

Viewpoint

WMD Proliferation: An International Crime?

BARRY KELLMAN

Professor Barry Kellman teaches at DePaul University College of Law and is Co-Director of the International Criminal Justice and Weapons Control Center. He chairs the American Bar Association Committee on Law and National Security and is also Chair of the Arms Control Section of the American Society of International Law. Professor Kellman has recently served as legal consultant to the National Commission on Terrorism, and he is a legal authority on the Chemical Weapons Convention (CWC). He has served as a consultant to the U.S. Department of Defense on issues relating to the legal implementation of the CWC and other major arms control treaties. He is the author of numerous reports for the U.S. government as well as articles and chapters on national security, the laws of armed conflict, Middle East arms control, nuclear nonproliferation, biological weapons control, and weapons smuggling.

The international community has recognized approximately 25 international crimes.¹ This essay considers whether a twenty-sixth should be recognized: proliferation of weapons of mass destruction (WMD). If so, what should be the content of that crime? And most important, what would be accomplished by the application of criminal law to proliferation?

WMD proliferation tends to be regarded as falling squarely in the domain of diplomatic/military affairs; rarely is a proliferation problem handled exclusively or even primarily as a law enforcement matter. This essay asserts that international law enforcement need not displace non-legal responses to proliferation, but criminal law mechanisms should be available at maximum strength; their absence may force adoption of a nonlegal approach in cases where law might have preferable applications. A primary incentive for characterizing proliferation as an international crime, therefore, is to enable decisionmakers to take advantage of law enforcement mechanisms without undue obstacles.

More specifically, established principles can identify certain behavior as an international crime, and identifying criminal conduct triggers important law enforcement tools.

However, WMD proliferation incompletely satisfies the doctrinal bases of criminality at this time. Thus, the point of this essay is to prompt international lawyers and non-proliferation experts to consider initiatives for clarifying the criminal status of proliferant behavior.

THE IMPORTANCE OF CRIMINALIZATION

To speak of “international crimes” is to invite ambiguity and perhaps derision. There is neither an international criminal code nor an international police force. But accelerating applications of criminal law to international conduct belies this simplistic viewpoint, which ignores reality. Even as attention focuses on criminal tribunals for alleged war criminals and indictments of gross human rights violators,² the progress of international criminal law is no less apparent in the constant transnational efforts to address drug trafficking, smuggling, money laundering, hijacking, and terrorism, among various other crimes.³ And the entry into force of the International Criminal Court, with the United States or not, signals the maturation of the international criminal legal system.⁴

This essay cannot pretend to address, much less resolve, the intricacies of this system nor broadly justify its

expansion. The argument here is more modest. First, designating WMD proliferation an international crime would establish a powerful norm under which violators could be condemned and shown to be deserving of prosecution and punishment, thereby discouraging others from committing a similar act.⁵ Focusing world attention on criminals can also have important strategic implications—all the more so in a world where deterrence is less than completely effective against rogue states and subnational groups. And for victims, invocation of the potential for justice through legal process can offer some vindication.

Second, and more important than condemnation or prosecution, is detection and interdiction. Although the risk of post-catastrophe arrest and prosecution might discourage some proliferators, the devotion of law enforcement resources exclusively to punishing use of WMD defies sane policymaking. Law enforcement tools can and should be effectively sharpened to prevent WMD use, but the full benefits of this approach can be achieved only if proliferation is criminalized. In connection with WMD proliferation, which typically requires covert accomplishment of numerous technologically complex tasks, criminalization is both an impediment and a deterrent to successful weaponization programs. For example, criminalization can clarify enforcement of export control laws by prohibiting exports of sensitive items to facilities suspected of weapons-related activities, rendering a potential exporter an accessory to that enterprise.

WHAT IS AN INTERNATIONAL CRIME?

Briefly stated, conduct constitutes an international crime if it contains certain doctrinal elements, and its prohibition is legally acknowledged. The analysis revolves around three inquiries:

1. the planning, preparation, or commission of the conduct must involve more than one state, either because: (1) the perpetrators are of different nationalities; (2) the victims are of different nationalities; or (3) the means employed transcend national boundaries.
2. the conduct must either: (1) threaten international well-being; or (2) require the mechanisms of international criminal law enforcement for effective prevention or control.⁶
3. the conduct includes internationally recognized elements of criminality, which provide an accused with constructive notice of its illegality. There can be no crime without a law; no punishment without a law; and no *ex post facto* application of the law: “[t]hese principles are

deemed part of fundamental justice because they protect against potential judicial abuse and arbitrary application of the law.”⁷

As will be discussed, application of these criteria to WMD proliferation provokes difficult questions as to whether the perpetrator is acting individually or on behalf of a state. Also, such application depends upon the legal reach of the source of the obligation. Most treaty-generated criminal prohibitions obligate only the treaty’s signatories;⁸ however, the obligation may extend to all states if it arises from general international law. For example, prohibitions against slavery or torture are recognized as binding even on states that have not joined or consented to relevant treaties prohibiting such conduct.⁹

THE IMPLICATIONS OF CRIMINALITY

To consider the utility of strengthened mechanisms of international criminal law to stanch proliferation, a distinction must be drawn between behavior that is primarily private and behavior that advances a state policy.

