Criminal Jurisdiction in Antarctica

Elizabeth K. Hook

Follow this and additional works at: https://repository.law.miami.edu/umlr

Recommended Citation
Elizabeth K. Hook, Criminal Jurisdiction in Antarctica, 33 U. Miami L. Rev. 489 (1978)
Available at: https://repository.law.miami.edu/umlr/vol33/iss2/10

This Article is brought to you for free and open access by the Journals at University of Miami School of Law Institutional Repository. It has been accepted for inclusion in University of Miami Law Review by an authorized editor of University of Miami School of Law Institutional Repository. For more information, please contact library@law.miami.edu.
Special problems are presented by the potential for criminal conduct in Antarctica. Various modes for asserting criminal jurisdiction are discussed, and the author concludes that a novel approach is required. The author proposes the creation of a multinational tribunal, which would incorporate certain traditional aspects of international courts but would also be designed to meet the unique needs of Antarctica.

I. INTRODUCTION

The vast, ice-covered continent of Antarctica has been an area of steadily increasing interest and activity throughout the twentieth century. Since Antarctic activities promise to multiply and diversify in the future, with concomitant population increase, the question of control of criminal conduct in Antarctica has become more pressing.

Antarctica has been subjected to multiple and conflicting sovereignty claims, the status of which are undetermined. During the twentieth century, seven states have staked claims to areas comprising approximately eighty percent of Antarctica. The claimants, and the dates on which their claims were advanced are: Argentina (1942), Australia (1933), Chile (1940), France (1924), New Zealand (1929), and the United States (1933).

* Former Articles and Comments Editor, University of Miami Law Review.
1. See Bilder, Control of Criminal Conduct in Antarctica, 52 VA. L. REV. 231, 235 (1966).
The claims of the United Kingdom, Argentina and Chile overlap considerably with respect to areas of the Palmer Peninsula, the Antarctic region closest to South America. The sector known as Marie Bird Land and the inner core of the Norwegian sector remain unclaimed. The status of these claims has been the subject of international conflict. The United States and the Soviet Union refuse to recognize claims by any state; each has also refrained from making any claims to sovereignty while reserving all rights which may stem from their activities in Antarctica. The United Kingdom, Australia, New Zealand, France and Norway appear to recognize each others' claims. Meanwhile, the rivalry between the United Kingdom, Argentina and Chile over their overlapping claims is intense and has been the source of considerable friction. These claims have been frozen temporarily by the Antarctic Treaty, entered into by all claimant states and several nonclaimant states in order to foster peaceful scientific research. However, while the Treaty obviates overt territorial disputes for the present, claimant states have been alerted by the dormant status of their claims to guard against their possible extinction.

This comment will review the problems inherent in criminal jurisdiction in Antarctica. Those problems are created by the disputed status of Antarctic territorial claims and are likely to be exacerbated by increased human activity on the southern continent. Since jurisdiction is closely linked conceptually with sovereignty, the universally significant goal of control of criminal conduct in

---

3. See, e.g., Comment, Quick Before it Melts: Toward a Resolution of the Jurisdictional Morass in Antarctica, 10 CORNELL INT'L L.J. 173, 175 (1976). See also P. Jessup & H. Taubenfeld, supra note 2, at 153.
6. A series of exchanges over the dispute was carried on through diplomatic channels from 1947 to 1955. For a partial collection of these exchanges, see 5 POLAR RECORD 228-40 (1948), 6 POLAR RECORD 415-18 (1952) and 7 POLAR RECORD 212-26 (1954). The tension has, on occasion, nearly ripened into overt conflict. See, e.g., Hambro, Some Notes on the Future of the Antarctic Treaty Collaboration, 68 AM. J. INT'L L. 217, 218 n.5 (1974). A British attempt to bring such a dispute before the International Court of Justice failed when Argentina and Chile refused to recognize the court’s jurisdiction. See P. Jessup & H. Taubenfeld, supra note 2, at 150.
Antarctica may become a pawn in the struggles surrounding territorial claims. A solution must be found which will lead to control of criminal behavior while avoiding further complication of the sovereignty issue.

II. THE ANTARCTIC TREATY

The conflicts created by international discord over the claims to Antarctic territories were set in abeyance with the conclusion of the Antarctic Treaty in 1959. Inspired largely by the success of the International Geophysical Year [I.G.Y.] (1957-58) in furthering international scientific collaboration, twelve states met in Washington in 1959 to conclude the Antarctic Treaty. The Treaty was designed to promote cooperative international scientific investigation and to ensure that Antarctica be used solely for peaceful purposes. The Treaty bans all military activity and provides for freedom of scientific investigation and exchange of scientific information.

In years prior to the Treaty, certain claimant states had opposed suggestions for the internationalization of Antarctica. The Treaty dealt with this sovereignty dispute by simply tabling the issue; all claims and postures as to claims are preserved unaltered. Article IV stipulates that the Treaty will not be interpreted as a “renunciation by any Contracting Party of previously asserted rights of or claims to territorial sovereignty in Antarctica.” Recognition and nonrecognition stances are preserved and “acts or activities” taking place while the Treaty is in force cannot constitute a basis for future assertions or denials of claims. In addition, new

---

8. See, e.g., Hambro, supra note 6, at 218-19.
9. The contracting states were Argentina, Australia, Belgium, Chile, France, Japan, New Zealand, Norway, South Africa, the Soviet Union, the United Kingdom and the United States. To date, the states acceding to the Treaty under Article XIII are Brazil, Czechoslovakia, Denmark, the German Democratic Republic, the Netherlands, Poland, Romania, U.S. DEP’T OF STATE, TREATIES IN FORCE 260 (1977), and, since Sept. 11, 1978, Bulgaria, 78 DEP’T STATE BULL. No. 2020, at 56 (Nov. 1978).
10. The Treaty Preamble provides a fitting introduction to the agreement: Recognizing that it is in the interest of all mankind that Antarctica shall continue forever to be used exclusively for peaceful purposes and shall not become the scene or object of international discord; Acknowledging the substantial contributions to scientific knowledge resulting from international cooperation in scientific investigation in Antarctica.

Antarctic Treaty, supra note 7, Preamble.
11. Id. arts. I, II, III.
claims and enlargement of existing claims are prohibited for the duration of the Treaty.\textsuperscript{13}

As a result of its interrelation with the sovereignty issue, the thorny problem of jurisdiction was also left relatively untouched by the Treaty. Article VIII(1) provides that contracting parties shall have jurisdiction over their own nationals who are either observers (as designated under Article VII) or scientific personnel (exchanged pursuant to Article III(1)(b)) and their staffs.\textsuperscript{14} Any disputes regarding jurisdiction over individuals not covered by Article VIII(1) are to be solved by consultation among the concerned states. Military personnel may be covered by specific military codes.\textsuperscript{15} However, most scientific and support personnel, tourists and civilian staff and crews that may be engaged in future resource exploration or exploitation are not covered by the Treaty.\textsuperscript{16} The Treaty, therefore, makes

\textsuperscript{13} Article IV provides:
1. Nothing contained in the present Treaty shall be interpreted as:
   (a) a renunciation by any Contracting Party of previously asserted rights of or claims to territorial sovereignty in Antarctica;
   (b) a renunciation or diminution by any Contracting Party of any basis of claim to territorial sovereignty in Antarctica which it may have whether or as a result of its activities or those of its nationals in Antarctica, or otherwise;
   (c) prejudicing the position of any Contracting Party as regards its recognition or non-recognition of any other State's right of or claim or basis of claim to territorial sovereignty in Antarctica.
2. No acts or activities taking place while the present Treaty is in force shall constitute a basis for asserting, supporting or denying a claim to territorial sovereignty in Antarctica or create any rights of sovereignty in Antarctica. No new claim, or enlargement of an existing claim, to territorial sovereignty in Antarctica shall be asserted while the present Treaty is in force.

