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Crime: The UN Agenda on International Cooperation in the Criminal Process

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Abstract

This article focuses on a package of model treaties on international criminal cooperation that were approved at the Seventh and Eighth United Nations Congresses on the Prevention of Crime and the Treatment of Offenders, in 1985 and 1990.

KEYWORDS: agenda, UN, crime

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This article focuses on a package of model treaties on international criminal cooperation that were approved at the Seventh and Eighth United Nations Congresses on the Prevention of Crime and the Treatment of Offenders, in 1985 and 1990.¹ These models represent an attempt to capture the state of the art in international cooperative practice. The model treaties in question are: Model Agreement on the Transfer of Foreign Prisoners,² Model Treaty on Extradition,³ Model Treaty on Mutual Assistance in Criminal Matters,⁴ Model Treaty on the Transfer of Proceedings in Criminal Matters,⁵ Model Treaty on the Transfer of Supervision of Offenders Conditionally Sentenced or Con-

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1. The United Nations Congresses, held by the United Nations every five years beginning in 1955, bring together specialists in penal law and administration, both governmental and non-governmental, from most countries of the world to share common experiences and to formulate standards. The tradition of holding Congresses of this nature goes back to the 1870s. *See generally* B. ALPER & J. BOREN, CRIME: INTERNATIONAL AGENDA (1972); L. RADZINOWICZ, *International Collaboration in Criminal Science in THE MODERN APPROACH TO CRIMINAL LAW* 467 (L. Radzinowicz & J. Turner eds. 1945); Clark, *The Eighth UN Congress on the Prevention of Crime and Treatment of Offenders*, 1 CRIM. L.F. 513 (1990).

2. *Report of the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders*, U.N.Doc.A/CONF.121/22/Rev.1 at 53 (1986) [hereinafter Model Prisoner Transfer Agreement].

3. *Report of the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders*, U.N. Doc. A/CONF.144/28 (1990) at 71 [hereinafter Model Extradition Treaty].

4. *Id.* at 82 [hereinafter Model Mutual Assistance Treaty].

5. *Id.* at 96 [hereinafter Model Transfer of Proceedings Treaty].

ditionally Released,⁶ and Model Treaty for the Prevention of Crimes that Infringe on the Cultural Heritage of Peoples in the Form of Movable Property.⁷

I shall endeavor both to analyze the documents themselves and to place them in legal and historical context.

I. BACKGROUND TO THE MODELS

In the simpler world of the nineteenth century, most of the impetus for encouraging transnational cooperation in criminal matters was generated by fleeing thieves and murderers. The basic response was the development of a network of bilateral extradition treaties which provided the means for the return of fugitives to justice.⁸ Few countries were ever entirely systematic in their pattern of treaties and there were always relatively safe havens left in the cracks. Many former colonial territories, moreover — including some developed ones like my own, New Zealand — never got around after independence to negotiating more than a handful of their own treaties. For the most part, they have relied on treaty succession to the treaties of the former metropolitan power. If my unscientific examination of the literature is any guide, the most interesting issue in extradition for decades was the political offender exception, a dash of human rights in an otherwise law and order structure, normally written into at least those treaties between states with a Western European political tradition.⁹

Along with the invention of the multilateral treaty in the nineteenth century, however, came a gradual realization that there were some societal ills that were of international concern and should be dealt with in part by the criminal law on a transnational and multilateral

6. *Id.* at 103 [hereinafter Model Transfer of Supervision Treaty].

7. *Id.* at 110 [hereinafter Model Cultural Heritage Treaty].

8. Within the British Empire, rendition of the likes of thieves and murderers between parts of that entity was facilitated by Imperial legislation. The modern Commonwealth has its successor to that in the "Scheme" initiated in 1965 and amended in 1983 and 1986. The basic approach of the Scheme (which is not a treaty) is the adoption by most members of the Commonwealth of what amounts to parallel legislation permitting return of fugitives under circumstances where extradition would be appropriate between two non-Commonwealth countries or between a Commonwealth country and a non-Commonwealth country. See *Commonwealth Scheme for the Rendition of Fugitive Offenders, as amended in*, 16 COMMONWEALTH LAW BULL. 1036 (1990). The actual workings of the scheme are similar to a network of bilateral treaties.

9. C. VAN DEN WIJNGAERT, *THE POLITICAL OFFENCE EXCEPTION* 72 (1980).

basis.¹⁰ Early examples were the slave trade,¹¹ the trade in women and children,¹² trade in obscene publications,¹³ forgery of currency¹⁴ and trade in illicit drugs.¹⁵ These have continued to be of some moment, but they were joined — as the twentieth century progressed and the United Nations came into existence — by perhaps more politically charged items such as genocide,¹⁶ war crimes,¹⁷ *apartheid*,¹⁸ and various terrorist offenses (like aircraft hijacking,¹⁹ attacks on diplomats,²⁰ the taking of hostages²¹ and torture²²).

10. For a comprehensive list of multilateral criminal law treaties, see M. BASIOUNI, *A DRAFT INTERNATIONAL CRIMINAL CODE AND DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL TRIBUNAL* 355 (1987) (published in this Symposium).

11. See, e.g., Declaration Relative to the Universal Abolition of the Slave Trade, Feb. 8, 1815, 2 Martens Nouveau Recueil de Traités 432; Slavery Convention, Sept. 25, 1926, 60 L.N.T.S. 253; Supplementary Convention on the Abolition of Slavery, Sept. 7, 1956, 266 U.N.T.S. 3.

12. See, e.g., International Agreement for the Suppression of the White Slave Traffic, Mar. 18, 1904, 1 L.N.T.S. 83; International Convention for the Suppression of the Traffic in Women and Children, *opened for signature* Sept. 30, 1921, 9 L.N.T.S. 415; Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others, May 4, 1949, 96 U.N.T.S. 271.

13. See, e.g., Agreement for the Suppression of the Circulation of Obscene Publications, May 4, 1910, 7 Martens Nouveau Recueil de Traités (ser.3) 266; International Convention for the Suppression of the Circulation of and Traffic in Obscene Publications, Sept. 12, 1923, 27 L.N.T.S. 169.

14. See International Convention for the Suppression of Counterfeiting Currency, Apr. 20, 1929, 112 L.N.T.S. 371.

15. See, e.g., International Opium Convention, Jan. 23, 1912, 8 L.N.T.S. 187; Single Convention on Narcotic Drugs, Mar. 30, 1954, 520 U.N.T.S. 151; United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, U.N. Doc. E/CONF.82/15 (1988).

16. Convention on the Prevention and Punishment of the Crime of Genocide, G.A. Res. 260 (III)A, 3 U.N. GAOR, U.N. Doc. A/810 (1948).

17. Geneva Conventions of 1949.

18. International Convention on the Suppression and Punishment of the Crime of *Apartheid*, G.A. Res. 3068 (XXVIII), 28 U.N. GAOR Supp. (No. 30) at 75, U.N. Doc. A/9030 (1973).

19. *Convention for the Suppression of Unlawful Seizure of Aircraft*, Dec. 16, 1970, 10 INT'L LEGAL MATERIALS 133 (1971); *Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation*, Sept. 23, 1971, 10 INT'L LEGAL MATERIALS 1151 (1971).

20. Convention on the Prevention and Punishment* of Crimes Against Internationally Protected Persons, Including Diplomatic Agents, G.A. Res. 3166 (XXVIII), 28 U.N. GAOR Supp. (No. 30) at 146, U.N. Doc. A/9030 (1973).

