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International Crimes and Domestic Criminal Law

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INTERNATIONAL CRIMES AND DOMESTIC CRIMINAL LAW

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INTRODUCTION

This Article is concerned with the concept of international crime and its relationship to domestic criminal law, particularly the domestic criminal law of the United States. There is a good deal of talk nowadays about "international crime," but not much clarity about what the expression means. This Article will examine the various elements that have to be taken into account in trying to work out a clear definition of international crime, and then will look at the range of prohibited conduct that can be regarded as falling within that definition. In addition, the Article will examine current United States law regarding international crimes and proposals for an international criminal code.

The Article is divided into five parts. Part I examines the definition of "crime" as the term is used in domestic law; such a definition supplies the criteria to be used in delineating the concept of international crime. Part II applies these criteria to produce a definition of "international crime." Part III rounds out that definition by discussing the different types of conduct that fall within the scope of the term "international crime." Part IV examines the extent to which criminal law in the United States currently makes provision for the prosecution of international crimes as thus defined. Part V concludes the Article by considering various proposals which have been put forward for codifying the law on international crimes.[1]

I. THE DEFINITION OF CRIME

There are a number of different views about the definition of the concept of "international crime."[2] There also is an unfortunate tendency in discus-

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1. The discussion responds, although not always in order, to questions posed by the general reporters on "International Crimes and Domestic Criminal Law"—one of the topics on the agenda of the XIVth International Congress of Penal Law. *See Commentary on Question IV*, 57 REVUE INTERNATIONALE DE DROIT PÉNAL 241 (1986).

2. It is said to be "a matter of common knowledge that there are divergent views regarding the definition of the concept of international crime." I. BLISHCHENKO & N. ZHDANOV, TERRORISM AND INTERNATIONAL LAW 78 (1984).

sions of international law to neglect the large body of knowledge that has been developed in connection with domestic criminal law.[3] Yet consideration of divergent views on how "crime" should be defined in domestic law may help to illuminate the problem of defining "international crime."

Generally, the concept of crime can be defined in formal or legal terms, or in naturalistic, material terms. In a formal sense, a "crime" is an act which the law prohibits and provides shall give rise to certain consequences. These consequences are roughly of two types.[4] First, criminal acts trigger certain proceedings conventionally termed "criminal," usually initiated and controlled by the state rather than by a private individual. Second, those proceedings involve punishment, as opposed to civil liability, as a possible outcome.[5]

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3. *See* Hall, *International Criminal Law from the Perspective of American Law and the Science of Criminal Law,* in 1 AKTUELLE PROBLEME DES INTERNATIONALEN RECHTS 82 (R. Laun & D. Constantopoulos eds. 1957). Speaking of jurisdiction over crime, Patrick Fitzgerald similarly has complained about the "way in which the average discussion concentrates on state practice and its justification in terms of international law, completely overlooking the criminological aspects of the problem. . . ." Fitzgerald, *The Territorial Principle in Penal Law: An Attempted Justification,* 1 GA. J. INT'L & COMP. L. 29, 29 (1970). In discussing such topics, he says, "we must beware of forgetting our criminology." *Id. See also* Wise, *Prolegomenon to the Principles of International Criminal Law,* 16 N.Y. L. F. 562, 573-77 (1970); Wise, *War Crimes and Criminal Law,* in STUDIES IN COMPARATIVE CRIMINAL LAW 35, 35-36 (E. Wise & G. Mueller eds. 1975) [hereinafter Wise, *War Crimes*]; Wise, *Terrorism and the Problems of an International Criminal Law,* 19 CONN. L. REV. 799, 812 (1987) [hereinafter Wise, *Terrorism*]. *Cf.* W. COOK, THE LOGICAL AND LEGAL BASES OF THE CONFLICT OF LAWS 9-16 (1942).

4. *See* P.J. FITZGERALD, CRIMINAL LAW AND PUNISHMENT 1-3 (1962); SALMOND ON JURISPRUDENCE 109-14 (G. Williams 11th ed. 1957); H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 18, 19 (1968); Williams, *The Definition of Crime,* 8 CURRENT LEGAL PROBS. 107 (1955); *cf.* C.S. KENNY, OUTLINES OF CRIMINAL LAW 5 (J.W.C. Turner 19th ed. 1966). Turner stated:

> [T]he nature of crime will elude true definition, nevertheless, it is a broadly accurate description to say that nearly every instance of crime presents all of the three following characteristics: (I) (sic) that it is a harm, brought about by human conduct, which the sovereign power in the State desires to prevent; (2) that among the measures of prevention selected is the threat of punishment; (3) that legal proceedings of a special kind are employed to decide whether the person accused did in fact cause the harm, and is, according to law, to be held legally punishable for doing so.

Id.

Perkins similarly suggests that a "crime" is 1) "any social harm" 2) "defined and made punishable by law" 3) through "a process that is primarily used for the prosecution and disposition of persons whose conduct resulting in social harm is classed as criminal." R. PERKINS & R. BOYCE, CRIMINAL LAW 12 (3d ed. 1982).

5. Different formal definitions are possible depending on which features of criminal procedure and punishment are taken to be paradigmatic. Austin defined "crime" as an offense "pursued by the Sovereign or by the subordinates of the Sovereign" as opposed to the "injured party or his representative." J. AUSTIN, LECTURES ON JURISPRUDENCE 417 (3d ed. 1869). *See also id.* at 517-18. But it is not invariably the case that criminal as opposed to civil proceedings can be prosecuted only by the state. Austin also observed that, with a crime, only the state has power to remit the liability incurred by the wrongdoer. *Id.* at 518. Following up this point,

There is some circularity in defining "crime" as an act that constitutes a breach of the law liable to be followed by "criminal" proceedings and "penal" consequences.[6] Yet context saves such a definition from being completely circular. The concept of crime does not exist in a vacuum; it is embedded in accepted distinctions between criminal and civil proceedings, between punishment and delictual liability. These distinctions are produced by the pattern of institutional specialization familiar in modern domestic law. Therefore, the definition refers, beyond itself, to this institutional background.

Nonetheless, questions have been raised about defining the concept of crime wholly in legalistic or formal terms, as if it were devoid of specific substantive content. Efforts to devise a "natural" or "material" definition of "crime" are based largely on the search for some intrinsic quality, apart from a legal label, that distinguishes criminal from non-criminal conduct. For example, crime has been defined in terms of actions involving either "moral culpability"[7] or some special or serious harm to "the whole community, considered as a community, in its social aggregate capacity."[8] Legislators, however, have not consistently acted on any such material criterion. Behavior which would not generally be regarded as immoral or unusually injurious to the public at large is often made criminal, while many moral wrongs and great social harms are not in fact treated as criminal offenses. This is true both nationally and internationally.

Notwithstanding the apparent conflict between formal and material definitions of crime, these two different kinds of definitions in fact respond to two distinct sets of questions. The first set of questions is concerned with

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Kenny suggested that a liability to punishment which can be remitted, if at all, only by the state is the distinguishing hallmark of crime. *See* C.S. KENNY, OUTLINES OF CRIMINAL LAW 530 (J.W.C. Turner 16th ed. 1952) (app. I). However, this seems to produce a circular test, since whether permission of the state is required to terminate criminal proceedings in turn depends on whether or not the wrong is classified as a crime. P.H. WINFIELD, PROVINCE OF THE LAW OF TORT 196-97 (1931). Winfield opted to fix on the element of punishment which, "once liability to it has been decreed, is not avoidable by the act of the party offending." *Id.* at 198. Williams concludes that it is a mistake to try "to define crime in terms of one item of procedure only . . . ." Williams, *supra* note 4, at 128. Williams, therefore, proposes to define "crime" generally as "an act capable of being followed by criminal proceedings," having one of the types of outcome (punishment, etc.) known to follow these proceedings. *Id.* at 130.

6. *Cf.* C.H. ROLPH, COMMON SENSE ABOUT CRIME AND PUNISHMENT 10 (1961). *See also* Herbert Packer's definition of a "crime" as "conduct that is forbidden by law and to which certain consequences, called punishment, will apply on the occurrence of stated conditions and following a stated process," which he takes to be equivalent to saying "crime is conduct capable of incurring consequences formally termed criminal." H. PACKER, *supra* note 4, at 18, 19.

7. *See* P. BRETT, AN INQUIRY INTO CRIMINAL GUILT 6-36 (1963); J. HALL, GENERAL PRINCIPLES OF CRIMINAL LAW 240-46 (2d ed. 1960).

8. 4 W. BLACKSTONE, COMMENTARIES *5. *See also* C.K. ALLEN, *The Nature of a Crime*, in LEGAL DUTIES 221-52 (1931). Some acts which do not harm society, like gross indecency or homosexuality, have been criminally sanctioned, while other acts that affect society, like breach of contract and negligence, are left to civil law remedies. P.J. FITZGERALD, *supra* note 4, at 4.

delimiting the conduct the law actually treats as criminal and the legal consequences of calling such conduct a "crime." The second set of questions is concerned with identifying features common to the various kinds of conduct that the law classifies as criminal. These common features can then be used as a guide to determine why certain behavior is made punishable or what types of conduct ought to be considered criminal or can be properly excluded from the scope of the criminal law. To present the problem as one involving a choice between a formal or material definition results in conflating these different two sets of questions.[9] A purely formal definition is inadequate to answer the second set of questions,[10] while the most perspicacious of material definitions is inadequate to answer the first.[11] Given their relevance to attempts to delineate the more settled concept of domestic crime, both kinds of definition are likewise relevant to attempts to define the less familiar concept of international crime.

II. THE CONCEPT OF INTERNATIONAL CRIME

In its formal aspects, the concept of crime is embedded in a web of practices, prevalent in modern legal systems, that permit drawing fairly clear distinctions between criminal and civil proceedings, and between criminal and civil law.[12] However, in other contexts, where there is not the same pattern of institutional specialization, the formal definition can only be applied by analogy.[13] The pattern of institutional specialization which is used formally to define domestic crime has no counterpart in international law.[14] Thus the term "crime" can be applied in an international context only by analogy; an international crime can be, at best, an act which international law prohibits and provides should be followed by consequences more or less closely analogous to the proceedings and punishments that characterize the operation of domestic criminal law.

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9. P.J. FITZGERALD, *supra* note 4, at 1.

10. *See* H. MANNHEIM, COMPARATIVE CRIMINOLOGY 22-67 (1965).

11. For a critique of Blackstone's definition of crime, see H.F. JOLOWICZ, LECTURES ON JURISPRUDENCE 347-58 (1963).

12. Hence the difficulty of applying concepts like "crime" to the institutions of preliterate societies. *See* J. SHKLAR, LEGALISM 83-84 (1964). "If it had been really understood how incoherent is the reality described by such terms of Western legal discourse as 'civil law,' 'public law,' 'crime,' 'tort,' and 'contract,' and how large a part historical accident has played in deciding what actions and rules belong in each category, there would have been less agony expended in squeezing primitive legal ways into these fortuitous classifications." *Id.* at 84. To take something H.L.A. Hart says out of context: "It is as if we were to insist that a naked savage *must* really be dressed in some invisible variety of modern dress." H.L.A. HART, THE CONCEPT OF LAW 230 (1961).

13. In Hart's account, the whole question of whether international law is really law, is also a question of analogy. *See* H.L.A. HART, *supra* note 12, at 226-31.

14. *Cf.* van Bemmelen, *Reflections and Observations on International Criminal Law*, in 1 A TREATISE ON INTERNATIONAL CRIMINAL LAW 77, 78 (M. Bassiouni & V. Nanda eds. 1973) [hereinafter Bassiouni & Nanda].

As indicated in the previous section, the definition of crime in domestic law has been confused by efforts to define it exclusively in material terms. Similar confusion is often evident in efforts to define "crime" in the international sphere. Such confusion is compounded by disagreement as to whether the term "international crime" should be used to refer to acts of states or of individuals.

A. State Responsibility

It was once the fashion to speak as if any breach of international law constituted an offense which subjected the offending state to "the penal consequence of reproach and disgrace . . . [and] . . . the hazard of the punishment to be inflicted in open and solemn war by the injured party."[15] This loose kind of talk, which assimilates the whole system of state responsibility to a form of criminal law, is obsolete.[16] Although there is an element of distortion whenever state responsibility is represented in terms of categories drawn from internal law, insofar as any domestic analogy is apt, the responsibility of states for acts in violation of international law generally comes closer, and usually has been treated, at least since the middle of the nineteenth century, as essentially similar to civil or, more precisely, delictual liability.[17]

Notwithstanding "the essential character of state responsibility as a form of civil responsibility,"[18] it has been argued that, at least for certain acts,

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15. 1 J. KENT, COMMENTARIES *181. Blackstone likewise had used the term "offense" as a synonym for a violation of law and noted that "offenses against the law of nations" are principally committed by "whole states or nations: in which case recourse can only be had to war . . . to punish such infractions. . . ." 4 W. BLACKSTONE, COMMENTARIES *68. *Cf.* 1 L. OPPENHEIM, INTERNATIONAL LAW 337 (H. Lauterpacht 8th ed. 1955) ("Every neglect of an international legal duty constitutes an international delinquency, and the injured State can, subject to its obligations of pacific settlement, through reprisals or even war compel the delinquent State to fulfil its international duties.")

16. Such talk is based on two presuppositions: 1) that reprisals or war are permissible sanctions for breaches of international law; 2) that reprisals and war initiated in response to a breach of international law amount to "punishment" in the sense in which that term is used in domestic criminal law. "Most writers maintain that the sanctions which international law provides against States as such, namely, reprisals and war, are not punishments in the sense of criminal law." H. KELSEN, PEACE THROUGH LAW 72 (1944). Kelsen himself thought it was possible to regard sanctions such as war and reprisal as "punishment," although a "collective punishment" different in kind from the punishment imposed on individuals by modern criminal law. *Id.* at 73-75. *See also id.* at 101. The older doctrine, which regarded war as a permissible form of collective punishment, was bound up with natural law theory, and it generally has shared the fate of natural law thinking. *See* Munch, *Criminal Responsibility of States*, in 1 INTERNATIONAL CRIMINAL LAW: CRIMES 123 (M. Bassiouni ed. 1986) [hereinafter Bassiouni: CRIMES]; Munch, *State Responsibility in International Criminal Law*, in 1 Bassiouni & Nanda, *supra* note 14, at 143.

17. I. BROWNLIE, SYSTEM OF THE LAW OF NATIONS: STATE RESPONSIBILITY (Part I) 22-23 (1983) [hereinafter BROWNLIE, STATE RESPONSIBILITY]. It is nonetheless generally true that "broad formulas on state responsibility are unhelpful and, when they suggest municipal analogies, a possible source of confusion." *Id.* at 36. *See also* I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONS LAW 433-34 (3d ed. 1979) [hereinafter BROWNLIE, PRINCIPLES].

18. BROWNLIE, STATE RESPONSIBILITY, *supra* note 17, at 23.

states are or should be criminally responsible.[19] A number of proposals put forward since 1920 contemplate the concept of state criminal responsibility.[20] This concept has been linked with proposals to create an international criminal court having jurisdiction over states.[21] Although in the years since World War II, the principle of individual rather than state responsibility for international crimes has been dominant in discussions of international criminal law, the idea of state responsibility persists.[22]

In 1976, the International Law Commission provisionally adopted a draft article on state responsibility which incorporates the idea of state responsibility for "international crimes." According to Article 19 of the Commission's draft, "[a]n internationally wrongful act which results from the breach by a State of an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognized as a crime by that community as a whole, constitutes an international crime."[23] The onus for committing such a crime rests on the state

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19. Lauterpacht took the position that such responsibility on the part of states already exists in international law: "The comprehensive notion of an international delinquency ranges from ordinary breaches of treaty obligation, involving no more than pecuniary compensation, to violations of International Law amounting to a criminal act in the generally accepted meaning of the term." 1 L. OPPENHEIM, *supra* note 15, at 339. *See also id.* at 355-57. Elsewhere, he stipulates the criteria for determining whether a delinquency amounts to a criminal act in both material and formal terms: "The essence of a criminal act, as distinguished from a contractual or tortious wrong actionable at the instance of the injured party, is the fact that it injures, and is punishable by, the community at large. Nor are the seriousness, the destructive uses, and the heinousness of the act irrelevant to the question of the determination of its criminal character." 2 L. OPPENHEIM, INTERNATIONAL LAW 192 (H. Lauterpacht 7th ed. 1952).

