for elaboration of a Draft Code of Offenses Against the Peace and Security of Mankind, Report of the International Law Commission to the General Assembly, 38 U.N. GAOR Supp. (No. 10), U.N. Doc. A/CN. 4/364 (1983) [hereinafter cited as Report of International Law Commission (1983)].

7. *See, e.g.*, THE UNITED NATIONS WAR CRIMES COMMISSION, HISTORY OF THE UNITED NATIONS WAR CRIMES COMMISSION 203-04 (1948) [hereinafter cited as HISTORY OF UNITED NATIONS].

> As far as State sovereignty was concerned, both the draftsmen of the Charter [of the International Military Tribunal] and the Court were operating in a vacuum, as it were, the sovereignty of the German State as the obstacle barring the enforcement of justice having been destroyed by the historic events of May and June, 1945. In view of this fact, it is doubly significant that the Charter and the Tribunal respected German sovereignty to the extent of subjecting to the Court's jurisdiction only such criminal activities as were connected with either crimes against peace or with violations of the laws and customs of war, i.e., only such acts as directly affected the interests of other states. It is by no means a novel principle in international law that the sovereignty of one state does not prevent the punishment of crimes committed against other States and their nationals. . . .
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> In its judgment the Tribunal stated that in creating the Tribunal the signatory Powers "have done together what any one of them might have done singly; for it is not to be doubted that any nation has the right thus to set up special courts to administer law." In addition, the Tribunal expressed the opinion that "the making of the Charter was the exercise of the sovereign legislative power by the countries to which the German Reich unconditionally surrendered; and the undoubted right of these countries to legislate for the occupied territories has been recognized by the civilized world." (Citing Judgment, at 38).
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> These brief statements of the Tribunal as well as the relevant provisions of the (London) Agreement and the Charter, raise a number of intrinsic problems and questions as to the exact status of the Nuremberg Tribunal and its military, international, judicial and *ad hoc* characteristics which are of primary relevance in assessing properly the importance of the Nuremberg trial and the authority of the Nuremberg Judgment for the development of international law in general, and for the protection of human rights in particular.

Id. (footnotes omitted).

terrorism, one of the major problems against which international criminal law has been invoked. Yet, effective cooperation has been elusive. This is due in part to definitional difficulties; it has been noted that what is terrorism to some is heroism to others.[8] Moreover, one distinguished scholar of international law has observed that the term "international criminal law" admits of at least six possible meanings.[9] Despite the passage of decades since his query as to which meaning or meanings would be appropriate, the field has yet to take a sufficiently concrete form to supply a clear answer.[10] As a result, the difference between law and morality in the field of international criminal law, as distinct from municipal criminal law, is particularly difficult to establish and the consequences of violations of international criminal law are not easily described.

The dissonance is debilitating. As to substantive offenses deserving to be called "international crimes," there is considerable consensus that at least four kinds of behavior are included: aggression,[11] war

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8. Bassiouni, *Methodological Options for the International Legal Control of Terrorism*, 7 AKRON L. REV. 388, 395-96 (1974).

9. These meanings include:

1. The law governing the territorial scope of municipal criminal law;
2. Internationally prescribed municipal criminal law norms;
3. Internationally authorized municipal criminal law operation;
4. Municipal criminal law common to all civilized nations;
5. The law of international cooperation in administering criminal justice; and
6. International criminal law in the "material sense" - penal proscriptions deriving from international law.

Schwartzenberger, *The Problem of an International Criminal Law*, in INTERNATIONAL CRIMINAL LAW 3-14 (G.O.W. Mueller & E.M. Wise eds. 1965) [hereinafter cited as Schwartzenberger].

10. The Formulation of the Nuremberg Principles presented in the Report of the International Law Commission to the General Assembly, 5 U.N. GAOR Supp. (No. 12) at 11-14, U.N. Doc. A/1316 (1950), provides that those who commit a crime under international law are responsible and liable to punishment. With the means by which such punishment would arise unspecified, any of the six Schwartzenberger meanings seem plausible. *See supra* note 9. In considering revision of the Draft Code of Offenses Against the Peace and Security of Mankind, the International Law Commission continues to puzzle over how punishment would be achieved. *See infra* note 108. A review of Glaser, *infra* note 20, which describes conventions for international criminal cooperation, complains that the compilation is "very heterogeneous," and that, "while Glaser apparently holds that all this can be brought under the umbrella of international criminal law, the present view ventures to suggest that the various subjects differ so widely, precisely where their possible relevance to criminal law is concerned, as to make this approach highly hazardous." Kolshover, Book Review, 74 AM. J. INT'L L. 458, 459 (1980) (reviewing Droit International Penal Conventionnel, Vol. II). Until the means for enforcement of international crimes is fixed, the meaning of "international criminal law" remains a six-fold headache.

11. Article 19 of the International Law Commission's Draft Articles on State Responsibility provides in section 3(a) that an "international crime may result . . . from . . . aggression." Report of the International Law Commission to the General Assembly, 35 U.N. GAOR Supp.

crimes,[12] genocide[13] and piracy.[14] However, there are varying degrees of support for inclusion of numerous others, ranging from slavery[15] and apartheid[16] through torture[17] and terrorism[18] to theft of

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(No. 10) at 64, U.N. Doc. A/35/10 (1980), *reprinted in* [1980] 2 Y.B. INT'L L. COMM'N 32, U.N. Doc. A/CN.4/SER.A/1980/Add. 1 (Part 2). It was also a crime prosecuted at Nuremberg in accordance with the London Agreement, 82 U.N.T.S. 280, and is an offense in the Draft International Criminal Code developed by M. Cherif Bassiouni in conjunction with the International Association of Penal Law. M.C. BASSIOUNI, INTERNATIONAL CRIMINAL LAW: A DRAFT INTERNATIONAL CRIMINAL CODE 52 (1980) [hereinafter cited as BASSIOUNI CODE].

12. War crimes were also Nuremberg crimes, London Agreement, *supra* note 11, and are treated in BASSIOUNI CODE, *supra* note 11, at 56-69. For "grave breaches" the Geneva Conventions of 1949 on the Humanitarian Law of Armed Conflicts require parties to "enact any legislation necessary to provide effective penal sanctions." *Id.* at 62.

13. The widely accepted Convention on the Prevention and Punishment of the Crime of Genocide, 78 U.N.T.S. 277, Dec. 9, 1948 [hereinafter cited as Genocide Convention], provides in Article 1 that genocide, "whether committed in time of peace or in time of war, is a crime under international law which [contracting parties] undertake to prevent and punish."

14. Piracy on the high seas has generally been regarded as the original international crime because of the availability from at least the eighteenth century of "universal jurisdiction" for its punishment, a matter recognized in the United Nations Conference on the Law of the Sea, Convention on the High Seas, April 29, 1958, 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82. Availability of universal jurisdiction has been seen by some as the essence of the meaning of the term "international crime." Israel used this notion in asserting that Adolf Eichmann's genocidal conduct, being an international crime, subjected him to jurisdiction of any state whatever. *See* P. PAPADATOS, THE EICHMANN TRIAL (1964); M. PEARLMAN, THE CAPTURE AND TRIAL OF ADOLF EICHMANN (1963); E. RUSSELL, THE TRIAL OF ADOLF EICHMANN (1962). BASSIOUNI CODE, *supra* note 11, at 110-13, does not make the assumption that all states may punish all international crimes, but it does assume that all states may undertake a duty to extradite as an alternative to prosecution.

15. Slavery is included in BASSIOUNI CODE, *supra* note 11, at 78-79, on the basis of numerous widely-accepted international conventions calling for its eradication. *See id.* commentary at 80-81.

16. Apartheid is also included as an offense in BASSIOUNI CODE, *supra* note 11, at 76-77, on the basis of U.N. documents and, particularly the 1976 International Convention for the Prevention and Suppression of the Crime of Apartheid, G.A. RES. 3068, 28 U.N. GAOR (No. 50), U.N. DOC. A/9233/Add. 1 (1973) [hereinafter cited as Apartheid Convention], *reprinted in* UNITED NATIONS, HUMAN RIGHTS: A COMPILATION OF INTERNATIONAL INSTRUMENTS 30 (1978) [hereinafter cited as UNITED NATIONS], which states in Article I that "apartheid is a crime against humanity." By September of 1978 the Apartheid Convention had been ratified by 46 states versus 82 for the Genocide Convention.

17. Torture is included in BASSIOUNI CODE, *supra* note 11, at 82, on the multiple bases of its condemnation in international conventions and in nearly all municipal constitutions as well as its condemnation in a General Assembly Declaration and the pendency in the United Nations, subsequently approved by the General Assembly and opened for signature, 10 Dec. 1984, 23 I.L.M. 1027, of a draft convention against torture, *id.* commentary at 82-84. One version of a draft convention introduced by the International Association of Penal Law would have declared torture an international crime with consequential duties on states to either prosecute or extradite those accused of it, *see* Bassiouni & Derby, *An Appraisal of Torture in International Law and Practice*, 48 REVUE INTERNATIONALE DE DROIT PÉNAL 17 (1978) [hereinafter cited as Bassiouni & Derby]. The current form does not.

18. BASSIOUNI CODE, *supra* note 11, contains no offense by this name, but includes Crimes Relating to International Air Communications, *id.* at 88, Threat and Use of Force Against

archaeological and art treasures[19] and trafficking in obscene publications.[20] How to determine what kinds of behavior merit such treatment is a threshold area of disagreement,[21] but even if this hurdle were overcome there would remain an enervating impasse over the correct definition of most offenses. For example, of the four enjoying widest support for inclusion as international crimes, only piracy is described by consensus in sufficiently specific terms to function as a criminal law proscription.[22]

Internationally Protected Persons, *id.* at 90, and Taking of Civilian Hostages, *id.* at 92. *See* R. FRIEDLANDER, TERRORISM: DOCUMENTS OF INTERNATIONAL AND LOCAL CONTROL (1981) (indicating the range of conduct that has raised international criminal law issues). The European Convention on the Suppression of Terrorism, Jan. 27, 1977, Europ. T.S. 90 [hereinafter cited as European Terrorism Convention], is the most important recent effort. Its Article I embraces the same subjects as BASSIOUNI CODE provisions, then adds, "an offence involving the use of a bomb, grenade, rocket, automatic firearm or letter or parcel bomb if this use endangers persons," and specifically covers attempt and complicity in all of the mentioned crimes.

19. Theft of National and Archeological Treasures is treated in BASSIOUNI CODE, *supra* note 11, at 98-99, based on the UNESCO convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Art Treasures, Nov. 14, 1970, *reprinted in* 10 I.L.M. 289 (1971). A significant number of other conventions and international documents expressing concern for this phenomenon exist. *See, e.g.*, Bassiouni, *Reflections on Criminal Jurisdiction in International Protection of Cultural Property*, 10 SYRACUSE J. INT'L L. AND COM. 281 (1983); Nafziger, *Comments on the Relevance of Law and Culture to Cultural Property Law*, 10 SYRACUSE J. INT'L L. AND COM. 323 (1983).

20. Such an offense is listed in BASSIOUNI CODE, *supra* note 11, at 106, based on conventions concluded during the first half of this century, *see id.* commentary. *See also* C. LOMBOIS, DROIT PÉNAL INTERNATIONAL 196-97 (2d ed. 1979) [hereinafter cited as LOMBOIS]; S. GLASER, DROIT INTERNATIONAL PÉNAL CONVENTIONAL 483-502 (1971).

21. Vespasien Pella, one of the prominent pioneers of the field presented the following definition: "any action or omission violating the fundamental requirements of the maintenance of international order." V. PELLA, LA CRIMINALITÉ DE LA GUERRE D'AGRESSION 12 (1948).

The Nuremberg Tribunal punished crimes of aggression and war crimes plus "crimes against humanity" committed in connection with aggressive war, despite wording in the London Charter that would have permitted punishment of such conduct even if it occurred before the war. HISTORY OF UNITED NATIONS, *supra* note 7, 194-95. The Draft Code of Offenses Against the Peace and Security of Mankind, U.N. Doc. A/CN.4/85 (1954) takes the Charter view.

Bassiouni relies on no concise definition, but considers proscriptions of two broad classes to be suitable candidates for treatment in an international criminal codes, ones involving harm to global interests and ones relating to conduct implicating interests of two or more states. The crimes focused on by Pella and the Draft Code of Offenses Against the Peace and Security of Mankind would fit the first category; aircraft hijacking and attacks on internationally protected persons would fit the second. A terse description of his criteria's consequences might be "conduct inherently threatening interests of more than one state."