\textsuperscript{14} Article VIII provides:
1. In order to facilitate the exercise of their functions under the present Treaty, and without prejudice to the respective positions of the Contracting Parties relating to jurisdiction over all other persons in Antarctica, observers designated under paragraph 1 of Article VII and scientific personnel exchanged under subparagraph 1(b) of Article III of the Treaty, and members of the staffs accompanying any such persons, shall be subject only to the jurisdiction of the Contracting Party of which they are nationals in respect of all acts or omissions occurring while they are in Antarctica for the purpose of exercising their functions.
2. Without prejudice to the provisions of paragraph 1 of this Article, and pending the adoption of measures in pursuance of subparagraph 1(e) of Article IX, the Contracting Parties concerned in any case of dispute with regard to the exercise of jurisdiction in Antarctica shall immediately consult together with a view to reaching a mutually acceptable solution.

\textsuperscript{15} United States military personnel, for example, are subject to United States law wherever they are pursuant to the provisions of the Uniform Code of Military Justice, 10 U.S.C. §§ 801-940 (1976). The statute, by its terms, "applies in all places." \textit{Id.} § 805.

\textsuperscript{16} Civilians, in United States activities at least, represent an ever-increasing portion of the population of Antarctica. \textit{Hearings Before the House Subcomm. on Immigration},
no jurisdictional provision for a significant proportion of the Antarctic population.

Anticipating the recurrence of jurisdictional questions, the Treaty parties did, however, make specific provision for discussion of such questions at the future meetings between parties mandated by Article IX(1).17

Whatever discussions may occur in the future, jurisdiction to control criminal conduct in Antarctica by any state is at present shrouded in uncertainty. If levied at any individual other than a national of the asserting state, such an assertion would almost certainly encounter opposition. Those states which do not currently recognize claims to territorial sovereignty are unlikely to countenance exercise of jurisdiction over their nationals by claimants where such exercise is based on sovereignty.18 Nor are claimants likely to surrender territorial jurisdiction to other states, lest such surrender serve as an apparent diminution of their claims.


17. Article IX(1) provides:
   1. Representatives of the Contracting Parties named in the preamble to the present Treaty shall meet at the City of Canberra within two months after the date of entry into force of the Treaty, and thereafter at suitable intervals and places, for the purpose of exchanging information, consulting together on matters of common interest pertaining to Antarctica, and formulating and considering, and recommending to their Governments, measures in furtherance of the principles and objectives of the Treaty, including measures regarding:
   (a) use of Antarctica for peaceful purposes only;
   (b) facilitation of scientific research in Antarctica;
   (c) facilitation of international scientific cooperation in Antarctica;
   (d) facilitation of the exercise of the rights of inspection provided for in Article VII of the Treaty;
   (e) questions relating to the exercise of jurisdiction in Antarctica;
   (f) preservation and conservation of living resources in Antarctica.

Antarctic Treaty, supra note 7, art. IX(1).

18. For example, during a congressional hearing, Robert C. Brewster, Deputy Assistant Secretary of State for Oceans, International Environment and Scientific Affairs (OES), stated: "The United States has not made, and does not recognize, territorial claims by any state in Antarctica. Accordingly, we believe that no state may assert criminal jurisdiction over persons committing crimes in Antarctica on the basis of the territorial sovereignty." 1977 Hearings, supra note 16, at 63. Similarly, during the same hearing, the following interchange took place between Joshua Eilberg, Chairman of the Subcommittee, and James H. Michel, Assistant Legal Advisor of the Department of State:

   Mr. EILBERG: Would we [the United States] protest the assertion of jurisdiction over a U.S. citizen by a foreign government, for example, New Zealand, where such jurisdiction is predicted [sic] on a foreign claim that we do not recognize?
   Mr. MICHEL: Since the U.S. does not recognize claims of territorial sovereignty in Antarctica, we would object to any exercise of jurisdiction in Antarctica based on a territorial claim...

Id. at 66.
III. THE CURRENT STATUS OF CRIMINAL JURISDICTION

Each of the seven claimant states has either enacted specific legislation covering criminal conduct in Antarctica or apparently considers its domestic criminal legislation to be applicable to its Antarctic claims. The claimants apparently base their assertion of criminal jurisdiction on a natural extension of their claimed territorial sovereignty. As suggested above, however, it is likely that such an attempt to assert jurisdiction over an individual other than a national of the claimant state would evoke protest.

Nonclaimant states have evinced varying degrees of vigilance in anticipating criminal misdeeds by their nationals in Antarctica. On one end of the spectrum, South Africa has enacted specific legislation applying its domestic criminal legislation to South Africans in Antarctica. In the median range, certain states such as Japan and the Soviet Union, although not directly addressing the problem of criminal jurisdiction in Antarctica, generally "consider at least certain of their criminal laws as applicable to extraterritorial conduct of their own nationals wherever they may be." At the other extreme, the United States currently has no law concerning criminal offenses specifically applicable to its civilians in Antarctica.

In short, the present state of affairs is chaotic. Although there appear to have been no major criminal incidents in Antarctica, increased human activities in the area may enhance the likelihood of crime. At present, there are at least forty permanent operational scientific research stations in Antarctica. In addition to a contin-

19. See Bilder, supra note 1, at 260 nn. 87, 89, 91, 93, 94.
20. See id. at 260 n.96.
21. Id. at 262 n.98 (citing e.g., GERMAN PENAL CODE § 3; GREEK CODE OF PENAL PROCEDURE § 3; INDIAN PENAL CODE § 4).
22. Professor Bilder, in his excellent and comprehensive article, pointed to the gap in federal legislation which leaves the United States without criminal law applicable to its civilian citizens in Antarctica. Professor Bilder suggested that the situation could be corrected by an amendment to title 18 of the United States Code incorporating by reference those activities made offenses if engaged in within the special maritime and territorial jurisdiction. For the draft of his proposed amendment, see id. at 284.

In July 1977, the House Subcommittee on Immigration, Citizenship and International Law, held a hearing on, inter alia, two nearly identical bills—H.R. 6148 and H.R. 7842—which would carry out Professor Bilder's suggested amendment of title 18. The two bills also contain sections delineating procedures for apprehension, restraint, search and seizure, etc. See 1977 Hearings, supra note 16, at 15-24.

