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## SYMPOSIUM ON INTERNATIONAL CRIMINAL LAW

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## International Criminal Law and the Macro-Micro Problem\*

Anthony D'Amato\*\*

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Prior to 1960, textbooks on international public law hardly made mention of international criminal law, except in brief references to subjects such as extradition, asylum, and jurisdiction over aliens. But by 1991, global consciousness in a shrinking, interdependent and increasingly criminally violent world, has seen international criminal law emerge as a generally accepted subject of international law. Prominent among scholars who have contributed to the rising consciousness about international criminal law are M. Cherif Bassiouni,<sup>1</sup> Ved Nanda,<sup>2</sup> John Murphy,<sup>3</sup> Robert Friedlander,<sup>4</sup> Christine van den Wijngaert,<sup>5</sup> Alfred Rubin,<sup>6</sup> and Jordan Paust.<sup>7</sup> The contributors to this Symposium carry on the tradition.

As with most academic subjects, the real world tends to outpace theoreticians' efforts to conceptualize and understand it.<sup>8</sup> Professor Bassiouni has listed twenty-two distinct international crimes;<sup>9</sup> each of

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\*\* Judd & Mary Morris Leighton Professor of Law, Northwestern University.

1. See, e.g., INTERNATIONAL CRIMINAL LAW (M.C. Bassiouni ed. 1986-87).

2. See, e.g., M.C. BASSIOUNI & V.P. NANDA, A TREATISE ON INTERNATIONAL CRIMINAL LAW (1973); V.P. NANDA & M.C. BASSIOUNI, INTERNATIONAL CRIMINAL LAW: A GUIDE TO U.S. PRACTICE AND PROCEDURE (1987).

3. See, e.g., J.F. MURPHY, STATE SUPPORT OF INTERNATIONAL TERRORISM (1989).

4. See, e.g., R. FRIEDLANDER, TERROR-VIOLENCE (1983).

5. See, e.g., C.V. WIJNGAERT, THE POLITICAL OFFENCE EXCEPTION AND EXTRADITION (1980).

6. See, e.g., A.P. RUBIN, PIRACY, PARAMOUNTCY AND PROTECTORATES (1974).

7. See, e.g., J.J. PAUST & A. BLAUSTEIN, WAR CRIMES JURISDICTION AND DUE PROCESS (1974).

8. See, e.g., D'Amato, *Legal Uncertainty*, 71 CAL. L. REV. 1 (1983). A notable and persistent exception is mathematics. Mathematical discoveries that have appeared totally academic when discovered have often been employed years later to explain real-world phenomena. Matrix algebra, for example, was invented in the mid-nineteenth century as a totally impractical and rather weird form of combinational function. In the mid 1920s, Werner Heisenberg utilized it to depict the behavior of the newly discovered quantum mechanics.

9. 1 INTERNATIONAL CRIMINAL LAW 135 (M.C. Bassiouni ed. 1986).

them has been the topic of discrete analysis. But we are still short on unifying explanations. How do these subjects cohere with the general theory of public international law? Does public international law throw any light on the specific subjects of criminal law? Can the generalizations of the one serve as heuristics for the generalizations of the other?

One fundamental line of theoretical inquiry highlighted by the study of international criminal law concerns what might be termed the macro-micro problem. It is the question of how the macro world of international law can cope with variations in the micro world of state law. What gives rise to the problem is the fact that there are many individual differences in state substantive law. One of the clearest examples of variations is the aftermath of the publication of Salman Rushdie's book, *The Satanic Verses*. The government of Iran condemned it as blasphemous and ordered its author executed for the crime of writing it. Indeed, Iran proclaims it to be a religious obligation of all its people to seek out and execute Mr. Rushdie. Western nations regard the notion of executing an author for writing a book as outrageous<sup>10</sup> and have taken positive steps (Rushdie is in hiding in London under the protection of the government of Great Britain) to frustrate Iran's attempt to track Rushdie down and execute him. Thus, what is criminal in Iran is highly safeguarded in other states.<sup>11</sup> It would be hard to imagine what general international law could say about the Rushdie problem. No matter what the proffered substantive rule of law might be, that rule would either favor Iran or Great Britain. Hence, Rushdie's case suggests, perhaps in an extreme way, the complexity entailed by examining international criminal law through the macro-micro perspective.

The macro-micro problem is not necessarily confined to the field of criminal law. In the nineteenth century the problem was addressed with respect to variations in state constitutional and tort law under the general rubric of "denial of justice." But whatever the subject matter, classic international law generally has had a hard time dealing with substantive rules that vary from state to state. Indeed, most rules of international law *define what a state is*,<sup>12</sup> and since states enter the

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10. But not 500 years ago at the height of the Inquisition!

11. The macro-micro problem does not apply to all international criminal law. There are some clearly universal crimes: genocide, enslavement, torture, war crimes, counterfeiting. Others are universal by some accounts and almost universal by others: terrorism, air piracy, hijacking, kidnapping.

12. As I have put it elsewhere, a "state" is simply a bundle of entitlements. *See*

international community with equal entitlements, it is hard for international law to say that any one state has an international entitlement that another state lacks.<sup>13</sup>

The nineteenth century evolved an ingenious solution to the macro-micro problem in matters concerning denial of justice. International law recognized the varying treatment of aliens in different states by evolving through the customary-law process two standards: an international non-discriminatory treatment standard and an international minimum treatment standard.<sup>14</sup> These standards were imposed upon all states; that is, each state had the same entitlement. But the two standards had different functions. The first one denied states the right to accord aliens a lesser standard of justice than that accorded to its nationals. The second standard applied even if there was no discrimination between the treatment accorded to aliens and citizens in those cases where the treatment was abysmally low for either category. International law provided that no state could accord aliens less than the threshold of the "international minimum standard," thus resulting in what today we would view as a human-rights anomaly that aliens in certain situations may enjoy more rights than citizens.

While the "responsibility of states" standards were customary law's attempt to solve the macro-micro problem, in the criminal law area a similar problem was addressed in the nineteenth century through bilateral treaties. Various extradition treaties confronted the problem at the bilateral micro level. These treaties incorporated provisions that have defined two emerging customary standards: the standard of double criminality and the doctrine of specialty.<sup>15</sup> But many difficulties remain because the problem of extradition continues to be addressed at the micro level and not at the more appropriate level of a

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A. D'AMATO, INTERNATIONAL LAW — PROCESS AND PROSPECT 21 (1987).

13. There may be physical differences among states; e.g., Switzerland does not border on an ocean and Japan does not have a continental shelf. But their rights remain the same. For instance, if by some geophysical convulsion Japan were to acquire a continental shelf, then it would have the same continental shelf rights that all other nations enjoy.

14. For an account of these two standards and how they interacted, see D'Amato & Engel, *State Responsibility for the Exportation of Nuclear Power Technology*, 74 VA. L. REV. 1011 (1988).

15. In my view, these doctrines have entered into customary international law. For a general account of the treaty-into-custom process, see A. D'AMATO, THE CONCEPT OF CUSTOM IN INTERNATIONAL LAW 103-66 (1971); D'Amato, *Custom and Treaty: A Response to Professor Weisburd*, 21 VAND. J. INT'L L. 459 (1988).

global standard. Some of the difficulties are brought out in Professor Sharon Williams' contribution to this Symposium.<sup>16</sup>

Three other ways for international law to cope with substantive legal differences are to urge "cooperation" among states, to set up an international criminal court, and to promote codification of substantive law. The "cooperation" approach is discussed in the Symposium papers by Roger S. Clark<sup>17</sup> and by Scott Carlson and Bruce Zagaris.<sup>18</sup> The international criminal court approach is discussed by John B. Anderson.<sup>19</sup> Professor Bassiouni has long been an advocate of international codification of substantive crimes, as evidenced by his contribution to this Symposium.<sup>20</sup> In a practical way, these approaches may lead to resolutions of the macro-micro problem. I am somewhat skeptical; I fear that conceptually they may merely recapitulate it. If I am right, efforts favoring cooperation, courts, and codification face their biggest challenges when the time comes to get specific about just what rules about just what crimes are to be included or excluded.

The intractability of at least two international criminal law issues transcends the difficulty of the nineteenth century resolution of the macro-micro problems of state responsibility and extradition. The first of these is the issue of terrorism. The cliché, "one man's terrorist is another man's freedom fighter," only hints at the difficulty because this aspect of the difficulty was at least addressed by classic international law. Customary international law traditionally has viewed any insurgency against a state as an outlaw criminal movement unless and until the point at which the insurgency takes control of the state. Then suddenly all is legalized, all is forgiven. This classic rule is hardly a solution to present complexities, which involve not only transboundary terrorist activities but include affirmative transboundary support of such activities.

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16. Williams, *The Double Criminality Rule and Extradition: A Comparative Analysis*, 15 NOVA L. REV. 581 (1991).

17. Clark, *Crime: The UN Agenda on International Cooperation in the Criminal Process*, 15 NOVA L. REV. 475 (1991).

18. Carlson and Zagaris, *International Cooperation in Criminal Matters: Western Europe's International Approach to International Crime*, 15 NOVA L. REV. 551 (1991).

19. Anderson, *An International Criminal Court - An Emerging Idea*, 15 NOVA L. REV. 433 (1991).

20. Bassiouni, *Draft Statute of the International Criminal Tribunal*, 15 NOVA L. REV. 373 (1991). See also M.C. BASSIOUNI, *INTERNATIONAL CRIMINAL LAW: A DRAFT INTERNATIONAL CRIMINAL CODE* (1980).

At the heart of the present problem of terrorism is how to conceptualize its illegality under present international law without implicating the majority of states which apparently practice it.<sup>21</sup> Anthony Chase's contribution to this Symposium<sup>22</sup> sharply raises the question of candor: Can United States' spokespersons and scholars ignore United States sponsored terrorist acts as they condemn the terrorist acts of others? His skepticism is generalizable; it applies to all scholars when their own nations' terrorism is implicated.

The second difficult macro-micro issue, perhaps the most complex, is narcotic drugs. At the most elementary level, this is a product that many people desire or crave, but one that is denied to many by virtue of the law of their own countries. The gap between demand and illegality (whether it be drugs, coffee, or alcohol) has historically been filled by organized crime. In the prohibition era in the United States beginning in 1921, bootleg alcohol was manufactured and distributed to "speakeasies," distilled liquor was imported from Canada; "rum-runners" challenged the coast guard at the 3-mile and 12-mile limits. Moreover, organized crime gained its foothold in the United States; once organized, it transferred its activities to other spheres when the Twenty-First Amendment was adopted in 1933 ending the federal prohibition of intoxicating liquor. We are still paying the price for the "grand experiment" of prohibition.

It is sometimes argued that narcotic drugs are far more dangerous substances than intoxicating liquor, and so the historical analogy does not hold up. In fact, there are undoubtedly more automobile accident fatalities due to drunken driving than all the deaths attributed to drugs. But the price now being paid to fight the war against drugs by the United States government vastly exceeds anything seen in the prohibition era.

The price has to be measured in terms of the number of criminal organizations spawned by the demand for drugs, the extent of corruption of the police, judges, and other officials, the strains placed upon international law by the aggressive actions of United States officials in interdicting ships on the high seas or even in pursuing and arresting

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21. This is, of course, a classic conundrum of customary international law. If most states engage in an activity *and* at least on occasion admit that they are doing so, how could that activity be illegal under customary international law? See, e.g., D'Amato, *Custom and Treaty: A Response to Professor Weisburd*, 21 VAND. J. INT'L L. 459 (1988).

22. Chase, *Book Review: Ministries of Terror*, 15 NOVA L. REV. 771 (1991).



foreign drug exporters within their own countries, and the opportunity costs associated with this vast police effort that could be diverted to other matters. Yet it is the very extent of the corruption associated with the war on drugs that may be the greatest political factor that insures its continued illegality. If the use of drugs were legalized, the high prices and profits associated with drug dissemination would plummet. Officials who have become accustomed to rake-offs from this vast profit system will suddenly be denied their major source of income, as would crime cartels.<sup>23</sup> Bruce Zagaris' contribution to this Symposium describes the situation as follows *without indicating whether his comments apply chiefly to the United States or to other countries or both*:

National law has been under attack by narco-terrorists and organized crime. By intimidating and killing judges, prosecutors, police, and the media, narco-terrorists and organized criminals ensure that the rule of law and a democracy cannot function properly. Similarly, by financing the campaigns of national and local politicians and running for office themselves, narco-terrorists and organized criminals also influence and control even the law-making and the entire electoral process. Indeed, the distribution of money, jobs, and other forms of wealth of largess by narco-terrorists and organized crime provide the donors with an inordinate amount of political power.<sup>24</sup>

The fact is that Professor Zagaris' words do apply both to the United States and to supplying countries such as Colombia, and for the same basic reason. The immensely valuable demand situation in the United States gives rise to drug corruption at home as well as abroad. Once a large number of politicians, police officers, judges and other govern-

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23. For example, eight police officers raid a hotel room where they had been tipped that a drug exchange was taking place. The criminals escape but leave behind twenty million dollars in cash and twenty million dollars worth of crack. Who will ever know if the police report back that they confiscated twelve million dollars cash and twelve million dollars worth of crack? Each police officer will be richer to the tune of one million dollars cash and one million dollars of street-value worth of narcotics. This is more money than any of them can accumulate in a lifetime's work. Does this scenario, with variations, take place? From all the media accounts, there is reason to believe that it takes place quite often.

What about judges who are paid off to acquit narcotics defendants? See generally M. MERMELSTEIN, *THE MAN WHO MADE IT SNOW* (1990).

24. Zagaris, *Protecting the Rule of Law From Assault in the War Against Drugs and Narco-Terrorism*, 15 NOVA L. REV. 703 (1991).

ment officials, are drawn into the lucrative drug trade, they gain a new incentive to call out for increasing criminal enforcement and penalties. The higher the rate of enforcement and the higher the punishment for offenders, the higher the price for drugs will go and hence the more room for profit-sharing and corruption.

Thus, a nation such as Colombia is in a basically self-inconsistent position. Since so much of its GNP derives from the lucrative drug-export trade, it may want to cooperate with the United States in suppressing local drug manufacture because it has an interest in keeping prices high by keeping drugs illegal. These officials want to make the drug business harder but not stamp it out altogether. At the same time, there may be many honest Colombian officials — as there are many honest United States officials — who genuinely want to win the war against drugs. Both the corrupt and honest officials share common ground in maintaining the regime of drug illegality in the United States. Some of the vast enforcement problems associated with the relationship between the United States and Colombia are depicted in Mark Sherman's contribution to this Symposium.<sup>25</sup> His paper should be read against the self-contradictory policy of government officials in wanting to maintain as well as eliminate the drug problem.

Countries who do not make illegal the use of narcotic drugs find it hard to sympathize with the efforts of the United States to strain or bend international oceanic law in order to search and interdict ships that may be carrying prohibited substances. Countries such as Mexico and Colombia which themselves have laws against drug manufacture and export — but at the same time derive a significant portion of their GNP from that trade — are of course more ambivalent toward United States policies. But even they resent actual physical intrusion by the United States, such as the apprehension within their countries of persons who are engaged in drug traffic or the spraying of their fields by American planes trying to destroy poppy and marijuana plants. The United States, in turn, ends up "bribing" such countries with massive foreign aid packages — thus expending taxpayer money in the effort to eradicate the drug problem, but only succeeding in driving up prices and profits.

In my personal view, the effort has not worked and will not work. We are unwilling to learn the lessons of prohibition, and thus are fated to repeat a historical mistake. This time it will be vastly more expen-

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25. Sherman, *United States International Drug Control Policy, Extradition, and the Rule of Law in Columbia*, 15 NOVA L. REV. 661 (1991).

sive and harmful.

In the meantime, international lawyers should make an attempt to grapple with the macro-micro problem in all the aspects of the international drug problem. Extradition, searches and seizures on the high seas, forcible intervention in other countries, and a host of related problems all strain against general norms of customary international law. Although I have never believed that solving a legal problem will necessarily solve a real-world problem, I think that real-world solutions can be remarkably wasteful and inconsistent if we fail to address possible inconsistencies in the network of applicable legal norms. The macro-micro problem with respect to international drug control can be a productive source of useful international legal scholarship as long as the criminalization of drugs remains the policy of the United States.

International investment fraud, though less visible and far more "white-collar" a problem than the traffic in drugs, raises many of the same macro-micro issues. The article by Lisa Davis and Bruce Zagaris suggests that, on the practical level, the macro-micro problem is addressed in the form of "international cooperation."<sup>26</sup> Discussion among the relevant national law-enforcement officers of their different national perspectives in the light of their potential common purposes may be the best that can be done to harmonize discordant national voices. International cooperation, on the entirely different subject of deporting Nazi war criminals, is similarly highlighted in the article Jeffrey Mausner.<sup>27</sup> In contrast, the seizure of Panama's Manuel Noriega, recounted in the article by Richard Gregorie, is a kind of test case of the limits of such international cooperation.<sup>28</sup> If the target state were Great Britain or France, instead of Panama, would "cooperation" play a more significant or a less significant role?

Although treaties, at first blush, appear to be a way of harmonizing certain kinds of discord, the article by David Stewart on the U.S. ratification of the Torture Convention reminds us that reservations, declarations, and understandings that are often appended to such documents tend to recapitulate particularistic national viewpoints.<sup>29</sup>

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26. Davis and Zagaris, *International Cooperation in a World Marketplace: Preventing & Prosecuting Commodity Futures Fraud & Abuses*, 15 NOVA L. REV. 507 (1991).

27. Mausner, *Apprehending and Prosecuting Nazi War Criminals in the United States* 15 NOVA L. REV. 747 (1991).

28. Gregorie, *Extraterritorial Jurisdiction: Its Use, Its Roots and Its Viability*, 15 NOVA L. REV. 625 (1991).

29. Stewart, *The Torture Convention and The Reception of International Crimi-*

The Symposium is rounded out by a description of Fordham University's new International Criminal Law Center.<sup>30</sup> More and more law schools—finally!—are discovering that there is a world out there beyond the borders of the United States. The incredible insularity of American legal study is at last under attack, and much of the challenge comes from the demand of students to be educated in legal systems other than the Anglo-American common law system. Not only should law professors introduce their students to different legal systems, but more importantly, in my view, they should use an external systemic perspective as a critical device in examining the fundamental postulates of our own common law.<sup>31</sup>

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*nal Law within the United States*, 15 NOVA L. REV. 449 (1991).

30. Abramovsky and Frank, *The Development, Objectives and Planned Activities of the International Criminal Law Center of Fordham University School of Law*, 15 NOVA L. REV. 501 (1991).

31. See D'Amato, *International Law in the Curriculum*, 2 PACE Y.B. INT'L L. 83 (1990).



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A COMPREHENSIVE STRATEGIC APPROACH ON INTERNATIONAL COOPERATION FOR THE  
PREVENTION, CONTROL AND SUPPRESSION OF INTERNATIONAL AND TRANSNATIONAL  
CRIMINALITY, INCLUDING THE ESTABLISHMENT OF AN INTERNATIONAL COURT

UNE APPROCHE STRATEGIQUE COMPREHENSIVE SUR LA COOPERATION INTERNATIONALE  
DANS LE DOMAINE DE LA PREVENTION, DU CONTROLE ET DE LA REPRESSION DE LA  
CRIMINALITE INTERNATIONALE ET TRANSNATIONALE

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A COMPREHENSIVE STRATEGIC APPROACH ON INTERNATIONAL  
COOPERATION FOR THE PREVENTION, CONTROL AND SUPPRESSION  
OF INTERNATIONAL AND TRANSNATIONAL CRIMINALITY, INCLUDING  
THE ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL COURT

By

M. Cherif Bassiouni  
Professor of Law, DePaul University;  
President, International Institute of Higher Studies in Criminal  
Sciences;  
President, International Association of Penal Law

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INTRODUCTION

1. The various forms and manifestations of international and transnational criminality require a comprehensive approach by the international community from which effective strategies of prevention, control, and suppression can follow.
2. At present, the lack of an overall comprehensive approach has led to occasional, unrelated, uncoordinated, and ineffective international action as may be evidenced by the increased forms, manifestations, and volume of international and transnational criminality. National strategies have also proven ineffective in the face of such forms of criminality.
3. In addition, national forms and manifestations of crime and delinquency have also increased, as have their volume. And, in a world where interstate mobility has become both easy and rapid, national law enforcement, as well as prosecutorial and judicial efforts, can no longer be effective without international cooperation.
4. The need to undertake a comprehensive codification of international crimes, and some types of transnational crimes, and also to develop some direct enforcement mechanisms, including but not limited to the establishment of a universal international criminal court and regional international criminal courts, appears to have gained ground with government policy-makers.
5. The need to develop an integrated codified or conventional approach

to the various modalities of interstate cooperation in penal matters has also become more evident. Such an approach is also particularly appropriate in furtherance of the existing approach: the "indirect enforcement scheme," whereby states obligate themselves under conventional international law to undertake national enforcement and interstate cooperation for the prosecution and punishment of certain types of offenses. Moreover, it is necessary to any "direct enforcement scheme."

6. The modalities of interstate cooperation in penal matters are, however, the same whether the conduct for which an individual is sought (either prosecution or punishment) constitutes an international, transnational, or purely domestic crime. Consequently, the integrated comprehensive approach to the various modalities of interstate cooperation in penal matters enhances the effectiveness of crime prevention and control irrespective of the type or manifestation of criminal activity.

7. To undertake effective implementation of any international strategy of crime prevention and control with respect to international and transnational criminality requires first an overall strategic approach.

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This report contains two parts. Part A covers the overall strategic approach and Part B contains a model for the establishment of a universal (international) criminal court and a model for regional international criminal courts.

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## PART A

**A COMPREHENSIVE STRATEGIC APPROACH  
ON INTERNATIONAL COOPERATION FOR  
THE PREVENTION, CONTROL AND  
SUPPRESSION OF INTERNATIONAL AND  
TRANSNATIONAL CRIMINALITY**

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**I. General Considerations on Defining and Codifying International Crimes and Developing an International Criminal Justice Policy Concerning International and Transnational Crimes**

1. Modern international criminal law can be said to have commenced in 1815 at the Congress of Vienna with efforts to abolish slavery. Since then 315 international instruments on substantive international criminal law have been elaborated covering the following international crimes: Aggression, War Crimes, Unlawful Use of Weapons, Crimes Against Humanity, Genocide, *Apartheid*, Slavery and Slave-Related Practices, Unlawful Human Experimentation, Torture, Piracy and Crimes on Board Commercial Vessels, Aircraft Hijacking and Sabotage of Aircrafts, Kidnapping of Diplomats and Other Internationally Protected Persons, Taking of Civilian Hostages, Mailing of Explosives and Dangerous Objects, Illicit Drug Cultivation and Trafficking, Destruction and Theft of National and Archaeological Treasures, Environmental Damage, Bribery of Foreign Public Officials, International Traffic in Obscene Materials, Interference with Submarine Cables, Falsification and Counterfeiting, Theft of Nuclear Weapons and Materials.<sup>1</sup>

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1. See M.C. Bassiouni, *International Crimes: Digest/Index of International Instruments 1815-1985* (2 vols. 1986). See also for other writings on the subject, A. Hegler, *Prinzipien Der Internationalen Strafrechts* (1906); F. Melli, *Lehrbuch Des Internationalen Strafrechts und Strafprossrechts* (1910); M. Travers, *Le Droit Pénal*

2. These offenses are designed to protect the following internationally recognized values and interests of the world community:<sup>2</sup>
  - (i) Protection of Peace
  - (ii) Humanitarian Protection During Armed Conflicts
  - (iii) Control of Weapons of Mass Destruction and Weapons Susceptible of Inflicting Unnecessary Human Suffering
  - (iv) Protection of Fundamental and Basic Human Rights
  - (v) Prevention of Terror-Violence
  - (vi) Protection of Social Interests
  - (vii) Protection of Cultural Heritage
  - (viii) Protection of the Environment
  - (ix) Protection of Means of International Communications
  - (x) Protection of International Economic Interests
3. While all these international crimes are often committed by individuals, some of them can be the product of state action, or the product of favoring state policy. But while responsibility for

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*International et sa Mise en Oeuvre en Temps De Paix et en Temps De Guerre* (5 vols. 1920-1922); H. Donnedieu De Vabres *Introduction A l'Etude Du Droit Pénal International* (1922); H. Donnedieu De Vabres, *Les Principes Modernes Du Droit International* (1928); N. Levi, *Diritto Penal Internazionale* Volckferstrafrecht (1952); V. Pella, *La Codification du Droit Pénal International* (1952); S. Glaser, *Introduction à L'Etude du Droit International Penal* (1954); A. Quintano-Ripolles, *Tratado De Derecho Penal Internacional e Internacional Penal* (2 vols. 1955-1957); S. Glaser, *Les Infractions Internationales* (1957); *International Criminal Law* (G.O.W. Mueller & E.M. Wise eds. 1965); O. Triffterer, *Domatische Untersuchungen Zur Entwicklung Des Materiellen Volkerstrafrechre Seit Nurnberg* (1966); S. Plawski, *Etude Des Principes Fondamentaux Du Droit International Pénal* (1972); 1 M.C. Bassiouni & V.P. Nanda, *A Treatise on International Criminal Law* (2 vols. 1973); *La Belgique Et Le Droit International Pénal* (B. DeSchutter ed. 1975); S. Glaser, *Le Droit Penal International* (2 vols 1979); H. Ebeid. *Algarima Al-Dawalia (The International Crime)* (1979); D. Oehler, *Internationales Strafrecht* (2nd ed. 1983); I. Karpetz, *Delitos de Caracter Internacional* (1983); Radin, "INTERNATIONAL CRIMES," 32 *Iowa L. Rev.* 33 (1946); Dinstein, "INTERNATIONAL CRIMINAL LAW," 5 *Israel* 55 (1975); Wright, "THE SCOPE OF INTERNATIONAL CRIMINAL LAW: A CONCEPTUAL FRAMEWORK," 15 *Val J. Int'l L.* 562 (1975); Green, "AN INTERNATIONAL CRIMINAL CODE NOW?" 3 *Dalhousie L.J.* 560 (1976); Mueller, "INTERNATIONAL CRIMINAL LAW: CIVITAS MAXIMAS," 15 *Case W. Res J. Int'l L.* 1 (1983); Friedlander, "THE FOUNDATIONS OF INTERNATIONAL CRIMINAL LAW: A PRESENT DAY INQUIRY," 15 *Case W. Res. J. Int'l L.* (1983); Wise, "INTERNATIONAL CRIMES AND DOMESTIC CRIMINAL LAW," 38 *DePaul L. Rev.* 923 (1989).

2. See M.C. Bassiouni, *A Draft International Criminal Code and a Draft Statute for an International Criminal Tribunal*, pp. 21-52 (1987) [hereinafter referred to as *Draft Code*].

such crimes has universally been recognized to apply to individual actors, there is little consensus in contemporary international criminal law doctrine as to state criminal responsibility, though the international law of state responsibility has been recognized under customary international law for compensatory purposes.<sup>3</sup>

4. International crimes as evidenced by conventional and customary international law invariably contain one or both of the following elements:<sup>4</sup>

- (i) An international element which evidences that the violative conduct effects world peace and security or significantly offends the basic values of humanity; and
- (ii) A transnational element whereby the offense affects more than one state, or the citizens of more than one state, or is committed by means involving more than one state.

But while some crimes are truly international in their scope, effect or consequences, others are essentially transnational and may only partly or incidentally be deemed international within the meaning stated above. Thus a distinction between such crimes needs to be made.<sup>5</sup>

5. Notwithstanding the diversity in nature, scope, and effect of these violations, there are no recognized criteria for distinguishing among these offenses which are indiscriminately referred to as international crimes. Some scholars have sought to distinguish them by referring to them as on the basis of international crimes *stricto sensu* and *lato sensu*. But even such labels hardly distinguish them in a way that can lead to the eventual precise definition of what constitutes an international crime, the definition of which is indispensable for the codification of international crimes and which is necessary to serve as a guiding policy for the development of future international crimes.<sup>6</sup>
6. Efforts by the United Nations since 1947 to develop a Code of

3. On the Principles of State Responsibility *see* the work of the International Law Commission between 1976 and 1989, published annually in the *Yearbook of International Law Commission (ILC)*. For the latest ILC position *see* the *Report of the International Law Commission*, on the work of its forty-first session, 2 May - 21 July 1989, (GAOR XLIV), Supp No. 10 (A/44/10). *See also* I Brownie, *State Responsibility* (1983).

4. Bassiouni, "CHARACTERISTICS OF INTERNATIONAL CRIMINAL LAW CONVENTIONS," in 1 *International Criminal Law Crimes*, p. 1 (M.C. Bassiouni ed. 1986).

5. *Id.*

6. DRAFT CODE *supra* note 2, at pp. 1-20.



Offences Against the Peace and Security of Mankind<sup>7</sup> have faltered because of a lack of clear perception of what constitutes an international crime, and thus what crimes should be included in the proposed Code. As a result, the present on-going efforts of the International Law Commission have included new categories of offenses not embodied in international conventions while excluding others which are covered by a number of conventions because they do not affect the "Peace and Security of Mankind."<sup>8</sup>

7. Contemporaneously, the International Law Commission, in its elaboration of Draft Principles on State Responsibility has sought, without defining them, to distinguish between international crimes and international delicts,<sup>9</sup> thus further evidencing the need for more precise definitions which would satisfy the "principles of legality."
8. The *Rationae Materiae* and *Rationae Personae* of international crimes needs to be clearly identified. Categories of violations need to be established to distinguish between the more serious offenses and the lesser ones. This effort must additionally focus on the choice of labels for these categories of offenses, such as: crimes, delicts, offenses, violations or others, such as "grave breaches" and "breaches" enunciated in the Geneva Conventions of August 12, 1949<sup>10</sup> and Protocols I and II of 1977.<sup>11</sup> Such labels must be

7. Draft Code of Offences Against the Peace and Security of Mankind, adopted at Paris 38 July 1954, 9 U.N. GAOR Supp. (No. 9), at 11, U.N. Doc. A. 2693 (1954). See Johnson, "THE DRAFT CODE OF OFFENCES AGAINST THE PEACE AND SECURITY OF MANKIND," 4 *Int. & Comp.L.Q.* 445 (1955). This Draft has been on the agenda of the U.N. Sixth Committee since 1979. See also Williams, "THE DRAFT CODE OF OFFENCES AGAINST PEACE AND SECURITY OF MANKIND," in 1 *International Criminal Law: Crimes*, p. 109 (M.C. Bassiouni ed. 1986); *Proceedings, Eightieth Annual Meeting, The American Society of International Law*, "DRAFT CODE OF OFFENCES AGAINST THE PEACE AND SECURITY OF MANKIND," remarks of Bassiouni p. 120, pp. 123-124; McCaffrey, pp. 120-123; Williams, pp. 124-127; Frankowska, pp. 128-130; and Friedlander, pp. 130-132.

8. See *Report of the International Law Commission* (1989), *supra* note 3, at pp. 127-187.

9. See Draft Articles of State Responsibility, art. 19, *Report of the International Law Commission* (1989), *supra* note 3. See also F. Malekian, *International Criminal Responsibility of States* (1985).

10. Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in the Armed Forces in the Field, Geneva, 12 August 1949, 75 U.N.T.S. 31, T.I.A.S. No. 3362; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Geneva, 12 August 1949, 75 U.N.T.S. 85, T.I.A.S. No. 3363; Geneva Convention Relative to the

reflective of an international policy designed to prevent control and suppress infractions of international criminal law.

9. An international criminal policy needs to be established in light of the availability and limits of the international sanction, and in keeping with the capabilities and effectiveness of the existing systems of international and national enforcement which are based on the voluntary cooperation of states to prosecute or extradite accused violators, and to assist states seeking to or engaging in the prosecution of violators of international criminal norms.<sup>12</sup>
10. A new approach to international criminal justice policy needs to be developed to make more effective a system of international criminal justice. Such a policy should include *inter alia* the following considerations:
  - (i) identification of the international or transnational social interest sought to be protected,
  - (ii) identification of the international or transnational harm sought to be averted,
  - (iii) assessment of the intrinsic seriousness or offensive nature of the violation to the world community, its fundamental values and basic interests, including, but not exclusively limited to, the preservation of peace and security of human kind and the protection of fundamental human rights,
  - (iv) appraisal of the inherent dangerousness of the prohibited conduct and of the perpetrator as manifested by the violative conduct and the manner in which it was performed, and
  - (v) recognition of the degree of general deterrence sought to be generated by the international criminalization of the violative conduct in light of the degree of certainty of eventual prosecution and punishment.
11. International criminal law must also preserve the well-established principles of legality which include the basic maxims *nulla poena*

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Treatment of Prisoners of War, Geneva, 12 August 1949, 75 U.N.T.S. 135, T.I.A.S. No. 3364; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949, 75 U.N.T.S. 287, T.I.A.S. No. 3365.

11. Protocol I Additional to the Geneva Conventions of 12 August 1949, Berne, 12 December 1977, U.N. Doc. A/32/144 Annex I; Protocol II Additional to the Geneva Conventions of 12 August 1949, Berne, 12 December 1977, U.N. Doc. A/32/144 Annex II.

12. See ANNEX I to Part A at p. 29.

*sine lege, nullum crimen sine lege*<sup>13</sup> and the requirements that international crimes must be clearly and unambiguously defined and carry established penalties, or penalties based on sufficiently ascertainable parameters and guidelines.

12. The prosecution of international crimes, whether by an international or national judicial body, must conform to established international human rights norms in order to assure justice, fairness, and equality of the law to all accused persons.<sup>14</sup>
13. The effective enforcement of international criminal law depends on:
  - (i) the development of national legislation embodying international crimes,
  - (ii) the development of national legislation, multilateral and bilateral instruments for interstate cooperation in the prevention, prosecution and punishment of such crimes, and
  - (iii) the establishment of various modalities of international investigation, prosecution, adjudication and punishment of violators of international criminal law, among which would be an international criminal court.
14. An international criminal code should be developed by the United Nations which should include:<sup>15</sup>

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13. Ancel, "LA RÈGLE *Nulla poena sine lege* DANS LES LEGISLATIONS MODERNES," in *Annales de l'Institut de Droit Comparé* 245 (1936); Vassalli, *Nullum Crimen Sine Lege*, (1939) reprinted from 91 *GIURISPRUDENZA ITALIANA*; Nuvolone, "LE PRINCIPE DE LEGALITE ET LES PRINCIPES DE LA DEFENCE SOCIALE" in *Revue de Science Criminelle et de Droit Comparé* 231 (1956). For a survey of these principles see Glaser, "LE PRINCIPE DE LA LÉGALITÉ EN MATIÈRE PÉNALE, NOTAMMENT EN DROIT CODIFIÉ ET EN DROIT COUTUMIER," 46 *Revue de Droit Pénal et de Criminologie* 889 (1966). For national approaches see R. Merle & A. Vitu, *Traité de Droit Criminal* p. 108 et seq. (1967) which documents the historical right of the judge in the French criminal justice system to interpret principles of law, and which at p. 113 acknowledges the decline in the 20th century of the rigid positivist approach to "principles of legality;" J. de la Morandiére, *De la Règle "Nulla poena sine Lege"* (1910); Soler, "LA FORMULATION ACTUELLE DU PRINCIPE *Nullum Crimen*," *Revue de Sciences Criminelles*, p. 11 et seq. (1952); Vassalli, "*Nullum Crimen Sine Lege*," in *Novissimo Digesto Italiano*, p. 3 (1984); and Vassalli, "ANALOGIA NEL DIRITTO PENALE," in *Novissimo Digesto Italiano*, p. 3 (1987).

14. See *inter alia*, International Covenant on Civil and Political Rights, 16 December 1966, G.A. Res./2200 A (XXI); United National Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, 17 December 1984, A/Res/39/146; Standard Minimum Rules for the Treatment of Prisoners 31 July 1957, ECOSOC Res/663 C (XXIV); and 13 May 1977, ECOSOC Res/2076 (LXII).

15. See DRAFT CODE, *supra* note 2.

- (i) a general part containing principles of responsibility,
- (ii) a special part containing substantive crimes, and
- (iii) a procedural part containing modalities of international cooperation.

## II. Technical Legal Considerations Pertaining to the Definition and Codification of International and Transnational Offenses

The enforcement of international criminal law would be advanced by defining and codifying international offenses, on the basis of the criteria stated above. The following definitions and criteria are recommended for consideration by the United Nations, governments and the scholarly community.<sup>16</sup>

1. An international offense is conduct, internationally proscribed, for which states have an international duty to criminalize, prosecute or extradite, and eventually to punish the transgressor, and to cooperate with other states and international organs for the effective and good faith implementation of these duties in order to attain the purposes of prevention, control and suppression of the violative conduct.
2. International offenses should be categorized in light of their international seriousness.
  - (i) The term "International Crimes" should be limited only to the more serious offenses, which are usually the product of state action or state policy and which affect the peace and security of humankind or which significantly offend basic fundamental international values. They are:
    1. Aggression,
    2. War Crimes,
    3. Unlawful Use of Weapons,
    4. Crimes Against Humanity,
    5. Genocide, and
    6. *Apartheid*.
  - (ii) *International Delicts* are those offenses which offend basic human values, but which do not affect the peace and security of humankind, and which are not the product of state action or state policy. They are:
    1. Slavery and slave-related practices,
    2. Torture,

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16. *Id.*, at pp. 21-66.

3. Unlawful human experimentation,
  4. Piracy,
  5. Aircraft hijacking,
  6. Threat and use of force against internationally protected persons,
  7. Taking of civilian hostages,
  8. Drug offenses,
  9. Destruction and/or theft of national treasures,
  10. Environmental protection,
  11. Unlawful use of the mails for violence,
  12. Theft of nuclear weapons and materials.
- (iii) *International infractions* are offenses not includable in the categories of "International Crimes" and "International Delicts." They are:
1. International traffic in obscene materials,
  2. Interference with submarine cables,
  3. Falsification and counterfeiting,
  4. Bribery of foreign public officials.

The Nations should undertake the codification of conventional and customary international crimes in order to further their enforcement by national legal systems and by an eventual international criminal court. Such a codification would also serve as a model for national legislation and the embodiment of such norms in their internal laws. This effort has never been undertaken because of the perception by ILC that the Draft Code of Offenses Against the Peace and Security of Mankind is limited to offenses which affect peace and security. Thus, it does not encompass all international crimes.<sup>17</sup>

### III. Principles and Legal Bases of International Criminal Responsibility

Recognizing that conventional and customary international criminal law establishes individual criminal responsibility for international crimes irrespective of whether national legislation also does<sup>18</sup> and that

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17. See *supra* note 7.

18. See Charter of the International Military Tribunal (annexed to the London Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis), London, 8 August 1945, 82 U.N.T.S. 279, E.A.S. No. 472; Charter of the International Military Tribunal for the Far East (part of the Special Proclamation:

the responsibility of states exists under customary international law,<sup>19</sup> but acknowledging the need for further specifications to both bases of responsibility reaffirms that:

1. Individuals are the subjects of international criminal responsibility.
2. No individual can avail himself of the defense of "obedience to superior orders" for the commission of international offenses unless with respect to each and every act such a person was compelled by immediate threat commensurate with or greater than the actual harm committed.
3. Heads of State and Diplomats should not be immune from individual criminal responsibility for the commission of an international offense.
4. Standards of state responsibility should be established whenever agents of a state engage in the commission of such offences, or act on behalf or for the benefit of a state in committing the violation. Such responsibility, in keeping with existing standards of customary international law, should, in keeping with the needs of that state's economic viability, include restitution, compensation, and reparation to the victims of such violations and to the victim state.
5. National and eventual international prosecution and punishment of violators of international criminal law should not derogate the basic principles of justice and fairness as enunciated in international instruments on the protection of human rights, including, but not limited to: fair trial before an impartial tribunal; opportunity to be heard and to defend; confrontation of witnesses; obtaining witnesses; the right to counsel of one's choice; including self-representation and the appointment of counsel in case of indigency; the right to appear before a fair and impartial judicial body other than the one before which the accused was tried; the application of the principle of *ne bis in idem*; and the infliction of penalties and treatment which are not cruel, inhuman

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Establishment of an International Military Tribunal for the Far East), Tokyo, 19 January 1946 (General Order No. 1), as amended 26 April 1946, T.I.A.S. No. 1589. See also Kelsen, "COLLECTIVE AND INDIVIDUAL RESPONSIBILITY IN INTERNATIONAL LAW WITH PARTICULAR REGARD TO THE PUNISHMENT OF WAR CRIMINALS," 31 *Calif. L. Rev.* 530 (1943).

19. See *supra* note 3.

or degrading.<sup>20</sup>

#### IV. Principles and Policies on Increasing Effectiveness of National Enforcement (The "Indirect Enforcement Scheme")

In order to render the international system of prevention, control and suppression of international offenses more effective, the following recommendations need to be taken into account:

1. Application of the rule *aut dedere aut iudicare*;
2. Recognition of state's duty to prosecute effectively and in good faith or to extradite effectively and in good faith;
3. Embodiment of international crimes in the national legislation of all countries;
4. Establishment of a ranking of jurisdictional theories: territoriality, nationality, passive personality, and universality;
5. Granting individual victims the right to initiate prosecution and to participate in prosecution as *partie civile*;
6. Developing means by which to detect abuses of power by those public officials who may commit international offenses or who may prevent their effective and good faith prosecution;
7. Inclusion in the national legislation of states' integrated modalities for interstate cooperation in the prosecution of international offenses including, but not limited to: extradition, mutual judicial assistance in securing tangible evidence and witnesses, recognition of foreign penal judgments, transfer of proceedings, and transfer of prisoners;
8. Application by states of these modalities of interstate applicability cooperation with respect to international offenses irrespective of the existence of bilateral or multilateral treaties;
9. Consistent of these modalities in all international criminal law conventions; and
10. Development by the United Nations of an integrated code of international modalities of interstate cooperation as is in the course of consideration by the Council of Europe and as has been developed as a model by the League of Arab States. Such an integrated code could be used by an eventual criminal court and could also serve as a model for inclusion in national legislation (as discussed in paragraph five).

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20. See *supra* note 14.

## V. Integrating the Modalities of International Cooperation for the Prevention, Control and Suppression of International and Transnational Criminality

1. International modalities of cooperation are essentially the same with respect to all forms of international and transnational criminality.<sup>21</sup> The formal modalities relied upon are extradition, legal assistance in securing tangible evidence and witnesses, recognition of foreign penal judgments, transfer of proceedings and prisoners, and law enforcement and prosecutorial cooperation under some recent instruments.<sup>22</sup> Most international criminal law conventions contain provisions on extradition and mutual judicial assistance.<sup>23</sup> Most countries in the world recognize and utilize one or more of the modalities described above.
2. A number of regional and sub-regional arrangements have developed at the multilateral level.<sup>24</sup> They are: Latin America and

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21. See E. Muller-Rappard and M.C. Bassiouni, *European Inter-State Cooperation in Criminal Matters, La Coopération Inter-Etatique Européenne en Matière Pénale* (3 Vols. 1987) [hereinafter referred to as *European Inter-State Cooperation*]. For international cooperation in penal matters, see Muller-Rappard, Schutte, Epp, Poncet, Zagaris, et al, in M.C. Bassiouni, *International Criminal Law* (Vol. 2, 1986).

22. *Id.*, and also Grutzner, "INTERNATIONAL JUDICIAL ASSISTANCE AND COOPERATION IN CRIMINAL MATTERS," in M.C. Bassiouni and V.P. Nanda, eds. *A Treatise on International Law*, 189 (1973). For a survey of recent Mutual Legal Assistance Treaties between the United States and other countries see Nadelman, "NEGOTIATIONS IN CRIMINAL LAW ASSISTANCE TREATIES," p. 33 *Am. J. Comp. L.* 467 (1985) and Zagaris and Simonetti, "JUDICIAL ASSISTANCE UNDER U.S. BILATERAL TREATIES" in *Legal Responses to International Terrorism*, M.C. Bassiouni ed. (1989) at p. 219. For the latest of such bilateral treaties see Agreement between the United Mexican States and the United States of America on Cooperation in Combating Narcotics Trafficking and Drug Dependency, signed in Mexico City on February 23, 1989. See also Mutual Legal Assistance Cooperation Treaty with Mexico, Senate, 100th Cong., 1st Sess., Treaty Doc. 100-13 (Feb. 16, 1988); for a discussion of the proposed U.S.-Mexico MLAT, See Zagaris, "U.S. and Mexico Sign Mutual Legal Assistance Treaty," 2 *Int'l Enforcement Law Rptr.* 44 (Feb. 1989). For a Socialist perspective see Krapac, "AN OUTLINE OF THE RECENT DEVELOPMENT OF THE YUGOSLAV LAW OF INTERNATIONAL JUDICIAL ASSISTANCE AND COOPERATION IN CRIMINAL MATTERS" 34 *Netherlands International Law Review* 324 (1987); Gardocki, "THE SOCIALIST SYSTEM OF JUDICIAL ASSISTANCE AND MUTUAL COOPERATION IN PENAL MATTERS" in 2 M.C. Bassiouni, *International Criminal Law* 133 (1987); Shupilov, "LEGAL ASSISTANCE IN CRIMINAL CASES ON SOME IMPORTANT QUESTIONS OF EXTRADITION [IN THE USSR]," 15 *Case Western Reserve Journal of Int'l L.* 127 (1983).

23. See ANNEX I to Part A, p. 29.

24. See M.C. Bassiouni, *International Extradition in United States Law and*



the United States,<sup>25</sup> the Arab states,<sup>26</sup> the Benelux countries,<sup>27</sup> the Scandinavian countries,<sup>28</sup> an agreement involving some African countries and France,<sup>29</sup> and the Commonwealth countries.<sup>30</sup> However, piecemeal negotiation and complicated historical and political considerations have resulted in a situation wherein none of these multinational and regional or sub-regional agreements integrate the various modalities into a comprehensive codified form of interstate cooperation in penal matters.<sup>31</sup> Such an approach would permit better alternative utilization of the most appropriate modalities and reduce the loopholes or gaps left by the accidents of historical development.

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*Practice*, (Vol. I, 1987) p. 25 and I. Shearer, *Extradition in International Law* (1971). See also V.E.H. Booth, *British Extradition Law and Procedure* (1980); B.P. Borgoni, *Aspectos Procesales de la Extradición en Derecho Español* (1984); H.A. Boukhri, *La Coopération Pénale Internationale par Voie d'Extradition au Maroc* (1986); M.T. Lupacchini, *L'Estradizione dall'Estero per L'Italia* (1989), O. Lagodny, *Die Rechtsstellung des Auszuliefernden in der Bundesrepublik Deutschland* (1987); M.A. Vieira, "L'EVOLUTION RÉCENTE DE L'EXTRADITION DANS LE CONTINENT AMÉRICAIN," 185 *Recueil des Cours, Académie de Droit International* 155 (1989); T. Vogler, *Auslieferungsrecht und Grundgesetz* (1970); and *Legal Aspects of Extradition Among European States* (Council of Europe, European Committee on Crime Prevention, 1970).

25. See OAS Treaty Series No. 36.

26. September 14, 1952, *League of Arab States Collection of Treaties and Agreements* 95 (1978), reprinted in 8 *Revue Egyptienne de Droit International* 328 (1952). See also A.Y. Khadr, "EXTRADITION LAW AND PRACTICE IN EGYPT AND OTHER ARAB STATES," (unpublished doctoral dissertation, School of Oriental and African Studies, University of London, 1977).

27. See *Tractatblad* No. 97 (1962). See also B. de Schutter, "INTERNATIONAL CRIMINAL LAW IN EVOLUTION: MUTUAL ASSISTANCE IN CRIMINAL MATTERS BETWEEN THE BENELUX COUNTRIES," 14 *Netherlands J. Int'l L.* 382 (1967).

28. See e.g., the Swedish Law of June 5, 1959, No. 254. See also Shearer, *supra* note 46, at p. 332.

29. The parties are Cameroon, Central African Republic, Chad, Congo (Brazzaville), Dahomey, Gabon, Ivory Coast, Malagasy Republic, Mauritania, Niger, Senegal, and Upper Volta. See I. Shearer, *supra* note 24, at p. 333. Concerning other treaties of these countries, see D.P. O'Connell, *State Succession in Municipal Law and International Law* 58 (1967).

30. For the scheme relating to the Rendition of Fugitive Offences within the Commonwealth, 1966, Cmnd. 2008 at 1, see V.E. Hartley Booth, *British Extradition Law and Procedure* (Vol. I, 1980).

31. See *European Inter-State Cooperation*, *supra* note 21, vol. III appendix pp. 1-30 in English and pp. 1-32 in French, supporting the approach see Rec. No. R/87/1 of the Committee of Ministers of Justice to the Member States on Inter-State Cooperation in Penal Matters among Member States, (adopted by Committee of Ministers of Justice, Council of Europe 19/1/87).

3. The desirability of this integrated codification has, however, been recognized by a number of states which have developed such codes in their national legislation. These states include Austria,<sup>32</sup> the Federal Republic of Germany,<sup>33</sup> and Switzerland.<sup>34</sup> Other countries, however, have under consideration the integrated approach, e.g., the Union of Soviet Socialist Republics, Hungary, Czechoslovakia, which are presently reviewing their criminal codes and codes of criminal procedure.
4. At the regional level, the Council of Arab Ministries of Justice in 1988 developed such a model code, but it has not yet been ratified.<sup>35</sup> The Council of Europe has been considering such an integrated approach since 1987 on the basis of a project developed by an *ad hoc* Committee of Experts which convened twice at the International Institute of Higher Studies in Criminal Sciences in Siracusa.<sup>36</sup> Other than the three countries mentioned above, national legislatures have not yet accepted the importance and effectiveness of an integrated approach. As a result, the modalities of international cooperation are still dealt with on a piecemeal basis.

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32. Austrian Law on Mutual Assistance in Criminal Matters. Bundesgesetz vom 4. Dezember 1979 über die Auslieferung und die Rechtshilfe in Strafsachen (Auslieferungs - und Rechtshilfegesetz - ARHG), BGBl. Nr. 529/1979. See also K. Schwaighofer, *Auslieferung und Internationales Strafrecht* (1988); R. Linke, H. Epp, G. Dokoupil, G. Felsenstein, *Internationales Strafrecht* (1981).

33. F.R. Germany (Act Concerning International Mutual Assistance in Criminal Matters) "GESETZ ÜBER DIE INTERNATIONALE RECHTSHILFE IN STRAFRECHT" of December 31, 1982, entered into force January 7, 1983, BUNDESGESATZBLATT 1982, Teil I, No. 2071. (Federal Official Gazette 1982, part I, p. 2071. The act replaced the German Extradition Act of 1929 and provides for comprehensive measures of extradition and other forms of mutual assistance in penal matters, including execution of foreign sentences. See also O. Lagodny, *Die Rechtstellung des Auszuliefernden in der Bundesrepublik Deutschland*, (1987); T. Vogler, *Auslieferungsrecht und Grundgesetz*, (1970); Vogler, "THE EXPANDING SCOPE OF INTERNATIONAL JUDICIAL ASSISTANCE AND COOPERATION IN LEGAL MATTERS," *Di Friedens-Warte*, p. 287, Band p. 66, Heft pp. 3-4, (1986).

34. See Swiss Federal Law on International Mutual Assistance in Criminal Matters, *Entraide Internationale en Matière Pénale* of 20 March 1981.

35. See COUNCIL OF ARAB MINISTERS OF JUSTICE: A COLLECTION OF THE COUNCIL'S DOCUMENTS, No. 2, January 1988, pp. 96-148.

36. Committee of Ministers of Justice to the member states of the Council of Europe, recommendation number, R/87/1, Committee of Ministers of Justice, 19 June 1987, reprinted in *European Inter-State Cooperation*, *supra* note 21, vol. 3, appendix, pp. 1-30 in English, and pp. 1-32 in French.

5. The relatively slow pace with which the integrated approach has been accepted within international and regional organizations stems from the familiarity and comfort which government representatives feel with the bilateral approach and with the process of gradually strengthening modalities by a piecemeal approach.<sup>37</sup> Efforts by a few scholars and government experts to spur the multinational integrated approach met with some reluctance in international conferences and negotiations because of the perception by some government representatives that such an approach may not be politically acceptable. This reaction does not, however, reflect the positive possibilities of international criminal law. Partially as a result of diplomatic timidity, the world community has not advanced beyond existing modalities, which are not even sufficient to cope with ordinary transnational crime, let alone with the new international manifestations of organized crime, drug traffic, and terrorism.
6. These international and transnational criminal phenomena are not hampered by the political and diplomatic considerations which limit states in their international penal cooperation. Furthermore, they do not suffer from the impediments created by administrative and bureaucratic divisions which exist among the national organs of law enforcement and prosecution which impair effectiveness. The international response to phenomena which know no national boundaries is piecemeal, divided, and is more frequently than not divisive of any effective efforts of international cooperation. This leaves little opportunity for the development of new modalities of cooperation in other fields, such as:
  - i. sharing law enforcement intelligence;
  - ii. increasing teamwork in law enforcement cooperation;
  - iii. tracking the flow of international financial transactions; and
  - iv. the development of regional "judicial spaces".

This latter idea was floated within the Council of Europe by France in the late 1970's, but was discarded within that regional

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37. See the U.S.-U.K. Supplementary Treaty on Extradition of 1986 and Sofaer, "THE POLITICAL OFFENSE EXCEPTION AND TERRORISM," 15 *Denver J. of Int'l L. and Policy* 125 (1986). For a contrary position, see Bassiouni, "THE POLITICAL OFFENSE EXCEPTION REVISITED: EXTRADITION BETWEEN THE U.S. AND THE U.K. - A CHOICE BETWEEN FRIENDLY COOPERATION AMONG ALLIES AND SOUND LAW AND POLICY," 15 *Denver J. of Int'l L. and Policy* 255 (1987).

context.<sup>38</sup> It has survived in discussions during 1989 among certain countries within that region, namely the Benelux countries and the Federal Republic of Germany. In the Andean Region, a parliamentary Commission is considering that option and is also working on the elaboration of an integrated code of interregional cooperation which would include the traditional modalities described above.

7. A multilateral or regional integrated approach seems an eminently desirable course of conduct and the United Nations could significantly contribute to it by elaborating such a model code, which would also include new approaches to the problems of jurisdiction. Such an effort has already been undertaken, in a more modest form, with the Comprehensive International Convention on Illicit Drug Traffic, adopted by a 1988 United Nations Conference held in Vienna, which includes multilateral provisions on extradition, mutual judicial assistance, and on the control and seizure of proceeds of illicit drug traffic.<sup>39</sup>
8. In conclusion, it must be noted that the international and national legal systems fail to address a number of issues which could increase their respective effectiveness, they are:

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38. See F. Mosconi, "L'ACCORDO DI DUBLINO DEL 4/12/1979, LE COMUNITA EUROPEE E LA REPRESSIONE DEL TERRORISMO," *La Legislazione Penale* (No. 3, 1986) p. 543 referring to the European Judicial Space. See also Consiglio Superiore Della Magistratura, *Estradizione E Spazio Giuridico Europeo*, (1979); Van Den Wijngaert "L'ESPACE JUDICIAIRE EUROPÉEN FACE À L'EURO-TERRORISME ET LA SAUVEGARDE DES DROITS FONDAMENTAUX," 3 *Revue Internationale de Criminologie et de Police Technique* 289 (1980). See also M. Marhetti, *Istituzioni Europee e Lotta al Terrorismo* (1986), and Council of Europe, International cooperation in the prosecution and punishment of acts of terrorism: Recommendation No. R(82)1 adopted by the Committee of Ministers of the Council of Europe on 15 January 1982 and Explanatory memorandum (Strasbourg 1983). Van den Wijngaert, "L'ESPACE JUDICIAIRE EUROPÉEN: VERS UNE FISSURE AU SEIN DU CONSEIL DE L'EUROPE?" 61 *Rev. Droit Pénal et de Crim.* 511 (1981).

39. United Nations Convention Against Illicit Drug Traffic, Narcotics, Drugs and Psychotropic Substances adopted December 19, 1988 (E/Conf. 82/15). For the history of the Convention see United Nations Economic and Social Council, Final Act of the United Nations Conference for the Adoption of a Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, United Nations Conference for the Adoption of a Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, Vienna, Austria, Nov. 25, Dec. 20, 1988; see also U.N., Division of Narcotic Drugs, *Extradition for Drug-Related Offences: A study of existing extradition practices and suggested guidelines for use in concluding extradition treaties*, (ST/Nar/5. November 1985).

- (i) *at the international level*, the lack of integrating all modalities of interstate cooperation in a comprehensive and integrated code that can also include new modalities of cooperation while at the same time upholding internationally protected norms and standards of human rights. Also the failure to even consider new schemes of direct enforcement such as the establishment of an international criminal jurisdiction is a significant weakness in the international system.
- (ii) *at the national level*, the bureaucratic divisions within the administration of criminal justice which plague and sometimes paralyze the system remain unaddressed. Furthermore, they are aggravated by the addition of new bureaucracies involved in the prevention and control of these two forms of criminality such as administrative and banking agencies and agencies responsible for international relations.

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July 2, 1990

Prepared by a Committee of Experts on International Criminal Policy for the Prevention and Control of Transnational and International Criminality and for the Establishment of an International Criminal Court. Organized by the International Institute of Higher Studies in Criminal Sciences under the auspices of the Italian Ministry of Justice in cooperation with The United Nations Crime Prevention and Criminal Justice Branch. 24-28 June 1990. Based on a report prepared by M. Cherif Bassiouni, President ISISC; President IAPL; Professor of Law DePaul University College of Law.

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DRAFT STATUTE

INTERNATIONAL CRIMINAL TRIBUNAL

The designations employed, the presentation of the material and the views expressed in this paper are those of the International Institute of Higher Studies in Criminal Sciences (ISISC), and do not necessarily reflect the practices and views of the United Nations in any of these respects.



# ***ISISC***

**ISTITUTO SUPERIORE INTERNAZIONALE DE SCIENZE CRIMINALI  
INSTITUT SUPERIEUR INTERNATIONAL DES SCIENCES CRIMINELLES  
INTERNATIONAL INSTITUTE OF HIGHER STUDIES IN CRIMINAL  
SCIENCES**

## **DRAFT STATUTE**

### **INTERNATIONAL CRIMINAL TRIBUNAL**

**Committee of Experts on  
International Criminal Policy for the Prevention  
and Control of Transnational and International  
Criminality  
and For the Establishment of an International Criminal  
Court**

**Organized by the  
International Institute of Higher Studies in Criminal  
Sciences**

**Under the Auspices of  
the Italian Ministry of Justice**

**in Cooperation with The  
United Nations Crime Prevention & Criminal Justice  
Branch**

**24-28 June 1990**



## I. Introduction

The establishment of an international criminal tribunal has long been a goal, first of the League of Nations<sup>1</sup> and then of the United Nations. It is consistent with this tradition and appropriate that the United Nations adopt this Draft.

1. This Draft is based on the Draft Statute for the Creation of an International Criminal Jurisdiction to Implement the International Convention on the Suppression and Punishment of the Crime of *Apartheid*, U.N. Doc. E/CN.4/1426 (19 Jan. 1981), which was prepared at the request of the United Nations Commission on Human Rights and presented by Professor M. Cherif Bassiouni to the Ad Hoc Working Group of Experts on Southern Africa in the Final Report on the Establishment of an International Criminal Court for the implementation of the *Apartheid Convention* and Other Relevant International Instruments, U.N. Doc. E/CN.4/AC/22CRP.19/Rev.1 (10 Dec. 1980, orig. in English), *reprinted* in Bassiouni & Derby, *Final Report on the Establishment of An International Criminal Court for the Implementation of the Apartheid Convention and Other Relevant International Instruments*, 9 HOFSTRA L. REV. 533 (1981).

It also reflects some of the modifications incorporated in the draft presented in M.C. Bassiouni, A DRAFT INTERNATIONAL CRIMINAL CODE AND DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL TRIBUNAL 213 (1987). Modifications were made by members of the COMMITTEE OF EXPERTS ON CONTROL OF TRANSNATIONAL AND INTERNATIONAL CRIMINALITY AND FOR THE ESTABLISHMENT OF AN INTERNATIONAL CRIMINAL COURT, organized by the INTERNATIONAL INSTITUTE OF HIGHER STUDIES IN CRIMINAL SCIENCES, under the auspices of the ITALIAN MINISTRY OF JUSTICE in cooperation with the UNITED NATIONS CRIME PREVENTION AND CRIMINAL JUSTICE BRANCH, meeting in Siracusa, Italy, 24-28 June

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1. TREATY OF PEACE WITH GERMANY (TREATY OF VERSAILLES) signed at Versailles, 28 June 1919, 11 *Martens Nouveau Recueil* (3d) 323, (entered into force 10 January 1920). *See also*, CONVENTION FOR THE PACIFIC SETTLEMENT OF INTERNATIONAL DISPUTES (FIRST HAGUE, I), signed at The Hague, 19 July 1899, 26 *Martens Nouveau Recueil* (2d) 720, 32 Stat. 1779, T.S. No. 342 (entered into force 4 September 1900). CONVENTION RELATIVE TO THE ESTABLISHMENT OF AN INTERNATIONAL PRIZE COURT (SECOND HAGUE, XII), signed at The Hague, 18 October 1907, 3 *Martens Nouveau Recueil* (3d) 88 (never entered into force).

1990. The list of members of the COMMITTEE OF EXPERTS is attached at APPENDIX 2.

Modifications made by the Committee of Experts were recorded and formulated by the RAPPORTEUR for the WORKING GROUP ON MODELS FOR AN INTERNATIONAL CRIMINAL COURT AND FOR A REGIONAL CRIMINAL COURT, Professor Christopher L. Blakesley. Professors Ved Nanda and Daniel Derby assisted Professor Blakesley. The Working Group on Models for an International Criminal Tribunal Convention was chaired by the Honorable Arthur Napoleon Raymond Robinson, Prime Minister, Trinidad and Tobago.

2. The past efforts include: the League of Nations Convention on the Prevention and Suppression of Terrorism containing a proposal for the establishment of an international criminal court,<sup>2</sup> the precedents of the International Military Tribunals of Nuremberg<sup>3</sup> and Tokyo,<sup>4</sup> the efforts of the United Nations in their 1951 (revised in 1953) Draft Statute for the Establishment of an International Criminal Court,<sup>5</sup> and the 1980 Draft Statute for the Establishment of an International Criminal Jurisdiction to Implement the International Convention on the Suppression and

2. CONVENTION FOR THE CREATION OF AN INTERNATIONAL CRIMINAL COURT, opened for signature at Geneva, 16 November 1937, League of Nations O.J. Spec. in Supp. No. 156 (1938), League of Nations Doc. C.547 (I).M.384(I).1937.v(1938) (never entered into force).

3. AGREEMENT FOR THE PROSECUTION AND PUNISHMENT OF MAJOR WAR CRIMINALS OF THE EUROPEAN AXIS (LONDON AGREEMENT), signed at London, August 1945, 82 U.N.T.S. 279, 59 Stat. 1544, E.A.S. No. 472 (entered into force, 8 August 1945), CHARTER OF THE INTERNATIONAL MILITARY TRIBUNAL (NUREMBERG) (annexed to the London Agreement); and CONTROL COUNCIL LAW No. 10 (Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity), adopted at Berlin, 20 December 1945, OFFICIAL GAZETTE OF THE CONTROL COUNCIL FOR GERMANY, No. 3, Berlin, 31 January 1946.

4. INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST PROCLAIMED AT TOKYO, 19 January 1946, and amended 26 April 1946, T.I.A.S. No. 1589 (entered into force 19 January 1946), CHARTER OF THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST (TOKYO).

5. DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL COURT (Annex to the Report of the Committee on International Criminal Jurisdiction, 31 August 1951), 7 GAOR Supp. 11, U.N. Doc. A2136 (1952) at 23. REVISED DRAFT STATUTE FOR AN INTERNATIONAL COURT (Annex to the Report of the Committee on International Criminal Jurisdiction, 20 August 1953), 9 GAOR Supp. 12, U.N. Doc.A/2645 (1954), at p. 21.

Punishment of the Crime of *Apartheid*,<sup>6</sup> and other proposals by various organizations, such as the International Law Association,<sup>7</sup> the International Association of Penal Law<sup>8</sup> and the works of individual scholars.<sup>9</sup>

3. The establishment of an international criminal tribunal could admittedly be based on various models, including, but not limited to:

- i. Expanding the jurisdiction of the International Court of Justice to include questions of interpretation and application of conventional and customary international criminal law, and providing for compulsory jurisdiction under Article 36 of the Statute of the International Court of Justice for disputes

6. DRAFT STATUTE FOR THE CREATION OF AN INTERNATIONAL CRIMINAL JURISDICTION TO IMPLEMENT THE INTERNATIONAL CONVENTION ON THE SUPPRESSION AND PUNISHMENT OF THE CRIME OF APARTHEID, 19 January 1980, U.N. Doc. E/CN.4/1416 (prepared by Professor M. Cherif Bassiouni).

7. See, DRAFT STATUTE FOR AN INTERNATIONAL COMMISSION OF CRIMINAL INQUIRY AND A DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL COURT, International Law Association, 60th Conference, Montreal, August 29 — September 4, 1982, in *Report of the 60th Conference of the International Law Association* (1983).

8. See, REPORT ON THE CREATION OF AN INTERNATIONAL CRIMINAL JURISDICTION, by V.V. Pella, to the Interparliamentary Union, XXII Conference, held in Berne and Geneva, 1924, in *l'Union Interparlementaire. Compt Rendu de la XXII Conférence tenue à Berne et à Geneve en 1924, publié par le Bureau Interparlementaire*, 1925. See also, *l'Union Interparlementaire, Compt Rendu de la XXII Conférence Tenue à Washington et à Ottawa en 1925* (1925). Project of the International Association of Penal Law, in *Actes du Premier Congrès International de Droit Pénal, Bruxelles*, 26-29 June 1926 (1927) and PROJET DE STATUT POUR LA CRÉATION D'UNE CHAMBRE CRIMINELLE AU SEIN DE LA COUR PERMANENTE DE JUSTICE INTERNATIONALE, presented by the International Association of Penal Law to the League of Nations in 1927, 5 *Revue International de Droit Pénal* (1928). DRAFT INTERNATIONAL CRIMINAL CODE, presented by the AIDP to the VIth U.N. Congress on Crime Prevention and the Treatment of Offenders (Caracas, 1980) (U.N.Doc. E/CN.4/NGO 213) [Updated in M.C. Bassiouni, A DRAFT INTERNATIONAL CRIMINAL CODE AND DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL TRIBUNAL (1987)]. See also, 45 *Revue International de Droit Pénal* Nos. 3-4 (1974); 52 *Revue International de Droit Pénal* Nos. 1-4 (1981).

9. See, DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL COURT, in J. Stone & R. Woetzel, *Toward a Feasible International Criminal Court* (1970); DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL COURT, (*Foundation for the Establishment of an International Criminal Court — Wingspread Conference*, September 1971); DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL COURT, Work Paper, *Abidjan World Conference on World Peace Through Law* August 26-31 (1973).

between states arising out of these questions;

- ii. Establishing an international commission of inquiry, either as an independent organism, as part of the international criminal court or as an organ of the United Nations. Such a commission would investigate and report on violations of international criminal law, taking into account the proposal of the International Law Association and existing United Nations experiences with fact finding and inquiry bodies which have developed over the years;
  - iii. Establishing an international (universal) criminal jurisdiction along the lines of the 1953 United Nations Revised Draft Statute for Establishment of an International Criminal Court<sup>10</sup> or the 1980 Draft Statute for the Establishment of an International Criminal Jurisdiction to Implement the International Convention on the Suppression and Punishment of *Apartheid* Convention;<sup>11</sup>
  - iv. Establishing Regional International Criminal Tribunals as described below.
4. The United Nations should adopt this Draft and submit it to the General Assembly.

## II. Background

1. Initiatives on the establishment of an International Criminal Tribunal<sup>12</sup> have been developed since the failure to establish an International Tribunal pursuant to Articles 227-229, Treaty of Versailles (1919) to prosecute: Kaiser Wilhelm II for "Crimes Against Peace;" German Military Personnel for "War Crimes;" and Turkish Officials for "Crimes Against Humanity."
2. More particularly, there are two projects developed by the United Nations 1953 Draft Statute for the Creation of an International Criminal Court, which was tabled by the General Assembly in 1953,<sup>13</sup> and the 1980 Draft Statute for the Establishment of an International Criminal Jurisdiction to Enforce the *Apartheid*

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10. *Supra* note 5.

11. *Supra* note 6.

12. These initiatives are listed in the Appendix to this Draft.

13. *Supra* note 5.

Convention, which has been before the Commission on Human Rights without action since 1980.<sup>14</sup> Non-governmental organizations have also produced noteworthy projects such as those of the International Law Association (see Appendix).

### III. The Need for Establishing an International Criminal Tribunal

1. Increased international and transnational crimes.
2. The existence of 22 categories of international crimes<sup>15</sup> representing 315 international instruments between 1815-1988.
3. The internationally perceived dangers of drug-trafficking and recycling of illicit proceeds of drug-trafficking, and their harmful effects on many societies of the world irrespective of whether they are producing or consuming countries, and the increased manifestations of organized criminality.
4. The continued manifestation throughout the world of terror-violence which threatens *inter-alia*: civilian aviation; civilian maritime navigation; diplomats and other internationally protected persons; and innocent civilians.
5. The inability of states and their national legal systems to act unilaterally to control and suppress these and other dangers arising from international and transnational criminality.

### IV. Alternative Models

1. The Universal Model — *See*, 1953 United Nations Draft Statute<sup>16</sup> and 1980 Draft Statute.<sup>17</sup>
2. The non-adjudicative Inquiry Model — *See*, Model proposed by the ILA.<sup>18</sup>

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14. *Supra* note 6.

15. *See*, M.C. Bassiouni, *International Crimes: Digest/Index of International Instruments 1815-1985* (Vo. I & II, 1986).

16. *Supra* note 5.

17. *Supra* note 6.

18. *Supra* note 7; C. Blakesley, DRAFT MODEL FOR PROPOSED INTERNATIONAL COMMISSION [OR BOARD] OF CRIMINAL INQUIRY, part of DRAFT MODEL INTERNATIONAL CRIMINAL TRIBUNAL, adapted, with analysis from earlier Draft Models by M.C. Bassiouni and that cited in note 8, *supra*, for the *Istituto Superiore Internazion-*

3. The Regional Model. The universal model may be adapted for regional use. *See*, C. Blakesley, DRAFT MODEL INTERNATIONAL [REGIONAL] CRIMINAL TRIBUNAL, adapted, with analysis from earlier Draft Models by M.C. Bassiouni and that cited in note 7, *supra*, *reprinted in*, 136 THE CONGRESSIONAL RECORD, No. 77, pp. S 8080 - S 8089 (Washington, D.C. June 18, 1990).

## **A Model for A Proposed International Criminal Tribunal**

### **GENERAL**

#### **1. Establishment of the Tribunal**

- i. The Tribunal will be established pursuant to a multilateral convention [hereinafter referred to as "the Convention"] open to all States-Parties.
- ii. The States-Parties to the Convention will agree on the establishment of the Tribunal whose location will be determined by agreement.
- iii. The established Tribunal will have an international legal personality and will sign a host-country agreement with the host state. The Tribunal will thus have extra-territoriality for its location and immunity for its personnel.
- iv. The Tribunal's costs and facilities, including detentional facilities will be paid on a pro-rata basis by the States-Parties to the Convention.
- v. The Tribunal as an international organization will be granted jurisdiction by the States-Parties to prosecute certain specified offenses embodied in the annex, as codified by the States-Parties, and in international conventions and the authority to

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*ale de Scienze Criminali*, Committee of Experts on International Criminal Policy for the Prevention and Control of Transnational and International Criminality for the Establishment of an International Criminal Court, Siracusa, Italy, 24-28 June 1990.

detain those accused, and those convicted of the charges. [The merits of such a detentional scheme is that it removes pressures on the affected states, particularly in "terrorism" cases, and in cases involving major drug offenders].

## 2. Jurisdiction of the Tribunal and Applicable Law

- i. The Jurisdiction of the Tribunal will be universal for offenses provided and defined in the annex to this Convention to be enacted by the authority of the Standing Committee. For other crimes, not listed in the Annexed Code of Offenses, jurisdiction also exists by virtue of a provision (or series of provisions) in the Convention, which will be in the nature of a "transfer of criminal proceedings" agreement.<sup>19</sup> [Thus, each State-Party that has original jurisdiction based on territoriality, active or passive personality, would not lose jurisdiction, but merely transfer the criminal proceedings to the Court. This approach will alleviate some major jurisdictional and sovereignty problems.]
- ii. In the cases where it is called for, the intended consequence of this approach of "transfer of proceedings," the Tribunal will use the substantive law of the transferring state and its own procedural rules which will be part of the Convention and promulgated prior to the Tribunal's entry into function.<sup>20</sup>
- iii. In the transfer of proceedings context, the Procurator-General of the Tribunal will act as the Chief Prosecutor, but will be assisted by a prosecuting official of the transferring state whose law is to be applied.

## 3. Prosecution

- i. Prosecution may commence on the basis of a criminal

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19. See, e.g., the EUROPEAN CONVENTION ON THE TRANSFER OF PROCEEDINGS IN CRIMINAL MATTERS (E.T.S. No. 73).

20. The procedural rules will be consistent with and based on general principles of international law and in accordance with internationally protected human rights, particularly the International Covenant on Civil and Political Rights, Res. 2200 (XXI), 16 December 1966; 21 GAOR, Suppl. No. 16 (A/6316), at 45-52; and the Inter-American Convention on Human Rights. OAS T.S. No. 36, at 1-21 (OAS Official Records, OEA/SER. A/16) 22 November 1969.

complaint brought by a State-Party. In addition, a State-Party that does not have subject matter or *in personam* jurisdiction, or that does not wish to bring a criminal complaint within its own jurisdiction, may petition the Procurator-General of the Tribunal to inquire the potential direct prosecution by the Court. In such cases, the request by a State-Party will be confidential, and only after the Procurator-General of the Tribunal has deemed the evidence sufficient will the case for prosecution be presented to the Court *in camera* for the Court's action. In such a situation, the Tribunal's Procuracy acts as a Judicial Board of Inquiry.<sup>21</sup> Once the Procuracy (sitting as the Judicial Board of Inquiry) has decided whether to prosecute, the Procurator-General will issue an Indictment and request the surrender of the accused by the State-Party where the accused may be found.

- ii. The Convention includes provisions on surrendering the accused to the Tribunal and providing the Tribunal with legal assistance (including administrative and judicial assistance) for the procurement of evidence (both tangible and testimonial).<sup>22</sup>

#### 4. Conviction

- i. Upon conviction the individual may be returned to the surrendering state, which will carry out the sentence on the basis of provisions in the Convention, in the nature of "transfer of prisoners' agreements."<sup>23</sup> Alternatively, the convicted person can be transferred to any other State-Party on the same legal basis, or the Tribunal may place the convicted person in its own detentional facilities which will be established by the

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21. See, *supra* note 18.

22. See, e.g., THE EUROPEAN CONVENTION ON MUTUAL LEGAL ASSISTANCE (E.T.S. No. 30), and the various bilateral Conventions between various states. See, e.g., A. Ellis and R. Pisani, *The United States Treaties on Mutual Assistance in Criminal Matters*, in 2 M.C. Bassiouni, *INTERNATIONAL CRIMINAL LAW* 151 (1986).

23. See, e.g., THE EUROPEAN CONVENTION ON TRANSFER OF SENTENCED PERSONS (E.T.S. No. 112) and the bilateral treaties on Transfer of Prisoners between the United States and Canada, the United States and Mexico and other countries. See, Bassiouni, *TRANSFER OF PRISONERS BETWEEN THE UNITED STATES, MEXICO AND CANADA* 239; and H. Epp, *The European Convention on Transfer of Prisoners* in 2 M.C. Bassiouni, *INTERNATIONAL CRIMINAL LAW* 253 (1986).



Convention in accordance with a host-state agreement between the Tribunal and the State wherein the detentional facility will be established.

- ii. By virtue of the Convention, an indictment by the Procuracy, sitting as a Judicial Board of Inquiry, will be recognized by all States-Parties.

## **5. Composition of the Court**

The Court will consist of as many judges as there are States-Parties to the Convention, but not less than twelve. There will be four Chambers of three Judges each and a Presiding Judge. The judges will be drawn by lot to sit in rotation on the four Chambers (one of which will be the Judicial Inquiry Board).

## **6. Appeal**

To provide for the right of appeal, the Tribunal will be divided into Chambers and the Judges drawn by lot. One Chamber will be the Judicial Inquiry Board and one or more other Chambers will be adjudicating chambers. Three judges will form a panel for hearing cases. The Tribunal sitting *en banc* will hear appeals. The three judges who heard the case will not sit with the *en banc* for that appeal.

## **7. Selection of Judges**

Each State-Party will appoint a Judge from the ranks of its judiciary or from distinguished members of the Bar or from Academia. The judges will be persons of high competence, knowledgeable in International Criminal Law, and of high moral character. Appointment of Judges and their tenure is to be established by the Convention.

# DRAFT STATUTE OF THE INTERNATIONAL CRIMINAL TRIBUNAL

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## Part IV - Statute of the International Criminal Tribunal\*

### Chapter 1. Definitions

#### Article I. *The Statute*

The Statute of the International Criminal Tribunal which is the legal authority and basis for the functioning of the Tribunal and its Organs.

#### Article II. *The International Criminal Tribunal*

All the Organs created by the Statute, which include the Court, the Procuracy, the Secretariat, and the Standing Committee of States-Parties.

#### Article III. *The International Criminal Court*

The judicial organ of the Tribunal, which adjudicates matters constituting an alleged violation of the International Criminal Code, determines guilt or innocence, and meets out penalties in accordance with the provisions of the Statute.

#### Article IV. *The Procuracy*

That Organ of the Tribunal that investigates, prosecutes, and oversees the application of the decisions of the Court.

#### Article V. *The Secretariat*

The clerical and administrative organ of the Tribunal.

#### Article VI. *The Standing Committee*

That body consisting of the States-Parties to the Convention that adopted the Statute.

#### Article VII. *The Procurator*

The person elected by the Standing Committee to head the Procuracy.

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\* This text relies in part on the 1953 United Nations *Revised Draft Statute for an International Criminal Court* (9 GAOR Supp. XII, U.N. Doc. A/2645 1954), prepared by the International Law Commission, hereinafter referred to as 1953 ILC Draft and the *Draft Statute of an International Criminal Court* of the International Law Association of May 1979 in proceedings of the International Law Associations' Belgrade Conference, 1980, P. 11, hereinafter referred to as 1979 ILA Draft, and the Final Report on the Draft Statute for the Creation of an International Criminal Jurisdiction to Implement the International Convention on the Suppression and Punishment of the Crime of *Apartheid*, 19 January 1980, E/CN.4/1426 (1980).

**Article VIII. *The Judge or Judges***

The judicial person or persons who sit on the Court.

**Article IX. *The Secretary***

The person elected by the Standing Committee to head the Secretariat.

**Article X. *The Convention***

The instrument by virtue of which the Statute for the Tribunal is adopted.

**Chapter 2. General Provisions****Article XI. *Purpose of the International Criminal Tribunal***

The purpose of this International Criminal Tribunal is to enforce the provisions of those international crimes which shall be included in the annex, as codified by the States-Parties and other international offenses which may be established by means of Supplemental Agreements to this list.

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***Commentary***

This article establishes an International Criminal Tribunal which is to be a new international legal institution consisting of several organs discussed in Article III below. This Draft Convention provides States-Parties with the opportunity to include Supplemental Agreement to the International Criminal Code, within the jurisdiction of the Court, other international offenses than those contained in the International Criminal Code.

With some 22 categories of international crimes, representing some 315 international instruments enacted between 1815 and 1989, none of which properly defines in criminal law terms the offenses proscribed or provides their elements, it is necessary that the Standing Committee properly codify, or assign another organ of the Tribunal to codify, the offenses to be covered by the Convention.

**Article XII. *Nature of the Tribunal***

The Tribunal shall be a permanent body, occupying facilities and performing its chief functions at the Palace of Justice in The Hague, and utilizing as its official languages those of the United Nations.

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*Commentary*

This article considers the Tribunal a newly created institution, and, in order to minimize logistical problems, the suggested location is the Palace of Justice in The Hague; it is already established and equipped as an international judicial body. The official languages are those of the U.N., which represents a recognized world consensus.

**Article XIII. *Organs of the Tribunal***

1. The Tribunal shall consist of the following organs:
    - a. The Court;
    - b. The Procuracy;
    - c. The Secretariat; and
    - d. The Standing Committee of States-Parties to the Statute of the International Criminal Tribunal.
  2. The functions and competence of the above organs shall be as designed in Chapter 4 of this Convention.
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***Commentary***

This article establishes four bodies with separate functions and purposes which are described throughout this Statute.

**Article XIV. Jurisdiction of the Tribunal**

The Tribunal shall have universal jurisdiction to investigate, prosecute, adjudicate and punish persons and legal entities accused or found guilty of any of the crimes contained in the International Criminal Code and any other international offenses which may be embodied in a Supplemental Agreement.

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**Commentary**

The Tribunal's jurisdiction is universal in that there are no territorial or geographic limits to the offenses or offenders which would deny the Tribunal subject-matter or *in personam* jurisdiction with respect to those offenses contained in the International Criminal Code and any Supplemental Agreement thereto. Within the competence of the Tribunal, there are no geographical or territorial limits to the Tribunal's jurisdiction. *See*, art. XV, *infra*.

The 1953 ILC Draft does not define crimes to be dealt with beyond the phrase "crimes generally recognized under international law." whereas the 1979 ILC Draft incorporates by reference definitions of crimes in sixteen international conventions, but notably omitting the *Apartheid* Convention.



### Article XV. *Competence of the Tribunal*

1. The Tribunal shall, subject to the provisions of the present Statute, exercise its competence in accordance with international law whose sources are stated in Article 38 of the International Court of Justice.
  2. The competence of the Organs of the Tribunal shall be interpreted and exercised in light of the purposes of the Tribunal as set forth in this Convention.
- 

#### *Commentary*

While penal theoreticians may argue the merits of a distinction between jurisdiction and competence, it is suggested that jurisdiction establishes the Tribunal's geographic and subject-matter authority, and *in personam* authority, while competence determines the specific powers of the Court with respect to its jurisdiction and provides the legal framework of reference for the Tribunal's exercise of its jurisdictional authority. This includes the theory of *La Competence de la Competence* in the Statute of the International Court of Justice whereby the Court can establish its own competence from its recognized competence. See I. Shihata, *The Power of the International Court to Determine its own Jurisdiction*. The Hague: Nijhoff, 1965. Essentially, the Convention will provide what conduct committed anywhere will fall within the Tribunal's competence.

**Article XVI. *Subjects Upon Whom the Tribunal Shall Exercise Its Jurisdiction***

The Tribunal shall exercise its jurisdiction over natural persons.

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***Commentary***

Although Article XIV on jurisdiction refers to the Tribunal's authority over natural persons, it was deemed of importance to emphasize this authority under a separate article though it may appear duplicative, since the International Criminal Code covers natural persons. See M.C. Bassiouni, *A Draft International Criminal Code and Draft Statutue for an International Criminal Tribunal* (1987).

## Article XVII. *Sanctions and Penalties*

1. The Court as an organ of the Tribunal shall upon entering a finding of guilty, and in accordance with standards set forth in this Convention have the power to impose the following penalties and sanctions:
    - a. The penalties shall be:
      - i. Deprivation of liberty or any lesser measures of control where the person found guilty is a natural person; and,
      - ii. Fine to be levied against a natural person, organization or State; and
      - iii. Confiscation of the proceeds of proscribed (or criminal) conduct.
    - b. The sanctions shall be:
      - i. Injunctions against natural persons or legal entities restricting them from engaging in certain conduct or activities; and
      - ii. Order restitution and provide for damages.
  2. Sanctions shall be established by the rules of the Court and shall be published before their entry into effect. Such sanctions shall be based on the criteria set forth in the annexed list.
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### *Commentary*

Only the Court upon a finding of guilty, subject to the provisions of this Convention, the procedures, and rules which would be developed by the different Organs and the standards of fairness set forth in the International Criminal Court, can impose a sanction against a natural person, organization, or State. Clearly deprivation of liberty applies to natural persons and not to legal entities, but fines and other sanctions apply to both natural persons and legal entities. It is to be noted that there is no schedule of penalties affixed to any specific crime and that some may raise a question of *nulla poena sine lege*. To avoid this problem the Convention recognizes that the Court shall enact appropriate and specific rules or sanctions to be promulgated prior to the tribunal's commencement of activities, which could satisfy the element of notice. Proceeds of confiscation will go to defray costs of the Tribunal.

In keeping with the principle of legality, it is necessary that well developed sanctions and penalties be developed and promulgated prior

to trial. This legislative responsibility will be delegated by the Standing Committee to some organ of the Tribunal.

### Chapter 3. The Penal Processes of the Tribunal

#### Article XVIII. *Initiation of the Process*

1. No criminal process shall be initiated unless a complaint is communicated to the Procuracy or originated within the Procuracy.
2. The Investigative Division of the Procuracy shall determine whether such complaints are "manifestly unfounded" or not, and that determination shall be reported immediately to the source of the communication, if any.
3. No complaint by a State-Party to the present Statute or an Organ of the United Nations shall be deemed "manifestly illfounded." Other States and Intergovernmental Organizations whose complaints are determined to be "manifestly illfounded" may appeal such determinations to the Court pursuant to Article XII of this Statute.
4. Unless otherwise directed by the Court, the Procuracy may either take no further action on "manifestly illfounded" complaints or may continue further investigation.
5. Communications determined "not manifestly illfounded" shall be transferred together with the record of investigation to the Prosecutorial Division of the Procuracy, which shall immediately inform the accused and assume responsibility for the development of the case.
6. When a case is ready for prosecution, the procurator shall submit it to an appropriate Chamber of the Court pursuant to this Statute, or to the Standing Committee pursuant to this Statute, or to both, but if a case based on a complaint submitted by a State-Party to this Statute or by an Organ of the United Nations has not been presented to the Court within one year of submission to the Standing Committee, the source of the complaint may request the Court to examine the case and act pursuant to Article IX of this Statute.

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#### *Commentary*

The desirability of such a process has substantial support. See G.A. Res. 1187 (XII) 11 November 1957. See Report of the Secretary-General on "International Criminal Jurisdiction," U.N. GAOR (XII) 1957), Doc. A/13649; see also *U.N. Historical Survey on the Question of the International Criminal Jurisdiction* Doc. A/CN.4/7, Rev. 1 (1949). For a documentary history of the various projects for the creation on an international criminal jurisdiction, see B. Ferencz, *The In-*

*ternational Criminal Court* (1980) 2 vols. See also, J. Stone and R. Woetzel, *Toward a Feasible International Criminal Court* (1970); 35 *Revue Internationale de Droit Penal* 102 (1964) devoted to that subject, and 45 *Revue Internationale de Droit Penal* No. 3-4 (1974) containing the contributions of the AIDP to V U.N. Congress on Crime Prevention and Criminal Justice, Geneva, September 1975 devoted to the subject of "*La Creation d'une Justice Penal Internationale*. The *Revue International de Droit Penal* contained scholarly writings on this subject in its issues of 1928, 1935, 1945, and 1952, as well as others. The AIDP has traditionally supported the creation of an international criminal court as witnessed by the positions it has taken at its various International Congresses, and those of its distinguished members among them: Pella, Donnedieu de Vabres, Saldana, Graven, Jimenez de Asua, Setille, Cornil, Bouzat, Jescheck, Romoshkiin, Herzog, Glaser, Dautricourt, Quintano-Rippoles, Arroneau, Mueller, De Schutter, Triffterer, Lombois, Plawski, Ferencz, Oehler, and Zubkowski. As past Secretary-General and now President of the AIDP, Professor M. Cherif Bassiouni has consistently supported the proposition. Because of the numerous writings on the subject by the above mentioned scholars and others, it would be impossible to cite them all. For three more initiatives resulting in the submission of a draft statute, see the International Law Association, "Draft Statute for an International Commission of Criminal Injury" adopted by its International Criminal Law Committee in Paris, May 1978 Proceedings of the International Law Association (Belgrade Conference 1980) p. 4; and "Draft Statute for an International Criminal Court," World Peace through Law, Abidjan World Conference August 1973 (edited by Robert K. Woetzel); and a "Draft Statute for an International Criminal Court" prepared by the Foundation for the Creation of an International Criminal Court, see also K. de Haan, "The Procedural Problems of a Permanent International Criminal Jurisdiction" in *De bestraffing van inbreuken tegen het oorlogs - en het humanitair recht* (A. Beirlaen, S. Dockx, K. de Haan, C. Van den Wijngaert, eds., 1980) p. 91.

The 1953 ILC Draft in Article 29 provides that the penal processes could commence only by action of a State-Party. The 1979 ILA Draft in Article 23 allows only States to approach the Commission which at its turn would present a case to the Court. The procedures presented herein differ from the 1953 ILC Draft and the 1979 ILA Draft in that they concentrate the investigation and prosecution of any case with the Procuracy, but a State-Party, Organ of the U.N., Inter-Governmental Organization, Non-Governmental Organization

and individual may file a complaint with the Procuracy, which shall accept such communications. The Procuracy then makes an initial determination as to whether the complaint is "not manifestly illfounded" or "manifestly illfounded." That determination is quite similar to the one made by the European Convention on Human Rights. However, the Procuracy is not without controls as to its discretion, in that a State-Party and an organ of the U.N. are entitled to recognition of their complaints as being "not manifestly illfounded," while other States and Inter-Governmental Organizations are entitled to an appeal to the Court of a determination by the Procuracy that the complaint has been found "manifestly illfounded." Communications and complaints by individuals and Non-Governmental Organizations are not entitled to the same status. The Procuracy's decisions are thus reviewable in the case of certain complaints and communications, and a decision holding a complaint "not manifestly illfounded" will then travel two alternate channels: (a) the possibility of mediation and conciliation through the Standing Committee; and (b) adjudication before the Court. A period of one year is allowed for the conciliation process, which is the same period allowed for the Procuracy's investigation and preparation of the case. Thereafter, the case may be presented to the Court at the request of the complaining State-Party or Organ of the U.N. if it is the initiator of the complaint. Otherwise that period of one year is extendable, subject to the Court's review.

**Article XIX. Pre-Trial Process**

1. The Prosecutorial Division of the Procuracy may request an appropriate Chamber of the Court pursuant to this Article of the Statute to issue orders in aid of development of a case, in particular, orders in the nature of:
  - a. Arrest warrants;
  - b. Subpoenas;
  - c. Injunctions;
  - d. Search warrants; and
  - e. Warrants for surrender of an accused so as to enable accused persons to be brought before the Court and to transit States without interference.
2. Requests for such orders may be granted with or without prior notice if opportunity to be heard would jeopardize the effectiveness of the requested order.
3. All such orders shall be executed pursuant to the relevant laws of the state in which they are to be executed.
4. The ultimate merits of a case shall not be considered pursuant to Article X of this Statute until the case has been submitted to an appropriate Chamber of the Court, sitting in a preliminary hearing at which the accused is represented by Counsel, and the Chamber made the following determinations:
  - a. The case is reasonably founded in fact and law;
  - b. No prior proceedings before the Tribunal or elsewhere bar the process in accordance with principle *ne bis in idem* or fundamental notions of fairness; and
  - c. No conditions exist that would render the adjudication unreliable or unfair.
5. The schedule of proceedings shall be established by the appropriate Chamber in consultation with the Procuracy and Counsel for the accused with due regard to the principle of fairness to the parties and the principle of "speedy trial."