22. The Nuremberg principles, *supra* note 10, offer a nonexhaustive listing of examples for war crimes; the consensus definition of aggression makes the status of an instance of use of armed force as "aggression" depend on subsequent Security Council action, *see infra* note 110. Genocide, as the core of meaning of "crimes against humanity" is given the most careful treatment, and the most precise formulation is in the Genocide Convention, *supra* note 13, which, in Article II, lists reasonably clear examples of violative acts, but requires that they have been done with "intent to destroy, in whole or in part, a national, ethnic, racial or reli-

As to general principles of accountability, such as vicarious liability, culpable mental states or defenses, international criminal law offers little upon which there is wide agreement and most of it takes a negative form. A vague principle of "command responsibility" is touted,[23] as is an eviscerated defense of obedience to superior orders,[24] and, at least as to "war crimes and crimes against humanity," statutes of limitation are inapplicable.[25]

Intertwined with these shortcomings is the lack of agreement on appropriate reference points for enforcement, yet identifying precise definitions of offenses and principles of accountability might well depend on what institutions are to prosecute, try and punish. Proposals have been made to establish an international criminal court,[26] but its ability to obtain custody of suspects would depend critically on cooperation from states. The fact that no such court has been created indicates state reluctance to undertake such duties of cooperation, yet this mere inaction provides few clues as to causes for reluctance or how such reluctance might be overcome. On the other hand, leaving enforcement to states may be workable with respect to piracy,

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gious group" as such, but makes no provision for consideration of the mental state of the actor, if other than intent. BASSIOUNI CODE, *supra* note 11, commentary at 73.

23. BASSIOUNI CODE, *supra* note 11, does not reflect such an expansionist view in its General Part, Article V, Section 1.5.0, relying instead on a formulation resembling common municipal standards and reflecting the requirements of Geneva Convention IV. The broad view of command responsibility has its basis in the Judgment of the Tokyo War Crimes Trial, *excerpted in* 1 M. BASSIOUNI & V. NANDA, A TREATISE ON INTERNATIONAL CRIMINAL LAW 615, 617-18 (1973) [hereinafter cited as BASSIOUNI & NANDA]. The principle may have been applied at its maximum (or beyond its maximum) in non-international trials of two Japanese commanders at Manila before a U.S. military commission. *See, e.g.*, J. TAYLOR, A TRIAL OF GENERALS (1983) (author implies that one of the generals whose culpability was related to these trials was General Douglas MacArthur, upon whose authority the commission acted).

24. This emerges from Principle IV of the Nuremberg Principles, *supra* note 10.

25. Convention on the Nonapplicability of Statutory Limitations to War Crimes and Crimes Against Humanity, Dec. 9, 1968, G.A. Res. 2391 (XXIII), *reprinted in* UNITED NATIONS, *supra* note 16, at 46.

26. Official U.N. efforts in this regard include development of a Draft Statute for an International Criminal Court, Report of the 1953 Committee on International Criminal Jurisdiction, 9 U.N. GAOR Supp. (No. 12) at 23, U.N. Doc. A/2645 (1954), which has languished pending development of a Draft Code of Offenses Against the Peace and Security of Mankind, which in turn was delayed for nearly two decades pending elaboration of a definition of aggression. Another effort in the U.N. is a draft statute for a court designed to deal solely with apartheid. U.N. Doc. E/CN.4/1426 (1981). *See also* 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). A non-U.N. general draft appears in *Bulletin of the 59th Conference of the International Law Association* 11 (R. Dalco ed. 1980). *See also* J. STONE & R. WOETZEL, TOWARD A FEASIBLE INTERNATIONAL CRIMINAL COURT (1970) [hereinafter cited as STONE & WOETZEL]. For a comprehensive background, see B. FERENCZ, AN INTERNATIONAL CRIMINAL COURT, A STEP TOWARD PEACE: A DOCUMENTARY HISTORY AND ANALYSIS 399 (1980).

and possibly genocide,[27] but for aggression[28] or even war crimes,[29] reliance on states poses serious problems: the states with the greatest motivation to act against such conduct will normally have no timely opportunity to do so.[30]

This points to a major irony. To the extent that an international criminal law process is envisioned as a branch of international law independent from state sensibilities, it appears powerless; yet to the extent that it is viewed as intertwined with state criminal law policy, it looks less like a branch of public international law and more like a branch of municipal law. Yet, if international criminal process is left to states, what effective remedy can be found when states fail in their obligations?[31]

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27. Although piracy, if backed by a state, could find a haven that would pose enforcement problems, the obligation of states to refrain from sponsoring piracy seems to have been respected, leaving states with no motive to harbor pirates and some municipal inclinations to punish them, for there has been no recent move to create special international enforcement mechanisms. It must be noted, however, that pirates preying on Vietnamese refugees in the Gulf of Siam became a problem of sufficient gravity to involve the U.N. High Commissioner for Refugees in delicate discussions with Thailand on the use on non-Thai vessels to police the area. *See, e.g., Increased Attack on "Boat People" Reported,* N.Y. Times, May 19, 1985, at 23, col. 1.

As to genocide, where the government of a state is not motivated to support it, its prohibition seems assured by municipal action. The Genocide Convention, *supra* note 13, seems to assume such conditions, for it does not obligate signatories to extradite accused persons except in accordance with "their laws and treaties in force" (Article VII), and it contemplates their trial in the state where the acts in question occurred unless that state has accepted jurisdiction of an international penal tribunal (Article VI), so that the only means for assuring compliance where a state's government is motivated to support genocidal activity are relatively indirect ones - appeals to U.N. organs, including the International Court of Justice (Articles VIII and IX) - that may be ineffective in the face of contrary municipal law.

28. Aggression, by its nature, involves complicity of the government of the state from whose territory it is launched, assuring that a haven will be available for those who carry it out, unless a drastic change of government occurs.

29. Although many war crimes may occur without complicity of high government officials, the motivation of a government to try its military for such crimes is diminished by its concerns for morale. *See, e.g.*, T. TAYLOR, NUREMBERG AND VIETNAM: AN AMERICAN TRAGEDY (1970).

30. The My Lai massacre illustrates the problem; the state strongly motivated to pursue command responsibility beyond the level of field-grade officers was either the Democratic Republic of Vietnam or South Vietnam, through the alternative government of the Central Organization for South Vietnam, neither of which was in a practical position to act effectively. Accountability of Axis war criminals was made effective by Allied military conquests leading to unconditional surrender of Axis States. It should be noted that in the accompanying confusion, a number of major criminal suspects escaped. *See infra* note 54 and accompanying text.

31. The problem is especially acute when municipal law of the state that is in violation of an obligation to prosecute or extradite does not authorize either action. Derby, *Duties and Powers Respecting Foreign Crimes*, 30 AM. J. COMP. L. 523 (Supp. 1982) [hereinafter cited as Derby]. Neither reparations nor apologies would seem to be adequate remedies, and an indication of provisional measures by the International Court of Justice would be unavailing in view of municipal incapacity. Although one could argue that the obligation to take enforcement

One ready approach to clarifying such matters would be the use of one or more multilateral treaties. However, such conventions will not attract adherents if their only purpose is to clarify; they must be designed to serve the interests of states, or interests of the overall international community in which individual states concur. However, because it is difficult to find agreed upon and coherent descriptions of key features of international criminal law, it is by no means clear what interests of states are served by its past operation. As a result, it is difficult to assert with confidence what interests proposed conventions would have to serve in order to attract adherents, thus making it difficult for a proponent to argue the merits of a given proposal in convincing terms. One example which highlights the point is a proposal to deal with the definitional problems of "terrorism" by creating an armed force,[32] which would destroy "criminal" regimes whose behavior could provoke arguably justifiable attacks of a terroristic nature; then, with only "good" governments in power, all anti-government attacks that do not conform to the laws of war would be punishable internationally as crimes of terrorism.

A second approach is to attempt to inventory and analyze the various principles or putative principles relevant to the topic of international criminal law. Numerous scholars under the leadership of the International Association of Penal Law have contributed in various ways to such an effort, which has culminated in the development of an annotated Draft International Criminal Code.[33] That Code, however, has not as yet produced from the chaos of its sources a coherent theory of international criminal law that fully explains the background data in terms of policies that are credible or acceptable. Although it is a revolutionary and invaluable compilation and implementation initiative, it does not disclose the full significance of its subject matter.[34]

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action remains breached until such action is taken, the impact of such international responsibility is difficult to calculate; only a major change in law-making policy on the municipal level could result in purgative action and the declaration of such an international breach is unlikely to be a major factor expediting such change.

32. Milte, *Prevention of Terrorism Through the Development of Supra-National Criminology*, 10 J. INT'L L. & ECON. 519 (1975).

33. *See supra* note 11. The Code lists twenty substantive offenses in its Special Part, appends a General Part treating principles of culpability with a modified common law approach, and contemplates implementation through a multilateral convention and enforcement by either states-parties or an international criminal court.

34. The BASSIOUNI CODE, *supra* note 11, is openly ambivalent as to whether it is a restatement of existing confused norms rendered in clear terms or a positivistic proposal for law-making. Since some of the policy implications of its provisions are unclear or of debatable validity, Professor Claude Lombois of the University of Paris has described it as a *Code-*

What follows is an attempt to sketch a few touchstones for a theory of international criminal law that has been implicit but unarticulated in contemporaneous explorations of this field.[35] The ideas presented owe much to that work. By their nature it would seem that they ought to have broader ramifications, but circumstances prevent exploration beyond their impact on international criminal law.

II. THE RELEVANCE OF LEGAL REALISM

A leading United States text charts the progress of international law from natural law foundations to legal positivist reactions and on into the eras of the League of Nations and the United Nations.[36] It does not, however, offer any evidence of the entry of international law into the era of legal realism, even though one of its editors and contributors has authored a work entitled *How Nations Behave*.[37]

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miroir, suggesting that any imperfection in its reflections could be traceable to either contemporary international criminal law or to the mirror. Lombois, *Observations sur L'Avant-Projet de Code Pénal International et Rapport Final sur les Débats du Séminaire International de l'Institut de Syracuse sur l'Avant-Projet*, 52 REVUE INTERNATIONALE DE DROIT PÉNAL 531, 533 (1981).

35. As will be apparent, much reliance is placed on concepts found in works by Bassouni. However, the most crucial aspect of the theory to be expounded is its embracing of a broad base of data as relevant; it considers all aspects of criminal law that reflect more than unilateral municipal perspectives to be within the domain of inquiry. Such a perspective has antecedents in, *e.g.*, INTERNATIONAL CRIMINAL LAW, *supra note* 9; H. DONNEDIEU DE VABRES, LES PRINCIPLES MODERNES DU DROIT PÉNAL INTERNATIONAL (1922); V. PELLA, LA CODIFICATION DU DROIT PENAL INTERNATIONAL (1928); LOMBOIS, *supra* note 20; Jescheck, *Etat Actuel et Perspectives d'Avenir des Projet Dans le Domaine du Droit International Pénal*, 35 REVUE INTERNATIONALE DE DROIT PÉNAL 83 (1964); *see also supra* note 17; BASSIOUNI & NANDA, *supra* note 23.

One notable scholar has called for a "major effort to examine the theoretical understructure of international law and place it on a consistent and satisfactory footing." D'Amato, Book Review, 34 J. LEG. EDUC. 742, 743 (1984) (reviewing THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW: ESSAYS IN LEGAL PHILOSOPHY DOCTRINE AND THEORY). The possibility that the kind of reexamination proposed here for international criminal law is related to the broader reexamination he proposes cannot be dismissed.

36. INTERNATIONAL LAW, *supra* note 5, at 3-9.

37. HENKIN, *supra* note 5. Professor Henkin does attempt to show that criticisms of some aspects of international law by "realists" are unwarranted, *id.* at 137-38; that international law exerts realistic influence, *id.* at 92-95. His efforts, however, seem limited to establishing that public international law can be reconciled with the exigencies of legal realism; he does not convincingly demonstrate a framework for bringing legal realism to bear on problem-solving in the realm of international law. M. MCDOUGAL & F. FELICIANO, LAW AND MINIMUM WORLD PUBLIC ORDER (1961) [hereinafter cited as MCDOUGAL & FELICIANO], sets forth a policy-oriented framework that undeniably seeks to utilize legal realism in indicating ways in which to identify and critique policy options that would serve world public order. Its own importance is undeniable, but its overall utility as a framework for analyzing the entire spectrum of problems in international law is subject to notable limitations. These stem in large part from its reliance on the unproved assumption that world public order is a paramount value in inter-

One apparent problem is that legal realism, particularly as manifested in the writings of United States scholars, has been pre-occupied with decision-making in concrete cases,[38] and the absence of institutions for regular adjudication of international law violations makes direct application of the wisdom of legal realism troublesome.