21. International Convention Against the Taking of Hostages, G.A. Res. 34/146, 34 U.N. GAOR Supp. (No. 46) at 245, U.N. Doc. A/34/46 (1979).

Each of such activities became the subject of international efforts at control, centered on one or more multilateral treaties which typically require parties to the treaty to criminalize the activity and make an effort to prosecute — or to extradite to someone else who will prosecute — those who engage in it. The current fuel encouraging international cooperation is thus abhorrence of the egregious violator of basic rights, the terrorist, the drug cartel and organized crime in general. These areas are not, however, in all respects different from traditional crime and there is, in fact, much cross-fertilization going on. More cooperation in dealing with traditional problems is worth some effort too. In the long run, cooperation in fighting traditional crime may be of more practical note than attempts to deal with the obviously trendy topics.

In any event, the multilateral treaties commonly proceed with some fairly standard variations within the arsenal of international cooperation.²³ Some of them try to facilitate extradition by adding the offense in question to the list of extraditable offenses contained in existing bilateral treaties, or by providing that the multilateral treaty itself may be regarded as sufficient basis for extradition, even in the absence of another treaty. Making such an offense “extraditable” still leaves the political offender issue up in the air. In some cases, such as the Genocide²⁴ and *Apartheid*²⁵ Conventions, the treaty simply denies that political offender status may ever attach to the person charged with a treaty offense. In other cases, such as the Hijacking and Offenses Against Aircraft Conventions, a state may take the position that the accused is a political offender, but must nonetheless bring the case before its prosecutorial authorities with a view to bringing the accused to trial.²⁶

The regional European Convention for the Suppression of Terrorism²⁷ assimilates some of the broader multilateral terrorism treaties with the Genocide and *Apartheid* models as between the parties to the

22. Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, 39 U.N. GAOR Supp. (No. 51) at 197, U.N. Doc. A/39/51 (1984).

23. I have expanded upon this in Clark, *Offenses of International Concern: Multilateral State Treaty Practice in the Forty Years Since Nuremberg*, 57 NORDIC J. INT'L L. 49 (1988).

24. Convention on Genocide, *supra* note 16, at art. VII.

25. Convention on *Apartheid*, *supra* note 18, at art. XI.

26. See Clark, *supra* note 23, at 66-67.

27. Convention for the Suppression of Terrorism, Nov. 10, 1976, Europ. T.S. No. 90.

regional convention. It provides that for the purpose of extradition between its contracting states an offense within the scope of the Hague Convention for the Suppression of Unlawful Seizure of Aircraft²⁸ and an offense within the scope of the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation²⁹ shall not be regarded as a political offense or as an offense inspired by political motives.³⁰

Such treaties respond to the absence of an international penal tribunal by treating nation states as the agents by necessity of the international system. They thus encourage the exercise of jurisdiction on theoretical bases which have always seemed a little esoteric to the common law mind - such as the nationality of the accused, the nationality of the victim (so-called "passive personality" jurisdiction) and universal jurisdiction.³¹

Rather plainly, though, the multilateral treaties have not addressed all of the relevant problems of international cooperation. What is more, they rely for their efficacy on the network of bilateral relations already mentioned, since they in effect incorporate those relationships by reference. This has led to efforts both to modernize the bilaterals³² (not only as to extradition but also as to areas of cooperation beyond that) and to encourage states that do not have a serious network of bilaterals to enter into negotiations with others. This is indeed the role of the models adopted in 1985 and 1990. It has been taken as a given that a massive global treaty tying together all the loose ends is simply not about to happen. Thus, painstaking work must be done by individual countries to put the pieces together mostly on a bilateral basis.³³

28. Convention on Aircraft, *supra* note 19.

29. Convention on Aviation, *supra* note 19.

30. Convention on Terrorism, *supra* note 27, at art. 1 (which also denies political offense status to various acts constituting offenses against internationally protected persons, kidnapping and the taking of hostages and various acts involving a danger to the public).

31. Clark, *supra* note 23, at 85-86.

32. On the strategy of United States' modernization efforts, see Nadelman, *The Role of the United States in the International Enforcement of Criminal Law*, 31 HARV. INT'L L.J. 37, 64 (1990).

33. Note the trenchant comment by Nadelman, *supra* note 32, at 65: "Multilateral arrangements suffer from their tendency to settle on the lowest common denominator of cooperation. Bilateral treaties, on the other hand, afford the opportunity to push the negotiating partner to include those provisions of greatest interest and advantage to the United States." It is, of course, not only the United States that may seek such advantages — mutual ones even! A very good discussion of the practical and cultural

although some further regional developments might be expected.³⁴ Foreign offices and justice departments, especially those in developing countries and even small developed ones, simply do not have the resources to re-invent the wheel each time they enter into negotiations. Hence, it was deemed helpful to have some widely accepted models to which to turn - a kind of international form book.

This enterprise represents a new departure for the United Nations. The organization has had a great deal of experience with the drafting of other kinds of "instruments" — multilateral treaties such as the Covenants on Human Rights,³⁵ and resolutions of a softer legal nature which contribute to the development of international custom, such as the Universal Declaration of Human Rights³⁶ and the Standard Minimum Rules for the Treatment of Prisoners.³⁷ But the present documents are instruments of a different juridical nature. They represent a benchmark to follow but anticipate that states will almost certainly make some variations as they tailor-make the contents to their own needs and legal structure.³⁸

problems encountered by negotiators in the area, especially those dealing across different legal systems is contained in Eser, *Common Goals and Different Ways in International Criminal Law: Reflections from a European Perspective*, 31 HARV. INT'L L.J. 117 (1990).

34. Thus, the models are all drafted primarily in language that assumes the treaty to be a bilateral one, but occasionally there are lapses where the language reads more like that of a multilateral. Not much tidying up is required to utilize the models in either mode.

35. International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200 (XXI)A, 21 U.N. GAOR Supp. (No.16) at 49, U.N. Doc. A/6316 (1966); International Covenant on Civil and Political Rights, *id.* at 52.

36. International Bill of Human Rights, G.A. Res. 217 (III)A, 3(1) U.N. GAOR, U.N. Doc. A/810 (1948).

37. ECOSOC Res. 663 (XXIV) C, 24 U.N. ESCOR Supp. (No.1) at 11, U.N. Doc. E/3048 (1957).

38. On earlier efforts by the International Penal and Prison Commission (as it then was) to develop a model extradition treaty, *see* Radzinowicz, *supra* note 1, at 478-79 n.2. The technique of drafting model agreements to deal with developing areas of the law is not unknown in domestic legal practice. For a recent example, *see* American Bar Association, *The Commercial Use of Electronic Data Interchange - A Report and Model Trading Partner Agreement*, 45 BUS. LAW. 1645 (1990). The United Nations Commission on International Trade Law is considering whether it might be possible to produce a model electronic data interchange agreement with global possibilities in the commercial community. *Report of the United Nations Commission on International Trade Law* 45 U.N. GAOR Supp. (No.17) at 9-10, U.N. Doc. A/45/17 (1990). The work in the United States of the Uniform Law Commissioners is also analogous. *See*

II. THE MODEL TREATIES

1. *The Model Agreement on the Transfer of Foreign Prisoners*

The first of the model treaties was the lone one adopted in 1985, the Model Agreement on the Transfer of Foreign Prisoners.³⁹ Its rationales are stated rather succinctly in two preambular paragraphs of the adopting resolution which has the Congress “[r]ecognizing the difficulties of foreigners detained in prison establishments abroad owing to such factors as differences in language, culture, customs and religion,” and “[c]onsidering that the aim of social resettlement of offenders could best be achieved by giving foreign prisoners the opportunity to serve their sentence within their country of nationality or residence.”⁴⁰

generally Leflar, *Minimizing State Conflicts of Law*, 4 DET. C.L. REV. 1325 (1983); Handbook of the National Conference of Commissioners on Uniform State Laws (1979).