20. Tunkin states: "Proponents of this concept fell into two categories: some adhere to the view that only a state can be the subject of international criminal responsibility, and individual persons can bear criminal responsibility only under national law (Bustamante, Donnedieu de Vabres); others believed that both a state and individuals could be subjects of criminal responsibility under international law (Pella, Saldana, Levy)." G. TUNKIN, THEORY OF INTERNATIONAL LAW 396 (W. Butler trans. 1974).

21. Distinguished from the idea of an international criminal court exercising jurisdiction over individuals. For the history of these various proposals for an international criminal court, see 3 INTERNATIONAL CRIMINAL LAW (M. Bassiouni ed. 1987) [hereinafter 3 Bassiouni]. A comprehensive collection of pertinent documents appears in B. FERENCZ, AN INTERNATIONAL CRIMINAL COURT: A STEP TOWARD WORLD PEACE—A DOCUMENTARY HISTORY AND ANALYSIS (1980).

22. *See* Triffterer, *Jurisdiction Over States for Crimes of States,* in 2 Bassiouni & Nanda, *supra* note 14, at 86; Triffterer, *Prosecution of States for Crimes of State,* in 3 Bassiouni, *supra* note 21, at 99.

23. Article 19(2), *Draft Articles on State Responsibility,* in *Report of the International Law Commission to the General Assembly,* U.N. Doc. A/31/10 (1976), *reprinted in* [1976] 2 Y.B INT'L L. COMM'N pt. 2, U.N. Doc. A/CN.4/SER.4/Add.1 (pt. 2), 73, at 75. Article 19(3) gives examples of the kind of norms which, if breached, may result in an international crime: those concerned (a) with maintaining international peace and security, such as the norm prohibiting aggression; with (b) self-determination, such as the norm "prohibiting the establishment or maintenance by force of colonial domination"; (c) with human rights, such as norms prohibiting slavery, genocide, *apartheid;* and (d) with the environment, such as norms

itself. The expression "international crime" is used in the Commission's draft to refer to acts for which the state itself is responsible. By contrast, acts resulting in individual criminal responsibility are termed "crimes under international law."[24]

The Commission's concept of an "international crime" has been criticized.[25] There are two basic objections. First, in the more usual formal sense of the term, to call conduct a "crime" implies that it is liable to be followed by criminal proceedings and punishment. But there are no international criminal proceedings, or international agencies empowered to inflict punishment on states. The institutions of internal law that permit a distinction to be drawn between civil and criminal proceedings, between civil and criminal liability, have no precise analogue in international law. Second, while the imposition of punishment on a collectivity may not be impossible, there is the problem of holding an entire population responsible for the acts of its government, since any sanction must ultimately fall on all members of the collectivity. As one commentator has stated: "When Burke declared that you cannot indict a nation, he was uttering not a mere technical platitude of English criminal procedure but a profound political truth."[26]

In defense of the Commission's draft, it might be said that the word "crime" is not being used in its ordinary legal sense. Normally, a breach of international law is considered to be a matter of concern only to states whose rights are directly infringed; no other state is entitled to object or take action to redress the wrong. State responsibility is, in this respect, usually analogous to liability for a tort. The Commission's use of term "international crime,"

"prohibiting massive pollution of the atmosphere or of the seas." Article 19(4) characterizes an "internationally wrongful act which is not an international crime" as "an international delict."

24. [1976] 2 Y.B. INT'L L. COMM'N pt. 2, U.N. Doc. A/CN.4/SER4/Add.1 (pt. 2), at 103-04.

25. *See* BROWNLIE, STATE RESPONSIBILITY, *supra* note 17, at 32-33; Dupuy, *Action publique et crime international de l'Etat*, 25 ANNUAIRE FRANÇAIS DE DROIT INTERNATIONAL 539 (1979); Dupuy, *Observations sur le "crime international de l'Etat"*, 84 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 449 (1980); Green, *Is There An International Criminal Law?*, 21 ALBERTA L. REV. 251, 260-61 (1983); Green, *New Trends in International Criminal Law*, 11 ISRAEL Y.B. HUMAN RIGHTS 9, 27-40 (1981); Marek, *Criminalizing State Responsibility*, 14 REVUE BELGE DE DROIT INTERNATIONAL 460 (1978-79); Weil, *Towards Relative Normativity in International Law?*, 77 AM. J. INT'L L. 413 (1983); *see also* Conforti, *In tema di responsabilità degli Stati per crimini internazionali*, in 3 LE DROIT INTERNATIONAL A L'HEURE DE SA CODIFICATION: ETUDES EN L'HONNEUR DE ROBERTO AGO 99 (1987); Gounelle, *Quelques remarques sur la notion de "crime international" et sur l'évolution de la responsabilité internationale de l'Etat*, in MÉLANGES OFFERTS A PAUL REUTER—LE DROIT INTERNATIONALE: UNITE ET DIVERSITE 315 (1981); Rigaux, *Le crime d'Etat: Reflexions sur l'article 19 du projet d'articles sur la responsabilité des Etats*, in 3 LE DROIT INTERNATIONAL A L'HEURE DE SA CODIFICATION: ETUDES EN L'HONNEUR DE ROBERTO AGO 301 (1987); Sahovic, *Le concept du crime international de l'Etat et le developpement du droit international*, in 3 LE DROIT INTERNATIONAL A L'HEURE DE SA CODIFICATION: ETUDES EN L'HONNEUR DE ROBERTO AGO 363 (1987).

26. J.F. WILLIAMS, CHAPTERS ON CURRENT INTERNATIONAL LAW AND THE LEAGUE OF NATIONS 240 (1929).

taken in the context of the whole draft, is meant only to suggest that there are certain flagrant wrongs which are of concern to the entire international community,[27] and insofar as it is based on wrongs of concern to the whole community, state responsibility may be regarded as more nearly analogous to criminal responsibility.[28] As Jessup once wrote, acceptance of a general community interest in redressing certain violations of law would be comparable "to substituting for the present tort basis of international law a basis more comparable to that of criminal law, in which the community takes cognizance of law violations."[29]

The idea that certain wrongs are of concern to the whole of the international community is supported by language of the International Court of Justice. In the *Barcelona Traction Case,*[30] the Court stated that there are certain "obligations of a State towards the international community as a whole" which are by "their very nature . . . the concern of all States. In view of the importance of the rights involved, all States can be held to have a legal interest in their protection; they are obligations *erga omnes.*"[31] The Commission's concept of an "international crime" coincides more or less with the breach of such an obligation *erga omnes.* It is another way of expressing the idea that certain violations of law are not merely of concern to the immediate victim, but are regarded as a harm to the entire community.

Acceptance of a general community interest in suppressing certain wrongs does not, however, produce a situation precisely analogous to domestic criminal law because international law has no central authority entitled to initiate criminal proceedings or impose punishment. Nor does international law allow individual states to act as self-appointed representatives of the international community in fixing responsibility or inflicting punishment.[32]

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27. *See* Graefrath, *Responsibility and Damages Caused: Relationship between Responsibility and Damages,* 185 RECUEIL DES COURS 9, 54-61 (1984-II); Graefrath, *Völkerrechtliche Verantworlichkeit für internationale Verbrechen,* 1985 PROBLEME DES VÖLKERRECHTS 89. *See also* TUNKIN, *supra* note 20, at 415-20 ("[I]n the event of more serious violations of international law, any state, even though it has not suffered direct damage from the breach of the law, has the right to take measures against the offending state").

28. One of the material differences between tort and crime is supposed to be that crime involves some "special or serious injury to the community considered as a whole." P. BRETT, *supra* note 7, at 36.

29. P. JESSUP, A MODERN LAW OF NATIONS 12 (1948).

30. Concerning the Barcelona Traction Light & Power Company, Limited (Belg. v. Spain), 1970 I.C.J. 3 (Second Phase).

31. *Id.* at 32. "Such obligations derive, for example, in contemporary international law, from the outlawing of acts of aggression, and of genocide, as also from the principles and rules concerning the basic rights of the human person including protection from slavery and racial discrimination." *Id.*

32. Judge Jiménez de Aréchaga cautions that the distinction between international crimes and delicts:

> cannot be permitted to entitle any State to take individual action when it believes that an international crime has been committed . . .[that kind of] . . . anarchical system would lead to a repetition of the worst forms of intervention which occurred

Indeed, the consequences of characterizing state conduct as an "international crime" are not entirely clear.[33] What is clear is that the Commission's concept of an "international crime" is not a crime in anything like the ordinary meaning of the term.

Moreover, even if it is recognized that the Commission's use of the term "crime" is imprecise and metaphorical, there is the more serious objection that its definition, largely because it lacks a formal element, ultimately provides no precise test for determining what kind of conduct may be regarded as falling within the special category of "international crime." In the Commission's formulation, the concept of an "international crime" presupposes the existence of a genuine "international community," comparable to the kind of community that generates national criminal law. This simply does not correspond to the reality of international relations.[34]

B. Individual Responsibility

Attempts to regard the acts of individuals as international crimes are also complicated by the fact that there is no precise analogue in international law to the conditions under which municipal criminal law operates. International law lacks the necessary institutions. There is no international criminal court, nor is there any possibility of distinctly international criminal proceedings.

> in international relations in the nineteenth century. It is significant that some of the earlier advocates of the distinction were at the same time those who defended a policy of intervention by individual States as self-appointed policemen of the world or of a continent. It is essential therefore that the distinction is only implemented within the framework of the competent organs of the institutionalized international community.

E. Jiménez de Aréchaga, *International Law in the Past Third of a Century*, 159 RECUEIL DES COURS 1, 275 (1978-I).

33. It has been suggested that the Commission's concept of an "international crime" turns on three presuppositions: 1) that there is a special class of rules protecting fundamental interests of the international community; 2) that every state has a right to take steps to insist on compliance with those rules; and 3) that sanctions other than a request for reparation may be applicable when such rules are breached. *See* Cassese, *Remarks on the Present Legal Regulation of Crimes of States* in 3 LE DROIT INTERNATIONAL A L'HEURE DE SA CODIFICATION: ETUDES EN L'HONNEUR DE ROBERTO AGO 49 (1987). Cassese concludes that state practice supports saying that there are certain obligations which are regarded as being of fundamental importance and which are considered to be a "public affair," but that it is less clear with respect to the sanctions to be imposed for breach of those obligations. A further draft article submitted to the International Law Commission in 1985 stipulates that, besides all the other legal consequences of an internationally wrongful act, an "international crime" should entail acting with other states to undo its effects, in a manner to be determined by the "international community"; at a minimum, this would involve refusing to recognize as lawful the situation created by the crime and refusing to aid the offending state in maintaining such a situation. *See State Responsibility*, U.N. Doc. A/CN.4/389, at 13-14, *reprinted in* [1985] 2 Y.B. INT'L L. COMM'N (pt. 1), U.N. Doc. A/CN.4/SER.A/Add.1 (pt. 1).

34. *See* Weil, *supra* note 25, at 426-27, 441. *Cf.* Wise, *Terrorism*, *supra* note 3, at 817-21 (discussing the extent to which there can be said to be a genuine "international community").

Notwithstanding the lack of comparable institutions, there are a number of provisions in international agreements which stipulate that the participating states must treat certain kinds of conduct as criminal in their domestic law and take steps to prosecute or punish individuals who engage in such conduct.[35] Taken together with the implementing mechanisms supplied by municipal law, these provisions seem sufficiently analogous to rules of national criminal law to warrant calling the offending conduct in question an "international crime."

The resulting definition comes fairly close to fitting the formal conception of crime as conduct which the law prohibits and provides should be followed by criminal proceedings and penal consequences. It is true that the relevant international norms are not immediately directed to individuals but, rather, are cast in the form of rules requiring states to suppress particular conduct. Yet rules of domestic criminal law can also be represented in this way as directions to officials about how to proceed, rather than as commands issued to the public at large.[36] Thus, from a formal point of view, an international crime may be defined as conduct which an international agreement specifically requires states to subject to prosecution and punishment.

This definition of international crime produces practically the same results as Cherif Bassiouni's formula for identifying conduct that can be labeled an international crime.[37] According to Professor Bassiouni, an international crime is conduct described in a multilateral convention dealing with any one of twenty-two subjects.[38] Further, the convention must contain at least one of ten "penal characteristics."[39] Yet, many of these "characteristics" are

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35. For the terms of those agreements to which the United States is a party, see the appendix to this Article.

36. *See* Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 625-36 (1984).

37. M.C. BASSIOUNI, A DRAFT INTERNATIONAL CRIMINAL CODE AND DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL COURT 21-65 (1987) [hereinafter BASSIOUNI, DRAFT]. For earlier versions, see *Characteristics of International Criminal Law Conventions* in BASSIOUNI: CRIMES, *supra* note 16, at 1; 1 M.C. BASSIOUNI, INTERNATIONAL CRIMES: DIGEST/INDEX OF INTERNATIONAL INSTRUMENTS 1815-1985, at lv-lvi (1986); Bassiouni, *The Penal Characteristics of Conventional International Criminal Law*, 15 CASE W. RES. J. INT'L L. 27 (1983).

38. The twenty-two subjects are: 1) aggression, 2) war crimes, 3) unlawful use or emplacement of weapons, 4) crimes against humanity, 5) genocide, 6) racial discrimination and apartheid, 7) slavery and related crimes, 8) torture, 9) unlawful human experimentation, 10) piracy, 11) aircraft hijacking, 12) threat and use of force against internationally protected persons, 13) taking of civilian hostages, 14) drug offenses, 15) international traffic in obscene publications, 16) destruction or theft of national treasures, 17) environmental protection, 18) unlawful use of the mails, 19) interference with submarine cables, 20) falsification and counterfeiting, 21) bribery of foreign public officials, and 22) theft of nuclear materials. BASSIOUNI, DRAFT, *supra* note 37, at 28-29.

39. These ten "penal characteristics" are: 1) explicit recognition of the proscribed conduct as constituting an international crime, a crime under international law, or a crime; 2) implicit recognition of the penal nature of the act by establishing a duty to prohibit, prevent, prosecute, punish, or the like; 3) criminalization of the proscribed conduct; 4) a duty or right to prosecute;

essentially different ways of expressing an obligation to prosecute and punish offending individuals. Therefore, Bassiouni's formula more or less coincides with the definition of an "international crime" as conduct which states are generally required to prosecute.[40]

The old concept of an "offense against the law of nations"[41] also presupposed an international obligation to prosecute.[42] The definition of "inter-

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5) a duty or right to punish the proscribed conduct; 6) a duty or right to extradite; 7) a duty or right to cooperate in prosecution or punishment; 8) establishment of a basis of criminal jurisdiction or priority in the exercise of criminal jurisdiction; 9) reference to the establishment of an international criminal court; and 10) elimination of the defense of superior orders. *Id.* at 25-26. Many of these "characteristics" represent different ways of expressing an obligation to prosecute and punish and thus coincide with the definition of an "international crime" as conduct which states generally are required to prosecute. *See* Wise, Book Review, 35 AM. J. COMP. L. 842, 844-45 (1987) [hereinafter Wise, Book Review]. Insofar as they do not, the list of "penal characteristics" would be over-inclusive if treated, as it sometimes is in earlier versions of this scheme, apart from the requirement that the convention be limited to one of twenty-two subjects. For instance, if an obligation to extradite were a sufficient condition for international criminality, any conduct extraditable under a multilateral extradition convention would be an international crime. The qualification that the convention must also deal with one of twenty-two subjects is said to be based on "a fairly well established consensus" about what constitutes an international crime "which is substantially shared by many distinguished authors who have expressed similar views over the last sixty years." BASSIOUNI, DRAFT, *supra* note 37, at 25. But this, in effect, produces a definition by which an "international crime" is anything that has been agreed to be an "international crime"—usually because it is subject to an obligation to prosecute set out in a multilateral convention.

