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# Emergence of an International Environmental Criminal Law?

*Byung-Sun Cho\**

## ABSTRACT

Environmental misconduct increasingly extends beyond national borders. However, because of the traditional international law of territoriality, few conventional laws and domestic laws criminalize international environmental misconduct effectively. Because this deficiency must be corrected, international conventions and bodies seek suitable ways of penal enforcement. Following a brief introduction, this Article examines some penal provisions in international environmental conventions. Section III sets forth the process of domestic penal legislation of conventions including the way of shaping environmental criminal law. Several different possibilities for punishing international environmental pollution are then discussed. At the domestic level models of “standardization” and “transnationalization” of environmental criminal law are presented. Section IV will turn to some recent attempts to establish a supranational regulatory authority empowered to penalize core environmental crimes to protect the earth’s shared global commons and preserve the ecosystem. Finally, some concluding remarks will be formulated together with ideas for the further development of international environmental criminal law.

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I.  
INTRODUCTION

Transnational ecological connections and the new quality of global threats have led to great activity on the international stage. While the conventional law of the environment is replete with examples of penal provisions, the international community relies for their enforcement upon municipal rather than international institutions. Thus conventions aimed at protecting the global environment call upon state parties to enact legislation to penalize prescribed conduct. Also, agreements concerning pollution of the sea rely principally upon port, coastal or flag states for their enforcement. However, these conventions give the State wide discretion in domestic penal legislation. An environmental criminal law legally binding the citizens of all nations does not exist, nor is there an organization to which such a legislative competence could be granted. At present, the prosecution of environmental crimes which international environmental conventions have introduced is only possible before national courts. Therefore, the internationalization of environmental criminal law, including its standardization and transnationalization, assumes two central themes of this paper.

This paper is structured as follows. After sketching some penal provisions in international environmental conventions (below II) a detailed harmonization in domestic penal legislation of conventions will be discussed (below III). The article then turns to some recent attempts to establish a supranational regulatory authority empowered to penalize core environmental crimes to protect the earth's shared global commons and preserve the ecosystem (below IV). Finally, some concluding remarks will be formulated together with ideas for the further development of international environmental criminal law (below V).

II.  
PENAL PROVISIONS IN INTERNATIONAL  
ENVIRONMENTAL CONVENTIONS

a. *Reasons for Criminalizing Environmentally Harmful Conduct*

A principal reason for criminalizing environmentally harmful conduct in international environmental conventions in general is to deter conduct which is particularly harmful to the environment that is shared on the domestic and international levels. Because it

is likely that the internationally shared environment will often be protected even less by private vigilance than its domestic counterpart, the argument for protection by penal sanctions would seem to be stronger than that applicable on the domestic level. Furthermore, some elements of the internationally shared environment – such as flora and fauna or a “life support system for the whole planet”<sup>1</sup> may be entirely and forever extinguished because of the “commons” effect. That effect may be more pronounced when the commons in question overlaps jurisdictions or is beyond the limits of national jurisdiction. To the extent that (a) national law does not reach the conduct in question and (b) is not governed by a relevant international regime, it will operate free of both private and any existing public regulatory constraints.<sup>2</sup> The development of international environmental law is subject to the basic handicap that international environmental law functions mainly within the interstate system. It is difficult for a system based on inter-state relations to regulate impacts and effects which are not themselves state to state.

Although this paper is not intended to examine the reasons for criminal enforcement of environmental offenses in general, a brief overview of this topic will assist the reader in understanding international environmental criminal law. At the heart of this debate is the purpose of the criminal law. Although there have been many different legal and economic theories that attempt to explain the need for criminal enforcement of environmental law and criminal sanctions, fundamentally one can identify three possible rationales for criminal enforcement of environmental offenses. One possible rationale stems from the failure of the civil/administrative law to adequately deter violations.<sup>3</sup> Another possibility is that society prefers to call certain actions “criminal” in order to express its moral outrage and to prohibit the activity

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1. This term became popularized by its use in the *World Charter for Nature*, U.N. GAOR, 37th Sess., 48th mtg., U.N. Doc. A/RES/37/7 (1982).

2. See Stephen C. McCaffrey, *Crimes Against the Environment*, in 1 INT'L CRIM. L. 541 (1986).

3. See, e.g., European Community on Crime Problems, *The Contribution of Criminal Law to the Protection of the Environment* 14 (1978); Joseph F. DiMento, *Environmental Law and American Business: Dilemmas of Compliance* (1986). Professor DiMento explores the definition of compliance and the explanations for non-compliance with environmental rules. He examines the respective advantages and disadvantages of criminal, civil, and administrative sanctions; negotiations; and economic incentives as tools to promote compliance. He recommends multiple strategies for achieving compliance including selecting and tailoring sanctions to fit the economic, reputational, and organizational characteristics of each behavior.

unconditionally.<sup>4</sup> The third rationale is a kind of economic analysis of crime and punishment such as Gary S. Becker's "optional penalty model".<sup>5</sup> In general, an effectively enforced criminal statute raises the cost of certain kinds of conduct and thereby encourages compliance with laws and regulations that would otherwise be largely ignored. Based on this point of view, an increasing number of states have enacted legislation providing for punishment of environment-related offenses.<sup>6</sup> Furthermore, a number of states have enacted legislation to protect resources outside their borders. The most common form of these measures is that which is designed to protect the oceans from pollution.<sup>7</sup> This trend has given a significant boost to the international environmental criminal law, because international criminal law has as its principal *raison d'être* the protection of certain shared values

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4. See, e.g., Kenneth G. Dau-Schmidt, *An Economic Analysis of the Criminal Law as a Preference-Shaping Policy*, 1 DUKE L.J. 1, 26-27 (1990). Dau-Schmidt criticizes the pure economic theories of crime and punishment for not considering the distributional and other justice criteria. His new solution to the problem is that criminal sanctions should be used to shape people's preferences for a particular behavior so that an individual's preferences are compatible with society's and no externalities are imposed. *Id.* at 14-15. Dau-Schmidt explains that the threat of corporal punishment, in which the person experiences pain, or similarly, incarceration, in which the person experiences isolation, is a more costly but more effective way to shape preferences than is the threat of imposing a financial penalty. *Id.* at 16. In sum, he believes the criminal law is a useful tool to persuade people to avoid imposing externalities on society. Because of their great costs, however, he believes activities that create those externalities should only be labeled as crimes when there is a grave disparity in the respective values society assigns to the utility derived from two incompatible preferences. *Id.* at 38.

5. Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968). Becker assumed criminals were economically rational and argued that they weigh the costs and probability of getting caught against the probability and benefits of succeeding. Many scholars have tried to use the tools of economics to explain criminal law. On economic theories of crime and punishment in general see RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 207-09 (3d ed. 1986); Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193 (1985). Posner indicates that criminal fines are a cheap and effective remedy as long as the fine exceeds the costs society wants to impose for the violation, and that incarceration is a useful punishment for violators with no assets because it imposes pecuniary costs on the violator by reducing income while confined and by reducing earning capacity after release.

6. See G. Heine & V. Meinberg, *Environmental Criminal Law in Europe in Crime and Criminal Policy in Europe*, in *CRIME AND CRIMINAL POLICY IN EUROPE* 4 (1990); *ENVIRONMENTAL PROTECTION: POTENTIALS AND LIMITS OF CRIMINAL JUSTICE* (G. Heine, M. Prabhu & A.A. de Frate eds., 1997); *Preparatory Colloquium Section I: Crimes Against the Environment General Part*, 65 INT'L REV. PENAL L. 633 (1994).

7. See *infra* Part III. 4.

which the international community has come to recognize as being so important that penal sanctions must be employed.

### b. *Types and Characteristics of Penal Provisions*

At the level of international agreements, a State Party's obligation to penal legislation is of importance not only in the historically fundamental field of pollution of the high seas. With respect to specific global problems such as transboundary pollution, destruction of the ozone layer, global warming, acid rain and the loss of biological diversity, penal provisions of international environmental conventions appear to be one approach to problem solving. Now most environmental conventions have penal provisions.

Many international conventions require states that are parties to the convention to develop appropriate national domestic legislation to punish the prohibited acts. The first type requires the contracting parties to take "appropriate measures to ensure the application of the [agreement in question] and the punishment of infractions against [those] provisions." For example, the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes states that parties to the convention shall consider illegal traffic in hazardous wastes and other wastes to be criminal. It also states: "Each party shall introduce appropriate national domestic legislation to prevent and punish illegal traffic." This formula, or a very close approximation thereof, is employed in many conventions.<sup>8</sup> The second type of approach

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8. Convention for the Regulating of Whaling, Sept. 24, 1931, Geneva, art. 1, 155 L.N.T.S. 349, 3 Bevens 26, T.S. No. 880 (1935); International Agreement for the Regulation of Whaling, June 8, 1937, London, arts. 1 & 3, 190 L.N.T.S. 79, 32 U.N.T.S. 404, 52 Stat. 1460, T.S. No. 933 (*entered into force provisionally* July 1, 1937, *definitively* May 7, 1938) (this agreement was effectively replaced by the following agreement); International Convention for the Regulation of Whaling, Dec. 2, 1946, Washington, art. 9, 161 U.N.T.S. 72, T.I.A.S. 1849, 62 Stat.(2) 1716, 4 Bevens 248 (Nov. 10, 1948); Convention for the Regulation of the Meshes of Fishing Nets and the Size Limits of Fish, *signed in* London Apr. 5, 1946, art. 11, 231 U.N.T.S. 199 (*entered into force* Apr. 5, 1953); Convention for the Prevention of Marine Pollution by Dumping from Ships and Aircraft, *done at Oslo* Feb. 15, 1972, art. 15(3), U.K.T.S. 119(1975), 11 I.L.M. 262, *reprinted in* 2 INTERNATIONAL PROTECTION OF ENVIRONMENT 530 (B. Rüster et al. eds., 1979) [hereinafter Rüster & Simma]; Convention on the Prevention of Marine Pollution by Dumping Wastes and Other Matter, Dec. 29, 1972 Washington-London-Mexico City-Moscow, arts. 4 & 7, 26 U.S.T. 2403, T.I.A.S. No. 8165 (*entered into force* for the United States Aug. 30, 1975); Convention on International Trade in Endangered Species of Wild Fauna and Flora, with Appendices, *opened for signature* Mar. 3, 1973, Washington, art. 8, 993 U.N.T.S. 243, 27 U.S.T. 1087, (*entered into force* July 1, 1975); Convention for the Prevention of

includes requiring the parties to “enact and enforce such legislation as may be necessary to make effective the . . . provisions [of the agreement] with appropriate penalties for violation thereof”.<sup>9</sup> The third type includes providing that violations “shall be an offence punishable under the law of the territory in which the ship is registered”<sup>10</sup> or “shall be made a punishable offense by each State Party under its national law.”<sup>11</sup> The fourth type includes providing that the parties “shall enact and enforce such legislation and other measures as may be necessary for the purpose of giving effect to [the] agreement,” and includes various prohibitions. These types of provisions are found in some fifteen multilateral agreements relating to the environment.<sup>12</sup> They are also found in a number of bilateral and limited multilateral instruments. Some agreements expressly recognize their deterrent function to the effect that “the penalties specified under the law of a party shall be adequate in severity to discourage violations of the present Convention . . . .” For example the United Nations

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Marine Pollution from Land-Based Sources, *opened for signature* June 4, 1974, Paris, art. 12, U.K.T.S. 64 (1978), 13 I.L.M. 352.