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**Commentary**

A non-exhaustive list of orders that may be issued by the Court in aid of the preparation of a case is specified. It is expected that the Rules of the Court will go into the details of the form, content, and



other formalities pertaining to these orders. They are among the traditional powers of either a Court, or a judge of instruction, respectively, in the Common Law and Romanist-Civilist tradition. Similar provisions may be found in the 1053 ILC Draft, Articles 40, 41, and 42 and in the 1979 ILA Draft, Articles 36 and 37. It must be noted here that this Court will in this and other respects rely on the cooperation of the States-Parties to implement its orders. It must also be noted that where a State-Party has treaties or relations with a State non-Party on the subject of extradition and judicial assistance and cooperation, the Courts' orders and determinations of any sort would have an impact beyond that State-Party and thus give this Convention a multiplier effect with respect to its impact. [See e.g., V.E.H. Booth, *British Extradition Law and Procedure* (1980); C. Van den Wijngaert, *The Political Offence Exception to Extradition* 1980); M.C. Bassiouni, *International Extradition in United States Law and Practice* (2 vols. 1983); I. Shearer, *Extradition in International Law* (1971); T. Vogler, *Auslieferungsrecht und Grundgesetz* (1969); Bedi, *International Extradition* (1968); A. Billot, *Traite de l'Extradition* (1874); and M. Pisani and F. Mosconi, *Codice delle Convenzioni di Estradizione E Di Assistenza Giudiziaria in Materia Penale* (1979).] The observations made herein are also relevant to Chapter 6 on the Duties of the States-Parties since such duties will not only extend to the carrying out of the obligations of this Statute within their own territories but also whenever possible in their relations with other States. It is clear that the carrying out and execution of all such obligations to assist the Tribunal where required by this Statute, and in particular Chapter 6, but a State-Party is only requested to act pursuant to its relevant national laws. It must, however, be noted that a State-Party cannot enact national laws that will frustrate the carrying out of the obligations arising under this Statute.

Paragraph 4 establishes a procedure analogous to an indictment, such as was proposed in Articles 33 to 35 and 31 of the 1953 ILC and 1979 ILA Drafts, respectively, by means of a Committing Chamber in the former and Commission processes in the latter. Under the present draft, however, this process is but a step toward determination of guilt, it being unnecessary to give it special consequences because prior procedures in the Procuracy have been given appropriate consequences and progress under the present draft after the initial Procuracy action is gradual rather than involving thresholds.

The subparagraph a determination is primarily for the sake of effi-

ciency, as a means of detecting any errors by the Procuracy as to the suitability of the matter for further action. Subparagraph b provides an opportunity for early consideration whether misconduct in preparation of the case may have impugned the Tribunal's integrity in such a way to impair credibility or acceptability of its determinations, as well as for early consideration of *ne bis in idem* (double jeopardy) problems. [See M.C. Bassiouni, *Substantive Criminal Law* (1978), pp. 499-512].

Subparagraph c is particularly intended to deal with the need to consider the possibility that non-cooperation of States, particularly non-Parties, may render evidence of either incriminatory or exculpatory character unavailable, so that a fair trial of the case may be impossible. Early detection of problems of this type would not only be more efficient but also would tend to avoid unnecessary and difficult *ne bis in idem* questions aborted proceedings.

**Article XX. Adjudication**

1. Hearings on the ultimate merits of cases shall be conducted in public before a designated Chamber of the Court but deliberations of the Chamber shall be *in camera*.
  2. A Chamber may at any time dismiss a case and enter appropriately motivated orders. In case of dismissal for any reason other than on the merits, the principle *ne bis in idem* shall not apply.
  3. In all proceedings a Chamber shall give equal weight to evidence and arguments presented by the Procurator and on behalf of the accused in accordance with the principle of "equality of arms" of the parties.
  4. When all evidence respecting guilt or responsibility for wrongful acts has been presented, and argued by the parties, the Chamber shall close the Hearings and retire for deliberations.
  5. The decisions of the Chambers shall be publicly announced orally, in summary or entirely, accompanied by written findings of fact and conclusions of law, or entered 30 days from date of pronouncement of the oral decision, and any judge of that Chamber may write a separate dissenting or concurring opinion.
  6. A Determination of guilt shall be deemed entered when recorded by the Secretariat, which shall communicate it forthwith to the Procuracy and the accused, but no such Determination shall be regarded as effective until 30 days after the date of recording at which time the deciding Chamber may no longer modify its findings.
  7. Each Chamber shall consist of three judges selected by lot, and cases shall be assigned to each Chamber by lot.
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**Commentary**

Paragraph 1 parallels Article 39 of the 1953 ILC Draft and 35 of the 1979 ILA Draft conforming more closely to the latter, which makes no express provision for secret sessions. This treatment appears appropriate in that any confidential evidence must be submitted in public in a form or manner that protects essential matters of confidentiality, such as identity of a witness or a particular technique for obtaining evidence, and the details for such presentations may be treated in rules of the Court and Procuracy, which may be elaborated at a time when the actual needs in this regard are clearer.

Paragraph 2 describes the inherent powers of courts to dismiss cases, particularly in respect of evidentiary problems. Article 38, para-

graph 4, of the 1953 ILC Draft has a similar dismissal provision. No express provision is made for withdrawal of a matter, as was done in Articles 43 and 38 of the ILC and ILA Drafts, respectively, it being implicit in the nature of the powers of the Procuracy to determine whether to take such action.

Paragraph 3, it should be noted, relates to the principle of equality of arms, which has been observed under the European Convention on Human Rights. [Applications No. 596/59 and 789/60, *Franz Pataki and Johann Dunshim vs. Austria*, Report of the Commission of 28 March 1963, *Yearbook of the European Convention on Human Rights*, pp. 730, 734 (1963).]

Paragraphs 4 and 5 are self-explanatory.

It is contemplated that rules of the Court will address *ne bis in idem* issues.

Paragraph 6 is in part motivated by the availability of appeal and also the fact that Chambers, being constituted on a rotational basis, may be unavailable in their prior form for subsequent arguments. Details of the rotational constitution of Chambers are left for elaboration in the Court rules.

**Article XXI. Sanctioning**

1. Upon a Determination of guilt or responsibility, a separate hearing shall be held regarding sanctions to be imposed, at which hearing evidence of mitigation and aggravation shall be introduced and argued by the parties.
  2. At the conclusion of this hearing the Chamber shall retire for deliberation and shall issue its Determination in the same manner and subject to the same conditions as for a Determination of guilt, as set forth in paragraphs 5 and 6 of Article X.
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**Commentary**

These provisions are self-explanatory, but this Article is to be read in *pari materia* with Article VII and the Commentary thereto and Articles XIII and XXIII

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**Article XXII. Appeals**

1. Appeals to the Court *en banc* from Determinations of Chambers as to the guilt or responsibility or as to sanctions may be commenced by the accused upon written notice filed with the Secretariat and communicated to the other party within 30 days of the date of entry of judgement or order appealed.
2. Other appeals from actions of Chambers may be taken before a final judgement is entered only if such actions are conclusive as to independent matters.
3. The Procuracy may appeal questions of law in the same manner as an accused under paragraphs 1 and 2.
4. Decisions on Appeals shall be delivered in the same manner as other decisions of the Court *en banc* as provided in Article X, paragraphs 5 and 6 of this statute.
5. Decisions of the Court 24 *en banc* and unappealed Determinations of orders of Chambers shall be deemed final unless it is shown that:
  - a. Evidence unknown at the time of the Determination or order has been discovered, which have had a material effect on the outcome of the said Determination or order; or,
  - b. The Court or Chamber was flagrantly misled as to the nature of matters affecting the outcome; or
  - c. On the face of the record the facts alleged have not been proved beyond a reasonable doubt; or,
  - d. The facts proved do not constitute a crime within the jurisdiction of the Tribunal; or,
  - e. Other grounds for which the Court may provide by its Rules.
6. Appealed Determinations may be revised or vacated or remanded for new Determination, and when vacating a Determination the Court shall specify what if any *ne bis in idem* effects shall be given to the prior proceedings.

**Commentary**

Appeals from Chambers, Determinations and Orders, which may be done only on behalf of an accused or the Procuracy on questions of law, are permitted including post-conviction orders. This is consonant with the provisions of the International Covenant on Civil and Political

Rights concerning the dual level of judgement and review.

No appeal is permitted for the accused under Articles 49 and 43 of the ILC and ILA Drafts, respectively. Also interlocutory appeals are permitted as practical necessity may require them.

Paragraph 5 on revision of judgments parallels Articles 52 and 45 of the ILC and ILA Drafts, respectively, but is broader in scope.

### Article XXIII. *Sanctions and Supervision*

1. The Court may call upon any State-Party to execute measures imposed in respect of guilt, in accordance with the laws of the said State-Party.
  2. With respect to each accused determined to be guilty, a judge of the Court shall be selected by lot as Supervisor of the sanction imposed.
  3. All requests to modify sanctions shall be directed in the first instance to the Sanction Supervising judge who may submit the request to the Adjudicating Chamber for modification provided such action in no way increases the sanction or conditions imposed upon the person or legal entity found guilty.
  4. Decisions of the Sanction Supervising judges regarding modification requests may be appealed to the Chamber which imposed the sanction, but such appeals in the Chamber's discretion need not be the subject of full hearings and detailed written decisions.
  5. Nothing herein precludes the Court in accordance with its Rules to suspend its sanctions or place pre-conditions to their application in accordance with its Rules.
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### *Commentary*

Paragraph 1 corresponds to Articles 46 of the 1979 ILA Draft, Article 51 of the 1953 Draft having left such matters to future conventions. The terminology "sanctions" is capable of including not only punishments of imprisonment or fines but also levies of compensation or injunctive orders, thus maintaining the possibility for such broad ranges of action.

As noted previously, the supervisory mechanism of Paragraph 2 replaces the Clemency and Parole Boards provided by the ILC and ILA Drafts, and appeal is made possible under Paragraph 3.

It should be noted that these provisions govern only the procedures relating to sanctions. Standards relating to sanctions may be elaborated further in Court rules but subject to Article XXIV.



## Chapter 4. Organs of the Tribunal

### Article XXIV. *The Court*

1. The Court shall consist of twelve judges, no more than one of whom shall be of the same nationality, who shall be elected by the Standing Committee of States-Parties from nominations submitted thereto.
2. Nominees for positions as judges shall be of distinguished experts in the fields of international criminal law or human rights and other jurists qualified to serve on the highest courts of their respective States who may be of any nationality or have no nationality.
3. Judges shall be elected by secret ballot and the Standing Committee of States-Parties shall strive to elect persons representing diverse backgrounds and experience with due regard to representation of the major legal and cultural systems of the world.
4. Elections shall be coordinated by the Secretariat under the supervision of the presiding officer of the Standing Committee of States-Parties and shall be held whenever one or more vacancies exist on the Court.
5. Judges shall be elected for the following terms: four judges for four-year terms, four judges for six-year terms, and four judges for eight-year terms. Judges may be re-elected for any term any time available.
6. No judge shall perform any public function in any State.
7. Judges shall have no other occupation or business than that of judge of this Court. However, judges may engage in scholarly activity for remuneration provided such activity in no way interferes with their impartiality and appearance of impartiality.
8. A judge shall perform no function in the Tribunal with respect to any matter in which he may have had any involvement prior to his election to this Court.
9. A judge may withdraw from any matter at his discretion, or be excused by a two-thirds majority of the judges of the Court for reasons of conflict of interest.
10. Any judge who is unable or unwilling to continue to perform functions under this statute may resign. A judge may be removed for incapacity to fulfill his functions by a unanimous vote of the other

judges of the Court.

11. Except with respect to judges who have been removed, judges may continue in office beyond their term until their replacements are prepared to assume the office and shall continue in office to complete work on any pending matter in which they were involved even beyond their term.
12. The judges of the Court shall elect a president, vice-president and such officers as they deem appropriate. The president should serve for a term of two years.
13. Judges of the Court shall perform their judicial functions in three capacities:
  - a. Sitting with other judges as the Court *en banc*;
  - b. Sitting in panels of three on a rotational basis in Chambers; and
  - c. Sitting individually as Supervisors of sanctions.
14. The Court *en banc* shall, subject to the provisions of this Statute, adopt Rules governing procedures before its Chambers and the Court *en banc*, and provide for establishment and rotation of Chambers.
16. The Court *en banc* shall announce its decisions orally in full or in summary, accompanied by written findings of fact and conclusions of law at the time of the oral decision or within thirty days thereafter, and any judge so desiring may issue a concurring or dissenting opinion.
17. Decisions and orders of the Court *en banc* are effective upon certification of the written opinion by the Secretariat, which is to communicate such certified opinion to parties forthwith.
18. The Court *en banc* may within thirty days of the Certification of the judgement enter its decisions without notice.
19. No actions taken by the Tribunal may be contested in any other forum than before the Court *en banc*, and in the event that any effort to do so is made, the Procurator shall be competent to appear on behalf of the Tribunal and in the name of all States-Parties of this Statute to oppose such action.
20. States-Parties agree to enforce the final judgments of the Court in accordance with the provisions of this Statute.

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*Commentary*

Except for mechanical differences, the terms of this Article as to selection, tenure and replacement of judges closely parallel those of Articles 4 through 12 and 15 through 20 of the 1953 ILC Draft and 3 through 9 and 12 through 15 of the 1979 ILA Draft, although the latter makes no provision for removal of judges.

This Article represents an innovation, in that the other drafts deal with a single court organ and created a separate Clemency and Parole Board. As discussed below, the provision for separate functions of Chambers and the Court *en banc* permits appeal, a right called for in Article 14, Paragraph 5 of the International Covenant on Civil and Political Rights. Rather than create a separate institution to deal with such matters as clemency and parole, it was deemed more efficient to have such functions performed by individual judges, subject to possible appeals from their decisions, as discussed in connection with Article XII.

Paragraph 5 contemplates that judges will be elected with reference to specific terms. Accordingly, when a given judge is considered for re-election, any of the terms that are vacant at that time may be regarded as available for that judge.

Paragraph 7 addresses the concern that any conduct by a judge may create an appearance of impropriety, and narrowly circumscribes permitted non-Court activity.

Paragraph 11 is intended to permit judges to remain in their official capacity for the sole purpose of completing work on Court action begun prior to expiration of their terms.

Paragraph 12, it should be noted, does not bar re-election of the Court president.

**Article XXV. The Procuracy**

1. The Procuracy shall have the Procurator as its chief officer and shall consist of an administrative division, an investigative division and a prosecutorial division, each headed by a Deputy Procurator, and employing appropriate staff.
  2. The Procurator shall be elected by the Standing Committee of States-Parties from a list of at least three nominations submitted by members of the Standing Committee, and shall serve for a renewable term of six years, barring resignation or removal by two-thirds vote of the judges of the Court *en banc* for incompetence, conflict of interest, or manifest disregard of the provisions of this Statute or material Rules of the Tribunal.
  3. The Procurator's salary shall be the same as that of judges.
  4. The Deputy Procurators and all other members of the Procurator's staff shall be named and removed by the Procurator at will.
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**Commentary**

The significance of the three-part division of the Procuracy is apparent in connection with budgets, reports, and transfer of cases from investigative to prosecutorial divisions, as well as to the rights of the accused.

Paragraph 2, providing for joint action by the Court and Standing Committee for selection of a Procurator, appears appropriate because such an officer should be politically acceptable, and States are in a superior position to become aware of suitable candidates; the court is in a superior position to judge legal competence and estimate probable devotion to impartiality. Removal power is vested in the Court in the belief that deficiencies of the kind the Court would be likely to note would be the appropriate bases for dismissal.

Deputies are placed under control of the Procurator in Paragraph 4 in the interest of effective management.

**Article XXVI. *The Secretariat***

1. The Secretariat shall have as its chief officer the Secretary, who shall be elected by a majority of the Court sitting *en banc* and serve for a renewable term of six years barring resignation or removal by a majority of the Court sitting *en banc* for incompetence, conflict of interest or manifest disregard of the provisions of this Statute or material Rules of the Tribunal.
  2. The Secretary's salary shall be equivalent to that of the judges.
  3. The Secretariat shall employ such staff as appropriate to perform its chancery and administrative functions and such other functions as may be assigned to it by the Court that are consistent with the provisions of this Statute or material Rules of the Tribunal.
  4. In particular, the Secretary shall each year:
    - a. Prepare budget requests for each of the organs of the Tribunal; and
    - b. Make and publish an annual report on the activities of each Organ of the Tribunal.
  5. The Secretariat staff shall be appointed and removed by the Secretary at will.
  6. An annual summary of investigations undertaken by the Procuracy shall be presented to the Secretariat for publication, but certain investigations may be omitted where secrecy is necessary, provided that a confidential report of the investigation is made to the Court and to the Standing Committee and filed separately with the Secretariat. Either the Court or the Standing Committee may order by majority vote that the report be made public.
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***Commentary***

Although most of the functions of the Secretariat are ministerial in character, its duties to oversee communications and prepare reports serve an inspectorate function as well. Accordingly, control over the Secretariat is vested in the Court, as a neutral body.

**Article XXVII. *The Standing Committee***

1. The Standing committee shall consist of one representative appointed by each State-Party.
2. The Standing Committee shall elect by majority vote a presiding officer and alternate presiding officer and such other officers as it deems appropriate.
3. The presiding officer shall convene meetings at least twice each year of at least one week duration, each at the seat of the Tribunal, and call other meetings at the request of a majority vote of the Committee.
4. The Standing Committee shall have the power to perform the functions expressly assigned to it under this Convention, plus any other functions that it determines appropriate in furtherance of the purposes of the Tribunal that are not inconsistent with the convention, but in no way shall those functions impair the independence and integrity of the court as a judicial body.
5. In particular, the Standing Committee may:
  - a. Offer to mediate disputes between State-Parties relating to the functions of the Tribunal; and
  - b. Encourage States to accede to the Convention; and,
  - c. Propose to States-Parties international instruments to enhance the functions of the Tribunal.
6. The Standing Committee may exclude from participation representatives of States-Parties that have failed to provide financial support for the Tribunal as required by this Statute or States-Parties that failed to carry out their obligations under this Statute.
7. Upon request by the Procuracy, or by a party to a case presented for adjudication to a Chamber of the Court, the Standing Committee may be seized with a mediation and conciliation petition. In that case, the Standing Committee shall within 60 days decide on granting or denying the petition, from which decision there is no appeal. In the event that the Standing Committee grants the petition, Court proceedings shall be stayed until such time as the Standing Committee concludes its mediation and conciliation efforts, but not for more than one year except by stipulation of the Parties and with the consent of the Court.

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*Commentary*

The 1953 ILC Draft assumed that the Court created under it would be a part of the United Nations, and therefore any governing-body needs or political issues regarding its operations would be addressed by the political organs of the United Nations, especially the General Assembly. Under the 1979 ILA Draft, a similar assumption appears to have been made in that no treaty-type provisions are included and, although references are made to "Contracting Parties," this term appears to mean only States that have consented to be subject to operation of the Court. Nevertheless, the Commission contemplated in the ILA Drafts would have had a somewhat political character, in that only nationals of States consenting to be subject to operations of the Commission, could have been members and the Commission's own statute is referred to as a "Convention" in its Article 3.

The present Statute, in contrast, would be entirely conventional in character, although there are various express provisions for coordination of action with the United Nations. Accordingly, the need for an organ to deal with governance of the Tribunal and political issues relating to its activities promoted provision for a Standing Committee. It should be noted that the express functions of the Standing Committee are of a governing-body nature for the most part, and that its functions beyond these are largely unspecified. This would permit the representatives of States-Parties who constitute that organ to have wide flexibility in pursuing non-judicial matters helpful to international criminal justice. The requirement of meetings twice a year assures that the Standing Committee will be available for consultation on political questions.

One of the most significant functions of the Standing Committee may be in Paragraph 6 with respect to proposing action to initiate and propose new norms of international criminal law or standards for its application by the Tribunal. In view of the vagueness of existing instruments purporting to define international crimes, such proposals and adoption may be essential in order that criminal responsibility may be dealt with without violating the principle of *nulla poena sine lege*.

It should be noted that this Article does not contemplate deprivation of the status of State-Party in response to non-payment of financial support, but mere suspension.

No provision has been made for terms of representatives, it being assumed that their tenure shall be at the pleasure of the appointing State.

**Article XXVIII. General Institutional Matters**

1. Each of the Organs of the Tribunal shall formulate and publish its own Rules in accordance with the general principles of Internal law and the Standards set forth in this Convention to regulate its functions under this Statute, but the Rules of the Procuracy and Secretariat shall be subject to approval by a majority of the Court *en banc*.
2. The Procurator shall participate without a vote in formulating the Rules of the Court and of the Secretariat. The President of the Court shall participate without a vote in formulating the Rules of the Procuracy and of the Secretariat.
3. Except to the extent of the adopted Rules, procedures of the Court shall be those of the International Court of Justice and those of the Secretariat shall be as for the Registrar of the International Court of Justice.
4. Each of the Organs of the Tribunal shall cooperate with the Secretariat in formulating its budget request and such budget requests shall be presented to the Court *en banc* for modification or approval, subject to adoption or rejection in their entirety by the Standing Committee.
5. The Judges, the Procurator, the Deputy Procurators and their assistants, and the Secretary shall be deemed officers of the Court, as well as Counsels appearing in a given case, and they shall enjoy immunity from legal processes of States with respect to the performance of their legal duties.
6. No officer of the Court other than Counsel in a given case shall perform any function under this Statute without having first made a public, solemn declaration of impartiality and adherence to this Statute and the Rules of the Tribunal.

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**Commentary**

Paragraph 1 rules, it should be noted, are subject to further provisions in this Convention. Recognition that flexibility should be provided for such Rules was expressed in Article 24 of the 1953 ILC Draft and Article 10 of the 1979 ILA Draft. Court approval of Rules for the Procuracy and Secretariat appeal appropriate in view of the need to assure that such rules are fair and conform to legal requirements. Par-



ticipation by the Procurator in formulation of Court Rules recognizes the desirability that such Rules interrelate properly with Procuracy procedures and capabilities.

Paragraph 2 gives the Court, a neutral body, a key role in shaping the budget of the Tribunal, but leaves a veto power with the Standing Committee, which represents the States obliged to meet the budget. Prior draft statutes did no deal in detail with budgetary approval. See 1953 ILC Article 23 and 1979 ILA Article 17.

Paragraph 5 parallels Article 14 of the 1953 ILC Draft, which has no counterpart in the 1979 ILA Draft, as to judges. Expansion to other Tribunal officers is clearly appropriate. Expansion to other parties before the Court is necessary in the interest of fairness. [See, e.g., the European Agreement Relating to Persons Participating in Proceedings of the European Commission and Court of Human Rights (Council of Europe, May 1969; E.T.S. No. 69).

Paragraph 6's requirement of a solemn declaration parallels Article 13 of the 1953 ILC Draft and Article 11 of the 1979 ILA Draft, but is expanded to include officers of the Tribunal.

## Chapter 5. Tribunal Standards

### Article XXIX. *Standards for Rules and Procedures*

1. In all proceedings of the Tribunal and in the formulation of any of its organs, the accused shall be entitled to those fundamental human rights enunciated in the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights, which for these purposes are:

- a. *The presumption of innocence*

The presumption of innocence is a fundamental principle of criminal justice. It includes *inter alia*:

1. No one may be convicted or formally declared guilty unless he has been tried according to law in a fair trial;
2. No criminal punishment or any equivalent sanction may be imposed upon a person unless he has been proven guilty in accordance with the law;
3. No person shall be required to prove his innocence; and
4. In case of doubt the decision must be in favor of the accused.

- b. *Procedural rights*

The accused shall be given effective ways to challenge any and all evidence produced by the prosecution and to present evidence in defense of the accusation.

The defendant has the right to present at all judicial proceedings and to confront his accusers. The right to confront includes the right to examine opposing witnesses.

- c. *Speedy trial*

Criminal proceedings shall be speedily conducted without, however, interfering with the right of the defense to adequately prepare for trial. To this effect:

1. Time limitations should be established for each stage of the proceedings and should not be extended without reason by the appropriate Chamber of the Court.
2. Complex cases involving multiple defendants or charges may be severed by the appropriate Chamber of the Court when it is deemed in the interest of fairness to the parties and justice to the case.
3. Administrative or disciplinary measures shall be taken

against officials of the Tribunal who deliberately or by negligence violate the provisions of this Statute and the rules of this Tribunal.

d. *Evidentiary questions*

1. All procedures and methods for securing evidence shall be in accordance with internationally guaranteed Human Rights, the standards of justice set forth in this Statute, and in the rules of the Tribunal.
2. The admissibility of evidence in criminal proceedings must take into account the integrity of the judicial system, the rights of the defense, the interests of the victim, and the interests of the world community.
3. Evidence obtained directly or indirectly by illegal means which constitute a serious violation of internationally protected human rights, violate the provisions of this Convention, and Rules of this Tribunal shall hold them inadmissible.

e. *The right to remain silent*

Anyone accused of a criminal violation has the right to remain silent and must be informed of this right.

f. *Assistance of counsel*

1. Anyone suspected of a criminal violation has the right to defend himself and to competent legal assistance of his own choosing at all stages of the proceedings.
2. Counsel shall be appointed *sua sponte* whenever the court deems necessary and in accordance with the Rules of the Court enacted pursuant to this Convention.
3. Appointed counsel shall receive reasonable compensation from the Tribunal whenever the accused is financially unable to do so.
4. Counsel for the accused shall be allowed to be present at all stages of the proceedings.
5. Counsel for the accused or the accused shall be provided with all incriminating evidence available to the prosecution as well as all exculpatory evidence as soon as possible but no later than at the conclusion of the investigation or before adjudication and in reasonable time to prepare the defense.
6. Anyone detained shall have the right to access and to communicate in private with his counsel personally and by

correspondence, subject only to reasonable security measures decided by a judge of the Court.

**g. Arrest and detention**

1. No one shall be subjected to arbitrary arrest or detention.
2. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as established by this Statute and Rules of the Tribunal and only on the basis of a determination by the Court.
3. no one shall be arrested or detained without reasonable grounds to believe that he committed a criminal violation within the jurisdiction of the Tribunal.
4. Anyone arrested or detained shall be promptly brought before a judge of the Court and shall be informed of the charges against him; after appearance before such judicial authority he may be returned to the custody of the arresting authority but he shall be subject to the jurisdiction of the Court even when in the custody of a State-Party.
5. Preliminary or provisional arrest and detention shall take place only whenever necessary and as much as possible should be reduced to a minimum of cases and to the minimum of time.
6. Preliminary or provisional detention shall not be compulsory but subject to the determination of the Court and in accordance with its Rules.
7. Alternative measures to detention shall be used whenever possible and include *inter alia*:
  - limitations of freedom of movement, and
  - imposition of other restrictions.
8. No detainee shall be subject to rehabilitative measures prior to conviction unless he freely consents thereto.
9. No administrative preventive detention shall be permissible as part of any criminal proceedings.
10. Any period of detention prior to conviction shall be credited toward the fulfillment of the Sanction imposed by the Court.
11. Anyone who has been the victim of illegal or unjustified detention shall have the right to compensation. An action for damages may be brought and damages awarded for accusations which are vexations or brought in bad faith.

#### h. *Rights and interests of the victim*

The rights and interests of the victim of a crime shall be protected where appropriate taking into account the United Nations Declaration on victims of crime.

1. the opportunity to participate in the criminal proceedings;
  2. the right to protect his civil interests, and
  3. due regard shall be given in formulation of Rules of the Organs of the Tribunal to the principle of *ne bis in idem*, but a seemingly duplicative prosecution shall not be barred provided that the record in the prior proceeding is taken into account along with any prior measures in respect of the guilt of the accused.
2. Arrest and detention shall be in conformity with the Standard Minimum Rules for Treatment of Prisoners and the Principles on Freedom from Arbitrary Arrest and Detention of the United Nations.
  3. Maximum flexibility regarding restrictive measures should be encouraged, including use of such mechanisms as house arrest, work release and bail, and credit shall be given for any preconviction restrictions to an accused.
  4. The Tribunal shall include all of the above in the formulation of its Rules of Practice and Procedures which shall be effective upon promulgation.
  5. No proceedings before the Tribunal shall commence prior to the promulgation of the Rules of Practice and Procedures of the Court, the Procuracy, and the Secretariat.
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#### *Commentary*

The Standards of fairness which are to be guaranteed in all proceedings before the Organs of the Tribunal and which are to be reflected in the Rules to be promulgated by the said Organs embodying those rights are contained in the 1948 *Universal Declaration of Human Rights*, the 1966 *International Covenant on Civil and Political Rights*, the 1980 *Body of Principles on the Protection of Persons from All Forms of Arbitrary Arrest and Detention*, the 1950 *European Convention for the Protection of Human Rights and Fundamental Freedoms*, and the 1969 *Inter-American Convention on Human Rights*. These standards are also embodied in the resolutions of the XIIth Interna-

tional Congress of Penal Law held in Hamburg 1979 whose draft and explanatory notes are in 49 *Revue Internationale de Droit Penal* vol. 3, 1978. These provisions are particularly consonant with the *European Convention for the Protection of Human Rights and Fundamental Freedoms* and *Additional Protocols*. [See A. Robertson, *Human Rights in Europe* (1977), and D. Poncet, *La Protection de l'Accuse par la Convention Europeenne des Droits de l'Homme* (1977). See also, e.g., L. Sohn and T. Buergenthal, *International Protection of Human Rights* (1973).]

## **Chapter 6. Judicial Assistance and Other Forms of Cooperation**

### **Article XXX. *Cooperation between the States-Parties and the International Criminal Tribunal***

#### **Section 1. *Duties of States-Parties***

- 1.1 The States-Parties shall provide the International Criminal Tribunal with all means of legal assistance and cooperation, including, but not limited to extradition, letters rogatory, service of writs, assistance in securing testimony and evidence, transmittal of records, transfer of proceedings, and transfer of prisoners.
- 1.2 The application of 1.1 shall be in accordance with the domestic legislation of one requested state.
- 1.3 Where necessary States-Parties shall enact the legislation necessary to implement these provisions.

#### ***Comments***

Legal assistance includes administrative as well as judicial assistance.

#### **Section 2. *Methods and Procedures***

- 2.1 The methods of judicial assistance and other forms of cooperation and regulating procedures between the States-Parties and the International Criminal Tribunal shall be those methods and procedures provided for in Part III, "Procedural Enforcement Part."
- 2.2 The Rules of Practice of the Tribunal shall supplement the provision of Part III with respect to ministerial matters.

#### **Section 3. *Recognition of the Judgments of the International Criminal Tribunal***

- 3.1 The States-Parties agree to recognize the judgments of the Court and to execute its provisions. For the purposes of double jeopardy and evidentiary matters, the International Criminal Tribunal shall recognize the sanctions of other States in accordance with the provisions of this Convention.
- 3.2 The Court's Rules of Practice shall govern the recognition of the judgments of the Court by State-Parties and those of the other states by the Court.

#### Section 4. *Transfer of Offenders and Execution of Sentences*

- 4.1 In the event the International Criminal Tribunal does not have detentional facilities under its direct control, it may request a State-Party to execute the sentence in accordance with that Party's correctional system, and in that case, the Tribunal shall continue to exercise jurisdiction over the offender, including his transfer to another State or facility.
  - 4.2 In the event the International Criminal Tribunal has placed an offender in its own detention facilities, this person may by agreement be transferred for detention to his country of origin, subject to the Tribunal's jurisdiction.
  - 4.3 The Tribunal's Rules of Practice shall determine the basis and condition of the transfer of offenders and the execution of sentences.
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#### *Commentary*

Sections 1 and 2 of this Article refer to the modalities and procedures set forth in Part III, and Section 2 adds the proviso that ministerial matters can be provided for by the Tribunal's Rules of Practice.

The basis of international enforcement and cooperation derives from the maxim *aut dedere aut judicare* from Hugo Grotius, *De Jure Belli ac Pacis* (1624). It is now recognized as a general principle of international law to "prosecute or extradite," see Bassiouni, "International Extradition and World Public Order," in *Aktuelle Probleme des Internationalen Strafrechts* (1970), pp. 10, 15 (D. Oehler and P.G. Potz, eds), and it is the conceptual basis of the indirect enforcement scheme, which international law has relied upon. It is embodied in international criminal law conventions. The mechanism by which the indirect enforcement scheme operates is that a State obligates itself under an international convention to include appropriate provisions in its national laws which would make the internationally proscribed conduct a national crime. This approach is found in all international criminal law conventions establishing such a duty upon its Contracting Parties. See e.g., the Four *Geneva Conventions* of 12 August 1949, in their respective Articles 49-50/50-51/129-130/146-147. It is also the case with respect to all other international criminal law conventions.

The requested party executes in the manner provided for by its law any letters rogatory relating to criminal matters and addressed to it by the judicial authorities of the requesting Party for the purpose of procuring



evidence or transmitting objects, records or documents to be produced in evidence.

The requested Party shall effect service of writs and records of judicial decisions that are transmitted to it for this purpose by the requesting Party. Service may be effected by simple transmission of the writ or record to the person to be served. Other formalities shall be established by the Rules of the Court. *See* the 1959 *European Convention on Mutual Assistance in Criminal Matters*, and in part on the 1972 *European Convention on Transfer of Proceedings in Criminal Matters*. *See also* Grutzner, "International Judicial Assistance and Cooperation in Criminal Matters," in M.C. Bassiouni and V.P. Nanda (eds.), *A Treatise on International Criminal Law*, vol. 2, pp. 189, 217-218 (1973). *See also* *Explanatory Report on the European Convention on the Transfer of Proceedings in Criminal Matters* (Council of Europe, 1972); *Problems Arising from the Practical Application of the European Convention on Mutual Assistance in Criminal Matters* (Council of Europe, 1971); de Schutter, "International Criminal Law in Evolution: Mutual Assistance in Criminal Matters between the Benelux Countries," 14 *Neth. Int'l L. Rev.* 382 (1967); Grutzner, *Internationale Judicial Assistance and Cooperation in Criminal Matters*; and Markees, "The Difference in Concept Between Civil and Common Law Countries as to Judicial Assistance and Cooperation in Criminal Matters," in M.C. Bassiouni and V.P. Nanda (eds.), *A Treatise on International Criminal Law*, vol. 2, pp. 171, 189 (1972). *See also* Grutzner, *Internationales Rechtshilfeverkehr* (1967). For the text of these and other treaties, see M. Pisani and F. Mosconi, *Codice Delle Convenzioni di Estradizione e di Assistenza Giudiziaria in Materia Penale* (1979). *See also* e.g., 2 M.C. Bassiouni, *International Criminal Law* (1986).

Section 3<sup>3</sup> is applicable to: (1) sanctions involving the deprivation of liberty, (2) fines or confiscations, and (3) disqualifications. A State-Party shall under the conditions provided for in this Convention enforce a sanction imposed by the Court and vice versa. *See* the 1970 *European Convention on the International Validity of Criminal Judgments*. *See also* *Aspects of International Validity of Criminal Judgments* (Council of Europe, 1968), and *Explanatory Report on the European Convention on the International Validity of Criminal Judgments* (Council of Europe, 1970). *See also* Harari, McLean and Silverwood, "Reciprocal Enforcement of Criminal Judgments," 45 *Revue Internationale de Droit Penal* 585 (1974) D. Oehler, "Recognition of Foreign Penal Judgments and their Enforcement," in M.C. Bassiouni and V.P.

Nanda (eds.), *A Treatise on International Criminal Law*, vol. 2, p. 261 (1973); Schearer, "Recognition and Enforcement of Foreign Criminal Judgments," 47 Aust. L.J. 585 (1973); D. Oehler, *Internationalen Strafrecht* (1973). For the Benelux Convention, see *Convention Concerning Customs and Excise*, September 5, 1972, Belgium-Luxembourg-The Netherlands, 247 U.N.T.S. 329 (1956). See also K. Kraelle, *Le Benelux Commente, Textes Officiels* 147, 209, 306 (1961); de Schutter, "International Criminal Cooperation: The Benelux Example," in M.C. Bassiouni and V.P. Nanda (eds.), *A Treatise on International Criminal Law*, vol. 2, p. 261 (1973). The Scandinavian countries' arrangement for recognition and enforcement of penal judgments is reproduced in H. Grutzner, *Internationales Rechtshilfeverkehr in Strafsache*, pt. IV (1967). The arrangement between France and certain African states is reproduced in 52 Rev. Critique de Droit International Prive 863 (1973). See also e.g., 2 M.C. Bassiouni, *International Criminal Law* (1986).

Section 3 relies on the concepts embodied in the 1970 *European Convention on the International Validity of Criminal Judgments*, and on the 1964 *European Convention on the Supervision of Conditionally Sentenced or Conditionally Released Offenders*. It also relies on the treaties on the execution of penal sentences between the United States and Mexico, 5 November 1976, between United States and Canada, 2 March 1977, and between the United States and Bolivia, 10 February 1978, all treaties having entered into force. Furthermore, special reliance was placed on U.S. legislation implementing the above treaties. 18 U.S.C., sections 4100-4115. See Bassiouni, "Perspectives on the Transfer of Prisoners between the United States and Mexico and the United States and Canada," 11 Vanderbilt J. Transnat'l L. 249 (1978); Bassiouni, "A Practitioner's Perspective on Prisoner Transfer," 4 Nat'l J. Crim. Defense 127 (1978); Abramovsky and Eagle, "A Critical Evaluation on the Newly-Ratified Mexican-American Transfer of Penal Sanction Treaty," 64 Iowa L. Rev. 325 (1979), and Professor Vagt's response thereto in the same issue.

A scheme for transfer of offenders can be said to rely in part on the assumption that a given State will recognize the criminal judgment of another and of the Court. The manner in which this Article is drafted makes this assumption. See, in particular, Article 6 of the 1970 *European Convention on the International Validity of Criminal Judgments*.

## Appendix 1

### TO PART B

#### I. *Establishment of an International Criminal Court*

##### A. OFFICIAL TEXTS

1. CONVENTION FOR THE PACIFIC SETTLEMENT OF INTERNATIONAL DISPUTES  
(First Hague, I, Signed at The Hague, 19 July 1899, 26 Martens Nouveau Recueil (2d) 720, 32 Stat. 1779, T.S. No. 342 (entered into force 4 September, 1900).
2. CONVENTION RELATIVE TO THE ESTABLISHMENT OF AN INTERNATIONAL PRIZE COURT  
(Second Hague, XII), signed at The Hague, 18 October 1907, 3 Martens Nouveau Recueil (3d) 688 (never entered into force).
3. TREATY OF PEACE WITH GERMANY (Treaty of Versailles), signed at Versailles, 28 June 1919, 11 Martens Nouveau Recueil (3d) 323 (entered into force 10 January 1920).
4. CONVENTION FOR THE CREATION OF AN INTERNATIONAL CRIMINAL COURT, opened for signature at Geneva, 16 November 1927, League of Nations O.J. Spec. in Supp. No. 156 (1938), League of Nations Doc. C.547 (I).M. 384 (I).1837.v (1938) (never entered into force).
5. AGREEMENT FOR THE PROSECUTION AND PUNISHMENT OF MAJOR WAR CRIMINALS OF THE EUROPEAN AXIS (London Agreement), signed at London, August 1945, 82 U.N.T.S. 279, 59 Stat. 1544, E.A.S. No. 472 (entered into force, 8 August 1945), ANNEX, CHARTER OF THE INTERNATIONAL MILITARY TRIBUNAL (Nuremberg).
6. INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST PROCLAIMED AT TOKYO, 19 January 1946 and amended 26 April 1946, T.I.A.S. No. 1589 (entered into force 19 January 1946), ANNEX, CHARTER OF THE INTERNATIONAL MILITARY TRIBUNAL FOR THE FAR EAST (Tokyo).
7. CONTROL COUNCIL LAW No. 10 (Punishment of Persons Guilty of War Crimes, Crimes Against Peace and Against Humanity), adopted at Berlin, 20 December 1945, Official Gazette of the

Control Council for Germany, No. 3, Berlin, 31 January 1946.

8. DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL COURT (Annex to the Report of the Committee on International Criminal Jurisdiction, 31 August 1951), 7 GAOR Supp. 11, U.N. Doc. A/2136 (1952) at 23.
9. REVISED DRAFT STATUTE FOR AN INTERNATIONAL COURT (Annex to the Report of the Committee on International Criminal Jurisdiction, 20 August 1953), 9 GAOR Supp. 12, U.N. Doc. A/2645 (1954).
10. DRAFT STATUTE FOR THE CREATION OF AN INTERNATIONAL CRIMINAL JURISDICTION TO IMPLEMENT THE TO IMPLEMENT THE INTERNATIONAL CONVENTION ON THE SUPPRESSION AND PUNISHMENT OF THE CRIME OF APARTHEID, 19 January 1980, U.N. Doc. E/CN.4/1416.

#### B. UNOFFICIAL TEXTS

1. "REPORT ON THE CREATION OF AN INTERNATIONAL CRIMINAL JURISDICTION" by V.V. Pella to the Interparliamentary Union, XXII Conference, held in Berne and Geneva, 1924, in *L'Union Interparlementaire. Compte Rendu de la XXII Conference tenue a Berne et a Geneve en 1924, publie par le Bureau Interparlementaire*, 1925; see also, *L'Union Interparlementaire. Compete Rendu de la XXII Conference Tenue a Washington et a Ottawa en 1925* (1925).
2. "Projet d'une Cour Criminelle Internationale" adopted by the International Law Association at its 34th Conference in Vienna, August, 1926, *The International Law Association, Report of the 34th Conference, Vienna, August 5-11, 1926* (1927).
3. Project of the International Association of Penal Law, in *Actes du Premier Congres International de Droit Penal*, Bruxelles, 26-29 June 1926 (1927) and "*Projet de Statut pour la Creation d'une Chambre Criminelle au Sein de la Cour Permanente de Justice Internationale*," presented by the International Association of Penal Law to the League of Nations in 1927, 5 *Revue Internationale de Droit Penal* (1928).
4. "*Constitution et Procedure d'un Tribunal Approprie pour juger de la Responsabilite des Auteurs des Crimes de Guerre, presente a la Conference des preliminaires de Paix par la Commission*

*des Responsibilites des Auteurs de la Guerre et Sanctions, III, La Paix de Versailles*" (1930).

5. "PROJECT FOR THE ESTABLISHMENT OF A CONVENTION FOR THE CREATION OF A UNITED NATIONAL TRIBUNAL FOR WAR CRIMES," established by the United Nations War Crimes Commission, 1944, *see* United Nations War Crimes Commission (Wright ed. 1948).
  6. *L'Union Interparlementaire. Compte rendu de la XXVII Conference Tenue a Rome en 1948*, (1949).
  7. "DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL COURT," in Stone and R. Woetzel, *Toward a Feasible International Criminal Court* (1970).
  8. "DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL COURT," Foundation for the Establishment of an International Criminal Court (Wingspread Conference, September 1971).
  9. "DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL COURT," Work Paper, *Abidjan World Conference on World Peace through Law*, August 26-31, (1973).
  10. "Draft Statute for an International Commission on Criminal Inquiry and a Draft Statute for an International Criminal Court," International Law Association, 60th Conference, Montreal, August 29-September 4, 1982, in REPORT OF THE 60TH CONFERENCE OF THE INTERNATIONAL LAW ASSOCIATION (1983).
- II. *Instruments on the Codification of Substantive International Criminal Law*
- A. OFFICIAL TEXTS
1. 1954 Draft Code of Offences against the Peace and Security of Mankind. (9 U.N. 60R Supp. No. 9, UNDOC A/2693).
  2. Draft International Criminal Code, Presented by the AIDP to the VIth U.N. Congress on Crime Prevention and the Treatment of Offenders (Caracas, 1980) (U.N. Doc. E/CN.4/NGO 213) [Updated in M.C. Bassiouni, A DRAFT INTERNATIONAL CRIMINAL CODE AND DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL TRIBUNAL (1987)].

## **Appendix 2**

### **Committee of Experts on International Criminal Policy for the Prevention and Control of Transnational and International Criminality and For the Establishment of an International Criminal Court**

**Dr. Husain M. Al-Baharna**  
Minister of Legal Affairs State of Baharain  
Ministry of Legal Affairs  
Manama, Bahrain

**Mr. Christopher Amerasinghe, Q.C.**  
Senior General Counsel  
Department of Justice  
Toronto, Ontario Canada

**Justice Dr. Jaime Giraldo Angel**  
Supreme Court of Colombia  
Bogota, Colombia

**Dr. H.J. Bartsch**  
Secretariat General  
Directorate Legal Affairs  
Council of Europe  
Strasbourg, France

**Professor M. Cherif Bassiouni**  
Professor of Law, DePaul University Faculty  
of Law;  
President, International Institute of Higher  
Studies in Criminal Sciences;  
President, International Association of Penal  
Law;  
Chicago, Illinois

**Professor Christopher L. Blakesley**  
Professor of Law  
Louisiana State University Law Center  
School of Law  
Baton Rouge, Louisiana

**Mr. Robert Boylan**  
Office of International Affairs  
Criminal Division  
Department of Justice  
Washington, D.C.

**Dr. Hugo Caminos**  
Assistant Secretary for Legal Affairs  
Organization of American States  
Washington, D.C.

**Assessor Dr. Fernando Carrillo**  
Presidential Advisor  
Bogota, Colombia

**Magistrat Marie-Anne Chapelle**  
Bureau de Droit Penal International et  
European  
Direction des Affaires Criminelles  
Ministere de la Justice  
Paris, France

**Ms. Joan Chester**  
Administrative Attache  
Trinidad and Tobago Mission  
Geneve, Switzerland

**The Honorable Carmelo Conti**  
Procuratore Generale, Corte d'Appello  
Palermo, Italia

**The Honorable Dusan Cotic**  
Vice President, Supreme Court of Yugoslavia  
President, U.N. Committee on Crime  
Prevention and Control  
Belgrade, Yugoslavia

**Mr. Justice U. Cross**  
High Commissioner Designate to the United  
Kingdom  
Trinidad and Tobago High Commission  
London, United Kingdom

**Professor Said El-Dakkak**  
Professor of International Law  
Head of the Department of Public  
International Law  
University of Alexandria  
Alexandria, Egypt

Mr. Siba Kumar Das  
United Nations Official  
Deputy Director, UNICRI  
Roma, Italia

Richard C. Dennis, Jr.  
Special Agent FBI  
Special Assistant, Associate Deputy Director  
Investigations  
Federal Bureau of Investigation  
Department of Justice  
Washington, D.C.

Professor Daniel Derby  
Associate Professor of Law  
Touro Law School  
Huntington, New York

Mrs. Ebukiba Edem Ekpo  
Assistant Chief Legal Officer  
Federal Ministry of Justice  
Marina, Lagos, Nigeria

Mr. Ronald Gainer  
Former Deputy Associate Attorney General  
Member, U.N. Committee on Crime  
Prevention and Control  
Washington, D.C.

Professor Olga Lucia Gaitan  
Universidad de Los Andes  
Facultad de Derecho  
Bogota, Colombia

Dr. Iskandar Ghattas  
President de la Cour D'Appel  
Director of the Legislation et Entraide  
Judiciare Internationale  
Minister of Justice  
Cairo, Egypt

Professor Vasily P. Ignatov  
Head, Foreign Relations Department  
Ministry of the Interior;  
Member, U.N. Committee on Crime  
Prevention and Control  
Ministry of the Interior  
Moscow, USSR  
(Mrs. Natalya Goltsova; Interpreter for  
Professor Ignatov)

Professor Igor Karpetz  
Directeur de l'institut de Recherches  
Scientifiques sur les Problems deRenforcement  
de la legalite  
12 3022 Moscow D. 22, USSR  
(Mrs. Grenkova Iuni; Interpreter for Professor  
Karpetz)

Professor Raimo Lahti  
Professor of Criminal Law  
The University of Helsinki  
Faculty of Law  
Helsinki, Finland

Minister Luigi Augusto Lauriola  
Diplomatic Assistant to the  
Minister of Justice of Italy  
Ministry of Justice  
Roma, Italia

Professor Ferrando Mantovani  
Ordinario de Diritto Penale  
Universita di Firenze  
Facolta de Giurisprudenza  
Firenze, Italia

Mr. Peter-Michael Müller  
Chairman, Section on General Practice's  
Committee on Criminal Law  
International Bar Association  
Munich, Germany

Ambassador W.S. Naimool  
Office of the Prime Minister  
Port-of-Spain  
Republic of Trinidad and Tobago

Professor Ved P. Nanda  
Thompson G. Marsh Professor of Law  
Director, International Legal Studies Program  
University of Denver  
College of Law  
Denver, Colorado

The Honorable Ramon de la Cruz Ochoa  
Presidente Sociedad Cusana Ciencias Penales  
Professor Escuela Derecho Universidad de la  
Hosana  
Fiscal General de la Republica  
Member, U.N. Committee on Crime  
Prevention and Control  
Habana, Cuba

Professor Reynald Ottenhof  
Secrétaire-General, AIDP  
Professeur, Faculté de Droit  
Université de Pau;  
Directeur, Centre de Sciences Criminelles  
Pau, France

Judge Giocchino Polimeni  
Magistrato, Ministero de Grazia e Giustizia  
Member U.N. Committee of Experts on Crime  
Prevention and Control  
Roma, Italia

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Robinson  
Prime Minister  
Prime Minister's Residence  
Port-of-Spain  
Trinidad and Tobago

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Ancien Premier President de la Cour de  
Cassation;  
President, Societe Internationale de Defense  
Sociale  
Paris, France

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International Treaties  
Federal Ministry of Justice and Police  
Bern, Switzerland

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Professor of Law  
The John Marshall Law School  
Chicago, Illinois

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Senior Counsel  
Office of the Prime Minister  
Ministry of External Affairs & International  
Trade  
Port-of-Spain  
Trinidad and Tobago

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Ordinario di Diritto Penale  
Universite di Napoli  
Preside, ISISC  
Napoli, Italia

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Chief Prosecutor of Stockholm  
Prosecution Office  
Stockholm, Sweden

Professor Jacob W.F. Sundberg  
Professor of Law  
University of Stockholm  
Stockholm, Sweden

Professor A.H.J. Swart  
Professor of Criminal Law  
Amsterdam, The Netherlands

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Procuratore della Repubblica  
Nicosia, Italia

S.E. Professor Giuliano Vasalli  
Ministro de Grazia e Giustizia  
Roma, Italia

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Chief, United Nations Crime Prevention &  
Criminal Justice Branch  
Executive Secretary, Eighth United Nations  
Congress on Crime Prevention & the  
Treatment of Offenders  
Vienna International Center  
Vienna, Austria

Mr. Dimitrios Vlassis  
Social Affairs Officer United Nations  
United Nations  
Vienna, Austria

Professor Abdel Azim Wazir  
Professor of Criminal Law & Vice Dean  
University of Mansourah  
Cairo, Egypt

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Ministerialrat, Head of Division on  
International Criminal Law  
Federal Ministry of Justice  
Member of the Bureau of the European  
Committee for Crime Problems  
Bonn, Germany

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Attorney General's Department  
Robert Garran Offices  
National Circuit  
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Chicago, Illinois

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Attorney at Law  
San Francisco, California

*Staff*

**Dr. Gregory B. Richardson**  
J.D. Candidate  
DePaul University 1991  
Assistant to Professor  
M. Cherif Bassiouni

## An International Criminal Court—An Emerging Idea

John B. Anderson\*

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The articulation of a need for an International Criminal Court began perhaps as long ago as the beginning of the nineteenth century. At this time, during the Congress of Vienna in 1815, discussions were held among various nation-states concerning the need to punish those engaged in the slave trade. One might push the date back even further by tracing its origins to the sixteenth century when the ideas of Bodin were instrumental in creating the modern concept of state sovereignty. It was Bodin's construct which in turn led seventeenth century writers like Huber to assert that the force of all law is territorial. Its extension beyond the borders of a state, therefore, necessitated a doctrine of international comity, a conceptual precursor to modern international relations.<sup>1</sup> Professor Hessel E. Yntema has pointed out that it was Huber in his *De Jure Civitatis* who viewed the problem of conflicts law, "not in the tradition of the statisticians but as an aspect of the law governing the administration of public affairs."<sup>2</sup> Having taken this approach to private international law, he concluded that it then became relevant to consider the reciprocal obligations owed by those involved in legal disputes who came from different countries.<sup>3</sup> This would inevitably involve a consideration of extra-territorial observance of foreign laws, and it would become a matter of commercial necessity that nations respect the obligations imposed upon their citizens by the laws of foreign States. Their refusal to make this concession would thwart any efforts to foster necessary forms of actions to ascertain rights and obligations in matters involving the nationals of two or more states. Laws were based on a theory of territoriality, and the principle of absolute sover-

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\* Distinguished Visiting Professor of Law at Nova University Center for the Study of Law. B.A., University of Illinois, 1942, J.D., University of Illinois College of Law, 1946, LL.M., Harvard Law School, 1949. In 1960 John B. Anderson was elected U.S. Representative to Congress from the 16th District of Illinois, and served ten consecutive terms until 1980 when he ran as an Independent candidate for the Presidency of the United States receiving approximately 7% of the popular vote. Special thanks to Larry Magill, J.D. Candidate 1991, for his assistance in the preparation of this article.

1. See generally E. SCOLES & P. HAY, *CONFLICT OF LAWS* § 2.2, at 8-10 (1982).

2. Yntema, *The Comity Doctrine*, 65 MICH. L. REV. 1, 25 (1966).

3. *Id.* at 25, 26.

eignty applied to all subjects within the territory. These would include all persons who are found within its metes and bounds. Also, as mentioned above, even "if not required by treaty or by some other reason requiring subordination, the reason of the common practice among nations" sometimes requires nations to recognize the laws of another, or commerce would simply cease.<sup>4</sup>

Joseph Story, who was to become the first important American expositor of the basic principles of private international law, lent further support to Huber's comity doctrine in his *Commentaries on the Conflict of Laws, Foreign and Domestic*:

The true foundation on which the administration of international law must rest is that the rules which are to govern are those that arise from mutual interest and utility, from a sense of inconveniences which would result from a contrary doctrine, and from a spirit of moral necessity to do justice, in order that justice may be done to us in return.<sup>5</sup>

Although written well over a century and a half ago, Story's *Commentaries* could well be cited for the predicate that a body of international law is needed as a means of insuring its observance and execution in a way that benefits the international community.

As Professor M. Cherif Bassiouni has pointed out in his monumental compilation and digest,<sup>6</sup> we have seen a vast proliferation of more than 300 international instruments, conventions, and agreements, some of which are sufficiently penal in nature to rise to the level of substantive international criminal law.<sup>7</sup> However, few if any of these conventions, statutes, and treaties are self-enforcing. Few of them provide for much more than consultative arrangements.

Thus, the remission of violations to national courts for adjudication and the infliction of penalties is currently the norm. Although many of these international treaties and conventions are nominally under the aegis of the United Nations or one of its specialized agencies,

4. *Id.* at 26.

5. J. STORY, *COMMENTARIES ON THE CONFLICT OF LAWS, FOREIGN AND DOMESTIC* (1841).

6. *See generally* M.C. BASSIOUNI, *INTERNATIONAL CRIMES: DIGEST/INDEX OF INTERNATIONAL INSTRUMENTS 1815-1985* (1986).

7. *See generally* Bassiouni, *The Penal Characteristics of Conventional Criminal Law*, 15 CASE W. RES. J. INT'L L. 27 (1983).

powers of enforcement are noticeably lacking. Most proposals to remedy this defect are noteworthy for their extreme generality. For example, in a document submitted to the 1988 General Assembly of the United Nations, the Soviet Union called for a "broad international dialogue about ways of insuring comprehensive security in military, political, economic, sociological, humanitarian *and other fields*."<sup>8</sup> In calling for an enhanced role for the United Nations in the solution of global problems, the Soviet document did make reference to increasing the authority of the International Court of Justice in the Hague.<sup>9</sup> However, the institutional structure which would be required to deal with international crimes clearly does not exist at present. There simply is not a world judicial body with jurisdiction extending to cases involving individuals. Any attempt to amend the jurisdiction of the present Court would have the extremely undesirable consequences of distracting it from what should be its main role of attempting to settle those disputes between nation-states that present a threat to world peace.

An international criminal tribunal with limited subject matter jurisdiction would have sufficient matters before it to justify that it exists independently of the International Court of Justice in the Hague. The exponential growth of the world drug trade has a clear linkage with what has come to be called "narco-terrorism."

Huge illicit profits derived from the illegal sale of drugs have been used to fund revolutionary activities, and to attempt to further the accomplishment of political goals and objectives. This is a further dimension of the drug trafficking problem which makes it an even greater matter of international concern. There is, of course, the freestanding problem of international terrorism which would exist, and indeed is on the sharp rise, quite independently from the world commerce in drugs. The taking of hostages as a weapon of choice in virtually every international dispute has become commonplace. This international anarchy in defiance of every civilized norm of conduct between and among nations has led to a growing recognition that this has become a problem which is raging beyond control. There is the further recognition that it is one where, unless individual states are willing to risk war or pay tribute, there is little in the way of either deterrent or retributive justice availa-

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8. U.N. Doc. A/43/629 (1988) (emphasis added). The letter, dated September 29, was from Deputy head of the Delegation of the Union of Soviet Socialist Republics to the 43d session of the General Assembly and was addressed to the Secretary-General.

9. *Id.*

ble as a remedy. The problem, in short, is only destined to become worse.

Counterbalancing this gloomy, if not utterly grim, prognosis has been the fortuity of a complete transformation of East-West relations. From the time that Stalin consolidated his vice-like grip over the U.S.S.R. at the end of the 1920's until Mikhail Gorbachev's accession to power in March of 1985, law was simply a tool of the state both in a domestic and international sense. Although there was a facade of a legal regime, "despite its Western Structure, the entire purpose of the civil law was to harness the energies of the Soviet citizen in service to the policies of the party."<sup>10</sup> In the arena of world affairs, the spoken promissory commitment of the Soviet Union to the rule of law masked its determination to maintain the correlation of forces in a manner that would preserve and expand the Soviet empire. Although a signatory to many of the treaties and conventions of the post-war period cited in Professor Bassiouni's compilation,<sup>11</sup> the Soviet Union evinced no desire to have Soviet law supplanted by an international code administered and implemented by an international tribunal.

There has been a change in Soviet attitude since the term "*Perestroika*" was added to the lexicons of the world. In his address to the General Assembly of the United Nations in New York on December 7, 1988, General Secretary Gorbachev said:

Our ideal is a world community of States with political systems and foreign policies based on law. This could be achieved with the help of an accord within the framework of the UN on a uniform understanding of the principles and norms of international law; their codification with new conditions taken into consideration; and the elaboration of legislation for new areas of cooperation.<sup>12</sup>

From this comment, coupled with the domestic reforms that President Gorbachev has introduced and his willingness to accept the clear loss of the Soviet empire which was sealed on the third of October, 1990 with German reunification, it seems clear that the auguries for a new world order which will witness, if not universal, nevertheless vastly increased international cooperation undergirded by a regime based on the rule of

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10. Thornburgh, *The Soviet Union and the Rule of Law*, 69 FOREIGN AFF. 17 (Spring 1990).

11. M.C. BASSIOUNI, *supra* note 6.

12. U.N. Doc. A/43/PV.72 (1988) (address at the United Nations before the General Assembly in New York).

law are, for the moment at least, bright.

This is not to imply that the dimensions of the foregoing problems just discussed are only latitudinal. In the areas of narco-terrorism and the drug trade, in particular, there is a very troublesome and difficult North-South dimension as well. However, the clearly predictable end of the Cold War has for a number of reasons created a more beneficent climate in world opinion for international cooperation on problems and in areas which were given short shrift when nations were preeminently preoccupied with an East-West military threat to world peace and security.

Although supranationalism is not yet ready to supplant a more Hobbesian view of world affairs, there is a far readier disposition to acknowledge the growing political and economic interdependence of the global village as well as the commonality of our social problems in such areas as the physical, socio-economic, and cultural environment. As bloc political approaches hopefully disintegrate on both sides of the East-West relationship, hopefully the North-South dimension of world problems will also come under the influence of a multilateralism which, as mentioned above, needs to be extended particularly to such problem areas as narco-terrorism and drug trafficking. In other words, when the two superpowers - and the alliances which they have previously led - undergo the dramatic transformation which began in 1989 and is still continuing, it is not too much to hope and believe that the rest of the world will also take note.

Even Iraq's aberrant behavior under the dictatorial leadership of Saddam Hussein has certainly not detracted from the vastly changed attitudes of world powers toward cooperation on a broader range of problems heretofore defined exclusively in nationalistic terms. Indeed, the converse may well be the final result. The adoption, at the time this article was being prepared, of no less than thirteen United Nations Resolutions calling for the imposition of economic sanctions of the most comprehensive sort and their implementation is activity unparalleled in the forty-five year history of the organization. It is not irrationally optimistic to express both the hope and belief that this represents one of the most significant turning points in history since nation-states came into existence. It does not take a Kierkegaardian "leap of faith" to postulate that this can be an extremely far-reaching precedent for taking joint action. It is not unlikely that simply the experience of so many nations working together (not only the fifteen members of the UN Security Council, but others as well in the more than score of nations who are cooperating militarily in the Persian Gulf region) can lay the foun-

dation for international cooperation in quite different areas of mutual concern. The consultative procedures, rule-making, and general cooperation being employed in this instance can help develop institutional capabilities for the detailed work that must necessarily precede the drafting, and ultimate passage, of a statute for an international criminal court.

However, any outlining of a rosy scenario must be tempered with the realization that the tradition and the temptation to deal with these problems unilaterally has not yet been subdued. Witness our own actions against Colonel Qaddafi in Libya and General Noriega in Panama as two of the most conspicuous examples. One of these cases involved terrorism, while the other was allegedly based on both international drug smuggling and money laundering, and incidents directly involving the safety and well-being of American citizens in the Canal Zone. These are the very types of offenses which are envisioned as important subjects of jurisdiction for an international court. Unquestionably, these are examples of the most difficult types of cases, i.e., those cases involving a dispute which is in part, and perhaps even in large part, political and the party being charged with the commission of offenses is a national leader. Under some theory that the greater offense includes the lesser, there obviously could be a wish and a desire to pursue the political agenda through direct, unilateral intervention as the more expeditious route. However, a powerful case can be made that yielding to the desire for quick satisfaction for transgressions against national honor will create as many problems as it solves. Surely it is not difficult for the so-called Great Powers to see that their lack of consistency in following the rule of law when punishing international crimes, however defined, will only make more difficult the task of inducing the cooperation among the more than 165 nations of the world which is needed to deal effectively with transnational offenses.

Borders are becoming increasingly porous. In Eastern Europe it was the opening of borders which facilitated a flood of refugees and would-be emigres which in turn brought down governments. Clearly, it was the opening of the Hungarian border to East Germany in 1989 and the opening of West German embassies in Warsaw and Prague to East German nationals which were among the important factors that led to the downfall of the German Democratic Republic. By analogy, the ease with which borders can be crossed can also contribute to the collapse of any effort to contain the effects of criminal law violations to a single state. Reports of Italian Mafia taking up residence in certain South American countries to assist in running laboratories and developing

trade channels for the export and sale of unrefined coca paste to countries which refine and resell the drug is an example of how thoroughly internationalized drug trafficking has become.

The effects in the fields of drug trafficking and terrorism clearly have consequences which are oblivious to national borders. The drugs which are landed in the Ports of Marseilles and Rotterdam are destined for the channels of commerce all over the Western hemisphere. Turning to the field of international terrorism, similarly, the plotting of the terrorist action that resulted in the mid-air explosion of an airliner over Lockerbie, Scotland took place in some other country. Those who conspire to influence political judgments around the globe through the pressure of terrorism are heedless of national boundaries. A proper response to situations like those described above fairly cries out for action by a world community acting through institutions specifically created and chartered for the purpose of effectuating a credible response.

There are, of course, extensive political considerations involved in the creation of an international criminal court. At the most fundamental level, the argument can be made that such a court is unnecessary. The United States Congress has already demonstrated the capacity and will to deal by specific statute with such matters as terrorism and the taking of hostages which would provide a significant share of the subject matter jurisdiction that would be confided to an international court. The most recent such act was the Omnibus Diplomatic Security and Anti-terrorist Act of 1986.<sup>13</sup> In this Act, Congress expanded United States extraterritorial jurisdiction to foreign nationals who committed acts of international terrorism which caused injury to United States citizens.<sup>14</sup>

The expansion of extraterritorial jurisdiction was premised on the use of the passive personality principle and the universal theory as bases for United States Courts exercising jurisdiction. The passive personality principle can be defined as allowing a state the right to claim jurisdiction over the defendant in a criminal case because he has committed an offense harmful to a national of the state asserting the jurisdiction. The Restatement (Third) of the Foreign Relations Law of the

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13. Pub. L. No. 99-399 § 1202, 100 Stat. 853, 896-97 (codified at 18 U.S.C. § 2331) (1986).

14. 18 U.S.C. § 2331 includes within the meaning of "terrorist acts:" (a) homicide, (b) attempt or conspiracy with respect to homicide and, (c) other conduct. The section provides that section (c) applies to acts of physical violence with the intent or result of causing serious bodily injury to a United States national.



United States incorporates this jurisdictional basis by establishing jurisdiction over "conduct outside . . . [United States] territory that has or is intended to have substantial effect within its territory . . . ."<sup>15</sup>

The Restatement (Third) also recognizes the somewhat less controversial universal theory as a basis for extraterritorial jurisdiction.<sup>16</sup> Of great relevance here is an observation by the district court in *Attorney General of Israel v. Eichmann*.<sup>17</sup> The district court expressed its view that: "[I]n the absence of an International Court the international law is in need of the judicial and legislative authorities of every country, to give effect to its penal injunctions and to bring criminals to trial. The authority and jurisdiction to try cases under international law are universal."<sup>18</sup>

In general terms, the universal theory extends jurisdiction to cover a variety of different offenses conceived to be so heinous that they give a state jurisdiction over an offender if apprehended within its territory or otherwise coming under its control, regardless of any other connecting factor with its judicial system.<sup>19</sup> The potential misuse of this jurisdictional theory is at the foundation of its weakness as a viable long-term alternative to the existence of an international criminal court. It is not difficult to imagine American citizens subjected to the jurisdiction of foreign venues for allegedly committing offenses in the United States which violated the law of a country with whom the United States enjoyed less than cordial relations, although such conduct was not proscribed by domestic law.

There has been a reluctance in the past to embrace the universal theory which includes within its ambit crimes regarded as so heinous that all mankind would classify them as outside all conceivable norms of civilized behavior. It has been suggested that there is a substantial clue to the difficulty of broadening the list of crimes which would be

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15. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 402(1)(c) (1987) [hereinafter RESTATEMENT (THIRD)].

16. *Id.* at § 404. "Universal Jurisdiction to Define and Punish Certain Offenses:" "A state has jurisdiction to define and prescribe punishment for certain offenses . . . of universal concern, such as piracy, slave trade, attacks on or hijacking of aircraft, genocide, war crimes, and perhaps certain acts of terrorism, even where none of the bases of jurisdiction indicated in section 402 is present."

17. 36 I.L.R. 18 (Isr. Dist. Ct.-Jerusalem 1961), *aff'd*, 36 I.L.R. 277 (Isr. Sup. Ct. 1962), *excerpts reprinted in* 56 AM. J. INT'L L. 805.

18. *Id.* at 26.

19. The Draft Convention on Research in International Law of the Harvard Law School, *Jurisdiction with Respect to Crime*, 29 AM. J. INT'L L. 435, 467 (Supp. 1935).

included under the universal theory of jurisdiction by looking to the Restatement (Third).<sup>20</sup> The Restatement (Third) lists only the following offenses as coming within the scope of United States universal jurisdiction: piracy, slave trading, attacks on or hijacking of aircraft, genocide, and war crimes.<sup>21</sup> Thus, it has been asserted that this shows the inherent difficulty that would be involved in broadening the list through international negotiations and an agreement to include additional offenses within the presently accepted definition of the universal theory.<sup>22</sup>

However, I do not find that argument altogether persuasive. Although it is true that at the time this opinion was offered there was only one international agreement that dealt specifically with terrorism to which the United States was a party. Along with twelve Latin American nations, the United States had adopted the Convention to Prevent and Punish the Acts of Terrorism taking the Form of Crimes Against Persons and Related Extortion that are of International Significance.<sup>23</sup> However, the growth of the threat of terrorism, not just to the United States but to nations in virtually every quarter of the world, has increased exponentially in the almost two decades that have passed since that treaty was adopted. In the current situation in the Persian Gulf, a fear of terrorist reprisals has been one shared in common by the broad grouping of nations who have joined in the coalition of opposition to Saddam Hussein's invasion and occupation of Kuwait. Voices have been heard not just from the United States, but from other quarters as well, suggesting that Saddam Hussein, the Iraqi leader, should be held personally responsible and accountable for acts of terrorism that may occur.<sup>24</sup>

The question of a precise legal definition of terrorism admittedly

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20. See generally Note, *Extraterritorial Jurisdiction Over Acts of Terrorism Committed Abroad: Omnibus Diplomatic Security and Antiterrorism Act of 1986*, 72 CORNELL L. REV. 599 (1987) [hereinafter *Extraterritorial Jurisdiction*].

21. RESTATEMENT (THIRD), *supra* note 15, at § 404.

22. *Extraterritorial Jurisdiction*, *supra* note 20, at 602.

23. O.A.S. Doc. AG/doc.88, reprinted in 27 U.S.T. 3949, T.I.A.S. No. 8413 (Feb. 2, 1971). The 12 Latin American countries to join the United States in the Convention were Columbia, Costa Rica, Dominican Republic, El Salvador, Honduras, Jamaica, Mexico, Nicaragua, Panama, Trinidad and Tobago, Uruguay, and Venezuela (Chile voted against the Convention while Bolivia and Peru abstained).

24. Balz, *President Warns Iraq of War Crimes Trials; Bush Calls Invader's Acts 'Hitler Revisited'*, Wash. Post, Oct. 16, 1990, at A19. The article reported that British Prime Minister Margaret Thatcher had joined President Bush in his belief that Saddam Hussein should face war crimes charges for the taking of civilian hostages.

remains a difficult one. However, the chastening experiences that many nations have undergone through suffering the tremendous consequences of terrorist attacks have presumably sharpened their definitional skills. It seems difficult, in light of that history of events, to accept the verdict of some commentators that simply because a universally acceptable definition has not previously been formulated, it is an impossible task. I concur in the conclusion reached by Professor Kenneth C. Randall.<sup>25</sup> After studying the jurisdictional provisions of the various hijacking, terrorism, apartheid, and torture conventions adopted in the modern, and particularly the post-war era, he concludes they should be interpreted together with other developments in the general field of international criminal law and the *ergo omnes* and *jus cogens* doctrines.<sup>26</sup> They comprise the synergy for an emerging world legal order capable of defining the jurisdictional terms and bases for prosecuting a variety of extraterritorial offenses.

From this same perspective, it makes equally questionable the pessimistic assertion that "[a]lthough many nations condemn terrorism, never will a significant number of states reach such a consensus on a satisfactory definition of the term."<sup>27</sup> Recent events in other areas of the criminal law with international aspects lend genuine credence to the notion that the time is right politically both within the United States and in many other nations whose cooperation would be vitally necessary, for the creation of an international criminal court.

On November 11, 1990, a new international agreement, the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, became effective.<sup>28</sup> It has already been accepted as binding by the United States and twenty-six other nations, and sixty-two additional nations as well as the European Economic Community have given strong indications that they too will accept the Convention.<sup>29</sup> Thus, virtually two-thirds of the world's nations will be treaty partners in the battle against drug traffickers. The new United

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25. Randall, *Universal Jurisdiction Under International Law*, 66 TEX. L. REV. 785, 832 (1988).

26. *Id.*

27. *Extraterritorial Jurisdiction*, *supra* note 20, at 612 n.6; *see also* Blakesley, *A Conceptual Framework for Extradition and Jurisdiction over Extraterritorial Crimes*, 1984 UTAH L. REV. 685, 717 (1984).

28. United Nations: Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, *opened for signature* Dec. 28, 1988, 28 I.L.M. 493 (1989) [hereinafter *Convention Against Illicit Traffic*].

29. *Id.*

Nations Convention has some truly extraordinary provisions, some of which are heightened forms of cooperation previously existing only on an informal basis. Some, like the provision to allow shipments of drugs to pass into and through countries as though unnoticed and undetected simply to allow police agencies to trace the shipments to their consignees for apprehension, are new in international law.<sup>30</sup> Other significant provisions exemplify the new spirit of international comity in the area of drug trafficking. The Convention provides that all signatory nations share and exchange criminal evidence, extradite those suspected of drug trafficking, and generally co-operate to eliminate so-called "safe havens."<sup>31</sup> Nations that are signatories are pledged to adopt laws that will permit seizure and forfeiture of drug traffickers' records and assets.<sup>32</sup> There are guarantees of the monitoring of chemicals and additives which are potential constituent elements of any controlled substance.<sup>33</sup> Additionally, international carriers will be subject to surveillance and inspection on a cooperative basis among the signatories to the Convention.<sup>34</sup> Certainly, it is not a great leap into the unknown by the nations acceding to the terms of this convention to agree that international judicial enforcement by a tribunal created for that purpose in the war against drug trafficking is a step that is logical and necessary.

There is another category or subhead of jurisdiction which could be exercised by a new international criminal court involving crimes which result in the degradation and spoliation of the environment. Again, recent history clearly underrates that there is a surge of interest in protecting what Grotius once called the "common heritage of all mankind." He was speaking of the world's oceans. Today we refer to it in far broader terms as the biosphere or the environment of the world's global village. In November of 1990, the signatories to the London Dumping Convention,<sup>35</sup> adopted twenty years ago by nations including

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30. See generally *id.* at art. 11.

31. See generally *id.* at arts. 6-7.

32. *Id.* at art. 5, § 2 ("Each party shall also adopt such measures as may be necessary to . . . identify, trace, and freeze or seize proceeds, property, instrumentalities . . . for the purpose of eventual confiscation.").

33. See generally Convention Against Illicit Traffic, *supra* note 28, at art. 12 ("Substances Frequently Used in the Illicit Manufacture of Narcotic Drugs or Psychotropic Substances").

34. *Id.* at art. 9, § 1(b).

35. Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter, *opened for signature* Dec. 29, 1972, 26 U.S.T. 2403, T.I.A.S. No.

the United States, Great Britain, Germany, France, the Soviet Union, Japan, and most of the industrialized nations of the world, took a further enormous step forward in international environmental cooperation. In an action binding on all signatories, the dumping of industrial waste at sea is scheduled to be progressively phased out, resulting in a total ban by 1995.<sup>36</sup> Delegates to the conference which resulted in the ban also recommended the creation of a "global mechanism for controlling land-based pollution of the sea."<sup>37</sup> It does not seem either wildly futuristic or unreasonably optimistic to see this action and the recommendation for future action as encompassing the distinct possibility that the enforcement mechanism for these new treaty obligations could potentially be an international criminal court which could put teeth into this ambitious environmental protection program by imposing sanctions where needed.

From a political perspective, the inclusion within the jurisdiction of an international criminal court of matters involving terrorism, drug trafficking, and environmental protection make that idea highly salient to some of the most pressing concerns today in a wide band of nations. Their international components are clearly demonstrable. Obviously, there will be concerns about possible intrusion on national sovereignties. However, from the cases discussed above it would seem that the post World War II period has witnessed a growing belief in the United States that the traditional jurisdictional bases of territoriality and nationality must be expanded to accommodate and acknowledge the growing political and economic interdependence of the world. With the very recent evidence of the resurgence and dynamism of the United Nations because of its resolute posture in the midst of the crisis in the Persian Gulf comes further substantiation of a political mood in the world which sees institution building as a necessary corollary to the emergence of new areas for international cooperation. In addition, surely a powerful impetus for this mood, at least on a regional basis, is evidenced by the decisions being made by the European Economic Community. There the ideas of supranationality have found expression mainly in the field of economic cooperation. However, as that proceeds apace with the goals of "Europe - 1992" (the almost total dismantling of trade barriers), it should induce cooperation on a broader plane in such areas as would be embodied within the jurisdiction of an interna-

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8165.36. *Id.*

37. N.Y. Times, Nov. 3, 1990, § 1 at 7.

tional criminal court.

It will be necessary to be careful to qualify the extension of jurisdiction under any of the three subheads that have been suggested, terrorism, drug trafficking, and environmental protection, to serious and well-defined offenses. In *United States v. Yunis*,<sup>38</sup> Judge Parker acknowledged that with respect to asserting jurisdiction on the basis of the passive personality principle, many international legal scholars agree only that it is the most controversial of the five sources of jurisdiction.<sup>39</sup> The fear quite obviously is that under the guise of protecting its nationals while they are abroad, the passive personality principle could lead to a kind of judicial imperialism which would invite indefinite criminal liability for a nation's citizens, while they are in foreign states, for actions taken elsewhere which were unknown to them as illegal. However, Judge Parker concluded that the authors of the Restatement (Revised) of the Foreign Relations Law of the United States<sup>40</sup> had, in fact, withdrawn from their original stance on the issue of the passive personality.<sup>41</sup> The authors of the Restatement (Third) accepted the idea that "perpetrators of crimes unanimously condemned by members of the international community, should be aware of the illegalities of their actions."<sup>42</sup> Therefore, qualified application of the doctrine to *serious and universally condemned crimes* will not raise the specter of unlimited and unexpected criminal liability.<sup>43</sup>

The *Yunis*<sup>44</sup> case involved violation of both the Hostage Taking Act<sup>45</sup> and the Aircraft Piracy Act.<sup>46</sup> These acts are obvious examples of clearly defined and "serious and universally condemned crimes." In contrast to this case, there obviously are offenses which, although they violate internationally recognized values of the world community, are

38. 681 F. Supp. 896 (D.D.C. 1988).

39. *Id.* at 901. In his opinion, Judge Parker does, however, go on to assert that the international community recognizes its legitimacy: "Most accept that 'the extraterritorial reach of a law premised upon the . . . principle would not be in doubt as a matter of international law.'" *Id.* (quoting Paust, *Federal Jurisdiction over Extraterritorial Acts of Terrorism and Nonimmunity for Foreign Violators of International Law under the FSIA and the Act of State Doctrine*, 23 VA. J. INT'L L. 191, 203 (1983)).

40. RESTATEMENT (REVISED) OF FOREIGN RELATIONS LAW OF THE UNITED STATES (Tentative Draft No. 6 1985) [hereinafter RESTATEMENT (REVISED)].

41. *Yunis*, 681 F. Supp. at 902.

42. RESTATEMENT (REVISED), *supra* note 40, at § 402, comment g.

43. *Yunis*, 681 F. Supp. at 902.

44. *Id.*

45. 18 U.S.C. § 1203 (1984).

46. 18 U.S.C. § 32 (1984).

far less easily defined. Professor M. Cherif Bassiouni in his report submitted to the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders<sup>47</sup> concedes the difficulty of the problem. He singles out as an example the efforts by the United Nations since 1947 to develop a Code of Offenses Against the Peace and Security of Mankind, an effort which he suggests has faltered because of a lack of clear perception of what constitutes an international crime.<sup>48</sup> Obviously, an International Court of Criminal Justice would not have its more limited jurisdiction sweep so broadly. Nevertheless, the problem of definition of cognizable offenses will be present.

One suggestion is that initially it seek to define offenses and accordingly subject individual defendants to its jurisdiction on the basis of crimes which are most generally recognized and spelled out in broadly comparable language under the national legislation of the signatory powers. This principle might be extended, particularly in an area like environmental protection, to include offenses which can be clearly and substantively derived from obligations which all signatory powers have undertaken under treaties and conventions dealing with the general subject matter. With the passage of time, the accumulation of experience, and the acceptance of the validity of the idea of an international court, surely other ideas will emerge for the refinement and clarification of its jurisdiction and how and under what circumstances it should attach to individual citizens and foreign nationals of the signatory powers.

In its inception, a willingness on the part of the newly formed and created court to recognize concurrent jurisdiction would seem wise. Although acceptance of that principle might seem to carry with it the danger of slowing its growth, some deference to preexisting national courts who are willing to undertake to hear cases would seem prudent. Indeed, I foresee, and this has been borne out in some of the recent comments made by leaders of small states where their judicial systems have been literally under siege by a powerful drug cartel,<sup>49</sup> that it

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47. A Comprehensive Strategic Approach on International Cooperation for the Prevention, Control and Suppression of International and Transnational Criminality, Including the Establishment of an International Court, A/Conf. 144 NGO ISISC, July 31, 1990.

48. *Id.* at 5-6.

49. In an address to the United Nations on October 9, 1990, the Prime Minister of Trinidad and Tobago, A.N.R. Robinson called for the establishment of an international criminal court to deal with drug traffickers and extremists who can destabilize small emerging democracies like those in the Caribbean and Latin America.

would initially be the small states who would most welcome the judicial resources that would be provided by an international criminal court. As the court developed its expertise and usefulness to the international community, this would hopefully attract not only the attention, but also the participatory interest and involvement of larger states as well.

## CONCLUSION

On October 28, with the strong backing of Senator Arlen Specter of Pennsylvania, the United States Congress passed into law a bill in support of an international criminal court.<sup>50</sup> The law declares that "the United States should explore the need for the establishment of an international criminal court on a universal or regional basis to assist the international community in dealing more effectively with criminal acts defined in international conventions . . . ." <sup>51</sup> The law insures executive action by mandating that the President report to Congress by October 1, 1991, "the results of his efforts in regard to the establishment of an International Criminal Court" and that "[t]he Judicial Conference of the United States . . . report to the Congress by October 1, 1991, on the feasibility of and the relationship to, the Federal judiciary of an International Criminal Court."<sup>52</sup> What this law represents is the recognition by Congress that efforts by the United States to act unilaterally in an attempt to punish crimes of international scope lack both efficacy and legitimacy. Congress has joined the growing number of voices in the international community who have come to the realization that an international criminal court is an institution whose time has come: an institution which has become both necessary and feasible in light of the current climate of international cooperation on matters of great global importance.

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50. H.R. 5114, 101st Cong., 2d sess. § 599(e) (1990). The bill was *Foreign Operations, Export Financing, And Related Appropriations Act of 1991* (1990). It was initially approved by the Senate on October 19, 1990, and was read into the record by Senator Specter. See 136 CONG. REC. S16, 216 (daily ed. Oct. 19, 1990) (statement of Senator Specter).

51. H.R. 5114, *supra* note 50, at § (b)(1).

52. *Id.* at § (c), (d).



# The Torture Convention and The Reception of International Criminal Law within the United States

David P. Stewart\*

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The unanimous adoption of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment by the United Nations General Assembly in 1984 reflected continuing international concern over the use of torture as an instrument of state policy and practice in many parts of the world.<sup>1</sup> Modelled in both form and substance after several earlier multilateral conventions directed against terrorist acts,<sup>2</sup> the Convention is aimed at elimination of torture by establishing an effective international regime for the criminal prosecution of torturers. While the Convention is certainly not the first international instrument to criminalize acts violating internationally recog-

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\* Assistant Legal Adviser for Human Rights and Refugees, U.S. Department of State. Mr. Stewart was involved in the Executive Branch's efforts to obtain the Senate's advice and consent to ratification of the Torture Convention. However, the views expressed are those of the author and do not necessarily represent the position of the Department of State or the U.S. Government.

1. The 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/RES/39/708 (1984), *reprinted in* 23 INT'L LEGAL MATERIALS 1027 (1984), entered into force June 26, 1987. For the negotiating history of the Convention, see J. H. BURGERS AND H. DANIELIUS, *THE UNITED NATIONS CONVENTION AGAINST TORTURE: A HANDBOOK* (1988); see also N. RODLEY, *THE TREATMENT OF PRISONERS UNDER INTERNATIONAL LAW* (1987).

2. See, e.g., Convention for the Suppression of Unlawful Seizure of Aircraft ("Hijacking"), *done at The Hague*, December 16, 1970, 22 U.S.T. 1641, T.I.A.S. No. 7192; Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation ("Sabotage"), *done at Montreal*, September 23, 1971, 24 U.S.T. 565, T.I.A.S. No. 7570; Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, Including Diplomatic Agents ("Protection of Diplomats"), *done at New York*, Dec. 14, 1973, 28 U.S.T. 1975, T.I.A.S. 8532; and the International Convention against the Taking of Hostages ("Hostages"), *done at New York*, Dec. 17, 1979, \_\_\_\_ U.S.T. \_\_\_\_, T.I.A.S. \_\_\_\_, *reprinted in* 18 INT'L LEGAL MATERIALS 1456-63 (1979). The United States is party to all of these conventions, as well as the Inter-American Convention to Prevent and Punish Acts of Terrorism Taking the Form of Crimes Against Persons and Related Extortion that are of International Significance, *done at Washington*, February 2, 1971, 27 U.S.T. 3949, T.I.A.S. 8413.

nized human rights, it is one of the most specific and comprehensive.<sup>3</sup>

Now that the Senate has given its advice and consent to ratification, the United States is poised to become party to the Torture Convention.<sup>4</sup> While strongly supportive of other recent efforts to adopt international criminal regimes<sup>5</sup>, the United States has historically had great difficulty in adhering to so-called human rights treaties. Indeed, the Torture Convention is only the second such treaty recently to receive advice and consent (the other was the Genocide Convention, rati-

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3. It is not the only multilateral convention specifically addressed to the problem of torture. Within the OAS, a parallel Inter-American Convention to Prevent and Punish Torture was adopted in 1985 by the OAS General Assembly. *See* 25 INT'L LEGAL MATERIALS 519 (1986). The 1987 European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, Eur.T.S. No. 126, *reprinted in* 27 INT'L LEGAL MATERIALS 1152 (1988), *entered into force* Feb. 1, 1989, supplements the European Convention for the Protection of Human Rights and Fundamental Freedoms by establishing a committee of experts to conduct on-site visits to places of detention within States Party and to make recommendations thereon. A similar approach is taken by the proposed Optional Protocol to the Torture Convention, the second draft of which is currently before the U.N. Commission on Human Rights. *See generally* Casese, *A New Approach to Human Rights: the European Convention for the Prevention of Torture*, 83 AM. J. INT'L L. 128 (1989).

4. A joint resolution of Congress had endorsed United States participation in the negotiation of the Convention. *See* Pub. L. 98-447, 98 Stat. 1721 (1984). The Convention was signed by the United States on April 18, 1988 and submitted to the Senate by President Reagan on May 20, 1988. *See* President's Message to Congress Transmitting the Convention Against Torture and Other Treatment or Punishment, 24 WEEKLY COMP. PRES. DOC. 642-643 (May 20, 1988) [hereinafter the President's Transmittal]. Following a public hearing, and extensive consultations with the Executive Branch as well as interested groups in the private sector, the Senate Foreign Relations Committee reported favorably on the Convention. *See Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment: Hearing Before the Senate Foreign Relations Committee*, 101st Cong., 2d Sess. (1990) [hereinafter *Committee Hearing*]; Report of the Committee on Foreign Relations, S. EXEC. REP. NO. 30, 101st Cong., 2d Sess. 1 (1990) [hereinafter SENATE EXEC. REP. NO. 30]. The Senate gave its advice and consent to ratification on October 27, 1990. *See* 136 Cong. Rec. S17486-92 (daily ed., Oct. 27, 1990). The United States will not deposit its instrument of ratification until after the Congress has adopted necessary implementing legislation. *See* Appendix A to SENATE EXEC. REP. NO. 30.

5. *See, e.g.*, the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, U.N. Doc. E/CONF/82/15 Rev. 1, *adopted by consensus* Dec. 19, 1988, *reprinted in* 28 INT'L LEGAL MATERIALS 493 (1989). The United States instrument of ratification was deposited with the U.N. on Feb. 20, 1990. *See generally* Stewart, *Internationalizing the War on Drugs: The U.N. Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, 18 DEN. J. INT'L L. AND POL'Y 387 (1990).

fication of which took some forty years).<sup>6</sup> Some of the reasons for this longstanding reticence were re-examined during the Senate's consideration of the Torture Convention and are reflected, to a greater or lesser extent, in the package of provisos on which the Senate conditioned its advice and consent.<sup>7</sup>

This article briefly reviews the most important provisions of the Torture Convention and examines the various reservations, declarations and understandings contained in the Senate's resolution of advice and consent.<sup>8</sup> The conditions that the United States intends to impose on its

6. The Convention on the Prevention and Punishment of the Crime of Genocide, done at Paris, Dec. 9, 1948, — U.S.T. —, T.I.A.S. —, 78 U.N.T.S. 277 (1951), was initially submitted to the Senate in 1949 and received advice and consent only in 1986. *See* 132 CONG. REC. S1355-1381 (daily ed., Feb. 19, 1986), and the Genocide Convention Implementation Act of 1987, Pub. L. No. 100-606, 102 Stat. 3045 (1988) (codified at 18 U.S.C. §§1091-1093). The United States is also party to several earlier multilateral human rights treaties concerning slavery, the political rights of women, and refugees. Five human rights treaties submitted to the Senate during the Carter Administration remain pending. *See generally* Lillich, *The United States Constitution and International Human Rights Law*, 3 HARV. HUM. RTS. Y.B. 53 (1990).

7. The Senate had before it an initial package of reservations, declarations and understandings proposed by the Reagan Administration when it submitted the Convention for advice and consent. *See* Summary and Analysis of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, contained in the President's Transmittal, *supra* note 4, at 1-18. The Reagan proposals were criticized on a number of grounds, and in consequence a revised package was formulated by the Bush Administration, which the Senate Foreign Relations Committee accepted with some modifications. *See Committee Hearing, supra* note 4; SENATE EXEC. REP. NO. 30, *supra* note 4, at Appendix A. Only minor modifications were made on the floor by the full Senate. *See* 136 CONG. REC. S17486 et seq. (daily ed., Oct. 27, 1990). For a critique of the Bush Administration proposals, see The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 42 THE REC. OF THE ASSOC. OF THE BAR OF THE CITY OF NEW YORK 235 (1987).

8. The "package" finally adopted by the Senate includes two reservations, five understandings, two declarations and a "proviso". *See* 136 CONG. REC. S17486-92 (daily ed. Oct. 27, 1990). For present purposes, only the final versions of these conditions, as contained in the resolution of advice and consent to ratification (which is appended to this Article), are discussed.

As a matter of international law, a reservation is required when a state party purports to exclude or modify the substantive legal effect of an international agreement in its application to that state. *See* Vienna Convention on the Law of Treaties, May 23, 1969, Art 2 § 1(d), 1155 U.N.T.S. 331; RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §313 (1986) ("A state may enter a reservation to a multilateral international agreement . . ."). It is the substantive effect of a proviso, not its label, which is controlling. In United States practice, a reservation is distinguished from a statement of understanding, which is binding domestically but not in-

adherence to the Convention illustrate some of the current limitations of the international system in establishing effective criminal sanctions on a global basis. These conditions also demonstrate the problems of reception or incorporation which international criminal law can encounter at the domestic level.

## I. BACKGROUND

The prohibition against torture is hardly a new development in international law. Indeed, it has been recognized so often and so widely that most scholars and practitioners consider it a principle of customary international law binding on all states.<sup>9</sup> Persistent non-compliance with the prohibition, however, led the United Nations General Assembly to adopt, in 1975, a comprehensive Declaration defining and elaborating the substantive prohibition.<sup>10</sup> Subsequently, in 1977, the General Assembly called upon the U.N. Commission on Human Rights to draft a multilateral convention incorporating the principles set forth in the Declaration.<sup>11</sup> The Commission completed its work in 1984, and the General Assembly adopted the Convention by consensus on Human

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ternationally. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §314. The terms "declaration" and "proviso" encompass conditions which may be legally or politically relevant or important but which do not modify substantive legal obligations under either domestic or international law.

9. See, e.g., RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §702; Ackerman, *Torture and Other Forms of Cruel and Unusual Punishment in International Law*, 11 VAND. J. OF INT'L L. 653 (1978). The prohibition is found, inter alia, in art. 5 of the Universal Declaration of Human Rights (1948); art. 7 of the International Covenant on Civil and Political Rights (1966), Dec. 19, 1966; art. 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950); art. 5(2) of the American Convention on Human Rights (1969); and art. 5 of the African Charter on Human and Peoples' Rights (1981). Torture is also prohibited by the humanitarian law applicable to armed conflicts (see the four Geneva Conventions of 1949 on the protections of victims of war, including the Additional Protocols of 1977). Even the U.S. Senate considered the Convention to represent a codification of customary international law. See SENATE EXEC. REP. NO. 30 *supra* note 4, at 3. Within the European human rights system, several cases have examined the issue of which acts constitute torture. See *Ireland v. United Kingdom*, 2 Eur. H.R.R. 25 (ser. A) (1978); *Greek Case*, 12 Y.B.Eur.Conv.Hum.Rts. (1969); cf. *Tyrer v. United Kingdom*, 2 Eur. H.R.R. 1 (ser. A)(1978).

10. Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 30/3452, 30 U.N. GAOR Supp. (No. 34) 91, U.N. Doc. A/10034 (1975).

