

The Proscribing Function of International Criminal Law in the Processes of International Protection of Human Rights

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It may appear upon initial examination that international criminal law has little to contribute to the development and protection of international human rights. Close analysis demonstrates, however, that the international protection of human rights can be viewed as a continuum along which criminal proscription has become the *ultima ratio* modality of protection. Resort to criminal proscription is compelled when a given right encounters an "enforcement crisis" in which other modalities of protection appear inadequate. Yet, the need to find an international or transnational element in human rights violations together with the need to rely on national courts to implement international penal proscriptions present impediments to scrutiny of violations committed by officials of sovereign states. This paper describes how international criminal law facilitates the proscribing function and initiates an inquiry as to its role in a comprehensive system of international protections.

I. A Theory of Human Rights Development

The twentieth century has witnessed an unprecedented expansion in the international protection of human rights.¹ This expansion can be attributed to an ever-increasing sharing of fundamental values and expectations among nations. As a result, the world community now ac-

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1. For U.N. Conventions, see *Human Rights: A Compilation of International Instruments*, U.N. Doc. ST/HR/1/Rev. 1 (1978). See also *The Protection of Human Rights in the Criminal Process under International Instruments and National Constitutions*, 4 NOUVELLES ETUDES PENALES (Association Internationale de Droit Penal, 1981); European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, E.T.S. No. 5 (entered into force Sept. 3, 1953) [hereinafter European Convention]; HUMAN RIGHTS IN NATIONAL AND INTERNATIONAL LAW (A. Robertson ed. 1968). On the Inter-American System, see American Convention on Human Rights, Nov. 22, 1969, OASOR Ser. K/SVI/ 1.1, O.A.S. Doc. 65, Rev. 1, Corr.1 (Jan. 7, 1970) [hereinafter American Convention]; J. DOMINGUEZ, N. RODLEY, B. WOOD & R. FALK, ENHANCING GLOBAL HUMAN RIGHTS (1979) [hereinafter GLOBAL RIGHTS].

knowledges the need to protect the individual from a variety of human depredations.

Depredations, while sometimes the result of private conduct, are most frequently committed by persons acting in a public or quasi-public capacity. Governmental policies are thus the primary cause of human rights violations today. Fortunately, the claim that sovereignty prevents scrutiny of a state's human rights practices has been at least partially overcome.² This development presents the opportunity to adopt modalities of protection that can directly influence a state's human rights practices.

The rationale for international protection of human rights is that certain forms of depredations become matters of international concern when committed under the aegis of state policy because of the presumed international impact of such behavior.³ Thus, the rationale posits that collective effort is required to protect against policies that may ultimately affect the entire world community.⁴

Concepts upon which a comprehensive framework for development and enforcement of human rights can be based are as yet poorly defined.⁵ Indeed, international human rights are themselves inadequately defined⁶ and inconsistently enforced.⁷ There is no classification of rights according to the values sought to be advanced or effective en-

2. L. HENKIN, *THE RIGHTS OF MAN TODAY* 94 (1978); Van der Meersch, *Does the Convention have the force of 'ordre public' in municipal law?* in *HUMAN RIGHTS IN NATIONAL AND INTERNATIONAL LAW* 97, 101-03 (A. Robertson ed. 1968). See generally *Symposium on the Future of Human Rights in the World Legal Order*, 9 *HOFSTRA L. REV.* 337 (1981).

3. See Bassiouni & Derby, *An Appraisal of Torture in International Law and Practice: The Need for an International Convention for the Protection and Suppression of Torture*, 48 *REVUE INTERNATIONALE DE DROIT PENAL [R.I.D.P.]* 17 (1977).

4. See, e.g., *THE INTERNATIONAL DIMENSIONS OF HUMAN RIGHTS* (G. Vasak ed. 1982); M. McDUGAL, H. LASSWELL & L. CHEN, *HUMAN RIGHTS AND WORLD PUBLIC ORDER* (1980); R. LILICH, *HUMANITARIAN INTERVENTION AND THE UNITED NATIONS* (1973); M. McDUGAL & F. FELICIANO, *LAW AND MINIMUM WORLD PUBLIC ORDER* 290-92 (1961); L. OPPENHEIM, *INTERNATIONAL LAW* 312-13 (H. Lauterpacht 8th ed. 1955); Nanda, *Self Determination in International Law: The Tragic Tale of Two Cities—Islamabad (West Pakistan) and Dacca (East Pakistan)*, 66 *AM. J. INT'L L.* 321 (1972); McDougal & Reisman, *Rhodesia and The United Nations: The Lawfulness of International Concern*, 62 *AM. J. INT'L L.* 1 (1968).

5. See *THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS* (L. Henkin ed. 1981) [hereinafter *BILL OF RIGHTS*]; M. McDUGAL, H. LASSWELL & L. CHEN, *supra* note 4; R. LILICH & F. NEWMAN, *INTERNATIONAL HUMAN RIGHTS: PROBLEMS OF LAW AND POLICY* (1979); L. SOHN & T. BUERGENTHAL, *INTERNATIONAL PROTECTION OF HUMAN RIGHTS* (1973); E. HAAS, *HUMAN RIGHTS AND INTERNATIONAL ACTION* (1970).

6. See M. McDUGAL, H. LASSWELL & L. CHEN, *supra* note 4, at 63-68.

7. Compare the enforcement of the International Covenant on Civil and Political Rights, G.A. Res. 2200A, 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966) [hereinafter *Civil Rights Covenant*], and *BILL OF RIGHTS*, *supra* note 5, with European Convention, *supra* note 1.

forcement modalities.⁸ Proceeding from this observation, natural rights thinkers simply might conclude that human rights are divinely endowed.⁹ Nevertheless, despite the dearth of scholarly analysis,¹⁰ human rights do emerge and develop as part of a coherent process.

The immediate task is to chart and differentiate the stages through which human rights evolve. The degree to which a given right has attained international acceptance can be assessed by considering the following pattern of emergence and development.

Stage 1—*The Enunciative Stage*—The emergence and shaping of internationally perceived shared values through intellectual and social processes.

Stage 2—*The Declarative Stage*—The declaration of certain identified human interests or rights in an international document or instrument.

Stage 3—*The Prescriptive Stage*—The articulation of these human rights in some prescriptive form in an international instrument (general or specific) generated by an international body; or the elaboration of specific normative prescriptions in binding international conventions.

Stage 4—*The Enforcement Stage*—The search for, or the development of, modalities of enforcement.

Stage 5—*The Criminalization Stage*—The development of international penal proscriptions.

Rights in the declarative stage (Stage 2) frequently are framed in general terms. In the prescriptive stage (Stage 3), rights are more specifically articulated in general international instruments having some legally binding effect. In the final stage, international criminalization, rights are always expressed in specific international conventions which deal exclusively with the rights and proscribe violation of them.

A particular human right may not necessarily evolve through each of these stages in the order listed above. Nevertheless, there is sufficient similarity in the pattern of development of most international human rights to validate the categorization. Perhaps positioning a right at a given stage is a function of the perception of the significance of the interest protected through the articulation of the right and of the appraisal of the degree of protection that the interest requires. Although it is less structured in the international context, the process of evolutionary development can be analogized to the evolution of social values

8. See *supra* note 5.

9. See Murphy, *The Grotian Vision of World Order*, 71 AM. J. INT'L L. 477 (1982).

10. The literature does not discuss the evolutionary pattern of human rights and the criteria for their evolution. See *supra* note 5.

and the development of civil prescription and penal proscriptions in any organized society.¹¹

Throughout the evolutionary process, the enactment of international criminal proscriptions invariably has followed an implementation crisis. Nevertheless, the adoption of criminal proscriptions has not derived from an appraisal of the significance of the right sought to be preserved and protected; rather, it has been caused by the inadequacy of modalities of protection in the first four stages. Thus, the inadequacy of these modalities has compelled the transformation of the protected right into a prohibited crime. Therefore, international criminal proscriptions are the *ultima ratio* modality of enforcing internationally protected human rights.