40. Ultimately, Bassiouni does propose, without much comment, a definition by which an "international offense is conduct internationally proscribed for which there is an international duty for states to criminalize the said conduct, prosecute or extradite and eventually punish the transgressor, and to cooperate internationally for the effective implementation of these purposes and duties." BASSIOUNI, DRAFT, *supra* note 37, at 55.

41. The term "originated in the criminal law of States to designate acts of individuals directed against foreign States and their representatives. However, it subsequently came to be applied to other crimes in so far as conventional or customary international law binds or entitles States to punish their authors." Schindler, *Crimes Against the Law of Nations* in 8 ENCYCLOPEDIA OF PUB. INT'L L. 109, 109 (1985). U.S. CONST. art. I, § 8, cl. 10, authorizes Congress "[t]o define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations." *See* Comment, *The Offenses Clause: Congress' International Penal Power*, 8 COLUM. J. TRANSNAT'L L. 279 (1969) (tracing history and development of the Offenses Clause). *See also* Frend v. United States, 100 F.2d 691 (D.C. Cir. 1938) (affirming convictions for demonstrating in front of foreign embassies in violation of statute outlawing display of any device adapted to intimidate, coerce, or harass foreign embassy or consulate in the District of Columbia. Act of Feb. 15, 1938, ch. 29, §§ 1-2, 52 stat. 30 (codified as D.C. CODE ANN. §§ 22-1115 to -1116 (1967)).

42. In Blackstone's view, "offenses against the law of nations" (violations of safe-conducts, infringement of the rights of ambassadors, and piracy) are punished by municipal law because, when individuals violate the rights of foreign states under international law, it is "the interest as well as duty of the government under which they live, to animadvert upon them with a becoming severity, that the peace of the world may be maintained," and lest it be regarded as "an accomplice or abettor." 4 W. BLACKSTONE, *supra* note 8, at *68. *Cf.* 2 H. GROTIUS, DE JURE BELLI AC PACIS 523 (F. Kelsey trans. 1925) ("A community, or its rulers, may be held responsible for the crime of a subject if they know of it and do not prevent it when they could

national crime" here proposed differs from the traditional concept of an "offense against the law of nations" insofar as it requires that the obligation to prosecute be set out in a treaty. Accordingly, conduct which customary law obligates states to repress but which has not been made the subject of a specific treaty obligation, while it might fall within the traditional concept, would not count as an "international crime."[43]

Modern opinion generally has excluded actions not specifically prohibited in treaty provisions from the definition of international crime. There seem to be two main reasons for this. First, the law-making treaty has become our primary source of international law. Second, insisting on a text comports with the principle of legality in domestic criminal law, which requires express statutory condemnation of an act as criminal before it can be treated as a crime.[44]

While it is sometimes suggested that the distinctive feature of an international crime is the universal jurisdiction of any state that happens to have hold of the perpetrator,[45] with a few exceptions, most treaties establishing an obligation to prosecute do not unequivocally provide for universal jurisdiction.[46] Thus, the definition of "international crime" here proposed does not treat universality of jurisdiction[47] as a necessary condition of international criminality. It is limited to conduct which a state is bound to punish and does not include other conduct which a state is only entitled to punish by virtue of an international agreement.[48] In fact, this hardly makes a difference,

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and should prevent it."). James Madison argued that federal jurisdiction over "offenses against the law of nations" was needed in order to take it out of "the power of any indiscreet member to embroil the Confederacy with foreign nations." THE FEDERALIST No. 42, at 281 (J. Madison) (J. Cooke ed. 1961). *See also* Wise, *Note on International Standards of Criminal Law and Administration,* in INTERNATIONAL CRIMINAL LAW 135, 162-63 (G. Mueller & E. Wise eds. 1965) [hereinafter Mueller & Wise].

43. On non-treaty rules requiring prosecution, see Mueller & Wise, *supra* note 42, at 152-59.

44. *Cf.* BASSIOUNI, DRAFT, supra note 37, at 23-24.

45. For example, international criminal law, in the absence of an international criminal court, has been said merely to indicate "that an act is considered by the society of States as so abominable that every State is entitled to proceed against the person committing it . . . ." Green, *International Criminal Law and the Protection of Human Rights,* in CONTEMPORARY PROBLEMS OF INTERNATIONAL LAW: ESSAYS IN HONOUR OF GEORG SCHWARZENBERGER 116, 137 (B. Cheng & E. Brown eds. 1988).

46. *See* Clark, *Offenses of International Concern: Multilateral State Treaty Practice in the Forty Years Since Nuremberg,* 57 NORDIC J. INT'L L. 49, 51-63 (1988).

47. The principle of universality is stated as follows in the RESTATEMENT OF THE LAW (THIRD), THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 404: "A state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism, even where [no other basis of jurisdiction] is present." *See also* Randall, *Universal Jurisdiction Under International Law,* 66 TEX. L. REV. 785 (1988).

48. In Schwarzenberger's terms, it limits the concept to "internationally prescribed municipal criminal law," and does not include "internationally authorized municipal criminal

since multilateral conventions now impose an obligation to repress piracy and most war crimes, the two leading examples of offenses as to which customary international law is supposed to authorize the exercise of extraordinary jurisdiction.[49]

III. Types of International Crime

The concept of international crime, as formulated in the previous section, encompasses a wide range of conduct that can be subdivided according to various possible typologies.[50] The most generally useful scheme is one that distinguishes between types of international crime on the basis of the degree of official involvement in the conduct constituting the crime. Accordingly, international crime can be roughly divided into three general heads.

The first general heading includes violations of international norms directed toward restraining the conduct of state officials. The crimes that fall under this head are not likely to be committed by private enterprise. Offenses within this group may be said to constitute the classical international crimes,[51] or international crimes in the narrow sense of the term.[52] The prototypical offenses under this heading are conventional war crimes. It also includes the

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law." Schwarzenberger, *The Problem of an International Criminal Law,* 3 Current Legal Probs. 263, 266, 268 (1950), *reprinted in* Mueller & Wise, *supra* note 42, at 3, 6 & 8. *See also* Schindler, *supra* note 41, at 109 (distinguishing crimes punishable under internationally prescribed municipal criminal law, e.g., crimes against foreign states and crimes defined by international conventions; and crimes punishable under internationally authorized municipal criminal law, e.g., piracy and war crimes).

49. *See* Schindler, *supra* note 41, at 109-10. Although the "commentators agree that a war criminal can be tried by any sovereign that has physical custody of him . . . nations have rarely shown much interest in trying crimes of which they were not the victims." J. Bishop, Justice Under Fire 289 (1974). *See infra* note 60 (discussion of piracy).

50. *See, e.g.,* Bassiouni, Draft, *supra* note 37, at 41-52 (table listing categories of crimes, their international elements, their transnational elements and whether cooperation of states is necessary for enforcement); Dinstein, *International Criminal Law,* 20 Israel L. Rev. 206, 230-31 (1985) (classifying existing international offenses in terms of three possible distinctions: 1) peacetime offenses and wartime offenses; 2) private offenses and official offenses; and 3) offenses connected with human rights and those not connected with human rights). How the list of international crimes is divided up depends on one's purpose in trying to devise a typology, just as different classifications of domestic crimes are possible depending on "the consideration which is chosen as the basis of the grouping." Allen, *supra* note 8, at 247.

51. Jescheck refers to the "classical domain" of international criminal law, "which was the subject of the Nuremberg and Tokyo judgments." Jescheck, *Developments, Present State and Future Prospects of International Criminal Law,* 52 Revue Internationale de Droit Pénal 337, 339-40 (1981).

52. In this narrow sense, "international crimes" are more or less coextensive with "offenses against the peace and security of mankind." The International Law Commission has been working on and off since 1949 on a Draft Code of Offenses Against the Peace and Security of Mankind. The work resumed in 1982. For the draft articles adopted so far, see McCaffrey, *The Fortieth Session of the International Law Commission,* 83 Am. J. Int'l L. 153, 154-60 (1989) [hereinafter McCaffrey, Fortieth]; McCaffrey, *The Thirty-Ninth Session of the International Law Commission,* 82 Am. J. Int'l L. 144, 144-47 (1988).

two other categories of crime prosecuted at Nuremberg: crimes against peace[53] and crimes against humanity.[54] By extension, this heading would also include genocide,[55] the systematic use of torture by governments[56] and, if one likes, apartheid.[57]

The second heading includes the crimes associated with terrorist activities that have been the subject of relatively recent conventions.[58] These activities are often referred to nowadays as "international crimes." Unlike those that fall under the first head, the acts in question need not be committed directly by state officials. Nonetheless, a paramount reason for international concern has been the generally lax attitude taken towards such offenses, sometimes seeming to amount to complicity, on the part of states in which the offenders have taken refuge.[59] The old offense of piracy, which is commonly termed an "international crime," although usually for the wrong reason, is, in some respects, the prototypical offense under this heading.[60]

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53. Article 6(a) of the Charter of the Nuremberg Tribunal defined "crimes against peace" as the "planning, preparation, initiation or waging of a war of aggression or a war in violation of international treaties, agreements, or assurances, or participation in a common plan or conspiracy for any of the foregoing." Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, Aug. 8, 1945, 59 STAT. 1544, 82 U.N.T.S. 279, 288 [hereinafter, Nuremberg Charter]. This has come to represent general international law in the sense that there is clear agreement on the proposition that the initiation or waging of aggressive war constitutes an offense. "What is not so clear is whether it has any practical effect or serves any useful purpose." BISHOP, *supra* note 49, at 282. The General Assembly's Definition of Aggression, G.A. Res. 3314 (XXIX), 29 U.N. GAOR Supp. (No. 31) at 142, U.N. Doc. A/9631 (1974), has serious flaws. For a discussion of the development of the United Nations definition and a critical analysis, see J. STONE, CONFLICT THROUGH CONSENSUS: UNITED NATIONS APPROACHES TO AGGRESSION (1977).

54. Article 6(c) of the Charter of the Nuremberg Tribunal defined "crimes against humanity" as "murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population before or during the war or persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal . . . . " Nuremberg Charter, *supra* note 53, 8 U.N.T.S. at 288.

55. *See* the Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention] (article 1 makes genocide, whether committed in peacetime or in wartime, a crime under international law).

56. *See* Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment, Dec. 17, 1984, G.A. Res. 39/46, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984).

57. *See* the International Convention on the Suppression and Punishment of the Crime of *Apartheid,* Nov. 30, 1973, G.A. Res. 3068 (XXVII), 28 U.N. GAOR Supp. (No. 30) at 75, U.N. Doc. A/9030 (1973) [hereinafter *Apartheid* Convention].

58. For a list of such conventions, see Part II of the appendix to this Article.

59. Hence the focus on measures of cooperation and on eliminating bolt holes. Judge Sofaer reaches the "painful conclusion: the law applicable to terrorism is not merely flawed, it is perverse. The rules and declarations seemingly designed to curb terrorism have regularly included provisions that demonstrate the absence of international agreement on the propriety of regulating terrorist activity." Sofaer, *Terrorism and the Law,* 64 FOREIGN AFFAIRS 901, 902 (1986).

60. In past times, governments were often ambivalent about pirates, who could be useful

The third heading covers other acts of private individuals which have been subjected to treaty prohibition because they involve international traffic or harm to a mutual or common interest of states requiring international cooperation for its effective suppression.[61] This group of offenses might be called international crimes in the broad sense of the term. The list of conduct considered to constitute international crime is considerably expanded when this third head is included. If "international crime" is understood in this broad sense, the range of the concept becomes "very extensive and difficult to delimit."[62] However, if this definition of international crime seems overbroad, the same is true of the concept of crime in domestic law, with its broad array of purely regulatory offenses.

The scheme outlined above focuses primarily on whether or not a crime was committed under color of law. This reflects the recognition that attempts to restrain those acting in the name of a powerful modern state are something quite different from efforts to deal with other kinds of criminals or bands of criminals, however violent they may be. Indeed, one of the central problems confronting international criminal law is the problem of imposing restraints on the conduct of those whom the modern state has cloaked with official authority.[63]

There is another basis on which the first group, consisting of classical international crimes, is sometimes distinguished from the other two groups of international crimes. The crimes in the first group, especially conventional war crimes, are said to involve a direct violation of international law by the individuals who commit them. With respect to war crimes, international law

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allies. The suppression of piracy usually fell to the dominant sea power, to whom it had become a nuisance. The chief problem was to prevent other states from giving shelter or support to pirates. This led to a rule requiring states to refrain from allowing their territory to be used as a pirate base or haven. In Article 14 of the Convention on the High Seas, Apr. 29, 1958, 13 U.S.T. 2312, T.I.A.S. No. 5200, 450 U.N.T.S. 82, this is generalized as an obligation to "cooperate to the fullest possible extent in the repression of piracy . . . . " A second rule allowed the exercise of jurisdiction over pirates on the high seas—an apparent exception to the principle of freedom of the seas. Article 19 of the Convention on the High Seas restates this rule. Both rules are said to have originated in medieval treaties. G. SCHWARZENBERGER, THE FRONTIERS OF INTERNATIONAL LAW 104-06 (1962). They gradually grew into principles of customary international law, "in the humus of defunct treaty law." G. SCHWARZENBERGER, INTERNATIONAL LAW AND ORDER 35 (1971). Operationally, these are the principal rules of international law with respect to piracy. On the early history of piracy, see Rubin, *The Law of Piracy*, 15 DEN. J. INT'L L. & POL'Y 173 (1987).

61. *See* conventions listed in the Part III of the appendix to this Article.

62. Jescheck, *International Crimes*, 8 ENCYCLOPEDIA OF PUB. INT'L L. 332, 335 (1985).

63. This language is adapted from a statement by Sir John Fisher Williams, which was intended, however, to express skepticism about the feasibility of trying to subject the conduct of states to a system constructed on analogy to domestic criminal law: "An attempt to restrain a powerful modern state which violates the law of the great society is something quite different from an effort to deal by measures of internal police with a criminal or band of criminals, however violent they may be." J.F. WILLIAMS, ASPECTS OF MODERN INTERNATIONAL LAW 93 (1939). *See also id.* 84-88; J.F. WILLIAMS, *supra* note 26, at 232-56 (criticizing attempts to construct "international criminal law" by use of analogies to individual criminal behavior).

is supposed to speak directly to individuals and oblige them to refrain from engaging in proscribed forms of conduct. In prosecuting such conduct, the state is regarded as acting not merely to enforce its own law, but to enforce international law. Its courts exercise, as it were, "an international jurisdiction,"[64] and "what is punished is the breach of international law."[65]

By contrast, the international crimes encompassed within the other two groups do not involve duties imposed by international law directly on the individual. Generally, the only obligation imposed by treaty is that which requires a state to take steps under its own law to punish individuals who engage in the conduct described. The acts falling within the latter two groups are not directly proscribed by international law. The offender is punished only for the breach of a provision of municipal law implementing the treaty.