11. U.N. Res. 32/62 (Dec. 8, 1977).

Rights Day, December 10, 1984. It entered into force on June 26, 1987; as of the end of 1990, a total of 52 states had become Party through ratification or accession, and 21 others (including the United States) had signed but not yet ratified the Convention.

The significance of the Torture Convention lies less in its restatement of the well-established prohibition against torture than in its creation of interlocking law enforcement obligations among States Party to take steps to bring alleged offenders to justice. The Convention can be considered, in this respect, primarily as a law enforcement rather than human rights treaty— although it also contains important preventive and remedial provisions. Its principal application by States Party will presumably be through prosecutions and other governmental law enforcement measures as opposed to invocation as a cause of action in civil suits. Most of the problems it posed with respect to U.S. ratification turned on the manner in which the Convention affected law enforcement interests.

## II. PROVISIONS

The central provisions of the Convention require each State Party: 1) to prevent acts of torture in any territory under its jurisdiction; 2) to ensure that such acts—including attempts and complicity — are criminal offenses under its domestic law; and 3) to cooperate with all other States Party to ensure that alleged torturers will be criminally prosecuted, by relying on so-called “universal jurisdiction” and the duty to extradite or prosecute alleged torturers.

The Convention defines torture to include any act by which severe mental or physical pain or suffering is intentionally inflicted upon a person by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.<sup>12</sup> States

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### 12. Art. 1(1) states:

For the purposes of this Convention, the term “torture” means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.

Party are obliged both to prevent all acts meeting that definition and to make them a crime under their domestic laws punishable by appropriately severe penalties.<sup>13</sup> Each State Party must establish jurisdiction over offenses committed in any territory under its jurisdiction (and on board its registered ships or aircraft) or by its nationals, and may, if that State considers it appropriate, do so with respect to acts of torture against its nationals wherever those offenses occur.<sup>14</sup>

Torture is made an extraditable offense in all existing and future extradition treaties between States Party, and each State Party is obliged, under the *aut dedere aut judicare* principle, to submit the case for prosecution if it does not extradite an alleged offender found within its jurisdiction, regardless of where the offense was committed, who committed the offense, or the individual against whom the offense was committed.<sup>15</sup> States Party must also provide each other with the greatest measure of assistance in connection with such proceedings.<sup>16</sup>

In an effort to prevent as well as punish torture, the Convention requires States Party to take various educational and remedial steps to strengthen their domestic legal regimes, including providing the means for compensation and rehabilitation of victims.<sup>17</sup> Notably, Article 16 calls upon each State Party to undertake to prevent "other forms of cruel, inhuman or degrading treatment or punishment not amounting to torture" as that term is defined in the Convention, *inter alia* through many of the same educational and remedial measures. Finally, borrowing from other human rights treaties, the Convention establishes a

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13. Art. 2(1), 4(1) and (2). Attempts to commit torture, as well as complicity and participation, must also be prohibited. The Convention does not require enactment of a specific offense of torture corresponding to the definition in art. 1, only that all acts falling within that definition must be criminal offenses under domestic law. It does specifically provide, however, that neither exceptional circumstances, such as a state of war or political instability, nor an order from a superior, may be invoked as a justification of torture. Art. 2(2) and (3). These latter provisions are strongly suggestive that the Convention was intended to apply in times of war as well as peace. Interestingly, the Convention does not make torture a crime under international law or even specify that it is "an international criminal activity," as is the case, for example, with respect to illicit narcotics trafficking under the new U.N. Convention.

14. Art. 5(1).

15. Art. 7 and 8. Art. 5(2) provides the so-called "universal jurisdiction" to submit the case for prosecution, whether or not any of the other grounds of jurisdiction exist, when an alleged offender is present in a State Party and that State does not extradite him to a State having jurisdiction under Art. 5(1).

16. Art. 9.

17. Art. 10-14.

Committee Against Torture to monitor and enforce compliance with its provisions, on the basis of reports from States Party, its own inquiries, and consideration of complaints that other States Party or individuals submit.<sup>18</sup>

### III. CONDITIONS TO RATIFICATION

#### A. *Definition of Torture*

A central purpose of the Convention is to establish, as a matter of treaty obligation, a standard, uniform definition of torture to be applied by each State Party as a matter of its domestic criminal law.<sup>19</sup> It does so not by describing the particular acts or practices which are proscribed but rather by articulating the criteria to be applied in determining whether a given act amounts to torture as opposed to a lesser form of cruel, inhuman or degrading treatment or punishment.<sup>20</sup> Thus, according to Article 1, "torture" includes any act by which severe mental or physical pain or suffering is intentionally inflicted for purposes of punishment, coercion, intimidation or discrimination, by or at the instigation or with the consent or acquiescence of a public official or other person acting in an official capacity, excluding lawful sanctions.<sup>21</sup>

By stressing the extreme nature of torture, by requiring both specific intent and specified motives, and by limiting the context to one involving improper use of governmental authority, this definition describes a relatively limited set of circumstances likely to be illegal under most, if not all, domestic legal systems. Without question, any such act would be criminal under existing federal or state law in the United States. Precisely because the Convention contemplates criminal prosecutions, however, there was concern within the Executive Branch to ensure that the treaty definition satisfied United States Constitutional standards of clarity and precision. This was particularly true with respect to the inclusion of mental pain and suffering, which was critical to ensure that the Convention's protections extended to the psychological effects of such methods as mock executions, sensory deprivation, use of drugs, and confinement to psychiatric hospitals, but which some thought fell short of constitutionally required precision.<sup>22</sup>

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18. Arts. 17-24.

19. See SENATE EXEC. REP. NO. 30, *supra*, note 4, at 13.

20. See *id.*

21. Art. 1(1), *supra* note 12.

22. *Committee Hearing*, *supra* note 4, at 17.

Accordingly, U.S. ratification will be conditioned on an understanding that, to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering, and that mental pain or suffering refers to prolonged mental harm caused by or resulting from one of four specified circumstances:

- the intentional or threatened infliction of severe physical pain or suffering;
- the actual or threatened administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality;
- the threat of imminent death; or
- the threat that any person will be subjected to any of the foregoing.<sup>23</sup>

For similar reasons of clarity and specificity, United States adherence will be conditioned on several related understandings relevant to the definition of torture. In particular, it will be noted that the term "acquiescence," as used in Article 1, requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his or her legal responsibility to intervene to prevent such activity;<sup>24</sup> the definition of torture is intended to apply only to acts directed against persons in the offender's custody or physical control;<sup>25</sup> and, noncompliance with applicable legal procedural standards—for example, a failure to provide a *Miranda* warning which might result in the inadmissibility of a subsequent statement under the exclusionary rule—does not *per se* constitute torture.<sup>26</sup>

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23. SENATE EXEC. REP. NO. 30, *supra* note 4, at 17.

24. See also the Appendix to this article, *infra* p. \_\_\_\_ at II(1)(d) [hereinafter Appendix].

25. See Appendix at II(1)(b). This is consistent with the intent of the Convention to protect the rights of individuals subjected to any form of detention or imprisonment: "The history of the Declaration and the Convention make it clear that the victims must be understood to be persons who are deprived of their liberty or who are at least under the factual power or control of the person inflicting the pain or suffering." J.H. BURGERS AND H. DANIELIUS, *supra* note 1, at 120-121. Thus the use of armed force for military or police purposes would not by itself constitute torture.

26. See Appendix at II(1)(e). Art. 15 provides that statements which have been made as a result of torture shall not be invoked as evidence in any proceedings, "except against a person accused of torture as evidence that the statement was made."



## B. *Lawful Sanctions Exception*

The negotiators of the Convention agreed that the proper application of penal sanctions by the State does not constitute torture. Accordingly, the final sentence of Article 1 (1) states that the definition does not include "pain or suffering arising only from, inherent in or incidental to lawful sanctions." They were unable, however, further to define the content of this exception or to agree on whether the lawfulness of the sanctions in question should be determined by reference to domestic or international law.<sup>27</sup> Because the exception clearly contemplates sanctions which are, at the least, considered lawful under the relevant domestic law, it was considered necessary to supplement the treaty definition by specifying that the exception means, for the U.S., actions that United States law authorizes. However, it was also recognized that permitting the "lawfulness" of sanctions to be assessed solely by reference to domestic law could create a loophole in the definition by which the exception could swallow the rule.

Accordingly, United States ratification will include an understanding to the effect that "sanctions" includes judicially-imposed sanctions and other enforcement actions authorized by United States law or by judicial interpretation of such law, while at the same time expressly noting that a State Party to the Convention could not, through its domestic sanctions, defeat the object and purpose of the Convention to prohibit torture.<sup>28</sup> Thus, a sanction which amounted to torture could not be justified merely on the grounds that it was authorized by domestic law.

## C. *Non-Refoulement*

An important protection to potential victims of torture is contained in Article 3, which provides that no State Party shall expel, return ("refouler") or extradite a person to another State where substantial grounds exist for believing that he or she would be in danger of being subjected to torture. The Convention does not, however, specify what constitutes "substantial grounds," leaving that issue to domestic law

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27. The original draft text of the Convention limited the exception to sanctions consistent with the U.N. Standard Minimum Rules for the Treatment of Prisoners, adopted by the First U.N. Congress on the Prevention of Crime and the Treatment of Offenders (1955), *approved by* ECOSOC Res. 663C(XXIV) (1957). See J.H. BURGERS AND H. DANIELIUS, *supra* n. 1, at 121.

28. See Appendix at II(1)(c).

and requiring only that in making the determination, the competent authorities take into account all relevant circumstances including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant or mass violations of human rights.<sup>29</sup> A question to be resolved, therefore, was the standard to be applied under United States law for determining "substantial grounds."

Under the Refugee Act of 1980, an individual may not normally be expelled or returned from the United States if his life or freedom would be threatened on account of "race, religion, nationality, membership in a particular social group, or political opinion . . . ." <sup>30</sup> The United States Supreme Court has interpreted this mandatory "withholding of deportation" provision to apply when the threat of persecution is more likely than not.<sup>31</sup> By comparison, the Court has applied a somewhat less rigorous burden of proof in the context of eligibility for a discretionary grant of asylum, requiring only a "well-founded fear of persecution" in order to meet the statutory standard.<sup>32</sup>

In light of these statutory interpretations by the Court, and because adherence to the Convention would require (rather than permit) non-refoulement, the former, more stringent standard was considered the appropriate referent as a matter of domestic law. Accordingly, the Senate adopted an understanding interpreting the non-refoulement provision in Article 3 to mean "if it is more likely than not" that the individual in question would be tortured.<sup>33</sup>

#### D. *Private Remedies for Victims*

Article 14 provides that each State Party must accord the victim of torture both a legal right to redress and an enforceable right to fair and adequate compensation "including the means for as full rehabilita-

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29. See Appendix, II(2).

30. Pub. L. No. 96-212, §203(e), 94 Stat.102, [codified at 8 U.S.C. § 1253(h)(1) (1980)]. This provision implemented the non-refoulement obligations of Art. 33 § 1 of the Convention Relating to the Status of Refugees, *opened for signature* July 28, 1951, 189 U.N.T.S. 137, which the United States undertook when it became party to the Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577.

31. *INS v. Stevic*, 467 U.S. 407 (1984)(interpreting § 243(h) of the Immigration and Nationality Act of 1952, *as amended*, 8 U.S.C. § 1253(h) (1989)).

32. See *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987) (interpreting § 208 of the Immigration and Nationality Act, *as amended*, 8 U.S.C. § 1158 (1989)).

33. See Appendix at II(2).

tion as possible." In the event of the victim's death as a result of torture, his (or her) dependents are entitled to compensation.

As finally agreed by the negotiators, this provision was expressly limited to acts of torture committed in any territory under the State Party's jurisdiction.<sup>34</sup> Inexplicably, this limitation was evidently deleted by mistake in the final document, although the negotiating history supports the restrictive reading. Accordingly, the United States will clarify its view of the issue by conditioning ratification on an understanding interpreting Article 14 to require a State Party to provide a private right of action for damages only for acts of torture committed in territory under the jurisdiction of that State Party.<sup>35</sup>

In rejecting extraterritorial civil jurisdiction over acts of torture, the Convention reflects a narrower view than some courts have been prepared to adopt with respect to existing United States law. Under the Alien Tort Claim Act of 1790,<sup>36</sup> United States District Courts are given jurisdiction over civil actions by aliens "for a tort only, committed against the law of nations." Several cases have found this statute to apply, at least in principle, to alleged acts of torture committed entirely outside U.S. jurisdiction by non-U.S. persons; in one, actual as well as punitive damages were in fact awarded against a former Paraguayan official alleged to have tortured the plaintiff's brother to death in Paraguay.<sup>37</sup>

Recent efforts to codify the extraterritorial reach of the civil jurisdiction of United States courts over acts of torture, through adoption of the proposed Torture Victims Protection Act, have been opposed by the Executive Branch as inconsistent with the approach that the Torture Convention has taken, and as legally unwarranted and potentially prob-

34. See Appendix at II(3).

35. See *id.*

36. 28 U.S.C. § 1350 (1988).

37. *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d. Cir. 1980), *on remand* 577 F. Supp. 860 (E.D.N.Y. 1984). *But see* *Tel-Oren v. Libyan Arab Republic*, 517 F. Supp. 542 (D.D.C. 1981), *aff'd* 726 F.2d 774 (D.C. Cir. 1984), *cert. denied* 470 U.S. 1003 (1985); *Rodriguez-Fernandez v. Wilkinson*, 505 F. Supp. 787 (D. Kan. 1980), *aff'd* 654 F.2d 1382 (10th Cir. 1981). See generally RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 702 and 703 ("A state violates international law if, as a matter of state policy, it practices, encourages, or condones: . . . (d) torture or other cruel, inhuman, or degrading treatment or punishment.") ("An individual victim of a violation of a human rights agreement may pursue any remedy provided by that agreement or by other applicable international agreements."). For a recent case holding nonjusticiable claims based *inter alia* on extraterritorial torture, see *Linder v. Calero Portocarrero*, 747 F. Supp. 1452 (S.D. Fla. 1990).

lematic in practice.<sup>38</sup> The proposed Act would effectively open U.S. courts to cases having no nexus whatsoever to the United States, essentially providing the civil analogue to "universal jurisdiction" in the international criminal field. Absent a treaty providing for such jurisdiction, there would seem to be little justification for such overreaching.

#### IV. CONSTITUTIONAL CONSIDERATIONS

Some commentators have perceived several issues that the Convention presented as creating potentially difficult problems concerning the relationship between a treaty — which according to Article VI of the Constitution is the law of the land — and the Constitution itself.

##### A. *Cruel, Inhuman or Degrading Treatment or Punishment*

As indicated above, Article 16 obligates States Party to undertake to prevent—but not to prohibit or criminalize—other acts of cruel, inhuman or degrading treatment or punishment not amounting to torture as defined in Article 1, "when such acts are committed by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." In particular, the same steps must be taken in this regard under Articles 10-13 as are required with respect to torture itself: training of law enforcement personnel; review of interrogation techniques and detention rules and practices; investigation of violations by State authorities; and ensuring the right to bring a complaint for investigation.

Arguably, the scope of Article 16 exceeds existing United States law. Certainly, the phrase "cruel, inhuman or degrading treatment or punishment" as interpreted in other contexts<sup>39</sup> varies from the closely analogous prohibitions under various amendments to the United States Constitution. Because it is unclear how the Convention's terms will be

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38. This was the position taken by the Departments of State and Justice at the June 22, 1990 hearing before the Subcommittee on Immigration and Refugee Affairs of the Senate Judiciary Committee (no published transcript) concerning two bills introduced in the 1st session of the 101st Congress, namely, H.R. 1662 (introduced April 4, 1989 by Congressman Gus Yatron (D. PA.) and others) and S.1629 (introduced Sept. 14, 1989 by Senator Arlen Specter (R. PA.)).

39. See, e.g., *X v. Federal Republic of Germany*, (No. 6594/74) 11 Eur. Comm'n H.R. 16 (1977). Corporal punishment, for example, is lawful under the United States Constitution, unlawful under the analogous provisions of the European Convention.

interpreted, it was considered necessary to condition United States ratification of the Convention on a formal reservation to the effect that the United States considers itself bound by the obligation under Article 16 only insofar as the term "cruel, inhuman or degrading treatment or punishment" means the cruel, unusual and inhumane treatment or punishment prohibited by the fifth, eighth and/or fourteenth amendments to the Constitution.<sup>40</sup>

## B. *Death Penalty*

As noted at the hearing before the Senate Foreign Relations Committee on the Torture Convention, the death penalty does not violate international law nor does international law require the abolition of the death penalty.<sup>41</sup> Many, perhaps even most, countries in the world today provide for capital punishment for some offenses under their domestic laws, and none of the major international human rights instruments prohibits the death penalty.

The Torture Convention itself does not address the death penalty. Nonetheless, some concern was expressed that its ratification could, notwithstanding the "lawful sanctions" exception, provide an additional legal basis on which to oppose the imposition of capital punishment in U.S. courts. In part, this concern was motivated by the recent decision of the European Court of Human Rights in *Soering v. United Kingdom*,<sup>42</sup> which held that extradition of a West German national from the United Kingdom to the United States to stand trial on capital murder charges, for which the penalty could be execution, would violate the European Convention's prohibition against "cruel and inhumane pun-

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40. See Appendix at I(1). Initially a proposed understanding addressed this potential conflict, but since the intended legal effect was in fact to restrict, rather than simply to interpret, the legal obligation which the United States was prepared to accept under Article 16, a formal reservation was considered more appropriate. See SENATE EXEC. REP. NO. 30, *supra* note 4, at Appendix A.

41. *Committee Hearing*, *supra* note 4, at 10-11 (statement of Abraham D. Sofaer, Legal Adviser, Department of State). Various international conventions — for example, the European Convention for the Protection of Human Rights and Fundamental Freedoms and the International Covenant on Civil and Political Rights — do contain provisions limiting application of the death penalty, and some, such as the 6th Optional Protocol to the European Convention, prohibit its use entirely. These obligations apply only to states that have affirmatively accepted them through ratification or accession.

42. *Soering v. United Kingdom*, 161 Eur. Ct. H.R. 4 (ser. A) (1989), *reprinted in* 28 I.L.M. 1063 (1989).

ishment.” Interestingly, that decision did not turn on a finding that application of the death penalty itself would violate the European Convention, much less international law. Rather, the Court held that, because the United States legal system permitted extensive appeals in capital cases, the accused, if convicted, would face the prospect of spending many years on death row, never knowing whether his sentence would be carried out, overturned or commuted.<sup>43</sup> Given his youth at the time of the crime, the Court considered this “death row syndrome” prospectively violative of the accused’s human rights.<sup>44</sup>

The Administration proposed — and the Senate endorsed — an understanding reflecting its view that international law does not prohibit the death penalty in order to allay any doubt about the position of the United States in respect of the capital punishment issue. In addition, to clarify the United States’ position on the application of the death penalty in international law, the Senate consented to the ratification of the Convention on the condition that the Convention neither restricts nor prohibits the United States from applying the death penalty consistent with the protections of the fifth, eighth, and fourteenth amendments of the United States Constitution, including any constitutional period of confinement prior to the imposition of the death penalty.<sup>45</sup>

### C. *The “Sovereignty” Proviso*

When the Senate gave its advice and consent to ratification of the Genocide Convention, it did so subject to the following reservation, which was included in the United States instrument of ratification:

That nothing in the [Genocide] Convention requires or authorizes legislation or other action by the United States of America prohibited by the Constitution of the United States as interpreted by the United States.<sup>46</sup>

This reservation reflected the view, shared by those who believe that Senator Bricker was historically and legally correct in proposing

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43. *Id.* at 44-45.

44. *Id.*

45. *See* Appendix at II(4).

46. *See* REPORT OF THE SENATE COMMITTEE ON FOREIGN RELATIONS ON THE GENOCIDE CONVENTION, S. EXEC. REP. NO. 2 at 19 (1985); 132 CONG. REC. S1377 (daily ed., Feb. 19, 1986).

his amendment to the Constitution,<sup>47</sup> that an explicit statement of the primacy of the Constitution over an arguably or possibly inconsistent treaty is necessary to avoid any possibility that ratification of the suspect treaty could in some fashion bind the United States to take actions that the Constitution prohibited.

When consideration was given to the Torture Convention, neither the Administration nor a majority of the Senate Foreign Relations Committee shared this view. As indicated in the Committee's report, the Convention does not textually and could not, as a matter of domestic law, require the United States to take any legislative or other actions that the Constitution prohibited.<sup>48</sup> In *Reid v. Covert*<sup>49</sup> the Supreme Court stated that it had "regularly and uniformly recognized the supremacy of the Constitution over a treaty." This principle is acknowledged as definitive.<sup>50</sup> Even if an inconsistency did exist between the Constitution and the Convention, a constitutional reservation by the Senate would thus add nothing in the way of constitutional protection.<sup>51</sup> Such a reservation could, however, raise questions among other States Party to the Convention as to the extent of United States obliga-

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47. For a useful recent account of the debate, see D. TANANBAUM, *THE BRICKER AMENDMENT CONTROVERSY: A TEST OF EISENHOWER'S POLITICAL LEADERSHIP* (1988). As initially proposed, the so-called Bricker amendment, S.J. Res. 102, 82nd Cong. 1st Sess., 197 CONG. REC. 11344 (1951), would have repealed the second paragraph of Article VI of the Constitution and precluded, inter alia, treaties respecting or abridging rights and freedoms of United States citizens recognized by the United States Constitution. Subsequent versions, including the one finally voted on and defeated, provided that a provision of a treaty or other international agreement which conflicts with the Constitution shall not be of any force and effect. The "sovereignty" reservation to the Genocide Convention is a variant on this theme.

48. SENATE EXEC. REP. NO. 30, *supra* note 4, at 4.

49. 354 U.S. 1, 17 (1957).

50. See, e.g., RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 302(2): "No provision of an [international] agreement may contravene any of the prohibitions or limitations of the Constitution applicable to the exercise of authority by the United States;" see also *id.* at Comment (b): "The view, once held, that treaties are not subject to constitutional restraints is now definitively rejected. Treaties and other international agreements are subject to the prohibitions of the Bill of Rights and other restraints on federal power. . . ."

51. However, such a reservation could be unsettling at the international level, since it could raise questions as to the exact nature of the treaty obligations undertaken by the United States pursuant to the Convention. For other States Parties unfamiliar with the United States Constitution and its interpretation by United States courts, it would be difficult, if not impossible, to assess the precise effect of the "proviso" or "reservation" on the legal undertakings of the United States under the Convention.

tions under the Convention and, much more damaging, lead others to invoke their own Constitutions to limit compliance with the Convention's central provisions, including the prohibition against torture and the obligation to extradite or prosecute torturers.<sup>52</sup>

Nonetheless, when the Convention reached the floor of the Senate, Senator Jesse Helms of North Carolina expressed continued concern over the necessity of clarifying and preserving the supremacy of the Constitution over any inconsistent treaty provision. He stressed, however, in particular, the importance of doing so with respect to "international criminal law treaties" under which the United States accepts an obligation to conform its domestic law to international standards, because of the potential harm that could be done to the safeguards guaranteed in the Bill of Rights.<sup>53</sup> For this reason, he noted, the Senate had attached so-called "sovereignty" reservations not only to the Genocide Convention, but also to subsequently considered Mutual Legal Assistance Treaties ("MLAT's") and to the Vienna Illicit Trafficking Convention, eight times in all.<sup>54</sup>

Others — for example, Senator Daniel Patrick Moynihan — considered the "sovereignty" reservation to have been a mistake, noting that it could be read as a matter of international law to render uncertain the extent of obligations that the United States had undertaken pursuant to the Convention.<sup>55</sup> Unlike a narrowly drawn reservation to a specific article or clearly identified undertaking, the "sovereignty" reservation broadly purports to condition every provision of the treaty on the entire corpus of evolving United States constitutional jurisprudence. Not only are other nations then left to question the meaning and reach of United States adherence to the Convention, but some could also be drawn to attempt to condition their undertakings on their own domestic constitutional law. Such a development would clearly undermine the uniformity and universality which lie at the heart of a multilateral approach to the elimination of torture.<sup>56</sup>

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52. See, e.g., SENATE EXEC. REP. 30, *supra* note 4, at 5.

53. See 136 CONG. REC. S17487-89 (daily ed., Oct. 27, 1990).

54. 136 CONG. REC. S17489 (daily ed., Oct. 27, 1990).

55. Indeed, some twelve countries have made just such an objection to the comparable condition imposed on U.S. ratification of the Genocide Convention, and others have indicated their intention to oppose a similar reservation if taken with respect to the Torture Convention. Four of the six states involved with recent MLAT's have expressed strong concerns and/or take reciprocal reservations. See SENATE EXEC. REP. No. 30, *supra* note 4, at 4-5.

56. See 136 CONG. REC. S17489-90 (daily ed., Oct. 27, 1990).



To avoid these pitfalls, while at the same time recognizing the primacy of the Constitution as a matter of domestic law, the Senate agreed to include in its resolution of advice and consent a statement — which is neither a reservation nor an understanding to the Convention, and which need not be included in the instrument of ratification — that “[t]he President of the United States shall not deposit the instrument of ratification until such time as he has notified all present and prospective ratifying party to this Convention that nothing in this Convention requires or authorizes legislation, or other action, by the United States prohibited by the Constitution of the United States as interpreted by the United States.”<sup>57</sup>

#### D. *Federal-State Provision*

Many provisions of the Convention impose obligations that necessarily implicate State and local governments in addition to the Federal government. For example, the central undertakings to criminalize torture and to take effective legislative, administrative, judicial or other measures to prevent acts of torture apply throughout the territory under the jurisdiction of each State Party<sup>58</sup> and thus apply at the State and local levels.<sup>59</sup> With respect to a few provisions requiring specific prophylactic and preventive measures, the question arose over the extent of the Federal government’s undertaking to ensure that State and

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57. See Appendix at IV; 136 CONG. REC. S17488 (daily ed., Oct. 27, 1990). In proposing this formula, Senator Clairborne Pell (D. R.I.), Chairman of the Senate Foreign Relations Committee, noted in particular that because it is not a reservation, other countries cannot invoke it on a reciprocal basis to limit or eliminate their obligations to comply with the Convention, and the President can comply with the proviso simply by notifying all countries of the U.S. position.

58. Art. 2 and 4.

59. As indicated in the Reagan Administration transmittal, any act of torture in the United States, including acts constituting attempts or conspiracy to torture, would unquestionably violate criminal statutes under existing state and/or federal law. When such acts are subject to state jurisdiction, the offense would likely be a common crime, such as assault or murder. In some circumstances, the nature of the activity or the persons involved could also give rise to a federal offense, such as interstate kidnapping or hostage-taking under such statutes as 18 U.S.C. § § 112, 114, 115, 878, 1201 and 1203. Acts subject to federal jurisdiction would violate statutory provisions against assault, maiming, murder, manslaughter, attempt to commit murder or manslaughter, and rape. See, e.g., 18 U.S.C. § § 113, 114, 1111, 1112, 1113 and 2241-2245 (1988). In addition, federal law defines two “constitutional crimes” under 18 U.S.C. § § 241 and 242 that would likely be relevant to any situation covered by the Convention.

local governments comply. In particular, attention was focused on Articles 10-14, which require States Party to:

—ensure that education and information regarding the prohibition against torture are fully included in the training of persons involved in the custody, interrogation or treatment of persons arrested, detained or imprisoned;<sup>60</sup>

—keep under systematic review its interrogation rules, instructions, methods and practices for the custody and treatment of persons arrested, detained or imprisoned;<sup>61</sup>

—conduct prompt and impartial investigations of allegations of acts of torture within their territories;<sup>62</sup>

—provide individuals the right to bring complaints of torture and to have such cases promptly and impartially examined;<sup>63</sup> and to

—provide victims of torture with enforceable rights of redress, compensation and rehabilitation.<sup>64</sup>

Under Article 16, States Party assume similar obligations with respect to the prevention of cruel, inhuman or degrading treatment or punishment not amounting to torture, except that the Convention does not require provision of rights of redress or compensation.

In view of the division of authority between Federal, State and local governments in the United States, and considering the largely decentralized distribution of police and related authorities at all levels, it was considered necessary to clarify, primarily for the benefit of the international community, that the Convention would not be implemented solely by the Federal government or by Federal law. This clarification was particularly necessary in respect to those preventive measures which would in the first instance fall to State and local governments. The object is not to limit or modify United States obligations under the Convention but rather to indicate that implementation of those obligations will necessarily take place with respect to the Federal system.<sup>65</sup>

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60. Art. 10(1). This provision covers law enforcement personnel (civil and military), medical personnel, public officials and others.

61. Art. 11.

62. Art. 12.

63. Art. 13. States are also obliged to take steps to ensure that the complainant and witnesses are protected against all ill-treatment or intimidation as a consequence of the complaint or any evidence given.

64. Art. 14.

65. The provision is thus to be distinguished from a traditional "federal-state

For this purpose, the United States instrument of ratification will include the statement, characterized as an understanding, that "this Convention shall be implemented by the United States to the extent that it exercises legislative and judicial jurisdiction over matters covered by the Convention and otherwise by the State and local governments. Accordingly, in implementing Articles 10-14 and 16, the United States Government shall take measures appropriate to the Federal system to the end that the competent authorities of the constituent units of the United States of America may take appropriate measures for the fulfillment of the Convention."<sup>66</sup>

## V. NON-SELF-EXECUTING TREATY

Although the Convention, subject to the aforementioned provisos, is deemed consistent with United States law (or, stated otherwise, United States law is considered already to satisfy the substantive requirements of the Convention), it was considered nonetheless preferable to leave technical implementation of the Convention to the domestic legislative and judicial processes. Accordingly, the Senate declared that the provisions of Articles 1 through 16 are "non-self-executing," by which it is meant they do not establish rights enforceable in United

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clause" having the object of releasing a central government from international obligations which would require action beyond its power. *See generally* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 302, Reporters' Note 4 ("A 'federal-state clause' is likely to render a federal state's commitment under an international agreement less onerous than that of unitary states. Such clauses are therefore more likely to be acceptable in multilateral agreements reflecting common purposes than in those containing reciprocal exchanges.") The issue is not whether such a provision is required, for example under the tenth amendment to the Constitution, but whether a statement for the record is advisable.

66. *See* Appendix at II(5). This issue was initially addressed in a proposed reservation to the Convention, which suggested to some that the United States was in fact not accepting an international legal obligation to implement the Convention to the extent that it required action beyond the existing scope of Federal legislative and judicial jurisdiction. A reservation may have seemed appropriate to those who anticipated that the Convention could or would be used by the Federal government to expand its legislative and judicial jurisdiction into areas now primarily or exclusively the province of State and local authorities. Since neither was the case — the United States intends to implement the Convention fully and consistently with the Federal system — the reservation was rewritten and recast as an understanding by the Senate, and the amended version was introduced on the Senate floor. *See* 136 CONG. REC. S17486 (daily ed., Oct. 27, 1990). An interesting, and one assumes hypothetical, issue concerns the refusal of state or local authorities to comply with Convention obligations.

States courts unless and until Congress has approved implementing legislation.<sup>67</sup> This provision concerns only the domestic effect of the Convention and does not limit or alter the extent of the United State's international obligations thereunder.

## VI. COMMITTEE AGAINST TORTURE

To monitor and supervise compliance with its provisions, the Convention establishes an international Committee Against Torture, consisting of ten experts in the human rights field.<sup>68</sup> States Party are obliged to submit to the Committee, within one year after ratification or accession and every four years thereafter, reports on the measures they have taken to give effect to the Convention; the Committee considers and comments upon these reports at its semiannual meetings.<sup>69</sup> In addition, the Committee has competence: (1) to investigate reports of the use of torture by States Party when it receives "reliable information which appears. . .to contain well-founded indications that torture is being systematically practiced in the territory of a State Party;"<sup>70</sup> (2) to consider complaints by one State Party that another is not fulfilling its obligations under the Convention, where both States have rec-

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67. See Appendix at III(1). For the distinction between "self-executing" and "non-self-executing" treaties and agreements, see generally RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 111. Given the language of the Convention, for example requiring each State Party to criminalize acts of torture and to take "effective legislative, administrative, judicial and other measures" to prevent such acts, there is little room to argue that the Convention was intended to be self-executing. Since United States law, at both the federal and state levels, seems to be fully in compliance with the Convention, it may only be necessary to establish federal jurisdiction over offenses committed by United States nationals outside the United States, and over foreign offenders committing torture abroad who are later found in a territory under United States jurisdiction, under Art. V(1) and (2) respectively.

68. Art. 17. The experts are required to be persons of "high moral standing and recognized competence;" while nominated and elected by States Parties, they serve in their individual capacities, not as representatives of governments. Creation of such oversight bodies is common in contemporary multilateral treaty practice where there are no existing international structures to perform the function; for example, the International Covenant on Civil and Political Rights established a similar body, the Human Rights Committee, while the Vienna Illicit Trafficking Convention conferred supervisory responsibilities on two standing UN bodies, the International Narcotics Control Board and the UN Commission on Narcotic Drugs. See Stewart, *supra* note 5, at 403.

69. Art. 19(1), (3), and (4). See generally *Report of the Committee Against Torture*, U.N. GAOR Supp. (No. 44), U.N. Doc. A/45/44 (1990).

70. Art. 20(1).

ognized the Committee's competence to do so;<sup>71</sup> and (3) to consider complaints by or on behalf of individuals claiming to be victims of a violation of the Convention by a State Party if that State Party has recognized the Committee's competence to do so.<sup>72</sup>

In addition to submitting the required periodic reports to the Committee, the United States will recognize and accept the Committee's competence to investigate any reliable reports it may receive indicating a systematic practice of torture in the United States, and to consider complaints other States Party have lodged concerning alleged violations of the Convention by the United States — if the opposing State Party has made a reciprocal declaration.<sup>73</sup> Because of this reciprocity, accepting the possibility of State-to-State complaints will permit the United States to participate actively in the Committee's work by focusing attention where it may be most warranted. Since the Committee's authority to investigate reliable reports of a systematic practice of torture is accepted unless specifically declined, the United States' instrument of ratification need only include a declaration recognizing the competence of the Committee to receive State-to-State complaints under Art. 21 on the basis of reciprocity.<sup>74</sup>

By contrast, the United States will not, at least at this point, accept the competence of the Committee to consider individual complaints of treaty violations. Under Art. 22, such complaints are admissible only after the individual has exhausted all available domestic remedies — except when the application of the remedies is unreasonably prolonged or unlikely to be effective. Given the extensive protections of the United States legal system, it is highly unlikely that any complaint of torture by United States authorities not already resolved under United States law would be substantively meritorious. The

71. Art. 21(1).

72. Art. 22(1).

73. See Appendix at III(2).

74. *Id.* In submitting the Convention to the Senate, the Reagan Administration had indicated its intent to "opt out" of the Committee's work by making a reservation, pursuant to Article 28, that the United States did not recognize the competence of the Committee under Article 20 to investigate charges of a systematic practice of torture in the United States and by declining to make the declarations necessary to accept the Committee's other competencies under Articles 21 and 22. See President's Transmittal, *supra* note 4, at (iii). The Bush Administration determined, after its review of the "package," to drop the proposed reservation under Article 28 and to accept the Committee's competence over State-to-State claims. See SENATE EXEC. REP. NO. 30, *supra* note 4, at Appendix A.

amount of time and otherwise scarce governmental resources potentially required to respond to specious complaints outweighs any benefit accorded by "opting in" to the individual complaint mechanism. Declining to accept the Committee's jurisdiction in this regard will not prevent the United States from participating actively and effectively in the Committee's work.

## VII. DISPUTE SETTLEMENT

A final reservation, concerning an issue of public international law, will be made to the dispute settlement provisions of Article 30(1), which requires States Party to adhere to a two-step process with regard to dispute resolution. The process requires States Party to first submit any dispute between them concerning the interpretation or application of the Convention to arbitration and then, if within six months the arbitration has not been organized, to refer the matter to the International Court of Justice in conformity with the Statute of the Court. In keeping with recent U.S. policy regard the compulsory jurisdiction of the Court, and as specifically permitted by the "opt out" provision contained in Article 30(2), the reservation will state that the United States does not consider itself bound by Article 30(1) but reserves the right specifically to agree to follow this or any other procedure for arbitration in a particular case.<sup>75</sup>

## VIII. CONCLUSION

The United States has been from the outset a strong supporter of the Torture Convention. The Executive Branch participated actively in its negotiation, with the endorsement and encouragement of the Congress, and the Senate in giving its advice and consent to ratification viewed United States ratification as demonstrating a clear national policy of unequivocal opposition to torture as well as a major step forward in the international community's efforts to eliminate the practice.<sup>76</sup>

The various provisos upon which advice and consent was conditioned were intended both to clarify points of possible confusion and to resolve any potential conflicts between the Convention and United States law. No proviso significantly or substantially modifies the commitment of the United States to carry out its obligations under the

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75. See Appendix at I(2).

76. See SENATE EXEC. REP. NO. 30, *supra* note 4, at 3.

Convention. Some may contend that a few of these conditions are overly technical, unnecessary or unduly limiting, and would in any event have been more appropriately included in the Senate's record of consideration or in domestic implementing legislation, rather than formally placed in the international record as reservations, declarations or understandings. Nonetheless, each addresses an actual or perceived difficulty of implementation or interpretation. Taken together, they reflect the seriousness with which the United States approaches its international undertakings, particularly when they affect the rights and obligations of individuals within its jurisdiction. A close study of the reasons underlying the provisos may in fact help pave the way for future ratification of other human rights and international criminal law treaties.

APPENDIX  
SENATE OF THE UNITED STATES

in Executive Session

October 27, 1990

RESOLVED, (two-thirds of the Senators present concurring therein), That the Senate advise and consent to the ratification of The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by unanimous agreement of the United Nations General Assembly on December 10, 1984, and signed by the United States on April 18, 1988,

*Provided that:*

I. The Senate's advice and consent is subject to the following reservations:

(1) That the United States considers itself bound by the obligation under Article 16 to prevent "cruel, inhuman or degrading treatment or punishment," only insofar as the term "cruel, inhuman or degrading treatment or punishment" means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth and/or Fourteenth Amendments to the Constitution of the United States.

(2) That pursuant to Article 30(2) the United States declares that it does not consider itself bound by Article 30(1), but reserves the right specifically to agree to follow this or any other procedure for arbitration in a particular case.

II. The Senate's advice and consent is subject to the following understandings, which shall apply to the obligations of the United States under this Convention:

(1) (a) That with reference to Article 1, the United States understands that, in order to constitute torture, an act must be specifically intended to inflict severe physical or mental pain or suffering and that mental pain or suffering refers to prolonged mental harm caused by or resulting from: (1) the intentional infliction or threatened infliction of severe physical pain or suffering; (2) the administration or application, or threatened administration or application, of mind altering substances or other procedures calculated to disrupt profoundly the senses or the personality; (3) the threat of imminent death; or (4) the threat that another person will imminently be subjected to death, severe pain or suffering, or the administration or application of mind altering substances or other procedures calculated to disrupt profoundly the senses or personality.



(b) That the United States understands that the definition of torture in Article 1 is intended to apply only to acts directed against persons in the offender's custody or physical control.

(c) That with reference to Article 1 of the Convention, the United States understands that "sanctions" includes judicially-imposed sanctions and other enforcement actions authorized by United States law or by judicial interpretation of such law. Nonetheless, the United States understands that a State Party could not through its domestic sanctions defeat the object and purpose of the Convention to prohibit torture.

(d) That with reference to Article 1 of the Convention, the United States understands that the term "acquiescence" requires that the public official, prior to the activity constituting torture, have awareness of such activity and thereafter breach his legal responsibility to intervene to prevent such activity.

(e) That with reference to Article 1 of the Convention, the United States understands that noncompliance with applicable legal procedural standards does not *per se* constitute torture.

(2) That the United States understands the phrase, "where there are substantial grounds for believing that he would be in danger of being subjected to torture," as used in Article 3 of the Convention, to mean "if it is more likely than not that he would be tortured."

(3) That it is the understanding of the United States that Article 14 requires a State Party to provide a private right of action for damages only for acts of torture committed in territory under the jurisdiction of that State Party.

(4) That the United States understands that international law does not prohibit the death penalty, and does not consider this Convention to restrict or prohibit the United States from applying the death penalty consistent with the Fifth, Eighth and/or Fourteenth Amendments to the Constitution of the United States, including any constitutional period of confinement prior to the imposition of the death penalty.

(5) That the United States understands that this Convention shall be implemented by the United States Government to the extent that it exercises legislative and judicial jurisdiction over the matters covered by the Convention and otherwise by the state and local governments. Accordingly, in implementing Articles 10-14 and 16, the United States Government shall take measures appropriate to the Federal system to the end that the competent authorities of the constituent units of the United States of America may take appropriate measures for the fulfillment of the Convention.

III. The Senate's advice and consent is subject to the following

declarations:

(1) That the United States declares that the provisions of Articles 1 through 16 of the Convention are not self-executing.

(2) That the United States declares, pursuant to Article 21, paragraph 1, of the Convention, that it recognizes the competence of the Committee against Torture to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the Convention. It is the understanding of the United States that, pursuant to the above mentioned article, such communications shall be accepted and processed only if they come from a State Party which has made a similar declaration.

IV. The Senate's advice and consent is subject to the following proviso, which shall not be included in the instrument of ratification to be deposited by the President:

The President of the United States shall not deposit the instrument of ratification until such time as he has notified all present and prospective ratifying parties to this Convention that nothing in this Convention requires or authorizes legislation, or other action, by the United States of America prohibited by the Constitution of the United States as interpreted by the United States.

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

Roger S. Clark\*

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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.<sup>1</sup> 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,<sup>2</sup> Model Treaty on Extradition,<sup>3</sup> Model Treaty on Mutual Assistance in Criminal Matters,<sup>4</sup> Model Treaty on the Transfer of Proceedings in Criminal Matters,<sup>5</sup> Model Treaty on the Transfer of Supervision of Offenders Conditionally Sentenced or Con-

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\* Distinguished Professor of Law, Rutgers School of Law, Camden, New Jersey; Member, United Nations Committee on Crime Prevention and Control (1986-1990); B.A., LL.M. (Victoria U. of Wellington, New Zealand), LL.M., J.S.D. (Columbia). This article is based on a paper delivered by Professor Clark at the Ninth Commonwealth Law Conference, Auckland, New Zealand, Apr. 17-20, 1990. The author is currently engaged in a broader study of the work of the United Nations in the criminal justice area with the aid of an Andrei Sakharov Fellowship from the Jacob Blaustein Institute for the Advancement of Human Rights.

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,<sup>6</sup> and Model Treaty for the Prevention of Crimes that Infringe on the Cultural Heritage of Peoples in the Form of Movable Property.<sup>7</sup>

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.<sup>8</sup> 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.<sup>9</sup>

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

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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.<sup>10</sup> Early examples were the slave trade,<sup>11</sup> the trade in women and children,<sup>12</sup> trade in obscene publications,<sup>13</sup> forgery of currency<sup>14</sup> and trade in illicit drugs.<sup>15</sup> 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,<sup>16</sup> war crimes,<sup>17</sup> *apartheid*,<sup>18</sup> and various terrorist offenses (like aircraft hijacking,<sup>19</sup> attacks on diplomats,<sup>20</sup> the taking of hostages<sup>21</sup> and torture<sup>22</sup>).

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10. For a comprehensive list of multilateral criminal law treaties, see M. BAS-  
SIOUNI, A DRAFT INTERNATIONAL CRIMINAL CODE AND DRAFT STATUTE FOR AN IN-  
TERNATIONAL 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 Traites 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 Pub-  
lications, May 4, 1910, 7 Martens Nouveau Recueil de Traites (ser.3) 266; Interna-  
tional 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 Cur-  
rency, 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, 1953, 520 U.N.T.S. 151; United Na-  
tions Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Sub-  
stances, 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 Un-  
lawful 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 Interna-  
tionally 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.<sup>23</sup> 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 Genocide<sup>24</sup> and *Apartheid*<sup>25</sup> 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.<sup>26</sup>

The regional European Convention for the Suppression of Terrorism<sup>27</sup> assimilates some of the broader multilateral terrorism treaties with the Genocide and *Apartheid* models as between the parties to the

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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 Aircraft<sup>28</sup> and an offense within the scope of the Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation<sup>29</sup> shall not be regarded as a political offense or as an offense inspired by political motives.<sup>30</sup>

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.<sup>31</sup>

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 bilaterals<sup>32</sup> (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.<sup>33</sup>

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.<sup>34</sup> 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,<sup>35</sup> and resolutions of a softer legal nature which contribute to the development of international custom, such as the Universal Declaration of Human Rights<sup>36</sup> and the Standard Minimum Rules for the Treatment of Prisoners.<sup>37</sup> 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.<sup>38</sup>

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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.<sup>39</sup> 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."<sup>40</sup>

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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.<sup>41</sup> A transfer should be effected on the basis of mutual respect for national sovereignty and jurisdiction.<sup>42</sup> 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.<sup>43</sup> 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.<sup>44</sup> 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.<sup>45</sup> 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.<sup>46</sup> Moreover, the administering state should be given the opportunity to verify the free consent of the prisoner.<sup>47</sup> In cases where the prisoner is incapable of making a free deter-

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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.<sup>48</sup>

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.<sup>49</sup> One provision is in the pious hope category: The decision whether to transfer a prisoner shall be taken without delay.<sup>50</sup> 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.<sup>51</sup>

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.<sup>52</sup> 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.<sup>53</sup> 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.<sup>54</sup>

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

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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.<sup>55</sup> 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.<sup>56</sup> The period of deprivation of liberty already served by the sentenced person in either state shall be fully deducted from the final sentence.<sup>57</sup>

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.<sup>58</sup> 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.<sup>59</sup> The other confirms that both the sentencing and the administering state shall be competent to grant pardon and amnesty.<sup>60</sup>

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.<sup>61</sup> 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

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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.<sup>62</sup>

## 2. *The Model Treaty on Extradition*

The Model Treaty on Extradition<sup>63</sup> follows a fairly standard modern format, based to a substantial degree as a drafting matter on recent Australian extradition treaties.<sup>64</sup> 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.<sup>65</sup> 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.<sup>66</sup>

(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.<sup>67</sup> 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.<sup>68</sup>

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.<sup>69</sup> Essentially, the parties would agree that the *extradite-or-prosecute* obligation in treaties such as the Convention Against the Taking of Hostages<sup>70</sup> or the aircraft conventions<sup>71</sup> 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* Conventions<sup>72</sup> not to treat the offenses contained therein as political.<sup>73</sup>

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.<sup>74</sup> Similarly, it will be refused if the person whose extradition is requested has been or could be subjected in the request-

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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.<sup>75</sup> 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;<sup>76</sup> 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;<sup>77</sup> 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.<sup>78</sup>

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.<sup>79</sup>

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.'"<sup>80</sup> 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-

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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.<sup>81</sup> 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.<sup>82</sup>

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,<sup>83</sup> and where a prosecution in respect of the offense for which extradition is requested is pending in the requested state.<sup>84</sup> Again, it may be refused if the offense carries the death penalty

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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.<sup>85</sup>

The model contains standard machinery provisions<sup>86</sup> 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.<sup>87</sup>

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."<sup>88</sup> 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.<sup>89</sup>

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 Matters<sup>90</sup> 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.<sup>91</sup> It also has some similarities to the Scheme Relating to Mutual Assistance in Criminal Matters within the Commonwealth, first adopted in 1986.<sup>92</sup> The basic aim of the model treaty

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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.<sup>93</sup>

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.<sup>94</sup>

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;<sup>95</sup> 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.<sup>96</sup> 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,<sup>97</sup> and the form for requests and modes of dealing with them are set out.<sup>98</sup> 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."<sup>99</sup> 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.<sup>100</sup>

In one striking way, the model treaty differs from the Commonwealth Scheme<sup>101</sup> 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."<sup>102</sup> 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.<sup>103</sup> 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.<sup>104</sup>

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."<sup>105</sup> 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 law<sup>106</sup> and in current bilateral<sup>107</sup> assis-

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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 Matters<sup>108</sup> 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.<sup>109</sup> 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.<sup>110</sup> This kind of jurisdiction is referred to, particularly in European usage, as "vicarious administration of justice."<sup>111</sup> 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-

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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.<sup>112</sup> 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.<sup>113</sup>

As in the other models, the parties are to designate channels of communication;<sup>114</sup> certain documents are required;<sup>115</sup> and various formalities are spelled out.<sup>116</sup> Dual criminality is required.<sup>117</sup> Various grounds of refusal are given:<sup>118</sup> 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,<sup>119</sup> 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.<sup>120</sup> The suspect's right not to be prosecuted twice is protected.<sup>121</sup> A framework for dealing with multiple prosecution possibilities<sup>122</sup> 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.<sup>123</sup>

##### 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.<sup>124</sup> 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.<sup>125</sup> The sentencing state may request another party to the treaty ("the administering state") to take responsibility for applying the terms of the decision.<sup>126</sup> The rationale for the scheme is, as in other instances, found in the preamble to the

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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.<sup>127</sup> The draft contains similar grounds for refusal to those contained in the Treaty on the Transfer of Proceedings.<sup>128</sup> The sentenced person is entitled to express his or her views on the transfer<sup>129</sup> and the rights of the victim, especially to restitution or compensation, must not be adversely affected as a result of the transfer.<sup>130</sup>

The acceptance by the administering state of the responsibility for applying the sentence extinguishes the competence of the sentencing state to enforce the sentence.<sup>131</sup> 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.<sup>132</sup> The sentencing state alone shall have the right to decide on any application to reopen the case.<sup>133</sup> Either party, however, may grant pardon, amnesty or commutation of the sentence in accordance with the provisions of its Constitution or other laws.<sup>134</sup>

## 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.<sup>135</sup> "Movable cultural property" is defined

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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.<sup>136</sup> 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;<sup>137</sup>
- (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

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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.<sup>138</sup>

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.<sup>139</sup> 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.<sup>140</sup>

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.<sup>141</sup> 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.<sup>142</sup> The States Parties agree to make

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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.<sup>143</sup> 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.<sup>144</sup>

### 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)<sup>145</sup> 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.<sup>146</sup> One should not underestimate the paucity of resources in many a Ministry of Foreign Affairs or Ministry of Justice when it

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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.

# The Development, Objectives and Planned Activities of the International Criminal Law Center of Fordham University School of Law

**Abraham Abramovsky\***

**Jonny Frank\*\***

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In the spring of 1990, Fordham University established the International Criminal Law Center to commence in the 1990-91 academic year. As the first and only center of its kind in this country, the International Criminal Law Center seeks to respond to the many and varying needs of the entities and individuals who effect and are affected by international criminal law. The International Criminal Law Center aspires to serve the United States, state and foreign governments, multinational corporations, the private bar and private citizens. Among the projects planned for the International Criminal Law Center are conferences, lectures, consultations with foreign missions and a scholars-in-residence program. In addition, the International Criminal Law Center, commencing in September 1991, will begin to publish its own law journal featuring timely articles by both members of the bar, leading academic authorities in the field, as well as domestic and foreign officials.

This article traces the adoption of the International Criminal Law Center and defines its objectives and proposed activities. The article begins with an explanation of Fordham University's decision to establish the International Criminal Law Center and then considers the International Criminal Law Center's goals and plans for achieving its objectives.

## *Development of the International Criminal Center*

The authors originally proposed the establishment of the Interna-

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\* Professor of Law and Director of the International Criminal Law Center, Fordham University School of Law.

\*\* Adjunct Associate Professor of Law and Deputy Director of the International Criminal Law Center, Fordham University School of Law; Chief, Special Prosecutions, United States Attorney's Office, Eastern District of New York. The views expressed are his own and do not necessarily reflect any official law enforcement policy.

tional Criminal Law Center at Fordham University School of Law in the winter of 1990. International criminal law is a rapidly emerging area of the law. This is evidenced by this symposium as well as by the numerous articles being published in the field. The increasing number of cases, both criminal and civil, concerning the myriad of problems raised in this area likewise demonstrates the growing importance of this field. The growing importance of international criminal law is further evidenced by the decision of the American Bar Association to form an independent International Criminal Law Committee. Professor Abramovsky, who is the director of the center, is the Vice-Chair of that committee.

Three major problems have contributed to the heightened importance of international criminal law: globalization of business, terrorism, narcotics, and its attendant issues. The globalization of business necessitates that both the United States government and other nations have a readily available resource. Likewise, international businesses must be cognizant of the impact of the criminal laws of the various countries with which they do business. More specifically, in order to adequately represent these entities, members of the private bar, both foreign and domestic, must become aware and be kept up to date with the constant evolution of legislation, treaties, multi-lateral conventions and other agreements between nations which affect their clients.

Virtually every business transaction with any foreign ramification potentially contains a putative violation of a United States and/or foreign treaty obligation, statute, or regulation. As a result, international criminal law is not solely the concern of the scions of the bar who represent multinational corporations. Business has become so global that a working knowledge of the substantive as well as procedural aspects of international criminal law is a requirement of any lawyer who counsels, represents, or litigates on behalf of any client — no matter how small or large — who engages in or contemplates becoming involved in any business which contains transnational components.

Crime, unfortunately, like business, has become globalized. Terrorism is no longer just a national or regional problem. The atrocities wreaked by international terrorists over the last two decades have outraged the overwhelming majority of sovereign states and have resulted in numerous treaties and conventions to attempt to deal with this problem.

Narcotics trafficking, which inevitably has international ramifications, similarly has spawned nations to band together to combat this plague. That united effort has generated a number of international

agreements ranging from memoranda of understanding to bilateral treaties (i.e. extradition and mutual legal assistance treaties) to multi-lateral conventions. Thus, for example, the United States Senate has recently ratified the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.<sup>1</sup>

The international cooperation that has ensued from the "war on drugs" has also resulted in an increased international effort in the investigation and prosecution of other types of criminal acts. These acts range from intricate money laundering schemes to illicit offshore tax havens. This in turn has brought into question such issues as to what extent United States law may be applied extraterritorially and conversely, to what extent the laws of other countries may be used against American citizens who have not actually committed criminal acts within the territorial boundaries of those states, but whose activities have impacted in a criminal or detrimental form in those states.

Directly connected to the issue is the scope and extent of constitutional rights of American citizens who are targets of a criminal investigation overseas and whether these rights are applicable to resident aliens or even foreign nationals. This issue, in turn, raises the difficult questions of which law enforcement agents of the United States may operate abroad, what should their role be, and whether their actions are monitored strictly by the host state. Likewise, an ever increasing question which is asked domestically is to what extent and under what control may foreign law enforcement agents operate within the territorial boundaries of the United States.

These issues have arisen because, not only have the substantive laws expanded, but the methodology utilized to investigate, prosecute and defend international cases has become extraordinarily complicated. Attorneys have assumed a greater role in these international criminal cases. Until fairly recently, diplomatic agencies such as the Department of State and law enforcement agencies, for example, the Federal Bureau of Investigation and Drug Enforcement Administration, have shouldered most of the responsibility for setting policy and gathering evidence in international cases. American prosecutors (both federal, state and local) and criminal defense attorneys have become more involved in investigations and have increasingly relied upon relatively new law enforcement tools, such as mutual assistance treaties, to gather evidence. For example, Attorney General Richard Thornburgh's

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1. U.N. Doc. E/CONF.82/15 (1988) (found in 28 I.L.M. 493 (1989)).

proposal to station federal prosecutors in foreign countries illustrates the heightened involvement of lawyers in international criminal law.

Although international criminal law had developed into an area of legal specialty, there was no academic center actively serving the international criminal law community. In the winter of 1990, the authors proposed the establishment of the International Criminal Law Center at Fordham University to serve that community. We chose Fordham University Law School, both because of our ties there and because of its geographic location and international graduate program. New York City is this country's hub for international business and (unfortunately) for crime. Moreover, the presence in the city of the United Nations and over 100 missions makes New York City an ideal location for an international criminal law center.

Additionally, the authors believed that the International Criminal Law Center would blend well with Fordham's international graduate program, which focuses on international business programs. Fordham's LL.M. Program, along with its European Community Center, both founded by Professor Barry Hawk and currently administered by Professor Michael Malloy, attracts students from all over the world. It was thus clear to Dean John Feerick and Associate Dean Georgene Vairo that the next component of Fordham's international program should be a center dedicated to the study of international criminal law.

The university was very receptive and enthusiastic about the proposal, and hence authorized the creation of the International Criminal Law Center. The law school's commitment to the study of international criminal law is evidenced by the recent addition to the curriculum of courses in international criminal law, inter-national criminal business law, and international human rights.

### *Objectives of the International Criminal Law Center*

A primary goal of the International Criminal Law Center is to function as a think tank to help formulate United States policy in dealing with international criminal law issues. It is the authors' belief that, at present, there is no one office in the Department of Justice or Department of State which is solely dedicated to developing long term policy for international criminal law issues. Oftentimes, the United States seems to formulate its "policy" on international criminal law issues in an ad hoc manner. Perhaps even more alarming is the fact that the policy is one of reaction rather than a well thought out and



balanced proactive policy.<sup>2</sup>

The International Criminal Law Center will seek to offer guidance to government policy makers through conferences and symposia as new international criminal law issues arise. Further, the International Criminal Law Center will offer counsel by way of briefings and memoranda to the courts, Department of Justice and State officials.

The International Criminal Law Center will strive to serve a similar role to state and foreign governments as they create policies in response to the international criminal law issues that affect their communities. The Center intends to take advantage of its geographic location to consult with the many member states and observers of the United Nations to ascertain the concerns and needs of the world community that touch on international criminal law. Yet another function of the center will be to serve as an information clearinghouse and educational center to assist the private bar as new issues of international criminal law emerge.

### *Activities of the International Criminal Law Center*

The International Criminal Law Center will host conferences dedicated to particular concerns of international criminal law. The papers presented at such conferences will be published independently as a publication of the International Criminal Law Center and, on occasion, will be published in the *Fordham Journal of International Law*.

In 1991, the International Criminal Law Center expects to sponsor conferences on money laundering and the role of the United Nations in resolving the problems posed by international narcotics trafficking. These are but two samples of the type of conferences which the Center will sponsor.

In addition to conferences, the Center will offer a series of lectures at the law school by American and foreign lawyers and law enforcement personnel. The Center plans to offer during the spring of 1991 lectures by American law enforcement agents about the dangers, regulations and methodology for conducting criminal undercover investiga-

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2. See, e.g., Abramovsky, *Extraterritorial Abductions: America's "Catch and Snatch" Policy Run Amok*, U. VA. INT'L L.J. (1991) (discussing dangers inherent in using kidnapping to acquire *in personam* jurisdiction over fugitives abroad); Abramovsky, *Extraterritorial Jurisdiction: The United States' Unwarranted Attempt To Alter International Law in United States v. Unis*, 15 YALE J. INT'L LAW 121, 138 (1990) (discussing dangers inherent in extending subject matter jurisdiction beyond generally accepted principles of international law).

tions in foreign countries. At present, the International Criminal Law Center also anticipates offering a lecture by counsel to large American corporations about the representation of American corporations in criminal matters abroad.

In addition to sponsoring the conferences and lectures, the International Criminal Law Center takes advantage of its location in New York City through private meetings with foreign mission personnel. In addition, constant dialogue is had with leading members of the domestic bar to ascertain which areas they feel are in need of analysis and study.

Finally, the International Criminal Law Center is developing a "scholars in residence" program which will be composed of foreign students and their American counterparts. This program is intended to combine the training of students from diverse backgrounds and legal systems, which hopefully will result in creative proposals and solutions to complex and ever-growing multinational criminal law problems. It is the aspiration of the law school in general and the International Criminal Law Center in particular that these young men and women will one day be the leaders in their respective lands, whether they be scholars, public officials or private practitioners.

For information and/or assistance contact:

Abraham Abramovsky

or

Jonny J. Frank

Fordham University

School of Law

140 West 62nd Street

New York, New York 10023

212-841-5296

# International Cooperation in Criminal Matters: Western Europe's International Approach to International Crime

**Scott Carlson\***

**Bruce Zagaris\*\***

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## I. INTRODUCTION: THE NEED FOR INTERNATIONAL COOPERATION

### A. *International Aspects of Crime*

Any sophisticated discussion of criminal law is apt to touch on the nature of the criminal process itself. In so doing, questions should arise as to how, when, and why the criminal process punishes someone for engaging in certain types of behavior. Though one will not be able to find unanimous answers to these questions, in most circumstances, asking these questions helps to frame the boundaries of the debate.<sup>1</sup>

That is not to say that the details of this inquiry are readily or easily defined. In fact, such is clearly not the case. Take, for example, illicit drug use and trafficking in the United States, and within that topic focus simply on the role of drug testing in grappling with the drug problem in the public sector. The issues are legion, and rules and regulations are being regularly challenged in court. The litigants are looking for answers to significant constitutional questions. Does the fourth or fifth amendment apply? Is "reasonable suspicion" really an issue any more?<sup>2</sup> The answers to these questions will further define the criminal process in this country.

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\* The author is an Attorney-Advisor with the Office of Chief Counsel, Internal Revenue Service, Washington, D.C. The views expressed herein are solely those of the author.

\*\* The author is Of Counsel, Oppenheimer, Wolff & Donnelly, Washington, D.C.; Adjunct Professor of International Business Criminal Law, Fordham University School of Law; Co-Chair, Committee on International Criminal Law, Section of Criminal Justice, A.B.A.; and Editor-in-Chief of the International Enforcement Law Reporter.

1. P. LOW, J. JEFFRIES & R. BONNIE, CRIMINAL LAW CASES AND MATERIALS 1-2 (1986).

2. Weeks, *Public Employee Drug Testing under the Fourth and Fifth Amendments: Where Are We Now and Where Are We Going Under the Federal Decisions?*, 20 URB. LAW. 445 (1988).

However, criminal activity does not recognize national boundaries, and to be effective, the criminal process must be flexible enough to deal with this fact. In recent years, Americans have been confounded by the ability of some criminals to manipulate national boundaries to their advantage. How can it be that someone who is wanted for trial in the United States can relax with impunity at his Swiss estate?<sup>3</sup>

The answer is frustratingly simple. Most of the basic institutions which Americans rely on to define and improve the criminal process are nonexistent or extremely limited in the international sphere, for domestic courts and legislatures are, by definition, institutions of limited authority. To cope with the burgeoning international aspects of crime, the institutions we rely on must be adapted to operate in the international arena.

Years ago, Western European countries identified the shortcomings of a domestic approach to international crime and began taking steps to remedy the situation.<sup>4</sup> To illustrate the European approach, this paper focuses primarily on Western European developments in the area of illicit drug use and trafficking. Though progress is being made in other areas, the European approach to illicit drug use and trafficking has produced substantial results in the context of international cooperation; and with America's own "War on Drugs" raging, this subject has particular relevance to the domestic practitioner.

## B. *New Foreign Policy Considerations*

Another reason to examine international cooperation in Western Europe is that we now live in an era in which the territorial state is being eclipsed by non-territorial actors such as multinational corporations, transnational social movements, and intergovernmental organizations. The politics of global interdependence is inescapable.<sup>5</sup>

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3. Copetas, *The Sovereign Republic of Marc Rich*, REGARDIES 47 (Feb. 1990).

4. See Abbell, *Extradition of Business Crimes to and from European Countries*, A.B.A. Panel on International Criminal Cooperation in European Business Crimes in a Rapidly Changing Environment, A.B.A. Nat'l Convention 38, 40 (Aug. 7, 1990). For a discussion of some recent U.S. efforts to cope with international crime, see Weiland, *Congress and the Transnational Crime Problem*, 20 INT'L LAW. 1025 (1986). A summary of some of the international measures in the 1990 Crime Bill can be found at Barber & Zagaris, *Selected International Enforcement Provisions in the 1990 Crime Bill*, 6 INT'L ENFORCEMENT L. REP. 401 (1990).

5. See R. KEOHANE AND J. NYE, *POWER AND INDEPENDENCE WORLD POLITICS IN TRANSITION* 3-4 (1977).

In acknowledgement of this fact, criminal policy has been elevated to one of the priority issues within foreign policy itself. For instance, the declarations emerging from G-7 summits<sup>6</sup> have expanded their scope from economics to terrorism, drugs, and, more recently, money laundering.<sup>7</sup> These criminal problems often arise from international networks operating outside the control of any single sovereign nation. The fluid nature of these networks makes it difficult for a single nation acting independently to combat these criminal problems. In this vein, modern foreign policy increasingly reflects a situation where unilateral displays of force play a diminishing role, for traditional instruments of power cannot deal with these new, more subterranean, threats to international political stability which permeate national boundaries.

In this context, international cooperation represents a valuable new resource in the foreign policy arsenal, offering international solutions to international problems. The section that follows describes one method of facilitating international cooperation via international regimes. If successful, a regime fosters an ongoing cooperative spirit that enhances the participating nations' "soft powers."<sup>8</sup> The term "soft power" describes a nation's ability to persuade another to want what it wants, in contrast to "hard power" which involves one nation ordering another to do what it wants.<sup>9</sup>

In an era of multinational actors and concerns, the ability of nations to exercise co-optive or soft power is becoming increasingly important, for as the mix of resources that define international power change, so too must countries' approach to the acquisition and manipulation of international power. This lesson is especially important to countries which have enjoyed considerable influence from a hard power perspective, such as the United States. These countries must be careful to hone soft powers with the same vigor that they have devoted to hard

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6. The G-7 Summit is an annual meeting of the heads of government of the leading seven industrial nations (the U.S., Italy, France, the U.K., Japan, Canada and Germany). The agenda is predominantly economic. The governments involved prepare the agenda and do a substantial amount of background work. Traditionally, a statement is released at the end of the summits containing agreements on policies reached.

7. See, e.g., Nye, *Soft Power*, 80 FOREIGN POL'Y 153, 164 (1990); Perez, *OAS Opportunities*, 80 FOREIGN POL'Y 51, 55 (1990); see also Sorensen, *Rethinking National Security*, 69 FOREIGN AFF. 1-18 (1990) (discussion of criminal policy in the context of national security redefinition).

8. See Nye, *supra* note 7, at 164.

9. *Id.* at 168.

powers in the past.<sup>10</sup> If they do not, their ability to participate in shaping solutions to current international problems, such as illicit drug use and trafficking, may be compromised. Moreover, due to the important role that international regimes play in developing soft powers, an understanding of regimes is important, if not essential, to nations seeking to shape these solutions.

In order to illustrate the usefulness of international regimes when describing international cooperation in criminal matters, section two defines the term "international regime" and discusses some of the qualities of international regimes. In section three, the Western European regime of cooperation in international criminal matters is outlined, and section four then highlights recent developments and prospects for further developing and defining European cooperation. The article closes with some observations on the impact of the Western European regime of international cooperation both within and without Europe.

## II. INTERNATIONAL REGIMES—A FRAMEWORK FOR COOPERATION

"International regime" is a term from international organization theory that emerged in the early 1970s.<sup>11</sup> The term applies to arrangements that involve mostly government actors, but that affect non-government actors in diverse areas, such as international trade, telecommunications, and meteorology. A regime may be formal, like the General Agreement on Tariffs and Trade, or informal where the regime is merely implicit from the actions of the states involved.

Generally, the purpose of international regimes is to regulate and control certain transnational relations and activities by establishing international procedures, rules, and institutions.<sup>12</sup> In fact, international regimes have been defined as "norms, rules, and procedures agreed to in order to regulate an issue area."<sup>13</sup>

Thus, it is apparent that international regimes are goal-oriented enterprises whose participating members seek benefits through explicit

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10. *Id.* at 171.

11. For an early discussion of "international regimes," see Keohane & Nye, *Transnational Relations and World Politics*, INT'L ORG. 25, No. 3 (1971) (later enlarged and published as a book by Harvard University Press in 1972).

12. R. KEOHANE & J. NYE, *supra* note 5, at 5.

13. Haas, *Why Collaborate? Issue Linkage and International Regimes*, 32 WORLD POL. 357-405 (1980).

or tacit cooperation based on common concerns. In the case of illicit drug use and trafficking, these concerns include: reduction in the supply and demand of illicit narcotics; treatment for persons addicted to narcotics; and diminution of power of the organized narcotics traffickers. Though international regimes often enjoy the sponsorship of intergovernmental organizations (IGOs) like the United Nations, the issues addressed by international regimes are usually more specific in nature. Since the emphasis of a regime is on achieving a specific objective, international regimes are considered to be more flexible in nature and more likely to undergo evolutionary change than IGOs.<sup>14</sup>

If an international regime is successful, it maintains or reduces the cost of legitimate transactions while increasing the costs of illegitimate ones such as money laundering and drug trafficking. In the rapidly changing global marketplace and political scene, a premium is placed on an international regime's ability to meet new developments head-on. This challenge makes it an important function of the international regime to facilitate ongoing negotiations among governments.<sup>15</sup>

In the following section, this article generally outlines the international-regime of cooperation in criminal matters that is emerging in Europe. Typically, there are several approaches used to discuss and describe international regimes. These approaches can range in emphasis between an historical to a functional approach.<sup>16</sup> However, due to space limitations, this article will not follow a particular doctrinal approach in the interest of developing a general and accessible outline of the regime.

### III. THE EUROPEAN REGIME OF INTERNATIONAL COOPERATION IN CRIMINAL MATTERS

The following discussion is framed in terms of the European Communities and the Council of Europe. These organizations do not completely define the boundaries of the international regime, but they are

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14. W. FELD & R. JORDAN, *INTERNATIONAL ORGANIZATIONS* 40 (1983).

15. For additional background on the importance of international regimes to governmental actors like the United States, see AFTER HEGEMONY, *COOPERATION AND DISCORD IN THE WORLD POLITICAL ECONOMY* 107 (1984); see also KEOHANE, *The Demand for International Regimes*, in *INTERNATIONAL REGIMES* 141-72 (Keohane ed. 1983).

16. See generally W. FELD & R. JORDAN, *supra* note 14. For an example of the historical approach, focusing on alcohol and narcotics, see Nadelman, *Global Prohibition Regimes*, 44 INT'L ORG. 479-526 (1990).

two of the regime's most significant components, and their activities illustrate the general outline of the regime.

Though neither organization specializes in criminal matters, both possess an international institutional framework for the ongoing regulation and control of transnational relations, and both have dealt with international criminal matters. As noted earlier, international regimes are defined by their rules *and* procedures. Therefore, the following discussion describes not only the results of international cooperation in criminal matters, but also the means used to achieve those results.

### A. *The European Communities*

The term "European Communities" refers to the limited federalist system established between Western European countries through treaties of the 1950s.<sup>17</sup> The Communities comprise four main institutions: the Council of Ministers, the Commission, the Parliament, and the Court of Justice. The Council and the Commission bear the primary responsibility for producing legislation.<sup>18</sup> The Commission is responsi-

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17. See Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 3 [hereinafter EEC Treaty]. "European Communities" refers to three communities that were officially linked in 1967 with the ratification of the merger treaty. The three communities are the European Coal and Steel Community (ECSC), the European Economic Community (EEC), and the European Atomic Energy Community (Euratom). J. LOUIS, THE COMMUNITY LEGAL ORDER 9 (1980). Presently, the member states of the European Communities are Belgium, Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, The Netherlands, Portugal, Spain, and the United Kingdom.

18. COMMISSION OF THE EUROPEAN COMMUNITIES, THIRTY YEARS OF COMMUNITY LAW 3 (1983). The three binding acts that the Council and the Commission may issue, regulations, directives, and decisions, are set forth in article 189:

In order to carry out their task the Council and Commission shall in accordance with the provisions of this Treaty, make regulations, issue directives, take decisions, make recommendations or deliver opinions.

A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States.

A directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.

A decision shall be binding in its entirety upon those to whom it is addressed.

Recommendations and opinions shall have no binding force.

EEC Treaty, *supra* note 17, at art. 189; see also OFFICE FOR OFFICIAL PUBLICATIONS OF THE EUROPEAN COMMUNITIES, TREATIES ESTABLISHING THE EUROPEAN COMMUNI-



ble for preparing the initial legislative proposal, and the Council enacts the legislation into law. In the interim between its proposal and its enactment, the legislation is reviewed by the Council, Commission, and Parliament where opinions and amendments are offered.<sup>19</sup> Once the legislation is enacted, it is binding on the member states, and questions of interpretation are resolved with the assistance of the Court of Justice.<sup>20</sup>

Originally the Community system was quite limited in scope, dealing primarily with the goal of economic integration.<sup>21</sup> However, with the promulgation of the Single European Act in the late 1980s broader issues surfaced in the Community agenda—most notably the goal of European unity among the member states.<sup>22</sup> In title II of the Act, the widely touted date of 1992 was set as the target date for completion of an internal market without trade barriers, and toward that goal the Act granted the Council greater authority to enact legislation.<sup>23</sup>

Prior to the Single European Act, it was simply conventional wisdom that the European Communities had little if any competence to grapple with criminal law issues.<sup>24</sup> Thus, the member states were left to

TIES 331 (1978) (In light of differences in translation, the documents published by the European Communities are treated as authoritative for the purposes of this paper.).

19. Good, *Institutional Reform under the Single European Act*, 3 A.U.J. INT'L L. & POL'Y 299, 311-12 (1988).

20. In the words of the EEC Treaty, the Court of Justice "ensure[s] the observance of law and justice in the interpretations and applications of this treaty." EEC Treaty, *supra* note 17, at art. 164. The Court of Justice has consistently taken a progressive and pragmatic approach in this regard. See Recent Development, *European Economic Community—The Use of Article 173(2) of the EEC Treaty to Contest Actions of the European Parliament, Partie Ecologiste 'Les Verts' (the Greens) v. European Parliament* [1987], 2 COMMON MKT. L. REV. 343 (1986), 18 GA. J. INT'L & COMP. L. 85 (1988). Not only does the Court of Justice have primary jurisdiction over certain matters, such as disputes between member states & Community institutions, but also the Court has the authority to issue "preliminary rulings." These rulings are binding responses to requests for assistance from domestic courts or tribunals for assistance in interpreting a question of Community Law. EEC Treaty, *supra* note 17, at arts. 170, 177.

21. EEC Treaty, *supra* note 17, at art. 2.

22. COMMISSION OF THE EUROPEAN COMMUNITIES, SINGLE EUROPEAN ACT 2 (Supp. 1986). For an overview of the changes wrought by the Single European Act, see Good, *supra* note 19.

23. Schildhaus, *1992 and the Single European Act*, 23 INT'L LAW. 549, 552 (1989).

24. Bridge, *The European Communities and the Criminal Law*, CRIM. L. REV. 88 (1976); VAN DEN WYNGAERT, *Criminal Law and the European Communities: De-*

administer all criminal matters. This fact proved especially troubling in the context of Community commercial policy, for along with the Community's payment of premiums, subsidies, and refunds, there invariably arose questions of abuse and fraud. To complicate matters, some crimes are only punishable at the national level under certain circumstances. For instance, obtaining financial aid under false pretenses in many member states is only punishable when against national interest, and it is possible that a similar crime against Community interests would go unpunished.<sup>25</sup> Prosecution for crimes against the Community is sometimes referred to as indirect enforcement when the prosecution is conducted at the member state level. The limitations of this approach are obvious, for some states have been more diligent than others when it comes to criminalizing acts against the Communities.<sup>26</sup>

During the 1970s, the countries of the European Communities considered ways to improve this system of indirect enforcement. Their efforts resulted in two draft conventions establishing new offenses against Community interests. One of the conventions criminalized certain offenses against financial interests of the Community, and the second dealt with the criminal responsibility of Community civil servants. Both drafts were discussed, but not ratified.<sup>27</sup>

Though no broad expansion of substantive criminal law at the Community level appears immediate, the marketplace that each of the member states operates within is expanding and changing rapidly. Basically, the Single European Act has made progress towards a European economic union a priority without directly addressing collateral issues in substantive criminal law. This state of affairs has led some to conclude that 1992 may prove to be a boon to sophisticated criminals.<sup>28</sup>

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*fining Issues*, in TRANSNATIONAL ASPECTS OF CRIMINAL PROCEDURE 247 (1983); Harding, *The European Communities and Control of Criminal Business Activities*, 31 COMP. L.Q. 255 (1982).

25. VAN DEN WYNGAERT, *supra* note 24, at 247-48. The authority for Community payments in this area is set forth in the EEC Treaty. See EEC Treaty, *supra* note 17, at arts. 39 & 40.

26. B. ZAGARIS & A. FANTAUZZI, *European Integration and International Criminal Law*, 1 1992 THE EXTERNAL IMPACT OF EUROPEAN UNIFICATION 9 (No. 11, 1989).

27. Zagaris & Fantauzzi, *Application of Foreign Criminal Laws to U.S. Businesses Abroad*, 1 INT'L Q. 126 (October 1989).

28. M. BORNHEIM & B. ZAGARIS, *International Cooperation Against Money Laundering in the European Integration Context*, 1 1992 THE EXTERNAL IMPACT OF EUROPEAN UNIFICATION 13 (No. 15, 1989).

With the free circulation of goods, services, and capital, criminals will have an easier time moving operations and capital from country to country.<sup>29</sup>

Nevertheless, preparations for 1992 have not wholly overlooked the criminal element in the member states, and the Community institutions have been taking an active role in defining Community policy in this regard. The following subsections describe briefly some of the most recent and significant efforts of these institutions to further define the criminal process at the Community level.

### 1. The European Parliament

In 1985, the Parliament set up a Committee of Enquiry to look into the Community drug problem. This committee enjoyed a broad base of support from parties across the political spectrum. Upon concluding their inquiry, the Committee issued a report. The aim of the report was to set forth a basic understanding of the facts of the situation upon which to base proposals for improving both the short and long term outlook within the Community.<sup>30</sup>

The Committee discovered that the 1970s and 1980s saw a rise of serious proportions in hard drug use. At the time of the report, it was estimated that as many as 1.5 million people in the Community were regular users of heroin. Accompanying this increase in drug use are other more sinister and subterranean developments. The Committee noted that drug traffickers and criminal organizations are emerging in strength. In the words of the Committee, "[t]he activities of these organizations constitute an unprecedented attack on national and international social order."<sup>31</sup> In the face of this problem, the Committee concluded that the European Community suffered from a lack of coordination exacerbated by the absence of any strategic roadmap for the future.<sup>32</sup>

Developing an adequate strategy would be no easy task, the Com-

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29. According to Bank of Italy Governor, Carlo Azeglio Campi, the Mafia has billions of dollars waiting to be laundered and converted into various investments. *Id.*; see also Parmelee, *European Unity: An Offer the Mafia Can't Refuse*, Wash. Post, May 19, 1989, at F1, col 5.

30. OFFICE FOR OFFICIAL PUBLICATIONS OF THE EUROPEAN COMMUNITIES, COMMITTEE OF ENQUIRY INTO THE DRUGS PROBLEM IN THE MEMBER STATES OF THE COMMUNITY 12 (1987) [hereinafter ENQUIRY].

31. *Id.* at 13.

32. *Id.*

mittee conceded—especially in the substantive legal realm. Section IV of their report was devoted entirely to discussing some of the broad legal issues that demand Community-wide attention. The beginning of the section framed the discussion by raising a fundamental, if not controlling, concern: the wide variation in laws and penalties found in the criminal systems of the member states.<sup>33</sup> Within this topic, the Committee focused on four significant aspects: sentencing, extradition, freezing of assets, and money laundering.<sup>34</sup>

During the discussion the Committee made the following recommendations: 1) the Community address the issue of sentencing through harmonization of member states law or by adopting a "Community position" on the subject; 2) extradition be dealt with by the adoption of a multilateral European agreement;<sup>35</sup> 3) seizure and freezing of assets be addressed by "common legislation across the community" with the seized assets to be used directly to combat the problem; and 4) the European Commission address money laundering by publishing guidelines, and issuing a directive requiring currency transaction reporting.<sup>36</sup> In addition, the report identified the need for a Community computer database to house relevant information.<sup>37</sup>

## 2. The Council of Ministers of the European Communities

Though the Council of Ministers has not fully addressed all the points raised by the extensive report of the European Parliament's

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33. *Id.* at 44. "The matter is complicated by the fact that Napoleonic and Common Law exist in different countries within the Community. In addition the individual constitutions of some countries make it difficult to apply certain laws across the Community." *Id.*

34. ENQUIRY, *supra* note 29, at 45. However, the report acknowledged the broader reach of the subject: "Throughout it will be important to ensure as far as humanly possible that the law is applied in equal measure in all countries of the Community." *Id.*

35. *Id.* at 45.

36. *Id.* at 46-47. Basically, such an arrangement would be a European version of the International Currency Control Authority suggested in the Anti-Drug Abuse Act and the Interpol working group resolution of April 21, 1989. M. BORNHEIM & B. ZAGARIS, *supra* note 28, at 14. Note that some countries, such as Italy, have expressed reservations about detailed currency transaction reporting. *Id.* For an overview of some recent U.S. activity in this area, see Plambeck, *The Money Laundering Control Act of 1986 and Banking Secrecy*, 22 INT'L LAW. 69 (1988).

37. *Id.* at 57-58. See also ICC, *EC to Establish European Drug Intelligence Unit*, COM. CRIME INT'L 1 (1989).

Committee of Enquiry, it has taken steps toward improving international cooperation in criminal matters within the European Communities. In May of 1987, the Ministers of Justice met in Brussels. This Council of Ministers clearly expressed a resolve to tackle some of the problems facing the European Communities in cooperation in criminal matters. Specifically, the Council reminded the Commission of the European Communities of the urgent need to accelerate international legal cooperation in criminal matters. According to the Council, this increased cooperation is necessary to facilitate the development of a "European legal area" as envisioned by the Single European Act.<sup>38</sup>

The Council went on to discuss and endorse specific developments. In particular, the Council applauded the member states signing the conventions on the transfer of sentenced persons and double jeopardy.<sup>39</sup> Also, the Council examined possible reforms that can be made to the extradition process.<sup>40</sup> Though the scope of the above developments was limited, recent developments indicate the Council is willing to expand the range of issues it will address.<sup>41</sup> This trend is both promising and necessary if there is to be a European legal area.

### 3. The Commission of the European Communities

In addressing international crime, the Commission of the European Communities has been active in both its capacity as an advisor and as an initiator of legislation. Indeed, they have addressed these matters both within and without the Communities.

In a seminal proposal on November 26, 1986, the Commission outlined a broad program to combat the growing drug problem.<sup>42</sup> The purpose of the program was to "initiate an ongoing dialogue between the member states and the Commission aimed at identifying the priorities

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38. Council of the European Communities, Press Release 1167th Council Meeting 5 (1987) [hereinafter Press Release].

39. *Id.* at 6. For a more detailed treatment of the double jeopardy issue, see 1983-1984 EUR. PARL. DOC. (No.1-1397/83), Report of the Legal Affairs Committee (1984).

40. Press Release, *supra* note 38, at 6-7.

41. Zagaris & Fantauzzi, *Breaking the Connection*, 34 SEC. MGMT. 46, 49 (June 1990). In May of 1989, an informal meeting of the Council witnessed the opening for signature of an European Community convention on international criminal cooperation. Fantauzzi, *EEC Ministers of Justice Meet on International Criminal Cooperation*, 5 INT'L ENFORCEMENT L. REP. 220-21 (June 1989).

42. *Fight Against Drugs in the Community*, BULL. OF EUR. COMM. 8 (1986).

and areas in which cooperation is essential if the fight against drug addiction is to succeed."<sup>43</sup> The Commission's proposal was a follow-up to factfinding activities like those of the European Parliament discussed earlier.<sup>44</sup>

With similar vigor, the Commission has pursued the matter externally. In 1987, the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances was negotiated.<sup>45</sup> Following its completion, the Commission submitted a proposal for a Council of Ministers decision on the signing of the Convention.<sup>46</sup>

More recently, the Commission has begun to aggressively pursue specific proposals geared toward internal structural changes needed in light of 1992. On February 10, 1989, the Commission issued the proposal for a Council Directive amending Directive 77/799/EEC concerning mutual assistance by the competent authorities of the member states in the field of direct taxation and value-added tax.<sup>47</sup> The proposal mandated the development of national legislation which would abolish restrictions on the exchange of information due to administrative practices.<sup>48</sup>

These efforts complement new anti-fraud measures proposed by the European Commission. Here too the management of information is essential for law enforcement. Managing common commercial policies, such as the Common Agricultural Policy, has proven intricate, and the coordination of accounting controls among the member states is an essential step if 1992 is to be met without encouraging wholesale fraud.<sup>49</sup>

43. *Id.*

44. *See id.*

45. *See United Nations: Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, Dec. 20, 1988, U.N. Doc. E/CONF. 82/15, Corr. 1 and Corr. 2, reprinted in 28 I.L.M. 493 (1989).

46. Commission of the European Communities, Proposal for a Council Decision, Jan. 26, 1989.

47. Reprinted in *EC Prepares International Tax Enforcement Strategy*, 5 INT'L ENFORCEMENT L. REP. 297 (Aug. 1989).

48. *Id.* Also in preparation for a single capital market, a formal proposal was issued considering a Community-wide 15% withholding tax on interest income. This too would involve an increased rate of exchange of tax information. *See Liberalizing EC Capital Movements at the Price of Tax Avoidance*, 5 INT'L ENFORCEMENT L. REP. 50 (Feb. 1989).

49. Morris, *EC Finance Ministers Discuss New Anti-Fraud Proposals*, 5 INT'L ENFORCEMENT L. REP. 268-69 (July 1989). However, these anti-fraud efforts have yet to fully address the problem. *See Zagaris, EC Court of Auditors Report Indicates Fraud in EC Export Refund System*, 6 INT'L ENFORCEMENT L. REP. 267 (July 1990).

Both of the areas mentioned above, exchange of information in tax matters and accounting controls, fall within the predominantly commercial matters where the European Communities' competence is traditionally asserted. A more controversial step this year was the Commission's proposal for a directive which focused on preventing the Community financial system from being used for money laundering.<sup>50</sup> The proposal, if realized, would call on credit and financial institutions to scrutinize transactions, challenging them when the true identity of the customer is in doubt or no economic and lawful purpose appears present. Moreover, the institutions would be required to notify law enforcement authorities on their own initiative.<sup>51</sup>

## B. *The Council of Europe*

The Council of Europe was formed on August 3, 1949, when the Statute of the Council of Europe went into effect.<sup>52</sup> The signatories came together with the understanding "that the pursuit of peace based upon justice and international cooperation is vital for the preservation of human society and civilisation."<sup>53</sup> There are two principal organs of the Council of Europe, the Committee of Ministers and the Consultative Assembly.<sup>54</sup>

The Council of Europe, through its organs, investigates matters of importance to its members, and in some cases issues recommendations to its members. The Consultative Assembly deliberates and debates matters within its competence, and presents its conclusions to the Committee of Ministers.<sup>55</sup> The Consultative Assembly may, when appropriate, establish committees and commissions to consider and report on

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For an example of the fraud problem, see *supra* notes 24-26 and accompanying text.

50. Nilsson, *European Legal Cooperation in Criminal Matters*, A.B.A. Panel on International Criminal Cooperation in European Business Crimes in a Rapidly Changing Environment, A.B.A. Nat'l Convention, Aug. 7, 1990, at 3, 19.

51. *Id.* at 20.

52. STATUTE OF THE COUNCIL OF EUROPE, Aug. 3, 1949, 87 U.N.T.S. 103 [hereinafter STATUTE OF THE COUNCIL].

53. *Id.* at Preamble. The 12 members of the European Communities are also members of the Council of Europe.

54. *Id.* at art. 10. The Council sits in Strasbourg. *Id.* at art. 11.

55. *Id.* at art. 22. The Assembly consists of representatives selected by the respective national parliaments. *Id.* at art. 25. Its competence is rather broad except that it does not deal with issues of national defense and should not interfere with the work of international organizations. See *id.* at art. 23.

specific matters.<sup>56</sup> Upon receiving the recommendation of the Consultative Assembly, the Committee of Ministers considers what action would further the goals of the Council of Europe. The Committee may also examine matters and issue conclusions on its own motion. In its conclusions the Committee is free to put forth a range of options, including the adoption of international agreements and common policies.<sup>57</sup>

In this manner the Council has been actively addressing international components of the criminal process. Historically, their approach has been pragmatic. For instance, noting that the territoriality principle of jurisdiction did not adequately address the transborder elements of modern criminal activity, the Council promoted the 1964 Road Traffic Convention which departed from the territoriality approach.<sup>58</sup> Not only does it allow the state of residence to prosecute, at the request of the state of offense, an offense on the latter's territory, but also the state of residence is permitted, at the request of the state of offense, to enforce foreign judgements of the latter.<sup>59</sup>

While the Council has maintained a progressive approach to transborder criminal activity, the member governments have lagged behind in the area of conventions. For example, only a handful of governments have ratified the 1964 Road Traffic Convention.<sup>60</sup> Some have concluded that the reason for this is that member governments were not alarmed enough by the spread of crime.<sup>61</sup>

However, recent developments in the area of conventions give reason to be optimistic, and progress has been made in areas outside of the signing of conventions. The following subsections describe some of these promising developments.

56. *Id.* at art. 24.

57. STATUTE OF THE COUNCIL, *supra* note 52, at art. 15(a). "In appropriate cases, the conclusions of the Committee may take the form of recommendations to the Governments of Members, and the Committee may request the Governments of Members to inform it of the action taken by them with regard to such recommendations." *Id.* at art. 15(b).

58. See Muller-Rappard, *The European System*, II INT'L CRIM. L. 95, 100-101 (M.C. Bassiouni ed. 1986).

59. Of course, the aforesaid provisions only apply to offenses that are related to road traffic. *Id.*

60. *Id.* at 110-11.

61. *Id.* at 97-98.



# 1. Cooperation Group to Combat Drug Abuse and Illicit Trafficking in Drugs—The Pompidou Group

The Pompidou Group was formed in 1971 at the suggestion of Georges Pompidou, President of the French Republic, to his colleagues in Western Europe. The Group undertook to examine, from a multidisciplinary point of view, the problems of drug trafficking and abuse. The Group does not have the official character of an international organization, but it has conducted its activities since 1980 under the auspices of the Council of Europe.<sup>62</sup>

In the spring of 1980, the Committee of Ministers sanctioned an agreement for operating the Pompidou Group within the Council of Europe. Under this agreement, governments outside the Council of Europe may join with the unanimous agreement of the Group members. Still others, like the United States, have begun to participate on an ad hoc basis.<sup>63</sup> The members are represented at ministerial meetings by the appropriate minister from the member's government.

Like the European Parliament, the Pompidou Group has proven adept at gathering information. On September 12 and 13, 1984, the Seventh Ministerial Conference met in Paris where it was decided that the Group should examine cooperation between the criminal justice system and social/health services. A subsequent working group pro-

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62. Council of Europe, *A Brief Description of the Activities of the Pompidou Group and Its Establishment within the Framework of the Council of Europe* 1, Oct. 4, 1989, P-PG(88) Inf. 1.

63. *Id.*

The original members of the Group were Belgium, France, the Federal Republic of Germany, Italy, Luxembourg, the Netherlands, and the United Kingdom. Denmark, Ireland, and Sweden were subsequently admitted to the Group. Turkey joined the Group when the Partial Agreement was established by the Council of Europe in March 1980. Since then Greece became a member in 1981, Norway in 1983, Spain in 1984, Portugal and Switzerland in 1985, Finland in 1987, Austria on 1 January 1988, Malta on 1 April 1988 and Cyprus on 1 October 1989 bringing the number of member states to 20.

Certain countries which are not members of the Council of Europe participate in some activities of the Group on a technical ad hoc basis, for example, Canada, the United States, and the Holy See.

In addition since May 1986, the Commission of the European Communities takes part in the Group's work with a view to ensuring coordination of the two organizations' activities.

*Id.*

posed that two symposia be held on the subject.<sup>64</sup> The first, held on October 29 and 31, 1986, collected a wealth of information on the subject, cataloguing differences among the members in prosecution, treatment,<sup>65</sup> sanctions, et cetera.<sup>66</sup> The second, geared towards rehabilitation issues, was held on December 1 through 4, 1987.<sup>67</sup> Though such broad based symposia are not a frequent occurrence, the Pompidou Group's factfinding efforts have been maintained over the years, and the Group continues to keep track of developments between and within Group members.<sup>68</sup>

Their factfinding activities are complemented by their efforts to coordinate international measures to combat the drug problem. Often, these efforts focus on developing international agreements.<sup>69</sup> For instance, the Eighth Ministerial Conference noted that a convention or multilateral agreement would be useful in dealing with drug trafficking in international waters and the confiscation of drug trafficking proceeds.<sup>70</sup>

Regarding drug trafficking, the Group has proven especially persistent. In a Political Declaration at the Extraordinary Ministerial Conference in May of 1989, the Group "urged that the current work in the Council of Europe on the preparation of a European Convention on the search, seizure, and confiscation of the proceeds from crime be expedited."<sup>71</sup> The Group noted that international cooperation is essential for progress because criminal activity in this area has reached new levels of

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64. COUNCIL OF EUROPE, SYMPOSIUM ON DRUG MISUSERS IN CRIMINAL PROCEEDINGS: A DIFFICULT BALANCE BETWEEN PUNISHMENT AND TREATMENT 3 (1987).