39. Model Prisoner Transfer Agreement, *supra* note 2. The written legislative history of this and the other model treaties is rather thin. The United Nations does not make either verbatim or summary records of these planning sessions. At best there are rapporteurial or secretariat accounts of the debates together with what can be gleaned by considering successive drafts and any explanatory notes thereon. There is some useful material in the Note by the Secretariat prepared for the Seventh Congress under the title Model Agreement on the Transfer of Foreign Prisoners and Recommendations for the Treatment of Foreign Prisoners, U.N. Doc. A/CONF. 121/10 (1985). The first U.S. treaties were those with Mexico and Canada in 1976 and 1977 respectively. See Note, *Criminal Law: Exchange of Prisoners*, 18 HARV. INT'L L.J. 703 (1977). For debate on the advisability and constitutionality of the exercise in the American context, see Abramovsky & Eagle, *A Critical Evaluation of the Mexican-American Transfer of Penal Sanctions Treaty*, 64 IOWA L. REV. 275 (1979); Vagts, *A Reply to 'A Critical Evaluation of the Mexican-American Transfer of Penal Sanctions Treaty'*, *id.* at 325; Stotzky & Swan, *Due Process Methodology and Prisoner Exchange Treaties: Confronting an Uncertain Calculus*, 62 MINN. L. REV. 733 (1978). Prisoner transfers have been most developed in European practice. The first example was apparently the Convention Regarding the Recognition and Enforcement of Judgments in Criminal Matters, Mar. 8, 1948, Denmark-Norway-Sweden, 27 U.N.T.S. 117. See also European Convention on the International Validity of Criminal Judgments, May 28, 1970, Europ. T.S. No. 70; DeSchutter, *International Criminal Cooperation - the Benelux Example*, in 2 A TREATISE ON INTERNATIONAL CRIMINAL LAW 249 (M. Bassiouni & V. Nanda eds. 1973).

40. Model Prisoner Transfer Agreement, *supra* note 2, Preamble (paras. 2-3). This is the idealistic rationale for such treaties, and sometimes the real explanation. Cf. the following, concerning the first two transfer treaties negotiated by the United States:

The Canadian treaty appears genuinely intended to aid prisoner rehabilitation, parolee supervision, and law enforcement cooperation between the two countries. The Mexican treaty, however, is principally a response to

The model treaty itself begins with a set of "general principles." The desirability of fostering "social resettlement" is again stressed.⁴¹ A transfer should be effected on the basis of mutual respect for national sovereignty and jurisdiction.⁴² There must be double criminality: a transfer should be effected in cases where the offense giving rise to conviction is punishable by deprivation of liberty by the judicial authority of both the "sending" (or "sentencing") state and the state to which the transfer is to be effected (the "administering state") according to their national laws.⁴³ A transfer may be requested either by the sentencing or the administering state. The prisoner, as well as close relatives, may express to either state an interest in the transfer. To that end, the states in question must inform the prisoner of their competent authorities.⁴⁴ A transfer shall be dependent on the agreement of both the sentencing and the administering state, and shall also be based on the consent of the prisoner.⁴⁵ The prisoner must be fully informed of the possibility and of the legal consequences of the transfer, in particular whether or not he or she might be prosecuted for other offenses committed before the transfer.⁴⁶ Moreover, the administering state should be given the opportunity to verify the free consent of the prisoner.⁴⁷ In cases where the prisoner is incapable of making a free deter-

both popular and congressional concern with allegations that Americans in Mexican jails were subject to intolerable living conditions, acts of brutality, and extortion by prison officials and fellow prisoners.

Stotzky & Swan, *supra* note 39, at 736.

41. Model Prisoner Transfer Agreement, *supra* note 2, at para. 1.

42. *Id.* at para. 2.

43. *Id.* at para. 3.

44. *Id.* at para. 4.

45. *Id.* at para. 5. As the Secretary-General explains in his Note, *id.* at paras. 4-5:

[T]he requirement that prisoners must consent to the transfer ensures that transfers are not used as a method of expelling prisoners, or as a means of disguised extradition. Moreover, since prison conditions vary considerably from country to country, and the prisoner may have very personal reasons for not wishing to be transferred, it seems preferable to base the proposed model agreement on the consent requirement.

The issue has been joined on whether "consent" is "freely" given or refused when it takes place in the face of intolerable prison conditions. See Abramovsky & Eagle, *supra* note 39; Vagts, *supra* note 39; Stotzky & Swan, *supra* note 39; Abramovsky, *A Critical Evaluation of the American Transfer of Penal Sanctions Policy*, Wisc. L. REV., Jan.-Feb. 1980, at 25.

46. Model Prisoner Transfer Agreement, *supra* note 2, at para. 6.

47. *Id.* at para. 7.

mination, that person's legal representative is competent to consent to the transfer.⁴⁸

As a general rule, at the time of the request for a transfer the prisoner must still have to serve at least six months of the sentence; however, a transfer should also be granted in cases of indeterminate sentences.⁴⁹ One provision is in the pious hope category: The decision whether to transfer a prisoner shall be taken without delay.⁵⁰ The model treaty also contains a double jeopardy provision. A person transferred may not be tried again in the administering state for the same act on which the sentence to be executed is based.⁵¹

There follow a number of what the model describes as "procedural regulations." A rather basic proposition is that a transfer shall in no case lead to an aggravation of the situation of the prisoner.⁵² The extent to which the prisoner may be better off (aside from the benefit of returning to his or her own country) is complex. When the transfer occurs, the authorities of the administering state must (a) continue the enforcement of the sentence immediately or through a court or administrative order; or (b) convert the sentence, thereby substituting for the sanction imposed in the sentencing state a sanction prescribed by the law of the administering state for a corresponding offense.⁵³ In the case of continuing enforcement, the administering state is bound by the legal nature and duration of the sentence as determined by the sentencing state. However, if this sentence is by its nature or duration incompatible with the law of the administering state, this state may adapt the sanction to the punishment or measure prescribed by its own law for a corresponding offense.⁵⁴

In the case of conversion of sentence, the administering state shall be entitled to adapt the sanction as to its nature or duration according to its national law, taking into due consideration the sentence passed in

48. *Id.* at para. 9.

49. *Id.* at para. 11.

50. *Id.* at para. 12.

51. *Id.* at para. 13. Principles of double jeopardy are quite undeveloped at the international level. This and other models represent tentative efforts to move in the direction of exploring the matter further. For some tentative efforts to raise the issue, see International Law Commission, *Fifth Report on the Draft Code of Offences Against the Peace and Security of Mankind*, U.N. Doc. A/CN.4/404 (1987), at 5-6, 12 (Doudou Thiam, Special Rapporteur).

52. Model Prisoner Transfer Agreement, *supra* note 2, at para. 19.

53. *Id.* at para. 14.