II. An Illustration of the Theory

Demonstrating the existence of the pattern of development described above requires the selection of a substantive premise and a functional starting point. This paper adopts the existing international instruments as the substantive premise and the evolution of those protected rights contained in such instruments as the functional starting point. On this basis, the evolutionary development of a given human right can be traced from the enunciative stage (Stage 1) to the criminalization stage (Stage 5). Reversing the analysis, from the criminalization stage to the enunciative stage, is equally valid. The outcome of the analysis should be identical regardless of methodology.

For example, a number of declared protected human rights with respect to physical integrity, contained in the Universal Declaration of Human Rights,¹² can be traced through succeeding international instruments to their inclusion in international penal proscriptions. This observation reveals that these declared rights which were first enunciated in the Universal Declaration were then reiterated more specifically, or more emphatically, in the International Covenant on Civil and Political Rights.¹³ They later became the subject of specialized conventions, and finally the subject of specialized international penal protections (e.g., genocide and apartheid).¹⁴ With this framework

11. See M. MCDUGAL, H. LASSWELL & L. CHEN, *supra* note 4, at 797-860.

12. G.A. Res. 217, U.N. Doc. A/810 at 71 (1948) [hereinafter Universal Declaration].

13. G.A. Res. 2200 A, UN. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966).

14. See, e.g., Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277; International Convention on the Suppression and Punishment of the Crime of *Apartheid*, G.A. Res. 3068, 28 U.N. GAOR Supp. (No. 30) at 75, U.N. Doc. A/9233/Add.1 (1973) [hereinafter *Apartheid Convention*]. See also Bassiouni, *International Law and the Holocaust*, 9 CALIF. W. INT'L L.J. 201 (1979).

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established, the discussion turns to more specific applications based on existing international proscriptions.

The proscriptions which are contained in multilateral conventions of a penal nature can be topically categorized as follows: (1) crimes against peace; (2) war crimes; (3) crimes against humanity; (4) genocide; (5) apartheid; (6) slavery and slave-related practices; (7) torture; (8) unlawful human experimentation; (9) piracy; (10) hijacking; (11) kidnapping of diplomats and the taking of civilian hostages; and (12) unlawful use of the mails. These topical subject matters share the following characteristics. Each is predicated on one or more international conventions which either explicitly declare the conduct in question to be an international crime or require the contracting parties to do so in their national laws, and frequently obligate the parties to prosecute or extradite the offender.¹⁵ Each substantive area and its related conventions seek to preserve and protect certain human interests which have been enunciated in one or more preceding human rights instruments.¹⁶ Each of the enumerated international penal proscriptions is the product of an evolutionary and progressive development through which an international instrument, relying on its predecessor, adds a new dimension to the definition, content, implementation or enforcement of the right sought to be preserved and protected.¹⁷

The characteristics of these crimes are such that they may be separated into two general categories: provisions prohibiting actions by the state, through its officials, depriving individual human rights, and provisions requiring states to ensure that human rights are not infringed by private individuals.¹⁸ The first category of crimes consists of crimes against peace, war crimes, crimes against humanity, genocide, apartheid, slavery, torture, and unlawful human experimentation. The second category includes piracy, slavery, hijacking, kidnapping of diplomats and the taking of civilian hostages, and unlawful use of the mails.

An examination of the subjects listed above, the acts constituting

15. See M. BASSIOUNI, *INTERNATIONAL CRIMINAL LAW: A DRAFT INTERNATIONAL CRIMINAL CODE* (1980). See also Bassiouni, *Common Characteristics of Conventional International Criminal Law*, 15 CASE W. RES. J. INT'L L. (1983) (forthcoming).

16. See *infra* text accompanying notes 19-77 (exposition of the crimes and the rights protected by various proscriptions).

17. See *supra* note 16.

18. See M. BASSIOUNI, *supra* note 15, at 40-44. See also S. GLASER, *INFRACTIONS INTERNATIONALES* (1957); S. PLAWSKI, *ETUDE DES PRINCIPES FONDAMENTAUX DU DROIT INTERNATIONAL PENAL* (1972); C. LOMBOIS, *DROIT PENAL INTERNATIONAL* (2d ed. 1979).

these crimes, and the instruments embodying their definition follows below.

A. *Crimes Against Peace*¹⁹

A crime against peace is committed when a state commits an act of aggression, defined as the use of armed force by a state against the sovereignty, territorial integrity, or political independence of another state, or in any other manner inconsistent with the Charter of the United Nations.²⁰ Such acts of aggression include invasion, attack, military occupation, annexation of territory, blockade of ports or coasts, and allowing a second state to use one's own territory to attack a third state.²¹ The proscription of these acts of aggression protects the rights to life, liberty, and personal security,²² the right to property,²³ and more indirectly, the right to be free from torture and from cruel, inhuman, or degrading treatment or punishment.²⁴

19. *See, e.g.*, Convention on the Pacific Settlement of International Disputes, July 29, 1899, 32 Stat. 1779, T.S. No. 392, 26 Martens Nouveau Recueil 2d 920; Inter-American Convention on the Pacific Settlement of International Disputes, Jan. 15, 1902, 1 Bevans 331; Convention on the Pacific Settlement of International Disputes, June 14, 1907, 1 Bevans 575; Convention on the Pacific Settlement of International Disputes, Oct. 18, 1907, 36 Stat. 2199, T.S. No. 536, 3 Martens Nouveau Recueil 3d 360; Treaty of Versailles, June 28, 1919, 11 Martens Nouveau Recueil 3d 323; Pan-American Treaty to Avoid or Prevent Conflicts between the American States (Gondra Treaty), May 3, 1923, 44 Stat. 2527, T.S. No. 752, 33 L.N.T.S. 25; Inter-American Convention on Maritime Neutrality, Feb. 20, 1928, 47 Stat. 1989, T.S. No. 845, 135 L.N.T.S. 187; General Treaty for the Renunciation of War as an Instrument of National Policy (Kellogg-Briand Pact), Aug. 27, 1928, 46 Stat. 2343, T.S. No. 796, 94 L.N.T.S. 57; Pan-American Anti-War Treaty of Non-aggression and Conciliation (Saavedra Lamas Treaty), Oct. 10, 1933, 49 Stat. 3363, T.S. No. 906, 163 L.N.T.S. 393; Inter-American Convention for the Maintenance, Preservation, and Reestablishment of Peace, Dec. 23, 1936, 51 Stat. 15, T.S. No. 922, 188 L.N.T.S. 9; Additional Protocol Relative to Nonintervention, Dec. 23, 1936, 51 Stat. 41, T.S. No. 923, 188 L.N.T.S. 31; Inter-American Treaty on the Prevention of Controversies, Dec. 23, 1936, 51 Stat. 65, T.S. No. 924, 188 L.N.T.S. 53; Charter of the United Nations, June 26, 1945, 59 Stat. 1031, T.S. No. 993, 3 Bevans 1153; Definition of Aggression, G.A. Res. 3314, 29 U.N. GAOR Supp. (No. 31) at 142, U.N. Doc. A/9890 (1974); Draft Code of Offenses Against the Peace and Security of Mankind, Report of the International Commission, 9 U.N. GAOR Supp. (No. 9), U.N. Doc. A/2693 (1954).

20. *See* Definition of Aggression, *supra* note 19; M. BASSIOUNI, *supra* note 15, at 52-53.

21. M. BASSIOUNI, *supra* note 15, at 52-53.

22. Universal Declaration, *supra* note 12, art. 3; Civil Rights Covenant, *supra* note 7, art. 6; European Convention, *supra* note 1, arts. 2, 5; American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, OASOR, OEA/Ser.L/V/I.4 Rev. (1965), art. 1 [hereinafter American Declaration]; American Convention, *supra* note 1, art. 7.

23. Universal Declaration, *supra* note 12, art. 17; American Declaration, *supra* note 22, art. 23; American Convention, *supra* note 1, art. 21.

24. Universal Declaration, *supra* note 12, art. 5; Civil Rights Covenant, *supra* note 7, art. 7; European Convention, *supra* note 1, art. 3; American Declaration, *supra* note 22, art. 28; American Convention, *supra* note 1, art. 5.