Testimony at the Hearing indicated that the Departments of State and Justice, and the National Science Foundation, favor passage of such an amendment to title 18.

ued expansion of scientific programs,\textsuperscript{25} diversification of human activity in the southern region is imminent.

The possibility of exploitable mineral resources in Antarctica has drawn increasing attention.\textsuperscript{26} Tourism, to a limited extent, has existed for some time on the continent and may be expected to expand in the future.\textsuperscript{27} It has also been suggested that there may soon be trans-Antarctic routes for commercial aviation.\textsuperscript{28} Commercial harvesting of the enormous krill population in the Southern Ocean has begun and may prove a significant source of animal protein.\textsuperscript{29} Support facilities for fishery-related operations may even be established in the near future on the continent itself.

In sum, the scope and complexity of human involvement in Antarctica is growing. As the population shifts to include tourists and employees of private ventures, who may not be as carefully screened and highly disciplined as scientific and military personnel,\textsuperscript{30} it would seem unduly sanguine to depend on a continued absence of criminal activity as a solution.

The issue of precisely who has jurisdiction over criminal behavior in Antarctica is largely irrelevant to the ultimate objective—maintenance of order. Nevertheless, the jurisdictional issue is of strategic importance in the sovereignty dispute. The problem, therefore, is to devise a system for control of criminal behavior which has minimal ramifications for the sovereignty dispute.

\section*{IV. JURISDICTIONAL PRINCIPLES UNDER CUSTOMARY INTERNATIONAL LAW}

Before addressing the specific problem of crime in Antarctica, a brief discussion of jurisdiction under international law is in order.


\textsuperscript{27} 1977 \textit{Hearings}, supra note 16, at 61. Dr. Edward P. Todd, Acting Assistant Director, Astronomical, Atmospheric, Earth and Ocean Sciences, National Science Foundation, testified that: "Last year there were 400 or 500 tourists who visited some part of Antarctica as a result of the tourist service." See P. Jessup \& H. Taubenfeld, supra note 2, at 165; N. M. Meyers, supra note 23, at 33.

\textsuperscript{28} See P. Jessup \& H. Taubenfeld, supra note 2, at 166.

\textsuperscript{29} Shapley, \textit{Antarctic Problems: Tiny Krill to Usher in New Resources Era}, 196 \textit{Science} 503 (1977). Krill are small shrimp-like crustaceans which abound in enormous numbers in the Southern Ocean. Although the size of the total krill stock is not yet known, an estimate places the total biomass at perhaps one billion metric tons. \textit{Id.} at 504. See also 1977 \textit{Hearings}, supra note 16, at 149.

\textsuperscript{30} See, e.g., 1977 \textit{Hearings}, supra note 16, at 60.
There are several jurisdictional principles which have emerged and, to varying degrees, have been accepted under customary international law.\(^{31}\)

The *territorial principle* bases jurisdiction on the locus of the offense, allowing a state to control behavior within its boundaries. This principle has been extended to allow a state to assert jurisdiction over crimes executed beyond its territory but having substantial and direct effects within that territory.\(^{32}\)

The *nationality principle* gives a state jurisdiction over its own nationals regardless of their locus. Competence to prosecute and punish is based solely on nationality.\(^{33}\)

The *protective principle* is based on the necessity of allowing a state to protect certain national interests against injurious acts. States are thus allowed to assert jurisdiction over crimes against their security, integrity or independence, regardless of their locus.\(^{34}\)

The *universality principle* determines "jurisdiction by reference to the custody of the person committing the offense."\(^{35}\) Any state may exercise jurisdiction over perpetrators of universal crimes, the earliest and most firmly established of which is piracy.\(^{36}\) This type of jurisdiction is generally considered residuary and is exercised principally where extradition has been offered but refused by the state of the offender.

The *passive personality principle* determines jurisdiction by reference to the victim's nationality.\(^{37}\) This principle has limited acceptance and its application has been forcefully opposed by certain states.\(^{38}\)

The principles of territoriality and nationality are universally accepted. Territoriality in all cases is of primary importance, since it embodies fundamental notions of territorial sovereignty and equality among sovereigns. The protective principle is invoked by most states; and universality is fairly widely accepted as a source of residual jurisdiction. The passive personality principle, as noted above, is regarded with some disfavor.

\(^{31}\) For an excellent analysis of criminal jurisdiction under international law, see *Harvard Research in International Law, Jurisdiction with Respect to Crime*, 29 Am. J. Int'l L. Supp. 435 (1935) [hereinafter cited as *Harvard Research*].

\(^{32}\) *Id.* at 487, 488.

\(^{33}\) *Id.* at 519.

\(^{34}\) *Id.* at 543.

\(^{35}\) *Id.* at 445.

\(^{36}\) See text accompanying notes 85-88 infra.


\(^{38}\) *Id.* at 445. *See also* Bilder, *supra* note 1, at 272, 273.
V. A Previous Suggestion

Difficulties inhere in any exercise of jurisdiction based on territoriality in Antarctica due to the disputed nature of the claims and the fact that certain territories remain unclaimed. It has been suggested that criminal jurisdiction in Antarctica be based primarily on the nationality of the perpetrator with subsidiary jurisdiction lying in the victim’s state. Absent exercise by either the perpetrator’s state or the victim’s state, jurisdiction would be vested in any contracting party to the Antarctic Treaty. A mode of implementation for this jurisdictional scheme has been posited as an amendment to Article VIII of the Treaty.

Such a proposal is commendable for its simplicity and the relative mechanical ease with which it might be implemented. While the Antarctic population remains small and relatively homogeneous and the incidence of crime remains low, it may be the most practical, workable solution. There are, however, certain immediate and long range difficulties with the scheme.

The most immediate problem would be in securing ratification for such an amendment, particularly since amendment of the Treaty may be effected only through unanimous agreement of the contracting parties. Proposals at the Treaty conference to vest exclusive jurisdiction in each state over its own nationals were opposed by certain of the claimants who feared that such a provision might diminish the status of their sovereignty claims. There is no reason to believe that claimants have become less vigilant over the status of their claims, particularly since estimates of the resource potentials of Antarctica have become more promising. Furthermore, since the present language of Article VIII(2) specifically reallocates juris-


40. In the case of acts or omissions that occur in Antarctica during the course of this Treaty Regime, no person shall be subjected to the jurisdiction of any State, other than:
   1. the State or States of which he is a national; or
   2. a State whose national has been injured by the act or omission in question, provided the State or States referred to in paragraph 1 of this Article have refused prosecution or have otherwise failed to assert jurisdiction; or
   3. any Contracting Party, provided no other State is entitled to assert jurisdiction by virtue of paragraphs 1 or 2 of this Article or all States referred to in those paragraphs have either refused prosecution or otherwise failed to assert jurisdiction.

Comment, supra note 3, at 197.