Private Criminality

Private criminality renders the perpetrator subject to prosecution where he is apprehended or to extradition to the state that has jurisdiction to prosecute. His assets may be seized, frozen, or forfeited. His efforts to secure a hiding place will be opposed by a full array of law enforcement resources—domestic and international. At best, if he finds a safe refuge, he will be effectively captive there; if he travels, he will be subject to arrest. If the criminal plan is covert such that the perpetrator’s identity is unknown, significant law enforcement resources can be devoted to ferreting out that activity and interdicting it before the crime is successfully committed. But if proliferation is not a crime or if its status is unclear, the international legal system’s effectiveness unravels.

International criminal law enforcement is, for the most part, an indirect system based on the idea that states must enforce, under national law, international legal prohibitions. The indirect enforcement system depends on national criminal justice systems to investigate, apprehend, prosecute, and adjudicate accused persons within their jurisdictions and to punish those found guilty. It also depends on the cooperation of states to extradite and provide legal assistance to other states investigating cases or seeking to apprehend persons accused or found guilty of international crimes.¹⁰

Many crimes (e.g., WMD proliferation) entail planning and efforts to acquire illegal capabilities in different countries. Legal assistance and cooperation may enable the police and prosecutorial agencies of those countries to collaborate against that criminality. If, for example, state *A* suspects that a subnational group is pursuing an illegal capability in state *B*, it can request that state *B* conduct an investigation, including gathering evidence and reviewing documents. Where evidence of criminality is strong, the request may also be to immobilize evidence or proceeds of criminal activity, thereby preventing the wrongdoers from advancing their plot or profiting from it. If arrest is appropriate, state *A* may request that state *B* arrest and prosecute the alleged perpetrator. If the accused is a citizen of state *A* or otherwise under its jurisdiction, extradition may be requested. To support prosecution, state *B* may be asked to call witnesses or produce evidence for trial.

Admittedly, any of these mechanisms of legal assistance can be employed through diplomatic agreement, but such assistance tends to be slow and uncertain even among states that have established diplomatic arrangements.¹¹ Among states that do not have such arrangements, invoking these mechanisms can be next to impossible. To overcome diplomatic hurdles and to cope with differences among states and the limitations that sovereignty places on transnational investigations, international law has devised modalities of interstate cooperation in penal matters that enable states to agree on law enforcement priorities and interact effectively.¹² Most important here are formal mechanisms (as distinct from diplomatic comity) for gathering evidence, conducting investigations, immobilizing evidence or proceeds of a crime, and calling witnesses or producing evidence for trial.¹³

These cooperative mechanisms operate only if the conduct is a crime under the laws of both requesting and requested states. This is the principle of dual criminality.¹⁴ If the status of behavior as an international crime is ambiguous, national laws may not be harmonized, and dual criminality may not be sustained. Among many members of international nonproliferation regimes, laws dealing with sensitive exports or possession of nuclear materials are generally congruent. But this is not always the case, especially among states where proliferation behavior might be more likely. To facilitate prosecution, designation of certain behavior as an international crime can encourage states to bring their laws into harmony. Another problem, relevant to WMD proliferation, is the “political offense exception,” whereby some states refuse to pursue per-

sons who assert a motivation of political opposition to their government.¹⁵ Although such an assertion in the context of WMD is unprecedented, and such weapons have never been accepted as legitimate tools for expressing domestic political opposition, a clear international prohibition on specific conduct can help ensure that no accused perpetrator may successfully hide behind the claim that s/he is entitled to the exception’s protection. Perhaps even more significant is that a clear international prohibition can obligate states to enact strict penalties and to harmonize extension of the prohibition to a broader range of conduct such as conspiracy, attempt, or aiding and abetting the crime.¹⁶

International criminalization of proliferation activities can also be used to activate the capabilities of transnational law enforcement institutions. Recognizing that many states’ police and prosecutors are ill accustomed to confronting international problems, various institutions carry out selective law enforcement functions in this arena. Interpol provides a formal association for multilateral police cooperation, but its activities only extend to investigations of criminal activity.¹⁷ If the conduct is not criminal, devotion of scarce Interpol resources to its interdiction is unlikely. Other international institutions such as the United Nations (U.N.) Crime Prevention and Criminal Justice Branch¹⁸ or the World Customs Organization¹⁹ have expertise in connection with specific law enforcement initiatives, but their authority is constrained by current definitions of criminal behavior.