54. *Id.* at para. 15.

the sentencing state. However, a sanction involving the deprivation of liberty shall not be converted to a pecuniary sanction.⁵⁵ The administering state is bound by the findings as to the facts in so far as they appear from the judgement imposed in the sentencing state. Thus, the sentencing state has the sole competence for a review of the sentence.⁵⁶ The period of deprivation of liberty already served by the sentenced person in either state shall be fully deducted from the final sentence.⁵⁷

A final "procedural regulation" deals with costs. Any costs incurred because of a transfer and related to transportation shall be borne by the administering state, unless otherwise decided by both the sentencing and administering states.⁵⁸ Two brief paragraphs deal with what is described as "enforcement and pardon." One asserts that the enforcement of the sentence shall be governed by the law of the administering state.⁵⁹ The other confirms that both the sentencing and the administering state shall be competent to grant pardon and amnesty.⁶⁰

As adopted by the Seventh Congress, the model was accompanied by a set of nine recommendations of an essentially human rights and humanitarian nature on the treatment of foreign prisoners.⁶¹ These recommendations insist that foreign prisoners must be treated in a non-discriminatory fashion. They must also be informed without delay of their right to request contacts with their consular authorities, as well as of any other relevant information regarding their status. Contacts of foreign prisoners with families and community agencies should be facilitated, by providing the necessary opportunities for visits and correspondence, with the consent of the prisoner. Humanitarian international organizations, such as the International Committee of the Red Cross, should be given the opportunity to assist foreign prisoners. The recommendations were formulated taking into account that among the foremost measures for alleviating the problems of foreign prisoners — including those whose transfer cannot be effected — is the provision of

55. *Id.* at para. 16.

56. *Id.* at para. 17. Few states are likely to agree to treaties that permit the administering state's courts to review the original decision on the merits. *See generally* Vagts, *supra* note 39.

57. Model Prisoner Transfer Agreement, *supra* note 2, at para. 18.

58. *Id.* at para. 20. Presumably other costs - notably the cost of imprisonment in the administering state - lie where they fall.

59. *Id.* at para. 21.

60. *Id.* at para. 22.

61. *Report of the Seventh United Nations Congress, supra* note 2 at 57, Annex II.

information and contacts, including information in their own languages.⁶²

2. *The Model Treaty on Extradition*

The Model Treaty on Extradition⁶³ follows a fairly standard modern format, based to a substantial degree as a drafting matter on recent Australian extradition treaties.⁶⁴ The parties would agree to extradite to each other, upon request and subject to the terms of the treaty, a person who is wanted in the requesting state for prosecution for an extraditable offense or for the imposition or enforcement of a sentence in respect of such an offense.⁶⁵ Extraditable offenses are defined, as is now usual, not by a list of specific offenses, but by severity of penalty:

[E]xtraditable offences are offences that are punishable under the laws of both Parties by imprisonment or other deprivation of liberty for a maximum period of at least [one/two] year(s), or by a more severe penalty. Where the request for extradition relates to a person who is wanted for the enforcement of a sentence of imprisonment or other deprivation of liberty imposed for such an offence, extradition shall be granted only if a period of at least [four/six] months of such sentence remains to be served.⁶⁶

(The bracketed numbers reflect some disagreement about the appropriate parameters). The model contains both mandatory and optional grounds for refusing extradition.

Extradition *will* be refused if the offense for which extradition is requested is regarded by the requested state as an offense of a political

62. U.N. Doc, *supra* note 39 at 8 (Note by the Secretariat).

63. Model Extradition Treaty, *supra* note 3.

64. Australia has in recent years been unusually aggressive in tidying up its inventory of extradition treaties. It has brought new treaties into force with Argentina, Austria, Belgium, Denmark, the Federal Republic of Germany, Finland, Iceland, Ireland, Japan, Luxembourg, the Netherlands, Norway, Portugal, South Africa, Spain and Sweden. As of April 3, 1990, further treaties were awaiting ratification with Ecuador, France, the Federal Republic of Germany, Greece, Italy, Monaco, the Philippines, Switzerland, Uruguay and Venezuela. Letter from Herman F. Woltring (Attorney General's Department, Canberra, A.C.T., Australia) to Roger S. Clark (Apr. 18, 1990); *see also* Woltring, *Extradition Law*, 61 VICTORIAN L. INST. J. 919 (1987).

65. Model Extradition Treaty, *supra* note 3, at art. 1.

66. *Id.* at art. 2, para. 1.

nature.⁶⁷ However, a bracketed variation on this is included which provides:

Reference to an offence of a political nature shall not include any offence in respect of which the Parties have assumed an obligation, pursuant to any multilateral convention, to take prosecutorial action where they do not extradite, nor any other offence agreed by the Parties not to be an offence of a political character for the purposes of extradition.⁶⁸

The effect of the first part of this variant is functionally the same as the approach taken in the European Convention on the Suppression of Terrorism.⁶⁹ Essentially, the parties would agree that the *extradite-or-prosecute* obligation in treaties such as the Convention Against the Taking of Hostages⁷⁰ or the aircraft conventions⁷¹ would be treated as an absolute obligation between those parties to *extradite*. The latter part of the bracketed material is probably redundant. It confirms the obligation of parties to the Genocide and *Apartheid* Conventions⁷² not to treat the offenses contained therein as political.⁷³

Extradition will also be refused if the requested state has substantial grounds for believing that the request for extradition has been made for the purpose of prosecuting or punishing a person on account of that person's race, religion, nationality, ethnic origin, political opinions, sex or status, or that the person's position may be prejudiced for any of those reasons.⁷⁴ Similarly, it will be refused if the person whose extradition is requested has been or could be subjected in the request-

67. *Id.* at art. 3(a).

68. *Id.*

69. Convention on Terrorism, *supra* note 27.

70. International Convention, *supra* note 21.

71. Convention on Aircraft, *supra* note 19.

72. Genocide, *supra* note 16; *Apartheid*, *supra* note 18.

73. Modern practice in the international crime area seeks, as has been noted above, to deal with the "safe haven" problem in two over-lapping ways. Sometimes it encourages prosecution through extradition by denying political offender status to activities such as some varieties of terrorism; sometimes it permits a denial of extradition on a ground such as political offender status, but nonetheless compels prosecution in the state denying extradition. The nod in the model treaty goes towards extradition rather than prosecution.

74. Model Extradition Treaty, *supra* note 3, at art. 3 (b). Language to this effect first appeared in the 1976 European Convention for the Suppression of Terrorism, *supra* note 27. There is perhaps something of a trend in multilateral practice for such a provision to replace the political offender exception as the latter is whittled away.

ing state to torture, or cruel, inhuman or degrading treatment or punishment, or if that person has not received or would not receive the minimum guarantees in criminal proceedings, as contained in the International Covenant on Civil and Political Rights.⁷⁵ Extradition will also be refused if the offense for which extradition is requested is an offense under military law, which is not also an offense under ordinary criminal law;⁷⁶ if there has been a final judgment rendered against the person in the requested state in respect of the offense for which extradition is requested;⁷⁷ or if the person whose extradition is sought has, under the law of either party, become immune from prosecution or punishment for any reason, including lapse of time or amnesty.⁷⁸

Finally, extradition will be refused if the judgment of the requesting state has been rendered *in absentia*, the convicted person has not had sufficient notice of the trial nor the opportunity to arrange his or her defense, and has not had or will not have the opportunity to have the case retried in his or her presence.⁷⁹

A footnote on grounds for refusal coyly adds what is probably the nub of the matter for some: "Some countries may wish to add . . . the following ground for refusal: 'If there is insufficient proof, according to the evidentiary standards of the Requested State, that the person whose extradition is requested is a party to the offence.'"⁸⁰ There are two significant issues raised here: whether there should be a proof threshold at all and whether the requested state should defer to the evidentiary rules of the requesting state. Both are controversial and raise awkward questions about the extent to which one legal system should trust the quality of decision-making in the legal system of a treaty partner.