This distinction between direct international proscription of the first group of offenses, and indirect proscription with respect to other international crimes, is controversial.[66] Those who accept this distinction must still allow that, even with respect to the first group of offenses, much is left to the province and discretion of municipal courts.[67] But, in that event, it is hard to see why a municipal court largely applying municipal law should be regarded as anything other than a municipal court largely applying municipal law. Absent an international criminal court, international law has to rely on prosecution before national courts.

Yet, application of criminal law involves any number of local peculiarities.[68] National systems of criminal law vary with respect to modes of proceeding and proof and the composition of courts that may substantially affect the outcome of a case. National systems vary with respect to matters

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64. I. BROWNLIE, PRINCIPLES, *supra* note 17, at 561, 577.

65. *Id.* at 305.

66. It is asserted, to the contrary, that the sole international obligation is that which requires states to prosecute the conduct in question; individual criminal responsibility attaches only under national law as a result of the state's compliance with this obligation. *See* Baxter, *The Municipal and International Basis of Jurisdiction Over War Crimes,* in 2 Bassiouni & Nanda, *supra* note 14, at 65. There is a more recent tendency to blur the distinction from the opposite direction, by speaking as if not only war crimes, but all other crimes which multilateral treaties require states to prosecute or punish, give rise to direct individual criminal responsibility under international law, and as if it were only for want of an international criminal court that "the world community must depend on the cooperation and voluntary compliance of states to indirectly enforce the proscriptions of international criminal law." BASSIOUNI, DRAFT, *supra* note 37, at 54.

67. The laws of war "leave a wide discretion to belligerent states, without giving any precise indication as to the kind of court (e.g. whether military or civil), the forms of procedure, or the definition of particular offenses, which they should adopt." Brierly, *The Nature of War Crimes Jurisdiction,* in THE BASIS OF OBLIGATION IN INTERNATIONAL LAW 297, 304 (H. Lauterpacht & C.H. Waldock eds. 1958).

68. "Criminal trials are, of all parts of law, the most intensely national in their setting and general conduct; they are the most intimately connected with a nation's history and its whole habit and constitution of mind; they are the matters in which the differences between Anglo-Saxon and continental law and practice are most profound . . . ." J.F. WILLIAMS, *supra* note 26, at 252.

such as prosecutorial discretion and prescription that may wholly cut a case off, and with respect to how far they will go in admitting or disallowing certain kinds of defenses and, more subtly, with respect to the whole web of associations and appreciations having to do with assignments of blame and the differences between culpable, justifiable and excusable actions. As long as there is reliance on local prosecution, an international rule requiring repression of particular conduct will necessarily be complicated, qualified, modified, even distorted, by the system of national law through which it is implemented.[69] Thus, to say that in trying a case which international law obliges the state to prosecute, a national court is primarily exercising "an international jurisdiction," seems very much like putting the cart before the horse.

IV. INTERNATIONAL CRIMES IN UNITED STATES LAW

In principle, the federal government may exercise only the limited powers enumerated in the Constitution. But one of its enumerated powers authorizes Congress to define and punish "offenses against the law of nations."[70] Together with the treaty-making power, this enables Congress to create offenses which would ordinarily be beyond its competence in order to implement a treaty.[71]

In the 1790's, the federal government was thought to have the power to prosecute offenses under international law as common law crimes, without an implementing statute.[72] However, at least since the early nineteenth century, the Supreme Court has held that the federal judiciary generally has no jurisdiction to try common law crimes.[73] Accordingly, the federal government has also been required to act on a statutory basis in prosecuting international crimes.[74] Thus,

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69. *See* Wise, *War Crimes, supra* note 3, at 37-42 (peculiarities and distinctive characteristics of American law complicated the obligation of the United States to prosecute those involved in the My Lai massacre).

70. *See supra* note 41 and accompanying text for a discussion of the constitutional power granted Congress to proscribe international crimes.

71. Missouri v. Holland, 252 U.S. 416, 434-35 (1920). The appendix to this paper contains a listing of the provisions of multilateral conventions adhered to by the United States which require the parties to take steps to prosecute or punish particular conduct. The appendix also lists the federal statutes through which these treaties have been implemented.

72. *See* Preyer, *Jurisdiction to Punish: Federal Authority and the Criminal Law,* 4 LAW & HIST. REV. 223, 225 (1986).

73. *See* United States v. Hudson and Goodwin, 11 U.S. (7 Cranch) 32, 34 (1912); United States v. Coolidge, 14 U.S. (1 Wheat.) 415, 416 (1816); *see also* J. DRESSLER, UNDERSTANDING CRIMINAL LAW 13-15 (1987) (discussion of common law crimes in the state courts).

74. However, in the case of piracy, it has long been considered sufficient for the statute simply to prescribe a penalty for "the crime of piracy as defined by the law of nations." 18 U.S.C. § 1651 (1982). *See* United States v. Smith, 18 U.S. (5 Wheat) 153, 158-62 (1820) (upholding incorporation by reference of piracy as defined in international law). Likewise in the case of war crimes. The only pertinent statutes confer jurisdiction on military tribunals "to try any person who by the law of war is subject to trial by a military tribunal and . . . adjudge

a statute is usually required to implement a treaty obligation to prosecute and punish given types of conduct.[75]

Congress has not enacted a single federal statute on international crimes. While special statutes have been enacted to implement specific treaty obligations, these have been scattered throughout the United States Code. Not all appear within Title 18, which is designated as the United States Criminal Code. Even within Title 18, which is arranged alphabetically, international crimes appear in different places under various headings. The treatment of international crimes in federal law perfectly realizes "the old-fashioned English lawyer's idea of a satisfactory body of law . . . chaos with a full index."[76]

Certain treaties require states to establish extraterritorial jurisdiction over a number of international crimes.[77] This is notably the case with four recent conventions on crimes associated with terrorism. The Hague[78] and Montreal[79] Conventions have led to revision of the definition of "the special aircraft

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any punishment permitted by the law of war." Uniform Code of Military Justice, Art. 18, 10 U.S.C. § 818 (1982) (general courts-martial); *id.* at Art. 21, 10 U.S.C. § 821 (1982) (military commissions). Such incorporation by reference has been held to be permissible. *See Ex parte* Quirin, 317 U.S. 1 (1942) (trial of German nationals for espionage activities on United States soil); *In re* Yamashita, 327 U.S. 1 (1946) (trial of Japanese army official for atrocities committed against civilians and prisoners of war). In practice, war crimes which involve killing or mistreating non-combatants or prisoners of war are usually tried as common crimes, such as murder, before courts-martial. J. BISHOP, *supra* note 49, at 262.

75. For the suggestion that this may be an open question, see Paust, *Federal Jurisdiction Over Extraterritorial Acts of Terrorism and Nonimmunity for Foreign Violators of International Law Under the FSIA and the Act of State Doctrine,* 23 VA. J. INT'L L. 191, 211-13, 219-20 (1983).

76. The phrase is Holland's. It is quoted by Holmes in an unsigned early review of T.E. HOLLAND, ESSAYS UPON THE FORM OF THE LAW (1870), in Book Notice, 5 AM. L. REV. 114 (1870), *reprinted in* JUSTICE OLIVER WENDELL HOLMES: HIS BOOK NOTICES AND UNCOLLECTED LETTERS AND PAPERS 41 (1936). *See also* M. HOWE, JUSTICE OLIVER WENDELL HOLMES: THE PROVING YEARS 63 (1963).

77. The usual basis of jurisdiction over crime is territoriality. Beccaria maintained that "[t]he place of punishment can certainly be no other than that where the crime was committed; for the necessity of punishing an individual for the general good, subsists there, and there only." C. BECCARIA, AN ESSAY ON CRIMES AND PUNISHMENTS 135 (Academic Reprints ed. 1953) (2d Amer. ed. 1819). This used to be the position taken by the United States; the traditional Anglo-American view did "not admit that a state may punish an alien for a breach of its criminal law, if the act was committed outside its territory . . . ." J.L. BRIERLY, THE LAW OF NATIONS 299 (6th ed. 1963). In recent decades, however, the United States has moved fairly far from insisting on territoriality as the only proper basis of criminal jurisdiction; nowadays it is often the United States that relies on what other states regard as extravagant jurisdictional claims. *See, e.g.,* Blakesley, *United States Jurisdiction over Extraterritorial Crime,* 73 J. CRIM. L. & CRIMINOLOGY 1109 (1982).

78. Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641, T.I.A.S. No. 7192, 860 U.N.T.S. 105 [hereinafter Hague Convention].

79. Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 564, T.I.A.S. No. 7570, 974 U.N.T.S. 177.

jurisdiction of the United States" in the Federal Aviation Act.[80] The Criminal Code defines "hostage-taking"[81] in terms that replicate the provisions of the Hostages Convention.[82] The Code has also made punishable crimes committed by United States nationals involving nuclear materials, regardless of where these crimes take place,[83] as required by the Convention on the Physical Protection of Nuclear Materials.[84]

These four conventions, as well as those on offenses against internationally protected persons,[85] further require a state which elects not to extradite an offender who is present in its territory to submit the case to its own authorities for the purpose of prosecution.[86] This presupposes that the state will be able to exercise extraterritorial jurisdiction in such cases. Accordingly, United States law has been revised to establish jurisdiction with respect to aircraft hijacking and sabotage, terrorist offenses involving nuclear materials, hostage-taking, and murder, kidnapping, extortion, or assault against internationally protected persons "if the alleged offender is present within the United States, irrespective of the place where the offense was committed or the nationality of the victim or the alleged offender."[87] In addition, a section

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80. 42 U.S.C. App. § 1301(38)(iii) (Supp. II 1984).

81. 18 U.S.C. § 1203 (Supp. II 1984). The statute defines a "hostage taker" as anyone who seizes or detains or threatens to kill, injure or continue to detain another in order to compel a third person or governmental organization. The United States statute imposes a sentence of up to life in prison.

82. International Convention Against the Taking of Hostages, Dec. 17, 1979, G.A. Res. 34/146, 34 U.N. GAOR Supp. (No. 46) at 245, U.N. Doc. A/34/46 (1979), 18 I.L.M. 1456.

83. 18 U.S.C. § 831(c)(2) (1982).

84. Convention on the Physical Protection of Nuclear Materials, *opened for signature* Mar. 3, 1980, I.A.E.A. Legal Series No. 12 (1982), 18 I.L.M. 1419. Article 2 of the convention clearly states that the Convention applies to all nuclear materials for peaceful purposes when they are in international transport.

85. Organization of American States Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion that are of International Significance, Feb. 2, 1971, 27 U.S.T. 3949, T.I.A.S. No. 8413 (Article 5 states: "[W]hen extradition requested for one of the crimes specified in Article 2 is not in order because the person sought is a national of the requested state, or because of some other legal or constitutional impediment, that state is obliged to submit the case to its competent Authorities for prosecution . . . ."); Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, Dec. 14, 1973, 28 U.S.T. 1975, T.I.A.S. No. 8532, 1035 U.N.T.S. 167 (Article 7, relating to the situation where the alleged offender will not be extradited provides that the State will "submit, without exception whatsoever and without undue delay, the case to its competent authorities . . . .").

86. *See, e.g.*, Article 7 of the Hague Convention, *supra* note 78, which became the model for subsequent treaties, provides: "The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obligated, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State." *See also supra* note 85 (treaties cited therein).

87. 18 U.S.C. § 112(e) (1982) (assault against foreign officials); 18 U.S.C. § 878(d) (1982) (extortion against foreign officials); 18 U.S.C. § 1116(c) (1982) (murder or manslaughter of

of the Omnibus Diplomatic Security & Antiterrorism Act of 1986[88] establishes extraterritorial jurisdiction over homicide and physical violence against United States nationals abroad when the Attorney General certifies that the offense "was intended to coerce, intimidate, or retaliate against a government or a civilian population."[89]

The provisions in these conventions for prosecution in lieu of extradition are designed to ensure that offenders do not escape being brought to trial even though their extradition is not possible. One basis on which extradition may not be possible is the political offense exception—the rule excluding extradition where the crime for which it is sought is considered to be a political offense.[90] The fact that a treaty requires prosecution for a particular type of crime does not necessarily preclude its being committed under circumstances that bring it within the political offense exception. Although there have been various efforts to disallow the operation of the exception with respect to certain types of particularly abhorrent crime,[91] in multilateral treaties it has generally proved more acceptable to allow for the possibility

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foreign officials); 18 U.S.C. § 1201(e) (1982) (kidnapping of foreign officials). *See also* 18 U.S.C. § 32(b) (Supp. II 1984) (destruction of foreign aircraft); 18 U.S.C. § 831(c)(3) (1982) (prohibited transactions involving nuclear materials in use, storage or transport for peaceful purposes); 18 U.S.C. § 1203(b) (1982) (hostage-taking); 49 U.S.C. App. § 1472(n) (1982) (unlawful seizure of aircraft "outside the special aircraft jurisdiction of the United States").

88. Omnibus Diplomatic Security & Antiterrorism Act § 1202, 100 Stat. 853, 896-897 (1986) (codified at 18 U.S.C. § 2331 (Supp. IV 1986)).

89. 18 U.S.C. § 2331(e) (Supp. IV 1986). Federal jurisdiction over murder, kidnapping, extortion, and assault against U.S. government officials abroad has existed since 1976, by virtue of a definition of "internationally protected persons" that includes not only foreign diplomats but also "any other representative, officer, employee, or agent of the United States government . . . who at the time and place concerned is entitled pursuant to international law to special protection against attack . . . ." 18 U.S.C. § 1116(a)(4) (1982). Ordinary citizens are not included. Thus, the terrorists who hijacked the Achille Lauro in 1985 could have been prosecuted in the United States under the 1984 statute on hostage-taking, 18 U.S.C. § 1203, but, prior to 1986, not for killing Leon Klinghoffer. *See* Findlay, *Abducting Terrorists Overseas for Trial in the United States: Issues of International and Domestic Law*, 23 TEX. INT'L L.J. 1, 44-45 (1988). *Cf.* Paust, *Extradition and United States Prosecution of the Achille Lauro Hostage-Takers: Navigating the Hazards*, 20 VAND. J. TRANSNAT'L L. 235 (1987) (discussing the Achille Lauro incident and subsequent events).

90. *See generally* I. SHEARER, EXTRADITION IN INTERNATIONAL LAW 166-93 (1971); C. VAN DEN WIJNGAERT, THE POLITICAL OFFENSE EXCEPTION TO EXTRADITION (1980). *Cf.* Wise, Book Review, 30 AM. J. COMP. L. 362 (1982) (reviewing van den Wijngaert's treatment of the political offense exception). The United States does not have a comprehensive extradition statute—only the procedural rules set out in 18 U.S.C. §§ 3181-3195. Thus, whether or not extradition is possible turns on the provisions of the particular treaty under which it is requested. Nearly all of the extradition treaties concluded by the United States exclude the extradition of political offenders. As to those that do not, it was once said that an express exception was unnecessary: "[I]t was not supposed, on either side, that guarantees were required of each other against a thing inherently impossible, any more than, by the laws of Solon, was a punishment deemed necessary against the crime of parricide, which was beyond the possibility of contemplation." Letter from Secretary of State Fish to Mr. Hoffman (May 22, 1876), *reprinted in* 4 J.B. MOORE, DIGEST OF INTERNATIONAL LAW § 604, at 334 (1906).

91. "The standard formulation reads as follows: '*crime X shall not be considered as a*

that the exception will be invoked, but to require any state which refuses extradition to undertake prosecution itself.