Of increasing significance to international law enforcement is the establishment of *ad hoc* commissions to investigate particular allegations of criminal behavior. Such fact-finding bodies enable the international community to pursue specific threatening behavior without incurring the onus of establishing a permanent institution. Typically, such commissions have a broad range of access to conduct an investigation and can generate reports with significant impact.²⁰

Criminality in Furtherance of State Policy

If criminal conduct advances a state policy (not unlikely with regard to WMD proliferation), the implications for law enforcement are, unfortunately, far murkier. Until recently, most international lawyers agreed that states cannot, by definition, be prosecuted or imprisoned—only private persons can be criminals and only in connection with the domestic law of the state that has jurisdiction over that person.²¹ If the state is party to the international

instrument, then conduct in support of a state program constitutes a breach of that instrument. At what point a breach becomes a crime remains exceptionally undefined. As indicated earlier, these types of situations have been addressed more in diplomatic/military rather than legal terms.

If the state is not party to that instrument, then, except for crimes of exceptional gravity—more likely to involve the use of WMD than proliferation—it is difficult to conceive of criminal liability for those who advance a state WMD acquisition or assistance program. Moreover, it is highly unlikely that a state pursuing WMD capabilities would criminalize behavior domestically that is in support of its own programs—a significant limitation of international criminal law.

Nevertheless, international criminalization could serve important purposes. Most important is the clear and forceful articulation of a norm against such behavior and the opportunity criminalization would provide those seeking to enforce the norm to publicize the alleged noncompliance with standards of international law.²² That the conduct in question is clearly prohibited serves to direct world public opinion. Public knowledge that a state has violated accepted codes of behavior may lead to sanctions or lesser penalties, including loss of international prestige, standing, cooperation, or political friendship.²³

International criminalization may also be helpful when it is unclear whether the prohibited conduct is pursuant to a state policy. That is, if conduct is clearly criminal under international law, then each state must abstain from assisting the wrongdoer and must extradite or prosecute.²⁴ Thus, criminalization might restrain suspicious activities by states that are otherwise in good standing. Moreover, evidence of that conduct within a state's jurisdiction enables outsiders (e.g., other states or non-governmental organizations) to apply pressure on that state. If a state refuses to conduct an investigation into or request support in addressing alleged illegality, then it will be effectively signaling through its inaction that it does not find the illegal conduct to be objectionable. In a sufficiently dire case, an indication of whether a state is sponsoring illegality, tolerating illegality, or is helpless in the face of illegality may be decisive in determining the legality of the use of force against it under the U.N. Charter.

CRIMINAL CONDUCT INVOLVING WMD

With these concepts in mind, the question arises as to whether or not WMD proliferation should be deemed an

international crime. The term “proliferation” refers to unauthorized: (1) possession, production, or acquisition; (2) provision or transfer; or (3) conveyance or smuggling of WMD or critical precursors and highly specialized equipment. The term could also include the diversion of specialized expertise. Unfortunately, the different types of proliferators (e.g., states or subnational groups) and the array of WMD and their various control treaties complicate any analysis of the legality of proliferation. Altogether, a fair conclusion is that the international law pertaining to WMD proliferation is patchy, and this condition undermines any effective application of significant international law enforcement measures that could help control proliferation.

First, whether existing international agreements criminalize possession of WMD is unclear. The Chemical Weapons Convention (CWC) and the Biological and Toxin Weapons Convention (BWC) respectively prohibit, without reservation, both the use and possession of chemical and biological weapons. If a state party of either pact has prohibited weapons, it is most certainly in breach (unless it is in the process of destroying its stockpiles pursuant to international oversight). Whether that breach is “criminal” is still not clear. Most commentators agree that the term “war crime” extends to the use of chemical or biological weapons, and the International Criminal Court (ICC) Statute confirms that opinion.²⁵ But international criminal law in this context is caught on the same distinction between use and possession that undermined the 1925 Geneva Protocol.²⁶ As CWC and BWC negotiators came to realize, possession of these weapons is, in and of itself, a threat to international peace and security, and the two conventions reflect this fact. International criminal law should do the same. As discussed below, the application of international criminal law in the nuclear arena poses some, but not all, of these challenges.

There is, moreover, the question of how to evaluate the behavior of states that have not consented to treaty prohibitions. Does a state that has not joined the CWC behave illegally by maintaining a chemical weapons (CW) stockpile? The answer revolves around whether the prohibition has become so widely accepted as to be part of customary international law—a characterization as to which reasonable minds can certainly differ. Again, the extension of a prohibition against chemical and biological weapons (CBW) use, even to non-state parties, seems more than plausible. This is not the case, however, in the event of possession.