Extradition *may* be refused if the person whose extradition is re-

75. Model Extradition Treaty, *supra* note 3, at art. 3(f).

76. *Id.* at art. 3(c).

77. *Id.* at art. 3(d).

78. *Id.* at art. 3(e).

79. *Id.* at art. 3(g).

80. *Id.* at art. 5 n. 61. *Cf.* The Commonwealth debate about deleting the *prima facie* case requirement from the Commonwealth Scheme; *see, e.g.*, Commonwealth Secretariat, Meeting of Commonwealth Law Ministers, Zimbabwe, Jul. 26 - Aug. 1, 1986, Secretariat Doc.LMM (86) 5 (Memorandum by the Commonwealth Secretariat and the Government of Australia); *see also* Woltring, *supra* note 64, at 920; Kennedy, Stein & Rubin, *The Extradition of Mohammed Hamadei*, 31 HARV. INT'L L.J. 5, 17-18 (1990); Gilmore, *International Action Against Drug Trafficking: Trends in United Kingdom Law and Practice*, 24 INT'L LAW. 365, 371-72 (1990).

quested is a national of the requested state.⁸¹ In the past it has been the case that, where extradition is refused on the basis of the accused's nationality, a prosecution may proceed in the country of nationality, pursuant to domestic legislation, but until recently it was uncommon for treaties to make this obligatory. The present model, however, does just that. It provides that where extradition is refused on the ground of nationality, the requested state shall, if the requesting state so requests, submit the case to its competent authorities with a view to taking appropriate action against the person.⁸²

Extradition may be refused in a number of cases other than nationality, including those *ne bis in idem* cases where the competent authorities of the requested state have decided not to institute or to terminate proceedings against the person for the offense in respect of which extradition is requested,⁸³ and where a prosecution in respect of the offense for which extradition is requested is pending in the requested state.⁸⁴ Again, it may be refused if the offense carries the death penalty

81. Model Extradition Treaty, *supra* note 3, at art. 4(a). A recent commentator notes:

Most civil law countries, as well as some common law countries, regard the nonextradition of their citizens as an important principle deeply ingrained in their legal traditions. They justify the principle on various grounds, including the state's obligation to protect its citizens, lack of confidence in the fairness of foreign judicial proceedings, the many disadvantages a defendant confronts in trying to defend himself in a foreign state before a strange legal system, as well as the additional disadvantages posed by imprisonment in a foreign jail where family and friends may be distant and the chances of rehabilitation are significantly diminished.

Nadelman, *supra* note 32, at 67.

82. Model Extradition Treaty, *supra* note 3, at art. 4(a). Functionally, this provision in the model extradition treaty would work the same way as a request for the transfer of proceedings to the state of nationality. See discussion of the Model Treaty on Transfer of Proceedings, *infra* note 108. There is no magic to a provision requiring this type of vicarious administration of justice in the face of lethargy by the other treaty party. Note, for example, the discussion by Nadelman, *supra* note 32, at 70, of relatively unsuccessful efforts by United States authorities to galvanize Mexican prosecutors into action. (Art. 9 of the Mexico-U.S. treaty has a mild prosecution requirement. Where a national is not extradited "the requested Party shall submit the case to its competent authorities for the purpose of prosecution, provided that Party has jurisdiction over the offense." Extradition Laws and Treaties, United States, No. 590.19, at art. 9(2) (I. Kavass & A. Sprudz comp. 1979). As a civil law country, Mexico is more likely than the United States to have nationality-based legislation in place in a particular instance, but may not necessarily use it.

83. Model Extradition Treaty, *supra* note 3, at art. 4(b).

84. *Id.* at art. 4(c).

under the law of the requesting state, unless that state gives such assurance as the requested state considers sufficient that the death penalty will not be imposed, or, if imposed, will not be carried out.⁸⁵

The model contains standard machinery provisions⁸⁶ and re-asserts the "rule of specialty" under which a person surrendered under the treaty shall not be proceeded against, sentenced, detained, re-extradited to a third state, or subjected to any other restriction of liberty in the territory of the requesting state for any offense committed before surrender, other than an offense for which extradition was granted, or any other offense as to which the requested state consents.⁸⁷

Finally, the model reiterates the current "non-solution" to the problem of how to deal with concurrent requests from different countries for the same person, by providing that in such a situation a party "shall, at its discretion, determine to which of those states the person is to be extradited."⁸⁸ The problem is becoming acute in the area of terrorism, where multiple bases for jurisdiction may be asserted in respect of the same incident but no clear priority is assigned. The problem also may arise in situations where the accused is wanted in more than one place for different offenses. General international law provides no guidance about priorities in such cases and merely forces states to negotiate in each instance. The draft recognizes this approach, with an acknowledgement that the state having possession of the accused is in the ultimate position of calling the shots if no agreement can be reached.⁸⁹

85. *Id.* at art. 4(d). A footnote adds that some countries may wish to apply the same restriction to the imposition of a life, or indeterminate sentence - an interesting commentary on evolving contemporary attitudes towards modes of punishment.

86. *See id.* at art. 5 on channels of communication and required documents; art. 7 on certification and authentication; art. 9 on provisional arrest; art. 11 on surrender of the person; and art. 13 on surrender of property found in the requested state that has been acquired as a result of the offense or that may be required as evidence.

87. *Id.* at art. 14.

88. *Id.* at art. 16.

89. Some attention was given to this problem at the Eighth United Nations Congress in the context of the struggle against terrorism, although the only recommendation that emerged was that "[j]urisdictional priorities should be established giving territoriality the first priority." *Report of the Eighth United Nations Congress, supra* note 3, at 190, para. 7 (Resolution on terrorist criminal activities). The Commonwealth Scheme, *supra* note 8, para. 13, provides some help in some cases (it seems more help in cases of requests for different offenses arising out of distinct events rather than requests in respect of the same incident). It requires the requested state to consider all the circumstances, including (a) the relative seriousness of the offences, (b) the relative dates on which the requests were made, and (c) the citizenship or other national status

3. *The Model Treaty on Mutual Assistance in Criminal Matters*

The Model Treaty on Mutual Assistance in Criminal Matters⁹⁰ has benefitted, like the model extradition treaty, from a great amount of work done by the Australians who have been actively engaged in negotiating such treaties.⁹¹ It also has some similarities to the Scheme Relating to Mutual Assistance in Criminal Matters within the Commonwealth, first adopted in 1986.⁹² The basic aim of the model treaty

of the fugitive and his ordinary residence. The recent Australian treaties echo this language. *See, e.g.*, art. 9 of the treaty with the Netherlands in Aust. Stat. Rules 1988, No. 293. Simply granting priority to the territorial state does not catch the full range of considerations in respect of multiple extradition requests relating to the same incident, either in respect of international crimes or in respect of ordinary crimes. As a commentary on the transfer of criminal proceedings noted:

The assumption that it is normally most appropriate to prosecute an offence where it has been committed is not justified. Rehabilitation of the offender, which is increasingly given weight in modern penal law, requires that the sanction be imposed and enforced where the reformatory aim can be most successfully pursued. That is normally in the State where the offender has family or social ties or will take up residence after the enforcement of the sanction. On the other hand, it is clear that difficulties in securing evidence will often be a consideration militating against the transmission of proceedings from the State where the offence has been committed to another State. . . .