41. See id.

42. Antarctic Treaty, supra note 7, art. XII(1)(a).

43. Bilder, supra note 1, at 238 n.21.
dictional disputes to the informal channels of mutual consultation.\textsuperscript{44} A formal provision for exclusive jurisdiction over nationals might easily be viewed as an admission by claimant states of their lack of competence to exercise territorial jurisdiction. Currently, informal channels leave the territorial jurisdictional competence question open. Overt transition from informal channels to formal vesting of competence on the basis of nationality closes the question by denying territorial jurisdictional competence. Difficulty may be anticipated, therefore, in securing claimant ratification of the proposed amendment.

There are also certain practical considerations whose importance may increase as the Antarctic population expands. A jurisdictional scheme based largely on nationality presupposes the applicability of national penal codes to the activities of individuals in Antarctica. In the case of some states, such a premise is unfounded.\textsuperscript{45} Such gaps could presumably be remedied by appropriate legislation. There remains, however, the question of the appropriateness of application of national criminal codes to the unique setting of Antarctica. National criminal codes anticipate local and immediate enforcement mechanisms such as courts, detention facilities and police forces. National criminal codes also proscribe a wide and varying range of conduct that may or may not cover all possible conduct in Antarctica. Furthermore, the sanctions of national criminal codes may not be practicable in Antarctica.

Each state, in prosecuting criminal behavior in the Antarctic, would either have to transport the alleged offender home for trial, or locate a court in Antarctica.\textsuperscript{46} Transportation of the alleged offender home would involve concomitant difficulties with preservation of evidence and transportation of witnesses. It would also constitute a cumbersome and expensive operation, particularly in the case of lesser offenses. Transportation of a court to Antarctica would also prove expensive. Moreover, in the case of the United States, for example, due process protections would still attach.\textsuperscript{47} Establishment of separate national courts in Antarctica by each state would constitute a wasteful international duplication of effort in the small, functionally-designed stations in Antarctica.

Therefore, establishing criminal jurisdiction in Antarctica on

\begin{itemize}
\item \textsuperscript{44} Antarctic Treaty, \textit{supra} note 7, art. VIII(2).
\item \textsuperscript{45} See note 33 and accompanying text \textit{supra}.
\item \textsuperscript{46} For discussion of, and comment upon, the practical problems entailed in a jurisdictional scheme of this sort, see 1977 \textit{Hearings, supra} note 16, at 34-36, 59.
\item \textsuperscript{47} See Reid v. Covert, 354 U.S. 1 (1957), which held that the panoply of fifth amendment due process rights are guaranteed to United States civilians tried by United States tribunals abroad. The difficulties may arise, for example, in assuring other constitutional safeguards, e.g., the empaneling of an impartial jury.
\end{itemize}
the basis of nationality principles is by no means a panacea. There are, however, other possibilities for the future.

VI. A PROPOSED CODE

A. Uniform Provisions

It should be noted that unique geographical settings may call for special standards of conduct. This concept was recognized by the United States Court of Appeals for the Fourth Circuit in United States v. Escamilla,48 a case involving manslaughter on an unclaimed ice island in the Arctic called T-3. The court remarked:

Gross negligence or even simple negligence is to be determined by all of the facts and circumstances surrounding an act which is asserted to be either. It would seem plain that what is negligent or grossly negligent conduct in the Eastern District of Virginia may not be negligent or grossly negligent on T-3 when it is remembered that T-3 has no governing authority, no police force, is relatively inaccessible from the rest of the world, lacks medical facilities and the dwellings thereon lack locks—in short, that absent self-restraint on the part of those stationed on T-3 and effectiveness of the group leader, T-3 is a place where no recognized means of law enforcement exists and each man must look to himself for the immediate enforcement of his rights. Certainly, all of these factors are ones which should be considered by a jury given the problem of determining whether defendant was grossly negligent.49

Antarctica is a truly unique area of the earth. "To most people it is as remote and mysterious as the Moon; indeed to many the Moon may well seem more familiar if no less accessible."50 The five and one half million square miles of Antarctica are almost entirely covered by snow and ice sheets, and its temperatures are generally sub-zero. The pack ice of the Southern Ocean surrounding the continent freezes solid in the winter months so the continent is accessible by ship only for the few summer months of December through March.51 The scientific stations have been custom designed to meet the rigors and unique demands of Antarctic existence.

It is suggested, therefore, that what is needed is a special penal code tailored to the actualities of Antarctic conditions.52 Such a code

48. 467 F.2d 341 (4th Cir. 1972).
49. Id. at 347.
50. H. King, supra note 24, at 5.
51. See generally id.
52. The following description of part of the United States research program in Antarctica
could be drafted with the assistance of those who have experienced life in Antarctica first hand, and could fashion appropriate sanctions in an area where imprisonment for all but crimes of violence is highly impractical. Such a code could also take into account behavior which may be unique to the Antarctic living experience.

The Antarctic Criminal Code, as noted below, could be made applicable to behavior in Antarctica in several ways. Regardless of the scheme selected for implementation, the Antarctic Criminal Code itself is an indispensable facet of rational and equitable control of behavior in Antarctica. The standard of behavior required should be uniform and should be appropriate for Antarctic living conditions, irrespective of which state or tribunal exercises jurisdiction to enforce sanctions against an individual for his behavior in Antarctica. An Antarctic Criminal Code would put all individuals in Antarctica on notice of the behavior required and would place them on a parity. Present national criminal codes, with their variations both in proscriptions and sanctions, would generate confusion and inequity should such codes govern the behavior of individuals on the basis of nationality.

B. Implementation

The Antarctic Criminal Code could be implemented in any of three ways. First, it could be promulgated as a uniform penal code for conduct in Antarctica and adopted by each state separately through appropriate legislative procedures. The provisions of the code could then be enforced under the jurisdictional scheme outlined in section V above. Through amendment to the Antarctic Treaty, jurisdiction over behavior in Antarctica would vest initially in the state of the perpetrator, secondly in the state of the victim, and lastly in any Consultative Party. Although implementation of the Antarctic Criminal Code under this scheme would scatter jurisdiction among many states, it would provide a uniform and appropriate standard of behavior. There would remain, however, the

---

is but one small example of the unique activity in Antarctica, underscoring the need for a special criminal code. "The research is conducted at four antarctic stations, from remote temporary field sites, and aboard two research ships. Remote sensing techniques, using satellites, aircraft, rockets, balloons, and unmanned stations, are utilized in the conduct of the research." 1977 Hearings, supra note 16, at 149.

While it is desirable to control interference with, or sabotage of, these activities and equipment, it is unlikely that any national criminal code has an adequate provision to do so. An Antarctic Criminal Code could take into account such unique activities and equipment and have provisions creating sanctions for unauthorized interference therewith.

53. A committee to draft the Code could be nominated in a manner similar to that used for nomination of judges to the International Court of Justice. For the precise procedure, see I.C.J. Stat. arts. 4, 12.
problems of enforcement and trial discussed in section V.