However, only by focusing on decision-making with respect to particular matters is it possible to narrow issues to permit cogent discussion, and this narrowing function of legal realism is crucial to its greatest potential, its role as a tool for predicting legal behavior.[39] Such prediction would facilitate consideration of what international criminal law has entailed to date, the policies to which it has been responsive and that it may serve in the future, and how it might be implemented in their service.[40] The appropriate inquiry concerning a

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national policy making with the counter-balancing value of national sovereignty treated as an impediment to be eroded. In a great variety of situations, this perspective seems workable, for many of the prerogatives claimed by states would be unnecessary or counterproductive if certain changes in the status quo to more effectively assure world public order were implemented. However, it leaves little room for consideration of behavior based on a contrasting view that some steps that would enhance world public order may be less desirable than maintaining local autonomy. Because local autonomy preference seems active in actual international behavior, the policy-oriented framework is not well-suited to illuminating much actual behavior of international actors; it invites rejection of such behavior as inappropriate.

Moreover, at some point along the continuum of world public order, it would appear that the policy-oriented framework would lose its claim of legitimacy to local autonomy values, for it would seem hostile to any state of affairs short of world union under a uniform set of laws and there seems no reason to believe that such extreme conformity is desirable.

Finally, although it is not blind to municipal factors, *see* McDougal, *The Impact of International Law Upon National Law: A Policy-Oriented Perspective*, 4 S.D.L. REV. 25 (1959) [hereinafter cited as McDougal, *Impact of International Law*], there is no particular feature of the framework that invites consideration of the possibility that some impacts on municipal law could be especially difficult or impossible to achieve. There being no objective basis for dismissing such a possibility, this shortcoming is potentially important even for behavior far short of extremes of conformity. *See also* McDougal, Lasswell & Chen, *Human Rights and World Public Order: A Framework for Policy Oriented Inquiry*, 63 AM. J. INT'L L. 237 (1969).

38. *See, e.g.*, Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897) (emphasizing law as involving prophecies of what courts will do in fact); Llewellyn, *supra* note 1 (adding that seeing beyond words of decision-makers to what they are actually doing is essential to proper identification of the factors influencing behavior of legal actors); Oliphant, *A Return to Stare Decisis*, 14 A.B.A. J. 71 (1928) (arguing that only concrete decisions provide objective data suitable for scientific study).

The Americans are not alone. *See, e.g.*, A. ROSS, ON LAW AND JUSTICE 268-85 (1958) (in which a similar emphasis on prediction based on actual decision-making behavior is reflected).

39. Llewellyn, *supra* note 1, at 447-53 observes a distinction between "paper rules" whose lack of predictive capacity is reflected in decision-making behavior, and real rules having some predictive value, which can be augmented by appreciating the interests and related values served and sacrificed through them.

40. At a minimum, realistic analysis in the tradition represented by Llewellyn appears useful for identifying value preferences in various contexts within a legal system. Prediction is

given example of state conduct would be: What are the consequences that a decisionmaker relying on international law would assign to that conduct? As a refinement, it would be useful to consider the consequences of contrasting conduct.

Such an approach should be applied to the two leading paradigms of international criminal law — the Nuremberg trials and international cooperation in criminal law enforcement.[41] This will reveal that neither paradigm by itself offers a solid basis for prediction of future conduct of states with respect to so-called "international crimes." The latter, however, with an additional framework, offers a means for anticipation that encompasses and eclipses the significance of the former.

III. PARADIGMS OF INTERNATIONAL CRIMINAL LAW—ASSESSMENT OF THEORIES

A. Some Carefully Chosen (Hohfeldian) Words About Nuremberg

1. A Framework for Examining Law in Action

There is general agreement that law can operate without formal institutions,[42] and this may be true as to criminal law as well.[43] However, there are minimum conditions for law to function in a way that separates it from morality. In particular, there must exist norms that are knowable to those who act on behalf of or in response to

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premised on the expectation that behavior is likely to be repeated in the absence of changed circumstances, but the problem of determining what changes in circumstances will change behavior sometimes resists rigorous treatment. However, it is clear that realistic analysis narrows and structures discourse, facilitating discussion of factors having apparent predictive value.

For international criminal law, such structured discussion of values in particular contexts would seem extremely helpful in considering what proposals would have potential for effectiveness.

41. Most U.N. efforts respond to the Nuremberg model. *See supra* notes 10, 11 and 26. *See also* STONE & WOETZEL, *supra* note 26.

Those with the broader focus on international criminal cooperation include authorities mentioned in note 35, *supra.*

42. Ross, *Tû-Tû*, 70 HARV. L. REV. 812 (1957) [hereinafter cited as Ross], is one example of application of legal realism to primitive social behavior; a defense of international law as "law," despite the frailty of its institutions, may be found in the Separate Opinion of Judge Dillard, Legal Consequences for States of the Continued Presence of South Africa in Namibia Notwithstanding Security Council Resolution 276 (1970), 1971 I.C.J. 138, 168.

43. In Ross, *supra* note 42, "tû-tû" is a phrase attached to conduct violating taboos, *id.* at 812; on the international level the possibility of criminal law despite institutional weakness is raised by Article 19 of the Draft Articles of State Responsibility, *see supra* note 11.

them with sufficient clarity that they can guide conduct.[44] These norms must prescribe legal consequences for classes of conduct or situations and these prescriptions must have some degree of validity as bases for predicting what legal consequences will in fact be assigned in specific cases.[45] For some purposes, these minima may suffice for criminal law, but it must be noted that there is solid consensus among all modern legal systems that the norms at work must be extremely clear and scrupulously followed in institutional legal action.[46]

The range of particular consequences that may be assigned is vast and can impede analysis by inviting unnecessary and difficult comparisons. However, any time law is at work, the consequences assigned establish one of four classes of fundamental bilateral legal relationships, so that only these classes need to be considered.[47] The first is a "right-duty" relationship. This exists when for a certain party, A is entitled to (in an institutional setting, can obtain aid in getting) something from a certain party B—money, objects, behavior, etc. The second is a negation of the first; B is "privileged" so that under certain circumstances A has "no right" to certain things from B.

The remaining relationships involve creation of the former ones. When A can unilaterally create a right-duty relationship with B, as in the situation where B has made an irrevocable contractual offer, A has "power" to create such a relationship while B is under a form of "liability" with respect to such an eventuality. Its negation, as where B has made no such offer, is that A is under a "disability" and B is under an "immunity."

These relationships are not general as to the two individuals, but rather are linked to some specific situation. That is, B may owe many duties to A but each arises from a particular situation to which the law assigns such a consequence. Also, although a change

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44. HART, *supra* note 4, makes the point that what distinguishes law from morality in the case of international law is its specification of norms having detail - some of it arbitrary - in order to maximize certainty and predictability and to facilitate the proof or assessment of claims. *Id.* at 222-25.

45. *See supra* note 39 on "paper rules" versus real rules.

46. In the U.S. use of vague norms would raise special constitutional problems including due process concerns; throughout the Common Law world, it would raise concerns for *ex post facto* prosecution. In most other systems the maxim *nullum crimen sine lege, nulla poena sine lege* would be implicated.

47. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L. J. 710 (1917) [hereinafter cited as Hohfeld]. *See also* Radin, *A Restatement of Hohfeld*, 51 HARV. L. REV. 1141 (1938).

in the actual state of affairs is within contemplation, such as A's receiving money from B, the law does not purport to insure this result, but merely makes available means conducive to achieving it. For example, if A has a right to child support payments from B (which assumes B has money to pay), the availability of legal means to receive it depends on several factors. First is A's competent completion of such steps as pleading and filing papers; then the means may take the form of an order from a court. However, its effectiveness depends on such practical matters as locating B or suitable property belonging to B. Moreover, even when B is found, if B has hidden his assets thoroughly and has the resolve to accept all of the consequences of remaining indefinitely in contempt of court, A will still receive nothing. In a sense, A's "right" relates to access to legal "help" and not access to B's money.[48]

In applying this framework it is useful to consider matters from the perspective of some decision-maker contemplating legally-mandated action. An institutionalized court like the International Court of Justice may provide a more familiar and, therefore, clearer reference point, but others will suffice. For example, with respect to State A's military actions within the territory of State B, a third state's decision—based on law—whether to join in A's actions would reveal what legal relationship it saw as operative between A and B. Its actions would indicate whether it concluded that B had a right that A withdraw (as in aggression by A), or that A had a privilege to continue its activities (as in joint maneuvers pursuant to an international agreement).

The foregoing framework is revealing when applied to a phenomenon whose legal significance is questioned, such as the Nuremberg trials, which have been treated by some as a paradigm of international criminal law in action. Simply assessing a few hypothetical variations on them, and considering possible pleas for legal "help" and possible reactions of decision-makers will make the crucial points. The essential inquiry is whether the law as portrayed under a given theoretical model actually comports with the law in action in events upon which that model is based.

2. Nuremberg Examined

A suitable starting point is the bare fact of the occupying powers' placing German nationals on trial for crimes. The first issue is

48. *See* Hohfeld, *supra* note 47.

whether, had the Allies desired the assistance of other states (non-adherents to particular agreements concerning disposition of conquered Germany),[49] such states would have been under a duty to provide it. If, for example, a suspect had been located in Switzerland, and Switzerland had no duty to deliver him for trial unless a specific treaty of extradition provided otherwise,[50] then the Allies would not have had the power to create such a duty absent hypertechnical, unrealistic circumstances.[51] On the other hand, had the Allies refrained from bringing Germans to trial, non-associated states would have had no right to insist that the Allies do so, nor would these states have had the power to create such a right.

As to the defendants, they had no right under international law, vis-a-vis the Allies, to argue that the trials not be held, for even if their plea were accorded attention in that context,[52] the occupying powers were engaging in an exercise of criminal jurisdiction unassailable under international law, either on the basis of protected interest or specialized territorial jurisdiction.[53] Similarly, no individuals had any right under international law to insist that the trials be held.

As for Germany, analysis of any rights it may have had that its nationals not be tried poses a minor puzzle. Germany's government had been totally supplanted by occupying states' agencies. There was no indigenous government in any position to assert any rights in any

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49. Most pertinent is the London Agreement, *supra* note 11, entered into by the four Occupying Powers and subsequently adhered to by nineteen other United Nations members.

50. See 1 M.C. BASSIOUNI, INTERNATIONAL EXTRADITION: UNITED STATES LAW AND PRACTICE ch. I, § 2 (1983) [hereinafter cited as BASSIOUNI], where conflicting views of theorists and modern trends are evaluated against the prevailing contemporary practice.

51. See *infra* notes 55 and 58 on the legal power under international law to alter legal relationships by destroying the sovereignty of a state; note that in the relevant time frame effectiveness of such power would depend on nonaggression by the state attempting to exercise it.

52. In this time frame there existed no international institutions authorized to hear complaints of this kind and there was then very little recognition of rights of individuals to be asserted on their own behalf against states. *See* Lauterpacht, *The Subjects of the Law of Nations* (pts. 1 & 2), 63 LAW Q. REV. 438 (1947), 64 LAW Q. REV. 97 (1948).

53. *See* Feller, *Jurisdiction Over Offenses With a Foreign Element*, in 2 A TREATISE ON INTERNATIONAL CRIMINAL LAW 5 (1973); Baxter, *Jurisdiction Over War Crimes and Crimes Against Humanity: Individual and State Accountability*, in 2 A TREATISE ON INTERNATIONAL CRIMINAL LAW 65. As to the International Military Tribunal this is particularly clear, for it prosecuted only crimes of aggression (which led to Allied entanglement in World War II), war crimes (which were committed largely against nationals of states lending their authority to the process by adhering to the London Agreement) and crimes against humanity that occurred during the war (which directly or indirectly tended to strengthen Nazi control to the detriment of the Allies).

international institutional setting.[54] Thus, Germany's unconditional defeat had thrust it through the looking glass of international law and it might be said either that at that time the German State did not exist, or that it did exist but was spoken for only by the occupying powers.