9. Convention for the Preservation of Fur Seals in the North Pacific, July 7, 1911, Washington, art. 1 & 6, 5 Martens Nouveau Recueil 3d 720, 37 Stat. 1542, T.S. 564 (*entered into force* Dec. 15, 1911); Convention Relative to the Preservation of Fauna and Flora in Their Natural State, Nov. 8, 1933, London, art. 9(2), 172 L.N.T.S. 241 (*entered into force* Jan. 14, 1936); Convention on Nature Protection and Wild Life Preservation in the Western Hemisphere, *opened for signature* Oct. 12, 1940, Washington Pan American Union, arts. 5, 7 & 9, 161 U.N.T.S. 193, 56 Stat. 1354, T.S. No. 981 (*entered into force* Apr. 30, 1942).

10. International Convention for the Prevention of Pollution of the Sea by Oil, *opened for signature* May 12, 1954, London, arts. 3 & 6, 327 U.N.T.S. 3, 12 U.S.T. 2989, T.I.A.S. No. 4900 (*entered into force* July 26, 1958).

11. Convention on the Physical Protection of Nuclear Materials, March 3, 1980, New York & Vienna, arts. 7-13.

12. Agreement on the Conservation of Polar Bears, Nov. 15, 1973, Oslo, art. 6(1), 27 U.S.T. 3918, T.I.A.S. No. 8409 (*entered into force* 26 May 1976); Interim Convention on Conservation of North Pacific Fur Seals, *signed* Feb. 9, 1957, Washington, art. 6(3), 314 U.N.T.S. 105, 8 U.S.T. 2283, T.I.A.S. No. 3948 (*entered into force* Oct. 14, 1958) (stating “[t]he authorities of the Party to which [a] person or vessel [suspected of offending against the prohibition of pelagic sealing as contained in Article III] belongs alone shall have jurisdiction to try any case arising under Article III and this Article and to impose penalties in connection therewith.”); U.N. Convention on the Law of the Sea, Dec. 10, 1982, *done at* Montego Bay U.N. Doc. A/CONF.62/122 & Corrs. 3 and 8 (1982), 21 I.L.M. 1261 (1982). Article 218(1) provides that a port state “may undertake investigations and, where the evidence so warrants, institute proceedings in respect of any discharge from that vessel outside [its jurisdiction].” The Convention goes on to provide in Article 219 that states which have ascertained that a vessel “threatens damage to the marine environment shall, as far as practicable, take administrative measures to prevent the vessel from sailing.”

Convention on the Law of the Sea (UNCLOS)<sup>13</sup> states: “Penalties provided for by the laws and regulations of States for vessels flying their flag shall be adequate in severity to discourage violations wherever they occur.” Also the Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movements and Management of Hazardous Waste within Africa<sup>14</sup> states: “Each state shall introduce appropriate national legislation for imposing criminal penalties on all persons who have planned, carried out, or assisted in such illegal imports. Such penalties shall be sufficiently high to punish and deter such conduct.”

A number of the above-mentioned conventions contain what might be referred to as “policing provisions” which allow parties to take action on the spot to enforce the rules of the agreement. This is true, for example, of the 1911 Convention for the Preservation of Fur Seals in the North Pacific, which provides in article 1 that persons violating the Convention’s prohibition against pelagic sealing “may be seized” by the authorities of the territory in which the violation occurs. The same convention, in article 7, provides that each party “will maintain a guard or patrol in the waters frequented by the seal herd in the protection of which it is especially interested, so far as may be necessary for the enforcement of the [Convention].” Similarly, the 1937 International Agreement for the Regulation of Whaling provides in article 1 that the parties “will maintain at least one inspector of whaling on each factory ship under their jurisdiction.” The Interim Convention on Conservation of North Pacific Fur Seals of 1957 goes further, allowing a “duly authorized official of any of the Parties” to board and search “any vessel . . . subject to the jurisdiction of any of the Parties” which he “has reasonable cause to believe . . . is offending against the prohibition of pelagic sealing . . . .” The Convention goes on to provide that if after searching the vessel the official “continues to have reasonable cause to believe that the vessel or any person on board thereof is offending against the prohibition, he may seize or arrest such vessel or person.” Additionally, what might be referred to as a “self-policing provision” is found in the Agreement between Canada and the United

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13. U.N. Convention on the Law of the Sea, *supra* note 12; Law of the Sea, *entered into force* Nov. 16, 1994, art. 217(8), U.N. Sales No. E. 83. V.5 (1983).

14. Bamako Convention on the Ban of the Import into Africa and the Control of Transboundary Movements and Management of Hazardous Waste within Africa, *done at Bamako, Mali* Jan. 29, 1991, art. 9(2).

States on Great Lakes Water Quality of 1978. An annex to that agreement states: "As soon as any person in charge [of a vessel] has knowledge of any discharge of harmful quantities of oil or hazardous polluting substances, immediate notice of such discharge shall be given to the appropriate agency in the jurisdiction where the discharge occurs; failure to give this notice shall be made subject to appropriate penalties."

In general, the vast majority of international environmental conventions contain the implicit recognition of the penal nature of the act by establishing a duty to prohibit, prevent, prosecute, punish, or the like. Strictly speaking conventions are generally only a source of obligation, not a source of law. These conventions, as a rule, do not usually contain fixed concrete measures to deal with offenses. The main reason for this may be that there are considerable national differences in importance, function and type of repressive safeguards. Referring to a criminal-political determination is hardly "ratifiable."

### III.

#### NATIONAL IMPLEMENTATION OF PENAL PROVISIONS OF INTERNATIONAL ENVIRONMENTAL CONVENTIONS

In examining the national implementation of penal provisions of an international environmental treaty, one can examine the state's role in three stages:

*Signature and ratification by the state of the treaty concerned.* Signing a treaty does not bind a state, but indicates that it is considering ratifying the treaty. It is only the later act of ratification that leads to a state being legally bound by the treaty. Normally multilateral treaties require a specific number of ratifying parties before they enter into force. Once in force, they are only binding on those states that have ratified.

*Formal implementation,* whether by legislation or otherwise, of the treaty concerned once it has been ratified. For so-called dualist countries (which view international law and national law as two separate systems of law), treaties, even when ratified, have no status in domestic law. They become part of domestic law only when they have been implemented by legislation. Thus, a treaty that is intended to affect matters at the domestic level must be implemented by legislation if it is to have such effect. In so-called monist countries (which view both international law and national law as parts of a single system of law) such imple-

mentation is not normally required: once the treaty has been ratified it is automatically part of the law of the land.

*The way the formal methods of implementation actually operate in practice.* A treaty may be formally implemented by legislation if not actually applied in practice in the state concerned because of defects in the implementing legislation or because the legislation is not properly given effect.

a. *Ratification Process*

Prior to ratification, a nation that has signed an environmental convention accepts no positive obligations. However, according to Article 18 of the Vienna Convention on the Law of Treaties, signing a treaty denotes agreement to refrain from acts that would defeat its object and purpose.<sup>15</sup> Ratification is the formal confirmation and approval of an international agreement. This process has both domestic and international effects. By the process of ratification, a signing nation becomes a State Party and thereby assumes international legal obligations to comply with the convention's terms. The means of ratification are established by domestic constitutional law. Thus, the method of ratification depends entirely on each nation's law. Each ratifying State Party is internationally bound to the treaty and must perform its obligations in good faith.<sup>16</sup> The principle of *pacta sunt servanda* (contracts [treaties] are to be kept) is the cornerstone of international law.

b. *Position of the Convention in Domestic Penal Legislation*

There are usually two ways in which individuals can be prosecuted under international environmental criminal law: either directly by the application of international law or through domestic law. In the latter case, international conventions usually oblige State Parties to criminalize certain acts. To examine the implementation of international criminal law from the standpoint of domestic law one should pay attention to the relationship between international conventions and domestic law.

The relationship between an international environmental convention and domestic law will often turn on whether a nation

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15. Vienna Convention on the Law of Treaties, May 23, 1969, art. 18, U.N.Doc. A/CONF. 39/27, 8 I.L.M. 679. The Vienna Convention essentially codified the customary international law of treaties.

16. *Id.*, at art. 26. "Every treaty in force is binding upon the parties to it and must be performed by them in good faith."

ascribes to a monist or dualist legal system. In a unified legal order (monism), no separate implementing measures are needed to bring the international environmental convention into domestic force. If there is a conflict between the convention and domestic constitutional or statutory obligations, the answer lies in the hierarchy of legal norms. In a dualist system, international law is distinct from domestic law and the former regulates only conduct among states. Dualist states are legally bound to a treaty upon ratification as a matter of international law. Yet, a treaty is not a part of domestic law and has no internal effect until its incorporation through passage of domestic legislation. Incorporation can take three primary forms: (1) domestic legislation can be amended or extended to take account of a treaty's obligations; (2) the treaty can be re-written and its text formally incorporated into domestic legislation; or (3) the treaty can be formally incorporated, unchanged and in toto, into domestic legislation. In this way, international law and national law do not exist in a hierarchical relation. Instead, they operate in parallel. If there are any conflicts, a domestic judge will not be bound by international law and will apply only domestic law. In dualist states, therefore, national legislatures faced with a conflict will be required to take affirmative steps to harmonize any differences.