Between particular countries, however, it may be feasible to achieve on a bilateral basis what seems to be unacceptable on a universal or multilateral basis. Thus, the United States government in the last decade has been negotiating bilateral extradition treaties that circumvent the political offense exception by imposing an obligation to extradite whenever a multilateral treaty requires prosecution in lieu of extradition.[92] Such a provision transmutes the alternative duty to extradite or prosecute imposed by the multilateral agreement into an unconditional duty to extradite under the bilateral treaty.[93]

V. THE CODIFICATION OF INTERNATIONAL CRIMES

Historically, the idea of codifying international crimes has been associated with the idea of establishing an international criminal court.[94] However, there is no necessary connection between the two ideas. For example, an international criminal court could be established and its jurisdiction defined through reference to existing treaties.[95] Conversely, a code of international criminal law could be adopted without establishing a court, by relying instead

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political offense for the purposes of extradition.'" C. VAN DEN WIJNGAERT, *supra* note 91, at 133. This "depoliticizing formula" was first used in connection with the assassination of heads of state, and has since been used for other crimes. *Id.* 133-34. It appears in article 7 of the Genocide Convention, *supra* note 55, and in article 11 of the *Apartheid* Convention, *supra* note 57. It appears in article 1 of the European Convention on the Suppression of Terrorism, *opened for signature* Jan. 27 1977, Europ. T.S. No. 90, 15 I.L.M. 1272, but not in conventions dealing with particular aspects of terrorism concluded by the wider "international community"—precisely because these offenses, for "lack of political agreement, could not be 'depoliticized.'" C. VAN DEN WIJNGAERT, *supra* note 91, at 149.

92. Such treaties provide that "crimes that would otherwise be non-extraditable as political offenses are extraditable if a party to the treaty has an obligation to prosecute or extradite because of multilateral international agreements." *Report of the Committee on International Terrorism*, in AMER. BRANCH, INT'L L. ASS'N 1985-86 PROCEEDINGS AND COMMITTEE REPORTS 126, 129.

93. *See* Bassiouni, *The "Political Offense Exception" Revisited: Extradition Between the U.S. and the U.K.—A Choice Between Friendly Cooperation Among Allies and Sound Law and Policy*, 15 DENVER J. INT'L L. & POL'Y 255, 267 (1987). The controversial Supplementary Extradition Treaty with the United Kingdom contains such a clause, but goes further and also eliminates the political offense exception with respect to violent crimes such as murder, maiming, kidnapping, and use of bombs, even when these offenses do not constitute "international crimes." *See* Supplementary Extradition Treaty, June 25, 1985, United States-United Kingdom, S. TREATY DOC. No. 8, 99th Cong., 1st Sess. 1 (1985), *amended by* S. EXEC. REP. No. 17, 99th Cong., 2d Sess. 1, app. 1 at 15 (1986), *reprinted in* 132 CONG. REC. S9120 (daily ed. July 16, 1986). The final version is also reproduced in the appendix to Lubet, *Extradition Unbound: A Reply to Professors Blakesley and Bassiouni*, 24 TEX. INT'L L.J. 47, 62 (1989).

94. This paragraph is largely borrowed from Wise, *Codification: Perspectives and Approaches*, in 1 BASSIOUNI: CRIMES, *supra* note 16, at 101, 107.

95. This has been proposed by the International Criminal Law Committee of the International Law Association. *See* 1978 REP. INT'L L. A. 473, 475-76; 1980 REP. INT'L L. A. 400,

on "indirect enforcement"[96] through interstate cooperation and municipal prosecution,[97] as in the present system, or on some international mechanism, short of a court, for focusing public outrage on those to whom *prima facie* violations can be attributed.[98]

There have been a number of recent efforts to codify international crimes. One such effort is the International Law Commission's Draft Code of Offenses Against the Peace and Security of Mankind, which is limited to "international crime" in the narrow sense.[99] Other proposals are broader in scope.[100] Nonetheless, there seems to be little point to adopting a substantive

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401-02; 1982 REP. INT'L L. A. 377, 454-62 (draft statute establishing an International Criminal Court with provisions for jurisdiction, organization, procedures and judicial qualifications); 1984 REP. INT'L L. A. 252, 292-99 (redraft of the 1982 statute). On the other hand, the Committee has more recently proposed to add protocols that would delineate sanctions and defenses—matters usually included in the general part of a national criminal code. *See* 1984 REP. INT'L L. A. 252, 292-99 (proposing sanctions for violations of various treaty provisions and a statute of limitations); 1986 REP. INT'L L. A. 357, 366-76 (setting out defenses for violations of various treaty provisions). The cross-referencing technique is also used in the Draft Convention on International Crimes proposed by the Foundation for the Establishment of an International Criminal Court. *See* R. WOETZEL, THE ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL COURT: A REPORT ON THE FIRST & SECOND INTERNATIONAL CRIMINAL LAW CONFERENCES 14-15 (1973). *Cf.* TOWARD A FEASIBLE INTERNATIONAL CRIMINAL COURT (J. Stone & R. Woetzel eds. 1970) (discussing draft statutes concerning an international criminal court and methods of establishing jurisdiction).

96. BASSIOUNI, DRAFT CODE, *infra* note 100, at 37, distinguishes between the use of "a comprehensive code by an International Criminal Court (Direct Enforcement Model)," and its enforcement through a "national criminal justice system (Indirect Enforcement Model)." *See also* BASSIOUNI, DRAFT, *supra* note 37, at 69 (discussing the "Direct Enforcement Model" and the "Indirect Enforcement Model").

97. The latest version of the International Law Commission's Draft Code, see *supra* note 52, contemplates enforcement through national courts, although it "preserves the possibility that an international court may be established." McCaffrey, *Fortieth, supra* note 52, at 157. "The Commission has twice asked the General Assembly whether its mandate to prepare the code includes the drafting of a statute of an international criminal court, but has to date received no definitive response." *Id.* at 157 n.5.

98. *See* Mueller, *Two Enforcement Models for International Criminal Justice,* in ETUDES EN L'HONNEUR DE JEAN GRAVEN 107 (1969). *See also* Friedlander, *Enforcement Models of International Criminal Law,* NEW HORIZONS IN INTERNATIONAL CRIMINAL LAW 85 (Association Internationale de Droit Pénal Nouvelles Etudes Pénales No. 6, 1985) (discussing an expanded range of enforcement models and their probable effectiveness, sketched in a presentation by Gerhard Mueller). *Cf.* Mueller & Besharov, *The Existence of International Criminal Law and its Evolution to the Point of its Enforcement Crisis,* in 1 Bassioui & Nanda, *supra* note 14, at 5; Mueller & Besharov, *Evolution and Enforcement of International Criminal Law,* in 1 BASSIOUNI: CRIMES, *supra* note 16, at 59 (Mueller's enforcement models and their development in international law).

99. *See supra* note 52 and accompanying text on the International Law Commission's draft.

100. Bassiouni's draft encompasses all international crimes, in the broadest possible sense of the term. *See generally* BASSIOUNI, DRAFT, *supra* note 37; M.C. BASSIOUNI, INTERNATIONAL CRIMINAL LAW: A DRAFT INTERNATIONAL CRIMINAL CODE (1980) [hereinafter BASSIOUNI, DRAFT CODE]. *Cf. Le Projet de Code Pénal International: Commentaires,* 52 REVUE INTERNATIONALE DE DROIT PÉNAL 327-527 (1981) (symposium on 1980 version of the draft code).

code of international crimes unless some kind of enforcement system can be established. The main obstacles to effective enforcement derive from political disagreement, and the nature and depth of such disagreement varies with the different types of conduct that can be characterized as an international crime. For this reason, it may indeed be inadvisable to lump all international crimes together in a single code.[101]

Underlying proposals for more comprehensive codification is the image of a genuine "international community," acting, although often imperfectly, to prohibit and punish conduct that results in harm to its commonly shared values.[102] This "international community" is depicted as identifying conduct harmful to the "common good" and as labelling such conduct as "criminal." The object of comprehensive codification is to systematize a set of rules which are regarded as materially analogous to those of domestic criminal law and thereby to improve the procedures by which the whole community, through its constituted representatives, inflicts punishment on those who violate rules promulgated for the protection of its fundamental interests.

The difficulty with this picture is that, at present, a genuine international community does not exist.[103] International relations can be adequately described, at any given time, only in terms of elements drawn from each of three competing paradigms. In some respects, there does seem to be an incipient global community. In other respects, states seem to exist in a Hobbesian state of nature, a moral and legal vacuum, in which anything resembling a system of domestic criminal law is clearly impossible.[104] In yet other respects, they form a "society of states," in which each member

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101. The International Law Commission's work on a Draft Code of Offenses Against the Peace and Security of Mankind indeed presupposes that the classical international crimes require separate treatment. Sec. 1201 of the Omnibus Diplomatic Security & Antiterrorism Act of 1986, *supra* note 88, expresses "the sense of the Congress that the President should establish a process to encourage the negotiation of an international convention to prevent and control all aspects of international terrorism" and that "the President should also consider including on the agenda for these negotiations the possibility of eventually establishing an international tribunal for prosecuting terrorists." One is reminded of the abortive effort, under the League of Nations, to set up an international criminal court to try cases of terrorism. *See* Convention for the Creation of an International Criminal Court, Nov. 16, 1937, *reprinted in* 7 INTERNATIONAL LEGISLATION 878 (M. Hudson ed. 1941). At any rate, both proposals contemplate an international tribunal limited to trying a particular type of international crime. It may be significant that these more or less "official" proposals limit the prospective jurisdiction of an international criminal court; it is the "unofficial" drafts that suggest general jurisdiction over the whole range of international offenses.

102. *See* Wise, Book Review, *supra* note 39, at 846.

103. The international community "is an order *in posse* in the minds of men; in the realities of the international scene it is still groping towards existence; it does not represent an actually established order." De Visscher, *Positivisme et "jus cogens,"* 75 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 5, 8 (1971), *quoted in* Weil, *supra* note 25, at 441. *See also* C. DE VISSCHER, THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW 89-101 (P. Corbett trans. rev. ed. 1968).

104. "Where no civil society is, there is no crime." T. HOBBES, LEVIATHAN 190 (M. Oakeshott ed. 1957) (1651 ed.).

pursues its own purposes rather than some international "common good," but is constrained by rules regarding toleration and accommodation that make it possible for the society to continue to exist.

None of these three paradigms is completely valid; only their complementary adequacies and inadequacies supply anything like a full truth about the realities of international relations.[105] Yet, despite these descriptive difficulties, a surrender to incommensurate complexity is also unsatisfactory. The real problem is to forge a response using the qualifications and involutions suggested by all three of these strongly contrasting paradigms to determine the most apt way of representing the actual social reaction to each particular class of international crime.

CONCLUSION

The first step, then, toward understanding international crime is to clarify our ideas about what is meant by "crime" as the term is used in its ordinary domestic context. The concept of crime can be projected into the international sphere only by analogy. Provisions of multilateral treaties requiring states to prosecute and punish particular forms of individual conduct do furnish a sufficiently close analogy to the prohibitions of domestic criminal law and, at least in a formal sense, can therefore be regarded as creating international crimes. Nonetheless, the conditions under which international criminal law operates are materially different from those obtaining in domestic communities. It is fatuous to ignore these differences—to treat the problems involved in developing a law of international crime as essentially similar to those involved in codifying domestic criminal law. The study of international criminal law poses fascinating questions about the feasibility of using the concept of crime outside the national contexts in which it originates, about the connection between communal cohesion and criminal law, and about the degree of cohesiveness that actually exists in the international system. It begs the answer to these questions to presuppose that international crimes are the creation of a genuine international community. The reality is far more complicated.

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105. Wise, Book Review, *supra* note 39, at 846-47. *See also* Wise, *Terrorism, supra* note 3, at 818-20 (discussing the descriptive adequacy of these three paradigms).

Appendix

Provisions of United States Law Implementing International Obligations to Prosecute under Multilateral Conventions

I. War Crimes & Genocide

A. Conventional War Crimes

1. Law of The Hague

Article 1 of Hague Convention IV Respecting the Laws and Customs of War on Land, The Hague, October 18, 1907, 36 Stat. 2277, T.S. No. 539, 1 Bevans 631, provides: "The Contracting Powers shall issue instructions to their armed land forces which shall be in conformity with the Regulations respecting the Laws and Customs of War on Land, annexed to the present Convention." Article 3 provides: "A belligerent party which violates the provisions of the said Regulations shall, if the case demands, be liable to pay compensation. It shall be responsible for all acts committed by persons forming part of its armed forces." (There is no equivalent to Article 3 in the earlier Convention with Respect to the Laws and Customs of War on Land, The Hague, July 29, 1899, 32 Stat. 1803, T.S. No. 403, 1 Bevans 247.) Convention IV may be said to contemplate that soliders who deviate from Instructions requiring compliance with the Hague Regulations will be subjected to punishment under municipal military law. It does not, however, formally impose an obligation to prosecute.

Compare Article 28 of the Convention for the Protection of Cultural Property in the Event of Armed Conflict, The Hague, May 14, 1954, 249 U.N.T.S. 240: "The High Contracting Parties undertake to take, within the framework of their ordinary criminal jurisdiction, all necessary steps to prosecute and impose penal or disciplinary sanctions upon those persons, of whatever nationality, who commit or order to be committed a breach of the present Convention." The United States signed but has not ratified the 1954 Hague Convention on Cultural Property.

Violations of the Hague Regulations, as well as other conventional war crimes, are punishable in United States law by virtue of the provisions of the Uniform Code of Military Justice which confer jurisdiction on military tribunals to try "any person who by the law of war is subject to trial by a military tribunal. . . ." (10 U.S.C. § 818; 10 U.S.C. § 821).

2. Prohibited Weapons

Article 4 of the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, Washington, London & Moscow, April 10, 1972, 1015 U.N.T.S. 163, 26 U.S.T. 583, T.I.A.S. No. 8062, provides: "Each State Party to this Convention shall, in accordance with its consti-

tutional processes, take any necessary measures to prohibit and prevent the development, production, stockpiling, acquisition or retention of the agents, toxins, weapons, equipment and means of delivery specified in article I of this Convention, within the territory of such State, under its jurisdiction or under its control anywhere."

Article 4 of the Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, Geneva, May 18, 1977, 31 U.S.T. 333, T.I.A.S. 9614, provides: "Each State Party to this Convention undertakes to take any measures it considers necessary in accordance with its constitutional processes to prohibit and prevent any activity in violation of the provisions of the Convention anywhere under its jurisdiction or control."

Neither formally imposes an obligation to prosecute. Nor does the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, Geneva, June 17, 1925, 94 L.N.S.T. 65, 26 U.S.T. 571, T.I.A.S. No. 8061; all the Geneva Protocol provides is that "the High Contracting Parties, so far as they are not already Parties to Treaties prohibiting such use, accept this prohibition" and "agree to extend this prohibition to the use of bacteriological methods of warfare."

3. Law of Geneva

There are common provisions concerning "repression of abuses and infractions" in each of the four Geneva Conventions of 1949: the Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Geneva, August 12, 1949, 75 U.N.T.S. 31, 6 U.S.T. 3114, T.I.A.S. No. 3362; Convention for the Amelioration of the Condition of the Wounded, Sick, and Shipwrecked Members of Armed Forces at Sea, Geneva, August 12, 1949, 75 U.N.T.S. 85, 6 U.S.T. 3217, T.I.A.S. No. 3363; Convention Relative to the Treatment of Prisoners of War, Geneva, August 12, 1949, 75 U.N.T.S. 135, 6 U.S.T. 3316, T.I.A.S. No. 3364; and Convention Relative to the Protection of Civilian Persons in Time of War, Geneva, August 12, 1949, 75 U.N.T.S. 287, 6 U.S.T. 3516, T.I.A.S. No. 3365.