Certainly states occupying territory of another state by virtue of non-aggressive war may govern such territory to the fullest extent, including conducting international relations on its behalf.[55] Moreover, even if a plea on behalf of Germany against such trials were to have been heard, the trials were grounded on acceptable jurisdictional bases and, although the institutional framework was unusual, the treatment accorded German defendants was sufficiently similar to that accorded to similarly situated nationals of the occupying powers—soldiers and others in a zone of military activity facing court martial, military commissions and other special courts—that it is highly unlikely that any discriminatory treatment of aliens would have been found.[56]

Much the same is true as to the substantive criminal norms applied or the particular sentences meted out. No rights were involved and no one had the power to create rights under international law. The only possible exceptions to this are aspects of the proceedings that are regarded as unfortunate—the *ad hoc* nature of the institutions, *ex post facto* aspects of its standards and questionable fairness in procedures.[57]

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54. This was due to the unconditional surrender insisted upon and obtained by the Allies, which resulted in capitulation of all governmental powers to the occupying powers. See *infra* note 60 on the legal ramifications.

55. It is said that conquest alone does not make the conqueror sovereign, that formal annexation is needed to complete this process. 1 L. OPPENHEIM, INTERNATIONAL LAW (7th ed. 1948) [hereinafter cited as OPPENHEIM]. If such a talismanic attitude towards sovereignty has merit, then the question of which persons or what institutions exercised or could have exercised "German sovereignty" during the early post-war occupation is a perverse riddle. Realistically, the powers of occupying states are broad, and in the case of an unconditional surrender accompanied by collapse of the central government, it is difficult to define limits. *See generally* J. STONE, LEGAL CONTROLS OF INTERNATIONAL CONFLICT (1954) [hereinafter cited as STONE]. Since substitution of military institutions is clearly permitted where existing ones are unreliable and because an occupying power controls ingress and egress, conduct of foreign relations seems inevitable and proper at least as to short-term issues, so that asserting international rights on behalf of the German State would seem to have been up to the Occupying Powers. Although some of those rights may have corresponded to matters entrusted to a Protecting Power under the Geneva Conventions, the Protecting Power was authorized only to make communications to Germany as to those matters.

56. In general, discriminatory treatment of aliens occasions international responsibility, *see* OPPENHEIM, *supra* note 55, at 330-31, but use of military tribunals to try war criminals is expressly provided for. *See* STONE, *supra* note 55, at 700-32.

57. *See, e.g.*, HANKEY, *supra* note 6.

Thus, as to the immediate post-war trials, there is no operation of right-duty or power-liability relationships. This is the same situation that prevails as to all exercises of *municipal* criminal jurisdiction.

Considering matters as they might have arisen before or after Allied occupation provides possible illumination of the context in which the trials occurred. In 1944, had the Allies demanded extradition of the same German nationals, absent specific extradition treaties providing to the contrary, no rights would have been implicated since neither Germany nor any other state where such German nationals might have been found would have been under any generally recognized duty to deliver them. However, had any of the defendants been within the territory of any soon-to-be occupying power, it could have brought any such defendant to trial with no different international law consequences than those that attended the post-war "international" trials. What occurred in 1945 was that the Allies exercised a legal power at the same time that they projected military might. By overwhelming Germany's territory and its government, the Allies obtained custody of these defendants. Thus the Allies did not require any legally-motivated help and they were able (as a practical matter) to conduct the trials without adverse legal consequence (because there was no one with a right to demand that the trials should not occur). It should be noted that their "power" was exercised in response to aggression, which may be legally important.[58]

On the other hand, after a new German indigenous government emerged, Germany had neither power nor right under international law that the previous events, which violated no rights when they transpired, should be undone or entail any adverse consequences to the states involved.

Throughout, reference has been made to the "Nuremberg trials" without specific reference to the International Military Tribunal (IMT), and disclaimers have been made as to specific international agreements. All of the foregoing is valid as to the IMT's processes; it is probably equally valid as to all trials conducted by tribunals operating under Control Council Law No. 10.[59] This is because, to the

58. In the post-war era the U.N. Charter Article 2(4) seems to preclude the possibility of securing any advantages whatever under international law through use of force other than through self-defense under Article 51. *See* U.N. CHARTER art. 2, para. 4.

59. Through Control Council Law No. 10 of January 24, 1946, issued by the Occupying Powers' council for general government of Germany, a uniform basis for trials of Nazi suspects before "non-international" tribunals was created. Although the position is stated that these tribunals were not domestic German courts, this assertion was in response to arguments that such tribunals should respect pre-existing German law. *The Justice Case*, in 3 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL

extent that these tribunals are properly viewed as domestic German courts, their actions are without adverse international law consequences. Yet, to the extent that they are viewed as somehow apart from the German State, their actions are probably covered by jurisdiction based on protected interests or nationality of victims—the latter sometimes exercised vicariously on behalf of liberated states under control of the same occupying powers.[60]

As for the role of wartime international agreements for post-war actions, these relate to voluntarily assumed changes in legal relationships. Thus, neither the London Declaration nor any specific extradition agreement could in itself prove the existence of any international legal norm applicable to nonadherents. Such consensual arrangements may, however, serve as data indicating potential or emerging norms of customary international law,[61] and certainly these examples of cooperation are not without weight in that regard. The Geneva Conventions then in effect may be relevant as declaratory of customary norms concerning the conduct of war, but they did not specifically address extradition and they did not specifically require criminal prosecution of those responsible for violations of their provisions.[62]

What emerges is an image of Nuremberg that is ill-suited as a paradigm of any international law norms. It implicates no rights or duties under international law; the only power-liability relationship illustrated is the legal power of victors over the vanquished to trans-

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LAW NO., 955, 983-84 (1951). The status of these tribunals is suggested by the fact that they were empowered to try all of the crimes that were dealt with by the International Military Tribunal, including crimes against humanity regardless of relationship to aggression or war crimes, plus imprisonment, torture, rape, and other inhumane acts, regardless of the nationality of the victims. The Occupying Powers regarded these tribunals as courts of occupation. HISTORY OF UNITED NATIONS, *supra* note 7, at 212-15. Professor L. C. Green of the University of Alberta has noted that in *In re* Brandt (The Doctors' Trial) 14 Ann. Dig. 296 (1947), the U.S. Military Tribunal implied that, had all victims been German, it would have lacked jurisdiction. L.C. GREEN, ESSAYS ON THE MODERN LAW OF WAR 220 (1985).

60. As creatures of the Occupying Powers, most of these tribunals' trials can be justified on the same basis as those before the International Military Tribunal. Other cases, involving victims who were nationals of states adhering to the London Agreement, can be regarded as vicarious excerises of passive personal jurisdiction. Cases involving victims of German nationality alone where punishment was contrary to the German law in force at the time of the offense might be difficult to justify, but it appears that there were no such cases.

61. The adherence of nineteen states to the London Agreement, *supra* note 10, and the subsequent affirmation of the Nuremberg Principles, *supra* note 11, by U.N. resolution, seem important as evidence of contemporary customary law as to what states are permitted to do and as factual evidence of what states may be expected to do.

62. *See, e.g.*, Prisoner of War Convention, 47 Stat. 2021, T.S. No. 846, 2 BEVANS 1932 (1932).

form international issues into municipal ones by supplanting sovereignty. It is a unique example of what a group of conquering states may do to nationals of a vanquished state when they establish control and are able to enforce criminal law norms. The fact of cooperation and the general approval it received through the United Nations General Assembly resolution affirming the "Nuremeberg principles,"[63] are important, but their significance for "international criminal law" as a whole is unclear.

In sum, it is important to see Nuremberg for what it was if its significance is to be given realistic treatment. It in no way denigrates the historical importance of the event, or its potential significance as a datum with precedential impact, to note that the Nuremberg phenomenon is but *one* example of widely approved cooperation among states in the exercise of criminal jurisdiction in a setting that, for general international law purposes, is indistinguishable from any exercise of municipal criminal law. As such, its usefulness as a paradigm is extremely limited, for to generalize from a single datum is unnecessarily open-ended when there are numerous examples of similar phenomena that provide a superior data base for discerning patterns and developing a narrower range of hypotheses.

B. International Criminal Law Cooperation—In Search of Patterns

There is no scarcity of data concerning cooperation among states with regard to criminal law. Transfers of custody of accused or convicted persons are accomplished regularly under numerous bilateral agreements[64] and at least one functioning multilateral convention.[65] Similar frameworks govern judicial assistance and transfer of offenders.[66] Scores of international agreements obligate adherents to dis-

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63. *See supra* note 10.

64. Bilateral treaties devoted strictly to extradition are the most common. The United States alone has such treaties with over one hundred states. BASSIOUNI, *supra* note 50, ch. I, § 5.

65. The European Convention on Extradition, Europ. T.S. No. 24, *entered into force* Apr. 18, 1960. It is amplified by two protocols, Europ. T.S. No. 86, Oct. 15, 1975, and Europ. T.S. No. 98, Mar. 17, 1978.

66. *See* A. ELLIS & R. PISANI, *The United States Treaties on Mutual Assistance in Criminal Matters: A Comparative Analysis*, 19 INT'L LAW. 189 (1985) (discussing recent United States arrangements, such as those with Switzerland and Turkey, and including comparisons with the European Convention on Mutual Assistance in Criminal Matters).

On transfer of offenders the 1970 European Convention on International Validity of Criminal Judgements, Europ. T.S. No. 70, and the 1964 European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders, Europ. T.S. No. 51 are examples, as well as bilateral treaties of the United States for transfer of offenders, discussed in

courage particular forms of behavior,[67] some of them requiring that states criminalize such behavior,[68] others calling for particular measures of cooperation,[69] and still others labeling the behavior concerned an "international crime."[70] Besides Nuremberg, there have been other instances where war-related criminal trials have resulted from cooperative efforts among states.[71] The United Nations General Assembly has also developed documents expressing condemnation of particular forms of behavior in terms that raise issues of criminal law consequences.[72]

This would seem an adequate data base for detecting patterns that support hypotheses as to existing or emerging customary principles of international law concerning obligations of states to cooperate in criminal law matters. Unfortunately, works designed to reflect such hypotheses have so far proven inadequate to the task.

1. Marshalling the Data—The Draft International Criminal Code

By far, the most comprehensive effort to impose order on the broad range of chaotic data on criminal law coordination among states is the Draft International Criminal Code produced through

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Bassiouni, *Perspectives on the Transfer of Prisoners Between the United States and Mexico and the United States and Canada*, 11 VAND. J. TRANSNAT'L L. 249 (1978).

67. *See* Bassiouni, *The Proscribing Function of International Law in the Processes of International Protection of Human Rights*, 9 YALE J. WORLD PUB. ORD. 193 (1982); *see also* Bassiouni, *The Penal Characteristics of Conventional International Criminal Law*, 15 CASE W. RES. J. INT'L L. 27 (1983) [hereinafter cited as Bassiouni, *Penal Characteristics*].

68. *See* Bassiouni, *Penal Characteristics*, *supra* note 67. The 1949 Geneva Conventions are examples; they require states-parties to prosecute "grave breaches" of their terms. *See supra* note 12.

69. A narrow example is the convention dealing with statutory limitations for war crimes and crimes against humanity, *see supra* note 25.

70. Genocide Convention, *supra* note 13, art. I, and Apartheid Convention, *supra* note 16, articles I and III are examples of conventions declaring conduct an international crime.

71. For examples up to the time of Nuremberg, see Bierzanek, *The Prosecution of War Crimes*, in BASSIOUNI & NANDA, *supra* note 23, at 559.

On the trials held in Bangladesh under Indian sponsorship, see, *e.g.*, Paust & Blaustein, *War Crimes Jurisdiction and Due Process: The Bangladesh Experience*, 11 VAND. J. TRANSNAT'L L. 1 (1978).

72. For example, the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 3452 (XXX) (1975) *reprinted in* UNITED NATIONS, *supra* note 16, at 72, provides in Article 2 that such treatment is an "offence to human dignity and shall be condemned as a denial of the purposes of the Charter of the United Nations." *Id.* at 73. Article 7 calls upon states to ensure that all such treatment is an offense under their criminal law. *Id.*

However, the Draft Convention on the subject, in its present form, does not declare torture a crime under international law. *See* Bassiouni, *Penal Characteristics*, *supra* note 67, at 31 n.13.

the efforts of M. Cherif Bassiouni, Secretary General of the International Association of Penal Law.

Numerous scholars have played a part in its development, but at a post-publication conference of the International Association of Penal Law it was aptly dubbed by Professors Claude Lombois of Paris and Sassi Ben Halima of Tunis, the "Code Bassiouni."[73]

a. Attributes of the Code

The Code is an extraordinary document. It is openly ambivalent as to whether it is a restatement of existing international law norms or simply a law-making proposal.[74] It consists of four parts, the last of which may be most telling—a series of "treaty provisions" for its adoption as an international convention. Also extraordinary and revealing is its "enforcement part" detailing the cooperation obligations of states-parties with respect to prosecutions of crimes within its scope.