65. *Id.* at 24.

66. *Id.* at 116.

67. COUNCIL OF EUROPE, SYMPOSIUM ON THE CRIMINAL JUSTICE SYSTEM AND SOCIAL REHABILITATION MEASURES FOR DRUG MISUSERS (1988).

68. E.g., Council of Europe, *Background Document on the Cocaine Threat in Europe*, P-PG/MIN (89) 2 Revised (1989), Extraordinary Ministerial Conference, London 18-19 May 1989; Council of Europe, *Background Paper on HIV/AIDs and Addiction*, P-PG/MIN (89) 4 Revised (1989), Extraordinary Ministerial Conference, London 18-19, May 1989.

69. Council of Europe, *Declaration of the 8th Ministerial Conference*, (1987) P-PG/MIN (86) 5 Def., 8th Ministerial Conference, London 20-21, Jan. 1987.

70. *Id.*

71. Council of Europe, *Political Declaration of the Extraordinary Ministerial Conference in London May 18-19 4*, (1989) P-PG/MIN (89) 5 Def. The declaration went on to note that "[w]hen adopted this convention would provide a suitable framework for international, intra-European cooperation." *Id.*

sophistication.<sup>72</sup> Though earlier ad hoc technical conferences had provided some of the foundation for developing a convention to address the situation, the convention itself was slow to follow.<sup>73</sup> The Group noted that in this field, "there is no long-standing tradition of working cooperation."<sup>74</sup> In addition, current national legislation on the subject was woefully inadequate to cope with the problem. However, the Group was optimistic about the prospects for the future, noting that national differences on the subject were often matters of form more than substance.<sup>75</sup> The Group urged that members maintain a "steady momentum in developing international action."<sup>76</sup>

The optimism of the Group was not unwarranted, for in June of 1990, the Council of Europe's European Committee on Crime Problems adopted the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime.<sup>77</sup> Even more surprising was the fact that on November 8, 1990, the first day it was open for signature, twelve governments signed the Convention.<sup>78</sup>

## 2. Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime

Though the Convention was drafted with drug offenses particularly in mind, it was drafted broadly so that it addresses all types of criminality. Parties to the Convention will enjoy cooperation in the areas of investigation, search, and seizure in such diverse areas as arms dealing and trafficking in children.<sup>79</sup> The Explanatory Report to the

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72. Council of Europe, *Background Paper on Confiscation of the Proceeds of Drug Trafficking at the Extraordinary Ministerial Conference in London May 18-19, 1989* 2, (1989) P-PG/MIN (89) 3.

73. In 1983 and 1985, the Group held these technical conferences, but it was not until 1987 that the Council of Europe's European Committee on Crime Problems officially took up the matter. *Id.*

74. *Id.* at 3.

75. *Id.*

76. *Id.*

77. Council of Europe, *Draft Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime*, adopted at Strasbourg July 25, 1990, CDPC (90) 17 Addendum I [hereinafter COE Convention].

78. The governments which signed were Belgium, Cyprus, Denmark, Germany, Iceland, Italy, the Netherlands, Norway, Portugal, Spain, Sweden, and the United Kingdom. Zagaris, *Twelve Countries Sign European Laundering Convention*, 6 INT'L ENFORCEMENT L. REP. 380 (Nov. 1990).

79. Council of Europe, *Draft Explanatory Report on the Convention on Laun-*

Convention noted that the broad sweep of the Convention would require some states to make substantial amendments to their domestic legislation in order to become parties to the Convention.<sup>80</sup> However, the experts drafting the Convention considered that the somewhat strict obligations of the Convention would be operating within a group of like-minded states so a certain spirit of cooperation would prevail.<sup>81</sup> Moreover, in the same vein, the drafters left out the word "European" in hopes that "like[-]minded states outside the framework of the Council of Europe" would choose to participate.<sup>82</sup>

### a. Chapter I—The Use of Terms

Chapter I sets out some of the basic terms utilized in the Convention. Article 1.a. defines "proceeds" to mean "any economic advantage from criminal offences."<sup>83</sup> This broad construction of the term includes assets and property that may be held by third parties.<sup>84</sup> Similarly, article 1.b. gives a broad definition of "property." It defines the term to include "property of any description, whether corporeal or incorporeal, movable or immovable, and legal documents or instruments evidencing title to, or interest in such property."<sup>85</sup> The "confiscation" of the afore-said is phrased in terms of a "penalty or a measure, ordered by a court following proceedings in relation to a criminal offence or criminal offences."<sup>86</sup>

The prevailing consideration behind Chapter I was to structure the scope of the Convention to be as wide as possible in principle. Any offense that produces huge profits might fall within the ambit of this chapter; examples include environmental offenses, insider trading, and economic fraud.<sup>87</sup> Realizing that the extensive nature of this Convention might cause delays in ratification, the drafters provided that reservations to certain subsequent provisions could be made by way of

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*dering, Search, Seizure, and Confiscation of the Proceeds of Crime*, Strassbourg, July 6, 1990, CDPC (90) 17 Addendum II, para. 8 [hereinafter *Explanatory Report*].

80. *See id.*

81. *See id.* at para. 14.

82. *Id.* at para. 18. In fact Australia, Canada, and the United States participated in the drafting and are three such "like[-]minded states." *Id.*

83. COE Convention, *supra* note 77, at art. 1.

84. *Explanatory Report*, *supra* note 79, at para. 21.

85. COE Convention, *supra* note 77, at art. 1.b.

86. *Id.* at art. 1.d.

87. *Explanatory Report*, *supra* note 79, at para. 27.

declaration.<sup>88</sup>

## b. *Chapter II—Measures to be Taken at the National Level*

Generally, Chapter II prescribes the legal infrastructure that signatories will need to implement the Convention. The articles of this chapter list measures that the parties “shall adopt.”<sup>89</sup>

Articles two, three, and four deal with confiscation, investigative and provisional measures, and special investigative powers and techniques, respectively. As in Chapter I, the approach of these articles is broad in scope. For example, confiscation is to be permitted both of specific items and items of equivalent value,<sup>90</sup> and provisional measures must be developed to identify and prevent the disposition of these items.<sup>91</sup> However, unlike Chapter I, reservations to article two were permitted insofar as the categories of covered offenses is concerned,<sup>92</sup> though it was anticipated that parties would do so sparingly.<sup>93</sup>

The need for such reservations is further minimized by the inclusion of article five. This article calls on parties to insure that the rights of innocent parties are preserved.<sup>94</sup> The provision implies that parties should be given an opportunity to be heard in court with the assistance of counsel.<sup>95</sup>

The final article of the chapter, article six, establishes an obligation to criminalize money laundering.<sup>96</sup> Furthermore, to the extent that it is not contrary to a party's constitution or basic legal concepts, criminalization of “money laundering” should include the knowing use or possession of “proceeds” or aiding and abetting in the commission of money laundering.<sup>97</sup> Again, reservations are permitted insofar as the

88. COE Convention, *supra* note 77, at art. 2.2.

89. *E.g.*, COE Convention, *supra* note 77, at art. 2.1. *But see id.* at art. 4.2. (dealing with special investigative techniques such as wiretapping and stating, “[e]ach party shall *consider* adopting such legislative and other measures as may be necessary . . .”) (emphasis added).

90. *Id.* at art. 2.1; *see also id.* at art. 13; *Explanatory Report*, *supra* note 79, at para. 48.

91. COE Convention, *supra* note 77, at art. 3.

92. *Id.* at art. 2.2.

93. *Explanatory Report*, *supra* note 79, at para. 27.

94. COE Convention, *supra* note 77, at art. 5.

95. *Explanatory Report*, *supra* note 79, at para. 31.

96. COE Convention, *supra* note 77, at art. 6.1.

97. *Explanatory Report*, *supra* note 79, at para. 32.

categories of covered offenses is concerned,<sup>98</sup> but it should be noted that reservations under this article are independent of any in article two.<sup>99</sup>

### c. Chapter III—International Cooperation

Building on the foundation laid by the first two chapters, Chapter III sets forth the obligations and procedures needed to connect internationally the national measures described by the previous chapter. This chapter is divided into sections with each section addressing a general topic elaborated upon through the articles therein.

Section one describes the guiding principles to be used in construing the sections that follow.<sup>100</sup> Article 7.1. states the general rule that "[p]arties shall cooperate with each other to the widest extent possible . . . ."<sup>101</sup> To do so, article 7.2. mandates that parties "shall adopt" any needed legislation to provide the international linkage to comply with requests for assistance from another party.<sup>102</sup> Though phrased expansively, the Explanatory Report makes clear that this section is defined by the parameters of the Convention; thus, for example, "fishing expeditions," which are not contemplated by the Convention, do not fall within the obligation to cooperate.<sup>103</sup>

What does fall within the obligation to cooperate is further defined quite specifically in sections two,<sup>104</sup> three,<sup>105</sup> and four,<sup>106</sup> which deal with investigative assistance, provisional measures, and confiscation, respectively. The initial article of each section requires the requested party to comply with a request from the requesting party.<sup>107</sup> Later articles in each of the sections provide that the request will be executed in accordance with the domestic legislation of the requested party.<sup>108</sup>

98. COE Convention, *supra* note 77, at art. 6.4.

99. *Explanatory Report*, *supra* note 79, at para. 34.

100. *Id.* at para. 35.

101. COE Convention, *supra* note 77, at art. 7.1.

102. *Id.* at art. 7.2.

103. *Explanatory Report*, *supra* note 79, at para. 35. "If the requesting party has no indication of where the property might be found, the requested party is not obligated to search, for instance, all banks in the country; *cf.* Article 27, paragraph 1(e)(ii) [*sic*]." *Id.*

104. COE Convention, *supra* note 77, at art. 8.

105. *Id.* at art. 11.

106. *Id.* at art. 13.

107. *See supra* notes 93-95.

108. COE Convention, *supra* note 77, at arts. 9, 12, 14.

However, the execution of the request via domestic machinery does not mean that the grounds for a request are always subject to a de novo review. For example, when the competent authorities of a requesting state have determined the factual basis for a confiscation request, the competent authorities of the requested state should not then re-try the facts. Rather, the requested authorities should respect the decision of a competent foreign authority.<sup>109</sup>

Despite these strict obligations, a requested state may still refuse to cooperate, citing one of the grounds listed in section five, Refusal and Postponement of Cooperation. The grounds listed here range from sovereignty interests<sup>110</sup> to a de minimis exception where a sum to be confiscated will not outweigh the expense of confiscation.<sup>111</sup> Though the drafters concede that this section gives a requested state broad leeway to refuse a request, they stress that it nevertheless places some restrictions on refusal.<sup>112</sup>

Assuming cooperation is present, the issue of the rights of third parties may arise. Section six, Notification and Protection of Third Parties' Rights, deals with providing notice and an opportunity to be heard.<sup>113</sup> This section coordinates and secures the rights of third parties. As a general proposition, the rights of third parties may be addressed in either the requesting or requested state. However, the actual forum will be decided on the basis of procedural considerations particular to the parties involved.<sup>114</sup>

Section seven is the final section of this chapter, entitled Procedural and Other General Rules. The section sets out basic procedures to administer the international cooperation. These provisions address generally such matters as the format of the request,<sup>115</sup> to whom it should be addressed,<sup>116</sup> confidentiality,<sup>117</sup> and costs.<sup>118</sup>

109. *Explanatory Report*, *supra* note 79, at para. 52.

110. COE Convention, *supra* note 77, at art. 18.b.

111. *Id.* at art. 18.c; *see also Explanatory Report*, *supra* note 79, at para. 62.

112. *Explanatory Report*, *supra* note 79, at para. 58.

113. COE Convention, *supra* note 77, at arts. 21, 22.

114. *Explanatory Report*, *supra* note 79, at para. 81; *see also* COE Convention, *supra* note 77, at art. 30 (obligating a party who refuses to cooperate to give reasons for refusing).

115. COE Convention, *supra* note 77, at arts. 25, 27. These provisions are somewhat detailed covering translations, content, and methods of communication. *Id.*

116. *Id.* at arts. 23, 24.

117. *Id.* at art. 33.

118. *Id.* at art. 34.

#### d. Chapter IV—Final Provisions

Most of the provisions in Chapter IV are model clauses used by the Council of Europe.<sup>119</sup> These provisions cover reservations,<sup>120</sup> accession,<sup>121</sup> ratification,<sup>122</sup> et cetera.

The one notable exception is article forty-one, dealing with amendments. Unlike other penal law conventions concluded in the Council of Europe, this provision allows for minor amendments without the necessity of protocols.<sup>123</sup>

Lastly, it should be noted that provisions for dispute settlement are not specifically prescribed. A standard list of possible methods for dispute resolution is offered, leaving it to the parties to decide upon a particular method by agreement.<sup>124</sup>

### IV. PROSPECTS FOR FUTURE DEVELOPMENT OF THE EUROPEAN REGIME

This section elaborates on some of the developments mentioned in the previous section, and introduces others. The subsections that follow point out areas and proposals that, if pursued and ratified, will expand and further define the scope of the European regime of international cooperation in criminal matters.

#### A. The European Communities

##### 1. Directive on Money Laundering

On December 17, 1990, the Council of Economic and Finance Ministers (ECOFIN Council) agreed on a common position for a directive to address money laundering.<sup>125</sup> The directive, if finalized would go into effect January 1, 1993, calling on member states to make launder-

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119. *Explanatory Report*, *supra* note 79, at para. 93.

120. COE Convention, *supra* note 77, at art. 40.

121. *Id.* at art. 37.

122. *Id.* at 36.

123. *Id.* at art. 41. *See also Explanatory Report*, *supra* note 79, at para. 96.

124. COE Convention, *supra* note 77, at art. 42.

125. Zagaris, *EC Finance Ministers Reach Agreement on a Money Laundering Directive*, 6 INT'L ENFORCEMENT L. REP. 432 (Dec. 1990). The position was reached after discussion of the *Proposal for a Council Directive on Prevention of Use of the Financial System for the Purpose of Money Laundering*, March 23, 1990, COM (90) 106 final SYN 254.



ing drug trafficking proceeds a criminal offense.<sup>126</sup>

Though the draft directive initially only requires action in the realm of drug proceeds, it also allows member states the option of applying this convention to other areas such as terrorism and kidnapping. Furthermore, it calls for the establishment of a working party to examine the possibility of uniformly extending the directive to other criminal activities.<sup>127</sup> Supplementing the substantive requirements of the directive are procedural provisions. In this regard, financial and credit institutions would be subject to certain reporting requirements, including a duty to report suspicious transactions.

However, the most significant aspect of this draft is the manner in which it deals with the question of the Communities' limited jurisdiction. It provides that member states take all necessary measures to implement the provision, including participation in a multilateral declaration in which it is agreed that penal sanctions will apply to credit and financial institutions which refuse to comply with the directive. This approach is to counter objections that criminal law is outside the scope of Community law, for the penal sanctions themselves would be a requirement of an extra-Community agreement. In a similar vein, it is contemplated that some of the new democracies in Eastern Europe may be able to associate themselves with the agreement.<sup>128</sup>

## 2. European Communities as International Actor

The European Communities, as an entity, has participated in negotiations at the international level. As noted earlier, the United Nations Drug Convention is one example.<sup>129</sup> Whether the Commission's proposal for a Council decision on the Convention will be followed—and to what extent it will create obligations on the member states—remains uncertain. However, if the Council does issue a binding decision, the mere fact that the Communities will be taking such a position on the Convention demonstrates potential for future international cooperation in criminal matters at the Community level.

In addition, Community level cooperation is evident in other areas outside of treaty negotiations. Two notable examples of this cooperation

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126. For additional background, see Kellaway, *Agreement to Outlaw Laundering of Money in the Community*, Fin. Times, Dec. 18, 1990, at 20, col.5.

127. *Id.*

128. *Id.*

129. See *supra* note 46 and accompanying text.

are the Communities' participation in Interpol and the Basle Committee on Banking Regulation and Supervisory Practices. Both of these organizations have adopted rules or declarations on the subject of monitoring suspicious financial transactions.<sup>130</sup> By participating and exchanging views on the subject, the Communities will be able to further hone internal policy on the same subjects.

### B. *Council of Europe's Influence on Non-Member States*

A consequence of the Council of Europe's involvement in the international regime is that human rights are given added attention, for in article three of the Statute of the Council, there is the requirement that members of the Council "accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms."<sup>131</sup> Though this obligation is addressed to members of the Council of Europe, its influence reaches non-members.

In this regard, the Council of Europe is monitoring the human rights situation in Eastern Europe. The new democracies in Eastern Europe that want to join the Council will have to demonstrate the necessary respect for human rights. Implicit in such a demonstration is a criminal process that respects human rights. Furthermore, the same measures that secure human rights domestically can also be expected to foment international cooperation in criminal matters: for in the Western European regime, provisions for human rights are often a factor, if not a prerequisite, to international cooperation in criminal matters.<sup>132</sup>

Already, Eastern European countries have demonstrated an eagerness to accept advice and training on certain criminal justice policies, such as white collar crime. In the future, it appears probable that the Council's influence in Eastern Europe, and thus, the European regime,

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130. For the Interpol Resolution, see Resolution Adopted by Working Group on Assets Derived from Crime—St. Cloud, France, April 1989; see also *Assembly Passes and Begins Implementation of Currency Information Resolution*, 6 INT'L ENFORCEMENT L. REP. 96 (Mar. 1990). For the Basle Committee, see Committee on Banking Regulation and Supervisory Practices, Prevention of Criminal Use of Banking System, Draft Code of Conduct (B.S./88/52 May 9, 1988); see also Zagaris & Bornheim, *Foreign and International Money Laundering Laws*, MONEY LAUNDERING ENFORCEMENT LEGAL AND PRACTICAL DEVELOPMENTS (Criminal Justice Section, A.B.A., Oct. 26-27, 1989).

131. STATUTE OF THE COUNCIL, *supra* note 52, at art. 3.

132. See Nilsson, *supra* note 50, at 6.

will continue to grow.

### C. *The Schengen Accord*

In addition to developments in the context of the European Communities and the Council of Europe, international cooperation has surfaced in Europe in other areas. The Schengen Accord, signed June 19, 1990, by five countries, is one example.<sup>133</sup>

Generally, this accord provides that signatory countries will strengthen cooperation between police and justice officials in the signatory countries. This effort will formalize the already existing informal cooperation that allows police to pursue criminal suspects across their national borders.<sup>134</sup> Also, signatories agree to begin working on the simplification of information exchange and extradition procedures and the harmonization of gun-control legislation.

Regarding illicit drug trafficking, several articles of the accord address the issue specifically. For instance, one article provides for the establishment of a permanent working group to examine the problems of and design solutions to illicit drug trafficking,<sup>135</sup> while another provision serves to supplement the 1988 United Nations Drug Convention and efforts of the Communities such as the directive discussed above.<sup>136</sup>

It is anticipated that more countries will be signing the accord in the near future.<sup>137</sup> Expanding cooperative efforts in this manner, outside the framework of the Council and Communities, will add to and further define Europe's international regime. Moreover, developments of this type serve as further proof of the flexible nature of regimes.<sup>138</sup>

133. Convention to Apply the Schengen Agreement of June 14, 1985. Among the Countries of the Benelux Economic Union, Federal Republic of Germany, the French Republic Relative to the Gradual Suppression of Border Controls, signed on June 19, 1990, in Schengen [hereinafter Accord]. For a discussion of the Schengen Accord's enforcement provisions, see *Five EC Members Reach Agreement on Schengen Accord*, 6 INT'L ENFORCEMENT L. REP. 226 (June 1990) [hereinafter *Five EC Members*]. The five signatories are Belgium, Luxembourg, the Netherlands, France, and Germany.

134. In some cases, police officers from one country will be able to chase criminal suspects up to ten kilometers (6.21 miles) into a neighboring country. *Five EC Members*, *supra* note 133.

135. Accord, *supra* note 133, at art. 70.

136. Accord, *supra* note 133, at art. 71.

137. Two likely candidates for signature are Spain and Italy. *Id.*

138. See W. FELD & R. JORDAN, *supra* note 14 and accompanying text.

## V. CONCLUSIONS—IMPACT OF THE EUROPEAN REGIME

A. *As a Model for Other Regional Groups*

The study of the European regime's approach to illicit narcotics trafficking and money laundering has significance for other regional groups, because many other regional groups are contemplating establishing regimes and are searching for the proper models. In light of the changes in international money movement and illicit narcotics trafficking, other regional groups, such as the Caribbean Common Market and Community (CARICOM), have agreed on the need to take action against these problems. However, their proposals are not yet as definite and sophisticated as the actions of the European Communities or the Council of Europe.<sup>139</sup>

Nevertheless, the need for international cooperation is just as evident, if not more so, in groups like CARICOM. None of the members of CARICOM have the means to take unilateral action because, unless they take action in a uniform manner, the countries taking action will likely lose economically as illicit profits move to their nonconforming neighbors.<sup>140</sup> In this economically depressed region, such a result might be difficult to justify politically. To facilitate the necessary cooperation, the institutional models of a European Committee on Crime Problems have been suggested for the Americas: the establishment of an Americas Committee on Crime Problems with the Assistant Ministers of Justice and their assistants meeting on a regular basis to discuss and take action and cooperate against drugs, money laundering, and a panoply of criminal justice problems.<sup>141</sup>

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139. See, e.g., the communiques of the Tenth Meeting of the Conference of Heads of Government of the Caribbean Community from July 3-7, 1989 (support for the establishment of a multilateral force under the aegis of the United Nations to provide assistance in intelligence and interdiction of illicit narcotics and for the creation of an international criminal court to investigate and adjudicate criminal responsibility of persons allegedly engaged in drug trafficking); and the communiques of the Eleventh Heads of Government Meeting on August 2, 1990 (support for the development of mechanisms to protect the regional international banking and financial systems from subversion by the international drug traffickers). See *Caribbean Heads of Government Issue Communique*, 6 INT'L ENFORCEMENT L. REP. 336 (1990).

140. See the excellent discussion by Sanders in *The Drug Problem: Social and Economic Effects—Policy Options for the Caribbean*, 3 CARIBBEAN AFF. 18 (1990).

141. For a discussion of this idea, see Zagaris & Papavizas, *Using the Organization of American States to Control International Narcotics Trafficking and Money Laundering*, 57 REV. INT'L DE DROIT PENAL 118 (1986). For further discussion of

Proper consideration of the appropriate models requires an understanding of the origins and status of existing international regimes and organizations. Moreover, a consideration of regimes is at a premium in the Caribbean where within CARICOM there exists dynamic sub-regional groupings, such as the Organization of East Caribbean States (OECS), containing still another informal sub-sub-regional group, the Leeward Islands Group.<sup>142</sup>

## B. *On International Cooperation with the United States*

The current United States' posture towards international cooperation in criminal matters is not wholly encouraging. Recent remarks by William P. Barr, a Deputy Attorney General at the Justice Department, make clear that the advocates of hard power, unilateral action have a voice in the current administration. For example, in Mr. Barr's opinion, the United States is free to seize foreign criminals (particularly drug traffickers) and bring them to the United States for trial. According to Mr. Barr, the authority for such acts is provided by domestic laws, regardless of customary international law to the contrary.<sup>143</sup>

However, soft power, cooperative approaches are also being pursued by the Justice Department. Mark Richard, the Director of International Affairs, has expressed enthusiasm for updating treaty relations with other countries, while simultaneously continuing to work with existing treaties.<sup>144</sup>

Clearly, a hard power approach to criminal matters in Western Europe would be an extreme and untenable position. If the United States is to develop an effective international criminal policy with regard to Europe, it will have to develop more effective ways of working with Western Europe's international regime. Recently, the United

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recent developments in the Caribbean, see Zagaris, *Caribbean Financial Action Task Force Aruba Meeting Presages Cooperation by Caribbean Jurisdictions*, 6 INT'L ENFORCEMENT L. REP. 217 (1990).

142. See W. FELD & R. JORDAN, *supra* note 14 and accompanying text. Also, in this regard, the Communities and the Council of Europe have examined some of the benefits and difficulties of cooperation between regional groups. Commission of the European Communities, Commission Communication to the Council on relations between the Community and the Council of Europe, Brussels, March 8, 1989, COM(89) 124 final [hereinafter Commission of the European Communities].

143. Anderson, *Fighting the International Drug War*, A.B.A.J. 24 (Jan. 1991).

144. *Id.* at 25.

States has experienced difficulties in working with this regime,<sup>145</sup> and future difficulties appear likely.<sup>146</sup> Though the United States has shown some interest in working with the European regime,<sup>147</sup> it cannot be assured of an effective policy in Europe without a more aggressive commitment to work with the existing regime. Such a commitment requires that United States practitioners and policymakers familiarize themselves with the regime.

### C. *On Future Western European Cooperation in Criminal Matters*

Though the European regime's sophistication is due in part to the active sponsorship of both the Council of Europe and the European Communities, this dual sponsorship is not without attendant difficulties. Both organizations have distinctly separate agendas, and the potential for redundant and conflicting approaches to cooperation in criminal matters is real.

In acknowledgement of the need to coordinate the activities of the two organizations, formal structures have appeared to ensure that dialogue between the two groups is maintained.<sup>148</sup> The most significant structure is the relationship established between the Commission of the European Communities and the Interdepartmental Working Party of the Council of Europe. It is anticipated that this relationship can provide for a "regular comparison" of the activities of the two organizations.<sup>149</sup>

However, structural differences in the two organizations may still prove problematic. The Council of Europe pursues its objectives largely through conventions and recommendations. The Communities, on the other hand, emphasizes legislative actions. Disagreements over which methods to use when addressing particular problems may arise. The future of Western European cooperation in criminal matters will depend in part on the ability of the regime to accommodate these compet-

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145. See, e.g., Breitenmoser & Wilms, *Human Rights v. Extradition: the Soering Case*, 11 MICH. J. OF INT'L L. 845 (1990); Quigley, *Death Row as a Violation of Human Rights: Is It Illegal to Extradite to Virginia*, 30 VA. J. INT'L L. 241 (1990).

146. Current U.S. forfeiture laws may not be respected by Western Europe. Nilsson and Zagaris, A.B.A. National Institute Considers International and Foreign Law Aspects of Asset Forfeiture 435, 437, (Dec. 1990).

147. See *supra* note 62 and accompanying text.

148. See Commission of the European Communities, *supra* note 142.

149. *Id.* at 4.

ing approaches to cooperation. In this regard, the flexible nature of regimes and the current spirit of cooperation between the two organizations provide a basis for optimism.

# The Double Criminality Rule and Extradition: A Comparative Analysis

**Sharon A. Williams\***

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## I. INTRODUCTION

The double or dual criminality rule is one that is more or less uniformly applied in principle in extradition law and process on a worldwide basis. However, the particular construction differs from jurisdiction to jurisdiction, often quite considerably. The aim of this article is to sample but a small segment of practice by looking at the law of just three states: Canada, the United Kingdom, and the United States of America. These three were selected mainly because of historical and geographical considerations. For example, Canada and the United Kingdom, along with other Commonwealth countries, have a special scheme for the so-called "rendition" of fugitive criminals based upon historical ties. In addition, Canada and the United States, being so geographically close, are clearly appropriate and necessary partners for extradition matters. This article will place primary focus on the extradition law of Canada, and will show that Canada is in the process of reforming both its rendition and extradition laws.

The purpose of this article is to: first, differentiate between extradition to foreign states and "rendition" between Commonwealth countries; second, address the differences in approach between interpretation of extradition treaties and extradition statutes; third, make a comparative analysis of the laws of the United Kingdom, the United States, and Canada; and fourth, analyze the interaction between extra-territorial jurisdiction over criminal offenses and double criminality, and lastly, to draw some conclusions on the future of the rule of double criminality in potential new Canadian extradition law.

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\* Professor of Law and Assistant Dean, Osgoode Hall Law School, York University, Toronto, Canada.



## II. EXTRADITION AND RENDITION: COMPARISONS AND CONTRASTS

### A. *Extradition*

The basic precept of extradition law, contained in many countries' extradition statutes and bilateral treaties, is that there must be a threshold requirement of double criminality, otherwise known as duality of offenses. Under this doctrine, the offense for which extradition is sought must be one for which the requested state would in turn be able to demand extradition. In other words, the offense must be considered criminal in both states. Double criminality is based upon a reciprocal characterization of the offenses<sup>1</sup> and a type of mutuality of obligations<sup>2</sup> between states. It is also premised upon the maxim *nulla poena sine lege*, or "no punishment without law."<sup>3</sup> As one author succinctly stated: "No person may be extradited whose deed is not a crime according to the criminal law of the State which is asked to extradite as well as the state which demands extradition."<sup>4</sup>

It is important to note right at the outset of this article that the double criminality principle has not been viewed as a principle of customary international law automatically binding states. Instead, it has been considered a creature of treaty and statute. One commentator has argued that double criminality "is not so much a rule of international law as a consideration based on policy and expediency."<sup>5</sup> Thus, a fugitive cannot raise the double criminality question as a bar to extradition if the applicable treaty or statute — or both, depending upon the

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1. The reciprocal characterization is perhaps tied into the view of extradition as a form of mutual assistance in criminal matters between states. See M.C. BASSIOUNI, *INTERNATIONAL EXTRADITION*, UNITED STATES LAW AND PRACTICE 324 (1987).

2. M.C. BASSIOUNI, *INTERNATIONAL EXTRADITION AND WORLD PUBLIC ORDER* 314 (1974).

3. I. SHEARER, *EXTRADITION IN INTERNATIONAL LAW* 137-41 (1971); see also Karle, *Some Problems Concerning the Application of the European Convention on Extradition*, in *LEGAL ASPECTS OF EXTRADITION AMONG EUROPEAN STATES* 51 (1970); H. Schulz, *The Principles of the Traditional Law of Extradition*, in *LEGAL ASPECTS OF EXTRADITION AMONG EUROPEAN STATES* 7, 12-13 (1970).

4. 1 L. OPPENHEIM, *INTERNATIONAL LAW* 701 (8th ed. 1955).

5. 1 H. V.E. HARTLY BOOTH, *BRITISH EXTRADITION LAW AND PROCEDURE* 50 (1980) (citing O'Higgins, *British and Irish Extradition Law and Practice* (1961) (unpublished Ph.D. thesis)); see also Brabyn, *Exceptional Accusation Cases Under the Extradition Acts 1870 to 1935*, 1987 CRIM. L. REV. 796, 797 n.7.

forum — is silent. In the famous case of *Factor v. Laubenheimer*,<sup>6</sup> the Supreme Court of the United States held that the principle is based not on international law but on treaty.<sup>7</sup>

In the past, there has been some confusion between the distinct concept of double criminality and the extraditable offense. Under existing Canadian law, section 2 of the *Extradition Act* provides that an “extradition crime” is one that if committed in Canada or within Canadian jurisdiction would be one of the crimes listed in Schedule 1 of the Act.<sup>8</sup> The majority of Canada’s extradition treaties which pre-date the new “no list” approach likewise have a schedule and section 3 of the Act provides that if there is an inconsistency between the Act and the treaty, the treaty will prevail. In “list” treaties, the approach is really two-tiered. The first tier considers whether the offense is listed in the treaty as extraditable. If the offense is not included in the list in the treaty, then the analysis is over, and extradition is not possible. However, if the offense is included in the list, it is necessary to move to the second tier and consider whether double criminality exists.

In “no-list” treaties, the related principles of criminality of conduct and double punishability are of ultimate importance. It has been aptly put by one author that “[t]he requirement of double criminality provides the substantive basis needed to ensure that the process shall not . . . be arbitrary.”<sup>9</sup>

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6. 290 U.S. 276 (1923).

7. *Id.* at 287, 300. But see I. SHEARER, *supra* note 3, at 138: “The rule seems to be universally established by practice, however, that it could without much doubt be regarded as a customary rule of international law should the question ever arise as a result of some chance omission in the wording of a treaty.” Shearer’s conclusion does not seem to gel with actual practice. See, e.g., *In re Assarsson*, 687 F.2d 1157 (8th Cir. 1982); *In re Assarsson*, 635 F.2d 1237 (7th Cir. 1980).

8. Extradition Act, CAN. REV. STAT. ch. E-23, § 2 (1985).

9. M.C. BASSIOUNI, *supra* note 2, at 322. There has been much debate as to the two potential ways to interpret double criminality. The *in concreto*, or objective, approach looks to the exact labelling of the offense and its constituent elements. See 41 R. INT. DR. PEN. 12 (1970), for resolutions adopted by the 1969 10th Congress of the International Association of Penal Law, which indicates a preference for the *in concreto* approach. The *in abstracto*, or subjective, approach looks to the actual criminal nature of the act without undue preponderance on the label and full identity of the elements in the states. See C. van den Wyngaert, *Double Criminality as a Requirement to Jurisdiction*, in DOUBLE CRIMINALITY: STUDIES IN INTERNATIONAL LAW 43 (N. Jareborg ed. 1989) for an example of a preference for the *in abstracto* approach.

## B. Rendition

The surrender of fugitives to and from parts of the Commonwealth is called rendition. It has the same basic meaning as extradition but there are fundamental differences in Canada between its application under the *Fugitive Offenders Act*,<sup>10</sup> and extradition pursuant to the *Extradition Act*.<sup>11</sup> First, no treaties are required for rendition. This is premised upon the historical connection of the members of the Commonwealth and the feeling at the inception of the scheme in the late nineteenth century that the rigid formality and safeguards of the extradition process with "foreign" states were not appropriate or necessary within Canada.

Second, under Canada's *Fugitive Offenders Act*, there is no list of extraditable offenses and no provision for double criminality. Under section 3 of the Act, the only requirement is that the offense carry a penalty in the requesting province of at least twelve months' imprisonment with hard labor.<sup>12</sup> Under section 4, the offense does not have to be criminal in Canada, nor does it have to be punishable in Canada with at least twelve months' imprisonment with hard labor.<sup>13</sup> The argument to be addressed towards the end of this article is the need to bring rendition into line with extradition by providing that both rendition and extradition offer similar safeguards.

## III. TREATY INTERPRETATION AND STATUTORY INTERPRETATION

The differences in approach between interpretation of extradition treaties and statutes become apparent when the question considered is what role extradition actually plays. From an international law perspective, it is a treaty matter bearing on the rights and duties of states; thus, emphasis is placed on inter-state cooperation. From a domestic law perspective, extradition may be viewed as a part of the criminal process and is thus necessarily interpreted in a fashion that stresses the protection of the fugitive's rights.

Generally speaking, the rule fundamental to the Vienna Convention on the Law of Treaties is that of literal interpretation according to

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10. Fugitive Offenders Act, R.S.C. ch. F-32 (1985).

11. Extradition Act, R.S.C. ch. E-23 § 2 (1985).

12. Fugitive Offenders Act, R.S.C. ch. F-32 § 3 (1985).

13. *Id.* at § 4.

the ordinary meaning of the words used in the text.<sup>14</sup> There is also the essential commitment that treaties are to be interpreted in good faith, "which is at once psychological and ethical, requiring adherence to ordinary meaning and context."<sup>15</sup> A treaty must necessarily be interpreted in a manner that is calculated to give it effect and content rather than to deprive it of meaning.<sup>16</sup>

Applying this principle to extradition treaties, the approach of courts in Canada, and certainly in the United Kingdom, has been that of liberal interpretation to give effect to the treaty. As one commentator stated, "treaties should receive a fair and liberal meaning and . . . in extradition matters the ordinary technical rules of criminal law should only apply to a limited extent."<sup>17</sup>

In *Schmidt v. The United States*,<sup>18</sup> Mr. Justice La Forest made the following declaration:

I would add that the lessons of history should not be overlooked. Sir Edward Clarke instructs us that in the early 19th century the English judges by strict and narrow interpretation, almost completely nullified the operation of the few extradition treaties then in existence: see *A Treatise Upon the Law of Extradition* (4th ed., 1903), c. V. Following the enactment of the British *Extradition Act, 1870* (U.K.), 33 & 34 Vict., c. 52, upon which ours is modelled, this approach was reversed. The present system of extradition works because courts give the treaties a fair and liberal interpretation with a view to fulfilling Canada's obligations, reducing the technicalities of criminal law to a minimum and trusting the courts in the foreign country to give the fugitive a fair trial . . .<sup>19</sup>

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14. Vienna Convention on the Law of Treaties, May 23, 1969, U.N. Doc. A/Conf.39/27, reprinted in 8 INT'L LEG. MAT. 679 (1969) (instrument of accession deposited by Canada, October 14, 1970, pursuant to Order in Council, P.C. 1979-1339; entered into force January 27, 1980). Although it has not been ratified by the United States, the Vienna Convention provisions are considered to the greatest extent to be declaratory of customary international law. See RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES (1987).

15. See S.A. WILLIAMS & A.L.C. DE MESTRAL, AN INTRODUCTION TO INTERNATIONAL LAW 359 (2d ed. 1987).

16. *Id.*; see also M. McDougall, THE INTERPRETATION OF AGREEMENTS AND WORLD PUBLIC ORDER 156 (1967).

17. G.V. LA FOREST, EXTRADITION TO AND FROM CANADA 57 (2d ed. 1977).

18. [1987] 1 S.C.R. 500.

19. *Id.* at 524. According to section 52 of the Canadian Charter of Rights and Freedoms, see Part I, Constitution Act, 1982, which is Schedule B, Canada Act 1982 (U.K.), ch. 11. Should a treaty provision, as implemented into Canadian law by the

In the United States one author has stated that

[w]here a provision is capable of two interpretations either of which would comport with the other term of the treaty, the judiciary will choose the construction which is more liberal and which would permit the relator's extradition, *because the purpose of the treaty is to facilitate extradition between the parties to the treaty*.<sup>20</sup>

The author further observed that "[a]t times the judiciary will interpret terms beyond their actual meaning to encompass their spirit and intent . . . ." <sup>21</sup> This approach of liberal interpretation of extradition treaties may be labelled "cooperative," as it responds to the mutual interests of states in having a flexible extradition process and reciprocal cooperation.<sup>22</sup>

*Halsbury's Laws of England* characterizes this approach as follows: "The words used in such [extradition] treaties are to be given their ordinary, international meaning, general to lawyer and layman alike, and not a particular meaning which they may have attracted in certain branches of activity in England."<sup>23</sup> In the case of *Belgium v. Postlewaite*,<sup>24</sup> Lord Bridge of Harwich addressed this issue and referred to the well-known dictum of Lord Russell in *In re Arton* (No. 2),<sup>25</sup> where the latter stated: "In my judgment those treaties ought to

*Extradition Act*, violate a Charter Right and not be saved by section 1, the provision will be struck down as would domestic legislation itself. See *Schmidt*, [1987] 1 S.C.R. at 518, where Justice La Forest states that "[t]here can be no doubt that the actions undertaken by the Government of Canada in extradition as in other matters are subject to scrutiny under the Charter . . ." See also *Operation Dismantle Inc. v. The Queen*, [1985] 1 S.C.R. 441, 455, 464.

20. M.C. BASSIOUNI, *supra* note 1, at 88 (emphasis added) (citing the rule of liberal interpretation of extradition treaty terms); see also *U.S. v. Wiebe*, 733 F.2d 549, 554 (8th Cir. 1984); *Brauch v. Raiche*, 618 F.2d 843 (1st Cir. 1980); *In re Sidona*, 584 F. Supp. 1437, 1447 (E.D.N.Y. 1984).

21. M.C. BASSIOUNI, *supra* note 4, at 89 (citing L. OPPENHEIM, *supra* note 4, at 952-53). This rule was applied in *Melia v. United States*, 667 F.2d 300 (2nd Cir. 1984).

22. See C. Warbrick, *The Criminal Justice Act 1988: The New Law on Extradition*, 1989 CRIM. L. REV. 4, 5 n.19; see also *Bozano v. France*, 9 Eur. H.R.R. 297, 326-7 (ser. A) (1987) (Schermers, J., dissenting).

23. 18 HALSBURY'S LAWS OF ENGLAND para. 216, at 88 (4th ed. 1977).

24. [1987] 2 All E.R. 985 (H.L.); accord *United States v. Howe*, [1989] 3 All E.R. 315.

25. [1896] 1 Q.B. 509.

receive a liberal interpretation, which means no more than that they should receive their true construction according to their language, object, and intent."<sup>26</sup>

Lord Bridge went on to hold that the judgment in *Arton* was good authority for the proposition that the court should not interpret any extradition treaty, unless so constrained by the language, in a way which would "hinder the working and narrow the operation of most salutary international arrangements."<sup>27</sup> It is interesting to note that in *Postlewaite* Lord Bridge refers to Lord Widgery's statement in *R. v. Governor of Ashford Remand Centre, ex parte Beese*.<sup>28</sup> In *Beese*, Lord Widgery held that because an extradition treaty is a contract between two sovereign states, it must be construed as if it were a domestic statute.<sup>29</sup> However, in applying that principle in *Postlewaite*, Lord Bridge held that the parties to bilateral extradition treaties have entered into reciprocal rights and duties for the purpose of bringing to justice those who have committed grave crimes and thus to "apply to extradition treaties the strict canons appropriate to the construction of domestic legislation would often tend to defeat rather than to serve this purpose."<sup>30</sup> Thus, in *Postlewaite* Lord Bridge indicated that we should be looking for the underlying intention of the high contracting parties in interpreting the treaty provisions.<sup>31</sup>

This emphasis on inter-state cooperation in an era of transnational and international crime may be seen as conflicting with the protective function of extradition law. One commentator has made the following suggestion:

The conflict between the cooperative and protective functions of extradition law creates a certain tension, something exacerbated by the different views among States about the exact place of extradition in the criminal process. To the extent that extradition is seen [as] simply part of the process of gaining custody of the fugitive, the protections appropriate are relatively slight and the matter may be regarded as administrative rather than judicial.<sup>32</sup>

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26. *Id.* at 517.

27. *Postlewaite*, [1987] 2 All E.R. at 991.

28. [1973] 1 W.L.R. 969.

29. *Id.* at 973.

30. *Postlewaite*, [1987] 2 All E.R. at 992.

31. *Id.*

32. Warbrick, *supra* note 22, at 5 (footnotes omitted).

The protective side of the extradition procedure clearly lays emphasis on the penal law aspects and provides for procedural safeguards for the fugitive.<sup>33</sup> The *Postlewaite* case illustrates a preference for the cooperative approach, and this preference can also be seen in other fairly recent extradition cases dealing with evidentiary issues,<sup>34</sup> the political offense exception,<sup>35</sup> and the double criminality rule itself.<sup>36</sup>

In conclusion, on this issue of interpretation, it appears that courts in Canada, the United Kingdom, and the United States have in recent times emphasized the cooperative intent of the parties to extradition treaties when called upon to interpret their provisions. It is only where the domestic statute is in question that the courts have been more protective. When the courts have been required to interpret the extradition legislation, such as the *Extradition Act* or *Fugitive Offenders Act*, then the penal aspects have been stressed and where ambiguities have been found they have been construed in favor of the fugitive.<sup>37</sup> In *Regina v. Governor of Pentonville ex parte Cheng*,<sup>38</sup> in the House of Lords, Lord Simon of Glaisdale argued that "the positive powers under the Act [i.e. to extradite] should be given a restrictive construction and the exceptions from those positive powers a liberal construction."<sup>39</sup> Moreover, "[s]ince the common law, as so often, favours the freedom of the individual, the rules enjoining strict construction of a penal statute or of a provision in derogation of liberty . . . merely reinforce the presumption against change in the common law."<sup>40</sup>

#### IV. COMPARATIVE ANALYSIS OF STATUTES AND CASE LAW

In order to interpret and analyze the direction in which extradition law is heading, it appears most fruitful to engage in a comparative

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33. For a recent case in which the European Court of Human Rights held that extradition to Switzerland involved a violation of the European Convention on Human Rights, article 5(1)(f), see *Bozano v. France*, 9 Eur. H.R.R. (ser. A) 297 (1987).

34. *R. v. Secretary of State for the Home Office ex parte Rees*, [1986] 2 All E.R. 321.

35. *Cheng v. Governor of Pentonville Prison*, [1973] 2 All E.R. 204; *Keane v. Governor of Brixton Prison*, [1972] 1 All E.R. 1163.

36. *U.S. v. McCaffery*, [1984] 2 All E.R. 570; *Denmark v. Nielsen*, [1984] 2 All E.R. 81.

37. See *In re Aronson*, [1989] 3 W.L.R. 436, 466.

38. [1973] App. Cas. 931.

39. *Id.* at 954.

40. *Id.*

study of the status of the law in the United Kingdom, the United States, and Canada. This comparative study is particularly helpful in light of the fact that there is a new British statute that has recently addressed the question under consideration.

### A. *The United Kingdom*

In December 1989 the United Kingdom enacted a new *Extradition Act*. For the sake of the following analysis, this section will be divided into the pre-December 1989 case law — based on the earlier *Extradition Act*,<sup>41</sup> *Fugitive Offenders Act*,<sup>42</sup> and Treaties — and the post-1989 composite statute, for which as of yet there is no judicial interpretation.

#### 1. Pre-1989 Extradition Act

When discussing the British position on double criminality, perhaps the best approach is to look at the case law and government documents leading to the 1989 Act and to comment on them first. In March 1979 the Home Secretary announced the appointment of a Working Party to review the law and practice of extradition in the United Kingdom. In 1982 this Interdepartmental Working Party produced its *Report*.<sup>43</sup> Regarding the double criminality question, the *Report* stated the traditional rule that fugitives should only be surrendered for acts which are not only offenses against the law of the requesting state, but which would also constitute offenses against the law of the requested state if committed within its jurisdiction.<sup>44</sup>

The Working Party *Report* stated that the justification for the double criminality rule is the basic principle that the fugitive should be treated by the requested state in the same way as any other person in its jurisdiction.<sup>45</sup> Therefore he should not be detained or proceeded against for acts which do not contravene the requested state's criminal law. It should be emphasized that the double criminality rule, as ex-

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41. Extradition Act, 1870, 33 & 34 Vict., ch. 52.

42. Fugitive Offenders Act, 1967, ch. 68.

43. HOME OFFICE, A REVIEW OF THE LAW AND PRACTICE OF EXTRADITION IN THE UNITED KINGDOM (1982) [hereinafter REPORT].

44. This double criminality principle was contained in the relevant British statutes at that time: the 1870 *Extradition Act*, the 1967 *Fugitive Offenders Act*, and the 1965 *Backing of Warrants (Republic of Ireland) Act*.

45. REPORT, *supra* note 43, at 10.



pressed in the 1967 *Fugitive Offenders Act*, had been interpreted differently from the double criminality provisions in the 1870 *Extradition Act*. This will be evident from the analysis of the cases that follow.

In the case of *R. v. Governor of Pentonville Prison, ex parte Budlong and Kember*,<sup>46</sup> it was held that the acts or omissions for which the extradition request is made should disclose an extraditable offense if the acts or omissions had occurred in the requested state. This case was decided under the 1870 *Extradition Act*, and the double criminality rule was well articulated by Lord Justice Griffiths. He stated that double criminality would be satisfied if it is demonstrated "that the crime for which extradition is demanded would be recognized as substantially similar in both countries [and] that there is a prima facie case that the conduct of the accused amounted to the commission of the crime according to English law."<sup>47</sup>

The 1982 *Report* stated that this was, in the view of the Working Party, the correct approach.<sup>48</sup> According to the *Report*, the test applied in *Regina v. Governor of Brixton Prison, ex parte Gardner*,<sup>49</sup> a Commonwealth rendition case under the 1967 Act, was too stringent.<sup>50</sup> In *Gardner*, Lord Parker made the following argument:

It seems to me that what is clearly contemplated [in the 1967 *Fugitive Offenders Act*] is that a request coming forward to the Secretary of State must set out in some form, and no doubt the most useful form is the warrant or warrants for arrest, the offence or offences of which the fugitive is accused . . . . *Not only must it supply a general description . . . but it must condescend to sufficient detail to enable the matter to be considered.*<sup>51</sup>

The Working Party elaborated that the strictures imposed in *Gardner* were that "the offence disclosed must be identical, either in its description or in its constituent parts, to the offence named in the requisition."<sup>52</sup>

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46. [1980] 1 W.L.R. 1110.

47. *Id.* at 1122. Note that Lord Griffiths also held that it is the "substance of the two offences that must correspond, not their precise definitions." *Id.* at 1120 (citing *In re Arton* (No. 2), [1896] 1 Q.B. 509); see also *Rex v. Dix*, [1902] 18 T.L.R. 231; *Regina v. Governor of Pentonville Prison, ex parte Ecker*, 1974 Crim. L.R. 102.

48. REPORT, *supra* note 43, at 10.

49. [1968] 2 Q.B. 399.

50. REPORT, *supra* note 43, at 10.

51. *Gardner*, [1968] 2 Q.B. at 415 (emphasis added).

52. REPORT, *supra* note 43, at 10.

As the two cases indicate, there was a clear disparity in the approach between these two statutory applications. The later cases also bear this out. The key case applying the 1870 *Extradition Act* is *In re Nielsen*.<sup>53</sup> This case concerned an extradition request from Denmark, and the House of Lords held that double criminality need only be proved when the particular extradition treaty provides for it.<sup>54</sup> Lord Diplock described it as the “exceptional accusation” case.<sup>55</sup> The 1870 *Extradition Act* was held to require no more than that the conduct disclosed in the evidence delivered by the requesting state be an “extradition crime” in the United Kingdom. There are several passages from the judgment that are worth quoting, as they illustrate quite clearly the conduct-based approach to double criminality. Lord Diplock, writing for a unanimous court dismissing Nielsen’s appeal, began the opinion as follows:

It is . . . appropriate at this juncture to draw attention to the fact that, when one is describing crimes committed in a foreign state that are regarded in the United Kingdom as serious enough to warrant extradition of an offender by whom they have been committed, one is describing the way in which human beings have conducted themselves and their state of mind at the time of such conduct. Since conduct of that kind consists of wicked things that people do in real life it is possible to describe it either in broad generic terms and using popular language, or in varying degrees of specificity

. . . .

The 1870 [Act] list uses the former technique . . . .

So in order to determine whether conduct constitutes an ‘extradition crime’ within the meaning of the Extradition Acts 1870 to 1935, and thus a potential ground for extradition if that conduct had taken place in a foreign state, one can start by inquiring whether the conduct if it had taken place in England would have fallen within one of the 19 generic descriptions of crimes in the 1870 list.<sup>56</sup>

On its own facts *Nielsen* was not an “exceptional accusation case,” which resulted in the case being decided by reference solely to whether the conduct was criminal if committed in England and covered by the

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53. [1984] 2 All E.R. 81 (H.L.).

54. *Id.* at 82.

55. *Id.* at 89. As to the term “exceptional accusation cases,” see Brabyn, *supra* note 5, at 796.

56. *Nielsen*, [1984] 2 All E.R. at 84.

1870 list.<sup>57</sup> The *Nielsen* case clarified the meaning of section 26 of the *Extradition Act* 1870. Section 26 defined an extradition crime as "a crime which, if committed in the United Kingdom or within United Kingdom jurisdiction, would be one of the crimes described in the first Schedule to this Act."<sup>58</sup>

Until *Nielsen* it was uncertain what meaning attached to the word "crime." There were two possibilities. The first was that "crime" referred to a specific criminal offense under the laws of the requesting state. The second possibility was that it referred to conduct that is viewed as criminal. It was this second "conduct" approach that was adopted by Lord Diplock in *Nielsen*. As one writer has stated:

It follows that, since the first Schedule provides that the list of crimes therein is to be construed according to the law existing in England at the date of the alleged crime, only English law is relevant to the question whether particular behaviour amounts to an extradition crime for the purposes of the Act. So far as the statutory definition of 'extradition crime' is concerned, foreign law is not relevant at all.<sup>59</sup>

It is interesting to observe that in *Nielsen* and in the next case to be considered, *United States v. McCaffery*,<sup>60</sup> the House of Lords did not use the term "double criminality" in any shape or form. It has been suggested by one commentator that by not using this term the justices "sought to disassociate themselves" from the *Budlong* definition quoted earlier in this section.<sup>61</sup> The commentator goes on to suggest that the *Budlong* requirement, "that the foreign crime with respect to which extradition is requested must be substantially similar to a relevant offence in English Law," was forcefully rejected in *Nielsen* as having no justification in the words of the 1870 Act.<sup>62</sup> Lord Diplock's rejection of the double criminality rule is explicit in his use of the expressions "the

57. *Id.* at 88-89. See J. Crawford, *Case No. 5: Government of Denmark v. Nielsen*, 1984 BRIT. Y.B. INT'L L. 343, reprinted in 48 J. CRIM. L. 373 (1984).

58. Extradition Act, 1870, 33 & 34 Vict., ch. 52.

59. See Brabyn, *supra* note 5, at 797. In contrast, section 3 of Canada's *Extradition Act* refers explicitly to Canada's extradition treaties taking precedence over the Act in the event of conflict. See *supra* note 12 and accompanying text. The treaties contain double criminality clauses of varying descriptions.

60. [1984] 2 All E.R. 570 (H.L.).

61. Brabyn, *supra* note 5, at 798. For a discussion of the *Budlong* holding, see *supra* notes 46-48 and accompanying text.

62. Brabyn, *supra* note 5, at 798.

sobriquet of 'double criminality','<sup>63</sup> in *Nielsen* and "the so-called double criminality" rule in *McCaffery*.<sup>64</sup>

In *McCaffery*, Lord Diplock, again writing for a unanimous House of Lords, held that the proper test under *Nielsen* is "whether the conduct of the accused, if it had been committed in England, would have constituted a crime falling within one or more of the descriptions included in that list."<sup>65</sup> However, as Lord Diplock points out, "the precise matter on which evidence of foreign law would be necessary would depend on the terms of the particular extradition treaty."<sup>66</sup> Thus, the cases interpreting the 1870 *Extradition Act* can best be summed up as pointing out that proof of double criminality is only necessary where the Treaty calls for it. In all other cases it is sufficient that the conduct amounts to an extradition crime in the United Kingdom.

Under the Commonwealth scheme, a different position has been taken, as alluded to earlier in *Gardner*.<sup>67</sup> Article 12 of the *Scheme Relating to the Rendition of Fugitive Offenders Within the Commonwealth* provides that "[t]he return of a fugitive offender will be precluded by law or be subject to refusal by law . . . if the facts on which the request for his surrender is grounded do not constitute an offence under the law of the country or territory in which he is found."<sup>68</sup>

*Gardner* required correspondence of the crime in both requested and requesting states. Two writers have made the following suggestion:

As most of the requests to the United Kingdom under the Scheme emanate from countries enjoying a common legal heritage, little difficulty arose in the majority of cases in matching the ingredients of the crimes in both countries. However, in *Gardner* and a subsequent unreported case of *R. v. Pentonville Prison, ex parte Myers*

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63. *Nielsen*, [1984] 2 All E.R. at 90.

64. *McCaffery*, [1984] 2 All E.R. at 573.

65. *Id.* at 573.

66. *Id.*; see also *Jennings v. United States*, [1982] 3 All E.R. 104, in which the House of Lords held that evidence was required which would prove, under the criminal law in force in that part of the United States where the conduct took place, that a criminal offence occurred subject to the requisite minimum punishability required by the Treaty. *Id.* at 113. The emphasis again, as in *Nielsen* and *McCaffery*, is on conduct "rather than the particular packaging of criminal offences." See Brabyn, *supra* note 5, at 800.

67. See *supra* notes 49-52 and accompanying text.

68. CMND. 3008 (London, 1966). See also C. Nicholls & C. Nicholls, *The Old and the New* 4 (October 1989) (unpublished paper presented at the Biennial Conference of the International Bar Association, Strasbourg).

(1972) No. 293/72, the court refused to order the surrender of fugitives because the Commonwealth crimes charged related to future pretences, as there was no corresponding crime in the United Kingdom.<sup>69</sup>

In *Canada v. Aronson*,<sup>70</sup> the issue before the House of Lords was whether the evidence was sufficient to warrant the trial of the fugitive in the United Kingdom for what he was alleged to have done in the requesting state and not simply for what he had appeared to have done wrong according to English law.<sup>71</sup> Lord Bridge of Harwich declared that he preferred this narrow construction. In fact he stated that "I do not think that the language of the statute fairly admits of the wide construction . . . . [I]f the language is ambiguous, the narrow construction is to be preferred in a criminal statute as the construction more favourable to the liberty of the subject."<sup>72</sup>

The court took the view that there was a basic fallacy in the argument of the appellants in that there was an attempt to assimilate the requirements of the 1870 and 1967 Acts. This argument failed, as the structure and machinery of both Acts is disparate. Lord Bridge stated specifically:

Nowhere in the 1870 Act is there any provision which has the effect of imposing a double-criminality rule, though such a rule may be introduced into the extradition machinery by the provisions of particular treaties. By contrast . . . [l]egislating to give effect to the [1967] scheme, it was necessary to provide that a returnable offence should both fall within one of those broad categories and satisfy the 'double criminality rule' laid down in cl 10 of the scheme [relating to the Rendition of Fugitive Offenders Within the Commonwealth, Cmnd 3008, 1966].<sup>73</sup>

Lord Lowry, joined by Lords Bridge and Elwyn-Jones, addressed the impact of extradition cases such as *Nielsen* upon rendition cases such as *Aronson* in the following words:

[T]he appellants here seem to me to have represented to your Lordship's the paramount position of *Nielsen's* case, not only in

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69. C. Nicholls & C. Nicholls, *supra* note 68, at 5.

70. [1989] 2 All E.R. 1025.

71. *Id.* at 1027.

72. *Id.*

73. *Id.* at 1028.

relation to extradition, concerning which it is of course the leading authority, but also in regard to the return of fugitive offenders [under the 1967 Act]. . . . [S]uch an approach could not validly be adopted in a fugitive offender's case.<sup>74</sup>

Lord Griffiths, one of the two dissenting judges, held that the rejection of the *Nielsen* test of conduct would make the 1967 Act unworkable.<sup>75</sup> He did not hesitate to construe the words "act or omission constituting the offence," set out in section 3(1)(c) of the 1967 Act, as a reference to the fugitive's conduct.<sup>76</sup> He went on to state that "I cannot reconcile the alternative construction with section 3(1)(a), which by its language shows that what is required is broad similarity, not exact correspondence, of offence . . . ."<sup>77</sup> This sharply divided decision, which held that Aronson could not be extradited, illustrates the problems in the double criminality rule when narrowly construed, especially where fiscal offenses are concerned.

One final case that has dealt with this issue is that of *In re Osman*,<sup>78</sup> which involved a request from the Crown Colony of Hong Kong under the 1967 *Fugitive Offenders Act*. As to the double criminality rule, Lord Parker held as follows:

The double criminality provision of FOA does not require in my judgment a meticulous and precise identity of wording . . . . The

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74. *Id.* at 1048.

75. *Id.* at 1030.

76. Section 3(1)(c) of the Act provides for rendition of fugitives for "relevant offences," as follows:

(1) For the purposes of this Act an offence of which a person is accused or has been convicted in a designated Commonwealth country or United Kingdom dependency is a relevant offence if -

. . . .  
(c) in any case, the act or omission constituting the offence, or the equivalent act or omission, would constitute an offence against the law of the United Kingdom if it took place within the United Kingdom or, in the case of an extra-territorial offence, in corresponding circumstances outside the United Kingdom.

77. *Id.* Section (3)(1)(a) provides that an offence is a relevant offence if - in the case of an offence against the law of a designated Commonwealth country, it is an offence which, however described in that law, falls within any of the descriptions set out in Schedule 1 to this Act, and is punishable under that law with imprisonment for a term of twelve months or any greater punishment .

78. [1990] 1 All E.R. 999.

combined effect of *Aronson* and its predecessors [*Gardner and Myers*] is, in my view, that if the charge as formulated by the requesting state would constitute, if proved, an offence here, the offence is a relevant offence . . . .<sup>79</sup>

## 2. The 1989 Extradition Act

It is not within the scope of this article to enter into a comprehensive review of the 1989 Act. However, a brief account of its background will be given and the sections pertinent to this article on double criminality will be discussed. The 1989 *Extradition Act*<sup>80</sup> consolidates, with amendments, enactments relating to extradition under the 1988 *Criminal Justice Act*,<sup>81</sup> the 1967 *Fugitive Offenders Act*,<sup>82</sup> and the 1870-1935 *Extradition Acts*.

The impetus behind the new Act was not only to streamline the extradition procedure by reducing the multiplicity of legislation, but also to assist foreign states, particularly in Europe. Under the old law, the European states had difficulty in obtaining extradition, primarily due to the *prima facie* case requirement of sufficiency of evidence. In fact, "[t]he legislation ha[d] been said to be too protective of the rights of the fugitives and not sensitive enough to the cooperative needs of states dealing with international crime and mobile criminals."<sup>83</sup> The process of reform can be traced back to the 1982 *Report* of the Interdepartmental Working Party, considered earlier in this section.<sup>84</sup> This was followed by the *Green Paper on Extradition* in 1985.<sup>85</sup>

It should be noted that running through this process was the important consideration of the necessity of amendment if the United Kingdom was to become a party to the *European Convention on Extradition*.<sup>86</sup> In 1986, the White Paper entitled *Criminal Justice: Plans for Legislation*<sup>87</sup> was presented to Parliament. The proposals in these docu-

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79. *Id.* at 1015-1016.

80. Extradition Act, 1989, ch. 33.

81. Criminal Justice Act, 1988, ch. 33.

82. Fugitive Offenders Act, 1967, ch. 68.

83. [3 CURRENT LAW STATUTES ANNOTATED 33 (1989)]

84. *See supra* note 43.

85. Presented to Parliament by the Secretary of State for the Home Department, 1985. CMND 9421.

86. European Convention on Extradition, 1957, E.T.S. No. 24.

87. Presented to Parliament by the Secretary of State for the Home Department, CMND 9658.

ments became legislation in Part I of the 1988 *Criminal Justice Act*. However, it was not proclaimed into force immediately. In June 1989, an Extradition Bill was introduced to consolidate legislation relating to extradition.<sup>88</sup>

The new consolidated *Extradition Act* became effective in December 1989.<sup>89</sup> Its language is clearly taken from the earlier statutes, which are now wholly or largely repealed,<sup>90</sup> and from the recommendation of the Law Commission Report. In consolidating the earlier statutes, the 1989 Act makes binding, where utilized, the language of the earlier statutes. It could be argued that the case law interpreting those statutes should not be of value. However, even though strictly speaking this might be true, "it would be unrealistic to disregard the case law on the Fugitive Offenders Act 1967 (because it never came into force, there is no case in law on Part I of the Criminal Justice Act 1988) and, indeed the consideration of similar language in the Extradition Act 1870."<sup>91</sup>

Section 2 of the new act defines "extradition crime." This definition is radically different from the definitions found in the 1870 *Extradition Act* and the 1967 *Fugitive Offenders Act*. Instead, it follows the mode of Article 2 of the *European Convention on Extradition*.<sup>92</sup> The first striking feature is contained in Section 2(1)(a). This section defines an "extradition crime" as "conduct" in the territory of a foreign state, Commonwealth country or colony, which, had it occurred in the United Kingdom, would constitute an offence punishable with a term of imprisonment of at least 12 months. Moreover, however the crime is described in the law of the foreign state, Commonwealth country or colony, it must be so punishable under that law. This section clearly follows the conduct-based line taken by the courts in *Nielsen*<sup>93</sup> and *McCaffery*,<sup>94</sup> but not that of *Aronson*.<sup>95</sup> Therefore, the narrow construc-

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88. For consideration of the Bill and a Report making certain proposals, see The Law Commission and the Scottish Law Commission, *Extradition Bill: Report on the Consolidation of Legislation Relating to Extradition*, Law. Com. No. 182, Scottish Law Com. No. 119.

89. Extradition Act, 1989, ch. 33. See Hansard, H.L. Vol. 509, cols. 484, 846; Vol. 510, col. 790; H.C. Vol. 157, col. 1129.

90. See Current Law Statutes Annotated, *supra* note 83, at 33.

91. *Id.* at 33-34.

92. See *supra* note 86.

93. [1984] 2 All E.R. 81.

94. [1984] 2 All E.R. 570.

95. [1989] 2 All E.R. 1025.



tion of *Aronson* is dead.<sup>96</sup>

As to jurisdiction over the offense, section 2(1)(a) refers to the territory of the requesting state. The British courts could take a broad view of this basis of jurisdiction in a manner that can be compared to the Supreme Court of Canada's decision in *Libman v. The Queen*.<sup>97</sup> One British writer has commented: "The practical importance . . . will depend upon the extension of United Kingdom law, either by the courts or by legislation, to catch crime with an extraterritorial element."<sup>98</sup>

Sections 2(1)(b), 2(2), and 2(3) deal with extradition for extra-territorial offenses. Offenses will be extraditable where "in corresponding circumstances equivalent conduct would constitute an extra-territorial offence against the law of the United Kingdom" punishable by a minimum of 12 months imprisonment.<sup>99</sup> Thus, where there is duality of jurisdictional bases extradition will take place.<sup>100</sup> It should be noted

96. The minimum punishability requirement clearly will bring into play more offenses than before. In particular, fiscal offenses will no longer be excluded, as they generally had been in the past. *But see* R. v. Chief Metropolitan Stipendiary Magistrate, ex parte Secretary of State for the Home Department, [1988] 1 W.L.R. 1204; *see also Report, supra* note 43, at 12-13. This new approach will take immediate effect as regards treaties with such a provision. However, with the "old list" variety, that method will continue until amendment.

97. [1985] 2 S.C.R. 178. Evidence of this broad view may also be seen in *In re Reyat*, [CO 1157/88 Q.B.D. 1989]. In *Reyat*, the court held that the phrase "extra-territorial offences . . . refers to cases which are wholly foreign in concept and not those which merely have a foreign element . . ." *See also* R. v. Governor of Pentonville Prison, ex parte Osman, [1988] Crim. L. R. 611; R. v. Governor of Pentonville Prison, ex parte Herbage, 84 Crim. App. 149 (C.A. 1987); R. v. Treacy, [1971] App. Cas. 537 (H.L.).

98. C. Warbrick, *The Criminal Justice Act 1988: The New Law on Extradition*, 1989 CRIM. L. REV. 4, 8. The comments refer to the Criminal Justice Act, but as the same provisions appear in the 1989 Consolidation Act, they still stand. *See also* LAW COMMISSION, JURISDICTION OVER OFFENCES OF FRAUD AND DISHONESTY WITH A FOREIGN ELEMENT (1989); Leigh, *Territorial Jurisdiction and Fraud*, 1988 CRIM. L. REV. 280. For cases in which extradition was refused for lack of jurisdiction, *see* Governor of Pentonville, ex parte Khubchandani, 71 Cr. App. R. 241 (1980); and R. *Harden* (1962), 46 Cr. App. R. 90.

99. *Supra* note 89.

100. *See infra* notes 101-104 and accompanying text for an analysis of duality of jurisdiction. Note that this is in accord with the recent pre 1989 Act decision in R. v. Governor of Pentonville Prison, ex parte Naghdi, [1990] 1 All E.R. 257, where it was held that under the 1870 Act, the meaning of "within the jurisdiction of the requesting state" should not be interpreted solely in the sense as it is used by the foreign state, since this could be regarded by the United Kingdom as an "exorbitant jurisdiction." *Id.* at 265-66.

that the United Kingdom, much like Canada, utilizes a territorial approach to criminal jurisdiction,<sup>101</sup> except with respect to murder committed by its nationals abroad and offenses under the various international terrorism conventions.

Extradition will also take place for extraterritorial offenses (1) where the nationality of the offender basis of jurisdiction is used by the requesting state; (2) where the conduct took place outside the United Kingdom; and (3) if, had it occurred in the United Kingdom, it would constitute an offence subject to the minimum punishability rule of 12 months. This provision must be read in the light of the fact that many states in Europe use this active nationality basis.<sup>102</sup> It must be stressed that this application is only addressed to the nationality of the *offender* as the jurisdictional link with the requesting state. It is contrasted with the passive nationality principle, which is based on the nationality of the victim.<sup>103</sup>

A situation could present itself where a national of State A with whom the United Kingdom has an extradition relationship commits an offense in State B under the laws of State A. The conduct may be lawful in State B. However, extradition will take place if the conduct would be regarded as criminal if done in the United Kingdom and be punishable under the minimum punishability rule. One commentator supports this result by arguing that the "justification is to be found in the underlying policy of providing an effective response to certain kinds of international crime. It will eliminate the 'safe haven', e.g. drug dealing or planning terrorist operations, by allowing for the return of persons to the State most affected by the activities."<sup>104</sup>

## B. *The United States*

Until 1979 all the bilateral extradition treaties of the United

101. See *R. v. Governor of Brixton Prison, ex parte Rush*, [1969] 1 W.L.R. 165.

102. See Williams & Castel, *The Extradition of Canadian Citizens and Sections 1 and 6(1) of the Canadian Charter of Rights and Freedoms*, XXV CAN. YR. BK. INT'L. L. 263, 268-69 (1987).

103. It appears that an early version of the Criminal Justice Bill inadvertently did not so restrict it to active nationality. According to two commentators, the result would have been "to allow 'long arm' claims of, for example, the United States, which bases much of its federal jurisdiction on the nationality of the victim, particularly in the case of banks. This jurisdiction would not be recognized under the new Act." See C. Nicholls & C. Nicholls, *supra* note 68, at 12.

104. Warbrick, *supra* note 98, at 9.

States used the enumerative method. One writer has commented that the refusal to go with the no-list approach "stemmed basically from the multijurisdictional criminal justice system" in the United States.<sup>105</sup> The fear in the United States was that the no-list approach would prove unwieldy in that in every case it would have to be decided what law determines the extraditability of the offense.<sup>106</sup> However, it appears that recently "the United States Department of Justice has preferred to adopt the no-list approach, in light of the high cost in time and effort of updating treaties."<sup>107</sup>

However, where the list approach still exists, the applicable case law indicates that extradition will not be granted unless the fugitive (sometimes designated the "relator") is alleged to have committed an offense listed or described in some way in the applicable treaty. As is true with most countries' list treaties, there is no detail or definition of the offenses but simply an identification formula.<sup>108</sup> It stands to reason that to determine this formula, a body of substantive criminal law must be applied and that body of law is that of the place of arrest.<sup>109</sup> In the now classic case of *Collins v. Loisel*,<sup>110</sup> Justice Brandeis stated:

It is true that an offence is extraditable only if the acts charged are criminal by the laws of both countries . . . The law does not require that the same name by which the crime is described in the two countries shall be the same; nor that the scope of liability shall be coextensive, or in other respects the same in the two countries. *It is enough if the particular act charged is criminal in both jurisdictions.*<sup>111</sup>

This opinion dove-tails with the judgment of Chief Justice Fuller in *Wright v. Henkel*,<sup>112</sup> where it was held that "it is enough if the particular variety was criminal in both jurisdictions."<sup>113</sup>

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105. C. Blakesley, *International Extradition: An Exercise in Comparative and International Law* 37-38 (December 1989) (unpublished paper, presented at Conference on Extradition, Siracusa, Sicily).

106. *Id.* at 38; see e.g., *Factor v. Laubenheimer*, 290 U.S. 276 (1933).

107. C. Blakesley, *supra* note 105, at 38.

108. M.C. BASSIOUNI, *supra* note 1, at 336.

109. *Id.*; see also *U.S. v. Stokinger*, 269 F.2d 681 (2d Cir. 1959), *aff'd*, 361 U.S. 513 (1959).

110. 259 U.S. 309 (1922).

111. *Id.* at 312 (emphasis added).

112. 190 U.S. 40 (1903).

113. *Id.*; see also *Gluckman v. Henkel*, 221 U.S. 508 (1910).

Because of the variegated system of criminal jurisdiction divided between the federal government and the states, certain questions arise that are peculiar to the United States. For example, should double criminality be determined by the law of the state in the United States where the fugitive is found or by the law of the majority of states in the United States? In *Factor v. Laubenheimer*,<sup>114</sup> the United States Supreme Court mentioned that the crime charged was a crime under the "law of many states, if not Illinois . . . ."<sup>115</sup> This approach has been adopted by many courts in the United States.<sup>116</sup> One writer has summed up the position as follows: "What the Supreme Court in *Factor* and subsequent decisions following it appear to hold is that the judge will determine whether there is a sufficient number of States that have criminalized the action in question to legitimize his decision. The obvious defect is uncertainty."<sup>117</sup>

In the recent case of *United States v. Sensi*,<sup>118</sup> the circuit court of appeals held that double criminality does not require that the criminal laws of the requested and requesting states are "perfectly congruent."<sup>119</sup> According to the court, this would be an absurdity, based on the fact that the criminal laws of different states will rarely match exactly.<sup>120</sup> It is important to note the part of the judgment dealing with the fugitive's conduct as criminal. The court referred to the Restatement (Third) of the Foreign Relations Law of the United States, which states that the requirement for double criminality is that the "acts charged" constitute a serious offense in both states.<sup>121</sup> As the court stated, "[t]he Restatement makes clear that the focus is on the acts of the defendant, not on the legal doctrines of the country requesting extradition."<sup>122</sup>

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114. 290 U.S. 276 (1923).

115. *Id.* at 300, 303.

116. See, e.g., *Theron v. U.S. Marshal*, 832 F.2d 492 (9th Cir. 1987); *In re of Extradition of Russell*, 789 F.2d 801 (9th Cir. 1986); *Brauch v. Raiche*, 618 F.2d 843 (1st Cir. 1980); *In re Tang Yee-Chun*, 674 F. Supp. 1058 (S.D.N.Y. 1987); *U.S. v. Lehder-Rivas*, 668 F. Supp. 1523 (M.D. Fla. 1987).

117. C. Blakesley, *supra* note 105, at 49.

118. 879 F. 2d 888 (D.C. Cir. 1989), *aff'g* 664 F. Supp. 566 (D.D.C. 1987).

119. *Id.* at 893; see also *Oen Yiu-Choy v. Robinson*, 858 F. 2d 1400 (9th Cir. 1988); *Theron*, 832 F. 2d at 492; *In re Extradition of Russell*, 789 F. 2d 801 (9th Cir. 1986); *In re Suarez-Mason*, 694 F. Supp. 676 (N.D. Cal. 1988).

120. *Sensi*, 879 F.2d at 893.

121. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 476 comment d (1987).

122. *Sensi*, 879 F.2d at 894. See also *United States v. Herbage*, 850 F.2d 1463

In *Reza Emami v. United States*,<sup>123</sup> a case in which an Iranian physician was found to be extraditable to West Germany for criminal insurance fraud offenses, the United States District Court for the Northern District of California held that the keynote was that the substantive conduct punishable in both states was functionally identical. Thus, the principle of dual criminality was satisfied.

Pertinent to our discussion and of comparative assistance to Canadian jurisprudential discussion is *Quinn v. Robinson*,<sup>124</sup> where the circuit court of appeals held that "[t]he question whether the offense comes within the treaty ordinarily involves a determination of whether it is listed as an extraditable crime and whether the conduct is illegal in both countries."<sup>125</sup>

One author has noted that "a few decisions have more carefully analyzed the elements of the offense against those listed in the treaty and denied extradition."<sup>126</sup> He adds that "[l]ack of treaty coverage has been a difficulty for the United States in seeking to extradite for peculiar offences like mail fraud, wire fraud, interstate transportation of stolen goods, or securities law violations, none of which are listed in any extradition treaties entered into prior to World War I."<sup>127</sup>

## C. Canada

### 1. The No-List Approach

The recent treaties and protocol that Canada has negotiated with India, France, Germany, the Philippines and the United States respectively indicate that Canada has opted for the no-list approach, which determines extradition on the basis of double criminality and a minimum punishability requirement rather than on an enumerated schedule of offenses in the treaty. This will prevent outmoded lists. However, it

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(11th Cir. 1988).

123. 834 F.2d 1444 (9th Cir. 1987).

124. 783 F.2d 776 (9th Cir. 1986).

125. *Id.* at 791.

126. Kester, *Some Myths of United States Extradition Law*, 76 GEO. L.J. 1444, 1463 (1988). For listed cases, see *id.* at 1463 n.124; see also, *Melia v. U.S.* 667 F.2d 300, 302 n.1 (2d Cir. 1981).

127. Kester, *supra* note 126, at 1463. Note the following statement by the Department of Justice: "Many federal offences are based upon the commerce clause of the Constitution. Regrettably these offenses are not extraditable under most treaties. For example, the gravamen of 18 U.S.C. 2314 is interstate transportation, not theft." See U.S. DEPARTMENT OF JUSTICE, U.S. ATTORNEYS' MANUAL § 9-15.220 (1977).

is still necessary for the requesting state to show that the offense is criminal in both the requested and requesting states. In essence, the no-list approach allows potentially more offenses to be extraditable. Of particular note will be the inclusion of fiscal offenses, which unless provided for specifically in bilateral treaties are not extraditable at present.<sup>128</sup>

This approach appropriately places its concentration not on the strict denomination of the offense but upon the conduct constituting the criminal offense. This denomination or enumerative approach, may vary radically between countries and even between states in a federal system such as the United States of America. The no-list approach dictates a move away from a rigid interpretation of extraditable offenses within treaty schedules and emphasizes the conduct in question.

## 2. Canadian Case Law Interpreting Double Criminality

Canadian courts have long taken the position that even where there was an applicable list of offenses appended to a treaty, it was not necessary for the requesting state and Canada to use the same terminology. Apparently, the key factor is not that both states use the same terminology or denomination, but rather that the evidence as a whole makes a *prima facie* showing that the offender has committed what amounts to an offense in both states. In *Cotroni v. A-G of Canada*,<sup>129</sup> the Supreme Court of Canada held that the test to be used is to ask what is the essence of the offense. Accordingly, it does not matter that the particular indictment, had it been issued in Canada, would have been issued under the Criminal Code or any other statute. There is no requirement of exact identity between the offense charged in the requesting state and the Canadian offense. The focus is on criminal conduct.

In *United States v. Smith*,<sup>130</sup> Mr. Justice Borins held that "it is the conduct alleged against the [fugitive] which is central to the hearing resulting from a request for extradition. It is the alleged criminality

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128. Note, however, that this exception to extradition was recently eroded by the House of Lords in *R. v. Chief Metropolitan Stipendiary Magistrate, ex parte Secretary of State for the Home Department*, [1988] 1 W.L.R. 1204 (H.L.).

129. [1976] 1 S.C.R. 219; see also *In re Brisbois*, 133 C.C.C. 188 (Ont. H.C.) (1962); *Virginia v. Cohen*, [1973] F.C. 622.

130. 15 C.C.C. 3d 16 (1984); see also *In re Smith and the Queen*, 16 C.C.C. 3d 10 (1984).

of this conduct to which attention must be paid.”<sup>131</sup> The inquiry is not focused on the legal framework of the requesting state. Instead, Canada must fit a set of facts that constitute the conduct of the fugitive into Canadian law in order to see whether conduct constitutes an offense under that particular law.<sup>132</sup> Using this “conduct” test, it is not necessary to determine whether the requesting state can make out a *prima facie* case under its criminal law. The essence is the sufficiency of evidence in the forum.<sup>133</sup>

The Supreme Court of Canada again had cause to deal with this issue in *Washington v. Johnson*.<sup>134</sup> In *Johnson*, the applicable treaty, the 1976 Extradition Treaty between Canada and the United States,<sup>135</sup> contained a list of offenses. Mr. Justice Wilson, writing for the majority, stated that the issue was whether the requesting state must establish that the offense charged in the foreign state is an offense in Canada or whether it is sufficient to show that the conduct charged would have amounted to a Canadian crime, listed in the treaty, if it had occurred in Canada.<sup>136</sup> The court noted that Article 2 of the treaty requires a combination extraditable crime and double criminality, with a minimum punishment time of one year, and held that the double criminality rule looks to the conduct of the fugitive.<sup>137</sup>

The *Johnson* court quoted the following passage from La Forest’s *Extradition To and From Canada*:

An extradition crime may broadly be defined as an act of which a person is accused, or has been convicted of having committed within the jurisdiction of one state that constitutes a crime in that state and in the state where that person is found, and that is mentioned or described in an extradition treaty between those states under a name or description by which it is known in each state.<sup>138</sup>

It is not necessary for an exact identity between terminology in the two states, nor for the elements of the crime to be the same in both states.

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131. *Smith*, 15 C.C.C. 3d at 16.

132. *Id.*

133. *See* United States v. Caro-Payan, (Ont. D.C. Feb. 18, 1988) (unreported).

134. 40 C.C.C. 3d 546 (1988).

135. 1976 Extradition Treaty, Canada-United States, 27 U.S.T. 983, Can. T.S. No. 3.

136. *Johnson*, 40 C.C.C. 3d at 548.

137. *Id.* at 553.

138. G.V. LA FOREST, *supra* note 17, at 42; *see also* SHEARER, EXTRADITION IN INTERNATIONAL LAW 137 (1971).

This would be an impossible task to accomplish.<sup>139</sup> The focus is undeniably upon the conduct of the fugitive.

The British Columbia Court of Appeal recently dealt with the interplay of extraditable crime and double criminality in *United States v. McVey*.<sup>140</sup> This case involved an extradition request for the offense of submitting false statements to the United States Customs Service. This particular offense was not listed in the schedule to the Canada-United States Extradition Treaty of 1976. However, the crime of forgery is listed in the same Treaty. It was argued that the definition of forgery was broad enough to include McVey's alleged crime. In the United States his offense did not constitute forgery. The British Columbia Court of Appeal, referring once again to La Forest's text,<sup>141</sup> held that the offense must be listed in the schedule to the Treaty under some name or description by which it is known in each state.<sup>142</sup> This case demonstrates the need for the no-list approach to extradition, in which the criminality of the conduct in both states is the keynote coupled with a minimum punishability requirement. It gets away from the limiting effect of the enumerative method.<sup>143</sup>

None of the authorities discussed in this section so far bear directly upon this case. Although McVey's conduct was criminal in the United States, and would have been considered criminal if it had occurred in Canada, the difficult question is to decide what construction must be placed upon Article 2 of the Treaty.<sup>144</sup>

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139. See 1 H. BOOTH, *supra* note 5, at 50, where the author states that the extradition court cannot "become a tribunal of foreign law." See also *R. v. Governor of Pentonville Prison ex parte Elliott*, [1975] Crim. L.R. 516; *R. v. Governor of Pentonville Prison ex parte Narang*, [1978] A.C. 247.

140. 33 B.C.L.R. 2d 28 (1989).

141. See *supra* note 138.

142. *McVey*, 33 B.C.L.R. 2d at 30.

143. M.C. BASSIOUNI, *supra* note 1, at 330.

144. This Article provides as follows:

(1) Persons shall be delivered up according to the provisions of this Treaty for any of the offenses listed in the Schedule annexed to this Treaty, which is an integral part of this Treaty, provided these offenses are punishable by the laws of both Contracting Parties by a term of imprisonment exceeding one year.

(2) Extradition shall also be granted for attempts to commit, or conspiracy to commit or being a party to any of the offenses listed in the annexed Schedule.

(3) Extradition shall also be granted for any offense against a federal law of the United States in which one of the offenses listed in the annexed



The key question to be addressed is whether the alleged criminal conduct in the requesting state must be enumerated in the extradition treaty as well as the offence established by Canadian law, if it has another name, or whether it is sufficient to have the dual criminality conception as to the conduct present and an enumeration of the Canadian offense in the treaty alone. In interpreting treaty articles, and attempting to shed some light on the complex double criminality issue presented in *McVey*, some fairly recent cases may be of valuable guidance. In *United States v. Smith*,<sup>145</sup> Mr. Justice Borins saw the need for double criminality with respect to the fugitive's conduct and an enumeration of the offense in the treaty. He relied upon La Forest's *Extradition To and From Canada*<sup>146</sup> for the proposition that "if the act charged falls within the definition of different crimes in the two countries, the names of the crimes in both countries must appear in the treaty; otherwise extradition will be refused."<sup>147</sup>

A second valuable case is *United States v. Caro-Payan*,<sup>148</sup> which concerned, *inter alia*, the question of whether a continuing criminal enterprise relating to drug trafficking was an extraditable offence. Madame Justice Smith's reasoning succinctly addressed the point of extradition law raised in *McVey* and referred to the earlier case of *Sudar v. United States*.<sup>149</sup> The justice stated that "a treaty must be [given] a liberal interpretation in working to achieve its stated ends."<sup>150</sup>

Madame Justice Smith applied the British cases of *Nielsen*<sup>151</sup> and

Schedule, or made extraditable by paragraph (2) of this Article, is a substantial element, even if transporting, transportation, the use of the mails or interstate facilities are also elements of the specific offense.

1976 Extradition Treaty, Canada-United States, art. II, 27 U.S.T., 983 Can. T.S. No. 3.

145. 15 C.C.C. 3d 16 (1984).

146. G.V. LA FOREST, *supra* note 138, at 52-55.

147. *Smith*, 15 C.C.C. at 28. This is the line that the British Columbia Court of Appeal took in *McVey*, 33 B.C.L.R. 2d 28 (1989), *see supra* notes 140-143 and accompanying text, and more recently in *In re Ogoshi*, No. CC891575 (British Columbia Supreme Court Nov. 3, 1989) (unreported).

148. (Ont. D.C. Feb. 18, 1988) (unreported).

149. 39 N.R. 433 (1981).

150. *Caro-Payan*, (Ont. D.C. Feb. 18, 1988) (unreported). This emphasis on not frustrating the purpose of the treaty by resorting to technical arguments can also be seen in the trilogy of cases decided by the Supreme Court of Canada: *Allard and Charette v. United States* [1987] 1 S.C.R. 564; *Mellino v. Argentina*, [1987] 1 S.C.R. 536, and *Schmidt v. United States*, [1987] 1 S.C.R. 500.

151. [1984] 2 W.L.R. 737.

*McCaffery*,<sup>152</sup> and held that the old double criminality test, which required an almost exact pairing of all the constituent elements of the offense, is not the requisite test today. Instead, the conduct test should be applied. Of the utmost relevance to the *McVey* issue is the statement that “[t]he extradition judge need only consider whether the evidence against the fugitive would justify a committal for trial if the ‘conduct alleged’ had been committed in Canada, and that conduct is a crime that is listed in the *Treaty*.”<sup>153</sup>

The decision in *Caro-Payan*, which holds that for double criminality to be present there is no need for all the constituent elements of the offense charged to be the same in both the requesting and requested state, is non-controversial. Madame Justice Smith argued that “[i]t is the conduct that must be criminal and not the offence that must be identical in both the requested and requesting State.”<sup>154</sup> She concluded that this is a natural extension of *Nielsen* and *McCaffery* and is “totally consistent” with the observations of La Forest in *Extradition to and From Canada*.<sup>155</sup>

Madame Justice Smith seems to be holding that as long as the conduct would be criminal if committed in Canada, and if that conduct is a listed crime in the treaty, then there is no necessity for it to be also referred to in the treaty list under a name by which it is known in the requesting state. This point is re-emphasized further in the same case where she states:

It is no longer necessary for the extradition judge to determine whether a “continuing criminal enterprise”, as alleged in Count 1 of the Requesting State’s indictment, is an offence known in Canada. *Rather the question is whether the “conduct” alleged against the fugitive would, if committed in Canada, constitute a crime that is listed in the Schedule of offences to the Extradition Treaty.*<sup>156</sup>

This view would appear to go against the grain of La Forest’s statement that if the “act charged amounted [to different offenses in the requesting and requested states], both crimes would have to be

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152. [1984] 1 W.W.R. 867.

153. *Caro-Payan*, (Ont. D.C. Feb. 18, 1988) (unreported).

154. *Id.*

155. *Id.*; see G.V. LA FOREST, *supra* note 138, at 57.

156. *Caro-Payan*, (Ont. D.C. Feb. 18, 1988) (unreported) (emphasis added).

listed in the treaty before extradition would be granted.”<sup>157</sup> The *McVey* and *Ogoshi* courts relied upon La Forest’s statement, but however much assistance a doctrinal view may be, it is clearly not binding on the courts. There must be a primary interpretation of the sections of the statute and articles of the treaty. As indicated earlier, there is a good argument to be made that Article 2(1) of the 1976 Extradition Treaty does not require the offense to be listed under names by which it is known in both states.<sup>158</sup>

The third case is particularly relevant because it is factually similar to *McVey*. In *United States v. Golitschek*,<sup>159</sup> Madame Justice Smith held, similar to her holding in *Caro-Payan*, that the essence of double criminality is conduct-based. In *Golitschek*, the fugitive was alleged to have conspired with others outside of the United States to procure ten military helicopters and to take them outside of the United States to a state to which export under United States law is prohibited.<sup>160</sup> In order to accomplish this export, the fugitive and others produced and submitted a false document (end-user certificate) to obtain the required license to export from the United States Government.<sup>161</sup>

Madame Justice Smith held that the essence of the offense was a conspiracy to obtain an export license by false pretenses or by false statement.<sup>162</sup> Canada utilizes extra-territorial jurisdiction over conspiracies pursuant to section 423(4) of the Criminal Code and the substance of the conspiracy would give rise to the offense of obtaining by false pretenses, (section 321(a)), forgery or making false documents, (section 324(1)), uttering a false document, (section 325), and making false statements to obtain an export license under the *Export and Import Permits Act*.<sup>163</sup> Thus, the fugitive’s conduct would be capable of

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157. G.V. LA FOREST, *supra* note 138, at 56-57.

158. See *supra* notes 140-157 and accompanying text.

159. (Ont. D.C. January 1986) (unreported). Golitschek was extradited to the United States and was prosecuted and found guilty in March 1986.

160. *Id.*

161. *Id.*

162. *Id.* The false pretence was contained in the end-user certificate which indicated the helicopters were going to Spain rather than Iran. The essence of the second offense was conspiracy to forge or make false documents, based on the facts that if documents were presented to the U.S. authorities certifying that the helicopters were going to Spain so that they could effect an export to Iran, it would be by means of a false document. *Id.*

163. Madame Justice Smith refers to the *Import and Export Act*, section 16. This appears to be in error. I assume that she meant section 17 of the above named statute, dealing with false and misleading information and misrepresentation. See

prosecution in Canada if Canada was in the position of the United States.

Madame Justice Smith went on to hold that this conduct on the part of the fugitive was covered by several offenses listed in the schedule of offenses appended to the Treaty, namely Numbers 12 (obtaining property, money or valuable security by false pretences), 17 (offenses against the laws relating to forgery), and 19 (making of false affidavit or statutory declaration for any extrajudicial purpose). Article 2(2) of the Treaty stipulates that conspiracy to commit any of these offenses is also extraditable.<sup>164</sup> In addition, Count 2 on the extradition indictment alleged a conspiracy to obtain an export license by false pretenses using the telephone and telex.<sup>165</sup> Although there is no precise Canadian equivalent to fraud or obtaining property by wire, Madame Justice Smith emphasized that it is the underlying *conduct* covered by the Treaty which must be considered. In this case, it was the use of false pretenses to obtain an export license and the method by which the particular crime was executed was not relevant. Therefore, this offense was covered by Number 12 of the Schedule of Offences.

Madame Justice Smith concluded that the conduct on all counts would give rise to criminal offenses in Canada and all were listed in the Treaty. It is important to note that she did not discuss the issue raised in *McVey*, which was that in the United States the offense did not constitute forgery.<sup>166</sup> She did not question that the Schedule encompassed the offenses on the extradition indictment. As discussed earlier, this approach is the one that seems to be in keeping with the purpose behind the extradition process. The rights of the fugitive are safeguarded, as he or she will not be extradited unless the conduct is considered criminal in both states and is punishable by a term of imprisonment exceeding one year pursuant to Article 2(1) of the Treaty.

This provision is supplemented by Article 10, which requires that the evidence must be sufficient to justify committal for trial if the offense had been committed in the territory of the requested state.<sup>167</sup> The important question raised is why the *McVey* court, which failed to look

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R.S.C. 1985, ch. E-19.