The criminal status of CW or biological weapons (BW) possession by subnational groups is, fortunately, somewhat clearer. Both the CWC and BWC require state parties to enact legislation to penalize conduct prohibited by the treaty. Upon first impression, therefore, law enforcement should address the possession of CW or BW by anyone within the jurisdiction of that state. A few caveats are in order here. First, while the term “penal” includes criminalization, it also includes laws that merely impose administrative penalties. States that have not made CW or BW possession a criminal act may hesitate to apply

law enforcement resources to international control efforts. A second concern here is uncertainty as to whether a weapons-possessing subnational group outside of a CWC or BWC state party can be classified as a criminal. Both treaties rely on the indirect system of criminalization: instead of deeming the conduct a direct violation of international law, each treaty requires member states to enact domestic legislation that renders that conduct illegal. Discrepancies among national law as well as national police capabilities may weaken enforcement (see Scenario 1).

Scenario 1: Potential Independent Action of a Given Biological Laboratory

Assume hypothetically that a biological laboratory (Lab) is located in state A (a BWC state party that has not enacted legislation to prohibit biological weapons development). Researchers at the Lab are testing methods of dispersing plague; they may be developing capabilities on the basis of that research. It is certain that this laboratory is exporting something to a recipient in state B (a non-member state to the BWC), but the identity of that product is in doubt. Have Lab personnel committed a crime, and what does the answer to that question mean in terms of stopping Lab's suspicious activities?

Under current law, the answer is clear: no crime, either international or domestic, has been committed. State A is most definitely in breach of its obligation to enact prohibitory legislation and for its presumed tolerance of Lab in its territory, but that condition is irrelevant to addressing Lab's suspicious conduct as a criminal act. Moreover, no other state could demand legal assistance from state A's legal authorities, at least in the absence of a bilateral or regional agreement that would so provide. Diplomatic initiatives by outside states calling on state A to curtail the activities of its lab would be possible, but they could not properly allege that criminal violations had occurred.

Take this one step further: assume that the state B recipient commits an act of bioterrorism in state C, and further that state A Lab personnel are in state C at the time of attack but are not involved in the actual terrorist act. Clearly, state C may apprehend the perpetrators of the attack. The only basis for state C to apprehend Lab personnel would be on a conspiracy or aiding or abetting charge (perhaps pursuant to the Convention on the Suppression of Terrorist Bombing, Art. 2. 3(c)), but this would require evidence that Lab personnel in fact supplied critical materials to the attacker with the aim of furthering the attack or with knowledge of the attacker's intention. This is difficult enough to show under any conditions; in an international context where there is no preexisting arrangement for legal assistance, it is virtually impossible. (State C may, however, have the right, under Article 51 of the U.N. Charter, to take action against the state A Lab i.e., to destroy it under a broad interpretation of self-defense.)

If, in our hypothetical, the item is a chemical or nuclear weapon instead of a biological weapon, Lab's activities could provoke a challenge (CWC) or special (pursuant to the Treaty on the Non-Proliferation of Nuclear Weapons (NPT)) inspection, but only if state A were a party to the respective conventions. If not, the analysis is essentially the same as above.

The picture is even murkier in connection with nuclear weapons (NW). The use of NW is generally illegal, except where such use is necessary to preserve the very existence of the state, according to the 1996 *Advisory Opinion* of the International Court of Justice.²⁸ But the discriminatory structure of the NPT undermines any argument that state possession of NW is necessarily a crime. That treaty does not prohibit continued possession of NW by the five states that detonated nuclear explosions prior to January 1, 1967 (P-5). As with CW and BW, a non-nuclear state party to the NPT would be clearly in breach of its obligations if it acquired or possessed NW. But the argument that non-states parties are acting criminally by possessing NW is harder to sustain than with regard to CW or BW because, in contrast with those treaties, there is no universal (formal or informal) ban against the possession of NW. Accordingly, it is easier to ascribe criminality to a proliferant state that has not joined any of the nonproliferation treaties in the case of CBW possession than for NW.

Inexplicably, there is no international instrument that directly criminalizes the possession of NW by subnational groups. The NPT lacks a requirement that parties adopt criminal laws banning private behavior inconsistent with the treaty, analogous to that found in the CWC and BWC. The Convention on the Physical Protection of Nuclear Material prohibits the theft of nuclear material but does not extend to other methods of acquisition.²⁹ Moreover, only a few states subscribe to the Physical Protection Convention, and not all states have enacted domestic laws to criminalize the possession of nuclear materials. Whether the Physical Protection Convention can justify a claim to have criminalized theft somewhere other than in the jurisdiction of a member state is unclear.³⁰

So far, this discussion has focused only on “proliferators” in terms of those who acquire or possess WMD; what of suppliers of WMD capabilities? Much of the previous analysis applies here, but with even more impediments to criminalizing undesired behavior under international law. It is illegal, of course, for a CWC, BWC, or NPT state party to assist any “recipient,” i.e., another state party, a non-state party, or a subnational group in developing a prohibited capability. This discussion need not focus on the difficulties in defining illegal assistance in any of these three areas where materials and equipment have myriad dual-use implications. More significant for this discussion is that a non-state party may legally assist either another non-state party or a subnational group,

and there is no formal mechanism of control for the international community to address these cases. Furthermore, a subnational group that may legally possess CW, BW, or NW faces no criminal prohibition against transferring such capabilities.