The remaining parts, a "general part" and a "special part," correspond roughly to the major subdivisions of a Continental criminal code. The general part contains provisions addressing principles of culpability and is designed for use by an international criminal court. However, should no court be created, states-parties would use the general parts of their own criminal codes, together with the enforcement part, to achieve coordinated policy as to crimes within the Code's scope. The scope of the Code is fixed by its special part, in which offenses are defined.

The substantive offenses covered under the special part of the current draft code are limited to twenty classes of conduct.[75] All twenty have been addressed in multilateral conventions or in widely-supported resolutions of the United Nations General Assembly.[76] Most have been mentioned in connection with normative language concerning obligations of states to take one of eight kinds of actions

73. International Conference on New Horizons in International Criminal Law, May 7-12, 1984, held in Noto, Sicily.

74. BASSIOUNI CODE, *supra* note 11, at xxxi.

75. *Id.* at 37-40.

76. They include aggression, war crimes, unlawful use of weapons, genocide, crimes against humanity, apartheid, slavery, torture, unlawful medical experimentation, piracy, crimes related to international air communications, crimes against diplomats, hostage-taking, unlawful use of mails, drug trafficking, counterfeiting, theft of national treasures, bribery of public officials, interference with submarine cables and traffic in obscene publications. BASSIOUNI CODE, *supra* note 11.

reflecting modifications of their general freedom of action in the realm of municipal criminal process.[77]

Professor Bassiouni has aptly noted the common characteristics of the kinds of conduct thus identified as involving activities that either threaten the interests of more than one state or involve at least one other state in threats to the interests of a state.[78] While all listed offenses have these characteristics, it is clear that not all types of conduct having such characteristics have found their way into the Code; only those featured in wide-scope documents have done so.

Definitions of offenses are based on the specific documents that treat such conduct. In some cases the underlying documents were drafted with such a clear view towards criminal action that few modifications were deemed necessary. In other cases the closeness with which source documents were followed produced some awkwardness, as with aggression—for which criminality depends on Security Council action.[79] One omission from the list of offenses is noteworthy: terrorism does not appear, although some of its most internationally harmful forms are covered.[80] This may be justifiable for va-

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77. 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.

Bassiouni, *Penal Characteristics, supra* note 67, at 30.

78. Genocide is a paradigm of the former; unlawful use of the mails exemplifies the latter. "[I]n examining separately the twenty international crimes . . . there are two alternative requirements for proscribed conduct; namely, it must contain either an international or transnational element." *Id.* at 28.

79. Article I, section 2 of the D4raft International Criminal Code states:

> The first use of armed force by a state in contravention of the Charter [of the United Nations] shall constitute *prima facie* evidence of an act of aggression although the Security Council may, in conformity with the Charter, conclude that a determination that an act of aggression has been committed would not be justified in the light of other relevant circumstances including the fact that the acts concerned are not of sufficient gravity.

BASSIOUNI CODE, *supra* note 11, at 52. This text is taken verbatim from the consensus Definition of Aggression adopted by the General Assembly on December 14, 1974. *Id.* commentary at 54. In a criminal prosecution the role of Security Council action or inaction in creating or failing to create a defense seems difficult to rationalize.

80. *E.g.*, aerial hijacking, *id.* at 88, crimes against diplomats, *id.* at 90, hostage-taking, *id.* at 92, and unlawful use of the mails, *id.* at 94. One additional obvious omission is assassination of foreign public officials; general bombings and the like also seem to be beyond the scope of the named offenses.

rious reasons. For example, terrorism as an offense *per se* would conflict with the Code's adoption of a broad version of the political offense exception, under which requested states may refuse to extradite persons for crimes they deem political.

For all offenses defined in the special part, the consequences in terms of general part culpability and of the enforcement part duties of cooperation are identical. This includes a severe restriction on the defense of obedience to superior orders, inapplicability of any statute of limitation,[81] plus elimination of the political offense exception as a basis for refusing extradition or any other measure of cooperation, unless the state from which cooperation is requested elects to prosecute accused persons within its own legal framework.

Such total abolition of the political offense exception to extradition represents a dramatic shift from the general ability of states to offer asylum to favored individuals whose crimes have political overtones.[82] Its abolition as to some crimes of the kind enumerated in the Code has precedent behind it, but the breadth asserted here is novel.[83] Taken together with other enforcement part provisions for judicial assistance and transfer of offenders, this goes far to globalize criminal justice as to the enumerated crimes, thus realizing the goal embodied in the maxim *aut dedere aut judicare* (either extradite or prosecute).

As a result, the current Draft Code could be aptly labeled a code for dealing with international crimes. It does not purport to articulate norms for controlling criminal processes in other settings with international significance, such as extraditions for other crimes.

b. Evaluation of the Code

The current draft of the Code, with its focus on twenty kinds of conduct deemed to constitute international crimes, has a basis in weighty documents, but is, from a theoretical viewpoint, rather arbitrary. It serves to avoid nagging theoretical problems, thus constituting a potentially valuable practical compromise, but in the long run

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81. BASSIOUNI CODE, *supra* note 11, at 163-64 §§ 5 and 6, and at 167.

82. For the most comprehensive treatment in English see C. VAN DEN WIJNGAERT, THE POLITICAL OFFENCE EXCEPTION TO EXTRADITION (1980).

83. Abolition is mandated under the Genocide Convention for that crime, but as noted by Bassiouni, *Penal Characteristics*, *supra* note 67: "The various conventions on international criminal law do not all follow the same pattern of imposing upon signatory states the identical duty." *Id.* at 30. No duty to exclude political offense claims in extraditions can be found in documents relating to counterfeiting, traffic in obscene publications and some other enumerated offenses.

it may be both too broad and too narrow to meet the compelling needs of the global community. This shortcoming stems from the Draft Code's deliberate—and highly practical—ambivalence as to whether it is a restatement of the existing law or a progressive legislative proposal.[84]

Undue narrowness may be found in that the field of international criminal law may embrace as many as six different meanings.[85] By taking the form of a code for dealing with "international crimes" the current draft restricts itself to but one of those meanings, and by focusing on criminal punishment of individuals it fails to confront some matters implicit in even that one meaning.[86]

It may well be that the needs of the global community call for clarification of matters encompassed by other meanings of the term "international criminal law," such as the nature of the political offense exception to extradition obligations[87] and allocations of jurisdiction for criminal and other public law purposes.[88]

Questions of both narrowness and overbreadth arise from the listing of twenty crimes. The characteristics exhibited by these crimes—global impact or impact on more than one state—are exhibited by several forms of conduct not given the status of international crimes. For example, atmospheric nuclear testing and gross environmental pollution may have global implications and it cannot be denied that economic conduct affecting one state's markets, yet occurring in another state, implicate interests beyond the municipal. Moreover, new forms of conduct may emerge that exhibit such characteristics and the present draft offers no guidance as to when such conduct should be classed as an "international crime."[89]

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84. "The [Code] is in many ways novel, and in some ways a step beyond what is . . . . It combines two views of the future direction of international criminal law." BASSIOUNI CODE, *supra* note 11, at xxxi.

85. *See* Schwartzenberger, *supra* note 9.

86. The meaning is Schwartzenberger's sixth, "international criminal law in the material sense of the word," which represents substantive norms stemming directly from international law and applicable to both individuals and States. *Id.* at 13-14.

87. An example of continuing problems in this area is the division within the United States legal community concerning extradition of alleged terrorist members of the Irish Republican Army. This has created problems not only as to the definition of political offenses, but as to whether the definition is to be applied by judicial or executive officials. *See* Bassiouni, *Extradition Reform Legislation in the United States: 1981-1983*, 17 AKRON L. REV. 495 (1984) [hereinafter cited as Bassiouni, *Extradition Reform*].

88. Examples of persisting problems include application of United States antitrust laws to foreign activities, as in the Laker Airways case, and unitary taxation of multinational corporations, as practiced by the State of California.

89. "[T]here are no common or specific doctrinal foundations that constitute the legal basis for including a given act in the category of international crimes." Bassiouni, *Penal Character-*

Possible over-inclusiveness may be seen in the listing of counterfeiting, bribery and traffic in obscene publications as international crimes.[90] While these kinds of conduct exhibit the characteristics referred to above, their gravity may be regarded as rather less than that of genocide and aggression. More importantly, removing the political offense exception with respect to such conduct could be regarded as unduly narrowing the means available for legitimate revolutionary activities,[91] or threatening exercises of basic human rights.[92]

Questions concerning the scope of a list of "international crimes" lead to questions as to whether a single set of procedural and enforcement consequences is appropriate for every type of conduct that merits some special extra-municipal concern. Complete answers to these questions seem impossible without reference to some comprehensive theoretical framework that explains how conduct goes from being exclusively a matter of municipal concern to becoming an object of international concern such that special obligations upon all states to act against such conduct should follow.

c. The Need for a Framework: *Civitas maxima/aut dedere . . .*

One comprehensive framework for explaining obligations of states with respect to criminal conduct is that described by Hugo Grotius. Noting that all states are bound to protect human society from certain kinds of harmful behavior, he asserted that states should either punish those found within their territory who have engaged in such conduct or extradite them to the states wherein the conduct occurred

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istics, *supra* note 67, at 28. Thus, while such events as the machine-gunning of a crowd outside the Libyan Embassy in London or the destruction of a civilian airliner over Soviet airspace may generate much foment, there is no solid basis available for determining whether such events are or ought to be considered "international crimes."

90. BASSIOUNI CODE, *supra* note 11, arts. XVI, XVIII, & XX, at 97, 103, & 106.

91. The Code would have nothing to say about a revolutionary group's assassinating a foreign public official as a means of neutralizing him, but if the group chose to achieve the same end by the less violent means of bribing him, this would constitute an international crime!

92. The language of the current article does not include a definition of the term "obscenity," so that both artistic and political freedom of expression could be threatened. The threat cannot be dismissed lightly, for even where a double criminality requirement would seem to protect against one State's oppressive law operating against activity in a second, with more liberal laws, the existence of similarly labeled crimes in the two jurisdictions may be fatally confusing. *See* State v. Luv Pharmacy, 118 N.H. 398, 388 A.2d 190 (1978), discussed in Derby, *supra* note 31.

for punishment there.[93] A link between this view and the Roman Law concept of *civitas maxima* has been aptly noted.[94] Under this view, the rule for state behavior as to "common crimes" is clear, as is the underlying value. Established departures from the principle *aut dedere aut judicare* take the form of either exceptions to that general rule or qualifications of the definitional scope of the term "common crimes."[95]

The present Draft Code reflects the view that this principle is the cornerstone of international criminal law. It calls for acknowledgement of this principle as to conduct that is particularly threatening to more than one state's interests.

Unfortunately, the rule embodied in the Grotian maxim is virtually swallowed by exceptions and qualifications in the legal attitudes of states. The principle of double-criminality for both prosecution and extradition reduces the scope of "common crimes" to a potentially negligible level unless some principle mandating municipal criminalization is available. The political offense exception has a similar impact.

One recent test of the utility of the Grotian maxim as a central framework is worth noting. At the 1983 Congress of Comparative Law, a section was asked to report on the juridical consequences for states that decline extradition requests. Were the Grotian maxim a strong central force, the answers could have been expected to take the form of conclusions that international law had been violated unless a prosecution followed, allowing for some qualifications. However, the responses were so varied in form and content that the rapporteur who posed the question expressed dismay at their seeming unresponsiveness.[96]

Accordingly, there is cause to suspect that reliance on this principle as a central framework may be overly simplistic. Giving the same consequences and label to such disparate forms of conduct not only

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93. H. GROTIUS, DE JURE BELLI AC PACIS (1624), discussed in Bassiouni, *International Extradition and World Public Order*, in AKTUELLE PROBLEME DES INTENATIONALEN STRAFRECHTS (D. Oehler & P. Potz eds. 1970).

94. *See id.*; Mueller, *International Criminal Law: Civitas Maxima*, 15 CASE W. RES. J. INT'L L. 1 (1983).

95. Certain fiscal and military offenses are examples of exceptions; the requirement of double criminality also serves to limit the meaning of the term. For example, if two jurisdictions punish the crime of rape but only one punishes "rape" involving a consenting victim under the age of sixteen, the narrower offense is the operative one. This was the situation when film director Roman Polanski fled from California to France.