A second possible method for implementation is for the Consultative Parties to the Antarctic Treaty to enact the Code acting as a condominium. A pooling of the claims and interests of the Consultative Parties would create a sovereign, capable of legislating for Antarctica on a territorial basis. The condominium, as sovereign, could also set up appropriate courts and enforcement measures. The idea of a condominium, however, has met with some opposition in the past, and the Consultative Parties might not presently be able to reach such an agreement. As a last resort, claimant states may view formation of a condominium as a desirable bulwark against internationalization or free access. Formation of such a condominium, however, would be a conclusive step towards renunciation of exclusive sovereignty claims. Some claimants may perceive such a step as unnecessary and unduly compromising at this time.

The third possibility is to enact the Antarctic Criminal Code by multilateral treaty open to all states. The treaty would create a tribunal or tribunals to sit in Antarctica itself. This possibility will be discussed in section VII below. First, however, the political ramifications of this proposal require discussion.

The enactment of the Antarctic Criminal Code by treaty, with simultaneous construction and authorization of Antarctic tribunals, is suggested primarily as an interim measure. It is intended to terminate along with the Antarctic Treaty. It is also intended, as is the Antarctic Treaty, to preserve the status of claims and stances taken relative to them. It is thus designed to maximize the potential for ratification by permitting both claimant and nonclaimant states to participate without prejudicing their interests. In this manner, a means for controlling criminal behavior in Antarctica can be established until the sovereignty disputes are resolved.

The difficulty with this proposal is that a tribunal established by treaty would be, in essence, an international tribunal. Claimants may consequently fear that acquiescence in such a treaty would contribute to eventual internationalization of Antarctica. The alternatives, however, are these: (1) claimant assertion of jurisdiction over criminal acts in claimed territories (the consequential disputes

54. A condominium has been suggested as a solution to the Antarctic sovereignty dispute. See, e.g., P. Jessup & H. Taubenfeld, supra note 2, at 179; Hambro, supra note 6, at 225. The condominium form of solution, however, has been specifically rejected by Chile. P. Jessup & H. Taubenfeld, supra note 2, at 179.

55. Such claimants may be less than compelled by a great moral vision of Antarctica as a predestined common space and, hence, may not feel obliged to scurry into a condominium in an attempt to thwart destiny. See, e.g., Comment, Thaw in International Law? Rights in Antarctica Under the Law of Common Space, 87 Yale L.J. 804 (1978).
and reprisals, however, could perhaps trigger an undesirable challenge before the International Court of Justice; (2) the surrender of jurisdiction to the state of the perpetrator or victim under the scheme outlined in section VI (This possibility, like the proposed treaty creating an Antarctic tribunal, may be construed as a tacit partial surrender of sovereignty by claimants. However, this possibility has no similar redeeming scheme for practical administration and enforcement of justice); and (3) the formation of a condominium with the ability to prescribe and enforce law but with its attendant abandonment of hope for recognition of exclusive sovereignty claims.

Thus, while claimants might fear ratification of an Antarctic Criminal Code and Tribunal Treaty as a step towards internationalization, the alternatives are even less appealing. If, in the future, internationalization becomes a significant threat, the condominium alternative is always available. From the claimants' perspective, however, the condominium alternative may be a last resort. If sovereignty claims are to be preserved, ratification of the Antarctic Criminal Code and Tribunal Treaty, which at worst would only have precedential value in some eventual internationalization, is certainly preferable to the absolute surrender of sovereignty to a condominium.

In any event, the proposed treaty is not intended as a step toward internationalization. It emulates the Antarctic Treaty, which was formulated and ratified with a goal in mind—the promotion of scientific research. The Antarctic Treaty was not intended to internationalize Antarctica but, rather, temporarily to set aside sovereignty disputes. The proposed treaty also has a goal—control of criminal behavior in Antarctica during the dormancy period for sovereignty disputes mandated by the Antarctic Treaty. Furthermore, the proposed treaty is meant only to solve the practical problem of criminal behavior control; it is not concerned with whether Antarctica should be internationalized, turned over to the claimants as sovereigns or made a condominium. While theoretical considerations regarding the future of Antarctica may be the subject of long international debate, they offer no assistance in solving the immediate problem of controlling criminal behavior.

In sum, it is suggested that the proposed Criminal Code and Tribunal Treaty offers an immediate and practical interim solution to the problem of controlling criminal behavior in Antarctica in a form which does not impair the status of any state’s claim in Antarctica.
VII. PROPOSED CRIMINAL CODE AND TRIBUNAL TREATY

The proposed treaty would, as previously mentioned, enact an Antarctic Criminal Code and would establish a tribunal or tribunals to sit in Antarctica itself. Since such a tribunal would be relatively novel, several aspects of the idea merit discussion. A first set of questions centers on the competence and jurisdiction of the tribunal. A second set concerns the structure and organization of the tribunal and such procedural safeguards as might be designed to order its proceedings. Included in this latter discussion is the question of the tribunal's jurisdiction vis-à-vis the jurisdiction of national courts.

A. Historical Precedents

The concept of enacting a penal code and court system by treaty without relation to sovereignty is not without historical harbinger. The Spitzbergen example presents an interesting analogy to the situation in Antarctica. "The archipelago of Spitzbergen, an area lying between northern Greenland and Franz Joseph Land, totally lacking an indigenous population and relatively unsuited for permanent habitation due to its arctic climate, was claimed from time to time, with varying degrees of exclusiveness, by several European nations." The area was claimed by the English and the Danes early in the seventeenth century. The Dutch and French, under the doctrine of freedom of the seas, also claimed access and right to use. Initial concern, however, was mainly with whaling bases, and as the whaling industry declined in the mid-seventeenth century, the islands decreased in international importance until the nineteenth century. The discovery of coal and iron beds in the latter part of the nineteenth century resurrected interest in the islands. Because several states were concerned, a conference was convened at the invitation of the Norwegian government in 1910.

In 1912, a protocol of seventy-seven articles was formulated and was intended, according to Jessup and Taubenfeld,

56. P. Jessup & H. Taubenfeld, supra note 2, at 34. See also Lansing, A Unique International Problem, 11 AM. J. INT'L L. 763 (1917).
57. P. Jessup & H. Taubenfeld, supra note 2, at 34.
58. Id. at 34, 35.
59. In the 1880's, Sweden, Norway, the United States and Britain set up mining operations or stated claims, and a Russian company secured an option on some Norwegian claims. Id. at 35.
terra nullius; and (4) the recognition, due to their share in the discovery, their territorial proximity, their investments of their scientific explorations, of the special concern of Russia, Sweden and Norway in the legal organization of Spitzbergen.\(^{60}\)

The international regime proposed by the protocol was never implemented, however, due to the onset of World War I and the establishment, by treaty, of Norwegian sovereignty in 1920.\(^{61}\) The proposed regime nonetheless had several interesting features for purposes of the present discussion.