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B. *War Crimes*²⁵

A war crime is the result of the willful undertaking of conduct de-

25. Convention Regarding the Rights of Neutrals at Sea, July 22, 1854, 10 Stat. 1105, T.S. No. 300, 11 Bevens 1214; Declaration of Paris, Apr. 16, 1856, 15 Martens Nouveau Recueil 791; Geneva (Red Cross) Convention for the Amelioration of the Condition of the Sick and Wounded Armies in the Field, Aug. 22, 1864, 22 Stat. 940, T.S. No. 377, 18 Martens Nouveau Recueil 607; St. Petersburg Declaration, Dec. 11, 1868, 18 Martens Nouveau Recueil 474; Final Protocol of the Brussels Conference, Aug. 27, 1874, 4 Martens Nouveau Recueil 2d 226; Hague Convention on the Laws and Customs of War by Land, July 29, 1899, 32 Stat. 1803, T.S. No. 403, 26 Martens Nouveau Recueil 2d 949; Hague Convention for Adapting to Maritime Warfare the Principles of 22 August 1864 Geneva Convention, July 29, 1899, 32 Stat. 1827, T.S. No. 396, 26 Martens Nouveau Recueil 2d 979; Declaration of the Hague on the Use of Projectiles Diffusing Asphyxiating Gases, July 29, 1899, 26 Martens Nouveau Recueil 2d 998; Declaration of the Hague on Launching Projectiles and Explosives from Balloon, July 29, 1899, 32 Stat. 1839, T.S. No. 393, 26 Martens Nouveau Recueil 2d 994; Declaration Regarding Submarines and Poisonous Gases, Feb. 6, 1922, 3 Redmond 3116; Declaration on the Prohibition of the Use of Expanding Bullets, July 29, 1899, 26 Martens Nouveau Recueil 2d 1002; Hague Convention of Oct. 18, 1907, No. III, Relative to the Opening of Hostilities, 36 Stat. 2259, T.S. No. 538, 3 Martens Nouveau Recueil 3d 437; Hague Convention of Oct. 18, 1907, No. IV, Respecting the Laws and Customs of War on Land, 36 Stat. 2277, T.S. No. 539, 3 Martens Nouveau Recueil 3d 461; Hague Convention of Oct. 18, 1907, No. V, Respecting the Rights and Duties of Neutrals in War on Land, 36 Stat. 2310, T.S. No. 540, 3 Martens Nouveau Recueil 3d 504; Hague Convention of Oct. 18, 1907, No. VIII, Relative to the Laying of Automatic Submarine Contact Mines, 36 Stat. 2332, T.S. No. 541, 1 Bevens 669; Hague Convention of Oct. 18, 1907, No. IX, Concerning Bombardment by Naval Forces in Time of War, 36 Stat. 2351, T.S. No. 542, 3 Martens Nouveau Recueil 3d 604; Hague Convention of Oct. 18, 1907, No. X, For Adaptation of the 1906 Geneva Convention Principles to Maritime War, 36 Stat. 2371, T.S. No. 543, 3 Martens Nouveau Recueil 3d 630; Hague Convention of Oct. 18, 1907, No. XI, Relative to the Right of Capture in Naval War, 36 Stat. 2396, T.S. No. 544, 1 Bevens 711; Hague Convention of Oct. 18, 1907, No. XIII, Regarding Neutral Powers in Naval War, 36 Stat. 2415, T.S. No. 545, 1 Bevens 723; Declaration of the Hague Prohibiting the Launching of Projectiles and Explosives from Balloons, Oct. 18, 1907, 36 Stat. 2439, T.S. No. 546, 1 Bevens 739; Treaty for the Limitation of Naval Armament (Washington Treaty), Feb. 6, 1922, 43 Stat. 1655, T.S. No. 671, 25 L.N.T.S. 201; Protocol for the Prohibition of the Use in War of Asphyxiating Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571, T.I.A.S. No. 8061, 94 L.N.T.S. 65; Convention Regarding Maritime Neutrality, Feb. 20, 1928, 47 Stat. 1989, T.S. No. 845, 135 L.N.T.S. 187; Geneva Convention for the Amelioration of the Condition of the Wounded and Sick Armies in the Field (Red Cross Convention), July 27, 1929, 47 Stat. 2074, T.S. No. 847, 118 L.N.T.S. 303; Geneva Convention Relative to the Treatment of Prisoners of War, July 27, 1929, 47 Stat. 2021, T.S. No. 846, 118 L.N.T.S. 343; London Naval Treaty, Apr. 22, 1930, 46 Stat. 2858, T.S. No. 830, 112 L.N.T.S. 65; Inter-American Treaty for the Protection of Artistic and Scientific Institutions and Historic Monuments, Apr. 15, 1935, 49 Stat. 3267, T.S. No. 899, 167 L.N.T.S. 289; Second London Naval Treaty, Mar. 25, 1936, 50 Stat. 1363, T.S. No. 919, 3 Bevens 257; Protocol Relating to the Rules of Submarine Warfare Set Forth in Part IV of the Treaty of London of Apr. 22, 1930, *entered into force* Nov. 6, 1936, 173 L.N.T.S. 353; The Nyon Arrangement, Sept. 14, 1937, 181 L.N.T.S. 135; Modification of the Mar. 25, 1936 Agreement Regarding the Limitation of Naval Armament, June 30, 1938, 53 Stat. 1921, E.A.S. No. 127, 3 Bevens 523; Geneva Convention of Aug. 12, 1949, No. I, For the Amelioration of the Condition of the Wounded and Sick in the Armed Forces of the Field, 6 U.S.T. 3114, T.I.A.S. No. 3362, 75 U.N.T.S. 31; Geneva Convention of Aug. 12, 1949, No. II, For the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, 6 U.S.T. 3217, T.I.A.S. No. 3363, 75 U.N.T.S. 85; Geneva Convention of Aug. 12, 1949, No. III, Relative to the Treatment of Prisoners of War, 6 U.S.T. 3316, T.I.A.S. No. 3364, 75 U.N.T.S. 135; Geneva Convention of Aug. 12, 1949, No.

defined as a grave breach under the First, Second, Third, and Fourth Geneva Conventions and Protocol I,²⁶ where such conduct results in the death, great suffering, or serious injury to any protected person, prisoner, or civilian. The term "war crime" is broad and far-reaching, encompassing many specific acts. Torture, including the administration of unsound medical procedures and mind-altering drugs, physical mutilation, medical experimentation, or inhuman treatment, is the most obvious.²⁷ Other war crimes are, *inter alia*, causing a civilian to be taken hostage;²⁸ depriving a prisoner of war or a civilian of the right to the fair and regular trial prescribed in the Third and Fourth Conventions respectively;²⁹ appropriating or causing extensive and unjustifiable destruction of property;³⁰ willfully and unjustifiably delaying the release and repatriation of prisoners of war after the cessation of hostilities;³¹ deporting civilians;³² and discriminating against civilians or prisoners of war on the basis of race, creed, or religion.³³

These proscriptions protect the following rights: life, liberty, and personal security;³⁴ freedom from torture and from cruel, inhuman, or degrading treatment or punishment;³⁵ freedom from slavery and forced labor;³⁶ freedom from arbitrary arrest or detention;³⁷ a fair criminal

IV, Relative to the Protection of Civilian Persons in Time of War, 6 U.S.T. 3516, T.I.A.S. No. 3365, 75 U.N.T.S. 287; Convention for the Protection of Cultural Property in the Event of an Armed Conflict, May 14, 1954, 249 U.N.T.S. 215; Additional Protocol II to the Treaty for the Prohibition of Nuclear Weapons in Latin America, Feb. 14, 1967, 22 U.S.T. 754, T.I.A.S. No. 7137; Treaty on the Nonproliferation of Nuclear Weapons, July 1, 1968, 21 U.S.T. 483, T.I.A.S. No. 6839, 729 U.N.T.S. 161; Question of Chemical and Bacteriological (Biological) Weapons, Jan. 19, 1972, G.A. Res. 2827, 26 U.N. GAOR Supp. (No. 29) at 82, U.N. Doc. A/8574 (1971); Convention on the Prohibition of the Development, Production, and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, Apr. 10, 1972, 26 U.S.T. 583, T.I.A.S. No. 8062; Convention on the Prohibition of Military or Any other Hostile Use of Environmental Modification Techniques, May 18, 1977, 31 U.S.T. 333, T.I.A.S. No. 9614; Protocols Additional to the 1949 Geneva Conventions, June 10, 1977, INT'L REV. RED CROSS (SPEC. ISSUE AUG.-SEPT. 1977).