Finally, regardless of the legality of the recipient or the provider of WMD or its precursors, there is a related implication here for the smuggling of such items. In this context, the question is not whether smuggling is forbidden under national import/export laws, but whether there is adequate interaction of weapons control regimes, international institutions, and national border controls and customs authorities to foil these operations. There is no convention concerning WMD smuggling comparable to conventions pertaining to drug smuggling³¹ or trafficking of women and children.³²

Because there is no direct prohibition against interstate movement of any WMD precursor or weapons-relevant equipment,³³ there is no legal trigger for interaction or cooperation among these parties (although individual collaborative efforts based on diplomatic exchanges are not uncommon). Moreover, there is no legal basis for interdiction in areas of the commons, such as the high seas.³⁴ The point here is that criminalization, in addition to forming the basis for conducting criminal investigations, also forms the basis of coordinating regulatory initiatives to detect and prevent the behavior. The absence of criminalization means that coordination is *ad hoc*, depending on what states are concerned and whether they can initiate responses by international regulatory agencies or other interested states without a claim that a crime has been committed.

TOWARD CRIMINALIZATION OF WMD PROLIFERATION

International law prohibits most use of WMD, but the effects of such use are too cataclysmic to delay employing law enforcement until after the fact. A more effective criminal law enforcement system to address the threat of WMD, therefore, would focus on proliferation, not only on the use of WMD.

The bad news here is that gaps in relevant international law—notably, the absence of a primary prohibition against subnational group possession of CW, BW, or NW—marginalizes law enforcement capabilities, at least until proliferation explodes into catastrophe. It is difficult to conceive an argument in favor of the legality of subnational

group possession of WMD, and a multilateral agreement should put an end to any doubts on this issue. Moreover, criminalization should be universal, without regard to whether the state with jurisdiction over the subnational has joined the CWC, BWC, or NPT.

The Harvard-Sussex Program on CBW Armament and Arms Limitation has put forth a draft treaty to criminalize CW and BW activities.³⁵ This draft treaty goes far in satisfying the points made in this essay: it criminalizes not only the use of CW and BW, but also preparations, assistance, and construction of relevant facilities to produce such weapons. Although the draft treaty does not extend to NW, remedying this gap would merely require a straightforward supplementation of its text. The draft treaty would require each state party to criminalize prohibited conduct, to extend its jurisdiction to “any persons, irrespective of their nationality” (the universal theory of jurisdiction), to implement and use appropriate measures of legal assistance and cooperation, and to not refuse assistance on the grounds that the act concerns a political offense.

The limitation of the draft treaty, however, is that it allocates responsibility for pre-attack interdiction to each state party, as the prohibited pre-attack activity is based on intent (“engages in preparation,” “any facility intended for the production” of BW or CW, or “assists, encourages, or induces” any person to commit a CW or BW crime). Other states or international institutions lack authority to investigate or interdict. This is more than a semantic distinction: it goes to the very heart of the distinction between criminalizing use separate from proliferation.

Briefly, pre-use interdiction is complicated by the fact that WMD capabilities are typically dual use—the same capabilities may be employed for legitimate purposes. After an attack, we will know what those capabilities were used for, and the draft treaty allows us to pursue the perpetrators as well as their accomplices and supporters, but not necessarily their suppliers. The larger problem concerns possible action that may be legally justified before a catastrophic attack. The core of the issue is that without tightly woven multilateral regulatory obligations, the acquisition of WMD capabilities is not illegal unless the intent to produce or use such weapons can be proved. As earlier stated, this is extremely difficult to achieve before use occurs.

Criminalizing proliferation, by contrast, means that receiving, supplying, or smuggling weapons precursors, critical materials, or critical equipment would be illegal unless that activity is declared and subject to appropriate national and international regulation. If those activities are kept

secret and unregulated, the presumption must be that the objective (of the receiver, supplier, or smuggler) is criminal. Legitimate parties can avoid criminality by registering or declaring relevant activities. Stated simply, subnational group possession without compliance with relevant regulatory obligations of materials and equipment within the scope of control of the various treaties should be an international crime.

Most important, prohibitions against WMD proliferation should be supported, not only by legal assistance and cooperation obligations, but also by enhancing the direct law enforcement capabilities of relevant international institutions. Policing institutions and those that oversee the international traffic in goods are notable candidates. Fortunately, most of the regulatory systems that bear upon WMD proliferation already exist; it should not be arduous to implement criminal consequences to unregulated behavior and to develop the law enforcement capabilities to combat it.