164. 1976 Extradition Treaty, Canada-United States, art. II, section 1, 27 U.S.T. 983, Can. T.S. No. 3.

165. *Golitschek*, (Ont. D.C. January 1986) (unreported).

166. See *supra* notes 140-143 and accompanying text.

167. 1976 Extradition Treaty, Canada-United States, art X, 27 U.S.T. 983, Can. T.S. No. 3.

beyond the crime of "forgery" as listed in the Treaty, did not consider the "false pretenses" possibility as the *Golitschek* court did.

The same approach utilized in *Golitschek* was also taken by the Superior Court of Quebec in *United States v. Meredith*,<sup>168</sup> where Mr. Justice Hannan held that the nature and type of crime in the U.S. indictment, obtaining goods using false pretenses, was recognized in Canada. He argued as follows:

If the conduct of the accused, had it been committed in Canada would give rise to offences in Canada, and these offences are caught in the net of criminal offences covered by the Treaty, then the conduct with which the accused is charged as being an offence in the United States is an extradition offence. It is not the *title of the offence which is important but rather the essential element*, so that an offence may be subject to the treaty because of its essential elements though it not be there mentioned by name.<sup>169</sup>

In assessing the position taken by Canadian courts, it is clear that the case law stresses an interpretation of treaty obligations that is liberal and fair and gives effect to Canada's international obligations. It is also clear that section 2 of the *Extradition Act* has been interpreted to mean that the conduct must be viewed as criminal, if it had occurred in Canada. Section 2 allows for extradition as long as the "Canadian version" of the criminal conduct amounting to an offense is "described" in a "list-treaty." Section 3 of the *Extradition Act* provides that in the event of inconsistency between the Act and the extradition arrangement, the arrangement will govern and the Act must be so read and construed. It is therefore necessary to look at Canada's bilateral arrangements on a treaty by treaty basis. The 1976 Extradition Treaty with the United States is for obvious geographical reasons the most utilized and is the one at issue in the recent *McVey* case.

When the wording of Article 2, (1) of the 1976 Extradition Treaty is examined, it can be readily divided into two distinct parts: (1) persons shall be extradited according to the provisions of this Treaty for any of the offenses listed in the Schedule annexed to the Treaty, which is an integral part of this Treaty; and (2) these listed offenses must be punishable by the laws of both contracting parties by a term of imprisonment of no less than one year.<sup>170</sup>

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168. No. 500-27-004092-872 (Que. S.C. Sept. 4, 1987) (unreported).

169. *Id.* at 16 (emphasis added).

170. 1976 Extradition Treaty, Canada-United States, art. II, section 1, 27

As indicated above, there may be no need for the denomination of the offense to be the same in the requesting and requested state.<sup>171</sup> Similarly, the scope of liability need not be co-extensive. It is enough for the extradition process that the offense charged is considered to be criminal conduct in both states. The intention of the parties to the treaty was to extradite on the basis of reciprocity and the second part of Article 2 (1) should be read in this light. There should be a fair and liberal interpretation of extradition treaties that will not hinder the working and narrow the operation of the arrangement.

The word "offences" utilized in Article 2 (1) of the Treaty should be read to mean "conduct," and any "conduct" listed in the treaty should be extraditable, provided the conduct is considered criminal in both states and both states have a minimum punishability for it of at least one year. This would seem to fit well within the analysis of recent Canadian and British decisions considered earlier. It should also be recognized that in determining the extraditable nature of the crime, it is necessary pursuant to Article 9(3) of the 1976 Extradition Treaty to provide that there is "such evidence, as according to the terms of the *requested* State, would justify his arrest and committal for trial if the offence had been committed there . . . ."<sup>172</sup> This is a safeguard for the fugitive - extradition will not be granted for acts not considered criminal conduct in both states or where there is an insufficiency of evidence. The basis for these Articles is found in section 18 of the *Extradition Act*.<sup>173</sup>

This issue of double criminality interfaces with the principle of specialty, which holds that a person extradited shall not be tried or punished in the requesting state for an offense other than that for which extradition has been granted.<sup>174</sup> It is important to note here that the specialty principle is linked to the rigid approach of non-extradition

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U.S.T. 983, Can. T.S. No. 3.

171. See *Johnson*, 40 C.C.C. 3d at 546, discussed *supra* notes 134-139 and accompanying text; *Smith*, 15 C.C.C. 3d at 16, discussed *supra* notes 145-147 and accompanying text; *Caro-Payan*, (Ont. D.C. Feb. 18, 1988) (unreported), discussed *supra* notes 148-158 and accompanying text; *Meredith*, No. 500-27-0004092-872 (Que. S.C. Sept. 4, 1987) (unreported), discussed *supra* notes 168-169 and accompanying text.

172. 1976 Extradition Treaty, Canada-United States, art. IX, 27 U.S.T. 983, Can T.S. No. 3 (emphasis added).

173. Extradition Act, 1989, ch. 33, § 18.

174. 1976 Extradition Treaty, Canada-United States, art. XII, 27 U.S.T. 983, Can. T.S. No. 3.

adopted by the *McVey* court.<sup>175</sup> However, if a rigid, technical interpretation is to be made of Article 2 (1) of the Treaty, it would result in complex difficulties concerning criminal conduct. Several questions have arisen over the last decade with respect to whether double criminality may be achieved when dealing with foreign legislation that has no exact Canadian counterpart.

To use current examples, would offenses under the United States' laws such as RICO<sup>176</sup> and CCE<sup>177</sup> find equivalents under Canadian criminal law? Assume the 1976 Treaty is strictly interpreted and extradition could only take place for "forgery." If the conduct in the U.S. would not be prosecuted as "forgery" under the U.S. Code and other legislation, would this result in a violation of the specialty principle? The British Columbia Supreme Court, in the *habeas corpus* application in *In re McVey*,<sup>178</sup> held that the specialty principle would indeed be violated. Again, this type of analysis would seem to be artificial and defeat the purpose of the Treaty. The cornerstone of the Treaty is reciprocity and recognition by both states of the fact that the alleged conduct is criminal. To put up these technical roadblocks hobbles the efficacy of the whole process. Additionally, it should be noted that when Canada extradites for an offense listed in the Treaty, the requesting state may well be prosecuting under a different technical name. However, the emphasis always remains upon the conduct for which the extradition was granted; unrelated offenses allegedly committed before the extradition was granted are not included. As Mr. Justice La Forest stated in *Parisien v. The Queen*,<sup>179</sup> a state to which a request for extradition is presented is under no obligation to surrender the fugitive for prosecution in the requesting state "for behaviour not considered criminal in the requested state."<sup>180</sup> This is the basic principle upon which the process is founded, as expressed in the maxim *nulla poena sine lege*, - "no punishment without law."

In the case of *Sudar v. United States*,<sup>181</sup> the Ontario High Court held that extradition on charges of racketeering and conspiracy to racketeer could take place. It based this holding on the following rationale:

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175. See *supra* notes 140-147 and accompanying text.

176. Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 (1962).

177. Continuing Criminal Enterprise Act, 21 U.S.C. § 848(b) (1970).

178. 30 B.C.L.R. 2d 197 (1988).

179. [1988] 1 S.C.R. 950.

180. *Id.* at 956-57.

181. 39 N.R. 433 (1981).

[T]he only real substantive components of the indictment against Sudar for the purposes of extradition are the conspiracy . . . and the activities of murder, threats to murder etc. There is no doubt as to the criminality of these activities and of any conspiracy in relation thereto. They are recognized as such the world over.<sup>182</sup>

This appears to be an approach based upon conduct rather than denomination.<sup>183</sup> It was not necessary to find that the acts charged in the United States were also set forth in the Treaty. The basic problem is whether the extradition is granted for the offenses as named under the United States statute, or whether extradition is granted by the extradition court because the offenses are considered criminal in Canada. If the result is that the crimes are those articulated by the court, then any prosecution in the United States under a special statute would violate the principle of specialty. Canada extradited for the criminal conduct involved - conspiracy, murder, threats of murder, arson and extortion. All of these offenses are listed in the Treaty. However, Sudar was indicted in the United States and eventually prosecuted under RICO.

A similar situation arose in the Australian case of *Riley v. Commonwealth*,<sup>184</sup> in which the fugitives were sought by the United States for the offence of continuing criminal enterprise (CCE) under 21 U.S.C. § 848.<sup>185</sup> The fugitives were involved in a series of offenses regarding importation and possession for the purpose of distributing a narcotic.<sup>186</sup> The Australian court addressed the issue of whether CCE was an extraditable offense under the 1976 Treaty between Australia and the United States.<sup>187</sup> The schedule of offences appended to the Treaty had no CCE offense. However, the court assessed whether the

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182. *Id.*

183. For a criticism of the *Sudar* decision, see Bernholz, Bernholz & Herman, *International Extradition in Drug Cases*, 10 N.C.J. INT'L L. AND COMM. REG. 353 (1985), in which the authors argue that "the determination whether [CCE] . . . is recognized as punishable in the requested state must be made with reference to CCE as a whole and not its separate parts. Extradition is sought, granted or denied on the basis of the overall crime." *Id.* at 36. The authors also suggest that "[w]hen the elements of CCE are combined, it is clear that the offence is an exclusive genus of United States criminal law. Because it is not punishable in foreign countries, it cannot satisfy double criminality, and thus, does not qualify as an extraditable offence." *Id.*

184. 60 A.L.J.R. 106 (Austl. 1985).

185. Continuing Criminal Enterprise Act, 21 U.S.C. § 848 (1970).

186. *Riley*, 60 A.L.J.R. 106.

187. 1976 Extradition Treaty, Australia-United States, 27 U.S.T. 957, TIAS 8234.



acts composing the CCE offense would be considered criminal in Australia if committed there. The court found that the conduct would have been criminal if committed in Australia, and concluded that the CCE offense was extraditable, even though an exact parallel did not exist under Australian law.<sup>188</sup> As to the issue of double criminality, the court reasoned that "because at least one act which formed an element of the offence of continuing enterprise, or an equivalent act, would have constituted an offence against a law . . . if it had occurred in New South Wales, the offence itself is an extradition crime."<sup>189</sup>

In the British case *United States v. McCaffery*,<sup>190</sup> the United States sought extradition for federal offenses which consisted of using wire, radio, or television to transmit communications for fraudulent purposes in interstate or foreign commerce and of knowing transportation of a stolen security in interstate or foreign commerce. The House of Lords had to address the issue that there was no English equivalent to the charges. Following the decision in *Nielsen*,<sup>191</sup> the court held that the offense was extraditable and applied the test enunciated in *Nielsen*, which stated that what must be considered "was whether the conduct of the accused, if it had been committed in England, would have constituted a crime falling within one or more descriptions in that list."<sup>192</sup>

In *Hagerman v. United States*,<sup>193</sup> CCE was once again under review. This particular crime is unknown to Canadian law. Mr. Justice McKenzie held that the intent of Article 2(3) of the 1976 Extradition Act was to create a new extradition crime category if it "fits the description of possessing as a substantial element a listed federal offence or one listed under art. 2(3) . . . ."<sup>194</sup> The thrust of the judgment seems to be that Article 2(3) was aimed at giving greater scope for extraditable crimes "even though they might possess the purely American characteristic of requiring transporting, transportation, the use of the mails in interstate facilities."<sup>195</sup> What Mr. Justice McKenzie sought was (1) an offense against the federal law of the United States; and (2) a substantial element of that offense must be one of the of-

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188. *Riley*, 60 A.L.J.R. at 106.

189. *Id.* at 109.

190. [1984] 2 All E.R. 570.

191. [1984] 2 All E.R. 81. See *supra* notes 53-64 and accompanying text for a discussion of *Nielsen*.

192. *McCaffery*, [1984] 2 All E.R. at 573; see *Nielsen*, 2 [1984] All E.R. at 573.

193. 44 C.C.C. 3d 157 (1988).

194. *Id.* at 162.

195. *Id.*

fenses listed in the schedule to the Treaty.<sup>196</sup>

## V. DOUBLE CRIMINALITY AND DUALITY OF JURISDICTIONAL BASES

One issue still to be addressed is the impact of assertions through domestic law of extraterritorial jurisdiction over criminal offenses and how this interacts with double criminality. As emphasized earlier, it is essential that the requested state views the offense for which extradition is sought as extraditable.<sup>197</sup> Here, the principles of jurisdiction over the offense are crucial.<sup>198</sup> If an extradition treaty provides for crimes which are considered extraditable crimes if committed within the requesting state's jurisdiction, then, as La Forest stated, "[g]enerally . . . it seems best to interpret jurisdiction generously. This is in fact what has happened. In practice whether the term 'territory' or 'jurisdiction' is used in the Treaty, jurisdiction has been broadly construed."<sup>199</sup>

This matter of double criminality and extraterritoriality has become increasingly important as crime has become more transnational in nature. Many of Canada's more recent extradition treaties provide that when the offense for which extradition is sought was committed outside of the territory of the requesting state, the requested state shall have the power to grant extradition if the laws of the requested state also provide for jurisdiction in similar circumstances.<sup>200</sup> Other treaties go further and provide that even when the requested state does not use

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196. *Id.* at 165. The scheduled offense does not have to be identical to the U.S. federal law that forms a substantial element. *Id.*

197. See *supra* notes 101-104 and accompanying text for the discussion on extraterritoriality and the 1989 British *Extradition Act*.

198. For an in depth analysis of this issue, see S.A. WILLIAMS & J.G. CASTEL, *CANADIAN CRIMINAL LAW: INTERNATIONAL AND TRANSNATIONAL ASPECTS*, chs. 1-5 (1981); see also van den Wyngaert, *Double Criminality as a Requirement to Jurisdiction*, in *DOUBLE CRIMINALITY: STUDIES IN INTERNATIONAL CRIMINAL LAW* 43, 46 (N. Jareborg ed. 1989).

199. G.V. LA FOREST, *supra* note 138, at 45.

200. See e.g., 1976 Extradition Treaty, Canada-United States, art. III, § 3, 27 U.S.T. 983, Can. T.S. No. 3; Extradition Treaty between Canada and India, art II, February 6, 1987; Treaty of Extradition between Canada and the United Mexican States, art XI, § 2, January 24, 1990; Extradition Treaty between Canada and the Republic of the Philippines, November 7, 1989; (no extradition without duality of jurisdictional basis).

a similar extraterritorial basis, extradition may be granted.<sup>201</sup>

One of Canada's newest treaties with the United Mexican States also provides specifically for the use of the active nationality basis of jurisdiction.<sup>202</sup> The 1988 Treaty between Canada and France is worded differently. It states in Article 6(1) that extradition may not be refused if the offense for which extradition is sought was committed in whole or in part in the territory of the requested state or elsewhere subject to its jurisdiction.<sup>203</sup> Moreover, Article 6(2) stipulates that extradition "*may not be refused* when the offence was committed outside the territory of the requesting state *unless* the legislation of the requested state does not authorize prosecution of the same offence . . . in corresponding circumstances."<sup>204</sup>

Similarly, the *European Convention on Extradition* provides in Article 7(2) that extradition may be refused, even though the offense is extraditable under the Convention, if the offense was committed other than in the territory of the requesting state and the requested state does not utilize a similar extraterritorial basis of jurisdiction.<sup>205</sup> Clearly, where both requested and requesting states utilize the same extraterritorial basis of jurisdiction over the offense, no problem is presented. The difficulty arises when the jurisdictional basis is not recognized by the requested state.<sup>206</sup> In such a case, unless the treaty provides specifically for extradition, double criminality will not be satisfied and extradition will be refused.<sup>207</sup> One concern underlying this limitation is that a requesting state may seek extradition of a national of the requested state on a "theory of liability that the requested state finds troubling."<sup>208</sup>

An interesting case dealing with the interface between double

201. See Protocol Amending the Treaty on Extradition between the United States and Canada, art. III. This protocol is not yet in force.

202. Treaty of Extradition between Canada and the United Mexican States, January 24, 1990.

203. Extradition Treaty between the Government of Canada and the Government of the Republic of France, art VI, § 1, Nov. 17, 1988.

204. *Id.* at art. VI, § 2 (emphasis added).

205. European Convention on Extradition, 1957, art. VII, § 2, E.T.S. No. 24.

206. See Blakesley, *A Conceptual Framework for Extradition and Jurisdiction over Extraterritorial Crimes*, 4 UTAH L. REV. 685, 744 (1984). The author labels this a "special use" of double criminality.

207. The United States recognizes this "special use" of double criminality. *Id.*

208. M. Tigar, *The Extradition Requirement of Double Criminality in Complex Cases: Illustrating the Rationale of Extradition* 14 (December 1989) (unpublished paper presented at Conference on Extradition, Siracusa, Sicily).

criminality and basis of jurisdiction is *France v. Moghadam*,<sup>209</sup> in which France sought the extradition of Moghadam, a United States resident, for complicity in an agreement to import heroin into France. The court addressed the subject of double criminality and extraterritoriality and determined on the facts of the case "that the exercise of extraterritorial jurisdiction [by the United States] over Moghadam (under analagous circumstances) would be unreasonable. Hence the requirements of dual criminality are not met . . . . [T]he extraterritorial exercise of jurisdiction must be reasonable."<sup>210</sup>

A commentator has argued that "[o]ne reason for prohibiting prosecution of those who have never physically entered the forum state is that legal remedies differ, and that such differences lead us to doubt whether an accused acted with enough knowledge, intent or desire to make inculcation reasonable."<sup>211</sup> Many states with whom Canada has extradition arrangements use the active nationality basis and it seems to be "in the interests of justice" and also in the interests of Canada to extradite in these circumstances to the state of nationality of the fugitive.<sup>212</sup>

In this era of increasing transnational and international crime, where a state's citizens may be victims of criminal offenses organized abroad, such as fraud or drug smuggling, it is reasonable and appropriate to bring a more relaxed view to this jurisdictional question. As long as the conduct can be considered criminal if committed in the requested state, then this should be sufficient. The duality of jurisdictional bases should not be paramount.<sup>213</sup>

The only caveat would be that such extraterritorial jurisdiction should be in accordance with international law.<sup>214</sup> Reciprocity on a strict basis would thwart the efficacy of the extradition process. As Canada's criminal jurisdiction is fairly conservative, based to the greatest extent on the territorial principle contained in section 6(2) of the Criminal Code,<sup>215</sup> unless specifically extended by other sections of the

209. 617 F. Supp. 777 (N.D. Cal. 1985).

210. *Id.* at 786-87.

211. M. Tigar, *supra* note 208, at 15.

212. See REPORT, *supra* note 43, at 18; see also section 2(3) of the new British *Extradition Act*, discussed *supra* notes 99-104 and accompanying text.

213. See REPORT, *supra* note 43, at 17.

214. *Id.* at 18.

215. Criminal Code of Canada, R.S.C. ch. C-46, § (6)(2) (19\_\_\_). See Libman v. The Queen, [1985] 2 S.C.R. 178 for an interpretation of section 6(2) of the Criminal Code.

Code or other Act of Parliament, Canada would be unduly limiting the possibility of extradition, even where the actual conduct is viewed as criminal and where there is a sufficiency of evidence. It does not seem that Canada views the use by other states of other bases of jurisdiction, such as active nationality, as being untenable or unjust. Indeed, in some limited circumstances concerning international crimes, *stricto sensu*, such as hijacking, hostage-taking, attacks on internationally protected persons and war crimes, Canada now utilizes this approach.<sup>216</sup>

## VI. THE FUTURE: A NEW CANADIAN EXTRADITION ACT AND A REFORMULATION OF DOUBLE CRIMINALITY

In the early sections of this article, the basic distinction between extradition to "foreign" states and rendition to Commonwealth states was mentioned.<sup>217</sup> Rendition under the Canadian *Fugitive Offenders Act*<sup>218</sup> is based upon Britain's now long repealed 1881 *Fugitive Offenders Act*.<sup>219</sup> Extradition is dealt with under the *Extradition Act*,<sup>220</sup> as supplemented or amended by bilateral treaties.<sup>221</sup> As this article is devoted to the principle of double criminality, it is beyond its scope to consider all of the differences between the two Acts and how they could be melded into one composite approach. It would also be beyond the present article to canvass all the views on whether rendition merits treatment separate from extradition. The last section has three purposes: (1) to detail succinctly the basic reasoning between different treatment of fugitives under the two schemes; (2) to analyze the Canadian Charter of Rights arguments that a fugitive under the present *Fugitive Offenders Act* could raise if treated differently; and (3) to make some suggestions based on the comparisons drawn above for a new composite Act.

The *Fugitive Offenders Act* imposes few of the traditional extradi-

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216. See Criminal Code of Canada, C.R.S. ch. C-46, §§ 7(3), (3.1), (3.5), (3.7), (3.71) (19\_\_\_).

217. See *supra* Part II.

218. Fugitive Offenders Act, R.S.C. ch. F-32 (1985).

219. Fugitive Offenders Act, 1881, 44 & 45 Vict., ch. 69, replaced by Fugitive Offenders Act, 1967, ch. 68, and Extradition Act, 1989, ch. 33. La Forest points out that "[t]he repeal of the British Act by Great Britain in 1967 has no effect in Canada because of the Statute of Westminster." See G.V. LA FOREST, *supra* note 138, at 153 n.1.

220. Extradition Act, R.S.C. ch. E-23 (1985).

221. *Id.* at § 3.

tion law safeguards, such as the specialty principle or the double criminality requirement. There are no treaties and no list of offenses appended to the Act itself. The omission of these formal safeguards clearly illustrates the differing principles and assumptions upon which intra-Commonwealth rendition was conceived and has operated. Since Canada was originally a part of the British Empire, it appeared that rigid extradition formality was unnecessary. Although a fugitive might be surrendered from one part of the Empire to another, he or she never officially left the jurisdiction of the highest appellate court, the Judicial Committee of the Privy Council.<sup>222</sup>

Some earlier court decisions clearly reflect this rationale. In *In re Harrison*,<sup>223</sup> the court commented that "[i]t is quite obvious that some additional care ought to be taken in the case of extraditing persons to foreign countries than in facilitating criminal proceedings in the various parts of the Empire, to which alone the Fugitive Offenders Act applies."<sup>224</sup> The New Zealand Supreme Court expressed a similar opinion in *Ex parte Lillywhite*,<sup>225</sup> where Justice Stout argued as follows:

At common law there was thought to be an asylum for foreign offenders; and it is only by virtue of treaties that foreign offenders are given up. The rendition of an offender against the Crown from one portion of the possessions of the Crown to another portion should, it seems to me, be differently viewed.<sup>226</sup>

Bearing in mind the change from Empire to Commonwealth and the resulting change in constitutional status of the member countries, many questions arose as to whether the *Fugitive Offenders Act* was appropriate and whether it still applied to all Commonwealth states.<sup>227</sup> Another aspect of international life that cannot be ignored is that there has been a diminution of shared political and social objectives of the member states. The overall complexion of the Commonwealth has dras-

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222. See O'Higgins, *Recent Practice under the Fugitive Offenders Act*, 1965 CRIM. L. REV. 133.

223. 25 B.C.R. 433 (1918).

224. *Id.* at 437.

225. 19 N.Z.L.R. 502 (1901).

226. *Id.* at 505.

227. The current Canadian *Fugitive Offenders Act* applies to any part of Her Majesty's Realms and Territories. See *Fugitive Offenders Act*, R.S.C. ch. F-32 §§ 2 & 3 (1985). If this is correctly interpreted as meaning those countries that recognize the Queen as the head of state, there are a number of Commonwealth countries to which rendition is not possible.

tically changed since 1881. The constituent members are not aligned on all issues, and certainly Great Britain no longer exercises dominion and control. For most of the countries, appeal to the Privy Council no longer exists.

In 1966 a Commonwealth Conference was held in London, England, and the problems concerning rendition were discussed. Following this meeting, the United Kingdom enacted a new *Fugitive Offenders Act*,<sup>228</sup> as did several other Commonwealth states, excluding Canada. The 1967 Act provided that intra-Commonwealth rendition would be conducted basically in the same manner as extradition, including such safeguards as double criminality.

Concerning double criminality and the lack thereof in the Canadian *Fugitive Offenders Act* as it still exists, G.V. La Forest made the following statement:

The act charged need not be an offence in Canada, let alone punishable by imprisonment with hard labour [see s. 4]. That is what makes the situations described above so difficult. The question whether a man should be surrendered from Canada should depend primarily on the seriousness with which the crime is regarded here, not in the foreign country. When the British Statute on which the Canadian Act is modelled was passed, the British Government could control the punishment inflicted for offences by virtue of disallowing and reserving colonial legislation as well as by statute of the Imperial Parliament. That situation is now largely of the past.<sup>229</sup>

Section 17 of the present Canadian *Fugitive Offenders Act* provides for situations where rendition may be refused because it would be unjust.<sup>230</sup> However, as La Forest suggests, "that section . . . should not be expected to bear the whole burden of what *has now become an obsolete and defective piece of legislation*."<sup>231</sup>

In 1978, Bill S-9 was introduced in Canada to bring into operation a new *Fugitive Offenders Act*.<sup>232</sup> It provided for rendition for crimes falling within a schedule of offenses appended to it. This schedule and

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228. Fugitive Offenders Act, 1967, ch. 68.

229. G.V. LA FOREST, *supra* note 138, at 157 (footnotes omitted).

230. Fugitive Offenders Act, R.S.C. ch. F-32 § 17 (1985).

231. G.V. LA FOREST, *supra* note 17, at 157 (emphasis added); *see also id.* at 166-69.

232. 30th Parliament, 4th Sess. 1978-79.

the one belonging to the proposed amended *Extradition Act* were to be the same. The idea of "returnable offence," mentioned in section 2(1) of Bill S-9, in effect established a double criminality requirement. This legislation would have brought Canada into line with the United Kingdom and other Commonwealth countries such as Australia. Unfortunately, it died on the order paper. However, in 1981 two writers commenting on the demise of Bill S-9 stated that "[w]ithout a doubt a new bill will be introduced soon which will cover the same ground. This may be done in the same form as the previous attempt or it is suggested the present system of extradition and rendition may be combined in one statute."<sup>233</sup>

Ten years later, in 1991, it is clear that Canada's extradition and rendition laws are still in need of change. It is equally clear that the changing international climate dictates that the same basic approach to extradition should be taken with respect to all countries, Commonwealth or otherwise. As for the double criminality requirement, the Law Reform Commission of Canada mentioned in 1984 that there are two Acts which, "for 'extradition' purposes, hold that the conduct in question must amount to a criminal offence under the law of both the requesting state and Canada, [but] do not make this a requirement for 'rendition' where an offence against the requesting state law suffices."<sup>234</sup>

The same Working Paper made the following observation:

[W]e have seen enough to convince us of the need to modernize our statutes concerning these subjects. However, before that can be done, the federal government will have to seek answers to questions such as . . . Does Canada need two Acts? Would not one suffice? Is there any longer a need to differentiate between "extradition" and "rendition?"<sup>235</sup>

Finally, the Law Reform Commission recommended that "the *Extradition Act* and *Fugitive Offenders Act* be amended to provide for uniformity of treatment of persons under both Acts."<sup>236</sup>

The *Charter of Rights* has since 1982 played a large part in as-

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233. S.A. WILLIAMS & J.G. CASTEL, *supra* note 198, at 341.

234. WORKING PAPER 37, LAW REFORM COMMISSION OF CANADA, EXTRATERRITORIAL JURISDICTION 136 (1984).

235. *Id.* at 137.

236. *Id.* at 137.



sessing Canada's extradition legislation, but this is not the place to recount this case law history. Nevertheless, based on what has already been said on the need to treat fugitives in the rendition process in the same way as fugitives in the extradition process, many sections of the Charter clearly apply.<sup>237</sup>

Separate and apart from the issue of modernizing the rendition and extradition processes by amalgamating them within one statute, there is the question of whether right now the *Fugitive Offenders Act* violates the Charter of Rights by not allowing for the principle of double criminality. Are fugitive offenders being denied fundamental justice and being subjected to inequality before and under the law? Why should X, being surrendered to Great Britain, not have the same safeguards as Y, being extradited to the United States or Germany?

It is far from surprising that such a Charter argument was raised in the case of *The Queen v. Taylor*.<sup>238</sup> Taylor argued, *inter alia*, that under the *Fugitive Offenders Act* his Charter Rights - guaranteed by sections 7 and 15<sup>239</sup> - had been violated, in that the offense for which the requesting state asked for his rendition was not be an offense under Canadian Criminal law, as contrasted with the double criminality safeguard of the current *Extradition Act*. Mr. Justice Scullion held that there was no such breach of his rights under the Charter "so fundamental as to cause [him] to declare the [*Fugitive Offenders Act*] or parts thereof of no force and effect under section 52 of the Charter."<sup>240</sup>

Based on the foregoing analysis, including Justice La Forest statement that the *Fugitive Offenders Act* is "an obsolete and defective piece of legislation,"<sup>241</sup> it is remarkable that Mr. Justice Scullion in 1988 was able to come to the conclusion that there is no need for the same safeguards in rendition as in extradition. To illustrate this, he refers to the need for safeguards when extraditing to a country where the laws and judicial system are fundamentally different, as opposed to rendition to a Commonwealth country sharing "a great deal in that

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237. See Part I, Constitution Act, 1982, which is Schedule B, Canada Act 1982 (U.K.), ch. 11. § VII (right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice); § XV (equality before and under the law; equal protection and equal benefit of the law without discrimination) (1982).

238. (1988) [Ont. Prov. Ct.].

239. See *supra* note 237.

240. *Taylor*, (1988) [Ont. Prov. Ct.] at 10.

241. G.V. LA FOREST, *supra* note 138, at 157; see also *R. v. Governor of Brixton Prison, ex parte Rush*, [1969] 1 W.L.R. 165.

common legal and political heritage."<sup>242</sup>

Although in the nineteenth and early twentieth centuries this may have been true, it is submitted that it is not so today, as evidenced by the perceived need for the safeguards in the 1967 Commonwealth Scheme. However, Mr. Justice Scullion seems to be unaware that Canada stands in almost splendid isolation in clinging to the nineteenth century approach to rendition. As *Aronson* indicated,<sup>243</sup> Canada would not get the same treatment from Great Britain if the shoe was on the other foot! Although the Commonwealth Law Ministers have recently considered a modification of the Rendition Scheme of 1967, the concentration appears to be on the *prima facie* case question, not on double criminality.

In conclusion, it is submitted that a new Canadian Extradition Act should be drafted that would combine extradition and rendition. The present scheme of two separate statutes no longer fits modern realities. The time is ripe for reform. Without addressing the issue of whether treaties should be entered into with Commonwealth countries as with other foreign states, or whether they may simply be designated, the section listing crimes that are extraditable should utilize the conduct approach,<sup>244</sup> coupled with a minimum punishability requirement. This revision would allow for a more flexible approach and yet still offer the fugitive the appropriate safeguards that are necessary.

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242. *Taylor*, (1988) [Ont. Prov. Ct.].

243. See *supra* notes 70-77 for a discussion of the *Aronson* case.

244. See *supra* notes 65-79, 110-127, 129-173.

# United States International Drug Control Policy, Extradition, and the Rule of Law in Colombia\*

Mark Andrew Sherman\*\*

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\*\* Visiting Fellow & Senior Instructor, The Catholic University of America, Columbus School of Law; B.A., The George Washington University, 1986; J.D., University of Miami, 1989. This article is a result of research performed during the spring and summer of 1990 in the United States and Colombia. I am grateful to Richard L. Fricker, and certain Colombian friends - including members of the Colombian Bar and press, and former high-ranking members of the Colombian government whose names I will not mention for security reasons - without whose help this work would be conspicuously deficient. I thank Harold A. McDougall for his comments on the draft. This article is dedicated to my fiancée, Jennifer Frank.

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## I. INTRODUCTION

The United States has been fighting the importation, distribution, and possession of illicit drugs for a long time.<sup>1</sup> However, only within the past fifteen to twenty years has international drug control become a major priority in the formulation of United States foreign policy. The recent United States emphasis on international drug control appears to be a result of the perceived national security threat posed by domestic increases in drug consumption, drug-related crime, and chemical dependency, and by the strength of multinational enterprises involved in

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1. Nineteenth century legislation includes the Act of February 23, 1887, Chap. 210, 24 Stat. 409, which banned the importation of opium into the United States by Chinese subjects and criminalized participation of United States citizens in opium trafficking. Hogan & Doyle, *The Federal Response: A Growing Role*, CRS REV. (Nov.-Dec. 1989). The beginning of the 20th century was marked by a meeting of the newly created Shanghai Opium Commission in 1909 and by a Hague Conference and accompanying international convention in 1912. *Id.* at 11. See Hague Convention on Narcotic Drugs, Jan. 23, 1912, T.S. No. 612, 38 Stat. 1912, 8 L.N.T.S. 187. Following from the prescriptions of the Hague Convention, which advocated greater domestic drug control, Congress passed the Harrison Narcotics Act of 1914, Pub. L. No. 63-223, 38 Stat. 785, which remained the principal drug control statute in the United States until 1970. Hogan & Doyle, *supra*, at 12. The Harrison Act was a tax law requiring all those legally involved in narcotics commerce to register with the Internal Revenue Service, to pay a tax, and to comply with certain order form requirements. *Id.* at 11. In 1937, Congress passed the Marihuana Tax Act, Pub. L. No. 75-238, 50 Stat. 551, which mirrored the Harrison act. Between 1935 and 1963, Congress increased the penalties for unlawful distribution and possession of illicit drugs. Hogan & Doyle, *supra*.

In 1961, President John F. Kennedy formed the President's Advisory Commission on Narcotics and Drug Abuse (the Prettyman Commission), and the Commission's 1963 report served as a blueprint for legislation in the years that followed. *Id.* at 12; see also Single Convention on Narcotic Drugs, March 30, 1961, 18 U.S.T. 1407, T.I.A.S. No. 6298, 520 U.N.T.S. 151 (amended by 26 U.S.T. 1439, T.I.A.S. No. 8118, 976 U.N.T.S. 3). In 1970, Congress passed the Controlled Substances Act, Pub. L. No. 91-513, 84 Stat. 1242, and the Controlled Substances Import and Export Act, Pub. L. No. 91-513, 84 Stat. 1285, which made substantial changes in the system of penalties for violations of law and increased regulation of the pharmaceuticals industry. Hogan & Doyle, *supra*, at 12; see also Convention on Psychotropic Substances, Feb. 21, 1971, T.I.A.S. No. 9725, 1019 U.N.T.S. 14956. More recent United States domestic legal machinations and international agreements concerning drug control are addressed *infra* notes 3, 67, 70, and 106.

drug trafficking.<sup>2</sup>

Although the United States seems to be amenable to multilateral approaches devoted to the reduction of international drug trafficking, a more searching inquiry reveals that it has given such approaches short shrift.<sup>3</sup> Rather, the United States takes the position that expanding extraterritorially the reach of its jurisdiction to prescribe and enforce its criminal laws is the most effective way of reducing international drug

2. See THE WHITE HOUSE, NATIONAL SECURITY STRATEGY OF THE UNITED STATES 7, 28 (1990). Consumption of and trafficking in illicit drugs is also on the rise in Western Europe. See Zagari & Fantauzzi, *European Integration and the Volcano of Illicit Drug Trafficking: Will 1992 Bring the Promised Avalanche of Cooperation?*, INT'L ENFORCEMENT L. REP. 190 (May 1990); Ernestus, *West German Government Considers Three Anti-Narcotics Initiatives*, INT'L ENFORCEMENT L. REP. 201 (May 1990). Some commentators have suggested that the relatively new United States emphasis on international drug control stems from the loss of the Soviet Union as the prime United States enemy. In essence, the United States has chosen drug traffickers as the "new" enemy. *Nightline: Washington's Dwindling Importance* (ABC television broadcast April 27, 1990) (comments of P.J. O'Rourke, columnist for Rolling Stone Magazine). Note, however, that such commentary preceded more recent events in the Persian Gulf.

3. From the beginning, the United States has participated in the search for multilateral solutions to stem international traffic in illicit drugs. See generally Bassiouni, *The International Narcotics Control Scheme*, in 2 INTERNATIONAL CRIMINAL LAW: PROCEDURE 507 (M. Bassiouni ed. 1986); Comment, *International Narcotics Control: A Proposal to Eradicate an International Menace*, 14 CAL. W. INT'L L.J. 530 (1984). The United States is a party to the most recent multilateral convention, see *United Nations: Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, Dec. 20, 1988, U.N. Doc. E/CONF. 82/15, Corr. 1 and Corr. 2, reprinted in 28 I.L.M. 493 (1989), and has endorsed the establishment of an International Criminal Court with jurisdiction over internationally recognized crimes such as terrorism, narcotics trafficking, genocide, and torture. See H.R. Con. Res. 66 (1990) (Currently under review by subcommittees on Human Rights and International Organizations and International Operations of the Committee on Foreign Affairs, United States House of Representatives).

Despite all of this, the United States has insisted on pursuing its own policy and prescribing and enforcing extraterritorially its domestic law. In this regard, the lack of United States financial support of multilateral and regional agencies charged with initiating programs to fight narcotics production, processing, trafficking, and abuse, such as the United Nations Fund for Drug Abuse Control (UNFDAC) and Inter-American Drug Abuse Control Commission (CICAD), reveals the actual absence of United States commitment to multilateral and regional solutions. For example, in Fiscal Year 1989, the United States Congress earmarked a mere \$2,000,000 to UNFDAC and only \$1,000,000 to CICAD. International Narcotics Control Act of 1988, 22 U.S.C. § 2222 (1988). In 1990, there was no such appropriation.

trafficking.<sup>4</sup>

While the United States policy is certainly bilateral in nature because extraterritorial enforcement of domestic criminal law requires the cooperation of other states, it is a mistake to infer that such cooperation is always voluntary. This is particularly true when the United States policy involves third world nations, where the culture differs radically thereby heightening the probability of friction caused by conflicting political priorities. Ultimately, when a less developed country is reluctant to cooperate with United States international drug control policy, the United States wastes no time in resorting to its substantial bargaining power. Thus, the United States drug control relationship with many third world nations is actually one of at least partial coercion.<sup>5</sup> Naturally, such arm-twisting by any nation in pursuit of a foreign policy objective is bound to upset the governments with which that country must work, but which may have differing perspectives on, and approaches to, the same objective. This describes the current situation existing among the United States and certain Latin American countries.<sup>6</sup>

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4. On the expanding nature of United States extraterritorial jurisdiction to prescribe and enforce see Zagaris & Rosenthal, *United States Jurisdictional Considerations in International Criminal Law*, 15 CAL. W. INT'L L.J. 303 (1985); see also Note, *Constructing the State Extraterritorially: Jurisdictional Discourse, the National Interest, and Transnational Norms*, 103 HARV. L. REV. 1273 (1990).

5. See *infra* note 70.

6. United States pursuit of international drug control by such means is usually defended by United States officials and other proponents on moral grounds. This, in turn, is reflective of a general United States attitude which has been particularly prevalent throughout the post-war era. In this regard, one well known commentator has suggested:

The disproportionately high level of United States activity and initiative in the international enforcement of criminal law reflects attitudes characteristic of United States approaches to international relations. Most notably, United States citizens often assume that the United States is obligated and even destined to play a leading role in dealing with most international problems. Far more than any other nation, the United States defines its national interests in such broad terms that few significant events lie outside their ambit. Global networks of military personnel, intelligence agents, and law enforcement officials are required merely to look after this wide array of interests. Yet criminal justice has historically been a domestic issue. Hence, other governments naturally respond to the United States expansive criminal law enforcement efforts with a mixture of gratitude, resentment, and ambivalence. Like other areas of international cooperation and conflict, foreign states welcome much of the United States assistance yet

Ultimately, the United States' position has had an adverse impact on its ability to carry out a successful drug control policy with the Andean nations of Colombia, Bolivia, and Peru—the producing, processing, and trafficking nations responsible for most of the world's supply of cocaine.<sup>7</sup> Colombia presents a particular problem because it is the home of some of the most successful drug traffickers, and it is the traffickers whom the United States seeks to immobilize by subjecting them to the jurisdiction of its criminal laws. In this regard, the United States has had to work closely with Colombia to facilitate the extradition of suspected traffickers from that country to the United States.

The relationship that has evolved between the United States and Colombia is notable for its schizophrenia. On one hand, the United States demands the extradition of Colombian citizens suspected of breaking United States laws against drug trafficking, even where a suspect has acted wholly outside of United States territory. On the other hand, cocaine consumption is not a serious problem in Colombia, and drug trafficking is viewed by Colombians as one which can be reduced

react testily to the demands and pressures that frequently accompany it.

Nadelmann, *The Role of the United States in the International Enforcement of Criminal Law*, 31 HARV. INT'L L.J. 37, 39-40 (1990).

7. The policy has also strained United States relations with important Latin American allies such as Mexico, Costa Rica, and Honduras. With regard to Mexico, most recently the United States orchestrated the forceful abduction of Dr. Humberto Alvarez Machain to face charges in the United States stemming from the 1985 murder of DEA agent Enrique Camarena. The abduction was carried out without the host government's permission, and resulted in a severe rebuke from Mexican President Carlos Salinas de Gortari. *See U.S. Says it Won't Return Mexican Doctor Linked to Drug Trafficking*, N.Y. Times, April 21, 1990, at A3, col. 1. Ultimately, the trial court decided that the abduction was illegal, and that Alvarez must be returned to Mexico. *United States v. Caro-Quintero*, 745 F. Supp. 599 (C.D. Cal. 1990); *Defendant was Abducted in DEA Case, Judge Says*, Washington Post, Aug. 11, 1990, at A3, col. 5.

With regard to Costa Rica, the only established democracy in Central America, the foreign policy of the former Reagan Administration toward Nicaragua, i.e., encouraging United States assistance to the Nicaraguan *contras* by any means possible, including participation in drug trafficking, led to Costa Rica's current status as a transshipment point for cocaine and marijuana. *See Deputies Move to Continue Narcotics Probe*, Tico Times (Costa Rica), May 11, 1990, at 5, col. 1; *Accused U.S. Drug Trafficker Reported Comfy*, Tico Times, May 4, 1990, at 32, col. 1.

As to Honduras, in April, 1988, the United States pressured that country to deport to the United States suspected drug trafficker Juan Ramon Matta Ballesteros. *See Matta-Ballesteros v. Henman*, 896 F.2d 255 (7th Cir.), *cert. denied*, 111 S. Ct 209 (1990); *U.S. v. Matta-Ballesteros*, 700 F. Supp. 528 (N.D. Fla. 1988); Nadelmann, *supra* note 6, at 73.

through demand reduction in the United States combined with programs which will help stimulate the Colombian economy.<sup>8</sup> Colombians object to having their fellow citizens extradited and tried in the United States, a nation whose culture and legal tradition differ markedly from those of Colombia, and whose people are the primary users of cocaine.<sup>9</sup> Colombians assert that drug trafficking suspects who are Colombian citizens should be tried in Colombia, if at all.

Of course, the United States' response to the Colombian position is that the Colombian justice system is paralyzed by drug-related violence and corruption and, therefore, is incapable of dealing effectively with the problem.<sup>10</sup> Thus, to the United States, the only solution is to bring alleged traffickers, including Colombian citizens, to the United States for trial.

The problem with the "paralysis" argument is that it is bolstered by at least three as yet unquestioned assumptions. First, the argument assumes that the United States' justice system is dealing effectively with international drug trafficking because those being extradited, prosecuted, and convicted are important players in the drug trafficking business, and their convictions will reduce the flow of illegal drugs into the United States. A second assumption is that Colombia should view the drug trafficking problem with a moral disdain equal to that of the United States. Finally, the argument assumes that all of the violence in Colombia attributed to drug traffickers has been, in fact, carried out by

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8. See *Colombia Leader Emphasizes Anti-Terrorism*, N.Y. Times, Aug. 12, 1990, at A6, col. 1 (discussing new Colombian President Cesar Gavaria Trujillo's position that while "drug terrorism" is a Colombian problem, narcotics trafficking is "an international phenomenon that can only be resolved through joint action of all affected countries . . . [including] a substantial reduction in demand in consumer countries").

9. See *Extraditables Iniciaron Huelga de Hambre en Bogota*, El Siglo (Colombia), July 9, 1990, at 1, col. 1; *Bogota Chief Tells of Drug War's Toll*, N.Y. Times, May 27, 1990, at A3, col. 4; *Bogota Mayor Advocates Talks with Traffickers*, Wash. Post, April 24, 1990, at A18, col. 1; *Americans, Colombians Disagree Over Drug War, Survey Shows*, Wash. Post, Feb. 9, 1990, at A18, col. 4.

10. Proponents of this argument cite as justification the killings of Colombian judges and politicians, and other brutal acts against the government and citizens attributed to members of the illegal drug business. They also cite the 1987 release of suspected drug trafficker Jorge Ochoa from detention in a Colombian prison—presumably the result of a kickback. However, these same commentators uniformly fail to give any credence to the fact that Ochoa was released pursuant to an affirmative judicial finding of unlawful detention following his petition for a writ of habeas corpus. See, e.g., S. McDONALD, *DANCING ON A VOLCANO: THE LATIN AMERICAN DRUG TRADE* 41 (1988).



the traffickers. Each of these assumptions is dubious.

While the United States has extradited fourteen Colombian drug trafficking suspects since August, 1989,<sup>11</sup> none of the suspects are high level members of the illicit drug business, despite claims to the contrary.<sup>12</sup> Rather, these people are, if anything, low-level actors who cannot afford the political and paramilitary protection paid for by major traffickers.<sup>13</sup> If these "extraditables" are at all engaged in international

11. August, 1989 marked Colombia's resumption of extradition to the United States of suspected drug traffickers. See *infra* notes 106-126 and accompanying text.

12. A case in point is that of Jose Rafael Abello Silva, a Colombian extradited to the United States in October, 1989. Initially, Abello was reported to be a high ranking member of the Medellin Cartel. See *Medellin Suspect Extradited to the U.S.*, N.Y. Times, Oct. 30, 1989, at A13, col. 1 (high-level operative of Medellin Cartel); *Suspect is Extradited*, Newsday, Oct. 30, 1989, at 12 (Abello said to rank "number four" in the Medellin Cartel); *U.S. Jails Accused Master Drug Smuggler*, L.A. Times, Oct. 30, 1989, at A4, col. 4 (Abello accused of being Medellin Cartel's "master drug smuggler"). Abello was initially indicted in the United States in 1987 with three others on drug trafficking conspiracy charges. *United States v. Palmero*, No. 87-CR-140-B (N.D. Okla. filed Sept. 2, 1987); *United States v. Palmero*, No. 87-CR-140-B (N.D. Okla. filed Oct. 7, 1987) (superseding indictment).

Abello's alleged co-conspirators all pled guilty and agreed to testify against or provide information on him in exchange for light sentences. This led to the filing of a second superseding indictment naming only Abello. See *United States v. Abello Silva*, No. 87-CR-140-B (N.D. Okla. filed Jan. 3, 1990). The only testimony as to Abello's participation in the alleged conspiracy was that of his former co-defendants, persons related to his former co-defendants, other convicts, and Federal Bureau of Investigation Agents. Despite the previous news reports, Abello's position within the Medellin Cartel, if any ever existed, was never established. Ultimately, the jury saw its way clear to convict Abello and Judge Thomas Brett sentenced him to thirty years in prison, the maximum allowable under the existing United States-Colombia extradition regime. See *Extradited Colombian Drug Trafficker Sentenced to Thirty Years*, Reuter Libr. Rep., May 29, 1990; *Jury Convicts Reputed Key Colombian Drug Figure*, L.A. Times, May 20 1990, at A27, col. 1 (Abello reported as "reputed . . . key figure in the Medellin Cartel"). Regarding the current United States-Colombia extradition regime, see *infra* notes 106-126 and accompanying text.

13. A case in point here is that of Edward Mitchell, a United States citizen extradited from Colombia in July 1990. Mitchell was indicted in the United States on charges of conspiracy in 1983. The charges stem from his alleged role in a Colombia-Milwaukee, Wisconsin cocaine ring. *United States v. Mitchell*, No. 83-CR-86 (E.D. Wis. filed June 14, 1983). Notably, in light of the news reports which followed the Abello extradition, and the lack of such reports following Mitchell's extradition, one can reasonably deduce that Mitchell was not considered a major suspect. Indeed, it seems that anyone who is considered to be a "drug baron" stands little chance of making it out of Colombia alive. For example, in 1989, alleged Colombian cocaine trafficker Jose Gonsalo Rodriguez Gacha was killed by Colombian police. The last "ma-

drug trafficking, it is clear that they are considered by their superiors to be expendable and are, therefore, easy targets for the Colombian authorities and the United States Drug Enforcement Administration (DEA). Additionally, despite the fact that recreational drug consumption is not a problem in Colombia, the United States has asked Colombian civilians to support a policy which has helped transform their country into a police state. At the same time, the United States has been unwilling to engage in a comprehensive drug demand reduction program. Lastly, it is not clear that all of the violence carried out against the Colombian government and justice system is attributable to the traffickers. To be sure, the traffickers are a dangerous and violent group. However, it must also be recognized that Colombian society has been for many years characterized by violence; it is permeated with various guerilla, paramilitary fascist and rural "self-protection" groups,<sup>14</sup> and government military and police organizations which act with virtual autonomy.<sup>15</sup>

There is much more to international drug trafficking than meets the eye, and the current United States policy is unable to meet the challenge. United States' international drug control policy has addressed neither cultural, political, nor socioeconomic underpinnings which have given rise to the major role of Colombia in international drug trafficking.<sup>16</sup> Neither has the United States considered the sensitivity of Latin American nations to outside intervention.<sup>17</sup>

The analysis cannot end here, however. While coercion has had much to do with the Colombian government's cooperation with United States international drug control policy, it does not tell the whole story.

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jor" cocaine trafficker to be brought to the United States was Carlos Lehder-Rivas in 1987.

14. See *infra* notes 42, 46 and accompanying text.

15. See *infra* note 32.

16. For example, many poor Colombians view the drug business as the only viable alternative to climb the economic ladder in the absence of an effective welfare state. See *Medellin Journal: In the Capital of Cocaine, Savagery is the Habit*, N.Y. Times, June 7, 1990, at A3, col. 1. Though largely unreported in the United States, much of the drug-related violence in Colombia is the result of turf wars taking place between private armies commanded by members of the Colombian elite, such as Victor Corraza, who are engaged in cocaine trafficking, and those of nonmembers such as Pablo Escobar, Jorge Ochoa, and, formerly, Jose Gonsalo Rodriguez Gacha.

17. See Charter of the Organization of American States, arts 19, 20, and 21 (declaring nonintervention as a principle). This sensitivity was most recently witnessed in the aftermath of the United States invasion of Panama in December 1989. See *Latins Leery of U.S. Military*, Wash. Post, Jan. 9, 1990, at A1, col. 1.

In Colombia, as in the United States, there are members of government who have used the drug trafficking issue for personal and political advantage. In addition, because many high ranking Colombian politicians have strong familial or commercial ties with the United States and do not want to jeopardize those ties, they lack the political will to diverge from United States policy. While there have been brief periods in Colombia's recent political history where the government has sought to distance itself from the United States,<sup>18</sup> the domination of Colombian politics by members of the small social elite, and the considerable political influence of Colombian police and military organizations, have assured continued official Colombian support for Washington's policies.

The practical effect on Colombian society resulting from the United States international drug control policy and Colombian governmental complicity with that policy has been further detraction of Colombia's ability to govern itself according to the rule of law. The continued extradition of Colombian nationals to the United States, despite adverse rulings on the subject by the Colombian Supreme Court of Justice (SCJ), has caused bitterness among the intensely proud Colombian populace. The government stands accused of pandering to United States interests while Colombian society remains under a system of martial law which only promotes continued violence.<sup>19</sup> The United States does virtually nothing to effectively encourage the Colombian government to abide by the Colombian Constitution and to appropriate funds aimed at strengthening that country's understaffed, underequipped,<sup>20</sup> and overburdened judicial system.<sup>21</sup> Rather, the United States encourages the Colombian Executive to usurp legislative and judicial power and to increase the power of the military and police.

This article examines the steady deterioration of order in Colombian society through an explanation and analysis of the Colombia-United States extradition relationship in historical and political context. The article shows that the Colombian government's current inability to institute and effectuate the rule of law is a result of two destructive forces acting in concert: The first force is that of a United States drug control policy which emphasizes extraterritorial prescription and enforcement of domestic criminal laws - including extradition of Co-

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18. See *infra* notes 64-66 and accompanying text.

19. See *infra* note 76 and accompanying text.

20. See Fricker, *A Judiciary Under Fire*, A.B.A.J. 54 (Feb. 1990).

21. See Grossman & Anderson, *Lawyers and the Rule of Law in the Western Hemisphere*, 20 U. MIAMI INTER-AM. L. REV. 115, 124-25 (1988).

Colombian citizens to the United States - rather than assisting Colombia in enforcing its own laws and rebuilding its justice system. The second force is the Colombian elite's desire for political and, therefore, economic self-perpetuation which prevents the nation from effectively "dealigning" itself from United States policy. It is suggested that if the United States is truly interested in reducing illicit drug traffic, and if Colombia is truly interested in creating a more stable social climate, both countries must undertake fundamental changes in thinking and policymaking.

## II. THE UNITED STATES-COLOMBIA EXTRADITION RELATIONSHIP IN HISTORICAL AND POLITICAL CONTEXT

### A. *The Early Years*

#### 1. The 1888 Convention and 1940 Supplementary Convention

Colombia enacted its current constitution in 1886. Two years later, the initial extradition convention between the United States and Colombia was signed,<sup>22</sup> and went into force on January 11, 1891.<sup>23</sup> The 1888 Convention was the typical enumerative type; it listed the crimes for which an accused would be subject to extradition.<sup>24</sup> Notably, the 1888 Convention did not provide for extradition on the basis of crimes relating to illicit drug trafficking. Additionally, the 1888 Convention advocated against extradition of United States or Colombian nationals.<sup>25</sup>

By 1940, it had become apparent to United States officials that Colombia was a source of illicit drugs. Consumption of such substances in the United States was increasing as was the number of crime organizations involved in its importation and distribution. Thus, the United States and Colombia amended the 1888 Convention to include "[c]rimes against the laws for the suppression of the traffic in narcot-

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22. Convention for the Reciprocal Extradition of Criminals, May 7, 1888, United States-Colombia, 26 Stat. 1534, T.S. 58 [hereinafter 1888 Convention].

23. *Id.*

24. *Id.* at art. 2. Typically, where an extradition treaty exists, the issue of whether a particular alleged crime subjects an accused to extradition is determined by either listing the specific offenses in the text of, or in the appendix to the treaty, or by establishing the degree of punishment according to which an offense shall be extraditable. Comment, *RICO, CCE, and International Extradition*, 62 TEMPLE L. REV. 1281, 1295 (1989).

25. 1888 Convention, *supra* note 22, at art. 10.

ics.”<sup>26</sup> This Supplementary Convention went into effect on July 6, 1943.<sup>27</sup>

## 2. Dark Times in Colombian Politics

Until very recently, Colombian politics was characterized by a two-party system.<sup>28</sup> Each of these parties, the Liberals and the Conservatives, was dominated by the nation's small socioeconomic elite.<sup>29</sup>

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26. Supplementary Convention of Extradition, Sept. 9, 1940, United States-Colombia, art. 1, 57 Stat. 824, T.S. 986 [hereinafter 1940 Supplementary Convention].

27. *Id.* At this point it should also be mentioned that the there are two relevant multilateral extradition treaties in force. In 1933, as part of the Seventh International Conference of American States in Montivideo, Uruguay, the United States and other American republics signed the Pan American Convention on Extradition, Dec. 26, 1933, 49 Stat. 3111, T.S. 882 [hereinafter Pan American Convention]. The purpose of this convention is to effectuate extradition where there is no existing extradition treaty among the signatories or where an existing treaty lapses. In other words, the Pan American Convention “does not abrogate or modify the bilateral or collective treaties, which at the present date are in force between the signatory States.” *Id.* at art. 21. Unlike the bilateral 1888 Convention, *supra* note 22, and 1940 Supplementary Convention, *supra* note 26, which enumerate the particular extraditable offenses, the Pan American Convention simply relies on a conditional reciprocity requirement. Pan American Convention, *supra*, at art. 1. In essence, each of the signatory states promises to surrender an accused to a requesting signatory state based on certain conditions. Each signatory state contracts to surrender to the requesting state a person “who may be in their territory and who [is] accused or under sentence,” *id.*, where:

a) [T]he demanding State ha[s] the jurisdiction to try and to punish the delinquency which is attributed to the individual whom it desires to extradite.

b) [T]he act for which extradition is sought constitutes a crime and is punishable under the laws of the demanding and surrendering States with a minimum penalty of imprisonment for one year.

*Id.* at art. 1(a), (b).

An interesting and innovative aspect of the Pan American Convention is that unlike traditional extradition treaties, the Pan American Convention provides for discretionary delivery of a signatory state's citizens unless such delivery is precluded by the surrendering state's internal legislation or by the “circumstances of the case” as determined by the surrendering state. *Id.* at art. 2.

The second multilateral treaty is of more recent vintage but cannot be applied in extradition situations involving the United States. Despite its formulation under the auspices of the Organization of American States, the Inter-American Convention on Extradition, Feb. 25, 1981, O.A.S., T.S. No. 60 (OEA/Ser. A/36) has not yet been signed by the United States.

28. *See infra* note 42.

29. Findley, *Presidential Intervention in the Economy and the Rule of Law in*

During the 1930's and the first half of the 1940's, national politics was influenced by the Liberal Party.<sup>30</sup> In 1946 the Conservative Party took power.<sup>31</sup> The Conservative government formed the *Departamento Administrativo de Seguridad* (DAS), a police organization with extraordinary investigative and military capability. Although technically a part of the Ministry of Interior, DAS operates with virtual autonomy.<sup>32</sup>

In 1948, amid an increasingly violent political atmosphere, the populist, left-leaning Liberal leader, Jorge Eliecer Gaitán, was assassinated.<sup>33</sup> The blame for Gaitán's death was attributed to rightist elements of the Conservative government, and Colombia soon became embroiled in a bloody civil war known as *La Violencia*.<sup>34</sup> In 1949, the government declared a state of siege.<sup>35</sup> In 1950, another Conservative

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Colombia, 28 AM. J. COMP. L. 423, 425 (1980); see generally R. DIX, COLOMBIA: THE POLITICAL DIMENSION OF CHANGE (1967).

30. Bagley & Tokatlian, *Política Exterior de Colombia en los 80*, in CONTINUIDAD Y CAMBIO EN LAS RELACIONES AMERICA LATINA/ESTADOS UNIDOS 151, 176 n.50 (M. Hirst ed. 1987).

31. *Id.*

32. DAS is usually analogized to the United States Department of Justice's Federal Bureau of Investigation (FBI). See *Drug Lord's Base Hurt, Officials Say: Cartel Leader Escobar Fleeing Into Jungle to Escape Dragnet*, Wash. Post, July 14, 1990, at A23. While in many respects DAS resembles the FBI, the former wields much more power. Under the state of siege, see *infra* notes 71-77 and accompanying text, the government grants extraordinary powers to the police and military, allowing them to escape civilian control and oversight. In turn, organizations such as DAS, with sophisticated intelligence and military capability, pursue their own agendas and hold themselves out as defending the state against those allegedly seeking to destroy it. The current head of DAS, General Miguel Maza Marquez, is both praised and criticized in Colombia. He has been praised by conservatives for sustaining a hard line against drug traffickers, and for uncovering corruption within the armed forces. See *Colombian Anti-Drug Hero's Post in Doubt*, Newsday, July 5, 1990, at 13. On the other hand, Maza has been criticized for turning a blind eye to serious human rights violations committed by members of DAS. *Id.* Also, Maza himself has been accused of accepting payments from drug traffickers who are members of the established social elite (the Cali and Emerald Cartels). *Id.* In this regard, it has been rumored in Colombia that the 1989 death of reputed cocaine trafficker Jose Gonsalo Rodriguez Gacha at the hands of DAS was actually carried out by Maza at the request of either the Cali or Emerald Cartels or both. It seems that Rodriguez was making inroads into legitimate businesses operated by the Cali and Emerald Cartels and used by them as a front for cocaine trafficking.

33. Bagley & Tokatlian, *supra* note 30.

34. *Id.* See also Findley, *supra* note 29.

35. Findley, *supra* note 29, at 426. For a discussion of the state of siege and its effect on the rule of law in Colombia, see *infra* notes 71-126 and accompanying text.

was elected president when the Liberals refused to nominate a candidate.<sup>36</sup> In 1953, the civilian government was overthrown in a military coup led by General Gustavo Rojas Pinilla who then imposed a moratorium on all organized political activity.<sup>37</sup> In 1957, Conservative and Liberal leaders forced the ouster of Rojas and called for election of a civilian president. The Constitution was then amended to allow for a Liberal-Conservative coalition government for the next sixteen years.<sup>38</sup> Under the plan, known as the National Front, the parties equally divided between themselves seats in all legislative, judicial, and executive bodies.<sup>39</sup> The presidency alternated every four years.<sup>40</sup> Ultimately, there was not a competitive election until the National Front disbanded in 1974.<sup>41</sup>

Sixteen years of National Front leadership provided more than enough time for the incubation of militant political groups which were dissatisfied with a status quo favoring the elite. Indeed, it was during the National Front period that various guerilla groups such as the *Fuerzas Armadas Revolucionarias de Colombia* (FARC), *Ejercito de Liberación Nacional* (ELN), and *Ejercito Popular de Liberación* (EPL) formed and became powerful, appealing to Colombia's poor by espousing variations of communist ideology.<sup>42</sup>

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36. Findley, *supra* note 29, at 426.

37. *Id.*

38. *Id.*

39. *Id.*

40. Bagley & Tokatlian, *supra* note 30, at 176 n.50.

41. *Id.*

42. *Id.* at 171 n.40. FARC, a Marxist-Leninist group, actually traces its origins as far back as the period of *La Violencia* and currently is Colombia's most powerful guerilla organization. *Id.* The ELN, which aligns itself more directly with Fidel Castro, and the EPL, which espouses Maoist ideology, commenced their operations in the 1960's. *Id.*

Over the past year, many of Colombia's guerilla groups have begun to lay down their arms and integrate themselves into the political process. In early 1990, the *Movimiento 19 de Abril de 1970* (M-19) organization, a powerful populist guerilla group formed after the 1970 presidential elections, publicly laid down its arms. In the May, 1990 elections, the M-19 presidential candidate, Antonio Navarro Wolff, garnered thirteen percent of the vote despite the unexplained assassination of the organization's initial presidential candidate. See Brooke, *Colombia's Guerillas Break Into Politics*, N.Y. Times, June 3, 1990, at E5, col. 1; Brooke, *Colombia Rebels Shun Arms and Win Votes*, N.Y. Times, May 31, 1990, at A15, col. 1. Subsequently, Navarro was named Minister of Health by President Cesar Gaviria Trujillo. See *Colombian Guerillas Forsake the Gun for Politics*, N.Y. Times, Sept. 2, 1990, at A14, col. 1 (reporting on demobilization of the EPL, the indigenous self-defense group *Quintín Lame*, and the

## B. The Recent Record

### 1. Post-National Front Colombian Politics and Relations with the United States

By the mid-1970's, trafficking in and use of illegal drugs had become a major issue within the United States, and it was at this time that the problem began to seriously manifest itself in the relations between Colombia and the United States. In response to the large amounts of marijuana which were being imported into the United States from Colombia, then United States President Jimmy Carter requested of then Colombian President Alfonso Lopez Michelsen, that elimination of marijuana exports be given the highest priority. While Lopez agreed to address the marijuana issue, he refused to adopt the law enforcement measures advocated by Carter.<sup>43</sup> As a result, Lopez and Colombia suffered badly in the United States media and relevant halls of the United States federal government.<sup>44</sup>

Lopez' reaction to the Carter Administration's marijuana control policy lends insight in regard to the differing perspectives of Colombia and the United States toward the drug trafficking business. Professor Juan Gabriel Tokatlian, Director of the Center of International Studies at the University of the Andes in Bogota has written that,

during the [1970's] marijuana boom, [Colombian] policy was dominated by a certain socioeconomic rationale, marked by a strong vein of pragmatism. In fact, evidence of this can be found in several manifestations: the creation of the so-called *ventanilla sinies-tra* ([sinister] window) in the Banco de la Republica, which allowed funds originating from drugs and other activities to enter the country; the debates . . . on legalization of drugs; the acceptance—albeit limited—of the new social sector associated with its cultivation and marketing; and the government attitude . . . that it

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Revolutionary Workers Party).

Two powerful guerilla groups, FARC and ELN, continue to refuse to enter into discussions with the government. *Id.* Moreover, throughout the twentieth century Colombia has witnessed the proliferation of rightist, paramilitary "self-defense" groups. See WASHINGTON OFFICE ON LATIN AMERICA, COLOMBIA BESIEGED: POLITICAL VIOLENCE AND STATE RESPONSIBILITY 59-83 (1989) [hereinafter WOLA].

43. Tokatlian, *National Security and Drugs: Their Impact on Colombian-U.S. Relations*, 30 J. INTER-AM. STUD. & WORLD AFF. 132, 142 (Spring 1988); see also Bagley, *Colombia and the War on Drugs*, 67 FOREIGN AFF. 70 (Fall 1988).

44. Tokatlian, *supra* note 43, at 142-43.



not transfer unilaterally the cost of combatting the proliferating consumption to Colombia. Clearly, in the 1970's the Colombian system did not see itself seriously threatened by (1) the political institutional reach of the marijuana business; (2) its negative effect on national security; nor (3) the financial consequences of its production and trade. Thus, Colombia did not accentuate, unilaterally, repressive measures in its attempts to control and eradicate this traffic.<sup>45</sup>

In 1978, Liberal Party candidate Julio Cesar Turbay Ayala was elected president of Colombia. Turbay was a proponent of increased ties to the United States and upon assuming the presidency, he took a number of steps to assure solidification of the Washington-Bogota connection.

Because of the Colombian rural economy's poor state, and the absence of an effective welfare state, indigenous, rural-based "self protection" groups and labor unions such as the *Asociación Nacional de Usuarios Campesinos* (ANUC) and the *Consejo Regional Indígena del Cauca* (CRIC) had become quite active in the 1970s. These and other organizations, including M-19,<sup>46</sup> soon engaged in violence aimed at the new Turbay Administration which was perceived as dedicated to the preservation of the political status quo. Turbay had run his campaign based on a restoration of "law and order,"<sup>47</sup> a code-phrase for repression of political opposition. To that end, just over a month after assuming the presidency, Turbay, pursuant to his powers under the then existing state of siege, issued the *Estatuto de Seguridad Nacional* (National Security Statute).<sup>48</sup> The Statute was similar to legislation adopted by the military dictatorships in Argentina, Chile, and Uruguay, and increased the authority of the president and the role of the

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45. *Id.* at 139.

46. *See supra* note 42.

47. Bagley & Tokatlian, *supra* note 30, at 154-176.

48. DECRETO LEGISLATIVO No. 1923 de 1978, No. 35101 *Diario Oficial* 1033 (21 de septiembre de 1978); Bagley & Tokatlian, *supra* note 30, at 171 n.41. The Statute suspended the right to habeas corpus and permitted the armed forces to arrest civilians without formal charges. *Id.* In addition, it provided that civilians accused of crimes against the national security would be tried in front of military tribunals, and it replaced civilian government with military government in several localities throughout the country. *Id.* (citing AMNESTY INTERNATIONAL, REPORT OF AN AMNESTY INTERNATIONAL MISSION TO THE REPUBLIC OF COLOMBIA (1980)); *see also infra* notes 71-83 and accompanying text.

Colombian military in the operation of government.<sup>49</sup> Turbay used the Statute as a vehicle to establish closer relations with the United States and to obtain arms, military equipment, and military training.<sup>50</sup>

Additionally, in 1979, Nicaragua's Anastasio Somoza Debayle was overthrown by the leftist *Frente Sandinista de Liberación Nacional* (FSLN). The displacement of Somoza, a wealthy landowner whose family had ruled Nicaragua for most of the twentieth century, was taken as a signal by Turbay whose family belonged to Colombia's elite, and who was well aware of the strong leftist and populist guerilla movements in his own country. Also, the new Nicaraguan government disputed the territorial claims of Colombia to the San Andres Archipelago.<sup>51</sup> In response, Turbay requested protection from the United States. In this connection, while the United States initially supported the FSLN, by the time of Turbay's request, United States patience with the new Nicaraguan government had waned because of the FSLN's failure to "moderate" its militaristic, pro-Cuban stance. Thus, in the outgoing Carter Administration and United States Congress, Turbay had found a wealthy anti-Sandinista ally. With the advent of the fervently anti-communist Reagan Administration in 1980, Bogota and Washington would reach even firmer common ground.<sup>52</sup>

Finally, and most importantly for instant purposes, in 1979 a reluctant Turbay signed the controversial United States-Colombia extradition treaty.<sup>53</sup> Because of the consistent flow of marijuana to the United States from Colombia and Colombia's failure to seriously address the problem, the Carter Administration had placed political pressure on Turbay. The purpose of the pressure was to force Turbay to choose between signing the 1979 Treaty or asking the United States for

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49. Bagley & Tokatlian, *supra* note 30, at 171.

50. *Id.* While the Carter Administration expressed its willingness to assist Turbay, it also expressed its concern regarding possible human rights abuses under the Statute. *Id.* at 172.

51. Bagley & Tokatlian, *supra* note 30, at 157. The San Andres Archipelago is a group of islands located off of the Nicaraguan coast, near the *Golfo de los Mosquitos*. The largest two islands are San Andres and Providencia.

52. *Id.* at 159-161. For example, in response to Turbay's fears of Nicaraguan "expansionism" into the San Andres, and, more to the point, to gain a stronger military foothold in the area, the United States secretly negotiated with Colombia an agreement to allow the United States to set up a military installation on San Andres. *Id.*; see also *Treaty with Colombia Concerning the Status of Quitasueno, Roncador, and Serrana*, Sept. 14, 1972, United States-Colombia, 33 U.S.T. 4459, T.I.A.S. No. 10316.

53. Treaty of Extradition, Sept. 14, 1979, United States-Colombia, (unnumbered) S. Treaty Doc. 8, 97th Cong., 1st Sess. (1981) [hereinafter 1979 Treaty].

economic and military assistance without an illustration of Colombian cooperation in helping the United States stem the flow of illicit drugs. Just prior to Turbay's presidential victory in 1978, a report known as the "Bourne Memorandum" had leaked from the White House.<sup>54</sup> The report accused Turbay and others in the upper echelons of Colombian politics of having connections to groups involved in drug trafficking.<sup>55</sup> Despite an April 1979 report issued by the House Committee on Narcotics Control and Abuse which concluded that Turbay was not involved in drug trafficking,<sup>56</sup> he was not entirely absolved of the taint of corruption bestowed upon him by the Bourne Memorandum. Thus, to gain political absolution and, therefore, economic and military assistance, Turbay determined that it was in his administration's best interests to sign the 1979 Treaty.

## 2. The 1979 Treaty and The Palace of Justice Seizure

The 1979 Treaty went into force on March 4, 1982, and is one of several extradition treaties negotiated by the United States between 1978 and 1983.<sup>57</sup> Although each of the treaties negotiated within that

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54. Bagley & Tokatlian, *supra* note 30, at 172 n.41.

55. *Id.*

56. *Id.* at 172 & n.44 (citing SELECT COMMITTEE ON NARCOTICS ABUSE AND CONTROL, UNITED STATES HOUSE OF REPRESENTATIVES, FACT FINDING MISSION TO COLOMBIA AND PUERTO RICO, 96th Cong., 1st Sess. (1979)).

57. See, e.g., Treaty on Extradition, May 4, 1978, United States-Mexico, 31 U.S.T. 5059, T.I.A.S. No. 9656; Treaty on Extradition, June 24, 1980, United States-Netherlands, \_\_\_\_\_ U.S.T. \_\_\_\_\_, T.I.A.S. No. 10733; Supplementary Convention on Extradition, March 14, 1983, United States-Sweden, \_\_\_\_\_ U.S.T. \_\_\_\_\_, T.I.A.S. No. 10812; Treaty on Extradition, Oct. 13, 1983, United States-Italy, \_\_\_\_\_ U.S.T. \_\_\_\_\_, T.I.A.S. No. 10837; Treaty on Extradition, United States-Thailand, Dec. 14, 1983, S. Treaty Doc. No. 16, 98th Cong., 2d Sess. (1984); Treaty on Extradition, United States-Costa Rica, Dec. 4, 1982, S. Treaty Doc. 17, 98th Cong., 2d Sess. (1984); Treaty on Extradition, United States-Jamaica, June 14, 1983, S. Treaty Doc. 18, 98th Cong., 2d Sess. (1984); Treaty on Extradition, United States-Ireland, July 7, 1983, S. Treaty Doc. 19, 98th Cong., 2d Sess. (1984).

These new extradition treaties illustrate important departures from the traditional bilateral extradition treaties. For example, the new treaties expand significantly the scope of the United States jurisdiction to prescribe and enforce its laws, expressly including acts of conspiracy. See, e.g., 1979 Treaty, *supra* note 53, at arts. 1-3. In addition, the treaties pick up on a trend first evidenced in the text of the multilateral 1933 Pan American Convention, *supra* note 27, expressly permitting extradition of the contracting parties' citizens. While certainly unorthodox, the fact that this trend has continued in recently negotiated extradition treaties is not surprising in light of the advent

period allows the extradition of the contracting parties' nationals,<sup>58</sup> the relevant provision of the 1979 Treaty is notable for its specificity. Article 8 grants the surrendering state's executive discretion in determining whether a citizen of that state will be extradited, while simultaneously requiring that extradition of nationals will be granted where "the offense involves acts taking place in the territory of both States with the intent that the offense be consummated in the Requesting State."<sup>59</sup> Clearly, this provision is meant to encompass acts by the surrendering state's nationals which, under United States law, constitute conspiracies. Interestingly, the Letter of Submittal accompanying the 1979 Treaty specifically states that this "innovation . . . is especially important in prosecuting exporters of dangerous drugs."<sup>60</sup>

Although the debate on the 1979 Treaty in the United States Congress proceeded smoothly, the same cannot be said of the debate in the Colombian Congress. The focus there was, of course, on article 8, the text of which is considered by many Colombian politicians as an act of submission to the United States and a violation of Colombian sovereignty.<sup>61</sup> Despite the opposition, with the strong support of President Turbay, the treaty bill was approved by both houses of the Colombian Congress on October 14, 1980, and was sent to the President for signature.

On November 3, 1980, Minister of Government Dr. German Zea Hernandez, who had been delegated the exercise of presidential "constitutional functions" by President Turbay while the latter was out of the country on a state visit,<sup>62</sup> signed the treaty bill and published it as Law 27 of 1980.<sup>63</sup> By the time the 1979 Treaty went into effect in

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of modern communications technology which facilitates transnational crime, and when read in connection with treaty provisions delineating the long arm of United States criminal law.

58. See *supra* note 57.

59. 1979 Treaty, *supra* note 53, at art. 8(1)(a).

60. Letter of Submittal from State Department to White House, S. Treaty Doc., *supra* note 53, at vi.

61. Kavass, *Introductory Note to Colombia: Supreme Court Decision on Law Concerning the Extradition Treaty Between Colombia and the United States*, 27 I.L.M. 492, 493 (1988).

62. See COLOM. CONST. art. 128.

63. Ley 27 de 1980, No. 35643 *Diario Oficial* 401 (14 de noviembre de 1980). Notably, two other bilateral agreements were signed by the United States and Colombia in 1980. First, through an exchange of diplomatic notes, the two governments agreed to battle illicit traffic in narcotics. *Narcotic Drugs: Cooperation to Curb Illegal Traffic*, July 21, Aug. 6, 1980, United States-Colombia, 32 U.S.T. 2301, T.I.A.S. No.

March, 1982, Colombia was in the midst of a presidential campaign with elections slated for May.

Ultimately, the Conservative candidate, Belisario Betancur Cuartas was elected President. Betancur's success marked the first presidential victory for the Conservatives since the demise of the National Front in 1974. Contrary to the political attitude of Turbay, who was willing to push certain controversial domestic measures as a way of currying favor with the United States, Betancur took a populist stance and sought to cool relations between Bogota and Washington.<sup>64</sup> In so

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9838. This agreement comprises an offer and acceptance of \$13,225,000 in United States assistance for,

supplying and maintaining helicopters, patrol vessels, fixed radar equipment, transport vehicles, and fuel, which shall be used exclusively for interdicting drug traffic, for training personnel with respect to the interdiction of drug traffic, and for whatever other purposes the United States Congress may authorize.

*Id.* at 2302. Second, the two governments entered into a mutual legal assistance treaty. Mutual Legal Assistance Treaty with the Republic of Colombia, Aug. 20, 1980, S. Treaty Doc. 11, 97th Cong., 1st Sess. (1981). Each of these agreements is designed to facilitate the purposes addressed by the 1979 Treaty, *supra* note 53.

In addition, in 1981, the United States Congress amended the Posse Comitatus Act of 1878, 18 U.S.C. § 1385 (1982). The Act governs the use of the United States military in foreign and domestic police actions involving illegal drugs, *see* Comment, *A Proposal for Direct Use of the United States Military in Drug Enforcement Operations Abroad*, 23 TEX. INT'L L.J. 291, 293 (1988) [hereinafter *A Proposal*], and "prohibits use of 'any part of the Army or Air Force as a posse comitatus or otherwise to execute the laws except with authorization by the Constitution or Act of Congress.'" *Id.* at 294. However, the 1981 amendments, codified at 10 U.S.C. §§ 371-78, authorize military officials to furnish information, equipment, facilities, training, and expert advice to civilian law enforcement personnel. *A Proposal*, *supra*, at 295. Such authorization applies to both domestic and extraterritorial drug-oriented police work and has been relied upon to justify the increasing use of the armed forces in drug interdiction and eradication efforts. *See* United States v. Roberts, 779 F.2d 569 (9th Cir.), *cert. denied*, 107 U.S. 142 (1986) (*cited in A Proposal*, *supra*, at 299 (naval support used and approved of in extraterritorial drug interdiction)); Comment, *The Extraterritorial War on Cocaine: Perspectives from Bolivia and Colombia*, 12 SUFF. TRANSNAT'L L.J. 39, 45-60 (1988) [hereinafter *Bolivia and Colombia*] (discussing use of United States military in extraterritorial coca eradication); Isikoff, *War On Drugs Mobilizes National Guard*, Wash. Post, Aug. 14, 1990, at A1, col. 3 (discussing National Guard's escalating domestic role in assisting local police to identify suspected drug producers and users, respectively); Isikoff, *Interest in Grateful Dead Was Not Musical*, Wash. Post, Aug. 14, 1990, at A4, col. 1 (same).

64. Bagley & Tokatlian, *supra* note 30, at 176-186. For example, Betancur announced his intention to push for Colombia's membership in the Non-Aligned Movement. *Id.* at 177. He also sought to revamp the Inter-American system following the

doing, Betancur intentionally delayed executive action on extraditions under the 1979 Treaty. The case of Colombian Carlos Lehder Rivas is instructive on this point.<sup>65</sup>

Following his indictment in the United States on drug trafficking charges in 1983, Carlos Lehder appealed to the SCJ from a lower court's ruling in favor of his extradition under the 1979 Treaty. On November 29, 1983, the SCJ affirmed the lower court's ruling and forwarded the extradition request to the President for final resolution. Despite the SCJ's favorable ruling, it was not until June, 1984 that President Betancur handed down Resolution No. 101 permitting Lehder's extradition.<sup>66</sup> It is notable that Betancur's decision to permit Lehder's extradition took place at a time when the Colombian economy was in a shambles because of the worldwide recession of the early 1980's. As a result, Betancur's political "honeymoon" was coming to a close and he actively sought United States economic assistance.<sup>67</sup>

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divisive Falklands-Malvinas War. *Id.* at 178. In this regard, he supported the right of Argentina to exercise sovereignty over the Islands. *Id.* Indeed, during a visit to Washington, Betancur's foreign minister criticized the United States for siding with Great Britain and abandoning Latin America at a crucial moment. *Id.*; see Inter-American Treaty of Reciprocal Assistance (Rio Treaty), Sept. 27, 1947, T.I.A.S. No. 1838, 62 Stat. 1681. Finally, Betancur offered to restore relations with Cuba if that country ceased its support of Colombian leftist insurgent groups. Bagley & Tokatlian, *supra* note 30, at 179.

65. United States v. Lehder Rivas, 668 F. Supp. 1623 (M.D. Fla. 1987).

66. *Id.* at 1524-25.

67. Bagley & Tokatlian, *supra* note 30, at 197-99, 202-204. During this period (1984-85), Betancur was forced to adopt economic austerity measures to compensate for Colombia's ever-expanding external debt. In turn, such austerity depended on stabilization help from the United States in its roles as individual lender and member of the International Monetary Fund and other international financial organizations. *Id.*

Other notable events in Colombian politics during this time period included the Uribe truce agreement signed with FARC on March 28, 1984, and approved by Betancur on April 2, and, that same month, the murder of Justice Minister Rodrigo Lara Bonilla, allegedly the work of drug traffickers. Ultimately, after only a two year hiatus, Betancur reintroduced martial law in May based on the Lara assassination and other violence attributed to members of the illicit drug business. See *infra* note 76.

On August 23-24, 1984, new truce agreements were signed between the government, M-19, the Workers' Self-Defense Movement (ADO), and the EPL pending further talks on political reform. The government/M-19 truce was short-lived, lasting less than one year. M-19 justified its return to guerilla activity based on systematic violations committed by the Colombian army under the truce provisions, limitations on amnesty, failure of the government to implement basic political reforms, and the collapse of dialogue. Bagley & Tokatlian, *supra* note 30, at 201 n.103. Similar problems led to the collapse of the government truce with the other guerilla groups.

On November 5, 1985, the Palace of Justice, home of the SCJ, was seized by members of the M-19 guerilla group and a number of hostages were taken, including members of the twenty-four justice SCJ. While the reasons for the seizure are unclear,<sup>68</sup> rather than at-

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Also, during this time period, the Comprehensive Crime Control Act of 1984, Pub. L. 98-473, 98 Stat. 2168, was enacted by the United States Congress. The Crime Control Act marked the first serious attempt by the United States to combat international drug trafficking through penal legislation. In addition to its provisions regarding the stemming of international currency flows connected to the illicit drug business, the Act established the National Drug Enforcement Policy Board, Pub. L. 98-473, § 1302, 98 Stat. 2168. The Board was charged with the duties of development and coordination of a national drug enforcement policy, including international drug control. *Id.*; *Bolivia and Colombia*, *supra* note 63, at 44 n.30. Ultimately, the Board failed in its mandate because it was unable to bring under control the turf battles raging among the myriad federal governmental bureaucracies involved in the anti-drug effort. *Id.*

68. Clearly, the M-19 leadership was angry with the government's perceived failure to act in good faith under the August, 1984 truce agreement. *See supra* note 67. By the 1984-85 period, Betancur had lost any control of government that he may have had at the commencement of his presidency. Although Betancur was amenable to negotiation with the guerilla groups, other factions within the government were not so willing. These factions, bolstered by Betancur's increasing unpopularity and his lame duck status, ultimately prevailed. *See* Bagley & Tokatlian, *supra* note 30, at 200-201. In light of these events, M-19's frustration with the "formal" political and legal process is understandable and provides one explanation for the takeover of the Palace of Justice.

An alternative explanation for the seizure of the Palace of Justice has been offered: that M-19 was paid by drug traffickers to enter the Palace and destroy the extradition files. This explanation has been given some credence through the writings of commentators. *See, e.g.,* S. McDonald, *supra* note 10, at 37-39; Note, *Nonconsensual Military Action Against the Colombian Drug Lords Under the U.N. Charter*, 68 WASH. U.L.Q. 129, 132 (1990). Despite the absence of any hard evidence as to the truth of the "narcoguerrilla" theory in explaining the Palace of Justice seizure, some may justify the theory's veracity on the basis of an explanation proffered by the United States Department of Justice connecting the Colombian guerilla groups with drug traffickers. *See, e.g.,* United States Department of Justice, *Drug Trafficking and Terrorism*, 12 DRUG ENFORCEMENT 19 (Summer 1985).

The essence of the Justice Department's thesis is that in return for "protection" provided to traffickers and producers by M-19 (formerly) and FARC, the traffickers provide the groups with the means to support their respective causes. *Id.* at 19-21. While the Justice Department theory rings true, it is true only in part. A deeper view into the extent of the alleged trafficker-guerilla symbiosis reveals the weaknesses in the "narcoguerrilla" theory as the reason for M-19's seizure of the Palace of Justice.

The Justice Department theory does not imply that the groups work together or are "friendly" to each other. Each group has its own agenda and will use any avenue available to accomplish its goals. Indeed, according to the Justice Department, Colombian guerilla groups are not "employed" by the traffickers. Rather, the relationship is

tempt to negotiate the release of the hostages, the government decided to send in the military. The November 6th battle resulted in the total destruction of the Palace, and the deaths of the guerillas and eleven justices of the SCJ. Another justice was assassinated on July 31, 1986, following which several others resigned.

Article 148 of the Constitution directs the remaining members of the SCJ to fill vacancies created by death or resignation.<sup>69</sup> Neither executive nor legislative advice and consent is required or permitted. Ultimately, by the end of 1986, a majority of the SCJ justices were new appointees. Also by that time, Virgilio Barco Vargas had assumed the presidency.<sup>70</sup>

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extortionary in nature. *Id.* Interestingly, while there seems to some kind of business relationship between rural-based guerilla groups such as FARC, ELN, and EPL and the traffickers, the existence of an M-19/trafficker relationship is less evident. The reason for this is that production and processing operations in Colombia take place in the rural southeastern parts of the nation, areas controlled by FARC, ELN, and EPL. These groups "share" the territory with the traffickers, levying a "tax" on them for protection of shipments, laboratories, and growing areas. See Select Committee on Narcotics Abuse and Control of the House of Representatives, *Drugs and Latin America: Economic and Political Impact and U.S. Policy Options*, 101st Cong., 1st Sess. (1989) [hereinafter *Drugs and Latin America*]. However, because M-19 was an "urban" guerilla group and controlled no resources precious to the traffickers, there was no reason for the traffickers to pay a "protection" tax. Thus, despite assertions to the contrary by the Justice Department, there exists no evidence as to the existence of a symbiotic relationship between M-19 and the traffickers. See Lee, *The Cocaine Morass in South America*, in *Drugs and Latin America*, *id.* at 119, 122.

In the final analysis, it is difficult to comprehend the stupidity of any group who would pay for seizure of the Palace of Justice in an effort to destroy extradition "files." Copies of such files exist not only at the Palace of Justice, but in the Colombian Foreign Ministry and Justice Ministry as well.

69. COLOM. CONST. art. 148

70. During this period, the United States government enacted the most sweeping narcotics control legislation in United States history. Anti Drug Abuse Act of 1986, Pub. L. No. 99-570, 100 Stat. 3207 (1986). The Act advocated law enforcement in drug-producing countries, increased interdiction, criminal penalties for money laundering, establishment of grants to state and local enforcement agencies, and increases in funding for treatment and rehabilitation programs. *Id.*; Hogan & Doyle, *supra* note 1, at 12.

Most important for purposes of the present analysis are the provisions of the 1986 Act which provide for the use of United States armed forces in the extraterritorial enforcement of United States anti-drug criminal laws, Pub. L. No. 99-570, § 2012, 100 Stat. 3265-66 (use of Army in Operation Blast Furnace in Bolivia); *id.* at § 3051, 100 Stat. 3274-76 (increased use of military in interdiction), and those which tie foreign assistance to the adequacy of anti-drug efforts taken by producing/trafficking nations, *id.* at §§ 2005, 2008, 100 Stat. 3261-62, 64. These latter provisions are most pertinent



### III. THE RULE OF LAW IN COLOMBIA AND THE DELETERIOUS EFFECT OF THE RECENT UNITED STATES-COLOMBIA EXTRADITION RELATIONSHIP

#### A. *States of Siege and Emergency Under the Colombian Constitution*

To understand the adverse effects of the United States international drug control policy on the administration of justice in Colombia, it is first necessary to understand that Colombia has been governed under martial law almost continuously since *La Violencia*. Under the Constitution, a state of siege or state of emergency may be declared by a Colombian head of state where, with the concurrence of all cabinet members, the head of state decides that "the public order has been disturbed and that the whole or part of the republic is in a state of siege,"<sup>71</sup> or that events have taken place "which disturb or threaten seriously and imminently to disturb the economic or social order of the country or also constitute a serious public disorder."<sup>72</sup>

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to United States-Colombian relations. Essentially, these sections of the Act make foreign aid to drug-producing nations contingent upon certification by the President that those nations are making adequate independent efforts to eradicate production and trafficking or, alternatively, are adequately cooperating with the United States in its eradication and enforcement efforts.

The clear intent of the United States in tying third world foreign aid directly to certification is to force those nations to cooperate with United States drug control policy. However, the problem with such an incentive is its negative, coercive, and inherently paternalistic nature. Indeed, the certification process has caused much consternation among third world governments attempting to cope with huge external debts and guerilla insurgencies. Moreover, the certification process is susceptible to politicization. The clearest case illustrating the politics of certification is that of Panama in the 1980's. Less than one year prior his indictments on charges of drug trafficking General Manuel Antonio Noriega was praised by both then DEA Director Jack Lawn and the United States Embassy in Panama for his efforts in illicit drug interdiction. *See Comment, An Inquiry Regarding the International and Domestic Legal Problems Presented in United States v. Noriega*, 20 U. MIAMI INTER-AM. L. REV. 393, 403 (1989). It appears that the reason Panama was certified was due to its assistance of the United States effort in arming and training the Nicaraguan *contras*. *Id.* at 402; *see also* Bagley, *Narco-Diplomacy: Drug Trafficking and U.S. Latin American Relations*, in *Drugs and Latin America*, *supra* note 68, at 76, 78-79 ("In 1987, . . . U.S. Congressmen proposed to 'decertify' Mexico, Bolivia, Peru, Paraguay, and the Bahamas, in spite of the Reagan Administration's protests that such punitive measures would damage U.S. relations with those countries . . .").

71. COLOM. CONST. art. 121 (state of siege).

72. COLOM. CONST. art. 122 (state of emergency).

State of siege and state of emergency powers allow the President to issue executive decrees that have the same legally binding force as congressional legislation passed under non-state of siege/emergency conditions. Executive decrees issued during the state of siege/emergency can amend laws previously enacted by Congress under the normal constitutional lawmaking regime, or can create entirely new laws. Of course, executive decrees do not require or permit any action on the part of the Congress. While executive decrees issued under the state of siege/emergency are expressly subject to judicial review by the SCJ,<sup>73</sup> such review extends only to the procedure by which the executive decree was introduced and does not touch upon its "merits."

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73. COLOM. CONST. arts. 121, 122. A word of explanation is in order. Since 1886, the Constitution has accorded the President state of siege powers. Findley, *supra* note 29, at 424. However, the state of emergency was not added to the Constitution until the Constitutional Reform of 1968. *Id.* at 423-30. It seems that article 121 has been resorted to by presidents to deal with disruptions not only in the "public order" (e.g., internal armed conflict) but in the public economic order caused by governmental intransigence and turf battling in economic planning. *Id.* at 423-27. Thus, to reduce executive reliance on the state of siege when Colombia was confronted with economic problems, and thereby increase the role of the Congress and reinstitute democratic decision making, article 122 was formulated. *Id.* at 427-30.

As originally envisioned by some members of the Colombian government, article 122 aimed to separate the concepts of economic disorder from political disorder. *Id.* at 452. The state of emergency, which could last no more than three months, was to be invoked only where Colombia confronted an acute economic crisis (e.g., an abnormal decline in national income due to sudden closing of foreign markets), as opposed to situations where the government faced chronic economic problems (e.g., rural unemployment or even a bloated external debt). *Id.* at 452-53. Despite the laudable intentions of the government in implementing article 122, it soon became clear that the new provision would be subjected to the same abuse as article 121, and that presidents would quickly find non-economic reasons to invoke article 121.