26. Geneva Conventions of Aug. 12, 1949, *supra* note 25; Protocol to Geneva Conventions of Aug. 12, 1949, *supra* note 25.

27. M. BASSIUNI, *supra* note 15, at 56-60.

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *See supra* note 22.

35. *See supra* note 24.

36. *See, e.g.*, Universal Declaration, *supra* note 12, art. 4; Civil Rights Covenant, *supra* note 7, arts. 8, 11; European Convention, *supra* note 1, art. 4; American Convention, *supra* note 1, art. 6.

37. *See, e.g.*, Universal Declaration, *supra* note 12, art. 9; Civil Rights Covenant, *supra* note 7, art. 9; European Convention, *supra* note 1, art. 5; American Declaration, *supra* note 22, art. 25; American Convention, *supra* note 1, art. 7.

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trial;³⁸ equal treatment;³⁹ freedom of movement,⁴⁰ religion,⁴¹ opinion, expression,⁴² and association;⁴³ the right to a family;⁴⁴ and recognition as a person before the law.⁴⁵

C. *Crimes Against Humanity*⁴⁶

Acts constituting crimes against humanity include murder, extermination, enslavement, deportation, and other inhumane acts done against any civilian population, or persecution on political, racial or religious grounds, when such acts are done or such persecutions are carried out in execution of, or in connection with any crime against peace or any war crime.⁴⁷

These penal proscriptions protect the same human rights listed above in connection with war crimes.

38. See, e.g., Universal Declaration, *supra* note 12, art. 11; Civil Rights Covenant, *supra* note 7, arts. 9, 15; European Convention, *supra* note 1, arts. 6, 7; American Declaration, *supra* note 1, art. 26; American Convention, *supra* note 22, arts. 8, 9.

39. See, e.g., Universal Declaration, *supra* note 12, arts. 2, 7; Civil Rights Covenant, *supra* note 7, arts. 2, 26; European Convention, *supra* note 1, art. 14; American Declaration, *supra* note 22, art. 2; American Convention, *supra* note 1, art. 24.

40. See, e.g., Universal Declaration, *supra* note 12, art. 13; Civil Rights Covenant, *supra* note 7, art. 12; American Declaration, *supra* note 22, art. 8; American Convention, *supra* note 1, art. 22.

41. See, e.g., Universal Declaration, *supra* note 12, art. 18; Civil Rights Covenant, *supra* note 7, art. 18; European Convention, *supra* note 1, art. 9; American Declaration, *supra* note 22, art. 3; American Convention, *supra* note 1, art. 12.

42. See, e.g., Universal Declaration, *supra* note 12, art. 10; Civil Rights Covenant, *supra* note 7, art. 19; European Convention, *supra* note 1, art. 10; American Declaration, *supra* note 22, art. 4; American Convention, *supra* note 1, art. 13.

43. See, e.g., Universal Declaration, *supra* note 12, art. 20; Civil Rights Covenant, *supra* note 7, art. 22; European Convention, *supra* note 1, art. 11; American Declaration, *supra* note 22, arts. 21, 22; American Convention, *supra* note 1, art. 16.

44. See, e.g., Universal Declaration, *supra* note 12, art. 16; Civil Rights Covenant, *supra* note 7, art. 23; European Convention, *supra* note 1, arts. 8, 12; American Declaration, *supra* note 22, art. 6; American Convention, *supra* note 1, art. 17.

45. See, e.g., Universal Declaration, *supra* note 12, art. 6; Civil Rights Covenant, *supra* note 7, art. 16; American Declaration, *supra* note 22, art. 17; American Convention, *supra* note 1, art. 3.

46. See Treaty of Versailles, *supra* note 19; Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (London Charter), Aug. 8, 1945, 59 Stat. 1544, E.A.S. 472, 82 U.N.T.S. 279, 3 Bevans 1238; Control Council Ordinance No. 10, Dec. 20, 1945, Official Gazette of the Control Council for Germany, No. 3, Jan. 31, 1946; Charter of the International Military Tribunal: Far East, Jan. 19, 1946, T.I.A.S. No. 1589, 4 Bevans 20; Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, Report of the International Law Commission, 5 U.N. GAOR Supp. (No. 12) at 11, U.N. Doc. A/1316 (1950); Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity, G.A. Res. 2391, 23 U.N. GAOR Supp. (No. 18) at 40, U.N. Doc. A/7342 & Corr.1 (1968); European Convention on the Non-Applicability of Statutes of Limitation to Crimes Against Humanity and War Crimes, Jan. 25, 1974, *reprinted in* 13 I.L.M. 540 (1974); Definition of Aggression, *supra* note 19.

47. M. BASSIOUNI, *supra* note 15, at 75.

D. *Genocide*⁴⁸

The crime of genocide can be committed in peacetime, as well as during war, when members of a national, ethnic, racial, or religious group are killed, seriously injured, or subjected to conditions calculated to partially or completely destroy the group. Additionally, genocide is committed when the group members are prevented from giving birth, or children of the group are forcibly transferred to another group.⁴⁹ Characterizing these acts as crimes attempts to safeguard the same rights as mentioned above, namely, the rights to life, liberty, personal security, freedom from torture or cruel treatment, freedom from slavery, freedom of religion, movement, opinion, association, and the right to a family.⁵⁰

E. *Apartheid*⁵¹

Apartheid involves acts committed for the purpose of establishing and maintaining systematic domination over a racial group of persons. Physical harm, killing, torture, arbitrary arrest, imprisonment, imposition of severe living conditions, denial of participation in the political, social, economic, and cultural life of the country, and physical and legislative separation of the group from the rest of the society are all acts constituting apartheid.⁵² Criminalizing apartheid protects the variety of human rights listed above.⁵³

F. *Slavery and Slave-Related Practices*⁵⁴

“Slavery” is the status or the condition of a person over whom any of

48. See Convention on the Prevention and Punishment of the Crime of Genocide, *supra* note 14.

49. M. BASSIOUNI, *supra* note 15, at 72.

50. See Universal Declaration, *supra* note 12, arts. 5, 7, 13, 16, 18, 20; Civil Rights Covenant, *supra* note 7, arts. 2, 6-12, 18, 22-23, 26; European Convention, *supra* note 1, arts. 2-5, 9, 11, 14; American Declaration, *supra* note 22, arts. 1-3, 6, 8, 21-22, 27; American Convention, *supra* note 1, arts. 6-7, 12, 16-17, 22, 24.

51. Apartheid Convention, *supra* note 14.

52. See M. BASSIOUNI, *supra* note 15, at 76.

53. See *supra* notes 34-45 and accompanying text.

54. See Congress of Vienna (Declaration on Universal Abolition of the Slave Trade, Feb. 8, 1815, 2 Martens Nouveau Recueil 432; Treaty of London for the Suppression of the African Slave Trade, Dec. 20, 1841, 2 Martens Nouveau Recueil 392, 508; Treaty for the Suppression of the African Slave Trade (Washington Treaty), Great Britain-United States, Apr. 7, 1862, 12 Stat. 1225, T.S. No. 126, 1 Malloy 674; Brussels Convention, July 2, 1890, 27 Stat. 886, T.S. No. 383, 17 Martens Nouveau Recueil 2d 345; International Agreement for the Suppression of the White Slave Traffic, Mar. 18, 1904, 35 Stat. 1979, T.S. No. 496, 1 L.N.T.S. 83; Convention Relating to the Liquor Traffic in Africa, and Protocol (St. Germain-en-Laye Convention), Sept. 10, 1919, 49 Stat. 3027, T.S. No. 779, 8 L.N.T.S. 12; International Convention for the Suppression of Traffic in Women and Children, Mar. 31, 1921, 9 L.N.T.S. 415; International Convention for the Suppression of White Slave Traffic,

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the powers attaching to ownership are exercised. “Slavery-related institutions” include the institutions or practices of debt bondage, serfdom, marital bondage, slave labor, and sexual bondage. The criminalization of slavery and related institutions has also protected a variety of human rights.⁵⁵

G. *Torture*⁵⁶

The crime of torture is any conduct by which severe physical or mental pain or suffering is inflicted intentionally on a person at the instigation of, or under the responsibility of a public official to obtain information or a confession, to humiliate or discredit a person, or to inflict illegal, cruel, inhuman, or degrading punishment.⁵⁷ Freedom from torture and cruel or inhuman punishment,⁵⁸ rights to life, liberty and personal security,⁵⁹ and to a fair criminal trial⁶⁰ are the human rights protected by this proscription.