In the first instance:

Spitzbergen's neutrality was formally provided for and its status as terra nullius was preserved—that is, no state was to be permitted to annex it in whole or in part nor could it be subjected, in any form, to the sovereignty of any Power. Natural and juristic persons while at Spitzbergen retained their own nationality.\(^{42}\)

This state of affairs is closely analogous to the current situation under the Antarctic Treaty.\(^{43}\) Antarctica is also neutralized pursuant to the Treaty by the Article I provision that it be used only for peaceful purposes, and by the combined provisions of Articles IV and X which preclude, for all practical purposes, any exercise of sovereignty.\(^{44}\)

Under the Spitzbergen protocol, governing authority was placed in the hands of an International Commission whose members were to be appointed by certain signatories.\(^{45}\) Control of criminal conduct was specifically provided for. The Commission was given the power to decree regulations for order and security. Major criminal acts were to be tried by the perpetrator's state of nationality. Acts in violation of Spitzbergen regulations could be punished by penalties decreed by the Commission (up to three months in jail or
limited fines). Cases were to be tried before an international commissioner of the police, with appeal to the Commission as court of last resort. The protocol also provided for an international police force.

The Spitzbergen protocol therefore presented the following framework: (1) a penal code enacted by treaty (in this case by vesting drafting powers in an international commission); (2) an international criminal tribunal and court of appeal; and (3) an international police force. No facet of the plan was dependent upon or connected with sovereignty; that is, the jurisdiction of the tribunal and the power of the Commission to draft the penal code were not based on territorial sovereignty. Instead, it was founded simply on the terms of the treaty or convention itself. Since this treaty never went into force, it is, of course, impossible to assess the difficulties which might have been encountered after its implementation. It is nonetheless indicative of the fact that, for an area similar to Antarctica, international cooperation in enactment of a regime unrelated to sovereignty was possible.

Although the subject cannot be explored fully in this comment, consideration of historical precedent for an Antarctic Criminal Code should include at least passing reference to the International Military Tribunals (I.M.T.) established at Nuremberg and Tokyo. These tribunals were international and were given the power to try individuals for crimes against the international law of war.

The individuals in the Nuremberg trials were nationals of states that were not contracting parties to the tribunal's empowering statute. The Charter of the I.M.T. at Nuremberg defined the crimes over which the tribunal had jurisdiction, separating them into three categories: (1) crimes against peace; (2) war crimes; and (3) crimes against humanity. Some of the crimes enumerated in the Charter went beyond traditional war crimes, so much so that charges of ex post facto lawmaking have been levelled at I.M.T. signatories.

66. Id. at 37.
67. Id. at 38.
68. See 59 Stat. 1544 (1945).
69. See 14 Dep't State Bull. 361 (1946).
70. For a discussion of individuals as proper subjects of international law amenable to the jurisdiction of international criminal tribunals, see Pella, Towards an International Criminal Court, 44 AM. J. INT'L L. 37, 40 (1950).
71. For an extensive listing of discussions of the extent to which war crimes were crimes under international law before 1939, see Wright, The Law of the Nuremberg Trial, 41 AM. J. INT'L L. 38, 42 n.14 (1947).
72. See, e.g., id. at 44. The same charge was made in the case of the trial of a Japanese general by a United States military commission in Justice Murphy's dissenting opinion in In re Yamashita, 327 U.S. 1, 26 (1946).
Since jurisdiction of the I.M.T. was based neither on principles of territoriality nor of nationality, its validity has been the subject of much scholarly debate. Alternate rationales have been suggested to justify the actions of the tribunal: that the joint powers were in the position of the government of Germany; or that each sovereign had pooled its right to exercise universal jurisdiction over the crimes. In any case, a unanimous resolution of the United Nations General Assembly in 1946 affirmed the principles set out in the Nuremberg Judgment and in the Charter for the tribunal. It may therefore be suggested that the precedential value of the I.M.T. rests on two bases. First, regardless of theoretical difficulties, the I.M.T. did exercise de facto jurisdiction. Second, the I.M.T. received international affirmation through the resolution of the United Nations.

The situation in post-war Germany which occasioned establishment of the I.M.T. obviously is only roughly analogous to that of present day Antarctica. In the context of the proposed Antarctic Criminal Code and Tribunal Treaty, however, the I.M.T. may be cited in limited fashion for at least certain precedents despite acknowledged distinctions between the two situations. An international criminal tribunal may be enacted by treaty or international agreement; the tribunal may be declared competent to try crimes delineated in the agreement; and it may be considered competent to try individuals.

The concept of an international criminal court has been circulating since early in the twentieth century. Such a court would try certain international crimes, such as terrorism, genocide and war crimes. In 1951, a Committee on International Criminal Jurisdiction was appointed by the General Assembly. A year later the committee submitted a Draft Statute for an International Criminal Court.

---

73. See, e.g., R. Wortzel, The Nuremberg Trials in International Law (1960); Wright, supra note 71, at 38.
74. See, e.g., Wright, supra note 71, at 51.
76. It is recognized that the I.M.T. may have been intended for very limited purposes and that it may be argued that it was addressed to the atrocities committed during World War II. Once an event has been fixed historically by the passage of time, however, the scope and direction of its use as precedent for other events has passed beyond the control of its participants. The I.M.T. at least arguably stands for the propositions set forth in text and that is sufficient to establish its potential precedential value. For a discussion of the I.M.T. as precedent, see R. Wortzel, supra note 73, at 91-92.
77. See Wright, supra note 71, at 60.
Although never adopted, the statute reflects an international recognition of the viability of international criminal tribunals and an embryonic willingness to disassociate the notions of sovereignty and criminal jurisdiction.

B. Jurisdictional Basis

The situation in Antarctica is unique. It is the last landmass not subject to an internationally recognized sovereign. Furthermore, it has been formally recognized in the international community as an area in which international cooperation and peace should prevail. The situation in Antarctica is sui generis; likewise, solutions to various Antarctic problems, including that of control of criminal conduct, will necessarily be novel. Such solutions, while they may draw loosely upon precedents, legal principles and currently recognized international law, may not be rigidly confined by the past.

The proposed Antarctic Criminal Code and Tribunal Treaty, for example, purports to construct criminal jurisdiction without a framework of territoriality or territorial sovereignty. Such a treaty is intended to implement control of criminal behavior, while preserving the atmosphere of international cooperation fostered by the Antarctic Treaty. With such unique parameters, formation of an Antarctic Criminal Code and Tribunal-Treaty must perforce be innovative.

Abandoning, as it must, any territorial principles upon which to base the tribunal’s jurisdiction, the treaty must look to other jurisdictional bases. Initially, the treaty, like the Nuremberg agreement, need make no reference to jurisdictional principles. The treaty should simply declare that its tribunals shall have jurisdiction over certain enumerated crimes. The discussion of jurisdictional principles which follows is largely for theoretical purposes or in anticipation of a possible jurisdictional challenge after enactment.

Of the five generally recognized jurisdictional principles,\(^8\) territoriality has been rejected as divisive and inappropriate, and the passive personality and protective principles are virtually irrelevant. Thus, only two of the traditional five principles remain for discussion—nationality and universality.

