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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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. 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. Thus, the rationale posits that collective effort is required to protect against policies that may ultimately affect the entire world community.

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


6. See M. McDougal, H. Lasswell & L. Chen, supra note 4, at 63-68.

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forcement modalities. Proceeding from this observation, natural rights thinkers simply might conclude that human rights are divinely endowed. Nevertheless, despite the dearth of scholarly analysis, 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.
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.\textsuperscript{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 \textit{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,\textsuperscript{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.\textsuperscript{13} They later became the subject of specialized conventions, and finally the subject of specialized international penal protections (e.g., genocide and apartheid).\textsuperscript{14} With this framework

\textsuperscript{11} See M. McDOUGAL, H. LASSWELL & L. CHEN, supra note 4, at 797-860.
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. 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. 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.

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. 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


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

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. 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. The proscription of these acts of aggression protects the rights to life, liberty, and personal security, the right to property, and more indirectly, the right to be free from torture and from cruel, inhuman, or degrading treatment or punishment.


20. See Definition of Aggression, supra note 19; 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.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

A war crime is the result of the willful undertaking of conduct de-
fined as a grave breach under the First, Second, Third, and Fourth Geneva Conventions and Protocol I, 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. Other war crimes are, inter alia, causing a civilian to be taken hostage; 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; appropriating or causing extensive and unjustifiable destruction of property; willfully and unjustifiably delaying the release and repatriation of prisoners of war after the cessation of hostilities; deporting civilians; and discriminating against civilians or prisoners of war on the basis of race, creed, or religion.

These proscriptions protect the following rights: life, liberty, and personal security; freedom from torture and from cruel, inhuman, or degrading treatment or punishment; freedom from slavery and forced labor; freedom from arbitrary arrest or detention; a fair criminal
trial; equal treatment; freedom of movement, religion, opinion, expression and association; the right to a family; and recognition as a person before the law.

C. Crimes Against Humanity

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.

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.


47. M. Bassioumi, 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

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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.

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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 trial\(^{60}\) are the human rights protected by this proscription.

\(^{55}\) M. Bassion, 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.


\(^{57}\) M. Bassion, supra note 15, at 82. See also Bassioni & 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

63. See supra note 22.
64. See supra note 35.
65. See supra note 44.
68. See supra note 22 and accompanying text.
70. M. Bassion, 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][^73][^74]

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


[^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.


[^76]: M. BASSIOUNI, supra note 15, at 94.

[^77]: See supra note 22 and accompanying text.

[^78]: See 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 Bassionu & Derby, supra note 3, at 47-50. See infra text accompanying note 82.
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The 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.
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." 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. It

83. See M. Bassiouni, supra note 15, at 52.
has also been envisaged in a few international conventions.\textsuperscript{85} Of the 143 international instruments on international criminal law between 1815 and 1982,\textsuperscript{86} three have made specific reference to an international criminal court. The first, the 1937 Terrorism Convention,\textsuperscript{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,\textsuperscript{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,\textsuperscript{89} which declares that offenders under the convention may be tried by an "international penal tribunal."\textsuperscript{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.\textsuperscript{91}

The indirect enforcement scheme derives from Hugo Grotius' maxim \textit{aut dedere aut punire}\textsuperscript{92} (more appropriately \textit{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.\textsuperscript{93}

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

\textsuperscript{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, \textit{supra} note 14, art. 6; Apartheid Convention, \textit{supra} note 14, art. 5.

\textsuperscript{86} See M. Bassiouni, \textit{supra} note 15, at xix-xxx.

\textsuperscript{87} Convention for the Prevention and Punishment of Terrorism, \textit{supra} note 85. See also M. Bassiouni, \textit{INTERNATIONAL TERRORISM AND POLITICAL CRIMES} (1975).


\textsuperscript{89} Apartheid Convention, \textit{supra} note 14.

\textsuperscript{90} Apartheid Convention, \textit{supra} note 14, art. 5.


\textsuperscript{93} See M. Bassiouni, \textit{supra} note 15.
the benefit of a "statute of limitations";\textsuperscript{94} the opportunities for enforcement are increased, while the possibilities of escaping enforcement (prosecution or punishment) are reduced. Furthermore, penal proscriptions criminalizing human rights violations stigmatize the violators in a manner that is likely to have some deterrent effect.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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

\textsuperscript{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).

\textsuperscript{95} See Bassiouni & Derby, supra note 3.

\textsuperscript{96} See M. Bassiouni, supra note 92.

\textsuperscript{97} Compare M. Bassiouni, Substantive Criminal Law (1978) with M. Bassiouni, supra note 15.

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. 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. Similarly, fact-finding bodies with differing scopes could permit the airing of complaints. Fact-finding bodies generally and observers could also play more effective roles. Specialized tribunals could be established to deal with

99. See supra notes 84 & 91.
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certain types of violations. 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 rights and the Inter-American system of human rights 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. 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

103. See Bassiouni Report, supra note 91.
104. European Convention, supra note 1; Human Rights in National and International Law, supra note 1.
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. 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.

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. 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.

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. Among them are the

107. See id.
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 Pénales. 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.\(^{119}\) Communist International Criminal Law and Its Evolution to the Point of Its Enforcement Crisis, in 1 \textit{A Treatise on International Criminal Law} 5 (M. Bassiouni & V. Nanda eds. 1973).


\(^{113}\) The Commission on Narcotic Drugs publishes annual reports submitted to the U.N. Economic and Social Council.


\(^{115}\) The Committee also publishes annual and periodic reports as well as a number of publications.


\(^{117}\) The WHO publishes periodic reports and standards dealing with medical ethics.


\(^{119}\) \textit{See} European Convention, \textit{supra} note 1; American Convention, \textit{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. 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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