Under these provisions the parties are obligated (1) "to enact any legislation necessary to provide effective penal sanctions for persons committing, or ordering to committed" what are called "grave breaches" of the Convention—violations involving "wilful killing, torture or inhuman treatment, including biological experiments, wilfully causing great suffering or serious injury to body or health, and extensive destruction and appropriation of property, not justified by military necessity and carried out unlawfully and wantonly"; (2) "to seach for persons alleged to have committed, or to have ordered to be committed, such grave breaches" and to "bring such persons, regardless of nationality, before its own courts" or to "hand such persons over for trial to another High Contracting Party concerned"; and (3) to "take measures necessary for the suppression" of violations of the Convention that do not amount to "grave breaches." Further obligations with

respect to "repression of breaches of the conventions" are contained in the Protocols Additional to the Geneva Conventions, Geneva, June 8, 1977; the United States has not ratified either of these two Protocols.

As with the Hague Conventions, violations of the Geneva Conventions are punishable in United States law by military courts exercising the jurisdiction over violations of the laws of war conferred by the Uniform Code of Military Justice.

B. Violations of Neutrality

Article 5 of Hague Convention V Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, The Hague, October 18, 1907, 36 Stat. 2310, T.S. No. 540, 1 Bevans 654, provides that a neutral power "is not called upon to punish acts in violation of its neutrality unless the said acts have been committed on its own territory." This may be taken to imply that it is called upon to *punish* acts violative of neutrality which are committed on its own territory, although all that the terms of the Convention actually provide is that it "must not allow" such acts to occur on its territory.

Article 8 Hague Convention XIII Concerning the Rights and Duties of Neutral Powers in Naval War, The Hague, October 18, 1907, 36 Stat. 2415, T.S. No. 545, 1 Bevans 723, requires a neutral Government "to employ the means at its disposal to prevent" violations of neutrality from occurring within its jurisdiction.

Article 26 of the Convention on Maritime Neutrality, Havana, February 20, 1928, 135 L.N.T.S. 187, 47 Stat. 1989, T.S. 845, 2 Bevans 721, similarly provides: "Neutral states are bound to exert all the vigilance within their power in order to prevent" violations of neutrality from occurring in their ports or territorial waters. Article 27 provides: "A belligerent shall indemnify the damage caused by its violation" of the provisions of the Convention, and "shall likewise be responsible for the acts of persons who may belong to its armed forces."

Neither of the conventions on maritime neutrality formally imposes an obligation to prosecute. Nonetheless, violations of neutrality are among the oldest crimes in United States law. Most of the relevant provisions are contained in 18 U.S.C. §§ 956-967. Under these statutes, conspiracy to injure property of a foreign government with which the United States is at peace is punishable by three years imprisonment and a fine of $5,000 (18 U.S.C. § 956); possession of property intended for use in aiding another government to violate "the rights or obligations of the United States under any treaty or the law of nations," by ten years imprisonment and a fine of $1,000 (18 U.S.C. § 957); accepting a commission to serve against a friendly nation, by three years imprisonment and a fine of $2,000; enlisting in foreign service, by three years imprisonment and a fine of $1,000 (18 U.S.C. § 959); launching a military or naval expedition against a friendly nation, by three years imprisonment and a fine of $3,000 (18 U.S.C. § 960); augmenting the armament of a warship in violation of United States neutrality, by a years

imprisonment and a fine of $1,000 (18 U.S.C. § 961); arming a vessel in violation of United States neutrality, by three years imprisonment and a fine of $10,000 (18 U.S.C. § 962); taking such a vessel out of port, in violation of an order detaining it in the United States, by ten years imprisonment and a fine of $10,000 (18 U.S.C. § 963); delivering an armed vessel to a belligerent nation in violation of United States neutrality, by ten years imprisonment and a fine of $10,000 (18 U.S.C. § 964); taking a vessel out of port without the clearance required to ensure United States neutrality, by ten years imprisonment and a fine of $10,000 (18 U.S.C. §§ 965-966); taking out of port a vessel which has been forbidden to depart because "there is reasonable cause to believe that such vessel is about to carry fuel, arms, ammunition, men, supplies, dispatches, or information to any warship, tender, or supply ship of a foreign belligerant nation in violation of the laws, treaties, or obligations of the United States under the law of nations," by ten years imprisonment and a fine of $10,000 (18 U.S.C. § 967).

Further provisions with respect to neutrality are contained in 22 U.S.C. §§ 441-465. These prescribe the consequences of a formal proclamation of neutrality. Violations are generally punishable by two years imprisonment and fine of $10,000 (22 U.S.C. § 455); trading in government bonds of a state named in the proclamation, by five years imprisonment and a fine of $50,000 (22 U.S.C. § 447).

C. *Genocide*

In the Convention on the Prevention and Punishment of the Crime of Genocide, New York, December 9, 1948, 78 U.N.T.S. 277, the parties "confirm that genocide, whether committed in time of peace or in time of war, is a crime under international law which they undertake to prevent and punish" (Article I), and "undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the provisions of the present Convention and, in particular, to provide effective penalties for persons guilty of genocide" or of conspiracy, incitement, attempt, and complicity in genocide (Article V).

The United States Senate finally approved ratification of the Genocide Convention on February 19, 1986. The Convention is now implemented in United States law by 18 U.S.C. §§ 1091-1093, which were added by the Genocide Convention Implementation Act of 1987, Pub. L. 100-606, 102 Stat. 3045, enacted on November 5, 1988. Under this Act, forms of genocide which involve actual killing are punishable by life imprisonment and a fine of $1,000,000; other forms of genocide, by twenty years imprisonment and a fine of $1,000,000; incitement by five years imprisonment and a fine of $500,000 (18 U.S.C. § 1091).

II. Piracy, Hijacking and Terrorism

A. *Piracy*

Article 14 of the Convention on the High Seas, Geneva, April 29, 1958, 450 U.N.T.S. 82, 13 U.S.T. 2312, T.I.A.S. No. 5200, provides: "All States

shall co-operate to the fullest possible extent in the repression of piracy on the high seas or in any other place outside the jurisdiction of any State." 18 U.S.C. § 1651 provides: "Whoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or found in the United States, shall be imprisoned for life." (18 U.S.C. §§ 1652-1661 define various statutory forms of piracy, privateering, and related offenses; 33 U.S.C. §§ 381-387 contain regulations for the suppression of piracy.)

B. Hijacking and Sabotage

Article 3(b) of the Convention on Offenses and Certain Other Acts Committed on Board Aircraft, Tokyo, September 14, 1963, 704 U.N.T.S. 219, 20 U.S.T. 2941, T.I.A.S. No. 6768, provides: "Each contracting State shall take such measures as may be necessary to establish its jurisdiction as the State of registration over offenses committed on board aircraft registered in such State."

On the other hand, Article 1(2) of the Tokyo Convention says that "this Convention shall apply in respect of offences committed or acts done by a person on board any aircraft registered in a Contracting State, while that aircraft is in flight or on the surface of the high seas or of any other area outside the territory of any State." It is unclear how far this provision qualifies the obligation to establish jurisdiction in the state of registration, limiting it to cases in which no other state has territorial jurisdiction.

In 18 U.S.C. § 7(5), the "special maritime and territorial jurisdiction of the United States" is defined to include a United States owned aircraft in flight over the high seas or "other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State." This assimilates an aircraft flying over the high seas to a United States ship for purposes of establishing federal jurisdiction ("the special maritime and territorial jurisdiction of the United States" also extends to the surface of the high seas and, under 18 U.S.C. § 7(7), to any "place outside the jurisdiction of any nation with respect to an offense by or against a national of the United States.")

Further, in the Federal Aviation Act, 49 U.S.C. App. § 1301(38), the "special aircraft jurisdiction of the United States" is defined to include, *inter alia*, any aircraft registered in the United States. Certain crimes committed on an aircraft registered in the United States (and thus "within the special aircraft jurisdiction of the United States") are punishable under 49 U.S.C. App. § 1472(k): offenses involving assault, mayhem, theft, homicide, rape, and robbery, are to be punished as if committed on board a United States ship ("within the special maritime and territorial jurisdiction of the United States"); indecent exposure, as if committed in the District of Columbia, in violation of D.C. Code 22-1112. Certain other crimes involving hazards to the safety of aviation are separately punishable under federal law. *See, e.g.*, 18 U.S.C. §§ 31-35; 49 U.S.C. App. § 1472. But there is no general federal jurisdiction over offenses committed on board a United States

registered aircraft in flight over the territory of a particular state.

The Convention for the Suppression of Unlawful Seizure of Aircraft, The Hague, December 16, 1970, 860 U.N.T.S. 105, 22 U.S.T. 1641, T.I.A.S. No. 7192, stipulates that the unlawful seizure of an aircraft in flight by anyone on board is an offense, as is attempt and complicity (Article 1). "Each Contracting State undertakes to make the offence punishable by severe penalties (Article 2), to "establish its jurisdiction over the offence" in accordance with the rules set out in Article 5, and to treat the offence as extraditable (Article 8). "The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State." (Article 7).

Under 42 U.S.C. App. § 1472(i), "aircraft piracy" is punishable by a minimum of twenty years imprisonment; if death results, by life imprisonment or death. The seizure of an aircraft comes within this provision only if the aircraft was "within the special aircraft jurisdiction of the United States." In 42 U.S.C. App. § 1301, the "special aircraft jurisdiction of the United States" is defined to include not only United States registered aircraft and aircraft within the United States, but also a foreign aircraft making its next scheduled landing in the United States or landing in the United States with an offender who has committed the "offense" defined in the Hague Convention on board. Further, under 42 U.S.C. App. § 1472(n), the "offense" defined in the Hague Convention is similarly punishable, even though the aircraft was "outside the special aircraft jurisdiction of the United States," if the offender "is afterward found in the United States."

The Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation, Montreal, September 23, 1971, 974 U.N.T.S. 177, 24 U.S.T. 564, T.I.A.S. No. 7570, provides that intentional and unlawful acts endangering the safety of an aircraft, as well as attempts and complicity, are an offense (Article 1). The parties undertake to make these offenses "punishable by severe penalties" (Article 2), to establish their jurisdiction in accordance with the rules set out in Article 5, to treat such offenses as extraditable (Article 8) and, if extradition is not granted, to submit the case to the competent authorities for the purpose of prosecution (Article 7). (The Montreal Convention is supplemented by the Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving Civil Aviation, Montreal, February 24, 1988, 27 I.L.M. 627 (1988).)

The Montreal Convention is implemented by provisions contained in 18 U.S.C. §§ 31-32, as amended by the Aircraft Sabotage Act, enacted as part of the Comprehensive Crime Control Act of 1984, Pub. L. 98-473, 98 Stat. 2187. The various forms of aircraft sabotage described in the Montreal Convention are punishable by a fine of $100,000 and twenty years imprisonment; threats are punishable by a fine of $25,000 and five years impris-

onment (18 U.S.C. § 32). If death results, the offense is punishable by death or imprisonment for life (18 U.S.C. § 34). Under 18 U.S.C. § 32(a), these punishments apply to all offenses under the Montreal Convention committed with respect to an "aircraft in the special aircraft jurisdiction of the United States or any civil aircraft used, operated, or employed in interstate, overseas, or foreign air commerce." Under 49 U.S.C. App. § 1301(38)(d)(iii), the "special aircraft jurisdiction of the United States" is extended to include a foreign aircraft landing in the United States with an offender who has committed certain of the offenses defined in the Montreal Convention (destruction of air navigation facilties and conveying false information) still on board. The other offenses defined in the Montreal Convention (in-flight violence, damaging aircraft, and placing of explosive devises) are made punishable under 18 U.S.C. § 32(b) when committed with respect to a civil aircraft registered in a foreign country "if the offender is later found in the United States."

C. Hostages

The International Convention Against the Taking of Hostages, New York, December 17, 1979, U.N. G.A. Res. 34/146, 34 U.N. GAOR, Supp. (No. 46) at 245, U.N. Doc. A/34/46 (1979), 18 I.L.M. 1456 (1979), defines offenses involving "hostage-taking" (Article 1), and requires the parties to make such offenses "punishable by appropriate penalties which take into account the grave nature of those offences" (Article 2). It also requires the parties to establish their jurisdiction in accordance with the rules set out in Article 5, to treat these offenses as extraditable (Article 10) unless there are substantial grounds for believing that the offender will be persecuted "on account of his race, religion, nationality, ethnic origin or political opinion" (Article 9) and, if extradition is not granted, to submit the case to the competent authorities for the purpose of prosecution (Article 8).

The Hostages Convention is implemented in the United States by the Act for the Prevention and Punishment of the Crime of Hostage-Taking, 18 U.S.C. § 1203, enacted as part of the Comprehensive Crime Control Act of 1984. Under this act, hostage-taking is punishable by "imprisonment for any term of years or for life." 18 U.S.C. § 1203(a). The act applies to offenses committed outside the United States whenever the offender is found in the United States. It also purports to apply, even if the offender is not found in the United States, when the offender or the hostage was a United States national or threats were aimed at the United States government. 18 U.S.C. § 1203(b)(1).

D. Internationally Protected Persons

The Vienna Convention on Diplomatic Relations, Vienna, April 18, 1961, 500 U.N.T.S. 95, 23 U.S.T. 3227, T.I.A.S. No. 7502, provides that a "receiving State is under a special duty to take all appropriate steps to protect" diplomatic premises "against any intrusion or damage and to

prevent any disturbance of the peace of the mission or impairment of its dignity" (Article 22(2)), and to treat a diplomatic agent "with due respect" and "take all appropriate steps to prevent any attack on his person, freedom or dignity" (Article 29). In the Convention itself, appropriate preventive steps are not specifically defined to include the threat of criminal prosecution for attacks on diplomats or diplomatic premises.

Under the OAS Convention to Prevent and Punish the Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion that are of International Significance, Washington, February 2, 1971, 27 U.S.T. 3949, T.I.A.S. No. 8413, the parties agree to cooperate by "taking all the measures that they may consider effective . . . to prevent and punish acts of terrorism, especially kidnapping, murder and other assaults against the life or physical integrity of those persons to whom the state has the duty according to international law to give special protection, as well as extortion in connection with those crimes" (Article 1). Such offenses are to be treated as extraditable (Articles 3 & 7) and to be "considered common crimes of international significance, regardless of motive" (Article 2). A state which declines to extradite because of a legal or constitutional impediment, "is obliged to submit the case to its competent authroties for prosecution, as if the act had been committed in its territory" (Article 5).

The Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, New York, December 14, 1973, 1035 U.N.T.S. 167, 28 U.S.T. 1975, T.I.A.S. No. 8532, requires each party to make "a crime under its internal law . . . punishable by appropriate penalties which take into account their grave nature" any intentionally committed (a) "murder, kidnapping or other attack on the person or liberty of an internationally protected person" or (b) "violent attack upon the official premises, the private accommodation or the means of transport of an internationally protected person likely to endanger his person or liberty," or (c) "threat to commit any such attack," or (d) "attempt to commit any such attack," or (e) complicity therein (Article 2). The parties are required to take such measures as may be necessary to establish their jurisdiction over these crimes in accordance with the rules set out in Article 3, to treat these offenses as extraditable (Article 8) and, if extradition is not granted, to submit the case to the competent authorities for the purpose of prosecution (Article 7).

In United States law, common crimes committed against diplomats are ordinarily left to prosecution by the states. Thus, federal law does not cover the full range of offenses against internationally protected persons as to which international law may require prosecution. But murder, kidnapping, extortion, and assault are punishable under federal law. Under 18 U.S.C. § 1116, the federal homicide statutes are extended to include killing or attempts to kill internationally protected persons; but any such murder, in the first degree, is to be punished by life imprisonment, while attempted murder is punishable by twenty years imprisonment. Under 18 U.S.C. § 1201, the federal kidnapping statute includes cases in which the victim is an interna-

tionally protected person; the offense is punishable "by imprisonment for any term of years or for life"; an attempt by twenty years imprisonment. Under 18 U.S.C. § 112(a), an assault or other violent attack on an internationally protected person or a violent attack on official premises, etc., is punishable by three years imprisonment and a fine of $5,000; if a deadly weapon is used, by ten years imprisonment and a fine of $10,000. Under 18 U.S.C. § 112(b), efforts to intimidate, coerce, threaten, or harass are punishable by six months imprisonment and a fine of $500. Under 18 U.S.C. § 878, a threat to kill or kidnap an internationally protected person is punishable by five years imprisonment and a fine of $5,000; a threatened assault by three years imprisonment and a fine of $5,000; and extortion in connection with any of these offenses by twenty years imprisonment and a fine of $20,000. Federal jurisdiction is established with respect to all these offenses "if the alleged offender is present within the United States, irrespective of the place where the offense was committed or the nationality of the victim or the alleged offender." 18 U.S.C. § 112(e); 18 U.S.C. § 878(d); 18 U.S.C. § 1116(c); 18 U.S.C. § 1201(e).