May 4, 1910, 7 Martens Nouveau Recueil 3d 252; Slavery Convention, Sept. 25, 1926, 46 Stat. 2183, T.S. No. 778, 60 L.N.T.S. 253; Convention (No. 29) Concerning Forced or Compulsory Labor, June 28, 1930, 39 U.N.T.S. 55; International Convention for the Suppression of Traffic in Women of Full Age, Oct. 11, 1933, 150 L.N.T.S. 431; Protocol to Amend the Convention of Mar. 31, 1921, and the Convention of Oct. 11, 1933, Nov. 12, 1947, 53 U.N.T.S. 13; Convention for the Suppression of Traffic in Women and Children, Sept. 30, 1921, *as amended by* Protocol, Nov. 12, 1947, 53 U.N.T.S. 39; Protocol Amending International Agreement of May 18, 1904, and the International Convention of May 4, 1910, May 4, 1949, 30 U.N.T.S. 23; International Agreement for the Suppression of White Slave Traffic, May 18, 1904, *as amended by* Protocol, May 4, 1949, 2 U.S.T. 1997, T.I.A.S. No. 2332, 92 U.N.T.S. 19; International Convention for the Suppression of White Slave Traffic, May 4, 1910, *as amended by* Protocol, May 4, 1949, 98 U.N.T.S. 101; Convention for the Suppression of Traffic in Persons and the Exploitation of the Prostitutions of Others, May 21, 1950, 96 U.N.T.S. 271; Final Protocol to the Convention of Mar. 21, 1950, 96 U.N.T.S. 316; Protocol Amending Slavery Convention of Sept. 25, 1926, Dec. 7, 1953, 7 U.S.T. 479, T.I.A.S. No. 3532, 182 U.N.T.S. 51; Slavery Convention of Sept. 25, 1926, *as amended by* Protocol, *opened for signature* Dec. 7, 1953, 212 U.N.T.S. 17; Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, Sept. 7, 1956, 18 U.S.T. 3201, T.I.A.S. No. 6418, 266 U.N.T.S. 3; Convention (No. 105) Concerning the Abolition of Forced Labour, June 25, 1957, 320 U.N.T.S. 291; Question of Slavery and the Slave Trade in All Their Practices and Manifestations, Aug. 24, 1979, U.N. Doc. E/CN.4/Sub.2/434.

55. M. BASSIOUNI, *supra* note 15, at 78-79. *See supra* notes 34-45 and accompanying text (human rights protected). *See also* Universal Declaration, *supra* note 12, arts. 2, 6-10, 16, 20; Civil Rights Covenant, *supra* note 7, arts. 2, 6-10, 22-23, 26; European Convention, *supra* note 1, arts. 1-2, 8, 17, 21-22, 28; American Convention, *supra* note 1, arts. 3, 5, 7, 16-17, 24.

56. The Geneva Conventions of Aug. 12, 1949, *supra* note 25; Draft Convention for the Prevention and Suppression of Torture, U.N. Doc. E/CN.4/NGO.213 (1978) [hereinafter Prevention of Torture Convention].

57. M. BASSIOUNI, *supra* note 15, at 82. *See also* Bassiouni & Derby, *supra* note 3, at 17.

58. *See supra* note 24.

59. *See supra* note 22.

60. *See supra* note 38.

H. *Unlawful Human Experimentation*⁶¹

The crime of unlawful human experimentation consists of any non-consensual physical and/or psychological alterations by means of surgical operations or injections, ingestion, or inhalation of substances inflicted by, or at the instigation of, or under the responsibility of a public official. A person is not deemed to have consented to medical experimentation unless he or she has the capacity to consent and does so freely after being fully informed of the nature of the experiment and its possible consequences.⁶² This proscription protects the rights of life, liberty, personal security,⁶³ freedom from torture and cruel or inhuman punishment,⁶⁴ and the right to a family.⁶⁵

I. *Piracy*⁶⁶

The crime of piracy consists of any illegal act of violence, detention, or any other act of deprivation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed: (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft; or (ii) against a ship, aircraft, persons, or property in a place outside the jurisdiction of any state.⁶⁷ Life, liberty, and personal security are protected by this proscription.⁶⁸

J. *Hijacking*⁶⁹

It is a crime intentionally to seize an aircraft by force or threat, to destroy it, or to endanger the safety of an aircraft by threatening the safety of any person on board, or damaging or interfering with its operation in flight.⁷⁰ Life, liberty, and personal security are also protected by this proscription.⁷¹

61. The Geneva Conventions of Aug. 12, 1949, *supra* note 25.

62. M. BASSIOUNI, *supra* note 15, at 85.

63. *See supra* note 22.

64. *See supra* note 35.

65. *See supra* note 44.

66. *See* Convention on the High Seas, Apr. 29, 1958, 13 U.S.T. 2312, T.I.A.S. No. 5200.

67. M. BASSIOUNI, *supra* note 15, at 87.

68. *See supra* note 22 and accompanying text.

69. Tokyo Convention of Offenses Committed on Board Aircraft, Sept. 14, 1963, 20 U.S.T. 2941, T.I.A.S. No. 6768, 704 U.N.T.S. 219; Hague Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641, T.I.A.S. No. 7192, *reprinted in* 10 I.L.M. 133 (1971); Montreal 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, *reprinted in* 10 I.L.M. 1151 (1971).

70. M. BASSIOUNI, *supra* note 15, at 88.

71. *See supra* note 22 and accompanying text.

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K. *Kidnapping and Taking of Civilian Hostages*⁷²

This crime is committed by behavior which harms or threatens harm against internationally protected persons.⁷³ Seizing or detaining a person against his will is included. The same human rights are protected by this proscription as are protected by the proscription against hijacking.⁷⁴

L. *Unlawful Use of the Mails*⁷⁵

The use of mails to kill or inflict harm on anyone handling or receiving mailed materials is a crime. Explosives, dangerous substances, or animals are all barred from the mails.⁷⁶ The right to life, liberty, and personal security is protected.⁷⁷

III. Enforcement Through Criminal Proscription

A. *The Need for an International or Transnational Element*

Though in many respects international criminal law is a continuum of internationally protected human rights, there are distinguishing characteristics attributable to each of these areas. International penal proscriptions, whether or not established for the preservation and protection of human rights, require that each crime have an international or transnational element.⁷⁸ This element can be found in the very nature of the violative conduct, its target-victim, or in its impact.⁷⁹ The

72. O.A.S. 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; 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; International Convention Against the Taking of Hostages, *opened for signature* Dec. 17, 1979, G.A. Res. 34/146, 34 U.N. GAOR Supp. (No. 46) at 245, U.N. Doc. A/34/819 (1979).

73. M. BASSIOUNI, *supra* note 15, at 90, 92. For a definition of "internationally protected person," see Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, *supra* note 72, art. 1.

74. *See supra* note 22.

75. Treaty on the Creation of a Universal Postal Union, Oct. 9, 1874, 1 Martens Nouveau Recueil 2d 651; Universal Postal Union, May 26, 1906, 1 Martens Nouveau Recueil 3d 355; Universal Postal Convention (Berne Convention), July 11, 1952, 4 U.S.T. 1118, T.I.A.S. No. 2800, 169 U.N.T.S. 3 (including final protocol, detailed regulations, and provisions concerning air-mail correspondence); Agreement Concerning Insured Letters and Boxes, July 11, 1952, 170 U.N.T.S. 3 (including final protocol and detailed regulations).

76. M. BASSIOUNI, *supra* note 15, at 94.

77. *See supra* note 22 and accompanying text.

78. *See* M. BASSIOUNI, *supra* note 15, at 40-44.