CONCLUSION

The pursuit of international security is potentially thwarted by the increasing diffusion of WMD capabilities to states and subnational groups. One result is a blurring of distinctions among terrorists, smugglers, and proliferators. This, in turn, suggests a need for traditional law enforcement capabilities to be more effectively directed against the spread of WMD. However, the capacity of international criminal law is under-utilized with regard to proliferation because of the mottled condition of the legal prohibitions against WMD-related behavior short of actual use.

Taken seriously, the criminalization of WMD proliferation requires the development of a new international agreement or instrument that criminalizes different varieties of proliferation behavior. In addition, it would set forth the legal obligations of states to enforce that prohibition and promulgate responsibilities for relevant international institutions. A coherent strategy must be developed to clarify the responsibilities, opportunities, and benefits of criminalizing proliferation. This strategy would address the requirements of clarifying a norm against behavior, facilitating legal assistance and cooperation, and triggering initiatives from international regulatory and police institutions.

There is a catch, however. An international crime is a crime applicable to everyone and may be realized only in connection with a strong international legal system in which most states (and certainly the more powerful states)

manifest a commitment. No state is at liberty to dabble in international law: one cannot pick some aspects while rejecting others, and no state can hold adversaries to standards it does not seek to uphold itself. Making use of these tools cannot be sporadic or piecemeal, nor can they be avoided to satisfy *ad hoc* claims of *realpolitik*.

¹ These are: aggression, genocide, crimes against humanity, war crimes, crimes against U.N. and associated personnel, unlawful possession and/or use of weapons, theft of nuclear materials, mercenarism, *apartheid*, slavery, torture, unlawful human experimentation, piracy, aircraft hijacking, unlawful acts against maritime navigation, unlawful acts against internationally protected persons, taking of civilian hostages, unlawful use of the mail, unlawful traffic in drugs, destruction/theft of national treasures, unlawful acts against the environment, international traffic in obscene materials, falsification and counterfeiting, unlawful interference with international submarine cables, and bribery of foreign public officials. See M. Cherif Bassiouni, "The Sources and Theory of International Criminal Law," in M. Cherif Bassiouni, ed., *International Criminal Law*, vol. 1, *Crimes*, 2nd ed. (Ardsey, NY: Transnational Publishers, 1999), p. 47.

² The prosecutions of crimes against humanity in connection with Rwanda and the former Yugoslavia set precedent for bringing international criminals to justice. See William Miller, "Slobodan Milosevic's Prosecution by the International Criminal Tribunal for the Former Yugoslavia: A Harbinger of Things to Come for International Criminal Justice," *Loyola of Los Angeles International and Comparative Law Review* 22 (2000), p. 553; John Ackerman and Eugene O'Sullivan, *Practice and Procedure of the International Criminal Tribunal for the Former Yugoslavia: With Selected Materials From the International Criminal Tribunal for Rwanda* (Cambridge, MA: Kluwer Law International, 2000); John R. Jones, *The Practice of the International Criminal Tribunals for the Former Yugoslavia and Rwanda* (Ardsey, NY: Transnational Publishers, 1998); and Michael P. Scharf, "The Tools for Enforcing International Criminal Justice in the New Millennium: Lessons from the Yugoslavia Tribunal," *DePaul Law Review* 49 (Summer 2000), p. 925. More recently, renowned dictators have faced zealous prosecutors seeking to wield international law. See Antoni Pigrau Sole, "The Pinochet Case in Spain," *ILSA Journal of International and Comparative Law* 6 (2000), p. 653; Ruth Wedgwood, "International Criminal Law and Augusto Pinochet," *Virginia Journal of International Law* 40 (Spring 2000), p. 829; "Mexican Court and Foreign Minister Order Cavallo Extradited to Spain For Argentine Atrocities," *International Enforcement Law Reporter, Enforcement of International Human Rights* 17, No. 3, Sec. VIII (March 2001); and Marc Cooper, "As Bush Heads South: Chile And The End Of Pinochet," *The Nation*, February 26, 2001.

³ See Nikos Passas, ed., *Transnational Crime* (Aldershot, NH: Ashgate Publishing, 1999); William F. McDonald, ed., *Crime and Law Enforcement in The Global Village* (Cincinnati, OH: Anderson, 1997); John M. Martin and Anne T. Romero, *Multinational Crime: Terrorism, Espionage, Drug and Arms Trafficking* (Thousand Oaks, CA: Sage Publications: 1992).

⁴ See Daryl A. Mundis, "Improving the Operation and Functioning of the International Criminal Tribunals," *American Journal of International Law* 94, (October 2000), p. 759; and James L. Taulbee, "A Call To Arms Declined: The United States and The International Criminal Court," *Emory International Law Review* 14 (Spring 2000), p.105.