E. Physical Protection of Nuclear Materials

The Convention on the Physical Protection of Nuclear Materials, Vienna & New York, March 3, 1980, I.A.E.A. Legal Series No. 12 (1982), 18 I.L.M. 1419 (1979), requires the parties to make the intentional commission of various acts involving the unlawful acquisition of nuclear materials or threats to use nuclear materials an offense under national law punishable "by appropriate penalties" which take into account the "grave nature" of the offense (Article 7). Each party is required "to establish its jurisdiction" over such offenses committed on its territory, ships, or aircraft, or by its nationals, and also in cases in which the offender is present in its territory and extradition is refused (Article 8). These offenses are to be treated as extraditable (Article 11) and, if extradition is refused, a party must submit the case to its competent authorities for the purpose of prosecution (Article 10).

The Convention is implemented in the United States by the Convention on the Physical Protection of Nuclear Material Implementation Act of 1982, Pub. L. 97-351, 96 Stat. 1663, which added 18 U.S.C. § 831 to federal law. This section replicates the language of the Convention in defining various prohibited transactions involving nuclear materials. These offenses are punishable by a fine of $250,000 and twenty years imprisonment; by imprisonment for any term of years or life if the offender knowingly causes death or, in handling nuclear materials, recklessly causes death or serious bodily injury. Conspiracy is punishable by a fine of $250,000 and ten years imprisonment or by twenty years imprisonment if a co-conspirator knowingly caused death. These offenses are punishable if committed in the United States or within "the special maritime and territorial jurisdiction" or "special aircraft jurisdiction" of the United States, or by a United States national, or with respect to nuclear material being shipped to or from the United States, or by an offender who is found in the United States, "even if the

conduct required for the offense occurs outside the United States," when the offense involved nuclear material "in use, storage, or transport for peaceful purposes" (18 U.S.C. § 831(c)).

III. International Traffic & Resources

A. Slavery and Slave Trade

Under Article 5 of the General Act for the Repression of the African Slave Trade, Brussels, July 2, 1890, 17 Martens Nouveau Recueil (2d) 345, 27 Stat. 886, T.S. No. 383, 1 Bevans 134: "The contracting powers pledge themselves, unless this has already been provided for by laws in accordance with the spirit of the present article, to enact or propose to their respective legislative bodies, in the course of one year at the latest from the signing of the present general act, a law rendering applicable, on the one hand, the provisions of their penal laws concerning grave offenses against the person, to the organizers and abettors of slave-hunting, to those guilty of mutilating male adults and children, and to all persons taking part in the capture of slaves by violence; and, on the other hand, the provisions relating to offenses against individual liberty, to carriers and transporters of, and to dealers in, slaves. The accessories and accomplices of the different categories of slave captors and dealers above specified shall be punished with penalties proportionate to those incurred by the principals. . . ."

In the Convention to Suppress the Slave Trade and Slavery, Geneva, September 25, 1926, 60 L.N.T.S. 253, 46 Stat. 2183, T.S. No. 778, 2 Bevans 607, the parties undertake to "prevent and suppress the slave trade" and "bring about, progressively and as soon as possible, the complete abolition of slavery in all its forms" (Article 2); in Article 6: "Those of the High Contracting Parties whose laws do not at present make adequate provision for the punishment of infractions of laws and regulations enacted with a view to giving effect to the purposes of the present Convention undertake to adopt the necessary measures in order that severe penalties may be imposed in respect of such infractions."

The Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery, Geneva, September 7, 1956, 266 U.N.T.S. 3, 18 U.S.T. 3201, T.I.A.S. No. 6418, provides: "The act of conveying or attempting to convey slaves from one country to another by whatever means of transport, or of being accessory thereto, shall be a criminal offence under the laws of the States Parties to this Convention and persons convicted thereof shall be liable to very severe penalties" (Article 3(1)); "In a country where the abolition or abandonment of slavery, or of the institutions and practices [similar to slavery such as debt bondage, serfdom, or forced marriage] mentioned in article 1 of this Convention, is not yet complete, the act of multilating, branding or otherwise marking a slave or person of servile status in order to indicate his status, or as a punishment, or for any other reason, or of being accessory thereto, shall be a criminal offence under the laws of the States Parties to this Convention

and persons convicted thereof shall be liable to punishment" (Article 5); and "The act of enslaving another person or of inducing another person to give himself or a person dependent upon him into slavery, or of attempting these acts, or being accessory thereto, or being a party to a conspiracy to accomplish any such acts, shall be a criminal offence under the laws of the States Parties to this Convention and persons convicted thereof shall be liable to punishment." (Article 6(1)).

Further, Article 13 of the Convention on the High Seas, Geneva, April 29, 1958, 450 U.N.T.S. 82, 13 U.S.T. 2312, T.I.A.S. No. 5200, provides: "Every state shall adopt effective measures to prevent and punish the transport of slaves in ships authorized to fly its flag, and to prevent the unlawful use of its flag for this purpose. . . ."

In United States law, enslavement and enticement into slavery are punishable by a fine of $5,000 and five years imprisonment (18 U.S.C. §§ 1583-1584). Fitting out a vessel in the United States for use in the slave trade is punishable by a fine of $5,000 and seven years imprisonment (18 U.S.C. § 1582). United States nationals or residents who, as members of a ship's company, actively engage in the slave trade are likewise punishable by a fine of $5,000 and seven years imprisonment (18 U.S.C. § 1585); United States nationals or residents who voluntarily serve on a vessel engaged in foreign slave trade are punishable by a fine of $2,000 and two years imprisonment (18 U.S.C. § 1586). The master of a vessel engaged in transporting a person intended to be sold as a slave in the United States is punishable by a fine of $10,000 and four years imprisonment (18 U.S.C. § 1587); the master of a vessel engaged in transporting from the United States a person intended to be sold as a slave is punishable by a fine of $5,000 and five years imprisonment (18 U.S.C. § 1588).

B. Traffic in Persons

The Agreement for the Suppression of the White Slave Traffic, Paris, May 18, 1904, 1 L.N.T.S. 83, 35 Stat. 1979, T.S. 496, 1 Bevans 424, is mainly concerned with exchanging information and returning victims; it does not speak to prosecution or punishment. The United States is not a party to the International Convention for the Suppression of the White Slave Traffic, Paris, May 4, 1910, 7 Martens Nouveau Recueil (3d) 252, or the International Convention for the Suppression of the Traffic in Women and Children, Geneva, September 30, 1921, 9 L.N.T.S. 415. But United States law does make transportation for purposes of prostitution punishable by a fine and five years imprisonment (18 U.S.C. § 2421); by ten years imprisonment if a minor is transported (18 U.S.C. § 2423). Enticing or coercing someone to travel for purposes of prostitution is likewise punishable by a fine and five years imprisonment (18 U.S.C. § 2422). Under 18 U.S.C. § 2424, there is a duty to register with the Commissioner of Immigration any alien kept in a house of prostitution within three years of entering the United States from a country which is a party to the arrangement for the Suppression of the White Slave Traffic, adopted July 25, 1902. (The 1902 arrangement

was confirmed, word for word, in the formal Agreement of May 18, 1904.) Failure to file the requisite statement is punishable by a fine of $2,000 and two years imprisonment.

C. *Narcotics*

Under the Convention Relating to the Suppression of the Abuse of Opium and Other Drugs, The Hague, January 23, 1912, 8 L.N.T.S. 187, 38 Stat. 1912, T.S. No. 612, 1 Bevans 855, the parties undertake to impose various controls and prohibitions on the import, export, manufacture, distribution, sale, and use of opium, morphine and cocaine. Criminal penalties may be pre-supposed, but there is no precise stipulation requiring their imposition. The parties are obliged, under Article 20, to "examine into the possibility of enacting laws or regulations making the illegal possession of raw opium, prepared opium, morphine, cocaine and their respective salts liable to penalties, unless existing laws or regulations have already regulated the matter."

The Convention for Limiting the Manufacture and Regulating the Distribution of Narcotic Drugs, Geneva, July 13, 1931, 139 L.N.T.S. 301, 48 Stat. 1543, T.S. No. 863, 3 Bevans 1, requires the parties to "take all necessary legislative or other measures in order to give effect within their territories to the provisions of this Convention" (Article 15).

Likewise, the Protocol for Limiting and Regulating the Cultivation of the Poppy Plant, the Production of, International and Wholesale Trade in, and Use of Opium, New York, June 23, 1953, 456 U.N.T.S.3, 14 U.S.T. 10, T.I.A.S. No. 5273, requires the parties to "adopt all legislative and administrative measures necessary for the purpose of making fully effective the provisions of this Protocol" (Article 14). Again, while criminal penalties may be presupposed, there is no precise stipulation to that effect.

On the other hand, under Article 36 of the Single Convention on Narcotic Drugs, New York, March 30, 1961, 520 U.N.T.S. 204, 18 U.S.T. 1407, T.I.A.S. No. 6298, as amended by Article 14 of the Protocol Amending the Single Convention on Narcotic Drugs, Geneva, March 25, 1972, 26 U.S.T. 1439, T.I.A.S. No. 8118, provides: "1.(a) Subject to its constitutional limitations, each Party shall "adopt such measures as will ensure that cultivation, production, manufacture, extraction, preparation, possession, offering, offering for sale, distribution, purchase, sale, delivery on any terms whatsover, brokerage, dispatch, dispatch in transit, transport, importation and exportation of drugs contrary to the provisions of this Convention shall be punishable offences when committed intentionally, and that serious offences shall be liable to adequate punishment particularly by imprisonment or other penalties of deprivation of liberty. [But] (b) Notwithstanding the preceding sub-paragraph, when abusers of drugs have committed such offences, the Parties may provide, either as an alternative to conviction or punishment or in addition to conviction or punishment, that such abusers shall undergo measures of treatment, education, after-care, rehabilitation and social reintergration. . . ." Article 36 also provides for the punishment of accomplices, attempt, and conspiracy, and for the extradition of offenders and for

prosecution of serious offenses "by the Party in whose territory the offender is found if extradition is not acceptable. . . ."

Article 22 of the Convention on Psychtropic Substances, Vienna, February 21, 1971, 1019 U.N.T.S. 175, 32 U.S.T. 543, T.I.A.S. No. 9725, likewise provides: "1.(a) Subject to its constitutional limitations, each Party shall treat as a punishable offence, when committed intentionally, any action contrary to a law or regulation adopted in pursuance of its obligations under this Convention, and shall ensure that serious offences shall be liable to adequate punishment, particularly by imprisonment or other penalty of deprivation of liberty." Article 22 also authorizes treatment as an alternative to the punishment of abusers of psychtropic substances, and provides for the punishment of accomplices, attempt, and conspiracy, and for prosecution of serious offenses "by the Party in whose territory the offender is found if extradition is not acceptable. . . ."

The Single Convention on Narcotic Drugs and the Convention on Psychotropic Substances are implemented in the United States by the provisions of the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. 91-513, 84 Stat. 1236, and the Psychotropic Substances Act of 1978, Pub. L. 95-633, 92 Stat. 2768; these provisions are contained, for the most part, in chapter 13 of Title 21 of the United States Code (21 U.S.C. §§ 801-970).

D. Obscene Publications

The Agreement Relative to the Repression of the Circulation of Obscene Publications, Paris, May 4, 1910, 37 Stat. 1511, T.S. No. 559, 1 Bevans 749, provides for exchanging information, but does not itself require prosecution. The United States is not a party to the International Convention for the Suppression of and Traffic in Obscene Publications, Geneva, September 12, 1923, 27 L.N.T.S. 213. But interstate or foreign traffic in "obscene" publications is subject to prosecution under United States law, and a first offense is generally punishable by a fine of $5,000 and five years imprisonment. *See* 18 U.S.C. §§ 1461-1465.

E. International Communications

1. Submarine Cables

Article 2 of the Convention for the Protection of Submarine Cables, Paris, March 14, 1884, 24 Stat. 989, T.S. No. 380, 1 Bevans 89, provides: "The breaking or injury of a submarine cable, done willfully or through culpable negligence, and resulting in the total or partial interruption or embarrassment of telegraphic communication, shall be a punishable offense, but the punishment inflicted shall be no bar to a civil action for damages. This provision shall not apply to ruptures or injuries when the parties guilty thereof have become so simply with the legitimate object of saving their lives or their vessels, after having taken all necessary precautions to avoid such ruptures or injuries." Further, Articles 5 and 6 lay down rules for vessels in the

vicinity of submarine cables; Article 9 provides that "Prosecutions on account of the infractions contemplated in articles 2, 5 and 6 of this convention, shall be instituted by the State or in its name"; and Article 12 provides that the parties will "take or propose to their respective legislative bodies the measures necessary in order to secure the execution of this Convention, and especially in order to cause the punishment, either by fine or imprisonment, or both, of such persons as may violate the provisions of articles 2, 5 and 6."

A Declaration regarding the Convention, Paris, December 1, 1886, 25 Stat. 1424, T.S. No. 380-2, 1 Bevans 112, provides: "Certain doubts having arisen as to the meaning of the word 'wilfully' inserted in Article 2 . . . it is understood that the imposition of penal responsibility, mentioned in the said article, does not apply to cases of breaking or of injuries occasioned accidentally or necessarily in repairing a cable, when all precautions have been taken to avoid such breakings or damages."

Further, Article 27 of the Convention on the High Seas, Geneva, April 29, 1958, provides: "Every state shall take the necessary legislative measures to provide that the breaking or injury by a ship flying its flag or by a person subject to its jurisdiction of a submarine cable beneath the high seas done wilfully or through culpable negligence, in such a manner as to be liable to interrupt or obstruct telegraphic or telephonic communications, and similarly the breaking or injury of a submarine pipeline or high-voltage power cable shall be a punishable offence. This provision shall not apply to any break or injury caused by persons who have acted merely with the legitimate object of saving their lives or their ships, after having taken all necessary precautions to avoid such break or injury."

These obligations are implemented in the United States by the Submarine Cable Act of 1888, 25 Stat. 41, 47 U.S.C. §§ 21-33. Willfully breaking or injuring a submarine cable is punishable by two years imprisonment and a fine of $5,000 (47 U.S.C. § 21); doing so by culpable negligence, by three months imprisonment and a fine of $500 (47 U.S.C. § 22); failure to follow the rules for vessels in the vicinity of cables, by a months imprisonment and a fine of $500 (47 U.S.C. § 24) or, in the case of the master of a fishing vessel who does not keep nets at a proper distance, by ten days imprisonment and a fine of $250 (47 U.S.C. § 25).

2. *Postal Communications*

Article 18 of the Universal Postal Union Convention, Vienna, July 4, 1891, 28 Stat. 1078, 1 Bevans 188, required adoption of necessary measures for (1) punishing fraudulent use of counterfeit or used postage stamps and (2) for prohibiting and suppressing the manufacture, sale, and distribution of counterfeit stamps. A similar article, as expanded over the years, has appeared in each successive international postal convention. The latest version is that adopted at Hamburg, July 27, 1984, which entered into force on January 1, 1986.