A key to the operation of both monist and dualist systems is the place that treaties occupy in the hierarchy of domestic law. Typically, the position of a treaty in relation to domestic legal norms is specified as a matter of national law. In no nation does an international treaty supersede constitutional provisions. In most nations, treaties occupy a status between constitutional provisions and statutes or are co-equal to statutes. In a few nations, treaties are inferior to domestic statutes or even judge-made law.

For example, article 6 (2) of the Korean Constitution provides: "Treaties concluded by Korea and generally established international laws have the same validity as domestic laws." Most scholars are of the view that international law has the force of law in Korea by virtue of this provision.<sup>17</sup> The government and the courts also take this view. When a convention has been duly ratified and published in Korea, there is no doubt that it has validity – the force of law – in Korean law. The question whether a treaty can be directly applied in domestic law (the question of direct

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17. For details regarding Article 6(2) of the Korean Constitution see Y. HUH, *KOREAN CONSTITUTIONAL LAW* 177 (19th rev. ed. 1998, in Korean).

applicability) should be distinguished from the question of whether a treaty has the force of law in domestic law (the question of validity). In order for a treaty to be directly applied, it must have the force of law in the domestic legal order. On the other hand, even if treaties have validity in domestic law, not all treaties are directly applicable. Direct applicability of provisions of an international convention depends on the context in which it is invoked. The direct application of international conventions is not excluded if they contain provisions of sufficiently precise character.<sup>18</sup>

### c. *Harmonization in Domestic Penal Legislation*

#### 1. Standardization of Punishable Behavior

Differences among State Parties' penal legislation continue to exist. Such differences can ultimately only be eliminated by harmonization. In the process of effecting domestic penal legislation of the international environmental conventions, harmonization is uncertain (what kind of "activities prohibited" should constitute the obligation to enact penal legislation?). Moreover, often the treaty itself does not define the meaning of the word penal.<sup>19</sup> In sum, a closer look at the conventions and their respective goals reveals that the conventions often leave details about enacting penal legislation to the discretion of the individual states. Therefore, when enacting penal legislation, State Parties can choose, first, whether to apply criminal, administrative, or other penalties to the convention violations and, second, the kind (form and substance) adequate to meet the obligation to enact penal legislation. Harmonization of national environmental laws, as currently envisaged by several international and regional organizations, requires an integrated approach to the standardization of punishable behavior.

When formulating environmental offenses, the focus has been on the possibility of intervening before harm or damage to the environment. Comparative research demonstrates that formulat-

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18. See the resolutions of the XVth International Congress of Penal Law, reprinted in *INTERNATIONAL REVIEW OF PENAL LAW* 48 (1994).

19. On the concept of "penal" see Byung-Sun Cho, *Administrative Penal Law and Its Theory in Korea and Japan from a Comparative Point of View*, 2 *TILBURG FOREIGN L. REV.* 261 (1993).

ing environmental offenses raises proof problems.<sup>20</sup> Damages to the environment are quite often caused simply by the accumulation, addition or synergetic effects of hazardous actions. Therefore, with respect to damages to a certain medium of the environment, for instance, water, soil or air, difficulties arise regarding proof of causality.<sup>21</sup>

Three models represent the relationship between the way an environmental crime is defined in legislation and the conditions of proof that must be met to provide evidence of this crime:<sup>22</sup> the model of abstract endangerment (Model A), the model of concrete endangerment (Model B), and the model of serious environmental pollution (Model C). How environmental pollution is proven will inevitably depend upon the statutory protection that has been chosen. However, a division between three models can never be so exact that every provision can be categorized under one of the models. Initiating the ability to punish at an earlier stage of proof—the creation of offenses requiring only an endangering (instead of a specific damage)—might solve the problems. But several questions remain; what kind of conduct which may appear to be endangering the environment shall also be eligible for criminal prosecution? Can a risk-evaluation be done? Were a consensus attained and all demands for exactitude of the law provisions met, would not the initiation of criminal punishability at an earlier stage lead primarily to a criminalization of petty offenses that are relatively easy to detect? Would it not then upset the conduct validity of the norm if far more serious offenses remained unpunished due to their being legitimated by the administrative bodies? After all, large environmental areas are controlled by the regulatory programs of environmental administrative bodies. Accordingly, the issue is whether criminal law depends on administrative standards or, rather, whether both are independent. Such an administrative accessory position in a socio-political field prone to disagreement creates conflicts of principles: Is criminal law only important as a supporting means

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20. See Byung-Sun Cho, *Cuestiones de causalidad y autoría en el Derecho penal del medio ambiente coreano y japonés desde la perspectiva del derecho comparado*, 4 REVISTA PENAL 42 (1999).

21. See Byung-Sun Cho, *Umweltdeliktgesetze in Korea und Japan – Die normativen und domatischen Grundlagen und die Praxis*, 3 GLOBAL J. ON CRIME AND CRIM. L. 35 (1996).

22. See M. Faure & M. Visser, *How to Punish Environmental Pollution? Some Reflections on Various Models of Criminalization of Environmental Harm*, EUR. J. OF CRIME, CRIM. L. & CRIM. JUST. 316 (1995).

and thus dependent on every administrative decision (whether justified or not)? Or should the criminal judge be able to control the legality of the administrative decision and thus act as a kind of supervisor?

From an historical perspective, there seems to have been an evolution from Model A to Model B or C.<sup>23</sup> Originally criminal law protection of the environment started out with criminal provisions that were mere annexes to environmental statutes which were highly administrative in nature (Model A). Provisions falling under Model A are usually extremely precise, but do not provide adequate protection of the environment as such: the credibility of penal law is affected not only by the highly selective prosecution by environmental administrative agencies, but also by relatively low penal sanctions.<sup>24</sup> Since Model A was criticized for not providing direct protection of ecological values, legislative evolution in the 1980s, as a consequence of increased environmental awareness, led to the criminalization of concrete endangerment of ecological values (Model B). However, although in Model B ecological values are directly protected, this protection fails as long as administrative regulations are complied with.<sup>25</sup> This led legal doctrine and legislation to punish some cases of serious environmental pollution notwithstanding the fact that the conditions of a license were met (Model C). However, the protection of ecological values under this model is only realized in so far as human health or life is endangered. Therefore this model has an anthropocentric accent. One should note that the provisions falling under Model C have the disadvantages that (1) they are usually rather vague and (2) the requirement of a concrete endangerment of public health or human life will be difficult to prove in practice.<sup>26</sup>

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23. For the issue of the development of these models in case of Korea, see Byung-Sun Cho, *Research on Criminal Environmental Programs with regard to a Comparison of Foreign Environmental Criminal Law*, CHONGJU J. LEGAL STUD. 259 (1994) [hereinafter Cho, *Criminal Environmental Programs*]; Byung-Sun Cho, *Die Entwicklung des Umweltstrafrechts in Korea*, 106 ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTSWISSENSCHAFT 235 (1994) [hereinafter Cho, *Die Entwicklund*].

24. See GENEVRA RICHARDSON ET AL., *POLICING POLLUTION: A STUDY OF REGULATION AND ENFORCEMENT* (1982).

25. See H.-U. Paeffgen, *Overlapping Tensions Between Criminal and Administrative Law: The Experience of West German Environmental Law*, 3 J. ENVTL. L. 247 (1991).

26. For details regarding Japan, see R. Hirano, *Penal Protection of Natural Environment in Japan*, 47 INT'L REV. PENAL L. 185 (1979); Kensuke Itoh, *Japan: Criminal Protection of the Environment and the General Part of Criminal Law in Japan*, 65

(1) Usually an environmental convention requires that penal legislation be enacted with respect to any "activity prohibited" to a State Party, but it is very common that the term "activity prohibited" is undefined by the convention. State Parties may wish to penalize activities that undermine the convention's enforcement. In this case, it is usually found at the end of an administrative statute in a provision stating that everyone who violates the provisions of the act or the regulations enacted on the basis of the act shall be punished with specified sanctions. Therefore, the scope of criminal liability for environmental pollution depends largely on questions of administrative law. In some cases it specifically states that anyone who operates without a license or violates license conditions is criminally liable under the specific provision. In this model the criminal law is an addition to an existing system of administrative decisions on the level and quality of emissions into the environment. There has been some debate on whether or not this model is directed at protecting environmental values. To some extent one could indeed argue that the only value that is protected by such provisions is the interest of the administrative authority in the proper enforcement of environmental law. Then the question arises whether the specific criminal provision aims at providing protection against harm. This relates to theories of crime arguing that the criminal law should, in the first place, be a reaction to harm. In this model the occurrence of harm is not a prerequisite for criminal liability.