96. Bassiouni, *General Report on the Juridical Status of the Requested State Denying Extradition*, in PROCEEDINGS OF THE XITH INTERNATIONAL CONGRESS OF COMPARATIVE LAW OF 1982 (in print).

fails to correspond to past and existing practice but also fails to reflect a clear and acceptable policy basis. It is highly useful as an illustration of just how strong an ordering principle must be in order to create a system from the chaotic data on state cooperation, but it seems to establish that straightforward principles operating on the international plane and seeking to provide a single definition for "international crime" may have limited utility.

On the other hand, the Bassiouni Code seems to shed more light on the problem than other approaches, for each alternative, be it theoretical or practical in context, has severe limitations. On the theoretical end of the continuum, the policy-oriented framework pioneered by Myres McDougal of Yale is the leading alternative.

2. World Public Order as an Ordering Principle

The policy-oriented framework adapted for use in evaluating international law policy options has never been asserted as an algorithm leading inexorably to valid conclusions; it is merely a means for calling to mind the legislative options that may serve certain ends by curtailing contrary interests.[97] It does this by focusing attention on the *dramatis personae* in events jeopardizing cherished values and on the ends that these actors seek to achieve.

The one published attempt to utilize this framework in the field of international criminal law proved too much.[98] That is, the policy options that it highlighted with respect to torture would be applicable to any conduct not punished in some states yet which a larger number of states felt strongly ought to be punished. In such a situation a dispute between states jeopardizes world public order, and the general approach of persuading the minority to conform looms large as a means to serve global order.

Regardless of the merits of such a viewpoint with respect to torture, this unlimited scope of application places it at odds with both practice and the traditional policy against interfering with operation of municipal law, except in extreme cases. Thus, the apparent weakness of the McDougalian framework in this particular context is its insensitivity to the possibility that states with minority views on municipal criminal law policy may have valid bases for refusing to sub-

97. *See* McDougal, *Impact of International Law*, *supra* note 37. In view of the current level of global organization, the value of "world public order" seems generally under served, so that the comments made at note 37 *supra* are of limited applicability; generally, the trade-off between world public order and "sovereignty" meaning local autonomy for its own sake seems properly biased in favor of the former value.

98. Bassiouni & Derby, *supra* note 17, attempts such an analysis.

mit—at least in certain contexts—to the views of a majority, no matter how vocal that majority might be. This insensitivity is traceable to the framework's focus on the *dramatis personae* on only one plane: the international. It invites treatment of states as monoliths, having no other policy interests than official foreign relations positions.[99]

The failure of theory to produce a coherent framework in this realm has left major stumbling blocks for those whose practical work involves international criminal law issues.

IV. PRACTICAL CONSEQUENCES OF THE ANALYTICAL *STATUS QUO*

A. Efforts at Policy Formulation

The two principal United Nations efforts to elaborate frameworks in the realm of international criminal law are Article 19 of the Draft Principles of State Responsibility,[100] which divides international wrongs into "crimes" and "delicts," and the Draft Code of Offenses Against the Peace and Security of Mankind.[101] Both are products of the International Law Commission and both reflect the influence of the Nuremberg paradigm.

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99. See McDougal & Feliciano and McDougal, *Impact of International Law*, *supra* note 37, for indications of the framework's focus. That is not to say that the policy oriented framework focuses attention only on governments; it invites consideration of the role of individual governmental actors and even non-governmental actors. However, it does so with the goal in mind of determining resultant official government foreign relations policy and with the expectation that the only clash of values involved is between the benefits to be obtained from serving world public order and those to be obtained from preserving state autonomy. The framework does not forbid consideration of what precise benefits might arise from preserving state autonomy, nor is there any reason to believe that McDougal or any of his collaborators would actively discourage such consideration, but the framework as elaborated is conducive to presuming that state autonomy is sought for its own sake or because of a lack of confidence that sacrificing it actually will serve the interests of a "world public order" regarded as beneficial.

Accordingly, nothing in the framework facilitates or guides an inquiry into whether particular values enshrined by municipal law within its traditionally accepted sphere may be implicated by acceptance of a particular limitation of state autonomy; the possibility of a clash of values of this kind is not provided for.

In many settings, the foregoing may be of little or no consequence, for issues concerning projection of armed force abroad, limitations on weapons stockpiling or protection of human rights that a given state already protects effectively, may have little or no adverse implications for values served by municipal law within its accepted sphere. However, many issues in the realm of international criminal law may involve potential conflicts of this kind, and this may also be true of some issues in other topics of international law.

100. *Supra* note 11.

101. *Supra* note 21.

1. State Criminal Responsibility

The assignment of criminal responsibility to states has occasioned considerable debate, as well it should, for many reasons that are not crucially important here.[102] For present purposes, however, it is necessary and sufficient to make two observations. The first concerns use of the label "international crime" without reference to any particular processes or sanctions entailed. The non-exhaustive listings in Article 19 are inherently unsuitable for use as substantive definitions in any modern criminal process and even the rapporteur for Article 19 admits that the term "crime" was used only by virtue of the absence of a more suitable term.[103] It is apparent that the label was intended merely to denote conduct that entailed responsibility to the world community at large, rather than merely to one or several identifiable victim states, as is the case with "delicts."[104]

This is extremely revealing, for it highlights the fact that "public international law" has until recently been little more than a system of private law among states and that, where interests of the world community at large are involved, "public law" concepts are relevant. Given that in municipal systems public law embraces more than just criminal laws, one would expect a parallel structure in the international plane.[105] Accordingly, Article 19's seeming implication that in

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102. Foremost among the reasons for controversy are practical problems, beginning with the problem of enforcing any sanction without resorting to armed force. Securing jurisdiction to adjudicate charges of criminal conduct by a state is also an obstacle, for courts of states generally consider other states immune with respect to non-commercial activity and international tribunals have been regarded as competent to judge only those states that have consented to such adjudication. Other problems, such as the problem of devising punitive measures to punish states without unfairly penalizing segments of the population that have been without control over - or even have been victims of - the conduct in question, may also merit attention. *See* Report of International Law (1983), *supra* note 6, para. 45.

103. The Special Rapporteur, Professor A. Ago, explains that controversy concerning use of the label "crime" was due in large part to the fact that "legal language was inadequate." *See* McCaffrey, *The Work of the International Law Commission Relating to the Environment*, 11 ECOLOGY L.Q. 189, 213 n.175 (1983) (citation omitted) [hereinafter cited as McCaffrey].

104. The meaning of the term is indicated by language in the commentary to Article 19:

> [I]t seems . . . undeniable that the obligations flowing from these rules are intended to safeguard interests so vital to the international community that a serious breach of those obligations cannot fail to be seen by all members of the community as an internationally wrongful act of a particularly serious character, as an "international crime."

Id. at 214 (citing Report of the International Law Commission to the General Assembly, 31 U.N. GAOR Supp. (No. 10) at 261, *reprinted in* [1976] 2 Y.B. INT'L L. COMM'N 119, U.N. Doc. A/CN.4/SER.A/1976/Add.1 (Part 2)).

105. Even on the international level, the concept of non-criminal public law seems to have obtained tacit recognition, for under the International Covenant on Civil and Political Rights, G.A. Res. 2200A, 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), violations of human rights by one signatory state are the business of any or all other signatory states

the international system all conduct contrary to global interests must be "criminal" is surprising. To the extent that Article 19 suggests that the kinds of conduct it enumerates as "crimes" are to be regarded as matters of concern to all states, so that they are entitled to act as grievants without showing direct impact on themselves, the article is open to two criticisms: (1) the use of the term "crime" is misleadingly over-inclusive in that this term is normally reserved for use in processes where remediation is supplanted by punishment; and (2) the unrestrained enforcement of "public" rights by all members of the community is not permitted in developed legal systems, and there is no apparent reason why the international legal system should welcome such potentially chaotic actions.[106] Thus, Article 19, as an international criminal law framework, involves substantive dissonance and adjectival implications of dubious merit.

The second observation is that Article 19 does not create a foundation for treating true "crimes" differently from "public" law violations. It provides no indication of what special consequences could or should be assigned to true "crimes" and its use of non-exhaustive lists of vague terms does little to illuminate the substantive nature of such crimes. For example, international pollution is mentioned as a "crime," but whether a given occurrence should be regarded as a true crime or merely a public law violation cannot be determined from anything in Article 19.

2. Offenses Against the Peace and Security of Mankind

To date, International Law Commission work on the Draft Code of Offenses Against the Peace and Security of Mankind has been dominated by concern for Nuremberg principles.[107] Recently, however, questions have been raised concerning such matters as applica-

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without regard to any particular showing of effects upon whatever state might choose to raise the matter. *Id.*

106. McCaffrey, *supra* note 103, at 213-14, notes that, while Article 19 lists gross environmental pollution as an example of an "international crime," its commentary requires that, to qualify for this label, conduct must be abhorrent not merely to a majority of states but rather to all segments of the world community; however, because some segments of the world community are engaged in economic activity considered vital that pose the risk of such pollution, there is a great likelihood that such pollution would never achieve the requisite universal abhorrence to actually qualify as an "international crime."

McCaffrey also notes that there is some question as to whether Article 19 implies a right of states not directly injured to take measures against an offending state outside of the United Nations framework. *Id.* at 213. If so, this would seem to weaken the role of U.N. organs like the Security Council by permitting self-help as an alternative to reliance on them.

107. *See* Report of International Law (1983), *supra* note 6, noting the possibility of expanding the scope of treatment to make states subject to it and to add new offenses.

bility of the Code to states as well as individuals, creation of a "general part," and expansion of the scope of offenses covered to include threats to global interests that have emerged in the past several decades. The current rapporteur, Mr. Doudou Thiam, has offered observations that underline the confused context in which he and the Commission find it necessary to operate.[108] First, he takes Article 19 as a *fait accompli* and conceives the Commission's task as one of merely determining which "crimes" are so serious as to merit inclusion in their ominously labeled list. Even with the task so narrowly defined, he recounts with thoroughness and candor how inadequate the bases are for selecting appropriate norms. He proposes a two-pronged approach, using deduction and induction, with deduction involving a formulated standard for determining what kind of conduct threatens peace and security and induction involving inferences from patterns of conventions. He demonstrates an admirable awareness of the difficulty of making such choices without knowing the use to which they will be put—substantive norms enforceable by an international penal tribunal or some as yet undefined role.[109]

Mr. Thiam's quandary seems even worse than he realizes, for the difficulties to be confronted include not only those he presages but also the drastic shortcomings of Article 19, which he is using as a premise. He contemplates using a very narrow data base for induction while earnest efforts with larger data bases have thus far failed to reveal satisfactory policy options.

The depth of the problems to be faced is amply illustrated by the status of the definition of aggression, a keystone of the overall Code. It is totally unsuitable as a substantive norm upon which to base criminal prosecution.[110] This may be attributable in part to tenta-

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108. Report of the International Law Commission to the General Assembly, 39 U.N. GAOR Supp. (No. 10), U.N. Doc. A/CN.4/377 (1984), lays out the rapporteur's ideas on minimum and maximum scope and asserts that Article 19 cannot be ignored.

109. As McCaffrey, *supra* note 103, observes, concerning the draft on state responsibility, the consideration of how such responsibility is to be implemented has not yet begun. *Id.* at 212 (citing Report of the International Law Commission to the General Assembly, 10 U.N. GAOR Supp. (No. 10) at 64, *reprinted in* [1980] 2 Y.B. INT'L L. COMM'N at 32, U.N. Doc. A/CN.4/SER.A/1955/Add.1).

In Report of International Law (1983), *supra* note 6, it is noted that the U.N. has vacillated between concern for development of a code and development of a mechanism to implement it. It notes that the question has arisen of whether this "vicious circle" can be broken, or whether controversy over creation of an international penal tribunal will lead to a code to be enforced by the courts of individual states, with attending risk of partiality. The report makes it apparent that it is anticipated that further elaboration of substantive offenses will continue for at least a time before the matter of implementation is taken up.

110. One of many critiques, and possibly the most devastating, is *Statics and Dynamics in International Law*, in G. SCHWARTZENBERGER, DYNAMICS OF INTERNATIONAL LAW 5 (1976).

tiveness as to its function[111] or to the hazards of leaving the drafting of criminal law instruments to generalists and diplomats.