European Committee on Crime Problems, Council of Europe, Explanatory Report on the European Convention on the Transfer of Proceedings in Criminal Matters 15 (1970). Terrorism offenses may be different from other crimes because rehabilitation considerations may not weigh heavily with ideological offenders.

90. Model Mutual Assistance Treaty, *supra* note 4.

91. By Apr. 3, 1990, Australia had recent Mutual Assistance treaties in force with Canada, Japan, Switzerland, the U.S. and Vanuatu. Treaties were awaiting ratification with Austria, Italy, Luxembourg, the Netherlands, the Philippines, Portugal, Spain and the United Kingdom (the last limited to drug trafficking offenses). Letter from Herman Woltring, *supra* note 64. On recent United States practice, *see* Ellis & Pisani, *The United States Treaties on Mutual Assistance in Criminal Matters*, in II INT'L CRIM. LAW (PROCEDURE) 151 (M. Bassiouni ed. 1986); Nadelman, *supra* note 32, at 58. On the socialist countries' experience in the area, often as part of a larger package of conventions "on legal co-operation in civil, family and criminal matters," *see* Gardocki, *The Socialist System*, in II INT'L CRIM. LAW (PROCEDURE), *supra*, at 133.

92. *Scheme Relating to Mutual Assistance in Criminal Matters Within the Commonwealth, as amended in*, 16 COMMONWEALTH L. BULL. 1043 (1990). *See* McClean, *Mutual Assistance in Criminal Matters: The Commonwealth Initiative*, 37 INT'L & COMP. L.Q. 177 (1988).

is that the parties shall afford each other the widest possible measure of mutual assistance in investigations or court proceedings in respect of offenses the punishment of which, at the time of the request for assistance, falls within the jurisdiction of the judicial authorities of the requesting state.⁹³

The types of assistance may include:

- (a) taking of evidence or statements from persons;
- (b) assisting in the availability of detained persons or others to give evidence or assist in investigations;
- (c) effecting service of judicial documents;
- (d) executing searches and seizures;
- (e) examining objects and sites;
- (f) providing information and evidentiary items; and
- (g) providing originals or certified copies of relevant documents and records, including bank, financial, corporate or business records.⁹⁴

Mutual assistance is a somewhat limited concept, but of great practical importance. The draft underscores the limitations by indicating areas to which "assistance" does not extend, although such areas *may* be covered by other treaty obligations. Notably, the treaty is not a mode of extradition; it does not require the enforcement in the requested state of criminal judgments imposed in the requesting state;⁹⁵ it does not deal with the transfer of persons in custody to serve sentences; nor does it deal with the transfer of proceedings in criminal matters.⁹⁶ A mutual assistance treaty, in short, is useful in conjunction with other treaty relationships that deal with associated aspects of the general problem of cooperation.

States are required to designate competent authorities to process requests,⁹⁷ and the form for requests and modes of dealing with them are set out.⁹⁸ Assistance may be refused where the requested state "is of the opinion that the request, if granted, would prejudice its sovereignty, security, public order (*ordre public*) or other essential public interests."⁹⁹ Assistance may also be refused on political offender and human rights grounds which largely track the grounds for refusal

93. Mutual Assistance Treaty, *supra* note 4, at art. 1, para. 1.

94. *Id.* at art 1, para. 2.

95. Except as permitted by the law of the requested state and the optional protocol to the draft. *See infra* note 102.

96. Model Mutual Assistance Treaty, *supra* note 4, at art. 1, para. 3.

97. *Id.* at art. 3.

98. *Id.* at art. 5.

99. *Id.* at art. 4, para. 1(a).

under the model extradition treaty.¹⁰⁰

In one striking way, the model treaty differs from the Commonwealth Scheme¹⁰¹ on which in part it is based. The latter includes in its standard list of modes of assistance "tracing, and forfeiting the proceeds of criminal activities," but nothing to this effect appears in the United Nations model treaty itself. The matter is, however, singled out for an "Optional Protocol to the Model Treaty on Mutual Assistance in Criminal Matters Concerning the Proceeds of Crime."¹⁰² Parties to the Protocol would agree that a requested state will endeavor to trace assets, investigate financial dealings, and obtain other information or evidence that may help secure the recovery of proceeds of crime.¹⁰³ The requested state must, to the extent permitted by its law, give effect to or permit enforcement of a final order forfeiting or confiscating the proceeds of crime made by a court of the requesting state, or take other appropriate action to secure the proceeds following a request.¹⁰⁴

An explanatory note to the Protocol suggests that the Protocol is included "on the ground that questions of forfeiture are conceptually different from, although closely related to, matters generally accepted as falling within the description of mutual assistance."¹⁰⁵ It further provides that states may wish to include such provisions because of their significance in dealing with organized crime. Forfeiture seems to be in vogue both in domestic law¹⁰⁶ and in current bilateral¹⁰⁷ assis-

100. *Id.* at art. 4, paras. 1(b), (c); *see also* Model Extradition Treaty, *supra* note 63 and accompanying text.

101. Commonwealth, *supra* note 8.

102. Model Mutual Assistance Treaty, *supra* note 4. "Proceeds of crime" is defined broadly as "any property suspected, or found by a court, to be property directly or indirectly derived or realized as a result of the commission of an offence or to represent the value of property and other benefits derived from the commission of an offence." *Id.* at para. 1.

103. *Id.*, para. 3, at 95.

104. *Id.* at para. 5.

105. Optional Protocol, *supra* note 102 n. 90a.

106. *See, e.g.,* Fisse, *Confiscation of Proceeds of Crime: Funny Money, Serious Legislation*, 13 CRIM. L.J. 368 (1989); Gilmore, *supra* note 80, at 399-90; McClean, *Seizing the Proceeds of Crime: The State of the Art*, 38 INT'L & COMP. L.Q. 334 (1989).

107. As in some of the recent Australian treaties, *see, e.g.,* Treaty Between Australia and the Republic of the Philippines on Mutual Assistance in Criminal Matters, Apr. 28, 1988, art. 1, para. 3(e) and art. 18 (on file with the author); Treaty between Australia and the Kingdom of the Netherlands on Mutual Assistance in Criminal Matters, Oct. 28, 1988, art. 1, para. 2(h) and art. 18 (on file with the author). It also appears in dramatic detail in one recent multilateral treaty, the December 1988 United

tance practice, so it is not surprising that some effort is made to deal with it here.

4. *The Model Treaty on the Transfer of Proceedings in Criminal Matters*

The Model Treaty on the Transfer of Proceedings in Criminal Matters¹⁰⁸ proceeds on the basis that when a person is suspected of having committed an offense under the law of a state which is party to the treaty, that state may, if the interests of the proper administration of justice so require, request another state which is a party to take proceedings in respect of the offense.¹⁰⁹ For the purposes of the Treaty, a request provides the requested state with the necessary jurisdiction in respect of the offense if that state does not already have jurisdiction under its own law. Indeed, the Treaty obligates the parties to take the necessary legislative measures to ensure that a request to take proceedings shall allow the requested state to exercise the necessary jurisdiction.¹¹⁰ This kind of jurisdiction is referred to, particularly in European usage, as "vicarious administration of justice."¹¹¹ One suspects that the most likely field of application for such a treaty is where an accused has returned to his or her state of nationality and an extradition re-

Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, U.N. Doc. E/CONF.82/15 (1988). Article 5 of that Convention has fairly strong provisions requiring legislative, judicial and administrative action to effect confiscations.