However, it is now more widely accepted that such administrative statutes, especially insofar as they lay down emission limit values, are also directed at the protection of the environment. In other words, since it is the "abstract endangerment" of environmental media that can lead to criminal liability, punishment can take place even if no harm occurs. Here, the problem of proof is relatively small. All the Public Prosecutor has to do, for example, is to show that the waste water indeed had a pH of 3. There is no need to prove that this was done illegally, knowingly or intentionally. Nor need it be proven that this emission led to a reduction in the quality of the surface water. Therefore, the challenge is limited in the sense that usually no problems of interpretation arise; (a problem can, of course, arise in how to prove that the

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INT'L REV. PENAL L. 1037 (1994). Regarding Korea, see Cho, *Criminal Environmental Programs*, *supra* note 23; Cho, *Die Entwicklund*, *supra* note 23.

waste water indeed had a pH of 3). From the evidentiary point of view, this model is relatively clear and simple.<sup>27</sup>

The concept of abstract endangerment in light of the legality principle could be criticized because in some cases the legislature only broadly determines the conditions for criminal liability, but leaves all the power to determine the detailed conditions to the executive and its administrative agencies. As long as the legislature broadly defines the framework within which the executive has to operate there should not be any problem. However, in some cases the legislature leaves all the powers to determine the conditions for criminal liability to the executive. This leads to the problem that parliament only determines a punishment without having any idea as to what activities this criminal liability shall extend. In that case, the legislator gives a blank check to the administrative authorities. This "blank check" problem leads to questions of constitutionality of this type of provision<sup>28</sup> because, in some legal systems, all offenses must be statutory and there is no room for customary or judge-made law. Any penal offense and any general condition for punishment has to be enacted in an unambiguous manner and in written form previously to later prosecution (*nullum crimen, nulla poena sine lege praevia et scripta*). The construction of a statutory provision must not widen criminal liability beyond wording of the provision or lead to an analogy to the detriment of the defendant, no matter how blameworthy the considered behavior may seem to be. With respect to effectiveness this model has certain advantages (e.g. whether an emission limit has been violated). But the model can be "ineffective" in that as long as no administrative rule has been violated no penalty will apply even if substantial environmental harm occurs.

(2) In the 1980s policy-makers became increasingly dissatisfied with the "administrative dependence" of environmental criminal law. Therefore many legislators sought ways to punish environmental pollution directly. This has had consequences on the way environmental crimes are proven.<sup>29</sup> In this model one would expect more severe sanctions than in Model A, because in this

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27. Faure & Visser, *supra* note 22; Günter Heine, *Elaboration of Norms and the Protection of the Environment*, 2 DUKE ENVTL. L. & POL'Y F. 106 (1992).

28. For the discussion on constitutionality of such type of provision in Korean environmental law, see the Korean Constitutional Court judgment 95 HÖNBA 7 (Oct. 30, 1997).

29. See generally Heine, *supra* note 27.

model there is a clear link between the criminal liability and the threat of harm ("concrete endangerment" of environmental media). Therefore the provisions aim more directly at the protection of environment. Instead of abstract endangerment of environmental media, an abstract risk to human health or concrete endangerment of environmental media (actual damaging effect to the environment) is sufficient for penal liability. Therefore, expansion of penal liability relies on the interpretation of environmental media: when is water or land polluted sufficiently to warrant criminal liability? The criminal charge under this model usually contains two elements. First, it will refer to an emission or other form of pollution that the defendant allegedly has caused. Second, reference will be made to the fact that this has been done in an illegal, unlawful or unauthorized way. This notion of "illegality" is usually interpreted as violating statutory or administrative duties or the condition of a license.<sup>30</sup>

Criminal liability thus is dependent upon a complex set of regulatory provisions and the possession of permits or licenses may provide a defense to industrialists or other polluters. Although one could criticize this limited view of the concept of illegality it illustrates once again that the administrative authorities have a crucial influence in determining the scope of criminal liability. The new § 330d (5) of the German Criminal Code<sup>31</sup> also holds that if a license has been obtained through corruption or collusion, the act will be considered as having been committed "illegally (*unbefugt*)."<sup>32</sup> The effectiveness of provisions under this model will inevitably depend upon the notion of illegality, because the emissions or pollution will only lead to criminal liability if they were committed illegally.<sup>32</sup> A possible way of increasing the effectiveness is to strengthen the judicial control of the license. The illegality should not be limited to a violation of prior license conditions but can also consist, for example, of a violation of other administrative rules or general principles of environmental law such as BATNEEC (Best Available Technology Not Entailing Excessive Costs) or ALARA (As Low As Reasonably Achievable). In order to strengthen the judicial control of the

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30. According to the definition of the Council of Europe's convention on the protection of the environment through criminal law, "unlawful" means infringing a law, an administrative regulation or a decision taken by a competent authority, aiming at the protection of environment. Convention on the Protection of the Environment Through Criminal Law, Nov. 4, 1998, art. 1, Europ. T. S. No. 172.

31. In the version of the official promulgation of June 27, 1994 (BGBl I, 1440

32. See Paeffgen, *supra* note 25.

license, therefore, it is desirable to define duties including general principles under administrative law more clearly.

(3) Provisions of this model aim to provide protection against cases of very serious pollution. Although these provisions are discussed under the heading of *serious* pollution, the way these particular provisions are structured makes clear that they still mainly protect human interests. Because merely punishing "serious pollution" will be too vague and violates the *lex certa* principle, the option chosen was to focus on emissions that would constitute a concrete endangerment to human life and health. In this case the administrative authorities do not play a role at all, since crimes falling under this model are punishable even if the conditions of the license are met. Nevertheless, providing causal links between acts of pollution and concrete endangerment to human life and health is still extremely difficult. To overcome this problem, Korean and Japanese legislators have introduced a legally binding presumption of causation, according to which a substance is presumed to have caused a danger if substances of the same type would normally cause that danger if released in a hazardous manner.<sup>33</sup> The Korean legislature has gone one step forward and introduced special penal provisions that are related to the causing of widespread, long-term and severe damage to the natural environment.<sup>34</sup>

## 2. Criminal Liability of Enterprises

Each State Party undertakes to impose penal sanctions on persons who participate in illegal acts committed by or on behalf of corporate entities. Whether corporate entities can be penalized, civilly or criminally, varies among nations. In some nations, corporate entities can be penalized for engaging in environmental crimes. This raises an issue of whether a corporation may be penalized for the activities of its personnel or agents, despite the absence of an overt act on the corporation's behalf. At minimum in nearly all nations, the director, officer, or agent's actions must be within the scope of their employment. Furthermore, there usually must be evidence that the unlawful activities were di-

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33. On the issue of the presumption of causality in the case of Korea and Japan, see B.S. CHO, *UMWELTSTRAFRECHT IN KOREA AND JAPAN* (1993); Cho, *Die Entwicklung*, *supra* note 23.

34. For the new provision of presumptive causality in Korea, See B.S. Cho, *Umweltdeliktgesetze in Korea und Japan – Die normativen und domatischen Grundlagen und die Praxis*, 3 *GLOBAL J. ON CRIME & CRIM. L.* 35, 55 (1996).

rected by or with the consent of a senior corporate official and that the direction or consent was given within the scope of that official's authority.<sup>35</sup> Here, the criminal liability of enterprises will be discussed firstly in connection with the criminal liability of individual officers or employees, and secondly in the context of the enterprise as such.

(1) Activities in corporate bodies are typically the result of many interlocked decisions, with a tendency for wide delegation of responsibilities. As a result, where there is "organizational wrongdoing" a criminal system based upon personal fault has difficulties identifying and successfully prosecuting the individual person's responsible.<sup>36</sup> This can lead to an "organized irresponsibility"<sup>37</sup> of individual employees. Therefore, as to perpetrators, both statutory and case law are in the process of extending individual criminal liability especially in the area of entrepreneurial activity. What is the theoretical basis of the criminal liability of corporate officers who in fact are regarded as "responsible persons"? In this case, the vicarious criminal liability of a director, a representative and a manager is avoided because the doctrine of a criminal responsibility is increasingly emphasized. They are to be punished, only when they themselves commit an alleged crime.

In general, there are now three approaches: (a) The basis of liability of corporate officers may be a corporate criminal act by them within their knowledge and control even if the individual has not performed the unlawful act, at least when such individual ordered or authorized the activity. (b) A broader basis of liability may apply to situations where the corporate officer knows of a subordinate's unlawful activity and does nothing to prevent it. If the corporate officer stands in a position of responsibility over the act in question, liability may be predicated on the failure of the corporate officer to adequately supervise subordinates. (c) A still broader basis of liability is similar to strict liability: the corporate officer may be liable even without evidence of the officer's direct participation or acquiescence in a subordinate's unlawful behavior if the corporate officer holds a responsible position. Only an officer who exercises a high degree of care in at-

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35. See B.S. CHO, *Umweltraferecht in Korea und Japan supra* note 21 (1993).

36. See B. SCHÜNEMANN, *UNTERNEHMENSKRIMINALITÄT UND STRAFRECHT* 38 (1979).

37. For more details on this concept see U. BECK, *RISIKOGESELLSCHAFT – DIE ORGANISIERTE UNVERANTWORTLICHKEIT* (1989).

tempting to prevent the illegal activity will avoid liability.<sup>38</sup> Approach (a) can be reached by the traditional criminal theory of aiders and abettors, but approach (b) or (c) is beyond the reach of this traditional theory. The international trend is to reduce the requirements for intentional behavior when dealing with industrial perpetrators, to create a presumption of intent or to change the burden of proof (approach (b) or (c)).<sup>39</sup>

Faced with the above-mentioned difficulties as “organizational wrong-doing” or “organized irresponsibility,” it is not surprising that, in many countries, adherence to the traditional principle that criminal liability requires personal fault (approach (a)) is being sacrificed in an effort to secure greater environmental protection.

(2) When a *corporate* behavior has been determined to constitute a crime, it is possible to punish not only an individual perpetrator but also an enterprise itself. Several ways of punishing the enterprise itself exist. In the United States, for example, sanctions include putting the corporation in the custody of a U.S. Marshall, requiring reforms of operations, forcing community service by the corporation and/or individuals, fining, imposing substantial restitution, and providing notice to victims.<sup>40</sup> Punishments can be cumulative. In the case of fining, the estimation of the illegal gains is not admitted generally, but in some countries there are special regulations where such estimation is deemed necessary. For example, in the case of surcharge in the Japanese Antimonopoly Act, the law can deprive illegal gains through imposing a certain rate of the turn over of the enterprise with a clear numerical formula.<sup>41</sup> If national law does not permit corporate culpability, then the implementing legislation should reflect that limitation. However, worldwide there is a tendency to attribute responsibility on an impersonal basis. Even in states that have

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38. See e.g., B. KELLMAN & E.A. TANZMAN, *MANUAL FOR NATIONAL IMPLEMENTATION OF THE CHEMICAL WEAPONS CONVENTION* 54 (1998).

39. See G. Heine, *Criminal Liability of Enterprises and New Risks. International Developments – National Consequences*, 2 MAASTRICHT J. OF EUROPEAN & COMP. L. 107, 108-09 (1995).