⁵ See Grant M. Dawson, "Defining Substantive Crimes Within the Subject Matter Jurisdiction of the International Criminal Court: What is the Crime of Aggression?," *New York Law School Journal of International and Comparative Law* 19, No. 3 (2000), p.413.

⁶ Conduct is said to threaten international well-being if it significantly jeopardizes possibilities for peaceful coexistence, or it is so egregious as to offend commonly shared values of the world community. Crimes that threaten international well-being are typically committed by states or involve state support. Typically in contrast, crimes for which international criminal law enforcement

is necessary tend to be committed by persons acting in a private capacity without state involvement. See Barbara M. Yarnold, "The Doctrinal Basis for the International Criminalization Process," in M. Cherif Bassiouni, ed., *International Criminal Law*, volume 1, 2nd ed. (Ardsey, NY: Transnational Publishers, 1999), p. 147.

⁷ M. Cherif Bassiouni, "The Sources and Theory of International Criminal Law."

⁸ Discussing the principle of *pacta sunt servanda*, see Maurice Mendelson, "Are Treaties Merely a Source of Obligation?" in William Butler, ed., *Perestroika and International Law* (Deventer, Netherlands and Boston, MA: Kluwer Academic Publishers, 1990); and Jonathan I. Charney, "Universal International Law," *American Journal of International Law* 87 (October 1993), pp. 529, 534.

⁹ See Karen Parker and Lyn Beth Neylon, "Jus Cogens: Compelling the Law of Human Rights," *Hastings International and Comparative Law Review* 12 (Winter 1989), pp. 411, 418. Discussing the principle of *jus cogens*, see also Elizabeth Dietz, "Violence Against Women in the United States: An International Solution," *Arizona Journal of International and Comparative Law* 13 (Fall 1996), p. 551.

¹⁰ See generally Larry Chamblee, "International Legal Assistance in Criminal Cases," in John Fedders, ed., *Transnational Litigation: Practical Approaches to Conflicts and Accommodations*, volume 1 (Washington, DC: American Bar Association National Institute, 1984), p. 188. See also Jacqueline Klosek, "The Development of International Police Cooperation within the EU and Between the EU and Third Party States: A Discussion of the Legal Bases of Such Cooperation and the Problems and Promises Resulting Thereof," *American University International Law Review* 14, No. 3 (1999) pp. 599, 612-615.

¹¹ See Bruce Zagaris, "Developments in International Judicial Assistance and Related Matters," *Denver Journal of International Law and Policy* 18 (Spring 1990), p. 339.

¹² See Alan Ellis and Robert L. Pisani, "The United States Treaties on Mutual Assistance in Criminal Matters," in M. Cherif Bassiouni, ed., *International Criminal Law*, vol. 2, *Procedural and Enforcement Mechanisms*, 2nd ed. (Ardsey, NY: Transnational Publishers, 1999); David McClean, *International Judicial Assistance* (Oxford, UK: Clarendon Press, 1992), pp. 254-70; and Caryl Donigan Guymon, "International Legal Mechanism for Combating Transnational Organized Crime: The Need for a Multilateral Convention," *Berkeley Journal of International Law* 18, No. 1 (2000), pp. 53, 85.

¹³ See M. Cherif Bassiouni, ed., *International Criminal Law*, vol. 2, *Procedural and Enforcement Mechanisms*, 2nd ed. (Ardsey, NY: Transnational Publishers, 1999), ch. 4.

¹⁴ See Bruce Zagaris, "Extradition, Evidence Gathering, and Their Relatives in the Twenty-First Century: A U.S. Defense Counsel Perspective," *Fordham International Law Journal* 23 (June 2000), p. 1403.

¹⁵ See Christine Van Den Wijngaert, *The Political Offense Exception to Extradition: The Delicate Problem of Balancing the Rights of the Individual and the International Public Order* (Deventer, Netherlands and Boston, MA: Kluwer Academic Publishers: 1980); and M. Cherif Bassiouni, "The Political Offense Exception Revisited," *Denver Journal of International Law and Policy* 15 (Winter-Spring 1987), p. 255.

¹⁶ By analogy, see Robert McLaughlin, "Improving Compliance: Making Non-state International Actors Responsible for Environmental Crimes," *Colorado Journal of International and Environmental Law and Policy* 11 (Summer 2000), p. 377.

¹⁷ See Malcolm Anderson, *Policing the World: Interpol and the Policies of International Police Co-Operation* (Oxford, UK: Clarendon Press, 1989); and Michael Fooner, *Interpol: Issues in World Crime and International Criminal Justice* (Dordrecht, Netherlands: Plenum, 1989).