B. A Sample Effort at Principled Implementation

The work-a-day world of international criminal law evinces severe and sincere disagreements at surprisingly basic levels. In the United States, the proper allocation of authority between the executive and the courts in applying the political offense exception in extradition cases has been heatedly debated, with heat rather than light being generated.[112]

A recent informal meeting of Council of Europe experts in matters of criminal cooperation illustrates this problem. The sense of community in Western Europe has led to numerous agreements in the field of international coordination of criminal process and the purpose of this meeting was to consider a unified convention that would cover substantially all of the topics treated in prior agreements and avoid unnecessary and confusing duplication.[113] Given the history of cooperation and the nature of the mission, one might have expected the meeting to be straightforwardly technical, focusing almost exclusively on drafting strategies, but this was not the case.

Numerous reservations to the many agreements on particular topics made it difficult to identify the functional "lowest common denominator" for each. On the other hand, although one might have expected that the conditions under which a given state would extend cooperation—be it extradition, judicial assistance, transfer of persons under sentence or the like—would not be difficult to describe, there appeared to be some question as to whether different conditions were appropriate for different forms of cooperation.

Illustrative points arose when the group attempted to determine when withholding cooperation would be mandatory and when it would be permissive. Because Council members are also adherents to the European Convention on Human Rights, there was concern re-

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111. *See id.* The single greatest flaw in in the definition, making the status of an armed attack as "aggression" dependent on Security Council action, would be no flaw at all if it were intended to interpret the duties of members under the U.N. Charter rather than to define a substantive offense.

112. The debate is described in Bassiouni, *Extradition Reform, supra* note 87.

113. Experts meeting on the Council of Europe penal law conventions organized under the auspices of the Secretary General of the Council of Europe by the International Institute of Higher Studies in Criminal Sciences, Siracusa, Italy 2-6 May 1984, attended by the author. There, consolidation of the essentials of seventeen separate conventions into a single four-part document, based in part on structural aspects of the Bassiouni Code, were explored. Discussions were wide-ranging and no formal dispositions were made.

garding cooperation where the proceedings in the requesting state might be discriminatory or would otherwise jeopardize protected rights of an accused. It was noted, however, that withholding cooperation in the nature of judicial assistance could be harmful to an accused, so that withholding it without exception could aggravate the situation for an accused whose rights already are being abused. It was also noted, however, that granting judicial assistance where it favored such an accused could cause a requesting state to interpret a denial of such assistance as an indication that the evidence sought would have been harmful to the accused.

Also proposed as a mandatory basis for withholding cooperation was the expiration of the requesting state's limitations period for the offense in question. However, why this should be mandatory where the requested state's period is unexpired was unclear.

On the other hand, optional bases for withholding cooperation were proposed to include disproportionate hardship to the accused in relation to the interests to be served by the prosecution, the fact that the accused already had been tried *in absentia*, and the fact that such cooperation would interfere with criminal proceedings pending in the requested state.

Handling of the political offense exception issue was, naturally, a delicate matter. It seemed to be conceded that each state would apply its own criteria, even as to terrorism, but that some states' criteria would pose no problem for cooperation as to terrorism as it is defined in the recent European convention.[114]

This disarray as to such basic matters within a group of states that has a far stronger history of criminal cooperation than any other of comparable size,[115] demonstrates how deeply the policy implications of international criminal law are buried. Thus, the circle remains unbroken: Those who, in practical contexts and under time constraints, must produce international instruments in the realm of international criminal law do so on an *ad hoc* basis relying on glimmers of instinct in serving the narrow goals at hand, generating data

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114. The Italian reservation, for example, seems to indicate that Italy will employ its traditional political offense criteria but give consideration to factors emphasized in the Convention as making conduct inappropriate for political offense status; that of the Federal Republic of Germany merely notes that application as to Berlin is subject to considerations of British, French and United States rights there. *See* European Terrorism Convention, *supra* note 18.

115. The Council of Europe has twenty-one active members; the Organization of American States has dabbled in criminal enforcement cooperation, but without much result; the Benelux and Scandinavian states have their own sub-systems of cooperation.

that resists analysis by scholars, and leaving inadequate hypothesis concerning the policy bases for wise activity in the area.

V. THE CASE FOR AN INTEREST-ALIGNMENT FRAMEWORK

A. Building from Basics

1. Exigencies

As a threshhold matter, it seems essential that any realistic framework of analysis for problems in the realm of international criminal law take into account the dichotomy between municipal or internal values influencing domestic penalization and international values that might influence penal cooperation by states. Also, this framework should attempt to embrace the widest possible data base concerning instances of international cooperation in criminal law matters. Moreover, it should be noted that "international" is a vague term in this context, for some problems may concern a limited number of like-minded states whose behavior may or may not be sensitive to global values. The term "external" seems less misleading and aptly indicates the need to give separate consideration to transnational and global sensitivities. Finally, even where global sensitivities are implicated, there remains the problem of considering when the self-interest of one state can be expected to yield to broader—but not necessarily more compelling—interests of the world at large.

The function of a framework sensitive to such considerations would be to facilitate the sorting of data on state cooperation in criminal matters. Although on the one hand, international law can be regarded as an erosion of the absolute autonomy of states,[116] erasure of state boundaries and extinction of separate sovereignty is beyond current expectations.[117] Accordingly, the degree to which states have so far subordinated self-interest is an important reference point in considering what states may in the foreseeable future be prepared

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116. The point is made graphically in Schwartzenberger, *supra* note 110, at 32.

117. In his first report, the International Law Commission's rapporteur puts it thus:

> The Commission will again have to make a decision on this important question and say whether it intends to embark on a fabulous adventure that borders on science fiction, at least as things stand at present in the world order. Toppling the State from the lofty pedestal where it was held in awe like the gods of antiquity, making it an immanent creature, susceptible to error and wrongdoing and prescribing for it a course of conduct and a code of ethics to be followed under pain of coercive sanctions would clearly amount to a complete reversal of hitherto prevailing ideas and concepts.

Report of International Law (1983), *supra* note 6, para. 45.

to recognize as an obligation under international law. Such a framework should serve to illuminate such a reference point.

What follows is an attempt to sketch a suitable framework and examine how it might operate. It begins with consideration of the internal-external dichotomy. An attempt is made to consider "generic" situations — ones in which the particular conduct and values at stake are not crucial. This is facilitated by focusing on inherent characteristics of municipal criminal law proscriptions and inherent (or seemingly so) characteristics of assumptions of international obligations. Throughout, an ambivalence is purposely maintained as to whether international obligations "exist" or "ought to exist." The phraseology utilized focuses on whether states can be expected to recognize an obligation. This seems appropriate for realistic analysis in international law generally.[118]

2. An Interest-Alignment Framework

A return to basics entails not only sensitive re-evaluation of data,[119] but also careful re-building from fundamentals. One of the bedrock principles of legal realism is the recognition that any rule of law reflects a choice of one interest over another. Because interests are manifestations of values, rules of law provide data on what values rule-makers prefer over others in particular contexts.[120] On the global level, every rule of international law can be viewed as evidence of a preference for some supra-state or external value over the autonomy sovereign states otherwise enjoy. Rules deriving from particular international agreements may evince value choices among parties as to what internal autonomy will be sacrificed for what external gain. This is paralleled on the municipal level where values of individual autonomy are sacrificed through rules of criminal law in favor of social or governmental values.

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118. Briefly, it seems to follow from the insistence of legal realism on correspondence between legal principles and legal behavior that a legal principle purportedly applicable to states, yet not even widely acknowledged, is less than a "paper rule." *See supra* note 39.

119. Bassiouni, *General Report on the Juridicial Status of the Requested State Denying Extradition, supra* note 96, notes the failure of doctrine to explain state behavior in certain contexts of criminal law cooperation. In particular, he has remarked that a more complete framework for defining the elements that make conduct an "international crime" is needed. *See also* Bassiouni, *Penal Characteristics, supra* note 67, at 37. Professor Bassiouni is in the midst of a massive effort to compile the clues to be gleaned from hundreds of international conventions. *See* INTERNATIONAL CRIMES: A DIGEST/INDEX OF CONVENTIONS AND RELEVANT PENAL PROVISIONS (forthcoming) [hereinafter cited as INTERNATIONAL CRIMES].

120. Llewellyn, *supra* note 1.

Because states can act only through individuals, all conduct affecting values important on the global level is open in principle to regulation through use of criminal law against individuals. However, because ultimate effectiveness of international law depends on the actions of states or of organizations created by states, enforcement of criminal law norms against individuals ultimately depends on action taken by, or on behalf of, one or more states. Such action must accordingly reflect value judgments of one or more states. These would involve both the proper balance between individual autonomy and social or governmental values in a municipal perspective and the balance between external values, such as those of the global system, and the autonomy of states. In particular contexts these balances may be independent or linked.

As a result, the actual international application of criminal law to individuals will always depend not only on a state's perceptions of external or global needs versus their own, but also on their perceptions of the needs of individuals for liberty versus the needs of society or government. That is, there is a balancing at two or more levels, internal and external, and "external" may or may not be equated with "global." For example, states in alliance expecting war may be motivated to sacrifice individual liberty in favor of universal conscription and to sacrifice state autonomy through agreements to punish draft evaders, regardless of which allied states' laws they are evading. Yet such behavior has no bearing on the global value of avoiding breaches of, or threats to, peace.[121]

This dual (or multiple) level balancing will clearly point to effective action in service of international values only when balances on both levels are favorable; it points to inaction when balances on both levels are unfavorable; and it is problematic when balances on the two levels are contrary.

Some examples of balances may be useful. Where State A forbids aerial hijacking under its municipal law, it may be regarded as having chosen to sacrifice individual freedom to attract attention to grievances in favor of safe and regular air transportation for society

121. A less drastic but relevant example is the behavior of the United States and Canada during the Second World War concerning enforcement of military conscription. Although military offenses of all kinds are ordinarily excepted from international cooperation arrangements (they are excluded by art. 4 from the European Extradition Convention, *supra* note 65), draft authorities dealt with the problem of whether a prospective draftee was subject to the laws of their particular state by having them recite the alphabet. Those concluding it with "zed" were deemed Canadians, those concluding it with "zee," Americans, and individuals were either inducted or transferred to liaison officers from the other state on that basis.

as a whole. When faced with a situation in which its actions could result in punishment of an aerial hijacker who engaged in such conduct in State B, the balance struck by State A on the municipal level *vis-a-vis* individual and societal values is favorable to lending its criminal enforcement mechanisms to such action. On the global level, both the general desirability of safe and reliable air transportation for everyone and the desirability of avoiding tensions between states when one becomes a haven for those who have harmed another's societal or governmental interests militate in favor of such action. In the absence of strong countervailing considerations, such cooperative action can be expected, and in a typical case no such countervailing considerations would seem likely to arise.[122]

On the other hand, if the criminal processes in State B provided for capital punishment of hijackers and the municipal system of State A regarded such punishment with strong condemnation, State A's municipal balance of values would not support action leading to capital punishment for such an offender. Thus, notwithstanding supra-state value balances favoring extradition to State B, the adverse municipal balance would militate against such extradition. Trial of the offender in State A could represent a compromise, but if State A has regarded itself as municipally incompetent to judge conduct beyond its territory by non-citizens, then this option would seem contra-indicated if the offender was a non-citizen.

In a case of this kind, the force of the balance on the municipal level might be viewed as countering the force of the balance on the supra-national level. That is, if State A feels strongly that safe and regular air transportation, even in State B, is of great importance, or if it regards the danger of damage to international harmony as grave if it becomes a haven for a State B hijacker, it may extradite such a person despite its contrasting municipal value judgment.[123]

However, if State B utilized criminal procedures that were below accepted standards—summary proceedings before *ad hoc* tribunals that admitted confessions induced by torture—both balances would militate against extradition, for on the global level the values of safe

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122. This general expectation is confirmed by the wide acceptance of three international conventions providing for progressively greater cooperation in suppressing aerial hijacking. *See, e.g.*, Evans, *Aircraft Hijacking: What is Being Done*, 67 AM. J. INT'L L. 641 (1973).

123. As examples, apparently this would not be the case with respect to Portugal, whose reservation to the European Terrorism Convention, *supra* notes 18 & 116, excluded extradition for offenses punishable by death or by imprisonment for life. However, the United States has never hesitated to extradite upon such a basis even during a period when United States Supreme Court decisions cast grave doubts on the constitutionality of death penalties under all systems of law in the United States.

and reliable air transportation would be countered by global concerns for protection of fundamental human rights in connection with criminal processes.[124] Moreover, on the municipal level, State A's value judgment never included, and probably implicitly excluded, assignment of punishment on such an unreliable basis, so that State A's balance on the municipal level would be even more unfavorable.

In sum, when balances on both (or all) levels favor action, action would seem likely; when they disfavor it, inaction is indicated. When the balances are unaligned, the likelihood of action becomes difficult to assess.