79. Such an element is identifiable in every international crime discussed above at text accompanying notes 19-75, except for torture, which does not have an international or transnational element in its commission, target-victim, or impact, except by very broad extrapolation. *See* Bassiouni & Derby, *supra* note 3, at 47-50. *See infra* text accompanying note 82.

international element can be defined by virtue of the impact of the conduct, in that it affects the collective security interests of the world community, or if by reason of the seriousness and magnitude of the violative conduct it constitutes a threat to the peace and security of humankind. The transnational element merely affects the interests of more than one state and therefore is more limited in its impact on world order than is the international element.

Hence, when internationally protected human rights evolve to the stage of implementation crisis, they will find their expression in international penal proscriptions only if characterized by identifiable international or transnational elements.⁸⁰ Internationally protected human rights dealing with minimum standards of due process appropriate in national criminal proceedings, for example, are not likely to find their enforcement expression in international penal proscriptions, because there are no international or transnational elements affected by the deprivation of these rights.⁸¹ As a concrete illustration, the prohibition against the use of torture to secure evidence is still at a draft stage before the United Nations Commission on Human Rights.⁸² The slow progress in that area is attributable to the absence of the international or transnational element needed to make such conduct an international crime.

In short, the determination of whether the criminal modality of enforcement will be applied to human rights not presently so protected will depend more on the definition of the required international or

80. The transnational or international element that must be found in the human right can be viewed as the essential characteristic conferring jurisdiction over the criminal activity. The traditionally recognized bases of jurisdiction are:

first, *the territorial principle*, determining jurisdiction by reference to the place where the offense is committed; second, *the nationality principle*, determining jurisdiction by reference to the nationality or national character of the person committing the offense; third, *the protective principle*, determining jurisdiction by reference to the national interest injured by the offense; fourth, *the universality principle*, determining jurisdiction by reference to the custody of the person committing the offense; and fifth, *the passive personality principle*, determining jurisdiction by reference to the nationality or national character of the person injured by the offense.

Harvard Research on International Law: Jurisdiction with Respect to Crime, 29 AM. J. INT'L L. 435, 445 (1935) (emphasis added). See also RESTATEMENT (SECOND) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 10 (1965). The discussion of these jurisdictional bases would be relevant to an individual state's assertion of jurisdiction over specific activity. See generally Feller, *Jurisdiction over Offenses with a Foreign Element*, in 2 A TREATISE ON INTERNATIONAL CRIMINAL LAW 5 (M. Bassiouni & V. Nanda eds. 1973). As far as the protection of human rights through international criminal law is concerned, this article will not deal with the characteristics and ramifications of the jurisdictional principles, but will discuss only the transnational or international element as described in the text.

81. See Bassiouni & Derby, *supra* note 3, at 47-50.

82. Prevention of Torture Convention, *supra* note 56.

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transnational element than on the significance ascribed to the commonly shared values embodied in the rights by the processes which bring about their emergence, recognition, appraisal, and implementation.

B. *The Efficacy of International Penal Proscriptions*

An appraisal of the effectiveness of international criminal law in protecting human rights requires analysis of the enforcement mechanisms of international criminal law. Two methods have been used in enforcement: a "direct enforcement scheme" and an "indirect enforcement scheme."⁸³ The direct enforcement scheme contemplates the creation of an international criminal court and international machinery for the execution of an extra-national system of justice. The indirect enforcement scheme obligates states to prosecute or extradite violators of international normative proscriptions in accordance with national laws.

A direct enforcement scheme, predicated on the establishment of an international criminal court, has been discussed and advocated by numerous international law scholars and international organizations.⁸⁴ It

83. See M. BASSIOUNI, *supra* note 15, at 52.

84. See Historical Survey of the Question of International Criminal Jurisdiction, Memorandum Submitted by the Secretary-General, reprinted in 1 B. FERENCZ, AN INTERNATIONAL CRIMINAL COURT, A STEP TOWARD WORLD PEACE—A DOCUMENTARY HISTORY AND ANALYSIS 399 (1980); B. FERENCZ, AN INTERNATIONAL CRIMINAL COURT, A STEP TOWARD WORLD PEACE—A DOCUMENTARY HISTORY AND ANALYSIS (1980); Kos, Rabcewicz & Zubkowski, *The Creation of an International Criminal Court*, in INTERNATIONAL TERRORISM AND POLITICAL CRIMES 519 (M. Bassiouni ed. 1975); Dautricourt, *The International Criminal Court: The Concept of International Jurisdiction—Definition and Limitation of the Subject*, in 1 A TREATISE ON INTERNATIONAL CRIMINAL LAW 636 (M. Bassiouni & V. Nanda eds. 1973); Nepote, *The Role of an International Criminal Police in the Context of an International Criminal Court and Police Cooperation with Respect to International Crimes*, in 1 A TREATISE ON INTERNATIONAL CRIMINAL LAW 676 (M. Bassiouni & V. Nanda eds. 1973); J. STONE & R. WOETZEL, TOWARD A FEASIBLE INTERNATIONAL CRIMINAL COURT (1970); P. CARJEU, PROJET D'UNE JURISDICTION PENALE INTERNATIONALE (1953); Bassiouni & Derby, *Final Report on the Establishment of an International Criminal Court for the Implementation of the Apartheid Convention and Other Relevant Instruments*, 9 HOFSTRA L. REV. 523 (1981); Kos, Rabcewicz & Zubkowski, *La Creation d'une Cour Penale Internationale et l'Administration Internationale de la Justice*, 1977 CAN. Y.B. INT'L L. 253; Grebing, *La Creation d'une Cour Penale Internationale: Bilan et Perspectives*, 45 R.I.D.P. 435 (1979); *La Creation d'une Jurisdiction Penale Internationale et la Cooperation Internationale en Matiere Penale*, 45 R.I.D.P. 403-691 (1974); Miller, *Far Beyond Nuremberg: Steps Toward International Criminal Jurisdiction*, 61 KY. L.J. 925 (1973); Ambion, *The Organization of a Court of International Criminal Jurisdiction*, 29 PHIL. L.J. 345 (1954); Finch, *Draft Statute for an International Court*, 46 AM. J. INT'L L. 89 (1952); Glaser, *Vers une Jurisdiction Criminelle Internationale*, 67 SCHWEIZERISCHE ZEITSCHRIFT FUR STRAFRECHT 281 (1952); Wright, *Proposal for an International Criminal Court*, 46 AM. J. INT'L L. 60 (1952); Liang, *The Establishment of an International Criminal Jurisdiction: The First Phase*, 46 AM. J. INT'L L. 73 (1952); Advisory Opinion of the International Court of Justice and Punishment of Genocide, 1951 I.C.J. 15.

has also been envisaged in a few international conventions.⁸⁵ Of the 143 international instruments on international criminal law between 1815 and 1982,⁸⁶ three have made specific reference to an international criminal court. The first, the 1937 Terrorism Convention,⁸⁷ provided for the creation of an international criminal court, but it never entered into force because of insufficient ratification. The second convention to refer to an international criminal court was the Genocide Convention of 1948,⁸⁸ which states that such a court, if established, would have jurisdiction to prosecute and punish offenders. The most recent convention to refer to an international criminal court was the 1973 Apartheid Convention,⁸⁹ which declares that offenders under the convention may be tried by an "international penal tribunal."⁹⁰ It is noteworthy that both the genocide and apartheid conventions are essentially aimed at criminalizing human rights violations committed by individuals acting under color of state authority. In light of the present differences in the political and ideological attitudes of the members of the world community, and in particular the more powerful members, it is unlikely that a tribunal acceptable to all can be established or that any direct enforcement scheme will be adopted in the foreseeable future.⁹¹

The indirect enforcement scheme derives from Hugo Grotius' maxim *aut dedere aut punire*⁹² (more appropriately *aut dedere aut judicare*) which, while not specifically stated in all international criminal law conventions, can be inferred from the provisions of all such conventions.⁹³

Under this scheme, the violator or potential violator bears the risks of prosecution or extradition in a number of states, presumably without

85. See Convention for the Prevention and Punishment of Terrorism, 19 LEAGUE OF NATIONS O.J. 23 (1938); Convention on the Prevention and Punishment of the Crime of Genocide, *supra* note 14, art. 6; Apartheid Convention, *supra* note 14, art. 5.