For example, in September, 1974, one month after assuming office following Colombia's first competitive presidential elections in twenty-six years, Alfonso Lopez Michelsen indicated his intention of declaring a state of economic emergency under article 122. *Id.* at 453. Lopez based his decision on a government deficit which threatened to cut off salaries to government employees and suspend public programs. *Id.* After the required nonbinding opinion was issued by the Council of State - Colombia's highest level administrative tribunal - in favor of the declaration, Lopez finalized his decision which limited the state of emergency to forty-five days. *Id.* at 455 n.121 (citing Decreto 1970 of 1974). The legislative decrees issued thereunder imposed a far-reaching general tax reform package. *Id.* at 460-62. In 1976, Lopez declared a state of siege for reasons of internal security. *Id.* at 473. Despite the Constitutional Reform of 1979, this state of siege lasted until lifted by President Turbay in July, 1982. Bagley & Tokatlian, *supra* note 30, at 170 n.38.

Under recent invocations of the state of siege, presidents have issued decrees establishing trial of civilians by military tribunal,<sup>74</sup> limiting the jurisdiction of civilian courts, and altering basic constitutional rights such as habeas corpus.<sup>75</sup> During his tenure, under the current state of siege imposed by President Betancur in 1984,<sup>76</sup> Virgilio Barco increased the power of the military and police in maintaining the public order, diluting any demarkation that may have existed regarding their different roles.<sup>77</sup> Although Barco issued the decrees based on alleged violence carried out by drug traffickers, much of the additional legal firepower awarded to the military has been used to repress militant political opposition.

## B. *Martial Law and The Rule of Law in Colombia*

A strict view of the rule of law is defined by application of "the interrelated notions of neutrality, uniformity, and predictability."<sup>78</sup> These notions must be promoted and reinforced through "differentiation of the procedures of legislation, administration, and adjudication."<sup>79</sup> In turn, popular participation in government legitimizes and increases the power of each component because the legal order will "represent a balance struck among competing groups rather than the embodiment of the interests and ideals of a particular faction."<sup>80</sup> Conversely, the abdication of differentiation and the elimination of the appearance of effective popular participation inevitably result in failure of apparently neutral, uniform, and predictable application of the law

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74. See, e.g., DECRETO LEGISLATIVO No. 2260 de 1976, No. 34676 *Diario Oficial* 481 (17 de noviembre de 1976) (military tribunals imposed by President Lopez under state of siege powers); see also DECRETO LEGISLATIVO No. 1923 de 1978, *supra* note 48 (National Security Statute issued by President Turbay imposing military tribunals pursuant to state of siege powers). But see Decision of March 5, 1987 (Sala Plena), 16 JURISPRUDENCIA Y DOCTRINA 492 (May 1987). In the March 5th Decision, the SCJ declared unconstitutional the trial of civilians by military courts and restricted presidential powers under martial law. *Id.*

75. See DECRETO LEGISLATIVO No. 1923 de 1978, *supra* note 48; see also WOLA, *supra* note 42, at 87-106.

76. DECRETO NUMERO 1038 de 1984, No. 36608 *Diario Oficial* 673 (14 de mayo de 1984).

77. WOLA, *supra* note 42, at 88, 93-100.

78. R. UNGER, LAW IN MODERN SOCIETY 176 (1976).

79. *Id.* at 177.

80. *Id.* at 178.

and, therefore, a breakdown in the rule of law.<sup>81</sup> This is exactly the case in Colombia.

Because of the existence and cavalier invocation of the state of siege/emergency powers, Colombia is a nation governed by executive fiat rather than by democratic law. As a corollary, prevention of the development of democratic practices has promoted violence and lawlessness both within and without the government. Government institutions are unable to assist Colombians in obtaining effective recourse. The constant interference with legislative procedure and judicial independence by Colombian heads of state, combined with close commiseration between the executive branch, armed forces, and police has eliminated respect for the rule of law by delegitimizing popular power.

The most recent invocation of the state of siege by President Betancur in 1984<sup>82</sup> is based on a number of violent acts allegedly perpetrated by participants in the drug trade. However, the inability of the government to rule effectively under the normal constitutional regime may have less to do with such violence than with the perceived threat to the current political power structure posed by opposition groups, and constraints imposed upon Colombia in its dealings with the United States and the rest of the developed world.<sup>83</sup>

Regardless of the reasons for its invocation, the current state of siege enabled former President Barco to effectively disable the Colombian judiciary. Despite recent SCJ rulings affecting extradition, the executive ultimately has chosen to go its own way. Thus, redress through the Colombian courts for anyone subject to extradition is no longer an option.

### C. *The SCJ Decisions of December 12, 1986 and June 25, 1987*

#### 1. The December 12, 1986 Decision

On December 12, 1986 the SCJ handed down the initial decision

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81. I write here of "appearance" because it has been argued effectively, particularly by Legal Realists and adherents to the Critical Legal Studies Movement, that even in societies where differentiation and widespread public participation take place, the transformative effect of such participation is limited, and application of the law in a truly neutral, uniform, and predictable manner is mythical. *See generally* Blum, *Critical Legal Studies and the Rule of Law*, 38 BUFFALO L. REV. 59 (1990).

82. *See* DECRETO NUMERO 1038, *supra* note 76.

83. *See* Bagley & Tokatlian, *supra* note 30, at 202-204.

regarding the enforceability of the law containing the 1979 Treaty.<sup>84</sup> Despite statements in previous Court opinions that it was prevented by the separation of powers doctrine from ruling on the constitutionality of public treaties (i.e., a broad political question doctrine), the Court reversed itself, basing its jurisdiction on article 214(2) of the Colombian Constitution.<sup>85</sup>

A unanimous SCJ held that Law 27 was unconstitutional because the President had not signed it.<sup>86</sup> The Court reasoned that approval of the law by a cabinet minister acting as president has no legal effect because the delegation of presidential power under which he was acting does not include conducting international relations.<sup>87</sup> Such activity is of a political nature which requires "the personal use of presidential prerogative as the head of state."<sup>88</sup> The delegation of presidential power includes only the administrative functions of the office. Thus, without the signature of the head of state, a law containing a treaty between Colombia and another state is unenforceable under the Constitution.

It is notable that the Colombian Constitution contains no provision distinguishing between the "political and administrative responsibilities of the President or requiring the former to be exercised personally by him."<sup>89</sup> Thus, the SCJ's holding was one of inference derived from the Constitution's text. However, the SCJ decision was reinforced by the concurring opinion of the House of Representatives-appointed Attorney General.<sup>90</sup>

## 2. The June 25, 1987 Decision

In light of the SCJ's reasoning in its December 12th decision that Law 27 was procedurally defective because of the absence of then Pres-

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84. See Kavass, *supra* note 61, at 495 (discussing the Decision of December 12, 1986 (Sala Plena)).

85. COLOM. CONST. art. 214(2) (stating that "the Court shall have the . . . power: [t]o decide definitively on the legality of all laws and decrees issued by the government . . . when they are brought before the Court upon allegation of unconstitutionality by any citizen.").

86. Kavass, *supra* note 61, at 495.

87. *Id.* at 496; see COLOM. CONST. art. 128.

88. Kavass, *supra* note 61, at 496.

89. *Id.*

90. Under article 214(2) of the Constitution, the Attorney General is required to render, prior to the Court's review of the case, an opinion in all cases involving challenges to the constitutionality of laws. COLOM. CONST. art. 214(2).

ident Turbay's signature, President Barco attempted to cure the defect by signing the original bill containing the 1979 Treaty, and promulgating it as Law 68 of 1986.<sup>91</sup> Of course, Law 68 was immediately challenged and came before the SCJ in May, 1987.

The basis of the challenge to the new law was that, in signing Law 27 of 1980 and promulgating it as Law 68 of 1986, the President had approved a law that did not exist. The SCJ Decision of December 12, 1986, while based on procedural grounds, invalidated the whole of Law 27 of 1980, therefore requiring the reintroduction of the bill to Congress, and congressional debate on and passage of the new bill. Because these steps had not been accomplished, the President's promulgation of Law 68 had no constitutional basis. The legislative process had been violated.

In the Court's decision, twelve of the twenty-four SCJ justices agreed that the Court's December 12th decision rendered Law 27 completely invalid.<sup>92</sup> These justices reasoned that the various steps of the legislative process described under the Constitution (i.e., legislative debate, passage, and presidential approval/objection) must be viewed as a single unit.<sup>93</sup> While the Court did not specifically allude to separation of powers or "checks and balances," one can discern from its reasoning that such a process was indeed what the Court had in mind. In other words, where the legislature and executive fulfill functions in the lawmaking process, each of their respective functions must be subject to the oversight of the other because of the inherently political nature of both branches. Thus, any flaw in the lawmaking process must be considered fatal if that process is to retain its legitimacy. If one lawmaking branch makes a "mistake" in the process and is then allowed on its own to "fix" its mistake, such an allowance gives the appearance of removal of the oversight "check" of the other lawmaking branch thereby ceding too much power to the former. In this regard, the opinion of the first twelve-justice plurality is an interpretation of the Constitution's text delineating the legislative process, prior cases dealing with the same subject, and scholarly inquiry relevant to the process.<sup>94</sup>

The other twelve SCJ justices disagreed, holding that the SCJ's December 12th decision invalidated Law 27 only insofar as it was not

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91. Ley 68 de 1986, No. 37733 *Diario Oficial* 1 (14 de diciembre de 1986).

92. See Kavass, *supra* note 61, at 498 (reprint of Decision of June 25, 1987 (Sala Plena)).

93. See *id.* at 501.

94. See *id.* at 502.

properly approved by the President, and that proper approval of the law would remedy the procedural defect. This twelve-justice plurality reasoned that because the December 12th Court's reasoning in the "grounds" section of the decision was so specific as to why Law 27 was unenforceable, "[t]he Court believed that the bill was consistent with the Constitution as regards the legislative phase and that all that was lacking was the presidential approval so that it could become a law . . . ."<sup>95</sup> In other words, if it was the Court's intention to send the bill back to Congress, it would not have been so specific in the grounds for its decision. Thus, according to the second plurality of justices, the Court stated the legislation's defect and prescribed the cure. The second group of justices went on to give an expansive interpretation of the Constitution's Article 86, arguing that the President can approve and promulgate a bill at any time after expiration of the time periods prescribed for objection.<sup>96</sup>

Alfonso Suarez de Castro, the temporary justice appointed to break the tie, sided with the first plurality.<sup>97</sup> He noted that under Article 2 of Law 1 of 1873, laws must be numbered consecutively in the year they come through the Congress, and are sent to the President.<sup>98</sup> In this regard, executive approval is not considered in determining the year that a law was enacted.<sup>99</sup> Thus, because Congress did not enact Law 68 of 1986, it does not satisfy the requirements of Law 1 of 1873, and satisfies only one requirement of the Constitution's Article 81.<sup>100</sup> Therefore, Law 68 must be unconstitutional.

Justice Suarez then addressed the apparent interpretational conflict among the Court stemming from the December 12th Court's specificity in describing the "grounds" for its decision and the statement in the "operative" portion of the decision declaring Law 27 unenforceable. Justice Suarez stated that the view expressed by the Court in its "grounds" section is relevant only to the extent that it enunciates the basis of the Court's ultimate decision. He reasoned that under the separation of powers doctrine embodied in the Constitution, the Court, like the legislature, is prohibited from making suggestions to public offi-

95. *Id.* at 509.

96. *Id.* at 510-11.

97. Kavass, *supra* note 61, at 505-506 (opinion of temporary Associate Justice Alfonso Suarez de Castro).

98. *Id.* at 506.

99. *Id.*

100. COLOM. CONST. art. 81 (describing legislative process).

cials,<sup>101</sup> and that the remaining procedure by the President could not be completed under Article 86 because of the expiration of the constitutional time periods for legally executing them.<sup>102</sup> Therefore, the operative part of the Court's decision was tied to a very specific grounds section is not restrictive because the grounds merely indicate the determining conditions—in essence, the cause or causes—of the unenforceability of Law 27.<sup>103</sup>

Of all the reasons given by temporary Associate Justice Suarez, the first seems the most powerful because it militates against the issuance of advisory opinions. In turn, such reasoning goes hand-in-hand with the first plurality's separation of powers or checks and balances analysis.<sup>104</sup> For the same reason, Justice Suarez's conclusion is also quite strong. While Justice Suarez second reason appears weak because Article 86 of the Constitution prescribes time limitations only for presidential objection to bills,<sup>105</sup> it gains strength when read in conjunction with his interpretation of the law numbering process. The ultimate effect of the SCJ's June 25, 1987 decision was to render the 1979 Treaty unenforceable in Colombia. Suspension of all extraditions under the 1979 Treaty soon followed.

#### D. Decree Number 1860

Not until August, 1989 would extraditions resume. Why the two year hiatus? It is hard to say specifically, but it is worth noting that the summer of 1987 was not particularly good for the Reagan Administration because it was the summer of the Iran-Contra congressional inquiry. Later, United States Attorney General Edwin Meese resigned and was replaced by Richard Thornburgh. By the time the Thornburgh Justice Department got going, then Vice President George Bush was

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101. Kavass, *supra* note 61, at 507 (opinion of temporary Associate Justice Alfonso Suarez de Castro); *see also* COLOM. CONST. art. 78.

102. Kavass, *supra* note 61, at 507.

103. *Id.*

104. *See* COLOM. CONST. art. 78(1) (forbidding Congress to make suggestions to public officials); *accord* H. HART & H. WECHSLER, *THE FEDERAL COURTS AND THE FEDERAL SYSTEM* 66-68 (2d ed. 1973) (discussing the seminal 1793 United States advisory opinion case known as the "Correspondence of the Justices" in which the Supreme Court refused to issue such an opinion to the Washington Administration, reasoning that the doctrines of separation of powers and checks and balances prevented the Court from doing so).

105. COLOM. CONST. art. 86.



hot on the presidential campaign trail, as were a number of members of Congress and Senators. All of this served to push to the rear of the priority list renewed pressure on Colombia to resume extradition of suspected drug traffickers to the United States. However, the advent of the Bush Administration in 1989, with its emphasis on increased law enforcement to reduce international drug trafficking, was all that was needed to bring the extradition issue back to the forefront.<sup>106</sup>

A rather reluctant President Barco was left with four options in reviving extradition: His first option was to defy Washington's request. However, in light of his personal ties to the United States and the perceived importance of United States economic and military assistance, that option was simply not viable. His second option was to reintroduce to Congress a bill containing the 1979 Treaty. However, because of the congressional opposition to the 1979 Treaty expressed during the initial debate in 1980 and the hostility toward extradition of Colombian nationals that had developed within the Colombian populace, Barco knew that the odds were against passage of a new bill. As a third option, Barco could have sought either encourage adoption of the Inter-American Treaty on Extradition,<sup>107</sup> or renegotiation of the 1979 Treaty, deleting or restricting the provision allowing for extradition of Colombian nationals. The problem there was that it was precisely that provision which had been so strongly advocated by the United States during the initial negotiations.<sup>108</sup> Thus, there was little chance that the Bush Administration would support a Colombian request to restrict or delete such substantive language. Ultimately, Barco chose his fourth option: issuance under his state of siege powers of a legislative decree mandating "administrative" extradition.

The popular view in some sectors of Colombian society and in the

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106. Note that in 1988, the United States passed a sweeping anti-narcotics law known as the Anti-Drug Abuse Act of 1988, Pub. L. 100-690, 102 Stat. 4181 (1988). The law created the Office of National Drug Control Policy (the "Drug Czar") to coordinate all drug control efforts and required the President to formulate and submit to Congress a National Drug Control Strategy. Pub. L. 100-690, §§ 1001, 1005, 102 Stat. 4181, 4185. The Bush Administration, the campaign platform of which included a strong anti-drug crime plank, was quick in its response. The National Drug Control Strategy, emphasizing extraterritorial law enforcement, soon became a major political tool. See THE WHITE HOUSE, NATIONAL DRUG CONTROL STRATEGY 49-63 (1990); see also Perl, *International Aspects of U.S. Drug Control Efforts*, CRS REV. 17 (Nov.-Dec. 1989).

107. See *supra* note 27.

108. See 1979 Treaty, *supra* note 53.

United States was that President Barco issued Decree Number 1860 of 1989,<sup>109</sup> providing for summary administrative extradition of those accused of drug trafficking, in response to the August 14 assassination of Liberal presidential candidate Carlos Luis Galán. Of course, Galán's murder was alleged to have been committed by agents of drug traffickers. According to the conventional wisdom, the Decree would be a sign from the Barco Administration that it was serious about dealing with those involved in the drug trade, and that it would not tolerate mass bloodshed allegedly perpetrated by traffickers.

The problem here is that there are other well-informed and well-connected members of Colombian society who relate a much different story underlying the promulgation of D.N. 1860, a story much less altruistic and far more disturbing than the "official" version. The Bush Administration's strong emphasis of a law enforcement-oriented international drug control policy makes such an alternative view plausible.

Faced with the fact that the Colombian Congress was not about to approve a new bill containing the 1979 Treaty, in late spring or early summer of 1989 members of the Colombian Executive Cabinet, in consultation with members of the United States Department of Justice and the foreign ministries of certain European nations, devised the language that was to become the text of D.N. 1860. However, because of the then strong, anti-extradition feeling within Colombia, a pretext for issuance of the Decree was necessary—a pretext that would sufficiently shock the Colombian people into backing extradition of Colombian nationals. The death of Galán, a vocal critic of drug traffickers, provided such a pretext. His murder remains a mystery and Colombian authorities have yet to uncover any evidence that it was carried out by *sicarios* (professional assassins) in the traffickers' employ.

Certainly, in light of the alleged business acumen and complexity of those involved in the illicit drug business, the lack of evidence does not, in itself, mean that the drug trade had nothing to do with the Galán assassination. However, the official story simply does not comport with the strong Colombian popular feeling against extradition of nationals in effect at the time of Galán's death. It makes absolutely no sense that members of the illicit drug business would commit such a poorly timed assassination of a popular leader. Indeed, if drug traffick-

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109. DECRETO NUMERO 1860 de 1989, No. 38945 *Diario Oficial* 5 (18 de agosto de 1989) [hereinafter D.N. 1860 or "the Decree"]; see also DECRETO NUMERO 2105 de 1989, No. 38981 *Diario Oficial* 4 (14 de setiembre de 1989) (providing for personal appearance of defendant during extradition proceedings).

ers are considered to be sophisticated business people, how could they have been foolish enough to kill a popular politician when things were so much in their favor? They must have known that killing Galán would have resulted in a Colombian change of heart and a government-led crackdown. If nothing else, such a move would be "bad for business."

In any event, D.N. 1860 was in force. Although disturbed by the new administrative summary extradition procedure, the majority of the Colombian populace was caught sufficiently off-guard by the Galán assassination and the official story to deter a major political backlash.

D.N. 1860 is a severe measure. It was enacted by President Barco pursuant to the state of siege that his predecessor had invoked in 1984.<sup>110</sup> D.N. 1860 is designed to provide for summary administrative extradition of those who participate in the narcotics business.<sup>111</sup> Article 1 suspends subsection 2, Article 17 of the Penal Code "with regard to everything related to narcotics trafficking and related crimes . . . ."<sup>112</sup> Subsection 2 of Article 17 of the Penal Code provides that extradition of Colombians "shall be subject to the provisions of public treaties."<sup>113</sup> While the legislative intent of this provision is difficult to discern, one can deduce that its wording provides a safeguard against the extradition of Colombian nationals by pure executive fiat. In other words, because extradition of Colombian citizens is to take place only within the ambit of duly negotiated public treaties, and because all public treaties are subject to congressional legislation, the executive is prevented from extraditing nationals without congressional consultation.<sup>114</sup>

110. See *supra* note 76.

111. D.N. 1860, *supra* note 109, at Preamble.

112. *Id.* at art. 1.

113. CODIGO PENAL DE COLOMBIA art. 17, § 2, reprinted in REGIMEN PENAL COLOMBIANO (loose-leaf 1990).

114. A review of the history of Colombia's policy on extradition of its own citizens reinforces this point. From the year of the nation's independence until 1936, extradition of nationals was, at least, not expressly prohibited by law. However, note that such extradition was discouraged under the 1888 extradition convention with the United States. See 1888 Convention, *supra* note 22, at art. 10. In 1936, Law 95 was enacted as part of the Penal Code, and expressly forbade extradition of citizens. It was only in 1980, during the war on marijuana by the United States, and during the Washington-oriented Turbay Administration, that extradition of nationals was expressly permitted. In that year, President Turbay issued Decree Number 100, amending the Penal Code to its current form allowing for extradition of Colombian nationals, but only where such extradition is made pursuant to public treaties. Clearly, this decree was a response to the newly negotiated 1979 Treaty, *supra* note 53, which called for extradi-

Article 2 of D.N. 1860 eliminates the requirement of a "prior ruling by the Criminal Appeals Division of the Supreme Court of Justice" in the granting of extradition requests for Colombian citizens and foreign nationals.<sup>115</sup> Under prior practice, requests for extradition were subject to judicial review to assure that such requests were being made in accordance with Colombian law.

Article 3 places those persons "held or arrested and subject to extradition" at the disposal of the Justice Ministry.<sup>116</sup> Article 5 provides that an extradition request will preempt any conviction for another crime of the requested person already obtained in Colombia prior to the receipt of the extradition request.<sup>117</sup> In other words, if a requested person is already serving jail time in Colombia pursuant to a prior conviction, the Government may still "order the immediate delivery of th[at] person . . . to the requesting State . . ." for trial in that state on the charges upon which the extradition is based.<sup>118</sup>

Article 6 provides that "any person may be extradited, although the person may have been tried in Colombia for the same crime for which he is requested, as long as sentence has not been rendered."<sup>119</sup> Thus, it is possible for a person to be tried twice for the same crime, albeit in different jurisdictions. Article 7 denies both the right to release on bail and the ability to obtain a suspended sentence to requested persons against whom "other proceedings" are in progress in Colombia.<sup>120</sup>

Article 8 is very important, because it outlines the requirements for the granting of an extradition request. Section A requires the requesting state to guarantee that the death penalty will not be imposed upon the person extradited.<sup>121</sup> Section B states that "[t]he extradition of a citizen shall not be granted in any case where the requesting State does not fully guarantee that it shall not impose a term of imprisonment of more than thirty (30) years."<sup>122</sup> Section C provides that the requesting State shall "guarantee that the human rights of the person extradited shall be respected . . . in a manner that is non-discrimina-

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tion of the contracting parties' nationals.

115. D.N. 1860, *supra* note 109, at art. 2.

116. *Id.* at art. 3.

117. *Id.* at art. 5.

118. *Id.*

119. *Id.* at art. 6.

120. D.N. 1860, *supra* note 109, at art. 7.

121. *Id.* at art 8, § A.

122. *Id.* at art. 8, § B.

tory with regard to those convicted in its own country."<sup>123</sup> Section D provides that all costs of extradition (i.e., translation of documents and transportation of the person extradited) shall be borne by the requesting state.<sup>124</sup>

Article 9 provides that the Government may issue a resolution in favor of extradition in absentia.<sup>125</sup> In other words, the person requested does not have to be "the object of detention or arrest" for a favorable extradition resolution to be issued.<sup>126</sup> However, in such a case, the Government is required to issue a "summons" to the person requested so that the person may prepare a defense.

Ultimately, the promulgation of D.N. 1860 not only bypassed the constitutional legislative process, but proscribed any kind of independent judicial due process. By providing for extradition proceedings to be carried out exclusively by the executive branch, D.N. 1860 leaves much leeway for abuse of the requested person's civil rights. Essentially, under the Decree, Colombia can extradite anyone it wants as long as there is some type of illegal drug-related charge pending against that person in the requesting state.

### E. *The SCJ Decision of October 3, 1989*

The question of the constitutionality of D.N. 1860 came before the SCJ in September, 1989, and the Court rendered its opinion on October 3.<sup>127</sup> It began its opinion on the subject matter of D.N. 1860 by recognizing the power of the President, under his state of siege power, to amend the law when he believes that the public order is threatened. Thus, the Court agreed that, on its face, Article 1 of the Decree, suspending the section of the Penal Code restricting extradition of Colombians to duly negotiated public treaties, was constitutional.

The SCJ then examined the Decree in the context of previous decisions dealing with international extradition and international agreements on extradition to which Colombia is a party and which are currently in force. The Court seemed particularly concerned with that part of the Penal Code which D.N. 1860 left intact, to wit: that extradition

123. *Id.* at art. 8, § C.

124. *Id.* at art. 8, § D.

125. D.N. 1860, *supra* note 109, at art. 9.

126. *Id.*

127. Decision of October 3, 1989 (Sala Plena) (unofficial translation; on file at the offices of the *Nova Law Review*).

shall be granted, requested, or offered in accordance with public treaties. The SCJ stated:

[T]he circumstance that the extradition of nationals for drug trafficking and kindred crimes is now possible, even in the absence of a public treaty authorizing it, does not in any way imply that if such international instruments exist they should not be observed, inasmuch as, quite the contrary, it is imperative for both concerned states that they be performed with exactness, for the bona fides required of them is at stake. This conclusion, which goes hand in hand with a literal as well as a systematic construction of the rules, is unescapable [sic].<sup>128</sup>

Looking to its previous decisions both en banc and in its Criminal Appeals Division, the Court held that under basic principles of international law, despite the presence of conflicting domestic legislation, Colombia remains bound by its international obligations.<sup>129</sup> This is the rule in the United States as well.<sup>130</sup>

The SCJ attempted to draw distinctions among what it characterized as two of the three classes of international treaties: "contract" treaties and "law" or "normative" treaties. According to the Court, a contract treaty,

creates reciprocal rights and obligations between the parties which are, therefore, the reason for mutual performance by the very states that execute them; in this regard, they are subjective acts or the source of legal relations of that nature; they settle different, albeit not always contradictory or opposing, interests of the parties, and their common will leads to the resolution of each such interest. By contrast, law treaties or normative treaties regulate issues of concurrent or shared interest and determine, not the behavior of each state vis-à-vis the other's rights and obligations, but rather the behavior that each state must observe in a certain matter, thus giving rise to objective law.<sup>131</sup>

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128. *Id.* at 9.

129. *Id.* at 10; see also VIENNA CONVENTION ON THE LAW OF TREATIES, Nov. 22, 1971, S. Exec. Doc., 92d Cong., 1st sess., art. 27 (1971); Kearney & Dalton, *The Treaty on Treaties*, 64 AM. J. INT'L L. 495 (1970).

130. See RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 115(1)(b), comments (a), (b) (1987).

131. Decision of October 3, *supra* note 127, at 10-11.

Extradition treaties fall under the former category because such treaties involve regulation of "a [contracting] state vis-à-vis another in terms of mutual performance and on the international field,"<sup>132</sup> while treaties governing, say, intellectual property, fall under the latter category because such treaties "determine the internal conduct of the [contracting] states in transnational matters (international private law) . . . ."<sup>133</sup> Because contract treaties, such as those involving extradition, govern relations purely between states acting as legal persons, "the[ir] prevalence . . . cannot even be doubted . . . ."<sup>134</sup> Thus, in the presence of an extradition treaty, the contracting parties may not accord preferential application to internal legislation on the same subject. Ultimately, the 1979 Treaty, while dormant under Colombian law because of the SCJ's 1987 decision, is still in force under international law until it is denounced. Therefore, the 1979 Treaty takes precedence over D.N. 1860.<sup>135</sup>

Despite the October 3, 1989 decision by the SCJ, the Colombian government, with the approval of the United States, has continued to extradite both its nationals and noncitizens under D.N. 1860. There has been no formal denunciation of the 1979 Treaty either by Colombia or the United States as provided in Article 21 of the 1979 Treaty, and by the rules under article 54 of the Vienna Convention on the Law of Treaties: a convention to which both nations are signatories. Thus, under both countries' laws, the legal status of the 1979 Treaty, and the extraditions which have taken place pursuant to D.N. 1860, have yet to be resolved.

More poignantly, the Colombian government's refusal to abide by the SCJ's declaration of D.N. 1860's subordination to the 1979 Treaty is indicative of its low regard for the authority of Colombia's highest court and the pointlessness of SCJ decisions issued during a state of siege. Equally disconcerting is the role that the United States has played. Rather than implementing a policy focused on institution building which aims to reinforce the rule of law in Colombia, the United States' policy contributes to its deterioration by actively promoting debilitation of an independent Colombian judiciary and disrespect for the Constitution.

It is quite clear that current administration of justice in Colombia

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132. *Id.* at 11.

133. *Id.*

134. *Id.* at 11-12.

135. *Id.* at 13.

is carried out not by the judicial system pursuant to its constitutional mandate, but solely by executive discretion. Thus, despite both the "free and fair" presidential elections of 1990 - the campaign which saw the assassination of three candidates - and the absence of direct military rule, Colombian democracy, governed according to the rule of law, remains a fiction.

#### IV. CONCLUSION

If the United States and Colombia are serious about reducing the volume of international drug trafficking emanating from Colombia and restoring order in that country, they must endeavor to make the business less attractive. The current international drug control policy of the United States, and active participation in that policy by the Colombian government, verges on the perpetration of fraud<sup>136</sup> and has solidified Colombia's status as a police state. Rather than addressing some of the causes of Colombia's role as a base for drug trafficking: extreme poverty in that country; corruption in the highest echelons of Colombian society and government; and high demand for illicit drugs in the developed world, to name three, the current policy has only increased the level of violence in an already violent society. To defuse the situation, and this can occur only gradually, the rule of law must be established in Colombia, thereby giving Colombians some sort of recourse other than violence. That process can be initiated through a number of steps.

First, Colombia must amend its constitution to eliminate the state of siege/emergency powers of the President. These powers have been abused by Colombian heads of state who seem to prefer armed repression of political opposition to true competition, negotiation, and problem solving. The Colombian President's invocation of the state of siege/emergency powers robs the rule of law of all meaning.<sup>137</sup> If the state of siege/emergency powers are not eliminated, all other efforts to restore

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136. See *supra* notes 12, 13.

137. See *supra* notes 78-83 and accompanying text. Indeed, the practical effect of the state of siege regarding the independence of the judiciary, is to reduce considerably the judiciary's sphere of action in protecting constitutional rights from governmental abuse. Consequently, long-term usage of the state of siege or its functional equivalents has substantially hindered judicial independence in many Latin American countries by making protection of constitutional rights impossible.

Rosenn, *Judicial Independence in Latin America*, 19 U. MIAMI INTER-AM. L. REV. 1, 34 (1987).



the rule of law will be for nought. In this regard, Colombia must break with its authoritarian past.<sup>138</sup> The government must exhibit the political will to allow the judicial system to carry out its function as an inviolable branch of government with the power to overrule actions taken by the Executive and Congress when either of those two branches over-

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138. In light of Latin American political history in general, this appears to be a tall order. Indeed, some knowledgeable commentators on Latin American law have indicated that the trend toward authoritarian government in Latin America is a culturally natural and "not accidental" phenomenon, reflecting "the Roman law tradition of granting autocratic powers to the emperors and *paterfamilias*, the corporativism and patrimonialism of colonial rule, and the hierarchical structure of the Catholic Church." Rosenn, *supra* note 137, at 34 (citing Wiarda, *Toward a Framework for the Study of Political Change in the Iberic-Latin Tradition: The Corporate Model*, 25 WORLD POL. 206, 210-12 (1973); Wiarda, *Law and Political Development in Latin America*, 19 AM. J. COMP. L. 434, 438-47 (1971)).

Unwilling to accept such analysis as the final word on democratic evolution in Latin America, other specialists have attempted to provide an answer. For example, Carlos Santiago Nino, Professor of Law at the University of Buenos Aires, writes that, [a]s for the alleged Hispanic preference for strong leaders, this tendency should be institutionally counteracted rather than promoted. In fact, the postulation is rather dubious, given the easy adaptation of countries like Spain to a parliamentary system (after forty years of a caudillo's rule), and the adoption of strong leaders by non-Hispanic nations.

Nino, *Transition to Democracy, Corporatism and Constitutional Reform in Latin America*, 44 U. MIAMI L. REV. 129, 155 (1989). Professor Nino's attempt to dispel the culturally linked Latin American authoritarian governmental model is laudable but unsatisfying. It is laudable because it refutes a stereotype often bestowed upon Hispanic culture. However, it is unsatisfying for three reasons. First Professor Nino fails to acknowledge the differences among continental Spanish and Latin American cultures which may have influenced Spain's transition from military rule to parliamentary democracy and which may prevent many Latin American nations from doing so, including the influence of other democratic European nations on Spain because of geographic proximity, Spain's membership in the European Community, and her membership in the North Atlantic Treaty Organization. Second, Professor Nino fails to admit that even Spain experiences problems similar, albeit to a much lesser extent, to those of many Latin American nations, to wit: difficulty in controlling the police in some parts of the country, occasional coup attempts by the military, and the existence of separatist insurgent groups such as the Basques.

Finally, Professor Nino's argument that non-Hispanic nations have adopted strong leaders does not in itself effectively counter the cultural linkage argument. Rather, such an argument merely indicates that culture is not the only reason underpinning the rise of authoritarianism. Perhaps this strand of Professor Nino's reasoning can be strengthened by comparing the seemingly similar problems of post-colonial Latin America and post-colonial Africa and Asia. See *Africa's Cities*, THE ECONOMIST 25 (Sept. 15, 1990); Crosette, *In Pakistan, The Judiciary Tries to Keep an Even Keel*, N.Y. Times, Oct. 21, 1990, at D4, col. 1.

steps its constitutional mandate.

Second, the United States and Colombia should immediately cease all extraditions taking place under D.N. 1860, and the Colombian government should either reintroduce the 1979 Treaty to Congress, denounce it, and enter into new bilateral negotiations, or denounce it and insist on adoption of the Inter-American Treaty on Extradition.<sup>139</sup> New bilateral extradition treaty negotiations must take into account Colombia's sensitivity in protecting its sovereignty and culture, and must reinforce other aspects of a Colombian program to institute and effectuate the rule of law. In this regard, if a new treaty is negotiated, prosecution and incarceration of Colombian citizens accused of drug-related crimes should take place in Colombia. Extradition of Colombians to the United States should occur, if ever, only in certain clearly defined and closely monitored cases.<sup>140</sup>

Third, the United States must refrain from using negative incentives in determining whether Colombia will receive economic assistance.<sup>141</sup> Rather, the United States, the European Community, and Japan, under the auspices of international organizations, must positively assist Colombia economically, and in reforming and rebuilding its judicial system.<sup>142</sup> Military and economic assistance should be made contingent on a Colombian commitment to such reformation and reconstruction.<sup>143</sup> The developed nations might even earmark aid for specific projects. For example, the United States, the European Community, or

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139. See *supra* note 27.

140. Currently, this is not the case under D.N. 1860, *supra* note 109. See *supra* notes 106-126 and accompanying text.

141. See *supra* notes 67, 70.

142. A primary form of economic assistance should, of course, consist of trade credits and preferences negotiated under the General Agreement of Tariffs and Trade. Such credits and preferences should be targeted at Colombia's three most attractive exports: Coffee, fossil fuels, and cut flowers. With regard to coffee, by far the nation's largest export, the International Coffee Agreement, Dec. 3, 1975, 28 U.S.T. 6403, T.I.A.S. No. 8683, which collapsed in July, 1989, should be renegotiated. See OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, 1990 TRADE POLICY AGENDA AND 1989 ANNUAL REPORT OF THE PRESIDENT OF THE UNITED STATES ON THE TRADE AGREEMENTS PROGRAM 66-70 (1990).

143. Whether or not the new government of Cesar Gaviria Trujillo is prepared to make such a commitment remains to be seen. However, there is some indication that effective judicial reform is possible. See "Urge Reforma de la Justicia," *Pinzon Lopez*, *El Espectador* (Colombia), July 13, 1990 at 6A, col. 1 (testimony of former SCJ Justice and Labor Minister Jaime Pinzon Lopez regarding necessity of judicial reform to restore order in Colombia).

Japan could donate computer systems to be used by the Colombian courts, and could train Colombian court personnel in the use of such systems. In response, Colombia would agree to dedicate a substantial amount of its budget to appropriations aimed at hiring and training more judicial personnel, raising the desperately low salaries of judges and rank and file police and corrections personnel, and purchasing modern equipment for the courts. The Colombian government would also agree to effectively separate the duties of the military from those of the police.

Fourth, Colombia must seek to implement a social safety net that provides realistic upward opportunities for its large, poor population. Under the current system, such opportunities are non-existent, and "rank" in society is determined at birth.<sup>144</sup> By changing the caste system, Colombia will increase the alternatives available to the urban and rural poor, thereby decreasing the attractiveness of the drug business.

Finally, the United States, Western European states, and Japan must increase their emphasis on drug demand reduction. By engaging in demand reduction, these nations, the largest consumers of cocaine, will eliminate the economic incentive involved in the international drug trafficking business.

The author recognizes that these suggestions challenge certain Colombian cultural norms, as well as a United States policymaking process which gives great weight to short term results reflected in opinion polls. Long term policymaking obtains results which can be measured only over a substantial period of time. However, only through such fundamental changes in thinking can the rule of law be implemented in Colombia, and international drug trafficking be reduced significantly without civil and human rights sacrificed and lives lost.

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144. See generally INT'L BANK FOR RECONSTRUCTION AND DEV., COLOMBIA: SOCIAL PROGRAMS FOR THE ALLEVIATION OF POVERTY (1990).

# Protecting the Rule of Law from Assault in the War Against Drugs and Narco-Terrorism

By Bruce Zagaris\*

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## I. INTRODUCTION

This paper discusses the rule of law under attack in the context of international narcotics trafficking and narco-terrorism. To set the stage, the paper discusses the role of law, both internationally and nationally, in the fight against narcotics trafficking, and particularly, organized crime and narco-terrorism. Organized crime is used as the focus of the

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\* The author is of counsel, Oppenheimer, Wolff & Donnelly, Washington, D.C.; adjunct professor, international business criminal law, Fordham University School of Law; co-chair, Committee on International Criminal Law, Section of Criminal Justice, American Bar Association; is editor of the *International Enforcement Law Reporter*; and was a consultant to the U.N. Crime Committee on organized crime.

paper because narco-terrorists are extremely organized and powerful. Increasingly, the battle against international narcotics trafficking and narco-terrorism is a power struggle.<sup>1</sup> So powerful, wealthy, and intent on maintaining their position are the drug barons that they now have an inordinate amount of influence and power over many of the highest echelons of government in certain countries.

For discussion purposes, international law as a target of organized crime and narco-terrorism is treated. Surprisingly, many professionals and lay persons that follow narcotics policy are not even aware of the existence of a comprehensive policy of an international organization. Rather, they only know excerpts from the narcotics policy of the country in which they live. For instance, most professionals in the U.S. believe that international narcotics policy comes from the pronouncements of the U.S. Government, as set forth by President Bush or the Drug Czar. However, the international drug policy set by the United Nations is the international policy within which national governments must adopt and fund their own policy so that the international policy can become operational and effective. Failure to coordinate national policy with the international policy and failure to fund international drug policy weakens the rule of law.

The importance of national law in combatting narcotics trafficking and organized crime as manifested in narco-terrorism can be seen almost on a daily basis. Especially in the United States, attention is riveted on the need to adopt our country's laws and on the assaults that other countries' judicial systems operate (e.g., the constant terrorism of the judicial system in Colombia).

In order to discuss the rule of law as a target and how to safeguard it requires an overview of the growing internationalization.

### A. *Organized Crime*

The paper discusses in part the growing internationalization of organized crime activity: its impact on different aspects of society and international relations, and indicates possible avenues of action to counter this development, including modalities of international cooperation and instruments therefore.

The term "organized crime" refers to complex criminal activities,

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1. This paper is based in part on an assignment of the author for the United Nations on international cooperation to counter the growing internationalization of organized crime activities.

carried out on a large scale by organizations with the intent to establish, maintain and exploit markets for illegal goods and services, for the sake of profit and enrichment of their members, and at the expense of society. Such activities generally occur outside the law and often involve crimes against persons, such as threats, intimidation, and physical violence, including murder and mutilation. While organized crime has not been precisely defined, some of its elements are clear. It is conspiratorial crime aimed at economic gain using a hierarchical coordination of a number of persons planning and executing illegal acts or pursuing legitimate objectives by unlawful means or through the use of funds derived from illicit activities. A main characteristic of organized crime is the hierarchical structure of closely knit groups. The tight organization and the method of keeping it intact characterizes many of the organized crime groups. Organized crime has moved from classical forms of illegal activities such as gambling, narcotics, and prostitution into business crimes such as planned bankruptcies, fraud, and loan sharking. Many of the new internationalized forms of organized crime have not yet gone into business crimes and have concentrated on their own brands of crime. However, durability and the conspiratorial characteristics of organized groups provide common elements and an inevitable evolution into different *modus operandi* if the groups are to successfully survive. A secondary, but extremely harmful effect of such activities on society is the corruption of public officials and political figures through bribes and graft or mere collusion. The characteristics of a criminal organization are: continuity in time, a hierarchical structure, a defined group of members, criminal involvement, recourse to violence, and the acquisition of power as the main goal.<sup>2</sup>

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2. In reviewing the types and characteristics of organized crime, one should consider the identification by the U.S. National Advisory Committee on Criminal Justice of seven descriptive characteristics:

a. Organized crime is a conspiratorial crime, sometimes involving the hierarchical coordination of a number of persons in the planning and execution of illegal acts, or in the pursuit of a legitimate objective by unlawful means. Organized crime involves continuous commitment by key members, although some persons with specialized skills may participate only briefly in the ongoing conspiracies.

b. Organized crime has economic gain as its primary goal, although some of the participants in the conspiracy may have the attainment of power or status as their objective.

c. Organized crime is not limited to patently illegal enterprises or unlawful services such as gambling, prostitution, drugs, loan sharking, or racketeering. It also includes such sophisticated activities as laundering of illegal money through a legitimate business, land fraud, and computer manipulation.

Traditionally, organized crime has developed monopoly control and continues to derive resources from five areas of illicit activity: illegal gambling, illicit narcotics trafficking, racketeering, prostitution, and loan sharking. Legitimate businesses which were early targets of organized crime include the fields of juke-box and vending machine operation, laundry services, liquor and beer distribution, nightclubs, food wholesaling, record manufacturing, and the garment industry.<sup>3</sup> A distinction between the traditional forms of organized crime and the illicit drug trafficking operations is the inter-linkage between modern organized crime and terrorist and guerilla movements. The methods of organized crime have been characterized by extortion that seeks as its targets persons who are poorly situated and unable to protect themselves. They typically are without ready access to the law, unable to avoid monitoring by organized criminals because their earnings and activities are regular or can be metered, and are "victims" whose regularly conducted activity can be treated "fairly" by extortionists who are dealing with other targets.

Although this paper addresses the problem of the internationalization of emerging criminal groups generally, and in particular the problem of narco-terrorism, the international community can successfully design mechanisms by directly pinpointing the nuances of each group.

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d. Organized crime uses predatory tactics such as intimidation, violence, and corruption, and it appeals to greed to accomplish its objectives and safeguard its gains.

e. By experience, custom, and practice, organized crime's conspiratorial groups are usually very quick and effective in controlling and disciplining their members, associates, and victims. Hence, organized crime participants are unlikely to disassociate themselves from the conspiracies and are in the main incorrigible.

f. There is not one organized crime family or group. Rather, a variety of groups engaged in organized criminal activity.

g. Organized crime does not include terrorists dedicated to political change, although organized criminals and terrorists have some characteristics in common, including types of crime committed and strict organizational structures. Organized crime groups tend to be politically conservative, and want to maintain the *status quo* in which they succeed, contrary to terrorist groups dedicated to radical political change through violent acts. See U. S. National Advisory Committee on Criminal Justice and Goals, ORGANIZED CRIME REPORT OF THE TASK FORCE ON ORGANIZED CRIME 7-8 (1976).

3. Organized crime usually controls legitimate business concerns in four main ways: 1) investing concealed profits acquired from gambling and other illegal activities; 2) accepting business interests in payment of the owners debt from illicit activities such as gambling or narcotics; 3) foreclosing on usurious loans; and 4) using various forms of extortion. President's Commission on Law Enforcement and Administration of Justice, TASK FORCE REPORT: ORGANIZED CRIME 4 (1967).

Hence, in order to deal with drug trafficking by persons in Andean countries, the international community and even national governments have signed a specific multilateral convention as well as bilateral conventions on drug trafficking alone. Nevertheless, some criminal groups have several criminal activities that require attention by other than persons training in just in type of crime such narcotics and in particular narco-terrorism.

### B. *The Impact of International Narco-Terrorism*

At the recent Eighth U.N. Congress on Crime Prevention, the complexity of dealing with organized crime and narco-terrorism was underscored.<sup>4</sup> Many countries that lack essential institutional capabilities, financial resources, and skilled personnel are not capable of designing or implementing well-defined strategies for dealing with narco-terrorism. The lack of resources of many countries and the transnational nature of narco-terrorism requires effective international action.

Narco-terrorism is used to describe the role played by drug trafficking in international politics.<sup>5</sup> In recent years, the power of narco-terrorists, their ability to manipulate sovereignty, and the comparative slowness with which governments adopt to change has enabled narco-terrorists to gain significant power both nationally and internationally. Narcotics, trafficking in narcotics, terrorism, international money movement, drug bartering for arms, arms trafficking, insurgent guerrilla movements, and covert activities by governments are all recognized mechanisms to destabilize governments. Narcotics and narcotics trafficking are considered by some to be an integral part of the symbiotic relationship between groups involved in transnational organized crime and persons seeking destabilization through the "invisible wars" of terrorism.<sup>6</sup>

Narco-terrorism is a popular term employed by the media and pol-

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4. U.N. Economic and Social Council, *Eighth U.N. Congress on the Prevention of Crime and the Treatment of Offenders, Report of the Interregional Preparatory Meeting for the Eighth United Congress on the Prevention of Crime and the Treatment of Offenders on Topic III: Effective National and International Action Against (a) Organized Crime; (b) Terrorist Criminal Activities*, U.N. Doc. A/CONF.144/IPM.2 (1988).

5. For a useful discussion of narco-terrorism from which this account draws heavily, see Lupsha, *The Role of Drugs and Drug Trafficking in the Invisible Wars*, in *INTERNATIONAL DRUG TRAFFICKING* 15 (D. Rowe ed. 1988).

6. *Id.* at 19.



iticians to convey images of conspiracies between narcotics traffickers and terrorist organizations. The term can be misleading because it applies to a wide range of relationships, situations, and groups.<sup>7</sup> In terms of the rule of law, narcotics-trafficking groups employ terrorism as a means to intimidate governments and the judiciary, prosecutors, law enforcement officials, and the military. Terrorism enables them to avoid or substantially diminish the risk of apprehension, prosecution, and incarceration. The tactics of narco-terrorists in Colombia, for instance, have been well documented.<sup>8</sup>

In some cases, narco-terrorists can be so intrusive that they assume the role of the state itself in trafficking drugs and in cooperating with drug-trafficking organizations. For instance, in the early 1980s under the Luis Garcia Meza government, Bolivia was taken over by a group of military officers who also dominated the drug trade. A similar situation is alleged to have occurred in Panama under the Administration of General Manuel Noriega.

One aspect of the relationship between drug trafficking and the state has been the use of drugs and drug trafficking to foster and promote a state's policies and positions. For instance, a country uses transactional criminal groups, such as drug and arms traffickers, as links to terrorist and insurgent organizations. In the case of the U.S., a report by the U.S. Senate Foreign Relations Committee documented the arms-drugs trade in the support of the contra operations in Nicaragua.<sup>9</sup>

Organized crime and narco-terrorism have infiltrated into the international financial system. A problem in combatting international terrorism has been defining terrorism. Many experts have suggested that rather than try to define terrorism, conventions should merely establish a list of specific acts that are criminalized and excluded from the list of political crimes. Many experts believe that, rather than preparing new conventions, the best approach is to revise and improve existing agreements through concluding additional protocols to close gaps and strengthen enforcement. The U.N. could take a leading role in monitoring implementation of existing treaties and obtaining informa-

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7. *Id.* at 16.

8. SENATE PERMANENT SUBCOMMITTEE ON INVESTIGATIONS, COMMITTEE ON GOVERNMENT AFFAIRS, STAFF STATEMENT ON HEARING STRUCTURE OF INTERNATIONAL DRUG CARTELS (Sept. 12, 1989).

9. See SUBCOMMITTEE ON NARCOTICS TERRORISM AND INTERNATIONAL OPERATIONS, U.S. SENATE COMMITTEE ON FOREIGN RELATIONS DRUGS LAW ENFORCEMENT AND FOREIGN POLICY 2 (Apr. 13, 1989).

tion by the use of extensive surveys and questionnaires.

State terrorism has been an important phenomenon. It includes operations sponsored, organized, encouraged, directed or supported, either individually or collectively, materially or logistically, by a state or group of states for the purpose of intimidating another state, person, group or organization.

The relationship between terrorists and narcotics traffickers depends on a variety of the following: need, organizational infrastructure development, ability, worth or value, and the availability of modern technology.

As measures to combat international terrorism are strengthened, it is also important to ensure the right of the defendant to seek and obtain information that might contribute to his or her defense and to safeguard the fairness of the system.

### C. *Impact of Organized Crime Activities on Society and International Relations*

The rapid internationalization of both organized crime and terrorist activities are threatening social and public institutions in many countries. Organized crime is infiltrating legitimate businesses. Its reach has extended into the international financial system and its association with economic and white-collar crime has become increasingly more evident.<sup>10</sup> Its diversification and expansion, its new forms of association with highly profitable operations and inter-linkages with the illegal arms trade, illicit drug trafficking, terrorist activities, corruption, and professional sports are seriously undermining legitimate business activity and society in general.<sup>11</sup>

The activities of organized crime and narco-terrorists are far more destructive in developing countries, which are often highly vulnerable to the operations of criminal organizations. Organized crime has deeply infiltrated the agencies of public administration and political structures in a number of developing countries, where it bribes government officials at all levels, including the armed forces, and contributes to the

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10. See generally President's Commission on Organized Crime, THE CASH CONNECTION: ORGANIZED CRIME, FINANCIAL INSTITUTIONS, AND MONEY LAUNDERING (Interim Report to the President and the Attorney General, Oct. 1984); U.S. Department of Justice, Office of Attorney General, Drug Trafficking: A Report to the President of the United States 40 (Aug. 3, 1989).

11. See *supra* note 4.

electoral campaigns of political parties, thereby undermining the fabric of society, generating widespread demoralization and having a pervasive effect through all levels of society.<sup>12</sup>

Widespread corruption constitutes, moreover, a serious impediment to effective international cooperation by the countries concerned. In some cases, the officials in charge of implementing such cooperation were on the payroll of organized crime. In addition, money laundering and other financial operations carried out by organized crime in developing countries are a source of grave financial problems in those countries. Organized crime in those countries brings a new entrepreneur class, the financial power of which is often used in a manner contrary to national interests. Organized crime, therefore, has a devastating effect in all countries, and tends to spill over national borders in a most insidious manner.

The role of some new forms of international organized crime have assumed new importance, emphasis, and perspective, in part due to their own nature, and in part due to technological changes. Drug trafficking, terrorism, transnational money laundering, drug bartering for arms, arms trafficking, insurgent guerilla movements, and cover activities by governments have destabilized national governments and their regimes. Drug trafficking is now an integral part of the symbiotic relationship between groups involved in transnational organized crime and revolutionary ideological groups seeking to overthrow or destabilize governments.<sup>13</sup>

Despite writings of pundits on "narco-terrorism," suggesting simplistic alliances between narcotics traffickers and ideological criminals/terrorists, scholars and law enforcement, intelligence demonstrate that a wide range of relationships, situations, and groups occur.<sup>14</sup> Indeed, collaboration between drug traffickers and insurgent guerilla groups has occurred in countries, such as Colombia, Burma, Lebanon, and Sri Lanka. Revolutionary insurgent groups on some occasions have exploited and extorted drug trafficking organizations. More recently, narcotics-trafficking organizations have employed terror to intimidate governments and their judiciary, police, and military, in order to prevent their members from apprehension, prosecution and incarceration.<sup>15</sup>

Another new phenomenon arising out of narco-terrorism is the in-

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12. *Id.* at 7.

13. Lupsha, *supra* note 5, at 22.

14. *Id.* at 16.

15. *Id.* at 16-17.

volvement of the state itself in trafficking drugs and in cooperating with drug-trafficking organizations. A national government whose top officials control the drug trade and trafficking is indeed a pernicious force since it has *de jure* legitimacy and the right to use force.

Another facet of the relationship between drug trafficking and the state has been the use of drug trafficking and the profits therefrom to promote a state's policies and activities. This use can be traced to the activities of the British East India Company in China. More recently, nation-states have used transnational criminal groups, such as arms and drug traffickers, as links to terrorist and insurgent organizations. A variant of this practice is the use of drug trafficking and its profits to provide funds either directly, covertly or indirectly to other states that act as surrogates for other persons in the power struggle. Another variation is the use of connections between drug traffickers and representatives of nation-states to hide and protect private criminal activities.

The ubiquity of and enormous amounts of profits from drug trafficking enable persons to use illicit drugs as a type of currency that can be traded for money or for other commodities such as arms or jewels. In recent times, technological innovations have enabled individuals to garner types of property which used to be the sole province of governments: airplanes, radios, satellite communications, electronic fund transfers, and automatic weapons, rockets, grenades, and other military hardware. These developments have facilitated easy participation for individuals and groups to engage in transnational criminal activities.<sup>16</sup>

Today, international organized crime groups—money launderers, arms traffickers, ex-intelligence operatives, crime brokers, drug traffickers, international fraudsters, and other intermediaries who can set up and coordinate international criminal operations are in demand. Many examples quickly come to mind of symbiotic ties between organized criminal groups and the agents and agencies of legitimate governments. The linkages among the diverse organized criminal groups, including between narcotics traffickers, vary with the following: need, organization infrastructure development ability, worth or value, and the availability of modern technology. One of the key components linking disparate groups is the need for funding. For instance, revolutionary groups utilize both traditional and nontraditional means. Traditional crimes to obtain financing have included bank robbery, kidnapping for ransom, and extorting a "revolutionary tax" on persons within the areas con-

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16. *Id.* at 18.

trolled by the revolutionaries. Drug and arms trafficking, and money laundering represent new forms. In many countries drug traffickers have developed enormous amounts of capital and modern organizational structures. To some insurgent revolutionary groups, drug traffickers offer the potential opportunity for funds and access to technology. Due to the similarity of their needs, organizational skills, and infrastructures, drug traffickers in some areas of the world have cooperated. When drug traffickers and insurgent or terrorist groups find enough similarities and opportunities, they will cooperate. However, significant difficulties nevertheless exist between them. For instance, while drug traffickers are politically conservative, insurgent revolutionaries are propelled by a Marxist-Leninist ideology or its variants. In order to properly chart the latest developments in the links among cooperating groups of organized crime, especially the international elements, including those only marginally involved (e.g., professionals providing services on a regular basis), law enforcement officials should share intelligence and take collective action against such groups where appropriate.

## II. THE RULE OF LAW UNDER ATTACK

### A. *International Law*

International law is under attack in the fight against narcotics trafficking and organized crime because international law has not been as flexible and as dynamic as either the organized criminals or the narco-terrorists. International law develops new mechanisms only over time. Normally it takes two to four years to negotiate, conclude, ratify, and exchange instruments of ratification, even in the case of a bilateral treaty. Multilateral treaties, such as the U.N. Convention on Narcotic Drugs and Psychotropic Substances, take much more time. Organized criminals and narco-terrorists are not as limited by political boundaries, borders, sovereignty, double criminality or resource problems, and can quickly change their routes, couriers, and modes of operation.

The absence of effective cooperation in extradition and mutual assistance in the fight against organized crime and narco-terrorists results in circumvention of international law. The taking of short-cuts in order to accomplish a country's goals in catching and prosecuting suspects has resulted in the abandonment of extradition of defendants and the

seizure of defendants. Examples are Yunis,<sup>17</sup> Caro Quintero,<sup>18</sup> Verdugo-Urquidez,<sup>19</sup> and Manuel Antonio Noriega.<sup>20</sup> The Noriega case was especially egregious because of the use of masses of troops and wholesale violence that killed hundreds of innocent civilians, wiped out neighborhoods, and destroyed thousands of businesses.<sup>21</sup>

The rule of law and particularly international law is a target because some governments do not follow international law and policy. For instance, the U.N. Comprehensive Multidisciplinary Outline of Future Activities in Drug Abuse Control sets forth four major areas of work:

1. Prevention and Reduction of the Illicit Demand for Narcotic Drugs and Psychotropic Substances;
2. Control of Supply;
3. Suppression of Illicit Trafficking; and
4. Treatment and Rehabilitation.

One problem has been that some governments do not pay proper attention or devote resources to each of the four categories. Some governments, for instance, emphasize control of supply and suppression of illicit trafficking to the expenses of demand prevention, treatment and rehabilitation.

Another problem is that governments do not provide the resources to the international organizations charged with making and carrying out anti-narcotics activities. For instance, the U.S. has fallen seriously in arrears with its obligations to both the U.N. and the O.A.S.<sup>22</sup> In recent years, the U.S. contribution to international organizations in anti-narcotics activities has increased and its cooperation generally with

17. U.S. v. Yunis, No. 89-3208, slip op. (D.C. Cir. Jan. 29, 1991); United States v. Yunis, 867 F.2d 617 (D.C. Cir. 1989); United States v. Yunis, 859 F.2d 953 (D.C. Cir. 1988); see Levy, *U.S. District Court Upholds Extraterritorial Jurisdiction over Fawaz Yunis under the Hostage Taking Act*, 4 INT'L ENFORCEMENT L. REP. 65 (Feb. 1988); Levy, *U.S. District Court Denies Fawaz Yunis' Motion to Dismiss Charges Based on Illegal Arrest*, 4 INT'L ENFORCEMENT L. REP. 95 (Mar. 1988).

18. U.S. v. Caro-Quintero, No. CR 87-422-ER, slip op. (C.D. Ca. 1990).

19. U.S. v. Verdugo-Urquidez, 110 S. Ct. 1056 (1990).

20. U.S. v. Noriega, No. 88-79-CR-Hoeveler (S.D. Fla. 1988).

21. For a discussion of U.S. policy and legal issues see Abramovsky, *Extraterritorial Abductions: America's 'Catch and Snatch' Policy Run Amok*, — YALE J. INT'L L. — (forthcoming); see also Abramovsky & Eagle, *U.S. Policy in Apprehending Alleged Offenders Abroad: Extradition, Abduction or Irregular Rendition?*, 57 OR. L. REV. 51 (1977).

22. See *Drugs and Small Arms: Can Law Stop the Traffic*, B. Zagaris, Remarks at the Eighty-First Annual Meeting of the American Society of International Law (Apr. 8-11, 1987).

intergovernmental organizations has also improved.

### B. *National Law*

National law has been under attack by narco-terrorists and organized crime. By intimidating and killing judges, prosecutors, police, and the media, narco-terrorists and organized criminals ensure that the rule of law and a democracy cannot function properly. Similarly, by financing the campaigns of national and local politicians and by running for office themselves, narco-terrorists and organized criminals also influence and control law-making and electoral processes. Indeed, the distribution of money, jobs, and other forms of wealth of largesse by narco-terrorists and organized crime provide the donors with an inordinate amount of political power. The use of violence against politicians complements the use of influence by narco-terrorists and organized criminals.

So infiltrated with corrupt officials are the police, military, and virtually all aspects of law enforcement in some countries that most investigations and prosecutions become impossible to successfully design or execute.

An important development is that the small-time amateur operations of fifteen years ago have developed into sophisticated illegal conglomerates that routinely terrorize their adversaries, whether they are rival terrorist groups, political, or law enforcement figures. The powerful activities of the narco-terrorists and organized criminals require a strategy with intelligence to identify the groups, determine weak links in their operations, and to design and successfully implement a strategy to break them up.<sup>23</sup>

## III. MECHANISMS TO COUNTER ORGANIZED CRIME DEVELOPMENTS

To effectively design international modalities to combat new forms of organized criminals operating internationally requires an indepth use of multidisciplinary approaches. In particular, international organizational science (theory), public international law, and criminal law should be applied to various organized groups since international orga-

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23. For a discussion of organized crime and international narcotics trafficking, see the written statement of the Permanent Subcommittee on Investigations, "Structure of International Drug Cartels" (Sept. 12, 1989).

nizational theory and international criminal law are relatively new sciences and neither nation-states nor academicians have devoted intensive research to the interaction of these disciplines. Many of the mechanisms to counter organized crime can also be used against narco-terrorists.

### *A. Establishment of a Regime for International Criminal Law*

Some global interactions are initiated and sustained entirely, or almost entirely, by nation-states. Other interactions, such as the ones initiated by organized criminal groups (i.e., narcotics transactions, laundering criminal proceeds, traffic in guns), involve private persons. One of the prerequisites to successfully combat organized criminals is to view the law enforcement community as an actor in a world politics paradigm and to contrast it with the state-centric paradigm in which only nation-states have significant practical roles. If they are to succeed in the battle against organized crime, nation-states and countries confronting problems of emerging new criminal groups must become more sensitive to a world politics paradigm in which organizations other than the nation-states are accorded power. A successful effort will entail a more innovative use of existing and new bilateral and multilateral legal mechanisms, as well as more uniformity in national actions, so that law enforcement officials can be as mobile and efficient as new organized criminals. Already, law enforcement officials suffer from the lack of close-knit family ties that facilitate the operations of criminal groups. Likewise, they often lack the cultural skills to combat these new ethnic organized criminals.

Fostering the world politics paradigm would permit national governments as well as inter-governmental organizations (IGOs), international non-governmental organizations (INGOs), and non-governmental organizations (NGOs) to make more effective use of limited resources. Another result of international cooperation or transnational coordination would be an attitude change in favor of international cooperation. The attitude change toward increased cooperation would further assist politically international efforts against drug smuggling and money laundering. Still another result of international pluralism would be to create and strengthen law enforcement organizations, IGOs, INGOs, and NGOs, thereby adding additional actors with which national governments can cooperate in combatting crime.

By improving transnational relations to combat organized crime, national governmental law enforcement organizations should also as-



sume larger roles in transnational organizations. Actors and especially national governments should enable not only traditional law enforcement agencies to participate in a world politics paradigm of international criminal cooperation, but should also facilitate participation by IGOs, such as INTERPOL, the anti-crime organizations within United Nations, and regional organizations (i.e., the Council of Europe, the European Community, and the regional organizations for tax administration), NGOs, such as the American Bankers Association (*e.g.*, in the case of money laundering), and INGOs, such as the Association Internationale de Droit Penal, International Association of Chiefs of Police (IACP), the International Society for Social Defense, the International Society of Criminology, and the International Penal and Penitentiary Foundation. National governments and other concerned actors would facilitate the establishment and development of long-term alliances among the law enforcement community (*e.g.*, a type of pattern of an elite network).

Interested members of the world community, especially law enforcement officials, should plan and study the interactions of the above-mentioned categories of organizations in the international criminal arena in order to determine the best ways to design and implement a regime for international criminal law. For instance, to chart the best role for regional organizations and gauge their potential interactions with IGOs, INGOs, NGOs, and national governments, studies of the international relations of these organizations is required. To the knowledge of this author, such a study has yet to occur. Any of five basic approaches can be used: the historical approach, the normative approach, the structural-functional approach, the decision-making approach, and the interest approach.

After examining the role of intergovernmental organizations in the context of these five approaches, the concept of an international regime for international criminal law and its existence and future in a new world paradigm should also be examined. International regimes are defined as principles, norms, rules and decision-making procedures within which actors (governments, IGOs, INGOs, and NGOs) converge in a given issue area such as international criminal law, or a subarea, such as the international regulation of money laundering. Regimes are intervening variables standing between basic causal factors, on the one hand, and outcomes and behavior on the other. Two basic questions are raised by this formulation: first, what is the relationship between the basic causal factors such as power, interest, values, and regimes? Second, what is the relationship between regimes and related outcomes

and behavior? The answer to the first question requires an application of a paradigmatic framework. The answer to the second involves the issue of whether regimes make any difference, and, if so, how.

Another approach to the study of international regimes has been to utilize a supply-demand approach that borrows extensively from microeconomic theory. One study, for instance, has focused on the demand for international regimes in order to determine why international regimes wax and wane. This approach focuses on why states desire to institute international regimes and how much they will be willing to contribute to maintaining them. This approach considers the list of conditions which must apply if regimes are to be of value in facilitating agreements among states. Such an approach enables researchers to specify regime functions more precisely and understand the demand for international regimes. Similarly, the methodology can be used to understand the performance of international regimes over time. In addition to studying and analyzing organized crime and trying to react to the diverse emerging and powerful groups, international actors that want to diminish and control these groups must take proactive approaches, so they dictate the battles before the organized criminals become so powerful that the law enforcement community can no longer cope.

Within the regime of international criminal cooperation, many subregimes can and should be established to combat organized crime. For instance, subregimes in many of the areas of enforcement modalities include, *inter alia*, transportation, customs, immigration, and fiscal cooperation. Law enforcement officials, and all persons throughout the world outside the law enforcement community who are concerned with organized crime, should be included in the design of future subregimes. The task is to effectively design new principles, norms, rules, and decision-making procedures that will combat organized crime without detracting significantly from normal business operations, human rights and constitutional protections. Because of size constraints imposed on this paper, I will discuss only the potential subregime against financial crime, for illustration purposes.

## 1. Establishment of Subregime against Financial Crime

The studies of the new world politics paradigm, applied to the creation of a new regime for international criminal law, should be applied to the subregime of international money laundering regulation. The IGOs, INGOs, and NGOs that constitute international actors as well

as the nation-state actors, have many similarities. However, different organizations and indeed, different individuals are involved. Within nation-states, ministries of finance, central banks, and bank regulatory agencies, rather than ministries of justice and police commissions, are involved. Within IGOs, a different set of individuals and organizations may also be involved. The INGOs and NGOs, with expertise to establish and assist in the operation of an international money laundering subregime, tend to be specialized in financial activities, corporate security, and money management. The need to scrutinize and improve interactions among national governments and international actors in money laundering regulation is enormous since, until now, this activity has not been highly active.

## 2. Establishment of Other Subregimes

The international community should decide, when certain types of substantive crime are developing quickly or have reached a point of great harm to the international community, to establish additional subregimes. For instance, the international community has become so alarmed about narcotics that it has agreed to surrender some sovereignty in order to achieve new forms of cooperation. They have agreed to do this partly by agreeing to new types of cooperation, such as extradition and mutual assistance. They have also agreed to allow U.N. bodies, such as the Commission for Narcotic Drugs, to monitor the compliance with the U.N. drug convention.<sup>24</sup> In the event that new types of internationalization of crime become significant, the international community will want to develop other subregimes. For instance, in the area of stolen art, which is often the domain of organized groups, Interpol has developed international modalities.<sup>25</sup> They include monthly and semiannual bulletins, with descriptions and pictures of stolen objects. When an Interpol National Central Bureau member believes a stolen work of art may be in transit, Interpol circulates urgent messages in an attempt to have it intercepted. Similarly, Interpol issues special circulars on international thieves and recipients of stolen objects. NCBs in receipt of such notices are encouraged to circulate copies among deal-

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24. See *U.N. Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, U.N. Doc. E/Conf./82/15 (1988), reprinted in 28 I.L.M. 493 (1989) at Art. 21(a).

25. See Fooner, *INTERPOL ISSUES IN WORLD CRIME AND INTERNATIONAL CRIMINAL JUSTICE* 156, 169 (1989).

ers, private institutions, buyers, sellers, and custodians of art objects.

The development of cooperation between an IGO, such as INTERPOL, states (NCBs), and INGOs and NGOs in stolen art is an example of a small, but emerging subregime of criminal cooperation. These subregimes should be monitored from the perspective of international politics and international organizational theory, so that the regimes can stay ahead of new forms of organized criminals. Regional organizations, such as the Council of Europe, are playing a key role. Other regional organizations, such as the U.N. Committees for the Crime Prevention and Treatment, can and should play an important role in combatting new forms of crime.

One reason for research, discussion, analysis and careful planning of the development of subregimes and regimes in international criminal cooperation is that the existing IGOs, INGOs, and NGOs are mostly in the beginning stages of their own development. To become efficient, duplication must be avoided and linkages between different organizations and individuals active in law enforcement must be cultivated. The space limitations of this paper have resulted in the discussion of only one specific subregime.

## B. *Specific Mechanisms and Avenues*

Within the context of regimes and subregimes, the international community can develop specific mechanisms. The discussion of specific mechanisms employs primarily the perspective of a lawyer, especially the fields of criminal law and international law.

Generally the need to develop international modalities to combat new international forms of organized crime is only the reflection of the more general need to design better international enforcement models for international criminal law. One modality that would assist in the ability to fairly adjudicate international criminal cases involving organized crime is the establishment of jurisdiction of an international court. Two models have been suggested—the International Court of Justice and the International Criminal Court. The United Nations Members would expand the Charter of the International Court of Justice, so that it could, in limited instances, handle selected cases of international criminal law, especially cases dealing with certain organized criminal groups. Another potential model for an international court is to create a Permanent International Criminal Court. Initially, such a court would be able to handle only specialized types of crimes, such as illicit narcotics transactions and related money laundering. Another useful

mechanism would be the creation of an International Indictment (or accusation) Chamber as an attachment to the court. Its tasks would be to hear the prosecution's evidence *ex parte* and determine whether facts are sufficient to indict and order the arrest of an accustomed person. Once the Chamber issued a warrant of arrest, any signatory state would be obligated to arrest the defendant. Even if the state with custody did not arrest the defendant, such defendant would be virtually immobilized, since travel to any other country could result in his arrest. Still, another potentially useful variation of an international criminal court would be Permanent Regional International Criminal Courts, perhaps with the International Court exercising appellate jurisdiction over the decisions of the regional courts.

The establishment of international *ad hoc* bodies of inquiry for the purpose of fact-finding in cases of alleged flagrant violations of certain international criminal laws by organized groups, such as the involvement of states or their governmental entities or leaders in trafficking in cultural property, would focus world opinion on such violations. Such bodies and their reports have succeeded in focusing world attention on human rights violations. To have credibility, such *ad hoc* bodies must be strictly impartial. A condemnatory report by a duly established, impartial body would amount to an indictment without a trial.

Another useful enforcement modality would be the establishment of a mechanism for Complaints and Reports. It would be a communication procedure that would function similar to the Optional Protocol to the Covenant on Civil and Political Rights and the Convention on the Elimination of All Forms of Racial Discrimination. Interested or affected persons could lodge complaints to determine whether states are fulfilling their obligations in combatting international organized crime, and/or that they are themselves actively participating in and contributing to such crime. The complaint procedures would determine whether consistent patterns of gross violations are occurring. The spotlight of public attention consequent to such a finding, and its public discussion, would be an important, albeit "soft," means of persuading miscreant governments and some organized groups and their members into compliance with international law. In circumstances in which the complaint and report procedure does not achieve results, one could resort to the remedy of an *ad hoc* body of inquiry committee, discussed above. In the end, few governments would want to have a reputation for committing international crimes.

A periodic reporting system could be established whereby each United Nations member state must report annually on the extent of

implementation of United Nations agreements, guidelines, standards, and other rules concerning certain international crimes of organized groups, such as trafficking in arms and illicit narcotics. These reports should receive wide dissemination and interested persons and organizations should have access to such reports. The world community should consider conditioning the allocation of credits and eligibility for benefits of intergovernmental organizations, such as the World Bank Group and United Nations organizations, on compliance by states with the above-mentioned U.N. agreements, guidelines, standards, and other rules concerning certain international crimes.

With the above introduction on general enforcement modalities for international criminal law, the remainder of the paper discusses more specific modalities directed at organized crime.

### 1. Create Universality of Jurisdiction for Organized Crime and Subspecies of Crimes Therein

The issue of jurisdiction needs attention. Due to the complexity of transboundary criminality in the modern world, the traditional, almost exclusively territorial concept of jurisdiction requires revision. Although some expansion of the concept of jurisdiction has been introduced in recent years in a number of international instruments, such extensions were still inadequate to cope with the present challenges. Closely linked with the question of international jurisdiction is the issue of the establishment of an international criminal court. Pursuant to the discussion in III(B) above, support should be given to the efforts to establish international criminal courts, so that jurisdictions in which organized criminal groups have rendered the criminal justice inoperable or ineffective will have alternatives to try persons involved in serious crimes having international effects.

### 2. Strengthen Enforcement Modalities

#### a. International Organization to Supervise Adoption of Mechanisms in U.N. Drug Convention

To ensure compliance with the enforcement modalities that the world continually has agreed to implement, the U.N. Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substance (hereinafter U.N. drug convention) and other enforcement modalities for which there is agreement should be scrutinized. In particular, the Commission on Narcotic Drugs of the Economic and Social Council of

the U.N. has the responsibility, pursuant to Art. 21 of the U.N. drug convention, to review the operation of the convention, to make suggestions and general recommendations based on the examination of the information received from the contracting parties, and to bring matters to the attention of the International Narcotics Control Board. Moreover, the Board will prepare an annual report on its work. Its work will include making recommendations on: the prevention and the diversion of precursor substances used for the purpose of illicit manufacture of narcotic drugs or psychotropic substances; the prevention of trade in and the diversion of materials and equipment for illicit production or manufacture of narcotic drugs and psychotropic substances; and the proper documentation and labelling of lawful exports of narcotic drugs and psychotropic substances.

Under Article 20 of the U.N. Convention, contracting parties must furnish information to the Commission on the text of laws and regulations promulgated to give effect to the Convention and the particulars of illicit trafficking cases within their jurisdiction that they consider important because of new trends disclosed, the quantities involved, the sources from which the substances are obtained, or the methods employed by persons so engaged.

The Commission should consider disseminating a report certifying compliance with the U.N. drug convention and with the enforcement modalities in The Declaration of the International Conference on Drug Abuse and Illicit Trafficking and Comprehensive Multi-disciplinary Outline of Future Activities in Drug Abuse Control (e.g., Targets 17 through 28 on the suppression of illicit trafficking). In particular, the report should discuss legislation, treaties, and other international agreements, and adherence to the U.N. plan on combatting organized crime and drug policy. states with high marks should receive tangible benefits in economic development and other national objectives over which the world community has control. States with unexplained low marks should lose benefits. Certification should be distributed to concerned INGOs, NGOs, and they should be asked to disseminate the report and to take whatever actions they deem appropriate. The certification should give both praise and criticism, where warranted.

b. The U.N. Interregional and regional institutes and concerned intergovernmental and non-governmental organizations should give increased attention to the issue of organized crime.

c. The U.N. Development Programme and other funding agencies of the U.N. system, as well as member states, should be urged to strengthen their support for national, regional, and international pro-

grams for the prevention and control of organized crime.

d. The International Monetary Fund (I.M.F.) and the World Bank should integrate into their loan programs the recommendations of the U.N. certification reports, especially since the failure to take proper steps against narco-terrorism and the continuation of programs to nation-states dominated or substantially penetrated by organized crime groups only serves to further benefit such groups. The integration of criminal development planning and the subsector dealing with organized crime should be reviewed by the United Nations Development Programme (U.N.D.P.) and I.M.F.-World Bank in consultation with the U.N. Crime Prevention Committee. Improved planning processes designed to integrate and coordinate relevant criminal justice agencies that often operate independently of each other will also serve as a deterrent to crime.

e. In view of the complexity and volume of the financial operations of organized crime, it is essential to take an interdisciplinary approach that involves the combined expertise of lawyers, police, accountants, financial analysts, computer specialists, and investigators of corporate affairs. Interdisciplinary law enforcement teams should be established. Countries that have done this successfully should share information and provide technical assistance to other governments. Sharing law enforcement methods to combat narco-terrorism should be encouraged and facilitated. The complicated links between executives of entities controlled by narco-terrorists and the alleged illegal activities must be proven. This requires perseverance, effective investigative skills, solid and reliable intelligence, a capacity to understand the complicated financial arrangements, effective cooperation in the production and collection of evidence, and above all, a great dose of courage to resist corruption and intimidation. Electronic surveillance and wire-tapping have been important means of trapping the heads of organized crime syndicates, with full regard for basic human rights concerns.

f. Simultaneous tax examinations should occur of organized criminal groups involved in narco-terrorism and individuals therein. Simultaneous tax examinations are especially valuable for detecting persons engaging in transnational business, whether illicit drug trafficking, environmental crimes, and related money laundering crimes.

g. Systematic attention should be paid by researchers and law enforcement officials to the property holdings of persons involved in narco-terrorism, or to the property holdings of the groups in which they participate. Because of the high degree of compartmentalization of information among law enforcement agencies, existing knowledge does



not efficiently support specific case development or proactive law enforcement operations. For instance, knowledge about the title to property of organized groups may enable law enforcement agencies to anticipate the directions of the groups. Knowledge about the property holdings of organized crime may enable certain law enforcement agencies to operate more effectively, (e.g., estate and inheritance revenue officials). Several recommendations should be reviewed. Intelligence units should enrich their individual and group files by developing and maintaining separate file sections on the subjects' property interests. Property interest information should be regularly analyzed and distributed to potential users. Intelligence units should give special attention to collecting and analyzing significant events that produce property interest data (i.e., purchase or acquisition of real property or a business, a divorce or a death). Intelligence units should develop, maintain, and index an inventory of methods and devices used to create, maintain, extinguish, and adjudicate organized crime property interests. A systematic and expanded effort should be made to study the estates of deceased organized crime figures. Internally, IGOs, INGOs, and NGOs should hold workshops and training programs on these techniques. Bilaterally, states with Mutual Legal Assistance Treaties should have a working group on organized crime where their resources and the amount of organized crime activity warrant such a working group.<sup>26</sup> The U.S.-Italian working group is an example of the success of such groups.<sup>27</sup> The recent series of bilateral narcotics agreements and the commissions that implement such agreements can also include working groups that, *inter alia*, exchange information on cases and techniques of studying property holdings with each other.

### 3. Uniform Legislation

a. An international central data bank should keep track of and disseminate to interested governments laws and regulations on various types of measures taken against organized crime, such as racketeering and continuing criminal enterprises, sanctions against organized crime

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26. Zagaris & Simonetti, *Judicial Assistance under U.S. Bilateral Treaties*, in LEGAL RESPONSES TO INTERNATIONAL TERRORISM, U.S. PROCEDURAL ASPECTS 219, 228 (M.C. BASSIOUNI ED. 1988).

27. *Id.* at 226-27. For a discussion of the formation of the working group, see Meese *Addresses Italy-USA-Switzerland Conference*, 1.2 Int'l Enforcement L. Rep. 29 (Oct. 1985).

and against activities in which organized crime are known to participate, including illicit drug trafficking, money laundering, theft of cultural property, use of mails, and various types of frauds. In particular, an international central data bank would show that, insofar as illicit drug trafficking is concerned, the offenses defined in Article 3 of the U.N. drug convention include, *inter alia*: the production, manufacture, extraction, preparation, offering, offering for sale, distribution, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation, or exportation of any narcotic drug or any psychotropic substance contrary to the provisions of the 1961 Convention, as amended or the 1971 Convention; the manufacture, transport or distribution of equipment, materials or of substances listed in Table I and Table II of the U.N. drug convention, knowing that they are to be used in or for the illicit cultivation, production or manufacture of narcotic drugs or psychotropic substances; and the organization, management or financing of any of the offenses enumerated in Article 3 dealing with illicit narcotics trafficking.

Article 3 of the U.N. drug convention also requires that the contracting parties ensure that their courts and other competent authorities with jurisdiction take into account factual circumstances that make the commission of offenses established in accordance with certain articles of the Convention particularly serious, such as the involvement in the offense of an organized criminal group to which the offender belongs; and the involvement of the offender in other international organized criminal activities.

b. States and international actors should begin to design, monitor, disseminate manuals, and hold programs on the importance of the following laws:

i. Money laundering (right to financial privacy, currency transactions reporting, criminalization of money laundering, remedial measures, and blocking laws). Stricter regulation on a uniform basis should govern the persons who are able to establish and operate financial institutions, money exchange businesses, paper banks, and other businesses that offer potential for near money (i.e., scarce commodity business, such as gold, silver, and jewelry houses). The world community should have a list of minimum requirements to establish such businesses and an annual means to ensure conformity. Intergovernmental organizations, perhaps initially with technical and financial assistance from INGOs, should participate.

ii. For serious cases of trafficking by narco-terrorist groups and/or persons who belong to the groups, it would be helpful to introduce leg-

isolation that placed on the person holding the assets the onus of demonstrating that the assets had been lawfully acquired. This is a revolution in legal practice and theory, and as such should include the necessary safeguards to protect the human rights of the suspect.

iii. The establishment of a specific agency to deal with all matters concerning the activities of organized crime and to centralize all pertinent information on that subject.

iv. The establishment of special anti-corruption measures.

v. The adoption of new laws and methods on investigation and the techniques to combat organized crime.

vi. Protection against violence and intimidation are increasingly important in the criminal investigation and trial process and in enforcement efforts against organized crime. The procedures involve the provision of protected accommodation and physical protection, relocation, monetary support, and a new identity.

#### 4. Financial and Technical Assistance

a. Special legislation aimed at narco-terrorist groups, include: the Racketeering Influenced Corrupt Practices Act (RICO) and Continuing Criminal Enterprises (CCE), in which the Government can impose draconian penalties upon conviction of defendants and in which the law provides procedural advantages to the law enforcement officials and prosecutors (i.e., ability to wire-tap and conduct undercover operations). Other countries, such as Italy, have counterpart laws that may be adoptable, especially in civil law countries.

b. Legislation should provide rights and remedies to citizen groups that are impacted by organized crime. For instance, in some civil law countries, victims have a right to participate in the criminal proceedings and in decisions to charge the defendant, and make their views known to the court on evidence and appropriate sentences after conviction. In the U.S., although victims and citizens do not have the right to participate in the pretrial and trial aspect as parties, they can bring civil actions. In the case of RICO, treble damages are allowed. The laws concerning participation by victims and other interested citizen groups should be reviewed and recommendations on uniform laws provided. Once individuals are mobilized to participate in groups to combat organized crime, they can funnel their efforts into officially participating in the legal system to ensure that the criminal justice system effectively works against narco-terrorists.

c. Uniform tax laws should be enacted around the world, specifi-

cally targeting narco-terrorists. Since the organized criminals earn a great deal of money through criminal activities, they do not report and pay tax on such activities. Hence, many countries have found that tax laws provide a useful means to successfully prosecute organized criminals.<sup>28</sup> Manuals showing the specific tax laws, methods of investigating and prosecuting organized criminals in the various legal systems, and recommendations for training should be provided. Technical assistance should be available to requesting countries on these techniques.

d. There should be established, through existing IGOs, INGOs, and nation-states, technical assistance groups to provide technical services to requesting states. Some of the methods for providing technical assistance by nation-states and IGOs can be utilized (i.e., use of retired executives and use of NGOs on a state level).

e. Assets seized and forfeited should be shared with IGOs, INGOs and NGOs, which participate in combatting the narco-terrorist crimes from which the assets forfeited are derived, as well as national governments.

f. A fund to provide technical assistance in narco-terrorism cases should be established. It should be maintained by an appropriate U.N. organ.

g. Technical assistance should be a part of regional conferences bringing together members of law enforcement, prosecution, and judicial authorities. They should all develop a network to facilitate communication between meetings and exchanges.

## 5. The Model Extradition Treaty Adopted at the Eighth U.N. Crime Congress Should Be Widely Disseminated

Most experts supported the idea that the provisions of future model international criminal cooperation treaties should complement rather than replace existing cooperative arrangements. The view of many experts is that the drafts could actually serve as a model for new national legislation, thereby contributing to the harmonization and increasing uniformity of domestic legislations.

Care must be exercised in the drafting of extradition treaties, so that states can fulfill the dual criminality requirement in narco-terrorism cases. Extradition treaties should replace the list method of defin-

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28. See generally *Crime and Secrecy: The Use of Offshore Banks and Companies*: Hearings on S. 98-151 Before the Permanent Subcommittee on Investigations, U.S. Senate Committee on Governmental Affairs (1983).

ing dual criminality in favor of a simple, all-inclusive statement which defines extraditable offenses as crimes punishable under the laws of both states by deprivation of liberty for a period of more than one year period of incarceration for a felony. Such a broad decision eliminates the problems of constantly trying to update the lists. Another problem in the application of the dual criminality provision in complex prosecutions, especially those involving narco-terrorism and organized crime, is the need to match particular criminal statutes adopted by individual states to combat organized activities with parallel provisions in the laws of other states. The need to demonstrate that the offense, for which extradition is sought, is a criminal offense in the requested state gives rise to the need to find an analogous crime punishable under the laws of the requested state. For instance, difficulties are encountered by the new laws that seek to combat organized crime by criminalizing participation in organized groups that derive financial benefit from the commission of traditional crimes, such as extortion, usury or narcotics trafficking. To strengthen the prospects for satisfying the dual criminality standard, the extradition treaty should specify that particular types of statutes will constitute grounds for extradition. For example, Article II(2) of the U.S.-Italian Extradition Treaty provides that "any type of association to commit offenses described in (the dual criminality Article), as provided by the laws of Italy, and conspiracy to commit an offense described in (the dual criminality Article) as provided by the laws of the United States, shall also be extraditable offenses." Such language will facilitate the fulfillment of the dual criminality requirement by modern statutes that are aimed at organized crime and narcotics trafficking.

## 6. The U.N. Model Mutual Legal Assistance Treaty (MLAT) Should Be Disseminated

When concluding an MLAT, governments should apply as many of the instruments of judicial assistance as possible.

In the case of MLATs, it can be useful to establish a working group to develop on-going cooperation in focused areas and cases. For instance, after concluding an MLAT in 1983, the U.S. Department of Justice and Italian Ministry of Interior established an Italian-American working group to further cooperation on law enforcement problems. Initially, the working group focused only on combatting organized crime and narcotics. More recently, the working group broadened its agenda to include cooperating on terrorism.

Pending conclusion of a formal MLAT, states can and should explore more informal methods of cooperation if permitted under law. For instance, on October 17, 1986, the French and U.S. governments announced an accord to increase cooperation in the fight against terrorism by improved intelligence exchanges and law enforcement contacts in absence of a former treaty. In substantive areas, such as securities enforcement cooperation, governments have entered into memoranda of understanding to cooperate on enforcement matters. Such memoranda, providing for cooperation and mutual assistance against certain types of organized crime, may be appropriate as an interim step for governments. Studies should be done of the initiation, operation, and potential of less formal arrangements for mutual assistance. The studies would see to what extent they are working and can be improved. The studies would be shared with interested governments.

As a result of the attention focused on the U.N. drug convention, several states, such as Australia, have strengthened their mutual assistance infrastructure, and particularly, the new investigatory and enforcement measures that can serve as models for some states to emulate. New investigation techniques exist to follow the document and money trails including the issue of court orders for the production and seizure of relevant documents, the monitoring of transactions by financial institutions and the reporting of large scale cash transactions. New powers enable states to freeze, confiscate, and forfeit the proceeds of crime and to enforce monetary penalties representing the monetary value of benefits derived from committing serious crimes. States have new powers to search and seize property, articles and documents. New authority exists for the taking of evidence under oath and for the production of documents for transmission to another country for use in proceedings in that country. States have new powers to make arrangements for persons to travel to a requesting state to give evidence or assist in investigations in that country.

As the Australian government has noted, the establishment of effective international mutual assistance arrangements requires enormous political will. The exposure of a country's citizens to compulsory measures such as search and seizure or the tracing, freezing and confiscation of proceeds of crime at the request of another country requires a political decision by sovereign governments. The political aspect of that decision cuts through every aspect of mutual assistance, from revising domestic legislation so that mutual assistance can be given and received, to establishing appropriate bilateral and multilateral treaties and arrangements, and to deciding whether to grant or refuse a request

in a specific cases. The U.N. should compile and disseminate information on how states have changed domestic law to, *inter alia*: create money laundering and related crimes; authorize telecommunication interception for certain criminal activities; subject to judicial authorization, facilitate the monitoring by law enforcement agencies of the movement of large amounts of cash by requiring the reporting to an agency of certain types of cash transactions; and provide the necessary legal basis for Australia to give and receive a wide range of mutual assistance in criminal matters, as well as to enter into extradition treaties in a wider basis for making a mutual assistance request to, or executing a request from such a country.

For most countries, strengthening its ability to cooperate internationally against narco-terrorism and other organized crime requires a comprehensive treaty negotiating program to conclude conventions with countries with which there are no conventions and to modernize existing cooperation conventions. In this connection, model extradition and mutual assistance treaties that the U.N. Crime Prevention Committee is preparing should be helpful. Once adopted, it should be reviewed and, if appropriate, revised on a regular basis.

In order to ensure the efficient operation of mutual assistance against new forms of organized crime, states must establish a Central Office. A Central Office becomes especially important because the new forms of mutual assistance, such as the development of a financial sub-regime, requires the use of coercive investigatory or enforcement measures against citizens of one country and their property at the request and for the benefit of another country, thereby directly impacting the sovereignty of the requested country and producing divergent diplomatic, political, policy, and operational interests in both countries. The establishment of the Central Office has the responsibility of: ensuring the appropriate reconciliation of these interests; determining or helping determine whether the request should be granted or refused; and ensuring adequate coordination of all relevant agencies in the request and consistency of approach to the making and execution of requests. The U.N. drug convention requests in Article 7(8) that parties designate an authority, or, when necessary, authorities, which will have responsibility and power to execute requests for mutual assistance or to transmit them to the competent authorities for execution.

States should establish liaison units with the Central Office to deal with certain forms of organized crime (i.e., ethnic groups and/or substantive crimes, such as illicit narcotics trafficking and stolen art).

## 7. Adoption and Dissemination of Transfer of Proceedings, Transfer of Prisoners

Pursuant to the U.N. drug convention and other international conventions, states should provide for transfer of proceedings and prisoners.

## 8. Education and Promotional Programs to Raise the Consciousness of the Public

Education and promotional programs should raise the consciousness of the public to the pernicious nature and the level of power of narco-terrorist groups, so that they will support new enforcement efforts of IGOs and nation-states. The support of general public and of targeted groups should be solicited for participation in existing and new NGOs and INGOs concerned with combatting organized crime.

## 9. Assistance to Journalists and Other Media

One of the best modalities to identify and expose narco-terrorists is to reward and motivate journalists and the media to focus on these groups. The attention brought by media exposure removes the anonymity from narco-terrorist groups and the comfort they enjoy. In some cases, an effective piece or series of pieces by a journalist will reveal conduct or assets that may enable law enforcement officials to act to immobilize persons in a narco-terrorist group.

a. A fund should be established to assist media/journalist victims of organized crime.

b. In countries such as Colombia, stories by the media have resulted in concerted violence against the media, including the murder of journalists and arson and bombing of their businesses and homes. In order to assist the media, especially since the media-victims are often very knowledgeable about existing operations of organized criminals, states, IGOs, INGOs, and NGOs should establish a fund to assist journalists and the media to continue to undertake their important work.

c. Better communication between local and international media/journalists should be facilitated.

d. Multidisciplinary research into the structure and operations of organized crime has proven effective in identifying the weak points of the criminal syndicates. There exists a need for the frequent and regular exchange of experiences in these and similar matters.

e. IGOs, NGOs, INGOs, and nation-states should educate the



public on the important role of media/journalists in combatting narco-terrorism.

f. IGOs, NGOs, and NGOs, especially those that deal with the media and/or with international terrorism, and/or narcotics policy should educate the public on the important roles of the media/journalists, so that the general public will support the media/journalists, especially at critical moments. Governments should also provide education to the public in this regard.

#### 10. Support for Comparative Research and Data Collection

Comparative research and data collection related to issues of transnational narco-terrorism, its causes, its links to domestic instability and other forms of criminality, as well as its prevention and control, should be supported. Research in target areas for combatting organized crime should be encouraged. The encouragement of research must occur on the local and state levels as well as by the IGOs, NGOs, and INGOs. Internationally accessible data banks should be established. Some should be available to general public. Others should have more limited access (to serious academicians, journalists). Others should only be available to law enforcement officials. Law enforcement officials should be encouraged to keep records of their findings for dissemination within the data banks.

Appropriate authorities should arrange for civic and professional recognition or awards to individuals and non-governmental associations that have made outstanding contributions to comparative research and data collection on combatting organized crime.

#### 11. Telecommunications and Other Communication Modes

Proper telecommunications and other communications modes should be evaluated and designed, so that police and other interested persons at the local, regional and national levels of the nation-state, IGOs, NGOs, and INGOs have the most modern communication channels to learn about and adopt the latest means of combatting narco-terrorism. Interpol can likely provide leadership in this area.