B. Implications of Interest Alignment

1. Its Role in Development of Theory

The foregoing has served to explain the interest alignment framework in terms of its motivation and general nature. It is based on the need for alternatives to prior approaches and on its plausible derivation from rudimentary analytical concepts in the context of international criminal law. It is, however, more a hypothesis than a conclusion. That is, it represents an approach that may be more illuminating than its precursors, but its utility cannot be established by any apparent theoretical validity; it must be demonstrated.

The measure of utility must be its capacity to guide analysis of the existing data on international cooperation in criminal matters. It must make it possible to divide such data into broad categories so that within a given category data appear to reflect similar interest balances. Within each such category, examples of state behavior could be analyzed with some care to determine the degree to which they resemble one another and the degree to which the interest configuration according to which they have been grouped seems to explain them. To the extent that likes have been grouped with likes and the corresponding interest configurations seem to offer adequate explanations of state behavior, the framework will have proven successful. Moderate dissonance would not necessarily indicate failure, for non-conforming data may be explained by closer examination on such bases as unusual additional circumstances or failure of states to perceive the interests at stake. The first such explanation for devia-

124. For example, Article 5 of the European Terrorism Convention, *supra* note 18, provides that there shall be no extradition if there are substantial grounds to believe that the requested person is being persecuted on the basis of race, religion, nationality or political opinion, or that his position may by prejudiced for any of these reasons.

tions could lead to development of more detailed or parallel classification criteria that would enrich the analytical framework. However, too-ready resort to the latter could result in overlooking valuable clues that refinement is needed. Moreover, if too many examples can be explained in no other way, this would suggest that the framework does not well reflect how states perceive their choices in this sphere. This, in turn, would disprove the value of the framework.

Four broad categories are suggested by the inherent qualities of the framework:

1. Behavior of states where one has proscribed conduct generally regarded as valuable in terms of global interests;
2. Behavior of states with respect to conduct generally regarded as harmful to global interests;
3. Behavior of states where one has not proscribed conduct generally regarded as harmful to global interests; and
4. Behavior of states with respect to conduct lacking clear relevance to global interests.

These categories cover, respectively, situations where one state's internal interests appear counter to global ones and its conduct has taken an affirmative form, where states' internal interests coincide with global ones, where one state's internal interests do not favor affirmative action while global interests seem to call for it, and where the conduct itself seems to have no impact on global interests.

An attempt to classify the available data in such a way might yield some patterns and some deviations, with the latter leading to progressive refinements of classification criteria. If the data fall into reasonably well-formed groups at some point, its patterns could lead to hypotheses of behavioral norms along the lines of the following: when a state's internal interests call for proscription of a given form of conduct, it will cooperate with other states in criminal process regarding this proscribed conduct, provided that x and y are true, but not if z is true. As more and more data are analyzed, such hypotheses can be "tested" in the sense that the number of examples of state behavior that seem explainable in those terms can be contrasted with the number of examples that appear to conflict. If there are too many conflicts, or if the list of conditions under each hypothetical norm grows too long, reconsideration may be necessary. However, if a modest number of relatively straightforward hypotheses prove effective, a major advance will have been made.

The next step would be to re-examine these norms for their relevance as legal norms, rather than merely descriptions of how states

happen to have behaved.[125] This step may be challenging, but for a particular set of hypotheses, it may not be insurmountable. Beyond possible reconsiderations of formulations of norms, there would be further steps. First would be attempts to identify and describe slightly generalized versions of hypothetical legal norms in order to assess them for conflicts. Next would be attempts to apply them to current issues concerning criminal law cooperation. This would involve their use either as possible predictive and neutral principles or as influential normative arguments, and would be followed by attempts to assess their utility as indicators of future obligation acceptance.

2. Practical Expectations and Limitations

As a new analytical tool, an interest-alignment framework has notable potential for rationalizing the intractable data in the field of international criminal law. Such a framework promises freedom from naturalistic axioms concerning state behavior because it permits hypotheses framed in terms of system interests to be tested against data in a relatively orderly fashion. Moreover, because the framework itself is value-neutral— except for its assumption that interests at more than one level ought be considered—it is a flexible alternative that may be capable of progressive refinement.

However, full exploration of its potential will take much time and entail numerous subtle steps. The data to be considered is voluminous, comprising more than two hundred multilateral conventions dealing with offensive conduct[126] and bilateral arrangements for cooperation, such as extradition treaties. Analysis of such a vast data base will be labor-intensive, and some steps may prove more difficult than others, as where deviant conduct seems unexplainable. In such cases, deciding whether to reject such conduct as bad data or to formulate hypotheses that would reconcile it with the framework would require sensitivity and patience.

Further, the interest-alignment framework is, by its nature, more suited to identifying the level at which a crucial interest is to be found than to illuminating the nature of that interest or revealing its true worth in relation to competing interests. That is, while such interests as protecting individual liberty, protecting society from harm,

125. This would involve a determination of whether such behavior is required by, or at least consistent with prevailing international law, as well as the degree to which states have acquiesced in it. *See, e.g.*, A. D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW (1971).

126. INTERNATIONAL CRIMES, *supra* note 119, will constitute an invaluable resource.

or preventing unnecessary tension between states may be implicated readily, the precise nature of these interests is far from obvious; the first is one that is often sacrificed in the name of the second, but the second focuses on "harm" that may be invisible to a given viewer, as with "victimless crimes,"[127] and the third begs the question of which tensions between states are unacceptable as opposed to acceptable.

Presumably the impact of an interest-alignment framework would be limited until more meaningful elaboration of crucial interests is achieved. Unfortunately, there is reason to suspect that reliable elaboration may be difficult to achieve, for one of the most dramatic applications of interest-oriented analysis in a related field has encountered major problems in this respect. The "governmental interest" approach to choice of law in civil cases, which has risen to prominence within the United States, is based on the relatively non-controversial general premise that a court should not favor application of its own law over that of other interested states unless its own state's interests are implicated to at least a comparable degree.[128] However, because meaningful application of that wisdom requires sensitivity to the precise nature of competing interests, courts and commentators may not agree on a particular crucial formulation.[129]

Nevertheless, interest-oriented analysis in the realm of choice of law has done much to illuminate what policies may be served by a given course of action, even if it has not succeeded in prescribing how one policy is chosen over another. Thus, even if an interest-alignment framework does not prescribe courses of conduct, it may still shed some light on policy implications of alternatives, and this would be an improvement.

CONCLUSION

INTEREST ALIGNMENT AND THE PROBLEM OF AN INTERNATIONAL CRIMINAL LAW

To the extent that the foregoing has established the credibility of interest alignment as a worthwhile tool, or future work with it dem-

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127. For a discussion of such crimes in a United States context, see, *e.g.*, BASSIOUNI, SUBSTANTIVE CRIMINAL LAW 48-49 (1978); Decker, *The Case for Recognition of an Absolute Defense of Mitigation in Crimes Without Victims*, 5 ST. MARY'S L.J. 40 (1973).

128. *See, e.g.*, Currie, *Married Women's Contracts: A Study in Conflict-of-Laws Method*, and *Notes on Methods and Objectives in the Conflicts of Laws*, in PERSPECTIVES ON CONFLICT OF LAWS: CHOICE OF LAW 67, 81 (J. Martin ed. 1980) [hereinafter cited as PERSPECTIVES].

129. The problem is well described in Twerski, *Neumeier v. Kuehner: Where Are the Emperor's Clothes?*, in PERSPECTIVES, *supra* note 128, at 86.

onstrates its utility, it may now be possible to deal effectively with fundamental questions that have plagued international criminal law throughout its existence. For example, the question of what crimes are "international crimes,"[130] would seem to translate into questions about the purposefulness of such a label. Interest alignment would seem to indicate that more than one impetus to cooperate can be identified, yielding more than one category of crimes having distinctive international consequences. Accordingly, it would be possible to speak of more than one category of "international crime" or to reserve such a label for the category of crimes entailing the greatest international consequences.

Similarly, the question of which of the six possible meanings of "international criminal law" is appropriate[131] seems answerable only after some purpose for narrowing or clarifying the broad connotations of that label is identified. Interest alignment is well-suited to an analysis of data reflecting all six possible meanings, and it seems imperative for the purposes of initial sorting to examine the broadest possible range of data. Once pairings of kinds of conduct and consequences are reliably described, it would then be possible to consider applying such a label to the study of one or more of the categories featuring relatively great cooperation consequences. It is difficult, however, to foresee at this stage why such a narrow application would be desirable.

As a result, there is apparent merit, at least until analysis permits further reliable classifications, in regarding the domain of international criminal law as coextensive with all evidence concerning cooperation and non-cooperation in criminal law matters and in reserving judgment on the proper application of the term "international crime." This tends to vindicate those who have long held that it is suitable to study international criminal law as an adjunct to municipal criminal process, focusing on unusual jurisdictional exercises and cooperation duties assumed through international agreements.[132] It

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130. *See supra* text accompanying notes 11-22, and *supra* notes 103-04 and accompanying text.

131. *See supra* notes 9 and 10 and accompanying text.

132. The reference is to, *inter alia*, the authorities cited *supra* note 20, in the face of such criticism as that by the rapporteur for the Report of the International Law Commission:

> [T]here has developed within internal law a discipline which is wrongly called, in French at least, "international penal law", but which is in fact an internal discipline, its subject-matter being the internal laws which delimitate the jurisdiction of foreign courts and the authority of judgements outside the territory of the State in which they were rendered. The fact that, because of the need for co-operation in this field, countries decided to make the principle of the territoriality of penal law less rigid may have

does not directly undermine those who have approached the subject from the opposite end of the spectrum, beginning with norms of international law, but it does highlight the paucity of unequivocal data supporting the inferences they have drawn concerning the duties states have assumed or can be expected to assume.

In broader terms, it suggests that a coherent conception of the field of public international law may have striking parallels to the structure of private international law, called "conflicts of laws" in the United States, with questions of jurisdictional reach and conditions for recognition of foreign legal process looming large. Application in one state of norms created externally, either in another state or on a supra-national level, may be called for upon terms resembling those governing choice of applicable law for civil actions and sensitivity to interests of various legal systems may be equally important in both settings. This in turn suggests that at least some arbitrariness underlies the traditional classifications of public international law. It is apparent that there is, or ought to be, a "public law" among nations that is distinguishable[133] from the law affecting only

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been misleading, and this discipline was styled "international penal law". But the crimes to which the discipline relates are, as a rule, crimes under internal law, the courts competent to try them are national courts, and they may become international crimes only by virtue of conventions or of the circumstances in which they were committed. In this respect, they are different from crimes that are international by their very nature, which fall directly under international law irrespective of the will of States.

Report of International Law Commission (1983), *supra* note 6, para. 32.

Well might one puzzle about the genesis of "international law irrespective of States" and well might one wonder how this manner of law is to find implementation.

The framework advanced here acknowledges what seems undeniable, that municipal criminal law values and foreign relations values of states are crucial factors in identifying international criminal law norms that will be more than paper rules.

This general notion is not new, *see supra* note 35, and it was pre-saged right down to its distinction between types of "supra-national" values in Szazy, *Conflict-of-Laws Rules in International Criminal Law and Municipal Criminal Law in Western and Socialist Countries*, in BASSIOUNI & NANDA, *supra* note 23, at 135.

This aspect of "international criminal law" as involving considerations similar to those in "private international law" finds numerous glimmers of support. One interesting example is language sounding very similar to that relating to *forum non conveniens*:

> The assumption that it is normally most appropriate to prosecute an offence where it has been committed is not justified. Rehabilitation of the offender . . . requires that the sanction be imposed and enforced where the reformative aim can be most successfully pursued . . . On the other hand, . . . difficulties in securing evidence will often be a consideration.

Explanatory Report on the European Convention on the International Validity of Criminal Judgments (1970) (quoted in Müller-Rappard, The expanding scope of extradition and judicial assistance and cooperation in penal matters, at 7 (1984)) (on file in the office of the Touro Law Review).

133. *See supra* note 105 and accompanying text.

bilateral rights and duties. Moreover, the fields of "private international law" and "international criminal law" may both have ramifications for bilateral relations and, with particular reference to the latter, for interests of the overall community of nations.

For the foregoing reasons, a thorough exploration of the implications of interest alignment appears warranted. Should it prove useful in organizing the data to support discrete hypotheses concerning the norms of international criminal law, it will not only bring urgently needed coherence to that field, but it may also provide insights into arbitrariness, and remedies for it, in other areas of public international law.