Article 13 of the penultimate Universal Postal Convention, Rio de Janeiro, October 26, 1979, 32 U.S.T. 4587, T.I.A.S. No. 9972, provides: "The Governments of member countries undertake to adopt, or to propose to the legislatures of their countries, the necessary measures: (a) for punishing the counterfeiting of postage stamps, even if withdrawn from circulation, of international reply coupons and of postal identity cards; (b) for punishing the use or uttering: (i) of counterfeit postage stamps (even if withdrawn from circulation) or used postage stamps, as well as of counterfeit or used impressions of franking machines or printing presses; (ii) of counterfeit international reply coupons; (iii) of counterfeit postal identity cards; (c) for punishing the fraudulent use of genuine postal identity cards; (d) for prohibiting and suppressing all fraudulent operations of manufacturing and uttering adhesive stamps and stamped impressions in use in the postal service, counterfeited or imitated in such a manner that they could be mistaken for the adhesive stamps and stamped impressions issued by the postal administration of a member country; (e) for preventing and, if necessary, for punishing the insertion in postal items of narcotics and psychotropic substances, as well as explosive, flammable or other dangerous substances, where their insertion has not been expressly authorized by the Convention and the Agreements."

Under 18 U.S.C. § 502, the forging, using or uttering of counterfeit foreign postage stamps is punishable by a fine of $500 and five years imprisonment. The mailing of injurious articles is punishable, under 18 U.S.C. § 1716, by a fine of $1,000 and a years imprisonment; mailing with intent to kill or injury, by a fine of $10,000 and twenty years imprisonment; and, if death results, by life imprisonment or death.

While the United States is not a party to the International Convention for the Suppression of Counterfeiting Currency, Geneva, April 20, 1929, 112 L.N.T.S. 371, a number of provisions of United States law also cover the counterfeiting of foreign bonds, bank notes, and coins. *See* 18 U.S.C. §§ 478-492.

F. Natural Resources and Environmental Protection

1. Whaling

Article 1 of the Convention for the Regulation of Whaling, Geneva, September 24, 1931, 155 L.N.T.S. 349, 49 Stat. 3079, T.S. No. 880, 3 Bevans 26, provides: "The High Contracting Parties agree to take, within the limits of their respective jurisdictions, appropriate measures to ensure the application of the provisions of the present Convention and the punishment of infractions of the said provisions."

The Whaling Convention of 1931 has been effectively superceded by the International Convention for the Regulation of Whaling, Washington, December 2, 1946, 161 U.N.T.S. 72, 62 Stat. 1716, T.I.A.S. 1849, 4 Bevans 248. Article 9 provides: "Each Contracting Government shall take appropriate measures to ensure the application of the provisions of this Convention

and the punishment of infractions against the said provisions in operations carried out by persons or by vessels under its jurisdiction. . . . Prosecution for infractions against or contraventions of this Convention shall be instituted by the Government having jurisdiction over the offence."

The Convention is implemented in the United States by the Whaling Convention Act of 1949, 16 U.S.C. §§ 916-916*l*. Violations of the Convention are made unlawful (16 U.S.C. § 916*c*) and punishable by a fine of $10,000 and a years imprisonment (16 U.S.C. § 916*f*). Whaling is also covered by the Marine Mammal Protection Act of 1972, 16 U.S.C. §§ 1361-1407. A violation of that act is subject to a civil penalty of $10,000 and knowing violations are punishable by a fine of $20,000 and a years imprisonment (16 U.S.C. § 1375).

2. High Sea Fisheries

North Pacific Fisheries. Under Article 3 of the International Convention for the High Seas Fisheries of the North Pacific Ocean, Tokyo, May 9, 1952, 205 U.N.T.S. 65, 4 U.S.T. 380, T.I.A.S. No. 2786, as amended by the Protocol Amending the International Convention for the High Seas Fisheries of the North Pacific Ocean, Tokyo, April 25, 1978, 30 U.S.T. 1095, T.I.A.S. No. 9242, one of the functions of the International North Pacific Fisheries Commission established by the Convention is to "consider and make proposals to the Contracting Parties concerning the enactment of schedules of equivalent penalties for violations of this Convention which occur outside the 200 nautical mile fishery zone of any Contracting Party. . . ." Under Article 9, the parties agree that "(a) each Contracting Party shall enforce the provisions of this Convention within its 200 nautical mile fishery zone in accordance with its domestic law; (b) outside the 200 nautical mile fishery zone of any Contracting Party, any Contracting Party may enforce the provisions of this Convention. . . ." by searching and seizing vessels, but only the authorities of the state to which the offender or fishing vessel belongs "may try the offense and impose penalties therefor. . . ." Further, "[e]ach Contracting Party agrees, for the purpose of rendering effective the provisions of this Convention, to enact and enforce necessary laws and regulations, with appropriate penalties against violations thereof. . . ."

The Convention on North Pacific Fisheries is implemented by legislation appearing in 16 U.S.C. §§ 1021-1035. A violation of the Convention is subject to a civil penalty of $25,000 and also constitutes an offense punishable by a fine of $50,000 and imprisonment for six months, and by a fine of $100,000 and imprisonment for ten years if a dangerous weapon is used against an officer authorized to enforce the Convention (16 U.S.C. § 1030).

Salmon. Article 14(1) of the Convention for the Conservation of Salmon in the North Atlantic, Reykjavik, March 2, 1982, T.I.A.S. No. 10789, provides: "Each Party shall ensure that such action is taken, including the imposition of adequate penalties for violations, as may be necessary to make effective the provisions of this Convention and to implement regulatory

measures which become binding on it. . . ." through the procedures established in the Convention.

The North Atlantic Salmon Convention is implemented in the United States by provisions appearing in 16 U.S.C. §§ 3601-3608. Violations of the Convention are subject to a civil penalty of $25,000 and punishable by a fine of $50,000 and six months imprisonment (16 U.S.C. § 3606). Provisons on Pacific Salmon Fishing in 16 U.S.C. §§ 3631-3644 implement a bilateral treaty with Canada.

Tuna. Under Article 9 of the International Convention for the Conservation of Atlantic Tunas, Rio de Janeiro, May 14, 1966, 673 U.N.T.S. 63, 20 U.S.T. 2887, T.I.A.S. No. 6767 (which has been amended by a Protocol of July 10, 1984): "The Contracting Parties agree to take all action necessary to ensure the enforcement of this Convention. . . ." The Convention is implemented in the United States by the Atlantic Tunas Convention Act of 1975, 16 U.S.C. §§ 971-971*i*. Violations of regulations adopted pursuant to the convention are subject to civil penalties ranging from $25,000 to $100,000 (16 U.S.C. § 971*e*). The Tuna Conventions Act of 1950, 16 U.S.C. §§ 951-961, contains provisions implementing bilateral tuna treaties with Mexico and Costa Rica. The Eastern Pacific Tuna Licensing Act of 1984, 16 U.S.C. §§ 972-972*h* contains provisions implementing the Eastern Pacific Ocean Tuna Fishing Agreement, San Jose, Costa Rica, March 15, 1983, Senate Treaty Doc. 98-3.

3. *Wildlife*

General Conventions. In the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere, October 12, 1940, 161 U.N.T.S. 193, 56 Stat. 1354, T.S. No. 981, 3 Bevans 630, the parties agree to take nature conservation measures, some of which involve prohibiting certain kinds of conduct, such as hunting in national parks (Article 3) or the importation of protected species without a certificate of lawful exportation (Article 9). While these prohibitions presumably will be backed by criminal sanctions, the treaty itself does not specifically provide for the criminalization of such conduct.

Article 8(1) of the Convention on International Trade in Endangered Species of Wild Fauna and Flora, Washington, March 3, 1973, 993 U.N.T.S. 243, 27 U.S.T. 1087, T.I.A.S. No. 8249, provides: "The Parties shall take appropriate measures to enforce the provisions of the present Convention and to prohibit trade in specimens in violation thereof. These shall include measures: (a) to penalize trade in, or possession of, such specimens, or both; and (b) to provide for the confiscation or return to the State of export of such specimens."

The Trade in Endangered Species Convention is implemented in the United States by the Endangered Species Act of 1973, 16 U.S.C. §§ 1531-1543. Violations are subject to civil penalties ranging from $500 to $10,000; knowing violations are punishable by fines ranging from $10,000 to $20,000 and imprisonment ranging from six months to a year (16 U.S.C. § 1540).

Migratory Birds. The Migratory Bird Treaty Act, 16 U.S.C. §§ 703-712 implements bilateral treaties with Canada, Mexico, and Japan.

Polar Bears. Article 6 of the Agreement on the Conservation of Polar Bears, Oslo, November 15, 1973, 27 U.S.T. 3918, T.I.A.S. No. 8409, provides only: "Each Contracting Party shall enact and enforce such legislation and other measures as may be necessary for the purpose of giving effect to this Agreement. . . ." Implementing legislation is contained in effect in the Marine Mammal Protection Act, 16 U.S.C. §§ 1361-1407.

Seals. The Interim Convention on Conservation of North Pacific Fur Seals, Washington, February 9, 1957, 314 U.N.T.S. 105, 8 U.S.T. 2283, T.I.A.S. No. 3948, provides for the search and seizure by officials of any party of vessels offending against the prohibition on pelagic sealing contained in the Convention, although only authorities of the state to which a person or vessel belongs has jurisdiction to try the case and to impose penalties (Article 6). Under Article 10: "Each party agrees to enact and enforce such legislation as may be necessary to guarantee the observance of this Convention and to make effective its provisions with appropriate penalties for violation thereof."

The Convention is implemented in the United States by the Fur Seal Act of 1966, 16 U.S.C. §§ 1151-1175. Violations are subject to a civil penalty of $10,000; knowing violations are punishable by a fine of $20,000 and one years imprisonment (16 U.S.C. § 1174).

Antarctic Conservation. Article 2(2) of the Convention for the Conservation of Antarctic Seals, London, June 1, 1972, 29 U.S.T. 441, T.I.A.S. No. 8826, provides only: "Each Contracting Party shall adopt for its nationals and for vessels under its flag such laws, regulations and other measures, including a permit system as appropriate, as may be necessary to implement this Convention."

The Antarctic Seals Convention is tied to the system established by the Antarctic Treaty, Washington, December 1, 1959, 402 U.N.T.S. 71, T.I.A.S. No. 4780. Provisions implementing the Agreed Measures for the Conservation of Antarctic Fauna and Flora adopted by parties to the Antarctic Treaty appear in the Antartic Conservation Act of 1978, 16 U.S.C. §§ 2401-2412. These make it unlawful, without a permit, to take any native mammal or bird in Antarctica (16 U.S.C. § 2403(a)(1)). Violations of the act are subject to a civil penalty of $5000 or of $10,000 if the violation was knowingly committed (16 U.S.C. § 2407); a willful violation constitutes an offense punishable by a fine of $10,000 and a years imprisonment (16 U.S.C. § 2408). The defendant may also be convicted for a violation of the Marine Mammal Protection Act, the Endangered Species Act, and the Migratory Bird Treaty Act (16 U.S.C. § 2408(c)).

Article 21 of the Convention on the Conservation of Antarctic Marine Living Resources, Canberra, May 20, 1980, T.I.A.S. No. 10240, provides: "1. Each Contracting Party shall take appropriate measures within its competence to ensure compliance with the provisions of this Convention and with conservation measures adopted by the Commission to which the Party

is bound in accordance with [the procedure established in the Convention.] 2. Each Contracting Party shall transmit to the Commission information on measures taken pursuant to paragraph 1 above, including the imposition of sanctions for any violation."

The Antarctic Marine Living Resources Convention is implemented by the Antarctic Marine Living Resources Convention Act of 1984, 16 U.S.C. §§ 2431-2444. Violations of the convention are unlawful (16 U.S.C. § 2435) and subject to a civil penalty of $5,000 or $10,000 if the prohibted act was knowingly committed (16 U.S.C. § 2437). Impeding enforcement of the act is a criminal offense punishable by a fine of $50,000 and ten years imprisonment.

4. Marine Pollution

Pollution from Ships. Article 3(3) of the International Convention for the Prevention of Pollution of the Sea by Oil (OILPOL), London, May 12, 1954, 327 U.N.T.S. 3, 12 U.S.T. 2989, T.I.A.S. No. 4900, provided: "Any contravention of paragraphs (1) and (2) of this Article [concerning discharge of oil from ships] shall be an offence punishable under the laws of the territory in which the ship is registered." Article 6 provided: "The penalties which may be imposed in pursuance of Article III under the law of any of the territories of a Contracting Government in respect of unlawful discharge from a ship of oil or of an oily mixture into waters outside the territorial waters of that territory shall not be less than the penalties which may be imposed under the law of that territory in respect of the unlawful discharge of oil or of an oily mixture from a ship into such territorial waters."

By Amendments of April 11, 1962, 600 U.N.T.S. 332, 17 U.S.T. 1524, T.I.A.S. No. 6109, these two provisions were replaced by a new version of Article 6, which reads: (1) Any contravention of Articles III and IX shall be an offence punishable under the law of the relevant territory in respect of the ship. . . (2) The penalties which may be imposed under the law of any of the territories of a Contracting Government in respect of the unlawful discharge from a ship of oil or oily mixture outside the territorial sea of that territory shall be adequate in severity to discourage any such unlawful discharge and shall not be less than the penalties which may be imposed under the law of that territory in respect of the same infringements within the territorial sea. . . ."

OILPOL 1954 has been superceded as between parties to the International Convention for the Prevention of Pollution from Ships (MARPOL), London, November 2, 1973, 12 I.L.M. 1319 (1973). MARPOL is binding on the United States through its ratification of the Protocol of 1978 Relating to the International Convention for the Prevention of Pollution from Ships, London, February 17, 1978, 17 I.L.M. 546 (1978).

Article 4 of MARPOL provides: "(1) Any violation of the requirements of the present Convention shall be prohibited and sanctions shall be established therefor under the law of the Administration of the ship concerned wherever the violation occurs. If the Administration is informed of such

violation and is satisfied that sufficient evidence is available to enable proceedings to be brought in respect of the alleged violation, it shall cause such proceedings to be taken as soon as possible, in accordance with its law. (2) Any violation of the requirements of the present Convention within the jurisdiction of any Party to the Convention shall be prohibited and sanctions shall be established therefor under the law of the Party. Whenever such a violation occurs, that Party shall either (a) cause proceedings to be taken in accordance with its law; or (b) furnish to the Administration of the ship such information and evidence as may be in its possession that a violation has occurred. (3) Where information or evidence with respect to any violation of the present Convention by a ship is furnished to the Administration of that ship, the Administration shall promptly inform the Party which has furnished the information or evidence, and the [Inter-Governmental Maritime Consultative] Organization, of the action taken. (4) The penalties specified under the law of a Party pursuant to the present Article shall be adequate in severity to discourage violations of the present Convention and shall be equally severe irrespective of where the violations occur."

MARPOL is implemented in the United States by the Act to Prevent Pollution from Ships (1980), 33 U.S.C. §§ 1901-1911. Violations are subject to a civil penalty of $25,000; knowing violations are punishable by a fine of $50,000 and imprisonment for five years (33 U.S.C. § 1908).

Ocean Dumping. Article 7 of the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, Washington, London, Mexico City & Moscow, December 29, 1972, 26 U.S.T. 2403, T.I.A.S. No. 8165, provides that each party (1) "shall apply the measures required to implement the present Convention" and (2) "shall take in its territory appropriate measures to prevent and punish conduct in contravention of the provisions of this Convention."

Implementing legislation is contained in the Marine Protection, Research, and Sanctuaries Act of 1972, 33 U.S.C. §§ 1401-1445. Violations are subject to a civil penalty of $50,000; knowing violations are punishable by a fine of $50,000 and a years imprisonment (33 U.S.C. § 1415).