86. See M. BASSIOUNI, *supra* note 15, at xix-xxx.

87. Convention for the Prevention and Punishment of Terrorism, *supra* note 85. See also M. BASSIOUNI, INTERNATIONAL TERRORISM AND POLITICAL CRIMES (1975).

88. Convention on the Prevention and Punishment of the Crime of Genocide, *supra* note 14, art. 6. See also Bassiouni, *Slavery, Genocide, and Racial Discrimination*, in 1 A TREATISE ON INTERNATIONAL CRIMINAL LAW 504, 522 (M. Bassiouni & V. Nanda eds. 1973).

89. Apartheid Convention, *supra* note 14.

90. Apartheid Convention, *supra* note 14, art. 5.

91. See Report of M. Bassiouni to the Ad Hoc Working Group of Experts for the Commission on Human Rights, U.N. Doc. E/CN.4/AC/22 CRP, 19/Rev.1 (1980) [hereinafter Bassiouni Report].

92. H. GROTIUS, DE JURE BELLI AC PACIS, Bk. II, chap. 21, § 5(1) (1624). For a more contemporary perspective, see Costello, *International Terrorism and the Development of the Principle of Aut Dedere Aut Judicare*, 10 INT'L L. & ECON. 483 (1975). See also M. BASSIOUNI, INTERNATIONAL EXTRADITION IN U.S. LAW AND PRACTICE (1983).

93. See M. Bassiouni, *supra* note 15.

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the benefit of a "statute of limitations";⁹⁴ the opportunities for enforcement are increased, while the possibilities of escaping enforcement (prosecution or punishment) are reduced. Furthermore, penal prescriptions criminalizing human rights violations stigmatize the violators in a manner that is likely to have some deterrent effect.⁹⁵ Thus, international criminal law remains one of the most effective enforcement mechanisms for internationally protected human rights.

It must be noted, however, that, to the extent the cooperation of national courts is required, the indirect enforcement scheme is imperfect. Courts in many parts of the world will not be able to or will refuse to prosecute nationals who, acting pursuant to executive policy, violate international norms. Moreover, the prosecution of the officials of one state by courts of another state could create political conflict or encounter jurisdictional difficulty.⁹⁶ Proponents of greater international protection of human rights therefore must find solutions to these problems.

Perhaps the most basic problem to be solved is the clarification of the criteria that will be used in criminalizing violations of internationally protected human rights. So far little information on the relevance of international criminal law to human rights has emerged from the writings of human rights scholars.

The contemporary trend in international criminalization seems to follow a pattern similar to the trend in national policies.⁹⁷ When other social and legal (non-penal) means of control fail, the tendency is to resort to criminalization without much regard to underlying policies and the effectiveness of enforcement.⁹⁸ Yet, there is a higher expectation of enforceability in national systems than in the international system. The requirement discussed above, that international crimes must have a transnational element, limits the international criminalization process. Thus, at least one limit to international criminalization is not the product of a substantive policy choice at all.

The dilemma remains as to the justifiable policy limits on international criminal law, and the best use of international criminal law to control human rights violations. The time has come for international

94. See Convention on Non-Applicability of Statutes of Limitation to War Crimes and Crimes Against Humanity, *supra* note 46. See also Symposium, *Les problèmes actuels de l'extradition*, 39 R.I.D.P. 375 (1968).

95. See Bassiouni & Derby, *supra* note 3.

96. See M. BASSIOUNI, *supra* note 92.

97. Compare M. BASSIOUNI, *SUBSTANTIVE CRIMINAL LAW* (1978) with M. BASSIOUNI, *supra* note 15.

98. See, e.g., N. MORRIS & G. HAWKINS, *A HONEST POLITICIAN'S GUIDE TO CRIME CONTROL* (1970).

criminal law and international human rights experts to focus their attention on the interrelationship of the two disciplines and the policy questions relating thereto. The continued resort to international criminal law as a method of enforcing internationally protected human rights will be no more effective with respect to these types of violations than with respect to other international criminal violations unless workable enforcement mechanisms are instituted. Internationally protected human rights should not develop haphazardly; the international legislator should not be permitted to follow the easy path of criminalization while avoiding the difficult task of developing alternative modalities of enforcement.

International criminal law needs growth and development in the enforcement area, especially in developing alternatives to the all-or-nothing "traditional" approach of an all-encompassing international criminal court. So far, scholars have been concerned with development of an international criminal court as the only means to enforce international criminal proscriptions.⁹⁹ A different approach would be to create specific mechanisms to regulate specialized areas of conduct, or to prevent and suppress certain types of conduct. For example, specific forms of pre-trial inquiry by judicial or quasi-judicial bodies for particular types of violations could be developed.¹⁰⁰ Similarly, fact-finding bodies with differing scopes could permit the airing of complaints.¹⁰¹ Fact-finding bodies generally and observers could also play more effective roles.¹⁰² Specialized tribunals could be established to deal with

99. See *supra* notes 84 & 91.

100. See Report, *Draft Statute for an International Commission of Criminal Inquiry*, Int'l Law Ass'n, 95th Conf. at 402 (1982); Report, *Draft Statute for the Establishment of an International Criminal Court*, Int'l Law Ass'n, 95th Conf. at 409 (1982).

101. See, e.g., Optional Protocol to the International Covenant on Civil and Political Rights, G.A. Res. 2200A, 21 U.N. GAOR Supp. (No. 16) at 59, U.N. Doc. A/6316 (1966); BILL OF RIGHTS, *supra* note 5, at 15-16.

102. See N. BAR-YAACOV, THE HANDLING OF INTERNATIONAL DISPUTES BY MEANS OF INQUIRY (1974); W. SHORE, FACT-FINDING IN THE MAINTENANCE OF INTERNATIONAL PEACE (1970); Weissbrodt & McCarthy, *Fact-Finding by International Nongovernmental Human Rights Organizations*, 22 VA. J. INT'L L. 1 (1981); Franck & Fairley, *Procedural Due Process in Human Rights Fact-Finding by International Agencies*, 74 AM. J. INT'L L. 308 (1980); Norris, *Observations In Loco: Practice and Procedures on the Inter-American Commission on Human Rights*, 15 TEX. INT'L L.J. 1 (1980); Rodley, *Monitoring Human Rights Violations in the 80's*, in ENHANCING GLOBAL HUMAN RIGHTS 119 (1979); van Boven, *Fact-Finding in the Field of Human Rights*, 1973 ISRAEL Y.B. OF HUMAN RIGHTS 93; Kaufman, *The Necessity for Rules of Procedure in Ad Hoc United Nations Investigations*, 18 AM. U.L. REV. 738 (1969); Levdijk, *Fact-Finding: Its Place in International Law and International Politics*, 1967 NETHERLANDS J. INT'L L. 141; Rules of Procedure of European Commission on Human Rights, in COUNCIL OF EUROPE, COLLECTED TEXTS OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 301-08 (1976). See also Model Rules of Procedure for United Nations Bodies Dealing with Violations of Human Rights, U.N. Doc. E/CN.4/1021/Rev.1 (1970) (providing fact-finding procedures for ad hoc bodies investigating human rights vio-

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certain types of violations.¹⁰³ These bodies could be established not only on a world-wide basis but on a regional basis. The experience of the European system of human rights¹⁰⁴ and the Inter-American system of human rights¹⁰⁵ could also provide a basis on which to build alternatives to international criminal adjudication as the only method of human rights protection. These and other alternatives will be discussed in a more systematic manner in the section below.

IV. Alternative and Complementary Enforcement Modalities

Although the fifth stage of the evolution of internationally protected human rights, the criminalization stage, has been described as the *ultima ratio* modality, there are still alternative mechanisms through which human rights may be protected. These alternative mechanisms at times act in concert with international criminal law enforcement modalities, yet remain discrete. Because the focus of this article is limited to the examination of the effectiveness of international criminal law alone as a mode of enforcement of human rights, the effectiveness of these alternative mechanisms will not be explored in depth.