The nationality principle has possible applicability to an Antarctic criminal tribunal. Since each state has unquestioned jurisdic-

\(^1\) (1949); Finch, An International Criminal Court: The Case Against Its Adoption, 38 A.B.A. J. 644 (1952); Golt, The Necessity of an International Court of Criminal Justice, 6 Washburn L.J. 13 (1966); Wright, supra note 71.

\(^8\) See notes 32-38 and accompanying text supra.
tion over its own nationals, each state may, by treaty, delegate that jurisdiction to another entity under the terms of the treaty.

A similar delegation of jurisdiction, for instance, is approximated by the NATO Status of Forces Agreement. The agreement works as follows:

The country (receiving state) in which troops of another (sending state) are stationed concedes to the sending state the right to try by court martial within its borders members of its armed forces for violations of its military law. However, the receiving state has the right to try such persons for violations of its law in its ordinary courts.

Conflicts of jurisdiction in cases of acts illegal under both laws are provided for in the following way. [Priority of jurisdiction is set according to whether the crime was committed in the performance of an official duty.] Each country may waive its primary jurisdiction.

Any waiver of primary jurisdiction by the sending state is essentially an assignment of jurisdiction to a foreign tribunal pursuant to terms of a treaty.

The Convention on Genocide, adopted by the United Nations General Assembly in 1946, defined certain acts as crimes under international law and contemplated an international penal tribunal to assert jurisdiction over individuals committing those acts. The Convention also granted jurisdiction over nationals to a foreign tribunal pursuant to treaty. Although the jurisdiction of the international penal tribunal, as contemplated by the Genocide Convention, would rest on universality principles, it nonetheless incorporates the notion that a state has agreed by treaty to a diminution of its jurisdiction over its nationals.

Jurisdiction of the Antarctic criminal tribunal could thus be derived from the surrender by each signatory of jurisdiction over its nationals. Any difficulty concerns the converse; nationals of nonsignatories would not be subject to the tribunal's jurisdiction. While, in practice, jurisdictional challenges on this basis might be nullified by the tribunal's de facto control, the theoretical gaps would not thereby be filled. Consequently, the nationality principle is only partially effective in supplying jurisdictional underpinnings for the Antarctic criminal tribunal.

---

82. H. STEINER & D. VAGTS, TRANSNATIONAL LEGAL PROBLEMS 823 (1968).
1. THE UNIVERSALITY PRINCIPLE

The universality principle may be extended to cover the situation in Antarctica. Foundation of the jurisdiction of an Antarctic criminal tribunal upon the universality principle would set its limits according to the following definition: if the action is one which is a crime under international law, the competence to prosecute and punish may be founded simply upon a lawful custody of the person charged with the offense. Presence of the individual before the Antarctic criminal tribunal, regardless of the individual's nationality, would be sufficient to confer jurisdiction if the crime were a crime under international law. To be effective, the contemplated penal code must therefore establish the enumerated offenses as crimes under international law.

There are two possible justifications for this approach. The first is that the principles underlying the process by which certain crimes are considered to be universal comport with the principles inspiring the enactment of an Antarctic penal code. If so, the offenses enumerated therein should also trigger jurisdiction based on universality. The second justification assumes that because the Antarctic Criminal Code is enacted by treaty, it is ipso facto international law.

2. INTERNATIONAL OR UNIVERSAL CRIMES

Scholars are not in accord in expressing the principles which underlie international recognition of the universality principle. Nonetheless, reference is necessary to various scholarly comments on the universality principle. Discussion of the piracy problem will be presented first since it is the most notorious crime subject to universality jurisdiction.

The most comprehensive and familiar compilation of materials on the subject—the Harvard Draft Convention on Jurisdiction with Respect to Crime and Commentary85—provides the following explanation for universal jurisdiction over piracy:

Originating in a period when piratical depredations were a very real menace to all water-borne commerce and traffic, the competence to prosecute and punish for piracy was commonly explained by saying that the pirate who preyed upon all alike was the enemy of all alike . . . . The competence is perhaps better justified at the present time upon the ground that the punishable acts are committed upon the seas where all have an interest in

84. See Harvard Research, supra note 31, at 564.
85. Id.
the safety of commerce and where no State has territorial jurisdiction.\textsuperscript{86}

The relevance of this reasoning to Antarctica is clear: all have an interest, as declared by international treaty, in the safety of scientific exploration and research in Antarctica, and certainly no state has uncontested territorial jurisdiction.\textsuperscript{87}

Some commentators assert that in the face of international conventions which recognize certain crimes, when the issue becomes trial and punishment, some departure from traditional principles of national criminal jurisdiction, including territoriality of crimes, is permissible.\textsuperscript{88} Were this approach to be accepted universally, there would be no difficulty in characterizing offenses against an Antarctic Criminal Code as international crimes.

Two trends of thought seem to stem from the commentaries on international crime. One, centering on piracy, holds that universal jurisdiction arises because the locus of the offense, the sea, is beyond territorial competence and the offense itself disrupts an international interest in safety of commerce. These similarities to the Antarctic situation have already been noted. The other trend, exemplified by conventions on genocide and slavery, presupposes a state of affairs which is generally abhorrent to civilized states and which is unlikely to be corrected nationally. The currently available alternatives in Antarctica—lawlessness or triggering international disputes through national attempts at law enforcement—are similarly unattractive to civilized states and are unlikely to be corrected nationally or territorially.

3. TREATY AS INTERNATIONAL LAW

The second way to establish that offenses against the Antarctic Criminal Code are international crimes is to aver that the code is international law because it is enacted by multilateral treaty. As far back as 1935, this notion had sufficient proponents to be included in the Harvard Draft Code.\textsuperscript{89} The principle has had forty years to

\textsuperscript{86} Id. at 566. See also H. Steiner & D. Vagts, supra note 82, at 811.
\textsuperscript{87} See also Kuhn, The Genocide Convention and States Rights 43 Am. J. Int'l L. 498, 500 (1949).
\textsuperscript{88} Golt, supra note 79, at 21.
\textsuperscript{89} Finally, there are those who would assert a jurisdiction, comparable to that over piracy, with respect to all crimes which States have agreed by treaty to repress . . . . In short, proponents of this view would adopt international cooperation for the repression of certain crimes as the test for determining whether there is to be a universal jurisdiction with respect to such crimes on the same basis as in case of piracy. If a list of such crimes is to be undertaken, this is perhaps the soundest basis for selection; but it can hardly be said that any such principle of
mature and could find felicitous application in the situation in Antarctica. It has also been asserted:

[T]here are three standards for determining that an act is an international crime for which an individual may be held responsible: (1) if it is confirmed as such by customary international law and the practice of states, as with piracy and war crimes; (2) if it is established as such by treaty or international agreement, as for example, the conventions against opium traffic; and (3) if it constitutes a violation of fundamental principles of justice.\(^9^0\)

Since the Antarctic Criminal Code would be enacted by multilateral treaty, offenses against that code could properly be characterized as international crimes for which any criminal, regardless of nationality, may be prosecuted by any state and by an Antarctic criminal tribunal.