40. For the United States, see UNITED STATES SENTENCING COMMISSION, *GUIDELINE MANUAL* 357 (1991); W.S. Lofquist, *Legislating Organizational Probation: State Capacity, Business Power, and Corporate Crime Control*, 27 *LAW & SOC'Y REV.* 741 (1993); J.F. DiMento & F. Bertolini, *Green Management and the Regulatory Process: For Mother Earth, Market Share and Modern Rules*, 9 *Transnat'l Law.* 121, 143 (1996).

41. N. Kyoto, *Criminal Liability of Corporations*, *Criminal Liability of Corporation* 275 (H. de Doelder & K. Tiedemann eds., 1996).

traditionally adhered to the principle of *societas delinquere non potest* (enterprises cannot be criminal) Other countries adhere formally to the principle that an enterprise cannot be criminal, but there is a growing tendency toward imposing criminal liability on enterprises.<sup>42</sup> They have looked for ways to impose non-criminal sanctions on those enterprises.<sup>43</sup>

(3) However, in countries like Korea or Japan, the difficulty is not in imposing criminal penalties against the enterprise itself, but rather, in the determination of personal fault.<sup>44</sup> For example, the Korean legislature provides as does the Japanese that a corporate entity is imputed liability if its representative or agent commits a crime under its implementing legislation. According to this provision, however, one should prove who in fact violated the alleged regulation, because that provision requires only that an individual perpetrator acted illegally.<sup>45</sup> Therefore, to prove the illegal conduct of an individual perpetrator is a necessary condition to punish an enterprise. It often happens that the individual perpetrator is difficult to find, especially in the case where the enterprise is a large organization. After the individual perpetrator has been found, it needs to be proved that the conduct of the enterprise is somehow negligent. That is: the enterprise did not meet the duty of care to keep the employee from committing a crime. This omission constitutes a crime of the enterprise. In order to solve this difficulty of evidence, the Korean judiciary has adopted the co-called theory of fault-presumption that allows for

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42. For example, Finland, a civil law country, in 1995 after a 20 year debate, introduced the criminal liability of corporations into the Penal Code. Chapter 9 of the revised Penal Code of Finland is devoted to corporate criminal liability (21 April 1995/743). For details, see M. RIIHJÄRVI, CRIMINAL LIABILITY OF CORPORATIONS – FINLAND, CRIMINAL LIABILITY OF CORPORATION 203 (H. de Doelder & K. Tiedemann eds., 1996). EU is planning to introduce criminal liability of the organization into the law regarding the penal provisions for the purpose of the financial interests of the European Union. See CORPUS JURIS (M. Delmas-Marty ed. 1997).

43. E.g., in Germany, a non-criminal administrative fine (Geldbusse) may be assessed against legal persons and associations if a natural person, who is a legal representative of the enterprise, commits either a crime or an administrative violation, by virtue of which the association was, or should have been, enriched, or its legal obligations have been violated. For details see G. Heine, *Allemagne: Crime against the Environment*, 65 INT'L REV. OF PENAL L. 731 (1994).

44. See B.S. Cho, *Cuestiones de causalidad y autoría en el Derecho penal del medio ambiente coreano y japonés desde la perspectiva del derecho comparado*, 4 REVISTA PENAL 42 (1999).

45. See for the issue of the corporate liability in case of Korea and Japan, B.S. CHO, UMWELTSTRAFRECHT IN KOREA UND JAPAN (1993); B.S. Cho, *Die Entwicklung des Umweltstrafrechts in Korea*, 106 ZEITSCHRIFT FÜR DIE GESAMTE STRAFRECHTSWISSENSCHAFT 235 (1994).

finding that a supervisory duty has been violated within a certain circle of persons. This idea reflects the present difficulty of punishing a large and complicated organization, but has met strong criticism because of the doctrine of guilt (“*Schuldprinzip*”) recognized by the Korean Constitution. As Heine offers,<sup>46</sup> “guilt,” as the specific responsibility of the enterprise, should be understood in the sense that the material disposition of the firm prevented it from making legal co-ordination and reorganization decisions and allowed defective risk management with serious socially detrimental effects to prevail. Faulty decisions over time replace individual guilt.

#### d. *Transnationalization in Domestic Penal Legislation*

Not only are several bases of transnational subject matter jurisdiction less settled (e.g. passive personality theory and universal jurisdiction theory), but even well-settled principles of nationality and territoriality lead to the possibility that more than one law might apply to the same transaction or dispute. Even if one assumes that both the nationality and territoriality principles have attained customary law status, there are neither general treaty nor customary law rules for resolving such conflicts among conflict-of-law principles themselves. The uncertain status of at least some extraterritorial principles under international law and the lack of priority among potentially conflicting, authoritative principles present significant obstacles to solving legal problems caused by increasing cross-border activities. To overcome such obstacles, nations may develop a new interpretation of extraterritorial rules.

At a minimum, a State Party has jurisdiction over conduct that takes place or has harmful effects within its territorial boundaries, including relevant coastal waters and seabed areas (the so-called “territoriality theory” of jurisdiction). To make national offenses applicable to cases of a transboundary or transfrontier nature, the range of the territoriality theory should be substantially expanded through determination of the place of commission. According to the so-called ubiquity theory, the place of commission is both the place where the act/omission took place and that where the statutorily recognized harm arose. That extends the principle of ubiquity in connection with the principle of territoriality. Moreover, legal authority must extend to any act

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46. G. HEINE, DIE STRAFRECHTLICHE VERANTWORTLICHKEIT VON UNTERNEHMEN 271 (1996).

undertaken by a natural person who is a citizen of that State Party regardless of where it is performed (the so-called "nationality or active personality theory" of jurisdiction). In addition, some states may subscribe to broader theories of jurisdiction. The "passive personality theory" of jurisdiction extends jurisdiction where the victim of the offense is a national of the prosecuting state. The "protective theory" of jurisdiction extends jurisdiction over offenses, even those committed wholly outside a state's territory that may threaten important national interests such as security, integrity, sovereignty or some governmental function. The "universal jurisdiction theory" allows jurisdiction over offenses considered particularly heinous or harmful to mankind (e.g., piracy, slave trade, war crimes, hijacking, sabotage of civilian aircraft, genocide, and terrorism) if the forum State has *in personam* jurisdiction over the perpetrator – commonly, the concept of universal jurisdiction applies only if the conduct is criminalized by an international convention under which the state is obligated to prosecute offenders.

By virtue of the above-mentioned offense-imminent restrictions, limits may arise to criminal liability in environmental criminal law where the perpetrator or the act has connections with a foreign country but the factual elements of the pertinent offense do not include the adherence to foreign administrative requirements. For example, German law does not punish someone who operates a plant in a foreign country without a permit. According to the ubiquity principle, in long-distance offenses where the place of the act is different than that of the resultant harm, both qualify as the place of commission. But this extended jurisdiction only applies when an actual harm respecting a concrete endangerment is an element of the offense. This is not the case with the offense of exposure to abstract danger, such as violations against administrative regulations, where, according to the prevailing opinion, resultant harm is not an element of the offense.

However, in the first place, crime must be of primary concern to the country in which it takes place. Both the United States and the United Kingdom used to insist on the principle of the territoriality of criminal jurisdiction, and did not admit that a state may punish an alien for a breach of its criminal law, if the act was committed outside its own territory.<sup>47</sup> This was in sharp contrast to the position of other states which relied on the principle of the

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47. J.L. BRIERLY, *THE LAW OF NATIONS* 299 (1963).

passive personality, on the protective theory, and on the universal jurisdiction theory. In recent decades, however, the United States has moved fairly far from its traditional insistence on territoriality as the only proper basis of criminal jurisdiction. Now, it is most likely to be the United States that relies on what other states regard as extravagant jurisdictional claims.<sup>48</sup> According to this recent tendency the criminal provisions in environmental statutes in the United States have been interpreted very broadly, and recent judicial interpretation of international law principles may allow these broad interpretations to reach beyond the United States borders and have a broader international effect. Interpreting American environmental laws extraterritorially would also expose corporate officers responsible for environmental affairs to criminal liability in the United States. This would be true regardless of whether the vessels for which the officer is responsible fly the United States flag or a flag of convenience, or whether the officer is physically located in the United States or overseas. Whether the argument in favor of Americanization of international law enforcement (that rests heavily on the experience of drug law enforcement), can be applicable also in the field of international environmental law, should be examined.

A number of states have enacted legislation to protect resources outside their borders. Perhaps the most common form of these measures is that which is designed to protect the ocean from pollution. These laws generally proscribe pollution by a ship or national of the enacting state, or within its territorial waters. Many of them were passed to implement of the 1954 London Convention for the Prevention of Pollution of the Sea by Oil<sup>49</sup> and the Convention for the Prevention of Pollution from Ships.<sup>50</sup> Examples of others are Denmark's Act Amending the Action Measures against Pollution of the Sea by Oil<sup>51</sup> and that country's

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48. See, e.g., Blakesley, *United States Jurisdiction over Extraterritorial Crime*, 73 J. CRIM. L. & CRIMINOLOGY 1109 (1982).

49. The International Convention for the Prevention of Pollution of the Sea by Oil, done at London, 12 May 1954, 327 U.N.T.S. 3, 12 U.S.T. 2989, T.I.A.S. No. 4900 (entered into force 26 July 1958).

50. The International Convention for the Prevention of Pollution from Ships, with annexes, done at London, 2. Nov. 1973, I.M.C.O. Doc. MP/CONF/WP.35, 2. Nov. 1973, reprinted in 12 I.L.M. 1319, brought into force by the 1978 Protocol to this Convention, with annexes, done at London 17 Feb. 1978, reprinted in 17 I.L.M. 546 (entered into force 2 Oct. 1983, except for Annex II, which will enter into force 2 Oct. 1986). This Convention, with its 1978 Protocol, is also known as "MARPOL."

51. Act of June 7, 1972, No. 289, § 11, Amending the Action Measures Against Pollution of the Sea by Oil and Other Materials, text in 18 Ruster & Simma at 1034.