#### 12. Links Between Different Organized Criminal Groups

Particular attention and action should be directed at the links between different organized criminal groups, such as insurgent revolutionary organizations and drug- and arms-trafficking organizations, partic-

ularly with regard of the acquisition of sophisticated weapons. National legislation for the effective control of weapons, ammunition, and explosives and international regulations on the import, export, and storage of such objects should be developed in order to prevent those weapons from being used by terrorist or organized crime syndicates. International cooperation in securing evidence with respect to the prosecution or extradition of terrorists is especially important. In that connection, the U.N. model treaties on mutual assistance and extradition have significance. The political offense exception for the extradition of terrorists should be limited to cases where the requested state decides to undertake prosecution of the person or agrees to transfer the proceedings to another state to conduct the prosecution.

### 13. Strengthening Controls of Movement Through Official Points of Entry

By strengthening international modalities to control security of airports, exports, and land border crossings, these entry points will be less vulnerable to penetration. The organization and layout of facilities often present opportunities for evasion of controls. Few entry points are equipped with modern or appropriate means of detecting illicit movements of contraband, such as stolen art, illegal arms, or illicit narcotics. Service personal that carry out activities such as maintenance, cleaning, refuelling, catering, and crew members, are not always adequately controlled. Although customs services are under the jurisdiction of central government authorities, the management of airports and seaports may be conducted by a variety of local government or corporate entities. Organized private messenger and courier services also move across borders and pose potential risks.

The largest seizures of contraband is in commercial freight, especially for drugs, since they are often concealed either among goods in normal traffic or inside specially made cavities in means of transport. The expansion of international trade, the accelerated rotation of international means of transport and the development of containerized traffic should induce the supervising authorities to initiate action with respect to the establishment of effective national and international mechanisms to deter and enforce transportation of contraband which are compatible with a rapid flow of international trade.

Appropriate IGOs, INGOs, and NGOs should contact air and rail transportation entities and shipping and trucking firms that operate internationally, and/or the associations of such firms. A plan should be

designed for them to review their procedures for the purpose of not only safeguarding their services against misuse by traffickers, but also to ensure that information about any trafficking operation or activity of narco-terrorists is reported promptly. In particular, the International Civil Aviation Organization (ICAO), the International Maritime Organization (IMO), the World Tourism Organization (WTO), IATA and the International Chamber of Shipping should consider and adopt, insofar as they have not already done so, standards or codes of conduct for their members designed to improve control of the movement of passengers and goods, with the objective of curbing the illicit traffic in drugs. In this respect, they should establish memoranda of understanding with the Customs Cooperation Council (CCC).

Universal and regional IGOs and bilateral programs should assist countries that require assistance in equipping the law enforcement authorities, at points of entry, with mechanisms to detect contraband (e.g., illicit narcotics), such as drug sensing mechanisms, trained sniffing dogs, drug identification kits and other means of control. On request, the ICAO, IMO, the Universal Postal Union (UPU), WTO, Interpol, CCC, IATA, the International Chamber of Shipping and the International Association of Ports and Harbors should provide technical advice and assistance to Governments with respect to modalities to provide appropriate physical security in standard layout and sign of premises at official points of entry.

If narco-terrorist activity is deemed especially significant in two or more particular countries, one or more of them should be able to call on the above-mentioned IGOs, INGOs, and NGOs to furnish modalities to correct the problem, including law enforcement officials to assist in investigations and other measures.

Legislatures should exchange information on the enactment of legislation applying penalties to transportation entities that are aware of narco-terrorism and do not take prompt and adequate steps to correct and report it or are reckless and grossly negligent in this connection. In such circumstances, model and uniform legislation should provide in such circumstances for the seizure and immobilization of transport equipment used in drug trafficking, where such legislation is not already in force.

In some new types of organized crime, the transportation component is extremely important to the traffickers and is also thought to be one of their most vulnerable areas. Many of pilots used by the organized traffickers are citizens of consuming, developed countries and pilots are always in great demand. Pilots, even relatively new ones, are

often brought to the producing countries (e.g., Colombia) to meet the bosses of the organizations. This reliance on non-Colombians as pilots seems analogous in organizations which otherwise rely on family members or trusted associates from their region of Colombia, necessary because foreign-based pilots (e.g., American) have better technical know-how and skill, and they are more familiar with terrain of the consumer country. Also the transportation leg is the riskiest part of the operation, since the transporter is in close physical proximity to the narcotics and travels through areas where there are high concentrations of law enforcement officials. Hence, the consuming countries in which pilots reside should closely monitor the activities of pilots. For instance, by requiring reports on international trips they make and then being able to match the information would enable regulatory agencies to identify certain suspicious activities. Pilots flying small planes could be required to report on their passengers and cargo. Pilots could be held to a "know your customer" standard, similar to that to which financial institutions are held. Pilots and associated persons that fail to report would be subject to criminal penalties. Airports and other persons involved in the trips could also be required to obtain and process reports. They could also be required to report suspicious activities of pilots and planes.

#### 14. Improving Cooperation with Economic Integration Groups

In economic integration groups, in which sovereign states have joined together to cooperate in economic matters, free movement of goods, persons, and capital exists. In these cases, it may be difficult or even impossible, in the case of an absence of intracommunity border controls, to detect illicit movements of drugs and traffickers from one state to another. Hence, the community and its members should confer and agree to cooperative measures. They should, for example, exchange law enforcement intelligence and form special narco-terrorism groups, particularly when done according to unique characteristics (e.g., by ethnic or specialized forms of groups) and on cooperation between different groups of narco-terrorists and other organized criminals. They should permit member law enforcement officials the ability to operate within their borders (e.g., the recent Schengen Agreement signed in June of 1990 between Belgium, The Netherlands, France, West Germany and Luxembourg) and on request they should provide mutual assistance. The more advanced economic integration groups (i.e., the Council of Europe, the European Committee on Crime Problems, the Trevi and Pompidou groups), working with IGOs such as the United

Nations and INGOs such as the International Association of Chiefs of Police, should provide technical assistance on request to other economic integration groups (i.e., ASEAN, CARICOM). Special opportunities and research on functional integration (e.g., a branch of international organizational theory) in law enforcement cooperation exist in connection with economic integration groups. Such opportunities and research should be encouraged, especially in developing countries.

### 15. Improved Protection of Land, Water and Air Approaches to the Frontier

The difficulty of protecting frontiers has proffered opportunities for organized criminals to build private air strips and to make parachute deliveries in remote areas. More complete surveillance of frontiers, air-space and remote areas is required to protect societies from the activities of organized criminals.

IGOs, INGOs, and NGOs should design minimum levels of controls at a national level to protect land, water and air approaches to the frontier. Once these minimum levels of controls have been prepared and disseminated, states around the world should report on their efforts to meet them. Appropriate authorities should strictly enforce existing domestic and international regulations regarding the registration of all aircraft, commercial or private, and the obligation of all aircraft operators to operate strictly in accordance with approved flight plans and with the instructions of the air traffic control agencies.

Better controls should be imposed on the commerce of privately owned boats, including pleasure craft, arriving from abroad outside any official port of entry. Regulations should require that they report immediately to the nearest designated authority, giving full details of port of origin, cargo, passengers, owners and master of the ship or skipper, in order to request permission to refuel and obtain supplies. Similarly, an aircraft entering or leaving the territory of the state should be strictly required to land at, or take off from, a designated customs airport pursuant to Article 10 of the Convention on International Civil Aviation. The appropriate authorities of each state have an internationally recognized right, without unreasonable delay, to search any aircraft prescribed by national law and/or by international conventions. The non-observation of such regulations would be punishable. The IGOs should provide for a uniform document to report this information and such information should be entered into a computer. If feasible, an IGO should monitor the information, especially for suspect patterns. Persons

providing fuel or supplies to such craft would be required to verify compliance or would be liable to fines or other penalties.

The IGOs should establish goals for minimum levels of efficient communication networks and means of transport and training and education of law enforcement officials dealing with certain activities of narco-terrorism. States should report annually on their capabilities and IGOs should reassess the minimum levels of capability annually and upgrade according to the changes in technology and business needs. If states fall below the level of minimum capability, its national government or IGOs could propose projects qualifying for multilateral or bilateral assistance or for assistance from IGOs.

INGOs and NGOs of amateur pilots, yachtsmen and owners of pleasure craft and owners of private aircraft, boats and ferries, as well as associations of commercial and private fishermen and hunters and their individual members should work with IGOs and national governments in designing better ways for law enforcement officials to establish surveillance of land, water and air approaches to the frontier and to assist them in implementing their strategies. The participating INGOs and NGOs should arrange for recognition or awards to individuals and organizations that make outstanding contributions in this regard.

States should act at the regional and international levels to improve the protection of land, water and air approaches to the frontier. The air traffic control agencies and other authorities concerned should improve flight control regulations in cooperation with their counterparts in the region and on a world-wide basis. The ministry or authority concerned, together with law enforcement agencies at the national and local levels, should ensure that clear and effective channels of communication, with corresponding agencies in other countries, are established and maintained. States, IGOs, INGOs, and NGOs should organize regional seminars to facilitate the exchange of ideas and techniques designed to strengthen frontier controls. The ministries or authorities concerned should utilize regional and interregional cooperative mechanisms, of the sessions of the law enforcement organizations, such as the Commission on Narcotic Drugs and its Subcommittee on Illicit Drug Traffic and Related Matters in the Near and Middle East, regional meetings of Heads of National Drug Law Enforcement Agencies, and of ICAO, IMO, CCC and Interpol, and IATA, in order to ensure maximum cooperation and consistency of implementation and training methods in safeguarding and tightening the security of frontiers.

## 16. Protecting Against Use of Mails by Organized Criminals

States should ensure that they have implemented international agreements that require action against certain international criminal activity. In particular, Article 19 of the U.N. drug convention provides that, in conformity with the Conventions of the Universal Postal Union and in accordance with the basic principles of their domestic legal systems, contracting parties will take measures to suppress the use of the mails for illicit traffic and will cooperate with one another to that end. In particular, they agree to undertake the following:

a. coordinated action to prevent and repress the use of the mails for illicit traffic;

b. introduction and maintenance by authorized law enforcement officials of investigative and control techniques designed to detect illicit consignments of narcotic drugs psychotropic substances and substances in Table I and II of the U.N. drug convention in the mails; and

c. legislative measures to enable the use of appropriate means to secure evidence required for judicial proceedings.

If a suspicious item is in transit in the mails through the territory of the state whose authorities detect the illicit shipment, Article 1 of the Universal Postal Convention and of the Constitution of UPU provides that postal items in transit through a state party may not be opened. When this problem was discussed between CCC and UPU, the latter invited postal administrations:

d. to cooperate in combatting illicit narcotics traffic whenever they are legally required to do so by their national authorities responsible for this matter; to ensure respect for the fundamental principles of the international post, in particular, the freedom of transit; and

d. to make arrangements with their relevant national authorities to ensure that bags of mail in transit suspected of enclosing items containing illicit narcotics substances are not opened, but to advise by the quickest means, at the request of their customs authorities, the administration of destination so that the suspected bags can easily be identified on arrival; and to verify the origin of the mail. Hence, the procedure is analogous to controlled delivery for postal items in transit, a procedure already available with respect to items addressed to domestic destinations.

States, IGOs, INGOs, and NGOs should also consider appropriate action at the regional and international levels for combatting activities of narco-terrorists. In particular, the UPU should provide state parties to the Universal Postal Convention with models of standard procedures

for cooperation of postal authorities with customs. The state parties to the Universal Postal Convention might further consider how to prevent the use of the international mails for illegal activities and contraband, such as drug trafficking. For this purpose, they may want to consider and propose appropriate amendments to the Convention. A study of this problem and of appropriate action which may be taken to combat it would be useful.

### 17. Controls over Ships on the High Seas and Aircraft in International Airspace

Vessels and aircraft are used for illegal activities by organized crime, especially for the illicit transport of drugs between countries, outside national boundaries, on the high seas and in international airspace. Many countries may be affected by organized crime activities, such as the shipment of drugs, appropriate cooperative procedures for interception must be devised which do not interfere with legitimate passage and commerce, subject to compliance with existing relevant international conventions.

States should review their national and state laws to determine whether jurisdiction over illegal activities of organized crime groups on the high seas and aircraft in international airspace requires broadening. If the national or state authority have reasonable grounds to suspect that a vessel or aircraft registered under the laws of the state is illicitly carrying drugs or other similar contraband, it may request another state, to assist in carrying out a search. For instance, the other state may be asked to direct its authorities to board and inspect the vessel and, if drugs are found, to seize them and arrest persons involved in the trafficking. In such circumstances, the state's own authorities may board or seize a vessel or aircraft registered under its laws.

Subject to international law provisions, law enforcement officials should, to the extent allowed under national law, undertake to board and seize a vessel unlawfully carrying drugs, provided that the authorization of the state of registry and, when applicable, of a coastal state, has been obtained. A state should respond promptly when requested for permission to stop, board and search a vessel under its registry due to illicit drug trafficking control. Subject to the same considerations, a state should be able to search an aircraft upon landing at a designated airport.

States, IGOs, INGOs, and NGOs should consider whether they can establish international standards for the identification, seizure, and



disposition of vessels and aircraft suspected of carrying drugs illicitly, and of the drugs and traffickers found thereon. States should be encouraged to conclude bilateral, multilateral, and regional agreements to strengthen such cooperation between states. Existing intergovernmental fora, including transport and shipping programs of the regional commissions, should take up the issue of activities of narco-terrorists, the need to coordinate efforts to halt it, and the importance of support for the U.N. drug convention.

## 18. Monitoring Movement of Persons Among Countries

Migration among countries is an area in which cooperation can be vastly improved in the fight against organized crime. Intergovernmental organizations, such as the United Nations, should sponsor conferences and exchange of information on the ways in which immigration authorities operate.

a. Studies have shown that automated look-out systems are required to enable border entry officials to have access to computers that input information on criminals. Countries, such as the U.S., are improving their automated law enforcement systems to more effectively apprehend fugitive alien criminals. They are experimenting with a national level of successful local choke point criminal referral and processing models. Immigration officials should be able to initiate administrative and management remedies to more expeditiously hear cases and effect deportation.

b. On a national and international basis, more communication should occur, and agreements reached, to design acceptable procedures for the notification of suspected aliens involved in serious criminal activities. Memoranda of understanding should be concluded to establish choke points at the time of arrest and provide for: a definition of criminal aliens who pose a particular threat to the citizens in a specific area; procedures for notifying national immigration investigations of suspected illegal aliens; and a commitment to conduct immigration record checks, ideally through provisions of an immigration database line to the law enforcement agency and the commitment to do follow-up processing.

c. On a national and international basis, arrangements should be made among law enforcement agencies on what categories of criminal aliens should be defined for joint investigations/apprehensions on which to commit resources, and to ensure logical guidelines and mutual responsibility for use of manpower resources and detention facilities re-

quired in joint operations.

d. On a national basis, arrangements should identify choke points at the point of the criminal justice system that is post-arrest, but prior to a determination to incarcerate, to provide for:

i. immediate notification to immigration officials of the determination not to prosecute or otherwise terminate proceedings in favor of the alien defendant, who may in some instances still be amenable to deportation proceedings;

ii. contact with the immigration authorities at the time of pre-bail, pre-sentence or pre-parole investigations by probation and parole officers, to ensure that the adjudicating authorities are fully aware of the alien's immigration status in issuing their decisions(s);

iii. sentencing, or conditions of release on bail, probation, or parole that require submission of the alien defendant to immigration authorities for processing, appearance at deportation proceedings, and submission to removal if deportability is determined by an immigration judge.

e. Internationally, national governments should share intelligence about the ethnic groups committing entitlement, credit card, and other types of fraud, where such crimes are significant, and they should share law enforcement mechanisms. Where appropriate, working groups should meet, perhaps in the context of the implementation of a MLAT. Consideration can be given to exchange of law enforcement officials and joint operations to combat fraud. Such procedures should assure the presence of the alien at all required hearings while ensuring compliance with his or her due process rights. They also provide for special conditions of release that stipulate that, if the alien should return illegally during the period of probation, parole, pie-trial diversion, *etcetera*, he or she will be returned for full completion of sentence or trial, as appropriate.

#### IV. MECHANISMS TO COMBAT NARCO-TERRORISM

The experts meeting before the 8th U.N. Crime Congress proposed a number of basic measures that would help to combat narco-terrorism. Although some of the measures apply to organized crime, many of them are unique to combatting narco-terrorism.

##### A. *Identification of the Problem*

Some experts appropriately note the need to establish additional

norms to control terrorist violence.<sup>29</sup> Among the issues are: the lack of a clear definition of innocent civilians; the limits of the use of force in connection with wars of national liberation and conflicts of a non-international character; the limits of the use of force by states in response to what they may perceive as constituting acts of violence; state policies and practices that may be considered by other states as constituting a violation of international treaty obligations; the lack of specific norms on state responsibility in failing to implement existing international obligations; the abuse of the privilege of diplomatic immunity and the diplomatic pouch; the absence of norms concerning the responsibility of states for acts not prohibited by international law; the absence of international regulation and control of the traffic and trade in arms; the insufficiency of international mechanisms for the peaceful resolution of conflicts and for the enforcement of internationally protected human rights; the lack of universal acceptance of the principle *aut dedere aut iudicare* and the lack of adequate international cooperation in the effective and uniform prevention and control of all forms and manifestations of terrorist violence; and the absence of international norms on the use of mercenaries.<sup>30</sup>

The discussion of the establishment of subregimes applies to international terrorism. Among governments, intergovernmental organizations, and other persons, the establishment of rules to deal with the types of crimes perpetrated by terrorists in general and narco-terrorists in particular must be developed. Due to the variables in the interaction between narcotics traffickers and terrorists, social scientists outside of law must be used (i.e., political scientists, sociologists, geographical area specialists).

When governments circumvent international law to deal with international terrorism, there must be better enforcement mechanisms to punish states and individuals who try to violate the rule of law. Such mechanisms seem best integrated into an international criminal court with jurisdiction over terrorism.

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29. See generally J. F. MURPHY, PUNISHING INTERNATIONAL TERRORISTS, THE LEGAL FRAMEWORK FOR POLICY INITIATIVES (1985); Zagaris & Simonetti, *supra* note 26.

30. Eighth U.N. Congress, *supra* note 4, at 17. But see proposed International Convention Against the Recruitment, Use, Financing and Training of Mercenaries, adopted by U.N. General Assembly, Dec. 4, 1989, reprinted in 29 I.L.M. 89, 1582 (1990) (update on signatures, accessions and deposit of ratification).

## B. *Specific Mechanisms*

### 1. Jurisdiction

Better uniformity in the laws and practices of states concerning both criminal and extraterritorial jurisdiction must be developed as a means to prioritize and resolve cases of conflicting jurisdictional claims.

### 2. Extradition

The political offense exception should be better refined, so that its use is minimized for extradition for crimes of terrorist violence, except where the requested state decides to undertake prosecution of the requested person or transfer the proceedings to another state to conduct the prosecution.

Some experts have advocated the preparation of a multilateral extradition treaty covering all forms and manifestations of terrorist violence deal with in prior international conventions as a means to complement the existing treaties.

The use of *lawful* alternatives to extradition, such as deportation or voluntary return of the subject to appropriate judicial guarantees, should be encouraged.

### 3. Non-applicability of defenses

The defense of "obedience to superior orders," "act of State," and other eventual international immunities should not apply with respect to persons who have violated international conventions prohibiting acts of terrorist violence.

### 4. State Terrorism

States that violate international law and resort to terrorist violence should be more effectively sanctioned by the international community. The U.N. should develop mechanisms for the control of such behavior, especially through the strengthening of U.N. machinery for the protection of human rights and preservation of peace and security.

### 5. Control of Weapons, Ammunition, and Explosives

States must develop national legislation to effectively control arms, ammunition, explosives, and other dangerous materials that may be

come accessible to terrorists. International regulations on the transfer, import, export, and storage of such objects should be developed so that customs and border controls can be harmonized to prevent their transnational movement, except for established lawful purposes.

## 6. Protection of Victims and Witnesses

States should establish appropriate mechanisms for the protection, and should introduce relevant legislation for the assistance, of victims of terrorism, pursuant to the Declaration of basic Principles of Justice for Victims of Crime and Abuse of Power.

States should adopt measures and policies to protect witnesses of terrorist acts.

## 7. Treatment of Offenders

Because ideologically motivated offenders are not often susceptible to resocialization, programs must be designed for such offenders and alternative measures of correction and programs oriented to social defense. Care must be taken so that all offenders are treated without discrimination and according to international recognized human rights, as contained in several conventions.

## 8. The Role of the Mass Media

States should consider the development of guidelines for the mass media or encourage the establishment of voluntary guidelines to control the following: sensationalizing and justifying terrorist violence; dissemination of strategic information on potential targets; and dissemination of tactical information while terrorist acts are occurring, thereby possibly endangering the lives of innocent civilians and law enforcement personnel or impeding effective law enforcement measures to prevent or control such acts and to apprehend the offenders.

## 9. International Criminal Court

When feasible, the establishment of an international (or regional) criminal court with jurisdiction for terrorist acts is desirable.

## 10. Monitoring and Ensuring Improved Compliance

To ensure better compliance with international law on terrorist

acts, the U.N., in cooperation with specialized agencies, should prepare reports on compliance with existing international conventions, including detailed reporting on incidents and cases for international circulation.

States that are not signatories to international conventions prohibiting terrorist violence should be urged to accede to such conventions at the earliest opportunity and to take effective measures to enforce their provisions.

## V. SUMMARY AND CONCLUSION

Through designing and implementing a multidisciplinary program that seeks to develop effective regimes of international criminal cooperation, states and international actors can begin to mobilize resources sufficient to combat the power and perniciousness of new international activities of organized crime and narco-terrorism. Within the establishment and development of regimes and subregimes, the individual measures should be adopted and utilized.

# Apprehending and Prosecuting Nazi War Criminals in the United States

Jeffrey N. Mausner\*

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## I. INTRODUCTION<sup>1</sup>

When World War II ended, there were millions of refugees in Europe. Many of them had been victims of the Nazis, survivors of Nazi concentration camps, or persons who had been forced to leave their homelands by the Nazis. But hiding in this large mass of people were also some of the Nazi officials who had assisted in the mass murder and persecution. They lied about their activities during the War, claiming that they were also refugees from the Nazis or from the Communists.

In order to help the millions of true refugees, the United States enacted special immigration laws in 1948<sup>2</sup> and 1953<sup>3</sup> which allowed large numbers of refugees to come to the United States without regard to traditional immigration quota restrictions.<sup>4</sup> These special immigration laws specifically excluded any person who had assisted the Nazis in persecuting civilians.<sup>5</sup> However, Nazi criminals were able to enter

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\* Copyright 1990 by Jeffrey N. Mausner. All rights reserved. Jeffrey Mausner is a partner in the Los Angeles law firm of Berman, Blanchard, Mausner & Kindem, specializing in commercial litigation. He served as a Trial Attorney in the Office of Special Investigations, Criminal Division, United States Department of Justice, prosecuting Nazi war criminals, from 1979 to 1985. He received numerous awards for his work at the Justice Department, including the Exceptional Performance Award, the Meritorious Service Award and the Special Achievement Award from the Attorney General. Mr. Mausner graduated from Cornell Law School in 1976, *magna cum laude*. He was an editor of the Cornell Law Review and a member of the Order of the Coif.

1. I wish to express my appreciation to my partner, Laurence M. Berman, for his assistance on this article.

2. Displaced Persons Act of 1948, Pub. L. No. 80-774, 62 Stat. 1009 (*as amended* by Pub. L. No. 81-555, 64 Stat. 219 (1950)).

3. Refugee Relief Act of 1953, Ch. 336, 67 Stat. 400 (expired 1956).

4. Since the 1920's, immigration laws have limited immigration into the United States to a fixed percentage each year of persons of the same ethnic origin already in the United States. The Displaced Persons Act admitted over 400,000 refugees to the United States, but required that these admissions be counted against future quotas for particular countries, thereby limiting or closing off immigration from some countries for several years.

5. The Displaced Persons Act excluded from entry into the United States any

the United States under these special immigration laws by lying about their activities during the period from 1933 to 1945.

This article will discuss the apprehension, investigation, and institution of legal proceedings against Nazi war criminals in the United States. The first part of this article will describe who these Nazis were, the crimes they committed, and how Nazi criminals are apprehended and investigated. The second part of the Article focuses on the prosecution of Nazi criminals and discusses the denaturalization, deportation, and extradition proceedings which are brought against them.

## II. NAZI WAR CRIMINALS IN THE UNITED STATES: WHO ARE THEY AND HOW ARE THEY FOUND?

### A. *Nazi Criminals Subject to Legal Proceedings in the United States*

The Nazi criminals who are subject to denaturalization, deportation, and extradition proceedings in the United States are persons who assisted in persecuting innocent civilians during the period from 1933 to 1945, and who lied about their activities during World War II in order to obtain a visa to enter the United States. Most of these Nazi criminals served as concentration camp guards, Nazi police officials, or Nazi government officials.

#### 1. Concentration Camp Guards

Among the Nazis who entered the United States by misrepresenting or concealing their wartime activities were concentration camp guards such as Feodor Fedorenko, Karl Linnas, and Ivan Demjanjuk. Feodor Fedorenko was a guard at the Nazi death camp at Treblinka where 800,000 Jews were brutally murdered in gas chambers. When he entered the United States, Fedorenko claimed on his visa application that he had been a farmer during this time. Fedorenko was denaturalized (*i.e.*, his citizenship was revoked)<sup>6</sup> and deported<sup>7</sup> to the U.S.S.R.

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person "who advocated or assisted in the persecution of any person because of race, religion, or national origin." Displaced Persons Act, § 13, 64 Stat. 227.

The Refugee Relief Act excluded from entry into the United States any person "who personally advocated or assisted in the persecution of any person or group of persons because of race, religion, or national origin." Refugee Relief Act, § 14(a), 67 Stat. 451.

6. *United States v. Fedorenko*, 455 F. Supp. 893 (S.D. Fla. 1978), *rev'd*, 597 F.2d 946 (5th Cir. 1979), *aff'd*, 449 U.S. 490 (1981).

7. *In re Fedorenko, I & N Dec. 2963* (1984).



where he was tried and executed for crimes against humanity.

Karl Linnas served as chief of the Nazi concentration camp at Tartu, Estonia. According to witnesses' testimony:

Linnas supervised the transportation of prisoners from his camp to a nearby antitank ditch. On such occasions, innocent Jewish women and children were tied by their hands and brought in their underwear to the edge of the ditch where they were forced to kneel. The guards then opened fire. The ditch became a mass grave.

There was also eyewitness testimony that Linnas on at least one occasion announced his victims' death sentence at the side of the ditch and gave the order to fire. Linnas was also said to have then personally approached the edge of the ditch, and fired into it. Another eyewitness recounted having seen Linnas help direct Jews out of a school and onto a school bus. That witness recalled that Linnas helped a small child with a doll onto the bus, and that the doll was later placed in a storage area for the personal effects of those who had been killed.<sup>8</sup>

When he entered the United States, Linnas misrepresented his activities by claiming that he had been a student and technical artist during this time. Linnas was denaturalized<sup>9</sup> and deported<sup>10</sup> to the U.S.S.R. where he died in prison awaiting trial for mass murder.

When he came to the United States, Ivan Demjanjuk told immigration officials that he had been a farmer during World War II. In truth, he had been a guard at the Nazi death camp of Treblinka. Several witnesses identified him as Ivan the Terrible, the man who actually ran the gas chamber at Treblinka, in which hundreds of thousands of Jews were murdered. Children, even babies, were thrown into the gas chamber at Treblinka and murdered, just because they were Jewish. Demjanjuk was denaturalized<sup>11</sup> and extradited to Israel<sup>12</sup> where he was

8. *Linnas v. I.N.S.*, 790 F.2d 1024, 1026-1027 (2d Cir.), *cert. denied*, 479 U.S. 995 (1986).

9. *United States v. Linnas*, 527 F. Supp. 426 (E.D.N.Y. 1981), *aff'd*, 685 F.2d 427 (2d Cir.), *cert. denied*, 459 U.S. 883 (1982).

10. *In re Linnas*, I & N Dec. 3000 (1985); *Linnas v. I.N.S.*, 790 F.2d 1024 (2d Cir.), *cert. denied*, 479 U.S. 995 (1986).

11. *United States v. Demjanjuk*, 518 F. Supp. 1362 (N.D. Ohio 1981), *aff'd*, 680 F.2d 32 (6th Cir.), *cert. denied*, 459 U.S. 1036 (1982).

12. *In re Demjanjuk*, 612 F. Supp. 544 (N.D. Ohio 1985); *Demjanjuk v. Petrovsky*, 612 F. Supp. 571 (N.D. Ohio), *aff'd*, 776 F.2d 571 (6th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986).

convicted of murder. His case is currently on appeal to the Israeli Supreme Court.

## 2. Nazi Police Officials

Police officials in the areas under Nazi control often assisted the Nazis in carrying out the murder of Jews and other innocent people. One such police official was Boleslavs Maikovskis who was a police chief in Latvia during World War II.<sup>13</sup> On his visa application, Maikovskis claimed that he had been a bookkeeper for the Latvian Railway Department from 1941 to 1944. Because he lied, he was able to procure a visa to enter the United States.<sup>14</sup>

Witnesses testified that while he was chief of police, Maikovskis was in charge of murdering all the Jews in his police precinct. These witnesses testified that Maikovskis and the policemen working under him rounded up the Jews, took them into the mountains, and shot them. Several hundred people were killed in one day. Entire families were murdered.

Witnesses also testified that Maikovskis and his men rounded up all the inhabitants of the village of Audrini, took them into the mountains, and shot them. Every inhabitant of the village, including all of the children, were murdered. Maikovskis and his men burned the entire village of Audrini to the ground. Maikovskis is currently in prison in West Germany where he is standing trial on charges of mass murder.<sup>15</sup>

Another Nazi police official who entered the United States by misrepresenting his Nazi past was Serge Kowalchuk. Kowalchuk served in the Ukrainian Schutzmannschaft (militia-police) in the city of Lubomyl.<sup>16</sup> Prior to the Nazi occupation, five thousand Jews lived in Lubomyl. Almost all of the Jews were shot by the Germans and the Ukrain-

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13. *Maikovskis v. I.N.S.*, 773 F.2d 435 (2d Cir. 1985), *cert. denied*, 476 U.S. 1182 (1986).

14. *Id.* at 437.

15. After a deportation trial lasting several years, the trial judge ordered that Maikovskis would not be deported. *In re Maikovskis*, No. A8 194 566 (Immigration Court, New York, June 30, 1983). However, this ruling was unanimously overturned by the Board of Immigration Appeals, *In re Maikovskis*, A8 194 566 (B.I.A. Aug. 14, 1984), and the United States Court of Appeals for the Second Circuit, *Maikovskis v. I.N.S.*, 773 F.2d 435 (2d Cir. 1985), *cert. denied*, 476 U.S. 1182 (1986), which ordered that Maikovskis be deported.

16. *United States v. Kowalchuk*, 571 F. Supp. 72 (E.D. Pa. 1983), *aff'd*, 773 F.2d 488 (3d Cir. 1985) (en banc), *cert. denied*, 475 U.S. 1012 (1986).

ian Schutzmannschaft during two days in October, 1942.<sup>17</sup> Witnesses testified that Kowalchuk participated in the mass murder.<sup>18</sup> Kowalchuk swore at his trial that he was not in town on the day the Jews were shot.<sup>19</sup> Without finding that Kowalchuk had actually participated in the murder of the Jews, the United States District Court revoked Kowalchuk's citizenship on the grounds that he had been a Nazi police official and had thereby assisted in persecution, and because he lied by claiming that he had been a tailor during this time on his visa application.<sup>20</sup>

### 3. Nazi Government Officials

Andrija Artukovic was a Nazi government official who was able to enter the United States after World War II by misrepresenting his wartime activities. Artukovic served as the Minister of Internal Affairs of Croatia (now Yugoslavia) during World War II. Artukovic was in charge of concentration camps in Croatia where thousands of Serbs, Jews, and opponents of the Nazis were murdered. Artukovic entered the United States in 1948 on a visitor's visa, using a false name. Artukovic's deportation was held up in the courts for more than twenty years on various procedural technicalities.<sup>21</sup> In 1984, Yugoslavia asked the United States to extradite Artukovic. He was extradited to Yugoslavia, where he was convicted of murder.<sup>22</sup>

These are only a few examples of the hundreds of Nazis who came to the United States after World War II. The United States Justice Department Office of Special Investigations (OSI) has investigated hundreds of cases, and is still prosecuting Nazi criminals residing in the United States.<sup>23</sup>

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17. *Id.* at 81.

18. *Id.* at 76-80.

19. *Id.*

20. *Kowalchuk*, 571 F. Supp. 72 (E.D. Pa. 1983), *aff'd*, 773 F.2d 488 (3d Cir. 1985) (en banc), *cert. denied*, 475 U.S. 1012 (1986).

21. *See, e.g., Artukovic v. I.N.S.*, 693 F.2d 894 (9th Cir. 1982).

22. *In re Artukovic*, 628 F. Supp. 1370 (C.D. Cal.), *stay denied*, 784 F.2d 1354 (9th Cir. 1986).

23. The Office of Special Investigations (OSI) was formed in 1979 to consolidate all activities of the United States government relating to Nazi war criminals. Its sole purpose is to locate, investigate, and institute legal proceedings against Nazi criminals in the United States. It is a part of the Criminal Division of the United States Justice Department.

## B. *Apprehending and Investigating Nazi Criminals in the United States*

Much of the information regarding Nazi criminals in the United States comes from the governments of other countries, in particular the Soviet Union, Germany, Israel, and Poland.<sup>24</sup> The governments of these countries cooperate very closely with the OSI in identifying Nazi criminals in the United States. The OSI has also received information regarding Nazi criminals from organizations such as Simon Wiesenthal's documentation center in Vienna and the Simon Wiesenthal Center in Los Angeles.

Beginning in 1982, the OSI initiated a program to locate Nazi criminals in the United States who were not known to foreign governments or to organizations. The OSI obtained lists of concentration camp guards, police officials, members of the SS, and others who may have taken part in Nazi atrocities. The OSI computerized these lists and matched them against the lists that the U.S. Immigration and Naturalization Service maintains of persons who have entered the United States. A sophisticated computer program was developed to allow matching of names on a phonetic basis so that names spelled in Cyrillic and other alphabets could be matched against the American spelling of the name. When the OSI obtains a match, it conducts an investigation to determine if the person living in the United States was a concentration camp guard, Nazi police official, or a member of the SS, and if he participated in criminal activity.

Once the OSI identifies an individual who may have been a Nazi criminal, it initiates a worldwide investigation of his activities during the period from 1933 to 1945. As in any other lawsuit, there are two main types of evidence which the OSI seeks—witnesses and documents.

### 1. Locating Witnesses to Nazi Crimes

The OSI has located witnesses in the United States, the Soviet Union, Israel, Germany, and other countries. There are generally two types of witnesses who testify for the government in these law-

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24. Movies and television shows often depict the discovery of Nazi criminals by a former concentration camp inmate who fortuitously runs into a former concentration camp guard on the bus or walking down the street. I am not aware of any case in which a Nazi criminal who has been prosecuted by the Justice Department was discovered in such a manner.

suits—survivors of the Holocaust and other Nazi criminals.

Because there were relatively few survivors of the Nazi death-camps, it is generally very difficult to locate survivor witnesses who are able to identify a particular defendant and testify about crimes which they saw him commit. Additionally, many of those who were able to survive have died during the forty-five years since the War ended. Moreover, even if the OSI is able to locate a survivor who witnessed a certain atrocity, it is often very difficult for that survivor to identify the individual who committed the atrocity more than 40 years ago.

Despite the difficulties, there have been cases in which the OSI was able to locate survivor witnesses who were able to testify about crimes committed by a particular defendant. Several Holocaust survivors were able to identify Demjanjuk, the guard at Treblinka who operated the gas chambers.<sup>25</sup> These witnesses testified that they were able to identify Demjanjuk because they saw him on several occasions and because of the particularly heinous nature of his criminal acts.<sup>26</sup> Several survivors were able to identify Kowalchuk as a Ukrainian police official because they had gone to school with him before the War and therefore easily recognized him when they saw him in a police uniform.<sup>27</sup>

The OSI also uses other Nazi criminals as witnesses.<sup>28</sup> For example, in the *Maikovskis* case, policemen who served under Maikovskis when he was the chief of police were located in Latvia.<sup>29</sup> OSI attorneys conducted depositions of these witnesses in Latvia. The depositions were videotaped for presentation in United States courts.

25. See *supra* notes 11-12 and accompanying text.

26. *United States v. Demjanjuk*, 518 F. Supp. 1362, 1369-71 (N.D. Ohio 1981), *aff'd*, 680 F.2d 32 (6th Cir.), *cert. denied*, 459 U.S. 1036 (1982).

27. *United States v. Kowalchuk*, 571 F. Supp. 72, 76-77 (E.D. Pa. 1983), *aff'd*, 773 F.2d 488 (3d Cir. 1985) (en banc), *cert. denied*, 475 U.S. 1012 (1986).

28. In many prosecutions conducted by the Justice Department, it is necessary to rely on the testimony of other criminals. This is often true in drug cases, securities fraud cases, and other types of criminal prosecutions. In cases involving the prosecution of Nazi criminals in which the testimony of another Nazi criminal has been used, there has always been corroborating evidence from documents, survivor witnesses, or admissions of the defendant himself.

29. Latvia has been incorporated into the U.S.S.R. The United States does not recognize this incorporation.



THE AUTHOR (LEFT) WITH FORMER OSI DIRECTOR ALLAN RYAN (RIGHT) AND DEFENSE ATTORNEY IVARS BERZINS (CENTER), IN RIGA, LATVIA FOR THE TAKING OF DEPOSITIONS.

The witnesses in Latvia testified that Maikovskis served as the police chief in Rezekne, Latvia, and that they served as policemen under his command. They testified that Maikovskis ordered them to assist in the shooting of hundreds of Jews and all of the inhabitants of the village of Audrini. These witnesses were able to positively identify Maikovskis from a photospread containing the photographs of Maikovskis and 17 other men. They easily recognized Maikovskis because they had worked with him on a daily basis during their service with the police.



THE AUTHOR (FAR LEFT) WITH LATVIAN PROSECUTORS AND OTHER UNITED STATES JUSTICE DEPARTMENT AND STATE DEPARTMENT OFFICIALS, IN RIGA, LATVIA AFTER THE CONCLUSION OF DEPOSITIONS. FIFTH FROM THE LEFT IS ALLAN RYAN, FORMER DIRECTOR OF OSI. FIFTH FROM THE RIGHT IS THE PROCURATOR GENERAL (ATTORNEY GENERAL) OF LATVIA.



*Копия с фото-  
коллажа Игоря Николаевича  
Майковски (1942 г.)  
сфотографированного  
в форме капитана полиции  
(Латвия)*

Photospread used in the identification of Maikovskis by witness Anton Zhukovski's at his deposition in Latvia. Maikovskis is shown in photograph number 13 in his police captain's uniform taken in 1942. The witnesses deposed in Latvia were able to identify Maikovskis, from this photograph, as the person who served as the police chief and who was



responsible for the murder of the residents of Audrini and the Jews in Rezekne, Latvia. These witnesses were able to identify Maikovskis' photograph from a photospread that contained eighteen different photographs of Nazi officials.

## 2. Locating Documentary Evidence

The OSI also relies on documents to prove its case and obtains documents from all over the world, including Germany, Israel, the Soviet Union, Poland, and the United States National Archives. The documents are records created by the Nazis during the period from 1933 to 1945. For example, the OSI has used duty rosters for concentration camp guards at a particular camp in order to help establish that a defendant was a concentration camp guard. The OSI has also used Nazi police documents which conveyed orders to the police to establish that a defendant served in the police and took part in certain atrocities.

### C. *Use of Evidence From the Soviet Union*

Because many of the crimes committed by the Nazis took place in areas which are now part of the Soviet Union, much of the evidence used in the prosecution of Nazi criminals comes from the Soviet Union. Nazi documents were captured by the Soviet army as it advanced toward Germany, and witnesses to Nazi crimes reside in areas that are now part of the U.S.S.R. Accused Nazis have claimed that documents which OSI obtained from the Soviet Union were forged by the Soviet secret police, the K.G.B. The accused Nazis have also alleged that Soviet witnesses who implicated them in crimes were coerced into testifying against them by the K.G.B.<sup>30</sup>

However, evidence from the Soviet Union has proven to be very reliable. Documents which come from the Soviet Union are actual World War II documents which were captured by the Soviet Army during the War. These documents were created by the Nazis, not by the Soviet government. All documents which the OSI uses are ex-

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30. The cases which have gone to trial in which these claims regarding evidence from the Soviet Union were raised were tried during the period from 1980 to 1987, during which time cold war tensions were high. There have not been any trials in which evidence from the Soviet Union has been used since Glasnost and Perestroika were instituted. It will be interesting to see if defendants continue to raise the claim that evidence from the Soviet Union is unreliable, now that there have been fundamental changes in the Soviet political and judicial systems.

amined by handwriting experts, chemists, and other scientists from the Federal Bureau of Investigation (FBI), United States Treasury Department, and the Immigration and Naturalization Service. These experts testify in court regarding the authenticity of the documents. If a Nazi document was purportedly signed by the defendant, a handwriting expert compares the signature on the Nazi document with the defendant's signature on his immigration application. Chemists examine the chemical content of the ink and paper to determine if the ink and paper of the Nazi document are consistent with its date. The inks and papers in use during the 1940's have certain chemical contents. The government chemists are able to determine if the ink and paper of the Nazi documents were in use during the 1940's.

However, even with all of this expert testimony, some defendants still claimed that documents which came from the Soviet Union were forged. They claimed that the Soviet K.G.B. was extremely sophisticated, and that it was able to use ink and paper stored from the 1940's in order to forge the documents. However, during the 1980's the United States Treasury Department developed a scientific technique called relative aging. This technique allows experts to determine, within certain limits, how long the ink has been on the paper by examining the solubility of the ink (*i.e.*, the extent to which the ink has dried). This test reveals whether the ink was recently put onto the paper. In other words, the test could prove that a purported Nazi document was not a recent forgery. Without exception, every Nazi document which has been examined, including all Nazi documents obtained from the Soviet Union, has been found to be authentic through the use of handwriting comparison, ink and paper analysis, and relative aging.<sup>31</sup>

Evidence from the Soviet Union has also been corroborated by documents and witnesses from other countries. For example, in the *Kowalchuk* case, witnesses from the Soviet Union, Israel, and the United States all identified Kowalchuk as a Nazi police official.<sup>32</sup> In some cases, the defendant himself will end up admitting the truth of facts proven by evidence which came from the Soviet Union. One of

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31. See, e.g., *United States v. Demjanjuk*, 518 F. Supp. 1362, 1365-69 (N.D. Ohio 1981), *aff'd*, 680 F.2d 32 (6th Cir.), *cert. denied*, 459 U.S. 1036 (1982); *In re Maikovskis*, A8 194 566, at 15-17; *Maikovskis v. I.N.S.*, 773 F.2d 435, 438 (2d Cir. 1985), *cert. denied*, 476 U.S. 1182 (1986).

32. *United States v. Kowalchuk*, 571 F. Supp. 72, 76-81 (E.D. Pa. 1983), *aff'd*, 773 F.2d 488 (3d Cir. 1985) (en banc), *cert. denied*, 475 U.S. 1012 (1986).

the best examples of this is the *Maikovskis* case.<sup>33</sup> When he came to the United States, Maikovskis claimed on his visa application that he had been a bookkeeper for the Latvian Railway Department from 1941 to 1944.<sup>34</sup> The Justice Department received documents from the Soviet Union, purportedly signed by Maikovskis, stating that he had been police chief in the city of Rezekne, Latvia during this time. These documents also indicated that Maikovskis had participated in the arrest of all of the inhabitants of the village of Audrini and the burning of the village by the police.<sup>35</sup> Former policemen who served under Maikovskis were deposed in Latvia, and they testified that Maikovskis was in fact the chief of police. According to these witnesses, Maikovskis had given orders to arrest all of the inhabitants of the Audrini village and then burn it to the ground. The former policemen also testified that Maikovskis and his men transported the residents of the village to the hills outside of town and shot them in mass graves.<sup>36</sup>

When Maikovskis was first questioned by the Justice Department, he denied that he had served as chief of police and further denied that he had any involvement in the arrest or murder of the inhabitants of Audrini or the destruction of the village. He claimed that the Soviet secret police, the K.G.B., was trying to frame him. He and his attorney argued that the witnesses in Latvia had been coerced into testifying against him, and that the documents obtained from Soviet-occupied Latvia had been forged.<sup>37</sup>

At the deportation trial, a handwriting expert and expert forensic document examiner testified that the same person who signed Maikovskis' visa application also signed the documents obtained from the Soviet Union. These were documents which were signed by Maikovskis as chief of police, and which implicated him in the Audrini incident.<sup>38</sup> Maikovskis was then recalled to the stand and admitted that he had

33. *In re Maikovskis*, No. A8 194 566 (B.I.A. Aug. 14, 1984); *Maikovskis v. I.N.S.*, 773 F.2d 435 (2d Cir. 1985), *cert. denied*, 476 U.S. 1182 (1986).

34. *Maikovskis*, 773 F.2d at 437.

35. *In re Maikovskis*, No. A8 194 566 at 15-17; *Maikovskis*, 773 F.2d at 438.

36. *In re Maikovskis*, No. A8 194 566 at 11-15.

37. *Id.* at 10.

38. *Id.* at 17 n.14; *Maikovskis*, 773 F.2d at 438. One such document obtained from the U.S.S.R. was a January 3, 1942 report from the Chief of Rezekne District Police Precinct 2 (Maikovskis) to the Vice Prosecutor in the Second Precinct. The report states that "on orders of the German authorities, all the residents of Audrini village, Makeseni County, were imprisoned, but the village itself was burned." The report was signed by Boleslavs Maikovskis, Police Chief.

served as chief of police. He admitted that he had written and signed the documents obtained from the U.S.S.R. and finally admitted that he had given the order for, and participated in, the arrest of all of the inhabitants of Audrini and the burning of the village.<sup>39</sup> The evidence from the Soviet Union had been correct.

However, Maikovskis continued to deny that he had participated in the shooting of the Audrini villagers or the rounding up and murder of the Jews of Rezekne, as the witnesses in the Soviet Union testified. The United States courts did not have to reach a determination regarding whether the witnesses from the Soviet Union were correct on those points, because it was determined that there were sufficient grounds to deport Maikovskis based on his own admissions. Maikovskis is currently in prison in West Germany, standing trial on charges of mass murder. The West German court will determine whether Maikovskis participated in the murders of the Audrini villagers and the Jews of Rezekne. The German prosecutors have a convincing argument that Maikovskis has been shown to be a liar, while the witnesses in the Soviet Union have been proven correct on several points by Maikovskis' own belated admissions.<sup>40</sup>

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39. *In re Maikovskis*, No. A8 194 566 at 10-11; *Maikovskis*, 773 F.2d at 438.

40. I have conducted depositions of witnesses in the Soviet Union (including the witnesses in the *Maikovskis* case) and I have viewed the videotapes of depositions of other witnesses. I believe that most of them are truthful. I have never seen any evidence of coercion of witnesses by the Soviet authorities. The lawyer for the accused Nazi can accompany the OSI attorneys to the Soviet Union and cross examine the witnesses in order to test the truth of their testimony. When the Justice Department has been able to locate witnesses in other countries, such as the United States, Germany, or Israel, those witnesses have corroborated the testimony of the Soviet witnesses. Nevertheless, there have been several cases in which courts have refused to credit testimony of witnesses in the Soviet Union, simply because the witnesses were from the Soviet Union. *In re Maikovskis*, No. A8 194 566 (Immigration Court, New York, June 30, 1983), *rev'd on other grounds*, *In re Maikovskis*, No. A8 194 566 (B.I.A. Aug. 14, 1984), *aff'd*, *Maikovskis v. I.N.S.*, 773 F.2d 435 (2d Cir. 1985), *cert. denied*, 476 U.S. 1182 (1986); *United States v. Kungys*, 571 F. Supp. 1104 (D.N.J. 1983), *rev'd on other grounds*, 793 F.2d 516 (3d Cir. 1986), *rev'd and remanded*, 485 U.S. 759 (1988).

In the *Maikovskis* case, the trial judge, Judge Francis Lyons, went so far as to deny the government's motion to take depositions in the Soviet Union. The trial judge was overruled by a higher court, and depositions were taken in the Soviet Union. Not surprisingly, the trial judge then refused to credit the testimony of the Soviet witnesses. It should be noted that this was the same judge who determined that Maikovskis should not be deported, even though he admitted lying about his activities during World War II in order to obtain a visa to enter the United States, and even though he

### III. PROSECUTING NAZI CRIMINALS

Criminal proceedings are not brought against Nazi criminals in the United States. Because the Nazi crimes did not take place in the United States, the United States does not have jurisdiction over the crimes. However, there are two types of proceedings which may be properly brought against Nazi criminals in the United States. The first type is under the United States immigration laws. A proceeding under the immigration laws involves a two-step process: denaturalization (revocation of citizenship) and deportation (expulsion from the United States). Denaturalization proceedings and deportation proceedings are completely separate, are brought in different courts, and have separate appeals. Deportation proceedings cannot be commenced until denaturalization proceedings and all appeals have been successfully concluded.

The second type of proceeding brought against Nazi criminals is extradition. Upon the request of a foreign country, a Nazi criminal may be extradited to that country to be criminally prosecuted for the crimes he committed.

#### A. *Immigration Proceedings*

##### 1. Denaturalization

If a Nazi criminal has become a United States citizen, his citizenship must be revoked. As noted above, only after citizenship has been revoked can deportation proceedings be instituted in order to remove the Nazi from the United States. Denaturalization proceedings are conducted in United States District Court. There are two grounds for revocation of citizenship: 1) proof of a material misrepresentation in the course of procuring citizenship; and 2) proof that citizenship was illegally procured.<sup>41</sup> Proof of either of these grounds must be by "clear,

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admitted forcibly rounding up all of the residents of Audrini and burning the village to the ground. This ruling was unanimously reversed by the higher courts, which ordered that Maikovskis be deported. Maikovskis is now in prison in West Germany standing trial on charges of mass murder. The trial is taking place in the city of Muenster, West Germany.

41. 8 U.S.C. § 1451(a) (1986) provides in pertinent part:

It shall be the duty of the United States attorneys . . . to institute proceedings . . . in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the cer-

unequivocal, and convincing" evidence which does "not leave the issue in doubt."<sup>42</sup> This burden is "substantially identical with that required in criminal cases—proof beyond a reasonable doubt."<sup>43</sup>

a. *Denaturalization Based on Material Misrepresentation in the Course of Procuring Citizenship*

In order to become a United States citizen, an applicant must answer questions regarding his background and history. Title 8, U.S.C. § 1451(a) provides for the denaturalization of citizens whose citizenship was "procured by concealment of a material fact or by willful misrepresentation . . . ."<sup>44</sup> Courts have concluded that "this requires misrepresentations or concealments that are both willful and material."<sup>45</sup> The Supreme Court has held that this "provision plainly contains four independent requirements: the naturalized citizen must have misrepresented or concealed some fact, the misrepresentation or concealment must have been willful, the fact must have been material, and the naturalized citizen must have procured citizenship as a result of the misrepresentation or concealment."<sup>46</sup>

b. *Denaturalization Based on Illegal Procurement of Citizenship*

Citizenship was illegally procured, and must be revoked, if the applicant for citizenship did not meet all of the requirements to become a United States citizen at the time of naturalization.<sup>47</sup> One of the requirements for United States citizenship is that the applicant must

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tificate of naturalization on the ground that such order and certificate of naturalization were illegally procured or were procured by concealment of a material fact or by willful misrepresentation . . . .

42. *Fedorenko v. United States*, 449 U.S. 490, 505 (1981); *Kowalchuk*, 773 F.2d 488, 493 (3d Cir. 1985).

43. *Kowalchuk*, 571 F. Supp. 72, 73 (E.D. Pa. 1983); *United States v. Riela*, 337 F.2d 986, 988 (3d Cir. 1964).

44. *Maikovskis*, 773 F.2d at 438.

45. *United States v. Kungys*, 485 U.S. 759, 767 (1988); *see also Fedorenko*, 449 U.S. at 507-08 n.28.

46. *Kungys*, 485 U.S. at 767; *see also United States v. Schellong*, 547 F. Supp. 569 (N.D. Ill. 1982), *aff'd*, 717 F.2d 329 (7th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984). In *Schellong*, the defendant lied on his citizenship application about his service in the Nazi SS as a concentration camp guard. Schellong was denaturalized based upon his misrepresentations in his citizenship application. *Id.* at 574-75.

47. *Fedorenko*, 449 U.S. at 506; *Kowalchuk*, 773 F.2d at 494.

have entered the United States pursuant to a valid visa.<sup>48</sup> If a naturalized citizen was not eligible for the visa he obtained, citizenship must be revoked.<sup>49</sup>

Many Nazis illegally entered the United States under the Displaced Persons Act ("DP Act").<sup>50</sup> The DP Act excluded from entry into the United States any person "who advocated or assisted in the persecution of any person because of race, religion, or national origin."<sup>51</sup> Consequently, citizenship must be revoked from those Nazis who assisted in persecution and who entered the United States under the DP Act.<sup>52</sup> Additionally, section ten of the DP Act excludes "[a]ny person who shall willfully make a misrepresentation for the purpose of gaining admission into the United States as an eligible displaced person . . . ."<sup>53</sup> Therefore, citizenship of any person who willfully made a material misrepresentation regarding his position or activities during World War II, for the purpose of gaining admission into the United States as an eligible displaced person, must be revoked.<sup>54</sup> Although the DP Act does not on its face require that a misrepresentation be material in order to render an applicant ineligible, it has been held that such a misrepresentation must be material.<sup>55</sup>

Another prerequisite for citizenship is that the applicant must be "a person of good moral character."<sup>56</sup> It has been held that a person who participated in Nazi atrocities cannot be "a person of good moral character," and must therefore be denaturalized.<sup>57</sup>

Lack of good moral character is also demonstrated when an individual gives false testimony in the immigration or naturalization process. Pursuant to 8 U.S.C. § 1101(f)(6), a person shall be deemed not to be of good moral character if he "has given false testimony for the

48. *Kowalchuk*, 773 F.2d at 494.

49. *Fedorenko*, 449 U.S. at 506; *Kowalchuk*, 773 F.2d at 494-95.

50. Displaced Persons Act of 1948, Pub. L. No. 80-774, 62 Stat. 1009 (as amended by Pub. L. No. 81-555, 64 Stat. 219 (1950)).

51. Displaced Persons Act, § 13, 64 Stat. 227.

52. See *United States v. Linnas*, 527 F. Supp. 426 (E.D.N.Y. 1981), *aff'd*, 685 F.2d 427 (2d Cir.), *cert. denied*, 459 U.S. 883 (1982); *Kowalchuk*, 571 F. Supp. 72 (E.D. Pa. 1983), *aff'd on other grounds*, 773 F.2d 488 (3d Cir. 1985) (en banc), *cert. denied*, 475 U.S. 1012 (1986).

53. Displaced Persons Act, § 10, 64 Stat. 226.

54. *Fedorenko*, 449 U.S. at 507; *Kowalchuk*, 773 F.2d at 495.

55. *Fedorenko*, 449 U.S. at 507; *Kowalchuk*, 773 F.2d at 495 n.8.

56. 8 U.S.C. § 1427(a) (1982).

57. See *Linnas*, 527 F. Supp. at 439-40.

purpose of obtaining" immigration or naturalization benefits. Recently, the Supreme Court held that 8 U.S.C. § 1101(f)(6) does not have a materiality requirement, as does 8 U.S.C. § 1451 and the DP Act.<sup>58</sup> The issue under section 1101(f)(6) is whether the misrepresentation was made with the subjective intent of obtaining immigration benefits.<sup>59</sup> Therefore, the citizenship of any person who gave false testimony regarding his position or activities during World War II, with the subjective intent of obtaining immigration benefits, must be revoked.<sup>60</sup>

## 2. Deportation

Once a Nazi criminal has been denaturalized by revoking his citizenship, he must still be deported from the United States.

### a. *Deportation Based on Assistance in Persecution*

As noted above, the DP Act prohibited the entry into the United States of any person "who advocated or assisted in the persecution of any person because of race, religion, or national origin."<sup>61</sup> Any person who assisted the Nazis in persecution and then entered the United States under the DP Act is deportable under 8 U.S.C. § 1251(a)(1).<sup>62</sup>

There were, however, Nazi criminals who entered the United States under other immigration laws which did not specifically exclude persons who assisted the Nazis in persecuting civilians. Such persons could not be deported based upon their assistance in persecution. Therefore, in 1978, the Immigration and Nationality Act was amended to specifically provide for the deportation of all persons who assisted the Nazis in the persecution of civilians, regardless of the immigration law they used to enter the United States.<sup>63</sup> This amendment (known as the Holtzman Amendment) provides for the deportation of any person who

58. *United States v. Kungys*, 485 U.S. 759, 782 (1988).

59. *Id.*

60. However, the Court in *Kungys* recognized that "it will be relatively rare that the Government will be able to prove that a misrepresentation that does not have the natural tendency to influence the decision regarding immigration or naturalization benefits [i.e., an immaterial misrepresentation] was nonetheless made with the subjective intent of obtaining those benefits." *Id.* at 780.

61. Displaced Persons Act, § 13, 64 Stat. 227.

62. *Maikovskis v. I.N.S.*, 773 F.2d 435 (2d Cir. 1985).

63. Immigration and Nationality Act, § 241(a)(19), 8 U.S.C. § 1251(a)(19) (1989).



during the period beginning on March 23, 1933, and ending on May 8, 1945, under the direction of, or in association with—

(A) the Nazi government of Germany,

(B) any government in any area occupied by the military forces of the Nazi government of Germany,

(C) any government established with the cooperation of the Nazi government of Germany, or

(D) any government which was an ally of the Nazi government of Germany,

ordered, incited, assisted, or otherwise participated in the persecution of any person because of race, religion, national origin, or political opinion.<sup>64</sup>

Ordinarily, a person found deportable for making a material misrepresentation may be eligible for a discretionary ruling relieving him of the order of deportation. However, such relief is not available to a person found deportable under the Holtzman Amendment for assistance in persecution. Any person who is found to have assisted the Nazis in persecuting civilians *must* be deported.<sup>65</sup>

#### b. *Deportation Based on Material Misrepresentation in Procuring a Visa*

Section 241(a)(1) of the Immigration and Nationality Act provides for the deportation of persons who were excludable at time of entry into the United States because they procured their visa by fraud or misrepresentation.<sup>66</sup> The DP Act also made excludable any person who "willfully ma[d]e a misrepresentation for the purpose of gaining

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64. *Id.* This provision is known as the "Holtzman Amendment," named for its chief sponsor, Representative Elizabeth Holtzman of Brooklyn, New York. The constitutionality of the Holtzman Amendment has been challenged on the grounds that it is an ex-post-facto law and a bill of attainder. However, the amendment has been found to be constitutional. *See Artukovic v. I.N.S.*, 693 F.2d 894 (9th Cir. 1982); *Linnas v. I.N.S.*, 790 F.2d 1024, 1028-30 (2d Cir.), *cert. denied*, 479 U.S. 995 (1986).

65. *See* Immigration and Nationality Act, § 241(f), 8 U.S.C. § 1251(f) (1989) (waiver of deportation unavailable to person found to have assisted the Nazis in persecution); Immigration and Nationality Act, § 243(h)(2)(A), 8 U.S.C. § 1253(h)(2)(A) (1989) (withholding of deportation unavailable); Immigration and Nationality Act, § 244(a), 8 U.S.C. § 1254(a) (1989) (suspension of deportation unavailable); *see also Maikovskis*, 773 F.2d at 442.

66. Immigration and Nationality Act, § 241(a)(1), 8 U.S.C. § 1251(a)(1) (1989).

admission into the United States."<sup>67</sup> Such persons are deportable under Section 241 (a)(1) of the Immigration and Nationality Act.<sup>68</sup> Under all of these statutes, "[a]n alien who has made misrepresentations in his visa application documents is deportable on account of those misrepresentations only if they were material."<sup>69</sup>

### 3. Materiality of Misrepresentations

One of the issues which has caused a great deal of difficulty in both denaturalization and deportation proceedings is the standard for measuring the "materiality" of misrepresentations. In *United States v. Fedorenko*,<sup>70</sup> one of the first cases involving denaturalization of a Nazi, the district court held that in order to establish materiality, the government must prove that if the applicant for citizenship had revealed the true facts about his position and activities during World War II, citizenship *would* have been denied.<sup>71</sup> Under this standard, the district court held that Fedorenko, who admitted lying about his service as an armed guard at the Nazi death camp of Treblinka, was not subject to denaturalization, because the government had not proven by clear and convincing evidence that a guard at Treblinka could not have been eligible for immigration under the DP Act.<sup>72</sup>

The court of appeals for the Fifth Circuit reversed, holding that a misrepresentation was material if 1) disclosure of the true facts *would* have led to an investigation, and 2) the investigation *might* have uncovered other facts warranting denial of citizenship.<sup>73</sup> The court of appeals held that if Fedorenko had revealed his wartime activities when he applied for his visa, the American authorities *would* have conducted an investigation, and this investigation *might* have resulted in denial of a

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67. Displaced Persons Act, § 10, 62 Stat. 1013.

68. *Fedorenko v. United States*, 449 U.S. 490 (1981); *Maikovskis*, 773 F.2d 435.

69. *Maikovskis*, 773 F.2d at 440; *see also Fedorenko*, 449 U.S. at 507-08. As noted above, a person who is found deportable for making material misrepresentations is normally eligible for certain forms of discretionary relief from deportation. However, a person who is found to have assisted the Nazis in persecuting civilians is not eligible for such discretionary relief and *must* be deported. *See supra* note 63 and accompanying text.

70. 455 F. Supp. 893 (S.D. Fla. 1978), *rev'd*, 597 F.2d 946 (5th Cir. 1979), *aff'd*, 449 U.S. 490 (1981).

71. *Fedorenko*, 455 F. Supp. at 916.

72. *Id.* at 909.

73. *Fedorenko*, 597 F.2d at 950-51.

visa. Consequently, the court concluded that Fedorenko's citizenship must be revoked.<sup>74</sup>

The Supreme Court affirmed Fedorenko's denaturalization, but sidestepped the issue of which of the two lower courts' tests for materiality was correct. The Court held that

disclosure of the true facts about [Fedorenko's] service as an armed guard at Treblinka would, as a matter of law, have made him ineligible for a visa under the DP Act . . . . At the very least, a misrepresentation must be considered material if disclosure of the true facts would have made the applicant ineligible for a visa.<sup>75</sup>

After *Fedorenko*, courts set forth several standards for materiality in the denaturalization and deportation contexts. For example, in *Maikovskis v. I.N.S.*<sup>76</sup> the second circuit articulated the following standard for materiality in deportation cases:

[O]nce it has been shown that the alien made misrepresentations in his visa application, the materiality of the misrepresentations is established where the government shows that disclosure of the concealed information probably would have led to the discovery of facts warranting the denial of a visa.<sup>77</sup>

In *United States v. Kungys*,<sup>78</sup> the Supreme Court attempted to frame a definition of materiality in the denaturalization context which would clarify the standard and put an end to the inconsistent standards adopted by different courts. The Court framed the relevant inquiry as follows:

[W]hether the misrepresentation or concealment was predictably capable of affecting, *i.e.*, had a natural tendency to affect, the official decision. The official decision in question, of course, is whether the applicant meets the requirements for citizenship, so that the test more specifically is whether the misrepresentation or concealment had a natural tendency to produce the conclusion that the applicant was qualified.<sup>79</sup>

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74. *Id.* at 951-52.

75. *Fedorenko*, 449 U.S. at 509.

76. 773 F.2d 435 (2d Cir. 1985) *cert denied*, 476 U.S. 1182 (1986).

77. *Id.* at 442.

78. 485 U.S. 759 (1988).

79. *Id.* at 771-72.

#### 4. Assistance in Persecution

The question of whether an individual "assisted in persecution," warranting denaturalization or deportation, has also been an issue in several cases.<sup>80</sup> In *Fedorenko*, the Supreme Court set forth the following standard:

[A]n individual who did no more than cut the hair of female inmates before they were executed cannot be found to have assisted in the persecution of civilians. On the other hand, there can be no question that a guard who was issued a uniform and armed with a rifle and a pistol, who was paid a stipend and was regularly allowed to leave the concentration camp to visit a nearby village, and who admitted to shooting at escaping inmates on orders from the commandant of the camp, fits within the statutory language about persons who assisted in the persecution of civilians. Other cases may present more difficult line-drawing problems but we need decide only this case.<sup>81</sup>

The following cases exemplify the requisite "assistance in persecution," which warrant denaturalization and deportation. In *United States v. Koziy*,<sup>82</sup> a Nazi policeman who personally murdered a little Jewish girl was found to have assisted in persecution.<sup>83</sup> In *Maikovskis*,<sup>84</sup> a police chief who gave orders to arrest all of the inhabitants of a village and burn the village to the ground, and then participated in

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80. The issue of assistance in persecution becomes difficult in those cases in which the court does not credit, or chooses not to rely on, testimony of eyewitnesses, either from the Soviet Union or other countries, who testify that the defendant participated in murders, assaults, or other atrocities. If the court credits such testimony, there is no question that the defendant assisted in persecution. See, e.g., *United States v. Linnas*, 527 F. Supp. 426 (E.D. N.Y. 1981) *aff'd*, 685 F.2d 427 (2d Cir.) *cert. denied*, 459 U.S. 883 (1982); *United States v. Koziy*, 540 F. Supp. 25 (S.D. Fla. 1982), *aff'd*, 728 F.2d 1314 (11th Cir.), *cert. denied*, 469 U.S. 835 (1984). In those cases in which the court does not credit eyewitness testimony regarding the defendant's commission of atrocities, the court must usually rely on admissions made by the defendant as to his wartime activities. The defendant will, of course, attempt to minimize his involvement in persecution, thereby giving rise to close questions of whether the defendant assisted in persecution. See, e.g., *United States v. Kowalchuk*, 571 F. Supp. 72 (E.D. Pa. 1983), *aff'd*, 773 F.2d 488 (3d Cir. 1985) (en banc), *cert. denied*, 475 U.S. 1012 (1986).

81. *Fedorenko*, 449 U.S. at 512 n.34.

82. 540 F. Supp. 25 (S.D. Fla. 1982).

83. *Id.* at 32.

84. 773 F.2d 435.

the arrests and burning, was found to have assisted in persecution.<sup>85</sup> In *Kowalchuk*,<sup>86</sup> an individual who occupied a largely clerical, but responsible, position in a Nazi police force which carried out atrocities was found to have assisted in persecution, even though the court did not credit testimony of witnesses regarding the defendant's personal participation in the atrocities.<sup>87</sup>

## B. Extradition of Nazi Criminals

As mentioned above, extradition is the second type of proceeding brought against Nazi war criminals. If a foreign country wishes to try a Nazi criminal for his crimes, that country may request extradition of the criminal. Extradition of Nazi criminals has occurred in only three cases: *In re Ryan*,<sup>88</sup> *In re Artukovic*,<sup>89</sup> and *In re Demjanjuk*.<sup>90</sup>

Extradition is a simple and quick procedure. The U.S. government must only make out a prima facie case that there is probable cause to believe that the respondent committed a crime.<sup>91</sup> Review by appeals courts of an order of extradition is very limited.<sup>92</sup>

Extradition can only take place when there is an extradition treaty

85. *Id.* at 446-48.

86. 571 F. Supp. 72.

87. *Id.* at 81. In both *Maikovskis* and *Kowalchuk*, witnesses from the Soviet Union testified that the defendants had personally participated in the mass murder of Jews and other innocent civilians. However, the courts did not rely on that testimony, instead relying on the defendants' own admissions regarding their service in the Nazi police and assistance in persecution.

88. 360 F. Supp. 270 (E.D.N.Y.), *aff'd*, 478 F.2d 1397 (2d Cir. 1973).

89. 628 F. Supp. 1370 (C.D. Cal), *stay denied*, 784 F.2d 1354 (9th Cir. 1986).

90. 612 F. Supp. 544 (N.D. Ohio 1985). In the 1950's and 1960's, the U.S.S.R. requested extradition of Maikovskis and Linnas, but extradition did not take place because there was not an extradition treaty between the United States and the Soviet Union.

91. *Id.* at 548. In contrast, as noted above, the government must prove a denaturalization and deportation case by clear, unequivocal, and convincing evidence which does not leave the issue in doubt. *See supra* notes 41-42 and accompanying text.

92. *Demjanjuk v. Petrovsky*, 776 F.2d 571, 576 (6th Cir. 1985), *cert. denied*, 475 U.S. 1016 (1986). In contrast, denaturalization and deportation proceedings involve the following steps: 1) denaturalization trial in United States District Court; 2) appeal to the United States Court of Appeals; 3) certiorari to the United States Supreme Court; 4) deportation trial in United States Immigration Court; 5) appeal to the Board of Immigration Appeals; 6) appeal to the United States Court of Appeals; and 7) certiorari to the United States Supreme Court. This procedure can take from five to ten years.

between the United States and a foreign country covering the alleged crimes, and the government of the foreign country asks the United States government to send a person to the foreign country to stand trial for crimes allegedly committed in that country or under that country's jurisdiction. Germany has only requested extradition of one Nazi criminal from the United States.<sup>93</sup>

#### IV. CONCLUSION

Despite the many obstacles in prosecuting crimes which took place more than forty years ago, thousands of miles from the United States, Nazi criminals in the United States are finally being brought to justice. The OSI was not created until 1979, more than thirty years after the murder of six million Jews and millions of other innocent people. Since 1979, the OSI has done an excellent job making up for the lost time in bringing these criminals to justice. The work of the OSI must continue until all Nazi criminals in the United States have been brought to justice.

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93. *Ryan*, 360 F. Supp. at 270. The government of Germany never requested the extradition of Maikovskis. German law currently allows for extradition of Nazi criminals from the United States only if 1) the Nazi criminal is or was a German citizen; 2) the crimes took place on German territory; 3) the crimes were committed against German citizens; or 4) the Nazi criminal was a member of a German military or police unit. Because Maikovskis was a Latvian whose alleged crimes were committed in Latvia against Latvian citizens, and he was a member of a Latvian police unit, Germany could not request extradition under German law. However, once Maikovskis was in Germany, he could be tried under German law for his alleged crimes.

Maikovskis' deportation proceeding and appeals lasted seven years. If German law had provided for the extradition of Maikovskis and the government of Germany had sought extradition, he could have been extradited in less than one year.

# **TRANSCRIPT OF PROCEEDINGS**

**AMERICAN BAR ASSOCIATION  
STANDING COMMITTEE ON LAW NATIONAL  
SECURITY  
AND  
CENTER FOR NATIONAL SECURITY LAW,  
UNIVERSITY OF VIRGINIA SCHOOL OF LAW**

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**A NATIONAL SECURITY CONFERENCE  
STRENGTHENING THE RULE OF LAW  
IN THE WAR AGAINST DRUGS AND  
NARCO-TERRORISM**

**\* \* \***

**Day One**

**Thursday, October 11, 1990, 8:35 a.m.**

**International Center, 1800 K Street, N.W.,  
Washington, D.C.**

The views expressed are those of the individual speakers and should not be attributed to the American Bar Association, the Standing Committee, the Center for National Security Law or the Nova Law Review.

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#### I. THE RULE OF LAW AS A TARGET

MR. FRIEDMAN: Take your seats in the next minute or two, please, and we'll begin our program. This is the second panel of our program conference. It's entitled "The Rule of Law as a Target," and a couple of logistic announcements, the first of which is that I regret that our speaker Monica de Greiff was unable to make her transportation connections today, and therefore she will not be with us. So that will give us ample time to ask questions and hear answers from the



panel. We've agreed among ourselves that we're going to save as much time as we can. We've imposed an arbitrary thirty second introduction rule so that will save us a few moments.

We're also going to be guided by the constraint of lunch. That's an action-forcing event so we're going to adjourn promptly at 12:25. We will have a few moments before we assume our seats at the tables which are being set in the back. Our order of speakers today will be Gabriela Tarazona-Sevillano, who will be followed by Bruce Zagaris, and then finally Rafael Perl. And when those twelve to fifteen minute presentations are concluded, then we'll have ample time for questions and answers, and once again, please use the microphone which is stationed at the center of the room.

Our first speaker today will be Gabriela Tarazona-Sevillano. She has a very distinguished history, and let me just mention a couple of highlights. To begin with, she is a native of Peru. She holds a juris doctorate from the University of Trujillo in Peru. She has served as Visiting Professor of International Studies at Davidson College. She has been a prosecutor in the province of Zarumilla, Peru, and she has published widely in the field of terrorism and narco-trafficking.

It's our pleasure to introduce our speaker.

DR. TARAZONA-SEVILLANO: I would like to concentrate on the case of Peru, and permit me to say that the war against drugs and narco-terrorism in the producing countries such as Peru is particularly complex. To simply criminalize all acts associated with the production and trafficking of drugs has proven to be insufficient. The people who decide to participate in any of the stages of the production and trafficking of cocaine believe that the possible gains, sometimes very meager, outweigh the risk and threat of the criminal sanction.

Beyond the legal aspects, there are a number of political, social and institutional factors linked to the problem of narco-terrorism that need to be explained to understand the acute contradictions of the moment. I will present a case study on Peru to illustrate this thesis. Peru enacted the first and oldest law in South America against drug trafficking, Law for the Repression of Illicit Traffic of Drugs in 1978. This law was inspired by the South American Accord on Narcotic Drugs and the Psychotropic Substances of 1973. It was not until six years later that other South American countries followed with laws on drugs: Venezuela in 1984, Colombia in 1986, Ecuador in 1987, and Bolivia in 1988. The Peruvian law was also the first one in South America to outlaw coca cultivation. Since 1980, Peru has been the seat of the most powerful and radical terrorist organization in Latin America, Sendero

Luminoso or the Shining Path. Adhering to the theories of Marx, Lenin and Mao, the insurgency is determined to overthrow Peru's existing socio economic . . . system and restructure the state with its unique interpretation of communism. Sendero Luminoso has allied with the Peruvian drug syndicate and controls the most important coca/cocaine paste producing area of the world, the Upper Huallaga Valley. Simultaneously, the Peruvian economy is passing through perhaps the most critical moment of its recent history. With inflation skyrocketing to 2,775 percent in 1989, legal and illegal segments of the population have turned to the "parallel exchange system" to buy American dollars to preserve, to some extent, the purchasing power of its money. Undoubtedly, the impact of drug money has been important.

Allow me to make a few observations about the social, political, institutional and legal factors that are present in the Peruvian case to help understand the complexity of the situation and the traditional basis of coca culture. The coca plant has played an important role in the lives of the Andean people of Peru, who have cultivated it for centuries. In those regions, the workday includes several breaks exclusively for coca chewing, and I think a '70s survey shows that fifteen percent of the Andean population of Peru chews coca daily. In 1980, the first large scale operation was mounted to eliminate coca cultivation. But let's talk about the legal and illegal coca. Coca can be legally grown, but only for ENACO, the state coca company that commercializes it for commercial purposes. The 1978 law outlaws all other coca cultivation.

In the Upper Huallaga Valley, a rain forest valley region to the northeastern Andes, coca was first introduced as part of the subsistence agriculture brought by the Andean colonists in the mid 1960s. The valley provided ideal conditions for the growing of the coca. The expansion of this crop was due to the inability of the state to provide technical assistance for farming rain forest soil and proper marketing of goods.

As I mentioned to you, in 1980 the first large scale operation was mounted to eliminate coca cultivation. It accomplished little. Government forces were ordered to confiscate land and destroy coca crops. Farmers and landowners were to be incarcerated. These measures proved almost entirely counter-productive. The mandate of the police was logistically impossible to fulfill and had the unexpected counter-effect of causing higher prices for black market coca leaves. By 1988, coca cultivation was estimated to incorporate 211,000 hectares in the Upper Huallaga Valley alone. This growth has led the valley to become

a major center of cocaine paste production. Sendero Luminoso penetrates the area. Sendero's presence in the Upper Huallaga dates from the early 1980s.

Police sources believe that it was Osmán Morote who established the region as Sendero's northeastern front in 1983-84. By 1985, Sendero had become an armed presence in the region. The movement of strength and support has continued to increase since then, filling the political vacuum long present in the Upper Huallaga region. Predictably, Sendero's visibility led to heightened military occupation of the area. A development that Sendero Luminoso has also exploited to its own advantage. The Peruvian government unwittingly fueled the growers' resentment by implementing programs designed to reduce or eradicate coca grown in the Upper Huallaga.

Simultaneously, a narcotics police unit was introduced. Known as umopar, this police force was immediately perceived by the local populace to be a threat, and it added considerably to their hostility toward the state. These programs undertaken in conjunction with the U.S. agencies have served only to aggravate the populace and augment perceptions of official ineptitude. In the eyes of the farmers, these regulations and programs are aimed at taking away their only means of survival, coca cultivation. The group that benefitted the most from the state's anti-narcotics initiatives was Sendero Luminoso. The government's programs provided insurgencies with the fortuitous opportunity to denounce the United States as the primary culprit for the growers' problems.

Sendero also contends that it protects the growers from exploitation by traffickers. The rebels provided support for farmers seeking to organize themselves against both the police and the traffickers. Organization has also made it possible for the growers to negotiate better prices for their coca leaves.

### *The narco-terrorist alliance.*

Drug money shifts the balance of power. Each hectare of coca in the Upper Huallaga produces at least two metric tons of leaves annually. Growers sell each ton of leaves for processing into cocaine paste to middlemen for around \$600 (U.S.). The cocaesl of the valley encompass 211,000 hectares. Of these approximately 200,000 enter the illicit drug trade. Each metric ton of dry coca leaves yields twenty-one kilograms of cocaine paste. The paste is purchased by traffickers for \$890 per kilogram. These traffickers transport the past to hidden jungle labo-

ratories where it is refined into pure cocaine hydrochloride.

Approximately three kilograms of paste are required to produce one kilogram of pure cocaine. One metric ton of coca leaves is required to produce seven kilograms of cocaine. The finished product is then smuggled to the United States where it's sold to wholesalers in Miami for at least \$10,000 per kilogram. Will you please show figure three? This figure is for coca leaves and cocaine paste yield, an estimated wholesale value of \$28 billion for the Peruvian originated cocaine upon reaching the United States. According to these projections, it will yield revenues of approximately \$7.24 billion for the paste producers and local traffickers, and \$240 million for the growers who are cultivating coca.

Of course, there are a great many other expenses to be considered. Nevertheless, the gross amount of U.S. hard currency entering Peru through these illegitimate channels is equal to approximately twenty percent of the legitimate Peruvian GNP. Foreign exchange earnings from copper, Peru's largest legal export, pale in comparison comprising only 1.4 percent of the GNP. As of 1990, the Upper Huallaga ranks as the primary region of coca cultivation in the world. The massive influx of narco dollars has given the local traffickers unprecedented power and created abnormal activity in the region. Even the smallest of the towns in the coca region may boast several branch outlets of Lima's major banks. All are strategically placed to capitalize on the high volume of dollar transactions.

The estimated remaining \$20.52 billion generated by the sale of Peruvian originated cocaine remains in the hands of international traffickers. Why has this alliance proven so cohesive? Alliance benefits coca growers. Coca farmers initially associated with Sendero Luminoso for one fundamental reason: it was in their economic interest to do so. The Ministry of Interior indicates that there are 66,000 families cultivating coca in the Upper Huallaga. Assuming only two full harvests per year, a low yield, the average annual family earnings come to about \$3,636 U.S. dollars before expenses, a handsome sum compared to Peru's per capita income of \$1,470 according to the World Bank.

The insurgency has shrewdly won the farmer's confidence by easing their two primary burdens: the coca eradication programs activated by the government and exploitation from the traffickers and their intermediaries. Alliance benefits traffickers. It seems paradoxical that Sendero Luminoso will associate with the capitalist oriented traffickers. Nevertheless, a mutually beneficial alliance indeed exists. Sendero justifies its participation by explaining that narcotics contribute to the ero-

sion and demoralization of "Yankee imperialism". Sendero offers cocaine producers and traffickers three important benefits: discipline among the growers; protection from police and military interference; and the promise of further government destabilization.

Traffickers believe that because Sendero poses a far greater threat to Peru's national security than they do, Sendero provides them with a margin of freedom. They have also utilized the guerrillas to protect their many clandestine airstrips scattered throughout the region. An official from the Ministry of Interior has set the number of hidden airstrips at 168. Compounding the problem is the fact that the small aircraft traffic in the region is completely unregulated. The police do not have radar, and planes come and go at will. On the occasion when a police plane does sight a presumed trafficker's aircraft and orders it to land, the radio commands are generally answered by a derisive laughter.

### *Alliance benefits Sendero Luminoso.*

Sendero, on the other hand, also benefits greatly from its association with the traffickers. Besides its commitment to undermining the United States through drugs, Sendero's presence in the valley has facilitated recruitment of thousands of new supporters and access to previously unavailable funds. Yet, Sendero Luminoso has done more than simply take possession of the territory. It has also won the hearts and the minds of the inhabitants. The Upper Huallaga may be counted as one of Sendero's greatest successes.

In some areas, Sendero has also branched economically into other fields. In some, for example, the rebels have become involved in currency exchange. This is the hard currency that is mainly exchanged in the streets of Lima named the parallel exchange system. The actual amount that Sendero receives for its services is obviously difficult to determine, but it's generally thought to range in the tens of millions of dollars annually.

Exactly what the movement does with these vast sums is unknown. Present power of the narco-terrorist alliance—will you please put number one again—the Upper Huallaga, in effect, has become a state within a state governed by Sendero and supported economically by the cocaine syndicate. The two groups working together have given rise to narco-terrorism. The informal governing system set up by the two groups in the Upper Huallaga has actually proven quite successful lending legitimacy to the eyes of the populace to two marginal social

groups who, in reality, are delinquents. On a trip along the major highway of the region, one now finds walls blanketed with revolutionary slogans, "Coca or Death," "Viva Presidente Gonsalo [sic]," "Out with the Junkies, Viva La Revolucion."

The ubiquitous hammer and sickle is frequently carved into the pavement itself. Many stretches of the highway itself has also been claimed and are controlled by Sendero Luminoso.

### *Government response in the Huallaga Valley.*

Ironically, almost every attempt made by the government to undermine the narco-terrorist alliance has played directly into the hands of the narco-terrorists. The situation is further complicated by the state's refusal to acknowledge and address narco-terrorism as a single social, military and political entity. Instead of formulating a policy that will combat narco-terrorism as a whole, the government insists upon addressing narcotics and terrorism as separate elements.

Drug trafficking in Peru is fought by police forces. Terrorism, on the other hand, is considered a threat to the national security, and is therefore fought by the military. These two services are utterly uncooperative. As a result, the narco-terrorist alliance presently faces little tangible challenge from the Peruvian government. On May 31, 1987, 200 armed Sendero guerrillas stormed the civil guard station of Jauchisa [sic]. That's one of the towns in the Upper Huallaga. Many state officials have long feared these acts. The state was no longer the dominant power in the Upper Huallaga. As a result, an immediate state of emergency was declared in the department of San Martin. That's in the Upper Huallaga. Although it was Sendero initiative that actually led to its implementation, it was the police who were put in charge of the operation.

The government was attributing the source of the problem to the narcotics trade and not to the insurgency. For a short period of time, the police were able to establish order in the emergency region. Over the next few months the sales of coca leaves and cocaine paste slowed significantly. But the growers grew hostile towards the police, and with the help of Sendero Luminoso began to work against them. The police soon found themselves out-gunned and out-manned by the insurgency even though it was the traffickers that they had come to apprehend.

The government, alarmed by the state of total disorder in the Upper Huallaga, reacted by declaring the entire department of San Martin—it's equivalent to a state—under a state of emergency in early No-

vember, 1987. This time the operation was placed in the hands of the military, not the police. This policy change meant that the emphasis of the fighting had been shifted from narcotics to terrorism. Here, the complexities of fighting narco-terrorism are manifested as are the deleterious effects of such profound inter-service rivalries.

Despite a government implementation of a state of emergency in the region, Sendero Luminoso continued to grow in strength and the narco-terrorism phenomenon continued to spread. Sendero's strategy is rooted in the Maoist invisibility principle. Senderistas [sic] wear no uniforms, making them hard to distinguish from inhabitants of the area. They have no base camps giving the opposition no opportunity for debilitating counter-attacks, and they shy away from face-to-face fighting, preferring surprise attacks and bombings. In addition to this, the traffickers have used the corrosive influence of their wealth to further turn the armed forces against one another, a shrewd maneuver that even has led to one confrontation between umopar and army officers.

### *Military intervention.*

Military intervention in the Upper Huallaga has had the effect of alienating the populace from the state. The people of the region, already hostile toward the government eradication programs and police occupation, are even more aggravated by the ominous shadow of the military as can be seen by complaints of military abuses filed with local district attorneys. Sendero Luminoso, in contrast, is well-positioned to manipulate the people's distrust of the state. The district attorney's office in the Upper Huallaga receives countless complaints of army abuses every day. Disappearances rank among the most frequently reported. Unfortunately, the state of emergency status subordinates the legal apparatus to the military command.

District attorneys are categorically denied access to areas that the military has defined as critical, and cooperation from police forces operating in the area is virtually non-existent. Thus, while Sendero Luminoso and the narcotic traffickers work together to achieve their goals, the forces of law and order are deadlocked in a senseless and counter-productive power struggle.

In conclusion, geo-political control of the region has been almost completely arrested from the Peruvian government. As a narcotic terrorist alliance has created what amounts to a state within a state, government officials now realize that the fight against narco-terrorism has been lost, largely because there are no comprehensive programs to

counter it. Narco-terrorism must be aggressively approached with a comprehensive strategy deserving serious multilateral solution. Importantly, an intensive, well-financed crop substitution program should be initiated in the Huallaga Valley. Anything short of this integrated aggressive approach is doomed to fail.

(Applause.)

MR. FRIEDMAN: Our second speaker is Bruce Zagaris. Very briefly, Bruce has had an outstanding educational background. I dare to say that he's the only one in the room among all of these lawyers who has three—count them three—master of laws degrees, one from Georgetown University, one from Stockholm University, and the other from the Free University of Brussels in 1976. He has also served in exotic places such as the faculty of law of the University of the West Indies. He currently is associated with the law firm in Washington, D.C. of Oppenheimer, Wolff & Donnelly, where he specializes in international legal affairs.

He is widely published in the area of international business law, and among other things he serves as editor of the *International Enforcement Law Reporter*, and for those of you who have not seen it, or are not acquainted with it, it's an outstanding publication. There is some literature regarding it on one of the back tables as you leave the room. It's our pleasure to introduce Bruce Zagaris.

MR. ZAGARIS: So pernicious and pervasive have become the problems of organized crime, their involvement in drugs, and the problems of organized crime, their involvement in drugs, and the problem of narco-terrorism, that the rule of law is indeed under assault and in dire need of protection. I have recently had occasion to look at this problem as a consultant for the United Nations Crime Prevention Committee late last year where I did a study on developing new modalities to combat new forms of international organized crime. The way I will address the problem today is to first look at the way in which law is under attack, and for discussion purposes, I will look first at international law that's under attack, and then look at national law that's under attack. Then I will look at some proposed solutions to the problem and I will first look from the macro-view at developing new regimes of international criminal cooperation by marrying international organization theory with public international law and criminal law, and then I will look at some more specific solutions.

Let's now turn to the rule of law under attack. International law is under attack in the fight against narcotics trafficking and organized crime because international law has not been as flexible and as dy-



namic as either organized criminals or the narco-terrorists. International law develops mechanisms only over time. Normally, for instance, it takes two to four years to negotiate a bilateral treaty, and it takes a far longer time to conclude a multilateral convention of the type that Irving Tragen at CICAD was discussing today. The absence of effective cooperation in extradition and mutual assistance in the fight against organized crime and narco-terrorists has resulted in the circumvention of international law.

Because international law is not effective, countries and governments tend to take shortcuts. For instance, the cases of *Alvarez Machain*, *Verdugo Urquidez*, and *Manuel Antonio Noriega* are notorious examples of this. In my opinion, the *Noriega* case was especially egregious because partly in order to arrest the narcotics trafficker, the U.S. used masses of troops in wholesale violence that resulted in the deaths of innocent civilians, wiped out neighborhoods and caused thousands of people to lose their businesses.

The case of *Alvarez Machain* is also important because the United States in that case did not even try to use the extradition treaty which exists between Mexico and the United States. Instead, in the case of *Alvarez Machain*, and for those of you who are not familiar, he was the medical doctor who is alleged to have participated in the torture of Mr. Camarena. In the case of *Alvarez Machain*, he was one of three people who had been brought back from Mexico by way of kidnapping. The United States did this in the face of diplomatic protests by the Mexican government, and as a result, the judge, Judge Raffertie, in the District Court of Los Angeles ruled that because of the protests by the Mexican government that court did not have jurisdiction to try the case. As a result, the case right now is on appeal to the Ninth Circuit.

This case is very important to persons who are interested in national security and the law, and the reason is because now the Mexican government has requested the extradition of the persons responsible for the kidnapping including Mr. Beterase [sic] who is a high level official for the Drug Enforcement Agency. It is quite probable if the United States does not succeed in extraditing those individuals and does not release Dr. Alvarez Machain that there will be a wave of kidnapping in the case of the U.S. officials involved. Indeed, as many of you remember, that was one of the ways that the *Jaffe* case was resolved. That case involved a kidnapping of Canadians by people in Florida, and in the end Canada started playing the same way, and after a while the governments resolved the case and basically agreed not to resort to kidnapping in the future.

Now if the United States democratic system, including its executive and judicial branches, cannot force the United States government to follow international law, especially extradition treaties, then I believe a wave of kidnappings will follow. And although the case of Mexico is important, what should concern those people who deal with U.S. national security is the threat from other countries. For instance, the government of Iran passed a law providing for extraterritorial jurisdiction and announced that they were going to apply it first against the captain of the U.S. vessel in the Persian Gulf when the Iranian airbus carrying civilians was shot down.

I think there is a severe threat to our national security from other countries unless there is more international law brought to the process of the way that governments arrest individuals wanted for crimes.

Another area in which the rule of law and especially international law is important, and it has been addressed by several people this morning, has to do with international drug policy. Many people in various countries including our country hear the policy of their national government, but they're not aware that there is actually an international policy. Indeed, Mr. Tragen referred to the United Nations multidisciplinary program, which the Organization of American States (OAS) has also adopted and has begun to follow.

Now this program has four major themes: one is the prevention and reduction of illicit demand; the second is control of supply; third is suppression of illicit trafficking; and the fourth is treatment and rehabilitation. Under each of these four categories, there are many specific targets. Unfortunately, some countries only want to follow one or two of these major program categories. What needs to be done is for the international community and for lawyers and bar associations to ensure that each of these program targets are being followed.

Another problem in the area of international law is that the international organizations which are charged with the policy and with the implementation of the policy do not have the resources to do their job. And here national governments including the United States government must pay the dues for which they are obligated. And if they don't pay their dues, then the inability of international organizations to undertake their obligations cannot be met. You may recall Rachel Ehrenfeld mentioned the fact that although there are many international laws, they are not being followed, and this is partly a problem of resources. Some of this problem is being dealt with. As Irving Tragen said, there are both new mechanisms such as the U.N. Drug Convention of 1988 and the series of declarations and new conventions of CI-

CAD of the OAS, and within these conventions there are new enforcement mechanisms. For instance, the 1988 U.N. Drug Convention provides at the end for the U.N. Drug Commission to monitor, report, and make suggestions on the improvement of the operation of that convention. I think what you'll see happening is that eventually the commission is going to start recommending that sanctions be taken against certain governments that are not following the law.

Another innovation in that convention, which I think is very helpful, is that governments can share the funds of confiscated assets. This is also a new legal initiative which has been pioneered by the United States in the '86 Anti-Drug Abuse Act, and which I think has been effectively used because that helps provide incentives for governments to cooperate in investigation of narco-terrorism and organized crime.

National laws have also been under attack, and I won't spend much time on that partly because of the time, but also partly because I think a number of speakers today such as the speaker before me have talked about the problems that many of the developing countries are faced with.