A final suggestion regarding theoretical bases for jurisdiction is that none of the traditional principles is clearly applicable or appropriate for an Antarctic criminal court. An alternate approach to strained application of old principles is simply to formulate new ones. The following rationales could be considered as motivating the Antarctic Criminal Code and Tribunal Treaty: (1) under present conditions, the international community must tolerate either lawlessness or international dispute; (2) both conditions are internationally disruptive; (3) it is universally recognized in human society that some law is better than no law; (4) accordingly, by multilateral treaty, states may specify what offenses shall be deemed impermissible and may establish trial and enforcement mechanisms. The jurisdiction of a tribunal so established would be based on the principle that were its jurisdiction not recognized, lawlessness—a universally deplored condition—would prevail.

These theoretical jurisdictional difficulties may eventually be of no practical importance. Were the treaty enacted, it has been suggested that any jurisdictional challenges would leave it "incumbent upon the challenger to demonstrate that the claim violates an international standard; the claimant does not have to prove a rule of law in support of each claim."\(^9^1\) Thereafter, absent a showing that a state’s exercise of its jurisdiction would fill a legal void, the totality of the circumstances would favor the recognition of treaty jurisdiction.

---

\(^9^0\) Harvard Research, supra note 31, at 21.

\(^9^1\) R. Wostzek, supra note 73, at 110 (emphasis added).

Taube, Taubenfeld, States and Offenses Committed Beyond Their Borders, 16 N.Y.L.F. 592, 599-600 (1970).
Only a rough outline for the structure of an Antarctic criminal justice system need be suggested here since practical considerations would supply the details. It is anticipated that such a system would be funded by a common treasury established by the Antarctic Criminal Code and Tribunal Treaty signatories. Additional funding could be derived from collection of fines imposed as penalties for criminal code violations.

All positions should be filled by appointees nominated by treaty signatories. The number of tribunals and positions should be determined by reference to expedience and need. Leaving the quantities flexible, the positions should include a trial judge, a prosecutor, a defense attorney, and a magistrate. In addition, some type of pretrial confinement facilities would be necessary, particularly for perpetrators of violent crimes.

Any sentences entailing incarceration should be served in the offender's state of nationality if that state is a signatory. If the offender were a national of a nonsignatory, his sentence would have to be served in the prisons of a signatory state. Furthermore, any signatory that fails to enforce such a sentence when its convicted national is sent home would thereafter lose the privilege of punishing its own nationals. These measures, when incorporated into the treaty, would encourage states to become signatories to the treaty and to cooperate in furthering the enforcement.

A board of clemency should be established to handle appeals.

92. Ratification of the Mexican-Canadian prisoner exchange treaty by the United States will provide some indication of political and legal considerations to be taken into account in drafting such a scheme. See U.S. Citizens Imprisoned in Mexico: Hearings Before the Subcomm. on International Political and Military Affairs of the House Comm. on International Relations, 94th Cong., 1st Sess. 4 (1975-76).

First, while the Senate is required to pass on all treaties, U.S. Const. art. II, § 2, cl. 2, approval of the House of Representatives would also be necessary because the treaty would define international criminal acts and provide punishment therefor. U.S. Const. art. I, § 8, cl. 10. Such a ratification process may not only delay the effective date of a treaty but would also require a proposal which would satisfy both houses of Congress.

Second, under the proposed plan, United States citizens would probably be afforded habeas corpus rights while serving sentences in United States jails after having been sentenced in Antarctica. Such review of the tribunal's decisions with strict due process standards should be evaluated beforehand, in order to preclude the undermining of a delicate international framework.

These are considerations that must be addressed, but which are beyond the scope of this article. See generally Schwartz, Rights and Remedies in the Federal District Courts of Mexico and the United States, 4 Hastings Con. L.Q. 67 (1977); Stotzky & Swan, Due Process Methodology and Prisoner Exchange Treaties: Confronting an Uncertain Calculus, 62 Minn. L. Rev. 733 (1978); Developments in the Law—Federal Habeas Corpus, 83 Harv. L. Rev. 1038 (1970).
from the trial courts. Since the appellate docket would be small, defendants would not be subject to lengthy delays in appellate hearings. A possible method for formation of the board of clemency would be to permit each signatory to submit the name of a person expected to be making an extended stay in Antarctica. The board could be drawn from those nominees. The board of clemency would be a court of last resort and its disposition of cases final.

Sufficient provision for procedural safeguards would have to be included in the draft of the treaty so that at least fundamental fairness would be assured. One model, suggested by the NATO Status of Forces Agreement, would provide that a defendant prosecuted under the jurisdiction of the Antarctic criminal tribunal would be entitled to rights equivalent to the fifth and sixth amendment rights of the Constitution of the United States. Another proposed international model for achieving at least minimum procedural due process may be found in Article 14 of the International Covenant on Economic, Social and Cultural Rights. The Charter of the I.M.T. at Nuremberg had a similar provision for detailed procedures to ensure a fair trial for defendants. Sufficient safeguards of personal rights would achieve two goals: assuring a civilized system for dispensation of justice, and allaying the qualms of potential signatories connected with partial surrender of jurisdiction over their nationals.

VIII. Conclusion

As long as the territorial claims in Antarctica remain unresolved, some interim measures are necessary for control of criminal conduct. At the minimum, an Antarctic Criminal Code should be drafted and enacted domestically by all interested states. Such a code, as suggested above, would delineate uniform standards of behavior appropriate for conditions in Antarctica, and would pro-

93. For crimes tried locally in Spitzbergen, it was contemplated that the internationally appointed Commission would serve as a court of last resort. P. Jessup & H. Taubenheim, supra note 2, at 37-38.
94. Allowance for jurisdictional review by the International Court of Justice, or any other body, would only undermine the board's efficacy. So long as adequate protection is afforded in the Antarctic courts, no such review would be necessary.
98. For a discussion of the standards of justice which might be considered necessary by the United States, see Finch, Draft Statute for an International Criminal Court, 46 Am. J. Int'l L. 89, 94 (1952).
vide uniform sanctions for all infractions.

The present status of territorial irresolution only exacerbates the tension prompted by criminal incidents. Implementation of a jurisdictional scheme based on nationality through amendment to the Antarctic Treaty could enhance control over criminal conduct, although it leaves unresolved many of the practical problems entailed in prosecution and enforcement. Formation of a condominium would provide the crucial lawmaking authority, were the claimant states willing to abrogate exclusive claims of sovereignty.

The Antarctic Treaty establishes precedent for the area by constructing a unique regime of international cooperation. That regime separates a universal goal—furtherance of scientific knowledge—from the divergent goals born of the territorial claims. An Antarctic Criminal Code and Tribunal Treaty may similarly be able to disengage a universal goal—maintenance of order through control of criminal conduct—from the territorial claims dispute.

As with any novel proposition, the Antarctic Criminal Code and Tribunal Treaty is attended by certain theoretical difficulties which may impede ratification. It could nonetheless prove to be a practical and workable system that would foster international cooperation in Antarctica.