Act on Measures against Pollution of Sea by Substances other than Oil,<sup>52</sup> Finland's Law Concerning the Prevention of Pollution of the Sea of 1965<sup>53</sup> and that country's Act of 1972 for the Prevention of Oil Damage Caused by Ships,<sup>54</sup> the Japanese Marine Pollution Prevention Law of 1970,<sup>55</sup> and Singapore's Prevention of Pollution of the Sea Act of 1971.<sup>56</sup>

When the U.S. Congress passed the Oil Pollution Act of 1990,<sup>57</sup> it was responding to the environmental disaster caused by the Exxon Valdez Spill.<sup>58</sup> The Oil Pollution Act of 1990 has given the President power to criminally prosecute those responsible for marine disasters. Just as important as the breadth and stringency of the Oil Pollution Act's liability provisions is the question of whether its criminal provisions may apply to foreign nationals beyond U.S. territory. Applying to foreign nationals, however, would require a new interpretation of the law of the sea. By enforcing the Oil Pollution Act's criminal provisions beyond its territorial sea or within the territorial sea for spills that do not rise to the level of willful and serious, the United States would be exercising greater power than that allotted to coastal states under the U.N. Conventions on the Law of the Sea (UNCLOS).<sup>59</sup> While many provisions of the U.N. Convention on the Law of the Sea have been accepted as declarative of customary international law<sup>60</sup> and therefore the Convention has become a common refer-

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52. Act of June 7, 1972, No. 290, § 12, on Measures against Pollution of the Sea by Substances Other Than Oil, sec. 12, text in 3 Ruster & Simma, 1035, 1037 (1975).

53. Law No. 146 Connecting the Prevention of Pollution of the Sea, March 5, 1965, passim, text in 3 Ruster & Simma, at 1041 (1975).

54. Act No. 668 of 22 Sept. 1972 for the Prevention of Oil Damage Caused by Ships, arts. 1, 2 and 25, text in 3 Ruster & Simma, at 1043 (1975).

55. Marine Pollution Prevention Law of 1970 (Law No. 136), effective 24 June 1971, especially arts. 55-58, text in 3 Ruster & Simma, at 1074 (1975).

56. Prevention of Pollution of the Sea Act, 1971, effective Jan. 25, 1971, especially part 2, "Criminal liability for polluting the sea", text in 3 Ruster & Simma, at 1131 (1975).

57. Pub. L. No. 101-380, 104 Stat 484 (confined as amended at 33 U.S.C. §§ 2701-2761 (1991) and in various sections throughout titles 16, 26, 43, and 46 of the U.S. Code).

58. See B.H. Grumbles, *The Oil Pollution Act of 1990: Mixing Oil, Water, and Hazardous Waste*, 4 GEO. INT'L ENVTL. L. REV. 151 (1991) (describing the Congressional response to the Exxon Valdez spill of 1989).

59. United Nations Convention on the Law of the Sea, opened for signature Dec. 10, 1982, U.N. Doc. A/CONF.62/L2 (1982), reprinted in 21 I.L.M. 1261 (1982); The Law of the Sea, U.N. Sales No. E. 83. V.5 (1983) (*entered into force* Nov. 16, 1994).

60. L.B. SOHN & K. GUSTAFSON, *THE LAW OF THE SEA IN A NUTSHELL* xvii (1984).

ence point for discussions of marine environmental jurisdiction,<sup>61</sup> the Convention has not been signed by the United States. Because Congress has expressed its impatience with the pace of developments in the area of international environmental law, and because the law of the sea is one of the most dynamic and malleable areas of the law, both domestically and internationally, a U.S. court should give precedence to the Oil Pollution Act over the U.N. Convention on the Law of the Sea. The entire MARPOL Convention and the United States legislation that implements it are premised on the need to control and reduce pollution from routine operations of vessel traffic.<sup>62</sup> Moreover, the concept of customary international law leaves some room for change or modification in response to changing circumstances.

The inadequacy of the law of the sea to deal effectively with the fast pace of developments in modern life is well recognized, however, and the risk of unilateral action outside the law's boundaries leading to international conflict has been viewed as inevitable.<sup>63</sup> Some scholars view customary international law as a concept that grows slowly and only after ensuring mutual consent before action.<sup>64</sup> The use of criminal sanctions to protect the marine environment recognizes the environmental paradigm that has emerged to govern our society since the 1982 U.N. Convention on the Law of the Sea was negotiated.<sup>65</sup> When the 1982 U.N. Convention was completed, it addressed pollution concerns in somewhat greater detail but retained a structure that defers to a vessel's flag state for compliance certification and enforcement actions. This legal framework reinforces the "tragedy of the commons" situation, leading all actors to take whatever measures best serve their interests until finally, the resource is exhausted. This situation has led developing countries to offer "flags of con-

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61. D. Bodansky, *Protecting the Marine Environment from Vessel-Source Pollution: UNCLOS III and Beyond*, 18 *ECOLOGY L.Q.* 719 (1991).

62. See H.R. Rep. No. 1224, 96th Cong., 2nd Sess.(1980), reprinted in 1980 U.S.C.C.A.N. 4849.

63. A. PARDO, *AN OPPORTUNITY LOST*, IN *LAW OF THE SEA: U.S. POLICY DILEMMA* 13, 25 (B.H. Oxmann et al. eds., 1983). "These words are as true now as they were [in 1970]. The present [1982] convention is not the end but rather the beginning of a long process that must eventually lead to a more rational and efficient use of our environment and a more equitable world order." (citing U.S. Policy for the Seabed, U.S. Dep't St. Bull. 737 (1970)).

64. See, e.g., L.B. Sohn, *The Law of the Sea: Customary International Law Developments*, 34 *AM. U. L. REV.* 271, 279 (1985).

65. S.J. Darmody, *The Oil Pollution Act's Criminal Penalties: On a Collision Course with the Law of the Sea*, 21 *B.C. Env'tl Aff's L. Rev.* 89, 143 (1993).

venience". Vessels under their control are generally subject to less stringent environmental regulation,<sup>66</sup> so there is a common shift in vessel registry from nations like the United States, with strict environmental regulations, to flag states of convenience. Environmental concerns on the oceans have bowed to the theories of Grotius<sup>67</sup> as implemented in MARPOL and UNCLOS, applying their complicated system of flag state enforcement. More importantly, while UNCLOS and MARPOL, and the commentators<sup>68</sup> all seem to have adopted the view that the seas must be governed by a seemingly absolute concept they call the "freedom of the seas", that absolutism is neither the end for which Grotius argued, nor is it supported by his reasoning.<sup>69</sup> In addition, the obligations of conventions are often outdated by the time they come into force, particularly in environmental fields where scientific research and understanding is moving forward very quickly. It has taken nearly fourteen years for UNCLOS to receive the sixty ratifications it required to enter into force. To refuse to continue destroying the world's oceans while paying fealty to the words of UNCLOS that reflect neither the needs of today's world, nor the principles that were meant to shape it, extraterritorial jurisdiction in the case of pollution from routine operations of vessel traffic should be accepted as an international environmental criminal law. It should do so in the broad sense of accepting rules regarding mutual accommodation in the suppression of environmental crime.

#### IV.

##### SUPRANATIONAL ENVIRONMENTAL CRIMINAL LAW

###### a. *Is There a Supranational Environmental Criminal Law?*

The 1992 Earth Summit at Rio and the ensuing controversy over the diluted nature of the various resolutions passed are typical of the problems of enforcement in the area of international

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66. M.L. Boos, *The Oil Pollution Act of 1990, Striking the Flags of Convenience?*, 2 *COLO. J. INT'L ENVTL. L. & POL'Y* 407 (1991).

67. H. GROTIUS, *THE FREEDOM OF THE SEA VII* (R.V.D. Magoffin trans. & J.B. Scott ed., 1916).

68. D.M. Dzidzornu & B.M. Tsamenyi, *Enhancing International Control of Vessel-Source Oil Pollution Under the Law of the Sea Convention, 1982: A Reassessment*, 10 *U. TASMANIA L. REV.* 269, 270 (1991).

69. See e.g., S.J. Darmody, *The Oil Pollution Act's Criminal Penalties: On a Collision Course with the Law of the Sea*, 21 *B.C. ENVTL. AFF. L. REV.* 89, 139 (1993).

environmental regulation.<sup>70</sup> There are a number of types of penal provisions used as enforcement measures in international environmental conventions; some are of a character as to be part of field of international criminal law. A general international criminal law is actually being discussed, but environmental protection through criminal law at the supranational level still encounters opposition. In discussing the existence and coherence of supranational environmental criminal law, one must first find that there actually is an international community roughly comparable to the national communities in which domestic systems of criminal law operate. Without such an international community, the "law of international environmental crimes" can only be a simulacrum of criminal law, lacking the requisite social base. Doubts about the reality of international criminal law "in the material sense of the word"<sup>71</sup> ultimately rest on skepticism about the reality of a genuine international community.<sup>72</sup> In other words, there is no international superlegislature to establish international environmental criminal laws and no effective international mechanism with enforcement authority. With the exception of international war crime trials, the practice of international courts and tribunals cannot be adduced as evidence of the recognition in international customary law of anything even faintly resembling the phenomenon of international crimes or of an international criminal law *stricto sensu*.<sup>73</sup>

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70. *E.g.*, United Nations Conference on Environment and Development: Framework Convention on Climate Change, done 9 May 1992, U.N. Doc. A/AC.237/18(pt. II)/Add.1 (1992), reprinted in 31 I.L.M. 849; see also R. Abramson, *Bush Sees Role on Environment as Political Plus*, L.A. TIMES, June 14, 1992, at A1; W.K. Stevens, *U.N. Chief Charts Defense of Nature*, N.Y. TIMES, June 4, 1992, at A10; Timothy L.H. McCormack & Gerry J. Simpson, *The International Law Commission's Draft Code of Crimes against the Peace and Security of Mankind: An Appraisal of the Substantive Provisions*, 5 CRIM. L. F. 1, 39 (1994).