108. Model Transfer of Proceedings Treaty, *supra* note 5. According to the Report of the Experts who met in Baden in 1987 to work on the draft of this model:

The model agreement on transfer of proceedings . . . could contribute to a reduction of pre-trial detention and to the solution of problems of concurrent jurisdictions and plurality of proceedings which laid an additional burden on national criminal justice systems and caused unnecessary hardship for offenders. This model agreement might eventually lead to the reciprocal formal acknowledgement of the validity of foreign criminal judgments and, thus, may constitute significant progress towards the further establishment of international recognition of the principle of double jeopardy (*ne bis in idem*).

Report of the International Expert Meeting on United Nations and Law Enforcement, Baden near Vienna, Nov. 16-19, 1987, at 63 (hereinafter Baden Report).

109. Model Transfer of Proceedings Treaty, *supra* note 5, at art. 1, para. 1.

110. *Id.* at art. 1, para. 2.

111. For a good introduction to theory and practice in the area, see Meyer, *The Vicarious Administration of Justice: An Overlooked Basis of Jurisdiction*, 31 HARV. INT'L L. J. 108 (1990).

quest is futile since that state does not extradite nationals.¹¹² It is not, however, intended that the treaty should be limited to such cases and it is also meant to encompass situations where the requested state would not be in a position to effect the extradition of a national of a third state. Selling this treaty to common law countries is somewhat difficult since they do not usually exercise jurisdiction over what their nationals do abroad, yet that idea is not altogether unprecedented.¹¹³

As in the other models, the parties are to designate channels of communication,¹¹⁴ certain documents are required,¹¹⁵ and various formalities are spelled out.¹¹⁶ Dual criminality is required.¹¹⁷ Various grounds of refusal are given:¹¹⁸ that the suspected person is not a national of or ordinarily resident in the requested state; that the act is an offense under military law which is not also an offense under ordinary criminal law; that the offense is in connection with taxes, duties, customs or exchange; that the offense is regarded by the requested state as being of a political nature.

The suspected person is entitled to express to either state his or her

112. For a good discussion of the situations in which transfer treaties are useful and on the genre in general, see Schutte, *The European System*, in II INT'L CRIM. LAW (PROCEDURE), *supra* note 91, at 319. As was noted earlier in the discussion of extradition, *supra* note 3 and accompanying text, there may be a case based on the rehabilitation of the offender for trial and subsequent punishment in his or her country of origin. If the states in question have an extradition treaty with the provision for the prosecution of non-extraditable nationals discussed *supra*, then the present treaty would be redundant in the particular cases suggested in the text but may be useful in other instances. Moreover, transfer of custodial or non-custodial punishment to the state of origin after conviction may serve the same ultimate purpose as transfer of proceedings. Thus, the various forms of cooperation treaties discussed may often be alternative routes to the same end.

113. Note, for example, New Zealand's exercise of jurisdiction over diplomats who commit offenses abroad but who are immune from local jurisdiction at the place of commission. Crimes Act (New Zealand) 1961, Section 8A, as substituted by Section 14 (1) of the External Relations Act 1988. A number of British Commonwealth countries (anomalously) exercise jurisdiction over bigamy committed abroad by nationals but not over more serious offenses such as murder. See, e.g., *R. v. Lander*, [1919] N.Z.L.R. 305 (C.A.) (the "constitutionality" of such legislation, if not its wisdom, was conceded by the 1930s).

114. Model Transfer of Proceedings Treaty, *supra* note 5, at art. 2.

115. *Id.* at art. 3.

116. *Id.* at arts. 3-5.

117. *Id.* at art. 6.

118. *Id.* at art 7.

interest in the transfer of proceedings,¹¹⁹ although the factors to be taken into account in deciding whether to give effect to those views are not articulated. Both states are required to ensure that the rights of the victim, in particular the victim's right to restitution or compensation, shall not be affected by the transfer.¹²⁰ The suspect's right not to be prosecuted twice is protected.¹²¹ A framework for dealing with multiple prosecution possibilities¹²² is also suggested by language asserting that where criminal proceedings are pending in two or more states against the same suspected person in respect of the same offense, the states concerned shall conduct consultations to decide which of them alone should continue the proceedings. An agreement reached thereupon shall have the consequences of a request for transfer of proceedings.¹²³

5. *The Model Treaty on the Transfer of Supervision of Offenders Conditionally Sentenced or Conditionally Released*

The fourth of the 1990 models is the Model Treaty on the Transfer of Supervision of Offenders Conditionally Sentenced or Conditionally Released.¹²⁴ It follows up from the 1985 model on persons sentenced to imprisonment. It applies to a person who has been found guilty and (a) placed on probation without sentence having been pronounced, (b) given a suspended sentence involving deprivation of liberty, or (c) given a sentence, the enforcement of which has been modified (parole) or conditionally suspended, in whole or in part, either at the time of the sentence or subsequently.¹²⁵ The sentencing state may request another party to the treaty ("the administering state") to take responsibility for applying the terms of the decision.¹²⁶ The rationale for the scheme is, as in other instances, found in the preamble to the

119. *Id.* at art. 8.

120. *Id.* at art. 9.

121. *Id.* at art. 10.

122. *Id.* at art 13.

123. *Id.*

124. Model Transfer of Supervision Treaty, *supra* note 6. According to the Experts who met in Baden in 1987 to work on the draft of this and other instruments, the model "could contribute to a reduction in the numbers of persons required to serve prison sentences and to the social resettlement of foreign offenders by avoiding imprisonment through the increased application of supervision alternatives." Baden Report, *supra* note 108, at 63.

125. Model Transfer of Supervision Treaty, *supra* note 6, at art.1, para. 1.

126. *Id.* at art 1, para. 2.

draft. It argues that such transfers should further the ends of justice, encourage the use of alternatives to imprisonment, facilitate the social resettlement of sentenced persons and further the interests of victims of crime.¹²⁷ The draft contains similar grounds for refusal to those contained in the Treaty on the Transfer of Proceedings.¹²⁸ The sentenced person is entitled to express his or her views on the transfer¹²⁹ and the rights of the victim, especially to restitution or compensation, must not be adversely affected as a result of the transfer.¹³⁰

The acceptance by the administering state of the responsibility for applying the sentence extinguishes the competence of the sentencing state to enforce the sentence.¹³¹ The supervision is to be carried out in accordance with the law of the administering state. That state alone has the right of revocation. The administering state may, to the extent necessary, adapt to its own law the conditions or measures prescribed, provided that such conditions or measures are, in terms of their nature or duration, not more severe than those pronounced in the sentencing state.¹³² The sentencing state alone shall have the right to decide on any application to reopen the case.¹³³ Either party, however, may grant pardon, amnesty or commutation of the sentence in accordance with the provisions of its Constitution or other laws.¹³⁴

6. *The Model Treaty for the Prevention of Crimes that Infringe on the Cultural Heritage of Peoples in the Form of Movable Property*

The last of the 1990 models is the Model Treaty for the Prevention of Crimes that Infringe on the Cultural Heritage of Peoples in the Form of Movable Property.¹³⁵ "Movable cultural property" is defined

127. *Id.* at Preamble, para. 5.