The United Nations and its various organs are illustrative of a powerful enforcement mechanism which perhaps can be called world public opinion. Through the processes of fact-finding, discussion, debate, and censure, the fora of the U.N. have been used to police the activities of member-states in many spheres, including that of internationally protected human rights. The Security Council deals with threats to world peace as well as serious violations of human rights affecting the peace and security of mankind. For example, the Security Council has considered issues involving the Arab-Israeli, Congo, Cyprus, Rhodesia, and Bangladesh conflicts.¹⁰⁶ The U.N. General Assembly, although lacking the powers of sanction vested in the Security Council under the U.N. Charter, has also dealt with issues specifically related to human rights violations and has been the vehicle for the development of international instruments and norms relating to international criminal law

lations); Regulations of Inter-American Commission on Human Rights, art. 23, O.A.S. Doc. OEA/Ser.L/V/II.17 Doc 26 (1967).

103. See Bassiouni Report, *supra* note 91.

104. European Convention, *supra* note 1; HUMAN RIGHTS IN NATIONAL AND INTERNATIONAL LAW, *supra* note 1.

105. American Convention, *supra* note 1; Wood, *Human Rights Issues in Latin America*, in ENHANCING GLOBAL HUMAN RIGHTS 155 (1979); L. SOHN & T. BUERGENTHAL, *supra* note 5, at 1356; Fournier, *The Inter-American Human Rights System*, 21 DEPAUL L. REV. 376 (1971).

106. See, e.g., G. ABI-SAAB, THE UNITED NATIONS OPERATION IN THE CONGO, 1960-1964 (1979).

and international protection of human rights. The United Nations has made frequent use of U.N. relief forces and observer teams in various international, regional, and internal conflicts in the Middle East, Korea, Vietnam, the Congo, Cyprus, and Lebanon.¹⁰⁷ At a different level, the International Court of Justice has served as an important mechanism of conflict resolution and enforcement of international law, though the lack of compulsory jurisdiction of the Court has reduced its effectiveness.¹⁰⁸

Some mechanisms of the United Nations are focused more narrowly on violations of human rights. The U.N. Commission on Human Rights and the U.N. Subcommission on the Protection of Minorities and the Prevention of Discrimination have been used as mechanisms for the presentation of claims and complaints of human rights violations.¹⁰⁹ These bodies afford non-governmental organizations an opportunity to present reports, a useful tool in the fact-finding processes of these two bodies. They also elaborate on policy documents and international instruments to further the protection of human rights and the development of international criminal law.

Non-governmental organizations have had an increasing role as watchdogs, providers of information and data, and as suppliers of inspection and observation teams in connection with specific deprivations of human rights or other related issues. The contributions of organizations such as Amnesty International, the International Commission of Jurists, and the Anti-Slavery Society, are well known and established. Others, such as the International Association of Penal Law, affect through their scholarly work the shaping of policy and the development of international instruments within the U.N. and its specialized agencies, as well as domestically in a number of states.¹¹⁰

There are a number of other specialized agencies and organizations, either related to the United Nations or independent thereof, that monitor compliance with international criminal law.¹¹¹ Among them are the

107. *See id.*

108. *See S. ROSENNE, THE LAW AND PRACTICE OF THE INTERNATIONAL COURT (1965). See also Advisory Opinion on the Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa), 1971 I.C.J. 16.*

109. *See M. TARDU, HUMAN RIGHTS: THE INTERNATIONAL PETITION SYSTEM (1979).*

110. *See Frank & Fairley, supra note 102.* Amnesty International publishes annual and periodic reports of its activities and issues a regular newsletter. The International Commission of Jurists publishes a quarterly bulletin and occasional reports. The International Association of Penal Law publishes quarterly the *Revue Internationale de Droit Penal* and the *Nouvelles Etudes Penales*. These and other organizations present periodic reports and statements to U.N. specialized agencies.

111. On the role of the U.N. and non-U.N. bodies in monitoring state compliance with international criminal proscriptions, see generally Mueller & Besharov, *The Existence of In-*

International Protections

International Narcotics Control Board, created by the 1961 Convention on Narcotic Drugs;¹¹² the U.N. Commission on Narcotic Drugs, which implements U.N. enforcement of narcotics conventions with the support of the Division on Narcotic Drugs of the U.N. Secretariat;¹¹³ the International Labour Organization,¹¹⁴ which oversees the implementation of a number of conventions dealing with labor practices violative not only of international protection of human rights but also of international criminal law, such as slave-related practices; the International Committee of the Red Cross, a non-U.N. organization which supervises the implementation of the four Geneva Conventions of August 12, 1949 and the two Protocols of 1977 in relation to the sick, wounded, shipwrecked, civilian population, prisoners of war and other prisoners in conflicts of both international and non-international character;¹¹⁵ the U.N. High Commissioner for Refugees, who oversees the international protection of human rights of refugees;¹¹⁶ the World Health Organization, which deals with the international protection of human rights in the context of medicine and science;¹¹⁷ the U.N. Crime Prevention and Criminal Justice Branch, which supports international criminal law development;¹¹⁸ and the U.N. Division of Human Rights, which supports the development of internationally protected human rights.

The European and Inter-American regional systems for the protection of human rights have each established a commission and a court before which complaints and legal actions may be brought.¹¹⁹ Com-

International Criminal Law and Its Evolution to the Point of Its Enforcement Crisis, in 1 A TREATISE ON INTERNATIONAL CRIMINAL LAW 5 (M. Bassiouni & V. Nanda eds. 1973).

112. Single Convention on Narcotic Drugs, Mar. 30, 1961, 520 U.N.T.S. 151. See Bassiouni, *The International Narcotics Control Scheme—A Proposal*, 46 ST. JOHN'S L. REV. 713 (1972). The International Narcotics Control Board publishes an annual report.

113. The Commission on Narcotic Drugs publishes annual reports submitted to the U.N. Economic and Social Council.

114. See Constitution of the International Labour Organisation, in Treaty of Versailles, June 28, 1919, pt. 13, 11 Martens Nouveau Recueil 3d 323; St. Germain-en-Laye Convention, *supra* note 25, at pt. 13. The ILO publishes annual reports.

115. The Committee also publishes annual and periodic reports as well as a number of publications.

116. The U.N. High Commissioner of Refugees publishes annual and periodic reports. On the functions of the High Commissioner, see generally Nanda, *World Refugee Assistance: The Role of International Law and Institutions*, 9 HOFSTRA L. REV. 449 (1981).

117. The WHO publishes periodic reports and standards dealing with medical ethics.

118. The Branch prepares international instruments and reports which are submitted to the U.N. Congress on Crime Prevention and the Treatment of Offenders. It has sponsored the U.N. Standard Minimum Rules for the Treatment of Prisoners. See First United Nations Congress on the Prevention of Crime and the Treatment of Offenders, U.N. Doc. A/Conf./6/1, U.N. Sales No. 1956 IV.4 (1956) at 67. The Standard Minimum Rules were approved by the Economic and Social Council of the U.N. in ESC Res. 663C, 24 U.N. ESCOR Supp. (No. 1) at 11.

119. See European Convention, *supra* note 1; American Convention, *supra* note 1.

plaints may be brought by individuals and are investigated by the Commissions. The Commissions are vested with the power to attempt the conciliation of aggrieved parties and to make recommendations as well as to rule on the admissibility of such complaints.¹²⁰ The Courts consider cases brought after review by the Commissions, and give standing only to member states to adjudicate individual claims, though there is no requirement that the states represent only their own nationals.

V. Conclusion

Internationally protected human rights, based on their individual significance, have been articulated and protected at varying stages of the evolutionary process. The trend, however, has been towards a level of enforcement crisis. The response to these crises, where international or transnational elements have been present in the interests sought to be protected, has been enactment of international criminal proscriptions.

The challenge of finding justifiable limits on international criminal law and discovering how best to utilize international criminal law to prevent and suppress the violation of human rights remains. Scholars have yet to formulate the criteria that should be used in selecting rights to undergo the criminalization process. Experts in the fields of international criminal law and internationally protected human rights should focus their attention on the interrelationship of the two disciplines. Such a collaborative effort will lead to a better understanding of the role of international criminal law and a comprehensive system of international protections.

Despite the world community's growing awareness of the need to protect common values, the achievement of such protection has been elusive. Through clarification of the relations between these fundamental values and the criminal and alternative enforcement modalities, the possibilities of more effective protection are enhanced.

120. See M. TARDU, *supra* note 109.

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