71. Schwarzenberger uses the expression "international criminal law in the material sense of the word" to refer to the supposition that there exists an "international criminal law in a sense comparable to municipal criminal law." George Schwarzenberger, *The Problem of an International Criminal Law*, 3 CURRENT LEGAL PROBS. 263, 272 (1950), reprinted in INTERNATIONAL CRIMINAL LAW AND PROCEDURE 263 (J. Dugard & C. van den Wyngaert eds. 1996).

72. See *e.g.*, Van Bemmelen, *Reflections and Observations on International Criminal Law*, in A TREATIES ON INTERNATIONAL CRIMINAL LAW, 77-78 (M.C. Bassioni & V. Nanda eds., 1973); Schwarzenberger, *supra* note 71, at 14-33; L.C. Green, *Is There An International Criminal Law ?*, 21 ALBERTA L. REV. 251, 261 (1983); E.M. Wise, *Terrorism and the Problems of an International Criminal Law*, 19 CONN. L. REV. 799, 818 (1987).

73. See *e.g.*, Schwarzenberger, *supra* note 71, at 279-280; XIVth International Congress of Penal Law, 61 REVUE INTERNATIONALE DE DROIT PÉNAL 131, 132 (1990)

“Suppose we take the picture of a ‘society of states’ rather than that of an ‘international community’ – as representing most accurately what international relations generally are like. In such a society, there may be an international [environmental] criminal law in the broad sense of rules regarding mutual accommodation and cooperation in the suppression of [environmental] crime, but probably not an international [environmental] criminal law *stricto sensu*.”<sup>74</sup>

b. *Regional Cooperation: Different Standards for Different Countries?*

Most significantly, differences among domestic laws pose a difficult problem when attempting to achieve uniformity of application of a convention. As cross-border activity increases, and in instances when conflict-of-law doctrines are deemed inadequate, nations seek to create uniform, international rules. Progress in the internationalization of rules has also been made in environmental regulation. Strategies to create uniform rules take (1) domestic acceptance of the uniform rules, often prompted by international criticism and sanctions or (2) as a condition to either international assistance or membership in common unions. Mexico, for example, agreed to strengthen its internal environmental laws in order to strengthen U.S. political support for the North American Free Trade Agreement (NAFTA<sup>75</sup>).<sup>76</sup> The European Union also has placed conditions on countries applying for membership.<sup>77</sup>

The NAFTA Environmental Side Agreement is concerned with the establishment, maintenance, and enforcement of domestic environmental law. It increases public participation in the law-making and enforcement process, provides for government-to-

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(according to the resolutions of XIVth International Congress on Criminal Law, held in Vienna Oct 2-7, 1989, international crimes should be divided into two categories, international crimes *stricto sensu* and *lago sensu*. International crimes *stricto sensu* should be limited to violations of the highest values of the international community.).

74. Weis, *supra* note 72, at 821.

75. Canada-Mexico-United States: North American Free Trade Agreement, Dec. 17, 1992, 32 I.L.M. 605 (1993).

76. See D. Fraser, *Mexico Ponders Price it Must Pay for NAFTA-Side Accords Demanded by the U.S. Raise Some Thorny Issues*, FIN. TIMES, Mar. 23, 1993, at 9 (reporting that despite sovereignty concerns, Mexico expected to agree to new environmental regulations to accede to NAFTA).

77. See R. Mauthner, *Relations with the SEC: No Quick Entry, but the Log Jam is Broken*, FIN. TIMES SURVEY, May 19, 1986, III.

government dispute settlement for patterns of failure to effectively enforce domestic environmental law, and creates mechanisms for collaboration among the NAFTA parties. Under the Agreement, any person or organization residing or established in the territory of a NAFTA party may file a submission with an independent tri-national Secretariat alleging that a party is failing to effectively enforce its environmental law. If the submission complies with certain criteria (e.g., it provides sufficient information regarding the allegation, is aimed at enforcement and not harassment, etc.), the Secretariat may determine that it merits a response from the party (which has, at most, 60 days to respond).

Where there is evidence of a persistent pattern of failure of a party to enforce its environmental law, another party may request that the formal dispute settlement process set out in Part Five of the Agreement be invoked. Where a dispute settlement panel finds that a persistent pattern of failure to enforce exists, an action plan will be established to remedy the situation. Affected businesses will want to ensure that their interests are taken into account in the design and implementation of such plans. If the party complained against fails to implement an action plan, the panel may impose a monetary assessment. If the assessment is not paid, in the case of United States and Mexico, trade sanctions could be imposed. In imposing trade sanctions, the complaining party is obliged first to seek to suspend benefits in the same sector where there has been a persistent pattern of failure to enforce. In the case of Canada, the Commission established under the Agreement could apply for a court order to enforce the assessment.

An another example of regional enforcement is the Single European Act (1986) which provides clear authority for the European community on environmental and natural resources issues.<sup>78</sup> The community has issued directives and regulations aimed at controlling pollution and protecting the environment, and more are under consideration. The European Court of Justice has assumed an important role in ensuring that measures adopted by individual nations conform with Community direc-

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78. See generally, M.S. Feeley & P.M. Gilhuly, *Green Law-Making: A Primer on the European Community's Environmental Legislative Process*, 24 VAND. J. OF TRANSNAT'L L. 653 (1991); D.W. Simcox, *The Future of Europe Lies in Waste: The Importance of the Proposed Directive on Civil Liability for Damage Caused by Waste to the European Community and Its Environmental Policy*, 28 VAND. J. OF TRANSNAT'L. 543 (1995); H.G. Sevenster, *Criminal Law and EC Law*, 29 COMMON MKT. L. REV. 29 (1992).

tives. Under European Community law, the responsibility for the monitoring and enforcement of Community environmental obligations has to a large extent been taken away from the inter-state arena and placed upon the European Commission and the European Court of Justice.<sup>79</sup> The 1992 Maastricht Treaty introduces, for the first time, financial penalties for Member States which fail to comply with Community law.<sup>80</sup> Despite the importance accorded to the so-called doctrine of subsidiarity<sup>81</sup> under the post Maastricht arrangements, it does seem clear that the Community will retain considerable powers in the environmental field. Indeed, the development and enforcement of Community environmental law is viewed as one of the Union's more popular activities among the people of Europe.<sup>82</sup>

The Council of Europe (CE) is, in the criminal area, most known for its 21 Conventions and some 70 recommendations. The CE is a European Organization which was established in 1949.<sup>83</sup> Due to the changes in Eastern Europe it now has more than 30 members all over Europe. The CE soon showed a specific interest in environmental matters, especially environmental crime. Based on Conclusions of the 7th Conference of European Ministers of Justice in Basel in 1972, the CE adopted in 1977 its "Resolution (77) 28 on the Contribution of Criminal Law to the Protection of the Environment." The 17th Conference of Euro-

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79. Under the procedure established by Article 169 EEC, *see also* D. Freestone, *European Community Environmental Law and Policy*, 18 J. L. & Soc'y 135, 140 (1991).

80. Treaty of Rome Consolidated and the Treaty of Maastricht, Common Market Law Reporters 573, 590 (1992).

81. *Id.* at art. 3b. Article 3b of the EC Treaty, expressly states that "Any action by the Community shall not go beyond what is necessary to achieve the objectives of this Treaty". In the area of shared competence, the Community shall proceed "only if and in so far as objectives of the proposed action can not be sufficiently achieved by the member States".

82. *See e.g.*, D. Wilkinson, *Maastricht and the Environment: the Implications for the EC's Environment Policy of the Treaty of European Union*, 4 J. OF ENVTL. L. 221 (1992).

83. The organs of the Council of Europe are the Parliamentary Assembly and the Committee of Ministers with a Secretary General, the European Commission and the European Court on Human Rights which meet or are located in Stasbourg, France. The CE is competent to deal with a wide range of questions and problems except defense matters. Neither the Committee of Ministers nor the Parliamentary Assembly has legislative competence or enforcement measures like the European Community (now European Union). The Committee of Ministers considers the actions to be taken, in the form of the conclusion of conventions and agreements, the promulgation of recommendations or resolutions, of statements on common policy, or the publication of expert reports.

pean Ministers of Justice in Istanbul in 1990 concluded "Resolution No.1 on the Protection of the Environment through Criminal Law". The resolutions enumerate a series of measures that the governments of member States might take. The most recent undertakings in the field of environmental crime by the CE include the Convention on the Protection of the Environment through Criminal Law of Nov. 4, 1998.<sup>84</sup> The new Convention contains elements of harmonization of substantive criminal law and is a modern instrument for international cooperation in the area of transboundary environmental crimes.

On the other hand, even if binding regulations are enacted on the supranational level, national exceptions are made quite frequently. Such exceptions will probably remain the rule for quite some time as the Eastern European countries, with their dismal environmental conditions, associate with the EC. As a result, one may expect that interpretation and implementation of international instruments will remain inconsistent, at least for the time being. When choosing between a cleaner environment and less poverty, many poor nations choose more pollution in the belief that they will enjoy greater economic growth. In developing countries the criticism is often made that the West could afford to develop its industry without any concern for the environment during two centuries whereas it is now expected that the third world develop its industry in full respect of environmental statutes. For these countries it may make more sense to persuade them to take reasonable precautions against pollution, rather than to attain pollution controls equal to those in the industrialized nations. In addition, even two countries at the same level of development place different social value on pollution control due to differences in the environments and in the perceived need to control pollution. Therefore, it is not simple to determine whether different environmental standards apply for different countries.

Applying the general principles of international environmental law to the situations in developing countries is an unrealistic expectation. Even though the concept of "sustainable development", which recognizes that the twin goals of environmental protection and economic development are mutually supportive and interdependent, rather than contradictory,<sup>85</sup> has increased

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84. European Treaty Series (ETS) No. 172.