128. *Id.* at art. 7.

129. *Id.* at art. 8.

130. *Id.* at art. 9.

131. *Id.* at art. 10.

132. *Id.* at art. 11, para. 1.

133. *Id.* at art. 12, para. 1.

134. *Id.* at art. 12, para. 2.

135. Model Cultural Heritage Treaty, *supra* note 7. This model was the most controversial of the drafts considered at the Eighth Congress. It had not received the careful consideration of members of the Committee on Crime Prevention and Control (the preparatory body for the Congress) that the other drafts had received. It was revised by a drafting group of experts in Chicago in June of 1990 and the revised

for the purposes of the treaty as referring to property which, on religious or secular grounds, is specifically designated by a state party as being subject to export control by reason of its importance for archaeology, prehistory, history, literature, art or science, and as belonging to one or more of a lengthy list of categories.¹³⁶ Each state party undertakes:

- (a) To take the necessary measures to prohibit the import of movable cultural property (i) which has been stolen in the other State Party or (ii) which has been illicitly exported from the other State Party;
- (b) To take the necessary measures to prohibit the acquisition of, and dealing within its territory with, movable cultural property which has been imported contrary to the prohibitions resulting from the implementation of subparagraph (a) above;
- (c) To legislate in order to prevent persons and institutions within its territory from entering into international conspiracies with respect to movable cultural property;
- (d) To provide information concerning its stolen movable cultural property to an international data base agreed upon between the States Parties;¹³⁷
- (e) To take the measures necessary to ensure that the purchaser of stolen movable property which is listed on the international data base is not considered to be a purchaser who has acquired such property in good faith;
- (f) To introduce a system whereby the export of movable cultural property is authorized by the issue of an export certificate;
- (g) To take the measures necessary to ensure that a purchaser of imported movable cultural property which is not accompanied by

version did not become available until the Congress in U.N. Doc. A/CONF.144/L.2 dated 28 August 1990. Consequently some delegates would have preferred to put more work into it, for reasons of professional pride. The subject-matter is, moreover, of considerable political significance, especially between developed countries with large collections of precious objects from elsewhere and developing countries which would like them back. As a model, it is, of course, not cast in stone.

136. *Id.* at art. 1, para. 1. The list includes rare collections and specimens of fauna, flora, minerals and anatomy, and objects of paleontological interest; products of archaeological excavations or discoveries; pictures, paintings and drawings; and rare manuscripts and incunabula.

137. A footnote to the draft text at this point suggests that there should be further development of the data base approach. For a concrete suggestion along these lines, see Government of Canada, Proposal for the International Exchange of Information to Combat Crimes Against Cultural Movable Property (1990).

an export certificate issued by the other State Party and who did not acquire the movable cultural property prior to the entry into force of this treaty shall not be considered to be a person who has acquired the movable cultural property in good faith;

(h) To use all the means at its disposal, including the fostering of public awareness, to combat the illicit import and export, theft, illicit excavation and illicit dealing in movable cultural property.¹³⁸

Each party, further, promises to take the necessary measures to recover and return, at the request of another State Party, any movable cultural property covered by the treaty.¹³⁹ To emphasize the criminal law nature of the treaty, Article 3, headed "Sanctions," requires each party to impose sanctions upon (a) persons or institutions responsible for the illicit import or export of movable cultural property, (b) persons or institutions that knowingly acquire or deal in stolen or illicitly imported movable cultural property and (c) persons or institutions that enter into international conspiracies to obtain, export or import movable cultural property by illicit means.¹⁴⁰

Article 4 of the Model Treaty covers procedures to be followed. Requests for recovery and return are to be made through diplomatic channels, with supporting documentation.¹⁴¹ Expenses incidental to the return of the property are to be borne by the requesting State Party and no person or institution shall be entitled to claim any form of compensation from the State Party returning the property claimed. Neither shall the requesting State Party be required to compensate in any way such persons or institutions as may have participated in illegally sending abroad the property in question, although it must pay fair compensation to any person or institution that in good faith acquired or was in legal possession of the property.¹⁴² The States Parties agree to make

138. Model Cultural Heritage Treaty, *supra* note 7, at art. 2, para. 1 (footnotes omitted).

139. *Id.* at art. 2, para. 2.

140. *Id.* at art. 3. n. 122 at this point in the text makes the rather obvious point in the circumstances that "States Parties should consider adding certain types of offences against movable cultural property to the list of extraditable offences covered by an extradition treaty." The present model is not an extradition treaty but is intended as part of a package of relationships, and the other parts of the package need to be dovetailed.

141. *Id.* at art. 4, para. 1.

142. *Id.* at art. 4, para. 2 n. 124 at this point in the text suggests that "State Parties may wish to consider whether the expenses and/or the expense of providing compensation should be shared between them"; n.125 suggests that "States Parties

available to each other such information as will assist in combating crimes against cultural movable property.¹⁴³ Each party is, moreover, to provide information concerning laws which protect its movable cultural property to an international data base agreed upon between the States Parties.¹⁴⁴

III. CONCLUSION

So there is the package of model treaties. Given that many states need to do a lot of work on their basic extradition law and treaties, it is not all that likely that the more sophisticated models will command widespread acceptance in the near future. But the Congresses and their follow up within the United Nations represents an important opportunity to spread among criminal justice professionals — the basic constituency of the United Nations Congresses — further knowledge of the range of co-operative opportunities suggested by modern state practice.

It was appreciated that there was no great likelihood that such issues would be solved in a multilateral fashion (except perhaps among regional, or other like-minded groupings)¹⁴⁵ and that the emphasis should, accordingly, be on suggesting to states the framework upon which their negotiators might proceed, but leaving them to tailor-make the final details. I suggest that this is a useful enterprise in which to be engaged.¹⁴⁶ One should not underestimate the paucity of resources in many a Ministry of Foreign Affairs or Ministry of Justice when it

may wish to consider the position of a blameless possessor who has inherited or otherwise gratuitously acquired a cultural object which had been previously dealt with in bad faith.”

143. *Id.* at art. 4, para. 3

144. *Id.* at art. 4, para. 4.

145. Thus, as was noted *supra*, the documents are drafted primarily on the assumption that they will be used for bilaterals, but they are readily adaptable to wider - notably regional - use. The models, indeed, owe much to treaties developed in the European region. The limited ratification that has occurred there, however, suggests that these are areas where much education is required before states are actually going to do the nitty gritty work to bring the treaties into force. See Muller-Rappard, *The European System*, in II INT'L CRIM. LAW (PROCEDURE), *supra* note 91, at 96.

146. According to a report prepared by the Secretary-General for the Eighth Congress, 17 of 49 states which replied to a questionnaire item on the subject reported that they were using the Model Agreement on the Transfer of Foreign Prisoners for bilateral negotiations. *Implementation of the Standard Minimum Rules for the Treatment of Prisoners*, U.N. Doc. A/CONF.144/11, at 7 (1990)(Report of the Secretary-General).

comes to acting on the international plane and the documents are meant to be helpful in such cases.

Ultimately, however, there is no escaping the hard work involved in the network of individual exercises in diplomacy that are necessary to put the edifice of cooperation in place.