¹⁸ See Roger S. Clark, *The United Nations Crime Prevention and Criminal Justice Program* (Philadelphia, PA: University of Pennsylvania Press, 1994).

¹⁹ See World Customs Organization, WCO Business Partnership, <http://www.wcoomd.org/frmpublic_en.htm>.

²⁰ See G.O.W. Mueller and Douglas J. Besharov, "Evaluation and Enforcement of International Criminal Law," in M. Cherif Bassiouni, ed., *International Criminal Law*, vol. 1, *Crimes*, 2nd ed. (Ardsey, NY: Transnational Publishers, 1999), pp. 261-268.

²¹ See Gerry J. Simpson, "Didactic and Dissident Histories in War Crimes Trials," *Albany Law Review* 60 (1997), pp. 801, 822-823.

²² John Dugard, "Criminal Responsibility of States," in M. Cherif Bassiouni, ed., *International Criminal Law*, vol. 1, *Crimes*, 2nd ed. (Ardsey, NY: Transnational Publishers, 1999), p. 251.

²³ For a discussion on the condemnation and censure by U.N. Security Council of Taliban human rights violations, see Thomas Frank, "Bridging the Globalization Gap: Are Human Rights Universal," *Foreign Affairs* 191 (February 2001). See also "India Tests Nuclear Weapons, Drawing Worldwide Censure," *Foreign Policy Bulletin* 9 (1998), p. 32.

²⁴ John Dugard, "Criminal Responsibility of States," p. 252.

²⁵ Rome Statute of the International Criminal Court, U.N. Doc. A/Conf.183/9, 17 July 1998.

²⁶ See Barry Kellman, "The Legality of the Use or Possession of Weapons of Mass Destruction," in M. Cherif Bassiouni, ed., *International Criminal Law*, vol. 1, *Crimes*, 2nd ed. (Ardsey, NY: Transnational Publishers, 1999) pp. 495-518.

²⁷ "International Convention for the Suppression of Terrorist Bombings," in *International Legal Materials* 37 (1998), p. 249. This convention was adopted in New York on January 9, 1998.

²⁸ "Advisory Opinion: Legality of the Threat or Use of Nuclear Weapons," *International Legal Materials* 35 (1996), p. 809.

²⁹ "Convention on the Physical Protection of Nuclear Material," in *International Legal Materials* 18 (1987), p. 1419. This convention entered into force on February 8, 1987. See Barry Kellman and David S. Gualtieri, "Barricading The Nuclear Window: A Legal Regime To Curtail Nuclear Smuggling," *University of Illinois Law Review* (1996), p. 667.

³⁰ See Barry Kellman, "The Soft Law of Nuclear Materials Protection," in Dinah Shelton, ed., *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System*, (Oxford, UK: Oxford University Press, 1998). See also Richard L. Williamson, "Law and the H-Bomb: Strength-

ening the Nonproliferation Regime to Impede Advanced Proliferation," *Cornell International Law Journal* 28 (Winter 1995), p. 71.

³¹ The most recent and most comprehensive of numerous international agreements is the U.N. Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Vienna, Austria, 20 December 1988, U.N. Document E/CONF.82/15 corr.1 and corr.2, in *International Legal Materials* 28 (1989), p. 493. This treaty, which entered into force on November 11, 1990, not only requires the provision of legal assistance to enforce its prohibition of smuggling, it also contains a nearly comprehensive mechanism for implementing the obligation in the absence of a bilateral or regional agreement on the subject. See Mary McConville, "A Global War on Drugs: Why the United States Supports the Prosecution of Drug Traffickers in the International Criminal Court," *American Criminal Law Review* 37, No. 75 (2000); and "Legislative Development: Council Regulation No. 1610/2000/EC. Narcotic Drugs and Psychotropic Substances: Preventing the Illicit Diversion of Exports," *Columbia Journal of European Law* 6 (2000), p. 383.

³² Christopher M. Pilkerton, "Traffic Jam: Recommendations for Civil and Criminal Penalties To Curb The Recent Trafficking of Women from Post-Cold War Russia," *Michigan Journal of Gender and Law* 6 (1999) p. 221.

³³ See Kellman and Gualtieri, "Barricading The Nuclear Window."

³⁴ Joseph Kramek, "Bilateral Maritime Counter-Drug and Immigrant Interdiction Agreements: Is This The World of the Future?," *University of Miami Inter-American Law Review* 31 (Spring 2000), p. 121; and Rachel Canty, "Developing Use of Force Doctrine: A Legal Case Study of the Coast Guard's Airborne Use of Force," *University of Miami Inter-American Law Review* 31 (Winter 2000), p. 357.

³⁵ Draft Convention on the Prevention and Punishment of the Crime of Developing, Producing, Acquiring, Stockpiling, Retaining, Transferring or Using Biological or Chemical Weapons.