85. See e.g., LYNTON K. CALDWELL, INTERNATIONAL ENVIRONMENTAL POLICY: EMERGENCE AND DIMENSIONS 208 (1990).

international environmental cooperation, national sovereignty remains a formidable barrier to cooperation. States adamantly demand the right "to exploit their own resources pursuant to their own environmental and development policies." The sovereignty argument is based on the principle that every nation has a different perspective of social costs and benefits that go with pollution control. Nevertheless, the sovereignty barrier has been weakened to the extent that nations now realize, as a result of sustainable development, that nationalism must occasionally yield to protect the world's shared global resources.

c. *Efforts to Recognize and to Codify International Environmental Crimes*

1. The ILC's Draft Articles on State Responsibility

There appears to be little treaty or customary law behind the idea that global environmental damage can support supranational criminal prosecution. However, this situation may well change in the near future, particularly if a distinction made by the International Law Commission in its Draft Articles on State Responsibility comes to be accepted generally by the future international community.<sup>86</sup> Recent worldwide concern about global environmental issues makes it arguable whether the breach of an international treaty obligation is an internationally wrongful act that gives rise to state responsibility. Article 19(3) of that instrument enumerates four categories of international wrong that may give rise to international criminal responsibility, including "a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment." Draft Article 19(3)(d) accurately reflects a growing consensus on the law of environmental damage.

However, it is still unclear how much normative force the Draft Articles on State Responsibility muster and what the meaning of criminality proposed in them actually is. The ILC's stated rationale for distinguishing between international "delicts" and "crime" was, in essence, that "general international law now differentiates between various types of internationally wrongful acts, and consequently, between different regimes of state re-

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86. [1976] 2 Y.B. Int'l L. Comm'n 239-53, U.N. Doc. A/CN.4/SER.A/1976; The International Law Commission's Draft Articles on State Responsibility (S. Rosenne ed., 1991). See McCormack & Simpson, *supra* note 71 at 39-40.

sponsibility.”<sup>87</sup> Those internationally wrongful acts which (a) are particularly serious, and (b) violate an obligation essential for the safeguarding of the fundamental interests of the international community as a whole are denominated “international crimes” by article 19.

This draft article has been accorded a mixed reception by states, commentators, and present members of the ILC itself. The doubts that have been expressed about the notion of state “criminal” responsibility may be linked to the fact that the nature of the “regime” of such a form of responsibility is, at present, not at all clear. In particular, concern has been expressed about what kind of consequences would ensue from an “international crime” for the acting state, the “victim” state (if there was one in particular) and third states. For example, questions have been raised as to the validity of the concept that a state, as opposed to an individual leader of a state, is capable of committing a crime. Similarly, should an entire population of a nation be treated as international criminals because of the actions of their leaders? Strong doubts have also been expressed as to whether there is any solid evidence that the concept of international criminal responsibility is actually recognized in the practice of states. This would presumably be necessary in light of the definition of the concept of an “international crime” in article 19(2), which requires that the “international community as a whole” recognize the act or practice in question as a crime. According to the commentary to article 19, this means that “a given internationally wrongful act shall be recognized as an ‘international crime,’ not only by some particular group of states, even if it constitutes a majority, but by all the essential components of the international community.”<sup>88</sup> The report at the 50th session of ILC in 1998, made a series of recommendations to rationalize Part One, Origin of international responsibility, chapters I (General principles) and II (The acts of the State under international law), and to delete the notion of “crime” from article 19.<sup>89</sup> Whether to retain,

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87. [1976] 2 Y.B. Int'l L. Comm'n , at 118.

88. *Id.* at 119.

89. See First report of new special rapporteur, Professor James Crawford, on State Responsibility, UN Doc. A/CN.4/490 and Add.1-6 (1998); Report of the ILC on the work of its fiftieth session, UN GAOR, 53d Sess., Supp. No. 10, para. 546, UN Doc. A/53/10 and Corr. 1 (1998).

delete, or replace article 19 was to be determined at the fifty-first session of the ILC in 1999.<sup>90</sup>

One might wonder whether "all the essential components of the international community" could ever agree that a given type of environmentally harmful act would constitute an "international crime." That state criminal responsibility is controversial, however, does not diminish the force of the following statement in the commentary to article 19:

*The astounding progress of modern science, although it has produced and continues to produce marvelous achievements of great benefit to mankind, nevertheless imparts a capacity to inflict kinds of damage which would be fearfully destructive not only of man's potential for economic and social development but also of his health and of the very possibility of survival for the present and future generations.*<sup>91</sup>

This language is redolent of the suggestion that the ILC was particularly concerned about environmental damage caused by nuclear explosions. Indeed, a number of conventions dealing with the subject of nuclear weapons possess penal characteristics, such as prohibition of the conduct in question by private parties. For example, Article 1 of the Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water<sup>92</sup> provides that the parties undertake "to prohibit, to prevent, and not to carry out any nuclear weapon test explosion, or any other nuclear explosion, at any place under its jurisdiction or control," in the areas covered by the convention. The killing of all life on earth may be viewed as the ultimate environmental offense.

## 2. The ILC's Draft Code of Crimes against the Peace and Security of Mankind

The International Law Commission's Draft Code of Crimes against the Peace and Security of Mankind (Draft Code)<sup>93</sup> is the product of ten years' discussion and analysis by the ILC and marks the second major attempt by the United Nations in the

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90. See R. Rosenstock, *The Fiftieth Session of the International Law Commission*, 93 AM. J. INT'L L. 236, 240 (1999).

91. [1976] 2 Y.B. INT'L L. COMM'N, at 108.

92. Done at Moscow, 5. Aug. 1963, 480 U.N.T.S. 43, 14 U.S.T. 1313, T.I.A.S. No. 5433, reprinted in 2 I.L.M. 889 (1963).

93. Draft Code of Crimes against the Peace and Security of Mankind, in Report of the International Law Commission on Its Forty-third Session, U.N. GAOR, 46th Sess., Supp. No. 10, at 198, U.N. Doc. A/46/10 (1991); McCormack & Simpson, *supra* note 70 (discussing at length the prospects for the Draft Code).

past forty years to introduce a comprehensive and universal normative framework for international criminal regulation. The central components of such a regime are an international criminal court and a code of international crimes. On July 17, 1998, the UN Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court (Rome Conference) adopted the Rome Statute of the International Criminal Court (ICC).<sup>94</sup> The ILC Draft Code is an attempt to codify crimes that pose a serious threat to the peace and security of mankind. Observers and environmental activists have long bemoaned the absence of normative force behind the international instruments designed to protect the environment. The Draft Code's article 26 of "willfully causing or ordering the causing of widespread, long-term and severe damage to the natural environment" appropriately anticipates future attempts to safeguard the environment.<sup>95</sup> It is in this context that we must consider the criminalization of willful environmental destruction; the article identified five characteristics of environmental crime that qualify it as an international crime have been identified including:

- Indirect but important threat to world peace and security;
- Conduct significantly affecting more than one state;
- Means or methods transcend national boundaries;
- Cooperation of states is essential to enforce; and
- Conduct potentially affecting citizens of more than one state.

## V. CONCLUSIONS

International environmental criminal law is an emerging field of international environmental law. The standardization and transnationalization of environmental criminal law had a number of positive results. A system of international environmental criminal law has emerged, rather than simply more international criminal law principles about the environment. The Council of Europe's convention on the protection of the environment through criminal law is a good example.<sup>96</sup>

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94. Rome Statute of the International Criminal Court, July 17, 1998, U.N. Doc. A/CONF.183/9, at <http://www.un.org/law/icc/statute/romefra.htm>, reprinted in 37 I.L.M. 999 (1998). Rome Conference concluded by adopting Rome Statute of the ICC by a nonrecorded vote of 120 in favor, 7 against and 21 abstentions. The United States elected to indicate publicly that it had voted against the statute.

95. McCormack & Simpson, *supra* note 70, at 39-40.

96. *See supra* IV. 2.

This process is only at a beginning. This paper imagines the future process in the following: In the field of the international protection of human rights, international and regional treaties allow individuals rights of petition to international institutions. Human rights conventions also require regular reports from member states of their record of implementation and state representatives are questioned on these. The legal mechanisms of international human rights law afford far greater protection than that of international environmental law. This greater protection derives from the ability of human rights laws to bypass state sovereignty to protect individuals, whereas environmental laws generally yield to such concerns. A truly effective international environmental system will need to be modeled on similar sorts of devices. In other words, the human rights law should be a possible model for international environmental criminal law that deals with harms or threatened harms that significantly affect the ecological balance so as to deny the possibility of self-purification. Although the two fields share common interests,<sup>97</sup> neither field fits snugly within the framework of the other, and any attempt to force all environmental issues into a human rights rubric will fundamentally distort the concept of human rights.<sup>98</sup> Nevertheless, a fundamental human right to a healthy environment<sup>99</sup> should be recognized when the protection of the environment is neglected by a state to such an extent that the individuals who live in the affected region are seriously oppressed. Consistent with interna-

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97. Human rights law is concerned with the protection of the individual, whereas environmental law is concerned with the protection of nature for the ultimate benefit of mankind. See generally ALEXANDER KISS & DINAH SHETON, ENVIRONMENTAL LAW 17-18 (1991).

98. Human rights activists refuse to acknowledge a connection between human rights and environmental protection mainly due to the concern that a new environmental human right would devalue the previously recognized human rights. See Iveta Hodkova, *Is there a Right to a Healthy Environment in the International Legal Order?*, 7 CONN. J. INT'L L. 65, 71 (1991).

99. The overlap of interests provides the basis for a limited merger of human rights law and environmental law to create a "human right to a healthy environment". The link between the environmental and human right is increasingly being recognized by legal scholars. See e.g. D. Shelton, *Human Rights, Environmental Rights, and the Right to Environment*, 28 STAN. J. INT'L L. 103, 107 (1991); J. Symonides, *The Human Right to a Clean, Balanced and Protected Environment*, 20 INT'L J. LEGAL INFO. 24, 26 (1992); W.A. Shutkin, *International Human Rights Law and the Earth: The Protection of Indigenous Peoples and the Environment*, 31 VA. J. INT'L L. 479, 485-86 (1991); P. TAYLOR, AN ECONOLOGICAL APPROACH TO INTERNATIONAL LAW, 196-257 (1998); K. BOSSELMANN, ÖKOLOGISCHE GRUNDRECHTE 11-22 (1998); K. BOSSELMANN, IM NAMEN DER NATUR (1992).

tional human rights law and policy, international environmental criminal law protects the individual from uncontrolled state sovereignty.