Another problem has been the overreaction by certain countries, and the fact that in overreacting countries, governments are trying to deny wholesale the rights of defendants. And in this regard, for instance, the confiscation of drug profits and the denial of effective assistance of counsel, in my mind, undermines the integrity of our legal system. In addition, another problem has been that in enacting money laundering laws, some countries have gone so fast that the accumulation of "know your customer," suspicious transactions, and criminalizing involvement by negligence, has resulted in wholesale deterioration of relationships between professionals such as bankers, lawyers, accountants and their clients.

Policymakers must be cautious in this realm because the rights of individuals in their confidential relations are also very important. Another factor which we are seeing right now in the United States is a downturn in foreign investment in the U.S. The statistics in the first quarter of the Bureau of Economic Affairs of the Department of Commerce have shown a downturn, and this is continuing even more in this quarter, and this is, in part, a result of the severe reporting requirements of the United States with respect to money movement in comparison with other countries.

To be effective in controlling money laundering, and it is very important to take the profit out of organized crime, narcotics trafficking, and especially out of narco-terrorism, the world community should act

multilaterally because if only one or a few countries act it, the organized criminals will simply use other countries. Let me now turn to mechanisms to counter organized crime developments and specifically narco-terrorism. I only have a few more minutes before I want to turn the mike over, and my task was basically to focus on the rule of law under attack. So I've focused on that rather than too much on solutions.

One solution, which I think is very important and which really hasn't been dealt with, and I think is especially useful for a group like this dealing with national security and the law, is that international organization theory can be used much more adeptly with public international law and international criminal law. Right now the law enforcement fight against organized criminals that are engaged in international narcotics crimes and narco-terrorism has really been confined for the most part to the nation-state, using the classical definition of the state centric paradigm in which only the nation-state is a chief actor in international relations.

The world community needs to go beyond that and to foster and enhance relationships between the nation state and international governmental organizations, on the one hand, such as the United Nations and Interpol and especially intergovernmental regional organizations such as the European Community, the Council of Europe, and CICAD. The academic and governmental communities must explore and improve these relationships, so that nation states have more means to combat organized criminals. In this regard, there is a need then to develop an international criminal cooperation regime, and to also look at developing subregimes such as the subregime of regulating illicit money movement. This involves utilizing several areas of the law and also several components of law enforcement both in our country and other countries tend to be compartmentalized and which require better integration.

With respect to other mechanisms, in my formal paper I have outlined about thirty different specific mechanisms, but in closing, let me focus mainly on the need to develop more direct enforcement mechanisms for international criminal cooperation. In this regard, recently there have been developments towards creating an international criminal court which would have jurisdiction over some of these illicit narcotics crimes. Although that is a long way away from happening universally, there is a much better chance that it will be implemented either regionally, especially in the Americas, or subregionally within, for instance, the Commonwealth Caribbean.

There is also a need for an international police constabulary force, and again, it won't happen internationally. It will first happen on a regional or subregional basis. I also think, and I wrote in 1986 a paper, which I had presented first to the Inter-American Juridical Committee, suggesting that there really needs to be a Council of the Americas' Crime Problems at an attorney general level which would meet daily to focus not just on problems of illicit narcotics or problems of terrorism or problems of arms trafficking, because all these criminal problems, as several speakers have said, are integrated.

This organization already has a model. It is the Council of Europe Committee on Crime Problems which has been functioning since the '50s and which has just in the last two months prepared and adopted through its committee of experts a new convention on laundering and searching, seizure and forfeiture of assets. And this organization, I think, has much for the Americas to emulate. And by doing that, governments will find solutions to these problems on a multilateral level and only if there is a solution on a multilateral level will this problem be solved.

In conclusion, let me just say that in the post-Cold War era, where the powers of major countries are becoming increasingly diffuse, the success of U.S. diplomacy, in particular its narcotics policy, will increasingly be determined not by force, but rather by adept ability to persuade other countries to innovatively design and implement new legal mechanisms. And with that, I thank you.

(Applause.)

MR. FRIEDMAN: The third and final presentation on this panel will be made by Rafael F. Perl. He is a specialist in international narcotics policy with the Congressional Research Service, which is, as you know, an arm of the United States Congress. He received a doctor of jurisprudence from Georgetown Law School. He's an author, an editor of numerous publications relating to international narcotics control, and let me name just a few of them, to give you a sense of the richness of his interest.

He has published the *Andean Drug Strategy and the Role of the U.S. Military*. Another publication is *Congress and International Narcotics Control*. He has also published *Narcotics Interdiction and the Use of the Military: Issues for Congressional Deliberation*, and also *Combating International Drug Cartels: Issues for U.S. Policy*. He has a very wide background in the area of development and policy, and we're very anxious to hear the remarks of Dr. Perl.

DR. PERL: Thank you very much. The title of today's panel is

"The rule of Law as a Target." And in my remarks I will focus on or highlight briefly six ways in which drug trafficking organizations and groups target the rule of law and impede its implementation, and then I will briefly add some personal comments and observations of my own on related issues. Drug trafficking organizations threaten the rule of law by the very multinational nature of their criminal operations. Bruce talked of the need for a multilateral or multinational solution or regime, and a multinationalization of criminal enterprises engaged in the drug trade and the methods that such groups employ. Methods outside of the law pose a major threat to the rule of law.

Never before in history have criminal groups or insurgent groups had access to such funding, such easily available funding on such a massive scale. Irv Tragen spoke of the drug trade generating somewhere in the neighborhood of income equal to that of the arms trade. Rachel Ehrenfeld spoke about income equal to that of the oil trade, and figures we've heard range between \$100 and \$500 billion a year. These staggering amounts of money in the international marketplace can buy the best in communications equipment, can buy the best in weaponry, can buy the best in transportation equipment, as well as the best intelligence information, political power and other support.

As Irv Tragen said, power comes from drug money. And where silver does not produce the desired results, lead and terror are routine. Take Colombia for an example. Drug trafficking organizations and groups do not respect international boundaries or borders. They do not respect the law. In contrast, democratic governments and their policymakers and particularly those who implement their policies are pledged exactly to do that, to respect the rule of law. And the drug trade, by its international character, poses major policy dilemmas for national policymakers intent on respecting the rule of law. Traffickers can with impunity fly across national borders. They can transfer money across national borders.

However, those who pursue them often have to follow cumbersome procedures. They have to stop at customs. They have to check in. They have to make arrangements. The law is often its worst enemy when offenses, procedures and remedies differ from country to country. And efforts at harmonization of laws and efforts to create cooperative mechanisms to combat drug trafficking, while often effective, nevertheless require the means to implement such measures.

Remember Rachel Ehrenfeld spoke about the need for training, to train people in the field. People must be trained, and funding has to be made available for hiring the personnel as well as training them. And

we have to keep in mind that law alone is not always an effective solution. The rule of law is stronger in some countries and weaker in others. Policymakers recognize that whereas the rule of law may not always prompt a foreign nation to enforce its laws, diplomatic or other pressure may. Drug trafficking organizations also target the rule of law by developing an economic and political base in the regions in which they operate. They generate income—what was the figure—\$240 million for Peru in 1988 for Peruvian growers, and they buy political support. Just look at the power of the farm lobby in the United States.

Well, the farmers in Peru have political clout, too. The traffickers also will support and fund high visibility public works projects. And they often find powerful allies and industries which seek to avoid excessive regulation: the arms industry, the chemical industry and the banking industry, just to name a few. Drug trafficking organizations also target the rule of law by violence, intimidation and terror. And differing legal systems and political systems and economic systems have differing abilities to withstand sustained violence, intimidation and terror. Such organizations and groups target the rule of law by seeking to exploit differing perceptions of the priorities nations should assign to combatting drug production, trafficking and use.

For some countries, and perhaps rightly so, the drug issue is a relatively unimportant one when compared to overall national problems of debt, unemployment and insurgency. And many also suggest that drug trafficking organizations target the rule of law by seeking to exploit differences of opinion over what type of drug related activities should be subject to criminal sanctions. Remember Gabriela spoke about traditional coca production and use in the Andes. And also by exploiting differences of opinion as to whether or not any criminal sanctions at all are appropriate, Bill Ratliff suggested examining the option at least as to whether or not marijuana should be legalized. In many countries, including the United States, such perceptions are often deeply rooted in moral values and intense feelings of nationalism.

And finally, drug trafficking organizations may target the rule of law by destroying the power of the state to control territory within its jurisdiction—the creation of a state within a state like the Upper Hualaga Valley—in some instances by destroying the state itself.

Now, before closing, I'd like to add a number of personal observations. The United Nations Anti-Trafficking Convention which comes into force and effect next month offers a vehicle to help individual states confront the international drug trade by internationalizing the means to fight it, and basically by providing a framework for interna-

tional cooperation. But there are a number of policies, general policy issues here, that still need to be resolved, and in my opinion the central policy issue or question underlying the success of the convention is to what degree will the major drug producing and transit and consuming nations be willing to diminish contacts and approaches on the bilateral level and substitute multilateral ones instead.

Now let's look at which countries have ratified the convention to date. There are some twenty or twenty-one such countries. Ratification by countries such as Uganda, India and Togo is, of course, very important. And important producing and transit countries such as Bolivia, Ecuador, Chile and Mexico have ratified as well. But aside from the United States, no major drug consuming nation has ratified the convention to date. Much more important than some of these other countries would be ratification by consuming nations such as the United Kingdom, Germany, France, and the Soviet Union, just to mention a few. And if this list of twenty or so countries, which have ratified or exceeded the convention to date, is any indication of enthusiasm to cooperate or levels of cooperation in the future, it would seem that prospects for an enhanced international effort to tackle the drug trade may not hold much promise.

In closing, I'd like to raise and address the issue of technology. In wars, very frequently, technology provides the leading and the winning edge. And one of the panels that we'll have tomorrow will be looking at what types of regimes and what types of solutions can we be looking towards in the future. I think it's very important to keep technology in mind as we examine these issues. As one begins to do more research into the causes of drug addiction, and what makes drugs addictive, one begins to acquire more information on how to make more addictive drugs. And I'm speaking about synthetic drugs, and I'm talking about the possibility—let me just throw out two scenarios, and they're not that farfetched—a synthetic drug, which is not necessarily very harmful to the health, which is unbelievably addictive, that everybody can manufacture. Our kids can manufacture it in the garage. What will this do to the whole order of the cartels and insurgent groups that generate their income or some of their income from this type of activity?

Or the other scenario. An equally addictive drug that I absolutely have to have if someone slips it to me by design, where the formula is a closely held secret, perhaps by a Pablo Escobar or a Muammar Qadhafi or a Fidel Castro or an Abu Abbas or a Yasir Arafat. And although these ideas and concepts are a little bit down the road, I believe that we will see this developing, more and more use of synthetics



and more and more use of very powerfully addictive drugs. And with that I'd like to end my comments.

(Applause.)

MR. FRIEDMAN: Thank you for all those presentations, and we're almost on schedule. We'll have about twenty minutes for a question and answer session, and I would ask those of you who have questions of our panelists to do two things. One, address the panel by using the microphone, which is located in the center of the room, and if you feel compelled to make an observation, make sure it's limited to an observation rather than a speech, and please define your questions. Sir.

MR. BOYLAN: Mr. Chairman, thank you. I'm Robert Boylan. I'm with the Department of Justice, and I have something that's going to turn into more than a question. It is an observation directed to Bruce Zagaris who has suggested that part of the attack on the international legal system might be coming from potential law enforcement community, and he referred specifically to the ruling out in California in the *Machain* case. I wanted to, first of all, observe that the extradition treaty with Mexico that was at issue here has, to my knowledge, not resulted ever in the surrender of a Mexican citizen to the United States for the purpose of prosecution here. At least, it has not in recent years.

I would also observe that the conduct that is complained of in that case, namely the alleged kidnapping, appears to be entirely consistent with United States law, as announced by the Supreme Court in the *Ker-Frisbee* line of cases, and if you take it by analogy, to the cases that authorize the Bank of Nova Scotia's subpoenas, and also to the cases that authorized discovery pursuant to our Federal Rules of Civil Procedure, as opposed to limiting discovery in international cases to being taken in accordance with the Hague Evidence Convention.

So that is, as I said, a comment, but it's a comment which is intended to focus on the commitment of the Department of Justice to acting in the international spirit in accordance with the rule of international law as we understand it. His solution for this alleged attack on the international legal system is the development of new and different kinds of mechanisms that would involve a multilateral approach, and I would caution that the International Law Commission has been studying for almost forty years the international criminal court that Mr. Zagaris referred to, and while we're talking, the criminals out there are doing stuff. We need to keep in mind that action needs to be taken, action consistent with law and consistent with the rule of international law, but we can't allow ourselves to be confused by the suggestion that multilateralism provides a solution to these very real problems.

MR. FRIEDMAN: Thank you for your observation. I don't know for purposes of conserving time whether a response is required, but if any of the panelists have a short response, please feel free to do so.

MR. ZAGARIS: Yes, I have a brief response. With respect to the fact that the extradition treaty has not successfully worked, that is correct. However, I think that before the United States or any other government resorts to extra-legal measures, they should at least exhaust all alternatives. In that case, there was no attempt by the United States to make a request for extradition, whereas the Mexican government in seeking the persons responsible for the kidnapping of Dr. Alvarez Machain has at least made an extradition request to which there has been not even an acknowledgement by the United States.

Although multilateral measures are important—an example is that although, as Rafael said, certain European governments have not signed the U.N. Drug Convention or have not ratified it—the European Community is a signatory and already the Council of Europe, which includes sixteen countries, has adopted a convention on money laundering and asset forfeiture to further implement the U.N. Drug Convention, another example of the potential and the immediate example of action by international organizations. I also think that despite this problem between Mexico and the United States, there have been attempts by the United States government that have been successful bilaterally with Mexico.

An example would be the February '89 bilateral narcotics agreement. Another example is the conclusion of a mutual legal assistance convention and so while I think multilateral solutions are important, it's also important to pursue bilateral ones.

MR. FRIEDMAN: Thank you. Sir, would you identify yourself and your association, if you could.

MR. EMERSON: I'm Terry Emerson, formerly counsel to Senator Barry Goldwater, and my question is addressed to Mr. Perl. Narcoterrorism is an area where the lines between what is foreign and what is domestic policy blurs. So it seems the Congress as well as the President has an important role to play in shaping answers to this problem. I wonder if you have any thoughts to share with us on how the two political branches might cooperate with each other in developing American initiatives to tackle the problem?

DR. PERL: First of all, I have to make clear these are my own personal thoughts, and I'm not talking on behalf of the organization that I work for. But just shooting from the hip, and I don't like to do that, but I will do that, I think it would be important to create some-

thing comparable to the Helsinki Commission by statute where you had members of Congress from key committees and members from the executive branch from key agencies to work together on a policy planning board to set national drug policy.

I think that would improve communication and unity of policy. I think it's important. Drugs are an extremely fragmented issue, an interdisciplinary issue. There are health aspects, national security aspects, agricultural aspects, all sorts of aspects, trade aspects, to the drug problem. And it gets fragmented. Policy gets fragmented in the Congress, and policy gets fragmented in the executive branch. Congress created in the executive branch an Office of National Drug Control Policy, not a real czar, but kind of a mini-czar, or some people say a "czar-deen."

(Laughter.)

DR. PERL: But if Congress, and I don't think this is realistic, but if Congress were to create a similar joint committee on drug policy, something comparable to the Joint Economic Atomic Energy Commission in the '50s, this would produce more centralization to policy. But I do not see this happening, so I think more coordination and communication, and I think some sort of a committee, where you have got key people in power positions on the Hill, drug power policy positions on the Hill, together with key people in drug power policy positions in the executive branch.

MR. FRIEDMAN: Sir, next question.

MR. HALL: My name is Chuck Hall. I'm with the Washington Office on Latin America, a non-profit public education and research organization. My question is for Ms. Tarazona-Sevillano, and it regards Peru. You stated that the Peruvian government has refused to combat narco-terrorism as a whole, preferring to separate issues of anti-narcotics from those of counter-insurgency. I'm not an expert on Peru, but it seems to me that there is some sense in separating these two. For example, you mentioned the alliance between Sendero Luminoso and drug traffickers. There is also some aspect, as I understand it, of conflict between these two in two areas. One is that Sendero has aggravated the drug traffickers by imposing higher payment for coca farmers.

Another is that they have also imposed taxes on trafficking, which cuts into the profits of drug traffickers. And it seems that General Arsenaga [sic], who is the most well-known of the advocates of putting counterinsurgency before anti-narcotics effort, pointed out that anti-narcotics efforts really feed into Sendero's base of support by growing

coca farms over there. So would you talk about this and what implications this aspect of conflict has for U.S. anti-narcotics policy, and particularly the legal issues involved?

DR. TARAZONA-SEVILLANO: All right. Yes, that is true. The acknowledgment by the Peruvian government of the issue has been a separate matter. And I think this is very counterproductive. For one side, we have the military that was placed in the area just for controlling terrorism. And that was the stand of General Arsiniega. He was one of the last military chiefs in the area that tried to address the issue of narcotics and terrorism as completely separate entities. And in a way he wanted to win the support of the farmers for the military, and not do a thing with narcotics trafficking. That, the narcotics trafficking, since it was the problem of law enforcement, had to be dealt with by the police. So what General Arsenaga did is tried to gain this base of support, and he was widely criticized for that.

Right after his commitment to fight this insurgency, but only the insurgency as a separate manner, you know, he had tremendous problems. The U.S. was one of the major critics of General Arsiniega, and he was even said to be involved in drug trafficking himself, because there was no tangible help from his part to the U.S. efforts in the Upper Huallaga. When I refer to the interservice rivalries between the military and the law enforcement or police, actually there are areas of the Upper Huallaga that are just in the control of the military. The police cannot enter those areas. And it's said that the military also protects the activity of the local traffickers.

Now, when the police want to enter to a particular region that is controlled by the military, there are confrontations. So no single area is placed into the hands of the two forces at the same time; you know if one has priority over the other in one given area. So that is why I said there are two separate entities—that even though they work in conjunction against the state, the state doesn't work together against them.

MR. FRIEDMAN: Next question.

MR. PRADO: I am Antonio Prado, Chief of the Legal Department of the Embassy of Mexico, Sir. I'd like to make a brief comment on what Bruce said about the probability, if the Ninth Circuit will not return Alvarez Machain to Mexico, that Mexico would resort to kidnapping of American officials, the way it happened in the *Jaffe* case when Canada attempted to do something like that. No, we will not. We believe that we should not resort to illegal acts to further the rule of law. We prefer to take whatever redress to our national sovereignty, but we will not resort to illegal acts. This doesn't mean that we will not

make our best efforts to enforce the rule of law.

If you have seen the papers lately, the Mexican Air Force has been shooting down the Colombian planes that get into Mexican airspace without asking for permission. We have been very clear toward our South American friends that we do not want private planes in Mexico that do not have a flight plan, and if they fly into Mexico regardless of what their motives might be, and then won't abide by the signals of the Air Force, they will be shot down. And two months ago, we shot down two.

Now, referring to the comment that Mexico will never surrender a Mexican national, the treaty says that our President is empowered to surrender Mexican nationals. But in the case of *Alvarez Machain*, the crime took place in Mexico. Mexico was the jurisdiction where Alvarez Machain committed his crimes. Camarena was no diplomatic officer. He had no diplomatic immunity. Why should we surrender one of our criminals to a foreign jurisdiction? But the U.S. has lately resorted to the same idea. We have requested the surrender of Michael Joseph Carter from the U.S., an American who committed a crime in Mexico as a result of drug trafficking, and the U.S. said "no, because according to our discretionary power, we do not surrender Americans, but we prosecute them here." And this is the case.

The U.S. prosecuted Carter here, and we in Mexico are very satisfied because at least now we are operating in relatively the same way. We don't get it. You don't get it. But we prosecute. You prosecute. Now we have requested of the Department of State that they give Alvarez Machain back, not to party with *senoritas*--

(Laughter.)

MR. PRADO:—because under Mexican drug trafficking laws, there is no bail for traffickers, no bail for accessories before or after the fact, no parole, and absolutely no chance of civil rehabilitation after they get out. So that's what we want Machain for. And regarding the *Ker-Frisbee* case, I'd just like to say that I'm also a member of this bar, and I know a little of my American law, too. I went to Columbia Law School. So the *Ker-Frisbee* doctrine says that whoever came to the court wrongly seized but has been indicted or arraigned will remain in the court. But *Ker* is an 1890 case. *Kerr* versus—the man was abducted, he was not a Peruvian citizen. He was an American citizen living in Peru who claimed that he had the right to remain in Peru because he had received a permanent residence from the Peruvian government.

The case, the one in which the *Frisbee* doctrine is spelled out, is a

domestic case. It has absolutely nothing to do with an international situation. In none of those instances have the governments requested that the culprit be surrendered to them. But there is no fear that we will start kidnapping Americans. We resort to the rule of law, and after all of this, I'm saying that we don't want Alvarez Machain for too much. We are not requesting *amicus curiae* because we will need leave of the court, and we support that a sovereign should not be asking any other court to say what it wants. In contra-distinction, in my country any officer of the American government is allowed to go to the Mexican courts to file *amicus curiae* with the permission of no one. I just hope this has clarified some of the issues.

(Applause.)

MR. FRIEDMAN: Your presence here is very important to us, and your observations clarifying the issues are also very important. We have a response.

DR. PERL: I just wanted to say, not necessarily speaking for myself, but many Americans feel very strongly that this whole issue could have been avoided in the first place. One of the things that countries do is avoid incidents between countries, and had the Mexican authorities arrested this man in Mexico and investigated the case a little bit stronger to begin with, it might have been avoided.

MR. FRIEDMAN: We have time for one more question. If not, we will adjourn, and let me give you the logistics, I think we are booked 101 percent for lunch, and I hope that all of you have your luncheon tickets available. You can have about four or five minutes. I think the luncheon tables are set and please take your seats. There are no reserved tables. Thank you.

(Whereupon, at 12:35 p.m., the meeting recessed, to reconvene at 1:35 p.m. for the luncheon session.)

## II. STRENGTHENING THE REGIME OF EXTRADITION

MR. LEIGH: Ladies and gentlemen, could I ask you to take your seats so that we may begin the [next] panel of the day? I realize that even if we start in the next few minutes, we will have only approximately an hour for this subject. We have an agreement among the panelists that we would like to leave as much time as possible for questions and answers and so the speakers have agreed that we would probably be best advised to keep each participant's remarks to about ten, not more than fifteen minutes, and hope that we can save enough time for a lively question and answer period.

My name is Monroe Leigh. I've been asked to chair the panel on Strengthening the Regime of Extradition. We have four speakers, and I think you'll find that each of them has something very special to bring to this subject matter. Our first speaker is Mark Richard, Deputy Assistant Attorney General in the Criminal Division. Mark is an old colleague and friend of mine. We were involved in working out the details for the first prisoner exchange agreement, the one between the United States and Mexico.

He has had nearly every position of importance in the Justice Department in connection with the Criminal Division, and it's a particular pleasure to welcome him to this program. I think you will find that he has a perspective and an experience in this field which is quite unique. I give the microphone to Mark.

[This is a report on Mr. Richard's comments:

Mark Richard is responsible for processing the over 1400 U.S. extradition requests abroad, and the 450 foreign requests pending in U.S. courts. He described various barriers to this expanding area of international interdependence. Many treaties are obsolete, and fail to embrace our most effective narcotics enforcement laws, such as RICO. The European Court may be an obstacle in the future, taking jurisdiction even after European countries have authorized extradition to the U.S. In South America, if extradition is not allowed because of a "nationality principle," fugitives may never be brought to justice, because those countries cannot effectively apprehend and prosecute. That is less of a problem with our European allies. The "political offense exception" has been a significant impediment to extradition in certain cases, related to the scope of habeas review. Finally, he expressed uncertainty about how to handle cases in which the fugitive has already received a grant of political asylum prior to the extradition request. All these factors are impediments to mounting an efficient and effective program.]

(Applause.)

MR. LEIGH: Thank you very much, Mark, for that insightful presentation indicating what the future difficulties are going to be. We are very grateful for your presentation. Our next speaker, ladies and gentlemen, is John Murphy. John is a professor of law at Villanova University Law School. He received his law degree from Cornell University. He has also served with great distinction on the faculty of the law school at the University of Kansas. I should also mention that he has held the Charles Stockton chair of International Law at the Naval War College in Newport.

Among his publications, there are many which are relevant to to-

day's discussion. He is the author of *State Support of International Terrorism: Legal, Political and Economic Dimensions*, published in 1989. Another work, *Punishing International Terrorists: The Legal Framework for Policy Initiatives*, published in 1985; *United Nations and the Control of International Violence in 1982*; *Legal Aspects of International Terrorism: Summary Report of an International Conference*, in 1980. I could give others. At the present time, Professor Murphy is chairman of the ABA Committee on International Institutions Law and the ABA's Alternate Observer at the United States Mission to the United Nations. He is also a member of the U.S.-Soviet Task Force to Prevent Terrorism, and serves on the board of editors of *Terrorism: An International Journal*. It gives me great pleasure to offer the microphone to Professor Murphy.

DR. MURPHY: Thank you very much, Monroe. Just one small correction on your very generous introduction. I'm the past chairman of the Committee on International Institutions Law of the American Bar Association. We've just had a changing of the guard.

In the brief time that is given to us this afternoon, I'd like to set the question of Strengthening the Regime of Extradition Against Drugs and Narco-Terrorism in a slightly broader context than Mr. Richard has. I'd like to set it in the context of the general question of how we ensure that those who have been accused of engaging in terrorism or narco-terrorism or trafficking of drugs are brought before a forum where the due process rights of the accused will be protected.

That, indeed, is the primary goal of extradition. It's a method for ensuring that the individual who has been accused of the crime is brought to justice. I think it's important to note also that extradition is only one of the methods of bringing an individual before a forum that may exercise criminal jurisdiction over him.

And indeed, it is not the primary method. In addition to extradition, and in part because of the barriers to extradition as a methodology, two other methods are often employed, one being deportation where the individual is simply sent back to a country which would like to exercise jurisdiction over him, and the other is kidnapping or the seizure of the individual abroad. I think it's worth just a moment to distinguish among these three different methods.

There are a couple of major distinctions. Extradition, of course, is the only method that is truly bilateral or for that matter in some instances multilateral. It is also the methodology that in most instances, although not all, provides the greatest protection for the rights of an accused necessarily involves the greatest amount of international



cooperation.

By contrast, deportation is basically a unilateral method of ensuring the return of an individual to a country that may be seeking him, and of course, by definition, the seizure of an accused abroad is unilateral, at least in the situation where there is no cooperation on the part of the country where the individual is sought. Extradition has not been utilized as much as the other methods because it does not serve as an efficient method of ensuring the individual is going to be brought to prosecution.

However, I would suggest that there is another goal to be served here besides that of efficiency, and that is ensuring the due process rights of the accused. And in most instances, as I mentioned, extradition is a method that is designed to ensure that the accused gets a fair day in court.

Now let me turn to some of the problems of extradition. These have been identified to some extent by Mr. Richard, but I'd like to add one or two and maybe put a different spin on a couple that Mr. Richard mentioned. One barrier to extradition that was not mentioned is that in the case of the United States there is a need for a bilateral extradition treaty for the United States to send back an individual to a country that is requesting his presence.

It is, at least in theory, possible, and perhaps even as a matter of law possible, that the United States could use some of these multilateral conventions in the antiterrorist area, hostage taking, attacks on diplomats, and most recently the U.N. Drug Convention as an extradition treaty. However, U.S. law has been interpreted as not permitting this. One of the problems with U.S. extradition law is that it's sadly out of date. There was an attempt to amend extradition law that would have allowed the use of these multilateral treaties as a basis for extradition. Unfortunately, the law was not amended, not because of that issue, but rather because of another problem we'll talk about in a second, the political offense exception.

Another barrier to extradition is that there are a variety of defenses, some of them quite technical, under the average extradition treaty. Some are non-spectacular defenses. They don't get much attention: the need to establish probable cause; the need for double criminality; the need for specialty, *i.e.*, that the individual be tried for the crime for which the country is requesting his presence. The nationality barrier that Mr. Richard has mentioned is another one, especially with Latin American countries.

The political offense exception, I would suggest, while a major

barrier in the terrorism area, is normally not going to be a barrier to extradition in drug trafficking cases because, absent some extraordinary circumstances, drug trafficking is a private act by private individuals. Moreover, it is worth noting that the recent U.N. Convention expressly, unlike other multilateral conventions, say in the terrorism area, rules out the political offense exception as a defense.

So as the U.N. Convention gains more and more parties, the political offense exception presumably will become less of a problem. Another barrier that is particularly relevant narco-terrorism is the situation that we see in Colombia and some other countries. That is, the use of terrorist attack tactics against the law enforcement officers, the courts and so forth, in an effort to prevent extradition. Colombia has been the most spectacular example.

Now let me, in the brief time left, turn to some possible resolutions of these problems. One resolution is to amend the United States extradition law. It would be helpful from the point of view of efficiency to amend the extradition law, especially with regard to this question of what constitutes an extradition treaty. Moreover, the law badly needs to be streamlined.

Second, with respect to the problem that a requested country may not extradite its nationals, it seems to me there are two possible resolutions. One is a change in the legal position of the potential requested country, and this has happened to some extent. Another is the approach taken in the U.S.-Netherlands extradition treaty, which provides that a national may be extradited on the understanding that the requesting country, if the individual is convicted, will send that individual back to the requested country in order to serve the prison term.

With respect to the political offense exception, there are a couple of approaches. One, of course, is to eliminate drug trafficking as a possible political offense, as was done in the U.N. Convention, which was done with respect to terrorism in a regional convention, the European Convention on Suppression of Terrorism, and more generally has been done in U.S. bilateral treaties which eliminate as a political offense any crime covered by multilateral criminal law conventions.

A second way to do it that is much more controversial is illustrated by the sharp debate over the U.S.-U.K. supplementary extradition treaty, where the political offense exception was simply eliminated, not with respect to the specific so-called terrorist crimes, but more generally as to crimes of violence. The final outcome on the debate was the insertion of a provision in that agreement which, in effect, changes the rule of non-inquiry. The rule of non-inquiry is that a court will not look

into the issue of whether a country is seeking a person for purposes of persecution based on political opinion or race or nationality or religion. This is a decision normally to be made by the executive branch.

The U.S.-U.K. Supplementary Extradition Treaty gives that function to a court. It was the price to be paid for substantial elimination of the political offense exception. Moreover, the *Ahmad* case was mentioned in connection with the political offense exception. It's worth noting that Judge Weinstein in the *Ahmad* case, while deciding that an attack on an Israeli bus with civilians was not a political offense, also decided not to apply the rule of non-inquiry and looked into two issues: was Israel seeking to get this individual because of his nationality or political opinion; and could he get a fair trial? Judge Weinstein found that the answer to those questions was no, it was not seeking him for purposes of persecution; and yes, he could get a fair trial.

There was an appeal by the accused. The Second Circuit upheld the lower court's decision, and by way of dictum questioned Judge Weinstein's waiver of the rule of non-inquiry. Judge Weinstein's decision and the appeal court opinion are well worth reading. Finally, I want briefly to address the issue of an international criminal court. I am not as negative on that prospect as Mr. Mueller is.

I'll just make a couple of quick points. First, those who are supporting the idea of an international criminal court, at least at this juncture, are talking about a very limited jurisdiction, just relating to drug trafficking, not relating to terrorism. Terrorism is a different game. Terrorism is too political and too controversial. Second, as far as the U.S. perspective is concerned, the court would in all probability be simply an alternative forum. So if a country in the Caribbean decided that it couldn't try an accused because of political or legal difficulties, and it could not extradite him to a country such as the United States, it would have available an alternative forum, namely, an international criminal court. The issue is complex. I myself have been highly skeptical of an international criminal court in the past. But I think that this idea is one that deserves more thought, and I would hope not an *a priori* rejection, until we've examined all the possibilities. Thank you very much.

(Applause.)

MR. LEIGH: Thank you very much, John. We are moving along now. We have had one governmental point of view. We've had now an academic point of view. We next turn to a practitioner point of view. Our next speaker is Joe diGenova, who has had a varied experience and only recently has begun to concentrate in the private practice field. He

is a graduate of the University of Cincinnati and of the Georgetown Law School. He's held numerous important posts with the Congress of the United States, and more recently he was for four years, a very important four years, the U.S. District Attorney for the District of Columbia. Joe is a very much sought after person by the talk shows. You can hardly name one that he has not appeared upon.

Joe, as I give you the microphone, I assure you that although we cannot guarantee you the same audience that you would get on the MacNeil-Lehrer Program, you nevertheless are very welcome.

MR. diGENOVA: Monroe, thank you very much. I'm delighted to be here today, and particularly with this distinguished panel, and I wish to begin by expressing my respect and admiration for Luz Nagle, who is here from Medellin, Colombia as a judicial officer with grave responsibilities and who represents in the finest tradition the strength of the rule of law in the area which we are seeking to address here today. It's a privilege to share a podium with someone like her.

I will be very brief because I think the question and answer period promises to be much more interesting than anything I might say. Strengthening the Regime of Extradition. I don't think there is anything more important that could be done in this area than the following, and it is something which has been repeated by many people, and it bears repeating again, and that is that extradition will only work if countries never modify their behavior with regard to extradition based on violence or the threats of violence.

There is nothing more fundamental to the regime of extradition than never, and I underscore never, giving in to the threats of any organization, be they narco-terrorists or political terrorists, either within your country against your citizens or threats against your citizens in other countries, if people are going to be extradited by your country. We have many examples of countries who have provided safe haven in the false belief that by negotiating faustian bargains with either political terrorists or narco-terrorists, they would secure for themselves some form of political, legal, criminal and terrorist immunity.

It simply does not work, and the reason it doesn't work is when you negotiate with terrorists or narco-terrorists or political terrorists, they don't have to obey any rules ever at any time. And any deal you cut with them is by definition a non-deal because it takes two parties of equal strength to negotiate a bargain, any time you negotiate a deal with a terrorist, narco, or otherwise, there is, in fact, no deal.

We know from our own experience in this country that such negotiations not only serve no useful purpose, but they tend to discredit poli-

cies which are important in encouraging the rest of the civilized world to modify their behavior and to emulate ours. Our own recent experience in the Iran-Contra affair, I think, obviously underscores vividly the danger of breaching the rule that you do not do the things that we have long said you do not do.

Another point I would like to underscore is that strengthening the law of extradition by virtue of better case law, which is beginning to come our way with regard to interpretations of the political offense exception and other rules such as going behind or looking behind the reasons and the likely outcome of proceedings in the requesting country, are extreme developments. And it is important in those instances where treaties are excluding the political offense exception to try and have that repeated as much as possible. We must continue, the United States must, and indeed has, thanks to the leadership of people like Mark Richard and others in the State Department, to renegotiate treaties, to modify treaties, to modernize treaties to include the offenses, some of the offenses which have been alluded to.

I think, however, we must be realistic and understand that many, many countries simply will not accept the expanded view of the criminal law which the United States has written into its statute books over the last few years, and indeed, in order to be successful they need not do so. It is quite fine with me if countries choose to use rudimentary crimes as the basis upon which to extradite either their nationals or somebody else's nationals to our country. Whether or not they choose to enact copycat continuing criminal enterprise statutes, or the unmanageable, unannulable, unreviewable RICO statute, is a matter which I would prefer to have left out of an already quagmired area of the law, and I don't believe that we are going to be very successful in convincing civilized countries that RICO is something that they should adopt.

Indeed, many of them look at it and wonder in amazement how we ever could have structured something that is so complex that at least four members of the Supreme Court have already said they don't understand it. We may not have RICO to worry about after the next session anyway because there appears to be enough votes to question its validity in some areas, at least. But that's not really the point. The point is that we can modernize our treaty relations with a number of countries, and this is vital, to add narcotics offenses and other types of violent crimes, and other types of crimes involving financial matters such as money laundering. I would prefer to spend much more time worrying about money laundering additions to treaties than the more complex issues of RICO and CCE.

Those, I think, certainly would prove to be extremely helpful in extradition matters. I will not say anything about the area of non-extradition seizures because that's the next panel. But I just want to allude to it in the sense that it is important that we do, in fact, proceed to strengthen the regime of extradition by all of the things which have been mentioned by the panelists today because by doing so, we obviate the necessity for countries who do abide by the rule of law to have to resort to tactics which might not be acceptable to a lot of people under very difficult circumstances, particularly when a country cannot provide civil rule within its own borders and do all the things that we expect from a neighbor in a civilized world.

That will be dealt with next, however. I do want to underscore, however, once again that I don't think there is anything more important, and I know it's repetitive, but I'm going to say it again, that there is nothing more important in this exercise than a country never modifying its behavior based on violence or threats of violence. From my own experience in the area of extradition, which includes not only narco-terrorism cases as a proponent for the United States, but financial crimes in Western Europe, terrorism crimes in Western Europe and narcotics offenses in Colombia, in my office in 1983, we brought back the first Colombian ever to be extradited under the new treaties which had been ably negotiated by the two governments.

It was not an easy task, and it took a great deal of courage on the part of the Colombians, and I applaud them again for the risk that they have taken because of the rapacious appetite of the American public for illegal drugs. And while I have repeatedly criticized the Colombian government for having taken too long to realize that its own Faustian bargain with the major traffickers had led to the problems that we were facing and they were facing, there is just no question that the major responsibility for this problem lies with the people of the United States who have created this problem as a result of their incredible demand for illegal drugs.

And may I express my apology today to the representative of the people of Colombia who is here for the conduct of our current mayor of the nation's capital who singlehandedly has done more to damage the relationships between our two countries, as a result of his conduct if not his trial, than perhaps any single person in the United States. We in America owe the people of Colombia a sincere and deep apology for the level of our self-indulgence, and an apology on a grand scale for the conduct of an elected official of this city.

Once again, we should never ever modify our conduct with regard

to extradition based on the threats or actual carrying out of violence of terrorists and we must do more to modify current law with regard to extradition and make it streamlined, modern and accessible so that we can stop the misuse of the extradition process as I believe it has been misused in many, many cases, all of which are well-known to you, so that extradition remains a viable tool to prevent countries from seeking the options that none of us like.

(Applause.)

MR. LEIGH: Thank you very much, Joe, for those very trenchant observations. Our next speaker brings a perspective which we are probably more in need of receiving than any other person could bring. She comes from Colombia. Luz Estella Nagle has come to us, however, most recently from the University of California Law School where she is a student and a candidate for an LL.M. degree. But before that, she had a very distinguished career in her native Colombia.

She is a doctor of law in political science from the Universidad Bolivariana in Medellin, Colombia. In addition, she has served on the faculty of law at that institution. She also has been a district judge in the ministry of justice of the Republic of Colombia. She presided over the investigation and expedition of civil and criminal cases. She arbitrated and mediated labor conflicts in the capacity of an amiable compositor. She also supervised law enforcement throughout the jurisdiction. She served on the bench of Colombia from 1983 to 1986. She has been a lecturer also on sports law at her University in Colombia. It gives me the greatest pleasure to welcome Ms. Nagle to our panel.

(Applause.)

DR. NAGLE: Thanks. First of all, I'm going to tell you briefly about where I lived when I became a judge. This was a small village close to Medellin, a town called Sevanata [sic], close to where the drug lords have the big farms. Even as judge, I had to buy my pencils, my pads, and sometimes I had to take the bus or ask my mother to give me her car because I didn't have enough money to get to work. But the worst part was in 1985, when we had the big crisis and the Palace of Justice, as you all know, got blown up and so many people died. We received a communique from the government that they couldn't bring any forces to any judges or protection to anyone, and by that time the guerrilla groups had said that they were going to attack Sevanata where I was working.

The strike was a national strike. There were no buses, no one went to work, yet we had to work. Otherwise, we were going to be punished. I had to go out and try to see who could take me to work. I had to

change cars three times, but I got to work. They told us to wear tennis shoes to work because if you have to run, you run. And that is no joke. I wore my tennis shoes, and that was one of the days in which the government couldn't provide the judges with any protection at all.

Once on a Sunday, in this small village, a seven year-old child came to me and his shirt was all bloody. His father had been stabbed with a knife, with a machete, by another person. I called the police, the police station was twelve kilometers away from where my office was, but the officers said they were taking their lunch. They said they had no car, and could not respond. I was shocked, and begged them—knowing time was short and this attacker could escape. They said they had no transportation, so I had to take my car and go down and pick up the police officers, so that they were able to go and chase this person before he escaped.

All this, just to tell you that in Colombia, the judiciary system is the Cinderella of the three branches. It's the Cinderella because the judiciary system hasn't had the respect that it should have. I mean all of you know that being a judge should be something that will bring respect because they are imparting justice. But no, in Colombia, the judiciary system is the one that is begging left and right. Judges don't even have enough money to take buses sometimes. How can we expect judges to sit comfortably on the bench and be able to provide justice when they receive so little respect from the other two branches?

That is very difficult. But judges do apply the law in Colombia. Of course, some of them were and are corrupt, but others aren't. Others are trying to really do their duty, and the Colombian system is one which is positivist. In Colombia, what's important is the statute. If there isn't a statute that is going to tell the judge that certain conduct has to be criminalized, that judge cannot say this person has committed a crime. So the judge has to follow the law, and some judges do try to apply the law. But during this period of time in which I was on the bench, so many changes occurred, the government was trying to find more statutes to help solve the problem, to try and resolve this criminality that was really eating alive the judiciary system in the whole Colombian society.

But that wasn't the answer. We had many rules in the criminal code and many cases were taken away from the judges, yet they created new judges, provisional ones to deal with the drugs, because they thought that the existing judges were not doing their job. But they didn't realize that sometimes it was very difficult because even the executive power, the politicians, were getting involved in criminal sen-



tencing. Politicians had their hands in the solutions that the judges were trying to implement, because some politicians, too, were and are corrupt. They had their own interests.

So, again, we have judges in the middle. They are like a sandwich. They are caught in the middle of the crisis. And the problem is not one that is going to be resolved by imposing higher punishment, or by reducing the penalty for narco-traffickers, because not even these people are secure. They know that as soon as they are seen talking to the judge, they might be killed also.

I think that the problem is that we have too many statutes, and that those statutes that we have already are not applied. If someone that's going to commit a crime knows for certain that the rule is going to be imposed on his behavior, and he's going to be punished because of that, maybe he will think twice. But if we are going to start changing the rules and changing the treaties and changing the statutes, we are going to be creating more of a crisis. And then judges and people who will have to make decisions are going to get lost.

Some comments were made this morning that drugs run Colombia. Drugs don't run Colombia. And the proof is that Colombia had elections last year. We couldn't say that the elections were bought. No, people in Colombia do believe that there is democracy, and they want to believe that they do have a democracy. They elected a new president, and they are putting all their faith and hopes in this new president. They are doing business, they are contracting, they are still going before the judges, asking the judges to give them justice.

So I think that although there are so many problems, Colombia does believe in democracy, and the problem in a sense is the infrastructure. If the United States is going to help Colombia, it should be willing to give advice in that infrastructure. As soon as the Colombian government rebuilds the judiciary branch, Colombians will be able to take the judgment of those that we're calling extraditables into their own hands.

President Gaviria talked about the extradition. I don't think that what he expressed was that Colombia wasn't willing to cooperate with the extradition. He was talking about narco-traffickers and narco-terrorists. He was talking about two different figures that within the Colombian system we call peoples, which means they are two different conducts. And if an individual behaves in a way that his conduct has every single element of one or another, the sanction for that one will be imposed on him as a punishment. And he said that one of them will be the extreme sanction, which will be extradition.

That prospect scares the extraditables. By President Gaviria saying that, he meant not that he was going to talk with the extraditables. No, a judge is going to judge their conduct and simply apply one or another sanction for that conduct. And he meant, for certain conduct, even extradition.

(Applause.)

MR. LEIGH: Thank you very much, Dr. Nagle. We have, I think, heard a most extraordinary presentation, and we have to be grateful to you for coming here to share your experience and to share the record of your extraordinary courage in your country. The floor is now open for questions. I will ask those who wish to speak to find the microphone, which unfortunately has been turned in the wrong direction. Take it a little father back down the aisle. In any case, are there questions for any member of the panel?

I think all of us are somewhat numbed by the realization of the experience that you have lived through, Dr. Nagle. My question really goes to John Murphy where he was talking about the question of using multilateral treaties for the purposes of extradition. I remember a good many years ago when I was in the Pentagon, and my job was to supervise the administration of the status of forces agreement on a worldwide basis, and annually my colleagues would have to go up to the Senate of the United States and make a presentation on how we were doing. And that brought us before a most extraordinary man, Senator Sam Ervin, himself a great lawyer. And very sympathetic to our program. But one of the issues that we discussed with him, John, from time to time was the question of the provisions of the NATO status of forces agreement, which require the sending state to cooperate with the host state in the punishment of crimes, especially where there was parallel jurisdiction. We had cases where servicemen were actually brought back to the United States, discharged from the service with honorable discharges, and nevertheless thereafter it was discovered that they had committed a crime abroad.

So the question is should we use the treaty as a basis for picking up a former soldier now a civilian United States citizen and returning him to Germany in order to stand trial for a criminal offense. During the time that I had responsibility for this program, we never had to face that question. But we discussed it from time to time with Senator Ervin. I would wonder what your reaction would be to that?

DR. MURPHY: Well, the question of using the multilateral treaties as a basis for extradition requests arises in the case of the anti-terrorist treaties and the Drug Convention, because it is specifically

provided in those conventions that, if there is no bilateral extradition treaty between the two parties concerned, they can use the multilateral convention. In that context, it seems to me that there is something to be said for at least considering these multilateral conventions as a possible basis for extradition, because there is an extradite or prosecute protection that is built into most of those. If, for example, the United States were to try to get an extradition from a country with which it does not have a bilateral extradition treaty, that country could refuse the request, but it would be obligated to submit the individual to prosecution under its own system of criminal justice. There is a requirement that submission to prosecution be done in good faith, and that would require a prosecution free of the political dimension.

It also would require—in fact, this is often written in—the imposition of severe sentences if it appeared that the accused indeed had committed the crime. The problem may be most acute going the other way. That is, where the other country uses the multilateral convention as the basis for a request to the United States that it send an accused to that country for trial. The fear has been that the accused will not get protection in terms of due process.

In that kind of situation, however, under the multilateral treaties, the United States itself would be under an obligation to bring the individual to justice if it declined to extradite. Indeed, it's an obligation under the convention that the United States enact legislation which would give extraterritorial jurisdiction over the crime in the situation where it declines to extradite. So if the United States is worried about the protection of due process rights, it would be able, indeed it would be obligated, to submit the individual to prosecution in the United States.

My problem with the United States requiring in all instances that there be a bilateral extradition treaty is that there may be instances where we want to trigger the mechanisms of the multilateral conventions and ensure that the individual is submitted to prosecution somewhere, in the United States or abroad. But under a regime that will not allow extradition from the United States in the absence of a bilateral extradition treaty, and requires a bilateral extradition agreement for the United States to make an extradition request, you may never get the extradite or prosecute mechanism into operation. And so, as I said, in the draft legislation that was before Congress at the time there was this huge battle over the wording of exceptions to the political offense exception, the law would have been changed to permit the use of these multilateral conventions as a basis for an extradition request.

MR. LEIGH: Thank you very much. I have another question I'd like to direct to Mark Richard, and that is the question about extraditions. I must confess I'm not too familiar with the recent history of the U.S. government position on amendments to the extradition treaty. We have categories that permit the extradition of U.S. nationals and categories which have been interpreted in the *Valentine* case as not permitting the extradition of nationals of the United States.

MR. RICHARD: Well, the *Valentine* case, which is fairly old, does not reflect a policy position of the U.S. government. We have consistently taken the position that as an issue of policy, we are prepared to extradite our nationals. What we have is a drafting defect, if you will, reflected and picked up by the Supreme Court in the *Valentine* case that suggested that given the underlying statute, and the almost discretionary terminology of some of our older treaties, there was insufficient treaty language to accomplish the extradition of the nationals. We have been consistently trying to, as part of the process of updating the extradition treaties, to take care of the *Valentine* situation which, as I said, is at least in my perspective essentially a drafting problem.

As a question of policy, we take the position that if we're prepared to enter into an extradition relationship with a country, it is a reflection of our confidence in the integrity of the system and the fairness of the processes employed by our treaty partner, and therefore, we would be prepared to see the U.S. nationals be subject to the extradition. We are confident that if there is any deviation from the capability of the receiving country to provide adequate due process protection, regardless of whether we're dealing with a U.S. national or otherwise, we're confident that the State Department would not issue the final warrant and allow the extradition to a country where it, the State Department, did not have confidence the individual would receive a fair trial.

If I may, Monroe, I wonder if I can just go back and elaborate or comment on some of the implications, as I see it, of utilizing a multilateral as a basis for extradition out of the United States? Aside from questions of treaty interpretation whether these multilaterals are for our purposes self-executing and could constitute an adequate treaty basis for extradition, we have a variety of very real practical concerns with that approach. One, it at least raises the specter of us entering into potential treaty relationships, extradition relationships with countries that we are not particularly ready to do so. If you look at some of the multilaterals you have some interesting countries that are signatories to those multilaterals.

I'm not sure that we want to, at this point in time, enter into bilat-

eral extradition relationships with Libya and other countries that are members of these multilaterals. Moreover, our concern with the extradite or prosecute language in a lot of these multilaterals is a very real one. By and large, to fulfill the requirement of prosecute, the country will turn around and ask us for our evidence. This is not always, as a practical matter, an easy task to provide the country with the evidence, depending on the source of the evidence, the willingness of witnesses to cooperate with the foreign government and what have you.

So the technical arrangements that are engendered by this triggering of the requirement do pose at times some real problems. That's reflected, for example, in the German decision on Hamadei to exercise their right to try him rather than extradite him. One final point that gives us concern, and that is the triggering device and its implications for subsequent efforts to extradite the individual from third countries. For example, you have a lot of countries who are signatories to these multilaterals who would like nothing better than to have the opportunity to prosecute pursuant to their obligation. Thereafter, the acquittal or lenient treatment of that offense, in effect, may very well give the offender an international bath and protect him or her from subsequent extradition from third countries who would see the individual as having already been prosecuted for the offense being sought for.

So we in the enforcement community have to be very careful whether we wish to expose ourselves to this consequence depending on which country is involved and the anticipated reaction of the country to a prosecution. We have had difficulties in this area. We have gotten burned in the past involving some very notorious offenders, and it is something that I would suggest warrants a very cautious attitude on our part.

MR. LEIGH: Thank you very much, Mark. I hope no one in the audience is being discouraged from making a comment by not having a microphone in front of him or near him.

DR. MURPHY: Could I comment on his comment?

MR. LEIGH: Yes.

DR. MURPHY: The case of Hamadei is an interesting one in the sense that this was not a situation where there wasn't a bilateral extradition treaty. We had both the anti-hijacking convention and a bilateral extradition treaty, and Germany refused to extradite Mr. Hamadei and instead submitted him to prosecution, and it had a perfect right to do so. That is, under the multilateral convention the requirement is extradite or prosecute, and so Germany fulfilled its obligations under the multilateral convention, and there is an exception to the U.S.-German

extradition treaty in a situation where the requested country determines it has jurisdiction to try the individual and exercises that jurisdiction.

It's worth noting that Mr. Hamadei was convicted and sentenced to a rather substantial sentence, despite all the hostages in Lebanon. Moreover, with respect to possible difficulties of using the multilateral conventions, my basic point is that it ought to be an option that's available. That is, the decision may be made that we shouldn't use a multilateral convention, and indeed there is a lot to be said for using bilateral extradition treaties instead. But as interpreted presently, U.S. extradition law does not provide the option.

It seems to me that having the option available might be desirable in certain circumstances. The decision whether to use it could be made on a case by case basis.

MR. diGENOVA: May I address the issue of the Hamadei case, please, because I think, Professor, while what you say has the ring of truth to it, there is a problem with what you have said, and it's very simple. The Germans had absolutely no equities whatsoever in the Hamadei case, none. That crime was not committed on German soil. No German citizens were involved. It was an American aircraft. An American sailor was murdered on the Tarmac in Beirut. American citizens were held hostage, and an American airline was involved. The only reason the Germans got Mr. Hamadei was an accident by which he was arrested upon entering their country.

The only reason the Germans did not extradite was because their citizens were taken hostage in Beirut at the time of Mr. Hamadei's arrest. Their conduct was absolutely and unequivocally modified with regard to extradition conduct because their citizens were taken hostage. You are absolutely correct that Mr. Hamadei was tried and convicted, and I know a lot about the case because I went to Germany and tried to convince the Germans to extradite Mr. Hamadei.

Indeed, there is a very wonderful story about the courage of a series of Americans who were asked to come to Germany in an unprecedented request by the Germans to appear in a line-up in an attempt to identify Mr. Hamadei, which was an outrageous request, totally illegal, not required by any extradition treaty. But the United States did it at the request of the German government because the Germans feared that if they extradited Mr. Hamadei to the United States and found out later that he was not the right person, even though that is not the law, that they might have lost two citizens in Beirut who might have been murdered if he were extradited.

We responded to that immediately and found three courageous Americans who were willing to drop what they were doing, risked their own lives by going to Germany with me and a number of other people, appeared in a line-up and absolutely identified Mr. Hamadei on six separate occasions with each one of them, unequivocally. Upon our return to the United States and landing in Dulles, we were told that notwithstanding the identification, the Germans decided not to extradite. And the reason was very simple: they modified their behavior because of threats against their citizens who had purposely been taken hostage in Beirut to prevent the extradition of Mr. Hamadei.

The Germans had no choice but to try Mr. Hamadei, and they did live up to their legal obligation under the treaty. It is true, but it is also true that they clearly and unequivocally modified their behavior, and while he has been given a lengthy sentence, it remains to be seen whether or not he serves it. There are many countries in Western Europe who have dealt for a long period of time in the undercurrents of the Middle East, and made what can only be called, and I'll repeat it again, faustian bargains, and it remains to be seen how much of his sentence Mr. Hamadei will serve.

I have great respect for the prosecution authorities in Germany who came to our country and my office and spent months working with Mr. Richard and myself and others to get all of the evidence, which was only in the United States to prosecute that case with only American witnesses and only American experts in a German court. It's very important to realize that the *Hamadei* case, while it ended with Mr. Hamadei being convicted properly in a German court, was a frustration of the extradition process because the Germans modified their behavior out of fear of the murder of their two citizens taken hostage. Their two citizens were released, I might add, and there have long been undercurrents of deals going on between the German government and factions in the Middle East with regard to the release of Mr. Hamadei.

But whether or not those undercurrents are accurate, I do not know. But it's important to understand what happened in the *Hamadei* case. And it was a fascinating display of the modification of behavior by a country on the basis of threats by terrorists.

MR. LEIGH: Thank you very much, Joe, for that intervention. We have a question from the floor and another back there later.

DR. TARAZONA-SEVILLANO: I just wanted to recall some of the remarks made by Luz. Actually they remind me of many experiences back home, and I was shocked by our speaker at lunch, who referred to the Peruvian case as a discrete case in the situation of

narco-terrorism. Actually I didn't want to embarrass him in public, but I think it essential to make the situation clear. Producing countries such as Peru have these tremendous problems with infrastructure, as Luz has mentioned. Our infrastructure is practically non-existent. Funding for the judiciary is minimum. In Peru with a massive economic crisis that can allocate the proper funds for law enforcement, the judges are paid terribly and prosecutors are also not well compensated.

Well, anyhow, we can say that this is the sickness of the country in general, but what I want to stress here is that what happens in the capital sometimes does not receive the same attention by the media. What happens, for example, in coca and cocaine growing regions that are far away something that is too far away from the capital so that people just do not care. At least it seems that neither the government nor the international community has the knowledge of what happens in this remote region.

Also, in rural Peru, in areas where the trafficking is high, such as where I've been a prosecutor, in a sparsely populated province which is at the border of Peru with Ecuador, you have to really be able to take the law in your hands to make it work. And you have this problem of not having an infrastructure to assist you, having to pay for the gasoline to go on raids, having to practically ask here and there, you know, to be able to complete some assignment. And this cannot be something that can continue forever if we want the rule of law in these producing countries to be something that will be strengthened. I think something also very important to consider is not just the military factor of it, but also that the institutions of the state should be strengthened.

And one of these institutions is the judiciary. I have a friend who was killed and blown up by dynamite with a special police force when he went on a raid for cocaine. Myself, I had to change routes everyday to go to work which was thirty kilometers away from the place that I was living. And these remote areas are practically no-man's land. You are exposed to a number of dangers so that you are fearing for your life every single minute. So what Luz has said that she had to buy some of her supplies and all of that, is something that seems to be a common denominator in other countries such as Peru, too.

Actually, you know, to enforce the law, I had the good fortune, compared to hers, of having protection. (You know I had protection.) I had a body guard with me 24 hours a day. I had police in my office and police in my home, but eventually that doesn't protect very much because the police sometimes are not very trustworthy. If you had to do something very important, you had to do it in high secrecy, tremendous



secrecy.

This secrecy had to be enforced practically by yourself. In my case, I was the only prosecutor and I was on duty 24 hours a day. And so the judiciary is there. The institutions are there. What is needed is for these institutions to be strengthened, and the only things that might ameliorate what is happening in these producing countries is for the judiciary to have enough support to really fulfill its mandate. It's true there are some members of the judiciary that have been bought by drug money, but they are not the majority. There are a number of people who are fighting this war on drugs that seem to have no—anywhere. Okay. Thank you very much.

(Applause.)

MR. LEIGH: Ladies and gentlemen, we are somewhat over time. We have time for only one more question, and I agreed to let Harry Almond give the last question. Then we must adjourn to allow the next panel to resume.

MR. ALMOND: Thank you, Monroe. This question is very brief. It's raised in connection with a slightly hypothetical set of facts in the *Hamadei* situation and addressed to John Murphy. Our treaties provide for prosecute or extradite. Suppose that in this hypothetical case the Germans go ahead and prosecute and then we bring up a claim for an entirely different crime based on the same facts. I'm trying to get away from double jeopardy. Do they then have an obligation under that particular clause to extradite?

DR. MURPHY: I assume that the hypothetical crime that you're talking about is something other than aircraft hijacking?

MR. ALMOND: That's right.

DR. MURPHY: The question would arise under the bilateral extradition agreement. And the question would be whether this really was another crime so there was no double jeopardy problem. As long as you asked a question about *Hamadei*, I want to respond to Mr. diGenova's comments, and I'll make it very brief.

First, you'll remember that when I talked about Mr. *Hamadei*, I was not giving a general comment on the *Hamadei* case, but rather pointing out that the *Hamadei* case involved both a bilateral extradition agreement and a multilateral extradition agreement. So the question of using just the multilateral agreement did not arise. I suspect that the German officials who made the decision to prosecute Mr. *Hamadei* would not agree with the evaluation that they were giving in to pressure although to be sure they can speak for themselves. Perhaps this particular case raises the issue of whether we can find a more dis-

interested forum, which brings us back to the international criminal court issue. Thank you.

MR. LEIGH: Ladies and gentlemen, I think—

MR. diGENOVA: Let me just respond because it's important to respond to it. The prosecution authorities didn't make that decision.

MR. LEIGH: The prosecutor gets the last word.

MR. diGENOVA: The political authorities in Germany made that decision. Secretary Shultz asked that Mr. Hamadei be extradited, and Helmut Kohl, for reasons which are legally justifiable in one sense, decided not to extradite in the interest of protecting his citizens who were then hostages. The problem with the hypothetical is that given the facts in Hamadei, if the United States were to come up with another crime which had separate facts, the Germans would do the same thing again. They would try to try him in Germany because presumably there would still be hostages. And, in fact, their conduct was modified, and we know that for a fact. They decided not to extradite because German nationals had been taken hostage as a result of Mr. Hamadei's arrest.

There just isn't any question about that. It's a matter of record, and while it is wonderful that the Germans spent all that time preparing that case with U.S. citizens as witnesses, U.S. physical evidence, FBI agents, American experts, the truth is they had no connection with that case whatsoever and no equities whatsoever except their citizens who were hostages. It is the quintessential example of the modification of a country's behavior because their citizens have been taken hostage and threatened by terrorists. And it has nothing to do with multilateral treaties.

MR. LEIGH: I think we have to adjourn in order to allow the next panel. So may I ask you all to thank our four panelists for their contribution.

(Applause.)

MR. LEIGH: Please come back in about five minutes for the next session.

(A short break was taken.)

### III. SEIZURE OF NARCO-TERRORISTS ABROAD

MR. diGENOVA: Please be seated so that we can—some of our panelists, this is the middle of their business day, and they need to get back to their positions of employment, unlike the rest of us who are lounging around here learning today. We'd like to get started on the 3:30 panel which is entitled "The Seizure of Narco-Terrorists Abroad,"

an issue which has become current as a result of a number of recent cases, most particularly the case currently pending in California against Rafael Carroll Kentaro [sic] and a group of defendants in matters dealing with the seizure of a Mexican doctor and his rendition to the United States. The moderator for today's panel was to be Victoria Toensing. She is in trial in Boston, Massachusetts, and I am substituting for her today under orders from my wife, Victoria Toensing, to do that.

(Laughter.)

Mr. diGENOVA: I'm going to introduce each of our panelists right now, and then we'll just run through them in the order in which they are on the panel. Our first speaker will be William P. Barr, who is the Deputy Attorney General. Mr. Barr is a lawyer of great distinction in this city. He has been the Deputy Attorney General since May of 1990. Prior to that time, he served as the Assistant Attorney General for the Office of Legal Counsel, a very, very important job where legal advice is rendered to the Attorney General, a position in which he used to render some very significant legal advice in the subject matter of our panel discussion today and about which he will speak. Mr. Barr has served throughout the government in the Central Intelligence Agency, and as a law clerk to a very respected member of our D.C. Circuit, Malcolm Wilkey.

The next speaker will be someone who is known to all of you, Judge Abraham D. Sofaer. He is currently with the law firm of Hughes, Hubbard & Reed, and is formerly the State Department of Legal Advisor and was involved in many of the issues about which we will speak on this panel and which were spoken of both earlier today and in the previous panel. He has served as United States District Judge in the Southern District of New York and has been a professor of law at Columbia University. His resume is much longer than what I have just given you but in the interest of time we will stop at that point.

The final panelist will be Professor Andreas F. Lowenfeld, the Charles L. Denison Professor of Law at New York University School of Law. The professor specializes in public and private international law, international economic transactions, aviation law as well as international litigation and arbitration. He is an author of books on international legal process, conflicts, aviation and international economic law. He has also written widely on various aspects of international trade, investment, finance and dispute settlement, and perhaps most relevant, has recently written a series of articles on U.S. law enforcement abroad

in which he takes the position that constitutional restraints on governmental action apply or should apply abroad as well as within the United States, a position which has recently been repudiated by the United States Supreme Court. We will now begin our discussion.

(Laughter.)

[This is a report on Mr. Barr's comments:

The June 1989 OLC opinion addressed the legality, but not the policy implications, of United States law enforcement agents making arrests overseas without consent of the local government in contravention of customary international law. The Court held that domestic United States law grants such authority. In so doing, it overruled a 1980 opinion and its two arguments to the contrary: 1) that the United States was powerless to take action that impinged on the sovereignty of other nations; and 2) that statutes authorizing FBI action abroad were to be construed to comport with customary international law.

The current position is that the President or Congress can, when necessary, override customary international law, because what is "customary" is not a static concept, but rather an evolving concept. By making judgments which are sometimes out of bounds, the United States plays an important role in shaping those rules. Our Constitution demands that our political branches, and primarily Congress, not let foreign ministries impose rules on the people of the United States without their consent. If customary international law constrains our government from what it considers to be an appropriate response to a situation, it must be rejected.]

JUDGE SOFAER: It's a pleasure to be here and to talk about this very uncontroversial subject—

(Laughter.)

JUDGE SOFAER: —that one can always feel confident one is going to be quoted with impartiality and accuracy. Nonetheless, since we're used to being bashed with pieces out of our own words repeatedly after five years of Washington life, I'll plunge ahead. I completely concur with Bill Barr that the 1980 opinion should have been overruled. In fact, Joe and others in the Attorney General's office before this present administration came in had reached that conclusion, and Bill came along and did the work and implemented the policies that made a lot of sense, it seemed to me, in reversing the earlier opinion, which I think was extreme in the assertions it made.

On the other hand, I do think it's very important to say two things. One, to confirm that Bill's opinion did not address the international law and international relations aspects of such seizures abroad, non-consen-

sual seizures abroad. The President and the Attorney General and the Secretary of State made it crystal clear that there were important legal and policy concerns in connection with any such seizure that had to be addressed. There are always, in any of these situations where you don't have a seizure in international waters, at least three laws, or sets of laws involved. There is the U.S. law, there is international law, and then there is the domestic law of the country in which the action is taken. However authoritative the Office of Legal Counsel may be on the U.S. law, and the Legal Adviser combined with the Attorney General may be on international law, we are not authoritative with respect to the meaning of the local law of the other state.

We cannot pretend to dictate to other states about their local authorities and what steps they can take when a foreign state acts within their borders in a manner that they have not authorized. Bill has been emphatic in passing this on internally, as I have, that when an action of this kind is taken in a foreign country, the individuals involved, acting on behalf of the United States, might be considered kidnappers if someone dies as a result of this kind of action.

So it's a very, very serious business and obviously the United States keeps that in mind all the time in connection with these matters. Now the second basic point I want to make is not anything new. I want to emphasize this because people always jump on you, you know. You're saying something new. You're out of the government. I have always said that the issue of whether U.S. law has already authoritatively overridden customary international law, is undecided. The administration has a position. There is undoubtedly going to be at some point an interpretation of that issue, and I think it is incumbent on the administration to consider the rule that statutes are construed very narrowly when it is clear that to construe them otherwise would violate established principles of international law.

That is a doctrine that the administration, any administration, is going to have to come up against when it argues that a generally worded statute combined with the direction of the Attorney General overrides customary international law. It is crystal clear that if Congress has clearly authorized an action in violation of international law, and the President has joined in that and orders some action to be taken, however, clearly it violates international law, the courts, our courts, have repeatedly said that they will not intervene; that is a political decision.

But the question is, is it clear that Congress has intended a violation of customary international law in this area? So I think those two

conceptual issues are worth touching on, and then I'd like to talk about some practical things that give me some concern. First of all, I have defended the importance of international law repeatedly, both inside the government and outside the government in connection with these matters, not only because I believe in international law. Anyone who doesn't believe in international law is just closing his eyes to reality. And in that connection I might say that every now and then I hear how there is no such thing as customary international law, and a head of state who happens to be visiting the country or is planning a visit to the country can be arrested by the local U.S. Attorney, and I'm forced to write a little memo over to the White House pointing out that some idiot in the Department of Justice is claiming that he can arrest the head of a friendly state because there is no such thing as customary international law, and that person, that idiot, and I certainly feel he is an idiot, hears from the White House about the fact that, well, we don't care if there is no such thing as customary international law, you will keep your hands off the head of state of this friendly country without our particular approval.

Now, whether there is or isn't such a thing as customary international law, I feel that message that goes from the White House to the Attorney General's office is an important reflection of reality, and if you want to call that reality customary international law, as I do, then there is such a thing as customary international law. And it might well be based not on something that happened early in our nation's foggy childhood. I didn't think that John Marshall was particularly a foggy thinker, but rather because our head of state wishes to go to other friendly states and doesn't particularly want to be arrested by some idiot in the Department of Justice over there.

So there are very real concerns that I think may be appropriate for a certain degree of security that is helpful in the day to day operation of government. But I want to go on from there and say, yes, I stand up for international law and stood up for international law in the government, but I am appalled when I read publicly over and over again arguments about why it is so terrible and so outrageous that any foreigner ever gets grabbed overseas, brought to the United States, and prosecuted for some heinous crime.

I would just like to say that I don't think it's so terrible. First of all, it's been going on a long time, and we're not the only ones who do it. Foreign countries have done it repeatedly in human history. Now I would submit to you, having read every reported case of seizures abroad and having heard about many non-reported cases that I could

get my hands on, and I have some wonderful people working for me in the Legal Adviser's Office, that almost always these seizures occur with the consent of the state involved.

Now that consent doesn't have to be official. I'm not saying it occurs with a signed, sealed and delivered body and an order and everything else. It happens. Consent comes in all kinds of forms. And I don't understand why people are so keen on ratcheting up the rules relating to consent. Why do we have to have formalized consent of a foreign government? What interest are we serving by demanding a rigid and high degree of consent? It seems to me our law enforcement authorities know what they're doing in this area. They work with other law enforcement authorities, particularly with respect to narco-issues today, where narcotics violations are international crimes that almost every nation has agreed to enforce. I don't understand what interest we're serving by ratcheting up the requirements relating to consent.

If a colorable case of consent and good faith is present, why does a court have to even examine the issue? It seems to me that if the Attorney General's office in some kind of an affidavit makes it clear that a colorable basis for consensual action existed in the cooperation of the two law enforcement agencies involved, or even with some higher level official, that ought to be the end of that as far as any law is concerned—domestic, international or even the law of that foreign state. Now, with respect to those situations where the foreign country really is offended, and, in fact, no one in authority consented, I am also puzzled there as to why the issue is made an issue for our criminal law.

Why is it in our interest, in any nation's interest or in the public interest, to convert what is a very, very sensitive and extremely important issue of international relations into an issue of criminal defense procedure? It is a massive, it seems to me, expansion of the exclusionary rule at a time when we have learned after years of practice of all the lying, of all the corruption, and of all the injustice and cost and delay that the exclusionary rule generates, why apply such a failure of a rule in this area where the remedies, my God, can hardly be said to be inadequate.

I'm looking at my friend from Canada who happens to be here in the audience, and I'm sure there are many other foreign lawyers around who represent their countries so ably here, when we took an action (I take the rap in the sense that I was the Legal Adviser here) when some American goon takes the action of grabbing a foreigner in a foreign country and bringing him here, the roof caves in if there was no consent, in fact. The roof caves in, and we're not going to get into a

war with Canada, for God's sake. The issue here is friendship. Our friendship with our neighbor is threatened. We have hundreds of legal issues with Canada.

We don't need this kind of a garbage issue to deal with on top of all those other important questions. And so we go into action, and we go looking for that guy, and the Attorney General generally gets right along with us, and we go and we try to catch that person and punish him. These individuals, in fact, were prosecuted and sent to prison, and the Canadian was released and sent back. I think the remedies are adequate, the political remedies and all that flows from them are adequate in this area.

Finally, one more point: the issue of extraordinary circumstances is something that must be touched upon. Because even in this area of consent, I would submit to you we are in a world where international law itself is changing. Ten years ago there wasn't an international law relating to drugs that we have today. The international law relating to drugs is different today than it was ten years ago. The international law relating to terrorism is different today. The international law relating to human rights is different today. And the international law relating to self-defense is different today.

And if a bunch of narco-terrorists take the position that they're going to kill my President, or that they're going to send someone here to find him or catch him in Bogota when he's on a visit and kill him, I can tell you as Legal Adviser, I would construe that as a threat to the United States. Whether it amounts to an attack under Article 51 is something that I will leave to others to finagle over. Because in the history of human relations an inherent right is not changed by adding a few words after it, and the inherent right of self-defense has always included the right of a state to protect its nationals and particularly its head of state.

And finally, the issue beyond self-defense, in the human rights area, if you're for international law, you better wake up. If you think that international law is not going to support some of these seizures some day a lot more extensively than some people may want. While some people are arguing for the rights of defendants, which I don't think is going to go anywhere in terms of restraining states from seizing people abroad, the great trend of international law is focused on the rights of decent human beings, people whose moral rights are outraged by inhuman conduct, by monsters who kill innocents, who sell drugs that ravage communities. That's the course of international law in this world, and you better start planning for it because Adolf Eichmann



was only the first of the line of cases in that course of human history.

When there was outrage over the seizure of Eichmann and the state involved went to the United Nations and raised that, and clearly it was a violation of law, what was the remedy ultimately issued and accepted by the state involved? An apology. No payment, no request for his rerendition, nothing. And history now has a precedent that no one questions the propriety of. I mean certainly someone says, oh, well, it was a violation of law, but you go out in the world and ask, is what happened to Adolf Eichmann morally improper?

Even the state involved, in its final statements in the Security Council, made it clear that they were not going to seek more than an apology. So I think we're living here in a world that's dynamic. There are some uncertainties as to what's going on, and I've touched on what I think they are. But the trend, I would submit to you, is one where the courts of this nation and of all civilized nations, and the highest officials of those nations, are going to come back to what counts. And what counts is justice in the great sense of the word.

That is going to either lead states to be more forthcoming in the rendition of these criminals or to the development of international law of external seizures that is far more robust than you can imagine today. Thank you.

Mr. diGENOVA: Thank you, Abe.

(Applause.)

DR. LOWENFELD: I'm sort of debating whether to depart totally from my prepared remarks and respond to the not very subtle accusations. I agree with Mr. Barr that he's not an international lawyer.

(Applause.)

DR. LOWENFELD: I'm not sure I agree when by implication he regards me as a member of a small fringe element. I did after all labor for a good many years on the American Law Institute's Restatement, and with minor exceptions, most of what my colleagues and I wrote was adopted by what you might call the establishment, legal institutions. And Mr. Sofaer, by implication, says you'd better wake up. He did say it, and I think in part he meant me, and I hadn't thought that I was asleep. But let me just start with a couple of propositions. One I think is self-evident. The other, I regret to say, is controversial, though when Mr. diGenova said it's old hat and eliminated, I'm not sure I'm willing to concede that.

The first proposition is that kidnapping is a bad thing. It's a crime. It's a crime of violence. It's an assault on human dignity, and there are

no nice kidnappings. I'll come back to that in a minute. My second proposition is that the Constitution, including in particular the Bill of Rights, governs all conduct of officers of the United States in line of duty. At least figuratively speaking, I think an officer of the United States, wherever he is, carries the Constitution in his pocket as Hugo Black and Sam Ervin, and I, at least today, do. I don't think you can say it's like an overcoat, and when I cross the border I take it off.

It seems that the Supreme Court doesn't agree or at least doesn't agree completely with that. In the *Verdugo* case, the court draws a distinction between the fourth amendment and the fifth amendment. It talks about beneficiaries, and it says, well, citizens are beneficiaries and aliens aren't unless they're resident aliens or have some other affiliation. I find none of that very persuasive, and I think I can give you a fairly simple example. Suppose, for example, the DEA has a program in South America, and it says for that program we reject all blacks. Don't want them. Doesn't matter because the Constitution doesn't apply. I can't believe anybody would support that.

Or suppose they say anybody who works for the DEA in Brazil has to go to Church every Sunday whether he likes it or not. Nobody would believe that. So the notion that somehow the Constitution isn't relevant to American official conduct seems to me really quite unpersuasive. As I wrote in my article in the American Law Journal, I would not have been upset in the *Verdugo Urquidez* case if the Supreme Court—remember that was the case, partly of kidnapping, although that's not what went to the Supreme Court. The part that went to the Supreme Court was that while he was already in American custody north of the Mexican border, some guys, in a joint cooperative venture, and I'll come back to that, too, went to his two houses and conducted a search, a search that apparently would not have passed muster, at least the argument was it wouldn't.

I would not have been upset if the Supreme Court had said what Justice Stevens did, which is to say, well, the fourth amendment prohibits unreasonable searches, and in this context it wasn't unreasonable. I suggested that in my article, and then I had the P.S. in galley. I added something to it at the risk of writing for journals. But the notion that somehow the Constitution becomes irrelevant, I think, is unpersuasive. I think the historical argument induced by Justice Rehnquist is really just not there. I mean he quotes a page from Madison's statement when he introduces the Bill of Rights, and you read it and it just doesn't say what the Chief Justice said it did.

The notion that people is different from persons, I can never even

restate it. It just, I think, is unpersuasive, and I think we'll see that over time they'll take that back. We have a case now, you know, which is technically statutory construction about discrimination and employment, but I think you'll see that those issues just don't come up. But my main purpose here isn't to argue about or reargue the constitutional question. Perhaps I'm too late for that. I don't know. But my point is I think the United States government ought to learn to behave better. I don't think you win the war against thugs by behaving like thugs.

My friend Judge Sofaer says, well, these days things are different. I put in my article—forgive me for repeating for those of you who read it—I put the example of the killers of Mr. Herrhausen. Herrhausen was the most important banker in Germany. He was the chairman of the board of the Deutsche Bank. He was assassinated by terrorists in one of those sophisticated operations where his car apparently broke a beam of light, and that set off a bomb. Now suppose suspects in that terrorist operation show up in the United States. There's no doubt the German government would demand their extradition, and let us suppose they come with probable cause sufficient to arrest the person.

Well, then the suspects go before the courts. We have a variety of defenses. I agree with John Murphy and others that the political offense exception ought to be narrowed. I don't agree with Judge Sprizzo, for example, the way he defines it. But it is certainly possible that a judge might have problems with the political offense exception that there are habeas corpus proceedings. You can appeal from a denial of habeas corpus.

Suppose at some point along the way, the German government gets a couple of agents and puts them on and grabs the guy who, let us say, is out on bail and they find him in Philadelphia and take him back to Germany. I can't believe that the United States wouldn't be totally outraged, would regard such an act as a violation, yes, of the domestic law, Abe, as you say, but also of international law. But now comes the next point: suppose it isn't quite that simple. Suppose the law enforcement officials of the Federal Republic have friends in, say, the FBI or the local police force, and they make a deal. And it is the local officials or the FBI or the police in Philadelphia who put the guy on a Lufthansa plane, and then he's taken back, and when the American government protests, the German government says, oh, there was consent.

I can't believe that that's the kind of behavior that we would accept. This, of course, is a hypothetical case, and it's doubly hypothetical, first, because we haven't seen it, and second because it's with Europe, whereas everything we've been talking about here tends to be

with Latin America. But I'm suggesting that the notion that these are not shared values is just wrong. Now I want to talk for a minute about the *Toscanino* [sic] case. Most of you know the *Toscanino* case in which the Second Circuit said that if allegations of kidnapping and brutality and torture in bringing a guy back from South America were correct, then the U.S. court would have no jurisdiction to try him. In the actual case, as some of you know, he was not able to prove those allegations. And I don't really know the details of that.

*Toscanino* alleged that he had been blindfolded for seventeen days, and whether he was lying or whether he just couldn't prove them, I really don't know. I don't believe anybody in any of these cases, as I've written. But what I want to talk about is the follow-up of the *Toscanino* case. There were two cases almost immediately afterwards which involved apparently the same alleged conspiracy. One was a fellow called Lujan [sic], and Lujan was lured from Argentina to Bolivia. He was there seized by Bolivians working for the United States. That is, they were some kind of law enforcement officers, but they were acting as agents of the U.S. He was put on a plane for the United States, and he said I'm like *Toscanino*, and the Second Circuit said, well, what happened to you wasn't so bad, you weren't brutalized and tortured. You were merely kidnapped.

I started out, if you remember, my proposition was there are no nice kidnappings. Then, the second fellow, *Lira*, all these three cases within a very short time, he was arrested in Chile. He said he was tortured. There were electric prongs on his bed of steel. He had all kind of horrible disgusting things that happened to him, and then after several weeks he was put on a plane with a couple of DEA agents and taken once more to New York, and he made the same argument, and the court held, well, it's true you were tortured, or at least you made credible assertions of torture, but you haven't proved that the United States officials did it. They may have just been bystanders.

Well, I think both of these cases are wrong. As I say, I think *Lujan* is wrong because it suggests that there are acceptable kidnappings, and I reject that. And *Lira* is wrong because I think we'll never know who did what. I think I've read most of the cases of the so-called joint ventures or cooperations. If some of you want to look at the citations, they're in the notes to section 413 of the Foreign Relations Restatement. And whenever you read a case like that, you wonder what really did happen.

For instance, just to take a not very political case, a case called *Marzano*, the decision says the FBI agents accompanied the local po-

lice superintendent while the latter made the arrest, put the suspect on the plane, seated between two American agents and took him away. Well, who did what? I don't know, and I'm not sure that we'll ever know. We had this problem in the United States in the period between the *Weeks* case in 1914 which essentially developed the exclusionary rule for federal officials, and *Mapp* in the 1960s which applied it to the states. There were lots and lots of cases, if you read LeFevere [sic], he spells them out in great detail where federal officials take evidence and take a person who was arrested by state officials, and the holdings are, if it was truly a joint venture, then you suppress.

And on the other hand, if the government, federal government, got the evidence on a silver platter, then it's okay. It can use it. I think those cases were all unpersuasive, and I think the cases say that the foreign guys did it, and the Americans just watched are equally unpersuasive. Whether it's in a technical sense a partnership, an agency, a joint venture or whatever, I don't know. But I do know one thing. The foreign officials acting in their own country act with much less restraint than they would if they had to bring the suspect before their own courts or their own police authorities. They know that what they do won't ever be tested in front of their own authorities or courts because the guy is going to go on a plane to America.

Well, that brings me—if I can have just a couple of more minutes—to the famous *Ker-Frisbee* doctrine. The *Ker* case, which happened in 1883 in Bolivia, of course, well before our due process revolution, well before the intervention of the international law of human rights, but also interestingly enough, it happened when there was no Peruvian government. Chile was occupying Peru. There was a rump Peruvian government somewhere in the hills. The lady from Peru who's here will know the details of this much better than I do.

But the notion, the Supreme Court suddenly said, well, a claim of violation of international law can only be made by the duly constituted government, has a kind of ironic twist about it, and even if there is a firm government, you get really the classical catch-22 situation. Some of you may remember the Argaud case. Argaud was a former colonel or maybe brigadier general in the French Army who defected and joined the OAS, not the Organization of American States. I forgot what the initials stand for. It was the group that was against de Gaulle because they thought de Gaulle was giving Algeria independence, and he was hunted for awhile, and he was found in Germany and brought in some kind of a bundle in a van, and then guess what, he showed up in Paris, and they picked him up.

And he challenged the way that he was kidnapped, and the court said, the lower court said, well, if you think there is international law violated, that would have to be a protest by the German government. Well, the German Parliament read about this, passed a resolution. The lower court said you're out of time. The pleading—it's too late for the pleading. The Supreme Court in France said, well, the lower court should not have done that. They should have accepted a late pleading in these circumstances, but after all, if the German Parliament is claiming a violation of international law, that can be settled on an intergovernmental basis. Too bad for Col. Argaud.

So I think the notion of relying on the foreign government protest tends to be not meaningful. I think it's also obsolete or at least obsolescent, and maybe here, Mr. Sofaer and I have differing views about the trend of international law. I think we are in a period of ascendant individual rights to international law. We no longer think that international law doesn't care when a country tortures its own citizens, for instance. And so I think to simply say that a suspect has no basis for asserting a violation of international law is, or at least ought to be, wrong.

And third, I think—you say be practical—I think there are lots of reasons why a state may not want to raise the issue of violation of international law or violation of the treaty. Sometimes there's actual consent. Often there is consent at some level, and you don't know at which level. I wasn't here this morning. I just came at lunchtime from New York, but I understand there was talk about the *Alvarez Machain* case. Well, the interesting thing about that case is that the American officials involved in the *Alvarez Machain* case thought they were dealing with Mexican officials. And then the high officials said, no, you weren't. Who will ever know?

I don't know that anybody, that anybody can tell when somebody says we're going to do it, but off the record, and don't tell somebody else. I'm really, I'm suspicious about all those things. I think when we have consent, joint operations should be done by the political branches of the government. I was going to say something about the shortcomings of extradition. You heard that already today. I certainly would like to see extradition strengthened, and I don't need to go over the details of that. I just think extradition has three purposes: it is to protect the interest of the requesting state, the requested state, and individuals, and I don't think you should forget that.

I'm far from being on the side of criminals. Since I wrote my articles, several people have called me up and said would you help us with our brief and so on. And I've said no. And I continue to say no. That's

not my purpose. My purpose is to have my government—it's been twenty odd years since I've been a part of it, but I'm a citizen—to have my government behave properly, and I think in the long-run, it's those values that are the best, that are really the best remedy. I was very moved by the speeches of the two brave ladies from Colombia and Peru. And I think it's no accident that they come to America because America is the country with the lasting values.

I think it's more important to preserve those values than to grab a few thugs who will be replaced by other thugs the next month. Thank you.

Mr. diGENOVA: Thank you very much, Professor. I want to open up a bit of discussion in the time remaining between our panelists, but I want to underscore something that's very important here, particularly in light of the Professor's last remarks. And that is that frequently in our hemisphere, particularly in Central America and South America, the American government receives requests not to extradite people and to use other means of an extraditable nature for political reasons of that host country. It is a very common practice for internal political reasons for those countries that wish that there not be extradition because they don't want to deal with that, and they prefer the rendition method, and they are fully consenting in that process.

And there are recent cases to that effect, which I'm not going to discuss, but they're there, and they're well-known. Bill, you wanted to respond to some comments?

DR. LOWENFELD: What are those?

MR. diGENOVA: I'm not going to talk about the cases that I know about, but the truth is that they are legion.

MR. BARR: I think there are two ways, you know there are two perspectives of looking at renditions. One is from an international law perspective, and the other is from the perspective of domestic law, basically U.S. criminal law. And I think from the perspective of international law, there is very little disagreement, and I agree with Abe's remarks about the importance of adhering to international norms. The United States has a strong interest in developing a just set of international norms that promote peace and stability in the world, and it is a very serious matter with potentially grave consequences whenever the United States chooses to ignore those aspects of customary international law.

Now, let's look at it, however, from the standpoint of domestic law. If the President directs the arrest of someone overseas without the consent of the host government, there are a number of legal challenges

that can be interposed, and that have been interposed. One challenge relates to the legality of the arrest under U.S. law or under international law. And it has been advanced that the United States cannot, officers of the United States cannot arrest people overseas. They lack the power. Therefore, you should throw out the case. It's also been advanced that while they may have the power as a matter of domestic law, they violated customary international law, and a violation of customary international law should be made an exception to *Ker-Frisbee*, and you should throw out the case on that basis.

There have been other constitutional arguments interposed that the arrest is a violation of the fourth amendment, the principal argument being that if it violates the law of the host country or if it violates international law, it is, therefore, unreasonable, and therefore a violation of the fourth amendment. I don't think that line of argument is going to get very far in the wake of *Verdugo*. And then there is the argument that the arrest overseas is a violation of the fifth amendment, and I think *Toscanino* has been greatly narrowed, and basically stands for the proposition that absent extremely cruel treatment by the arresting authority such as torture of the arrestee, that there will be no violation of the fifth amendment.

And what we basically have being played out in the criminal courts of the United States are these attempts to interpose irregularities in the arrests or the apprehension of those people, as a way of escaping trial and ultimately punishment. And what we have in—and I'm not going to comment extensively on *Machain* because it's on appeal right now, but the rendition opinion of June of '89 basically says that the United States does have the authority to violate customary international law, and therefore an arrest in violation of customary international law is lawful under U.S. law, and therefore, it does not provide a basis for the defendant to challenge the jurisdiction of the U.S. court.

I think also the rule of law that is in the United States and will continue to develop is that a violation of customary international law will not provide a basis for escaping *Ker-Frisbee*. That once he had been apprehended, even though there is a violation of customary international law, that's a matter between the states—it doesn't create individual rights in the defendant. The defendant must stand trial. If we have offended the sovereignty of another country, that's a matter between the United States and that country. And that was basically approached in the *Eichmann* case.

In *Machain*, what you have is an attempt to get around *Ker-Fris-*



bee by suggesting that the rendition violated the extradition law, the extradition treaty. And I think basically the position of the United States is that we didn't violate the extradition treaty. We operated outside the extradition treaty. We ignored the extradition treaty. We did not go under the extradition treaty. It was obtained by other means. The second basis of Judge Raffertie's opinion in *Machain* is that you violated the treaty, and the violation of a treaty provides some kind of special exception to *Ker-Frisbee*. That you can violate the Constitution, you can violate federal statutes, but you can't violate a treaty. If you violate a treaty, *Ker-Frisbee* must fold. Now we disagree with that. We don't see a special exception for treaties under the *Ker-Frisbee* doctrine. In fact, it's counter-intuitive.

One would think that violations of the Constitution, the fundamental law of the land, would be more severe, and if anything—

DR. LOWENFELD: But you said it doesn't apply.

MR. BARR: Well—a violation of someone's constitutional rights is more serious, and if anything would give rise to the *Ker-Frisbee* exception. It would be a violation of an individual's constitutional rights, which hasn't been the doctrine under *Ker-Frisbee*, not the violation of a treaty, which basically derives its authoritative nature from the Constitution itself.

One thing that's interesting is to think about our own experience as a federal republic. The United States has had a lot of experience with extradition because of our early experience with extradition was among the colonies, and then among the states. And we do have an extradition treaty in our Constitution, as part of our compact as a Constitution. I think it's Article IV, and we have the procedures whereby one state governor can request another state to extradite somebody back for punishment, trial and punishment. So that's our extradition treaty built right into the Constitution. And let's not forget, while we're dumping on *Ker-Frisbee*, we have a lot more current case law dealing with snatches within the United States, where state governors have filed protests against people being kidnapped from their states, and yet the *Ker-Frisbee* rule has been applied, and that is that even though there is a violation arguably of Article IV of the Constitution, our built in extradition treaty in the Constitution, that's not enough to defeat the jurisdiction of the court.

Just very briefly I want to say two things about points Abe raised. And one is I think Abe is right that—and I think one of the great services he performed in his capacity as Legal Adviser is focusing international law on where it should be focused, the basis of law, all law,

including international law, should be protecting the innocent from predators. And I see all too often among international publicists and international journals and so forth a tendency to treat international law as sort of the strands by which you tie down Gulliver so that the international predators and thugs can use it as a shield and go about the world willy-nilly, and not enough attention paid to how the rule of law must be made to protect the innocent against the predators. And that leads to the other point that I think Abe adverted to, which is the concept of self-defense. Many of the situations where the United States might be tempted—I would not say it would ultimately be the decision—but many of the circumstances where renditions are talked about are situations where we should think about the scope of the right to self-defense and perhaps help the law evolve in a direction where the right to self-defense is understood to permit some of the activities that we're talking about.

Massive narcotics trafficking, sometimes with the complicity of the government or the tolerance of the government, is a threat to our national security, and perhaps, you know, actions of self-defense that are focused on apprehending the wrongdoer and then providing some due process, are a better form of self-defense than more indiscriminate ways of retaliating against that kind of conduct. And the same thing can be said for terrorist activities whereby if you can bomb Qadhafi, then why can't you arrest a terrorist as an act of self-defense.

Arresting a terrorist is far more focused with less collateral damage and more due process than retaliatory measures. That's my response.

JUDGE SOFAER: I think that it's interesting to me that Andy, who I deeply respect and obviously I agree with most of what he says in his articles, that Andy takes exception to the Supreme Court repeatedly, and so do so many people in this field who want to restrain these seizures overseas. It isn't—the notion that people who are opposed to these kinds of seizures want to convey to the world, and the press, of course, joins them in trying to convey this notion—that the government is some kind of a monster that's going out there and acting illegally repeatedly and in every way. Well, the fact of the matter is that the Supreme Court has made clear that certain things are the law, and people are very unhappy with that law, and to the extent that international law is relevant, and it certainly is, the principle of consent is a principle that relates to the state of mind of two states. It isn't a matter that they should have to convince Andy Lowenfeld or judge anybody about. It is a sovereign matter, and I don't understand why Andy needs

to know all these things. Why are you so curious?

DR. LOWENFELD: You told me I should wake up, didn't you?

JUDGE SOFAER: Yeah, wake up.

(Laughter.)

JUDGE SOFAER: Wake up to what I think is a reality that is behind this kind of instinctual notion in American lawyers that the only way to deal with a problem is to give some criminal the right to complain about it in a federal court. That is not the only way to deal with the problem. If we are doing something wrong as a government, as a society, my God, there are plenty of ways of stopping us, and every one of us who serves in the government as a lawyer, who has any guts, and we all do, and certainly the people at this table do because I've seen memos from Joe and Bill, we'll complain and we'll stop things from happening that shouldn't happen.

Isn't that the first test? And if there isn't a lot of complaining, my goodness, why are we letting this guy who maybe watched somebody get cut up in pieces, vicious human being, have some rights that we don't need to give him? Why are we doing it? It's ridiculous. Now, if the state did complain, well, then let's go and deal with that problem because that's a serious problem. In fact, some officials violated the sovereignty of a state and did not have any consent, well, I think that remedies are appropriate and there are plenty of them. Look at the historical record.

Sure, in *Eichmann*, they did not get Eichmann back. I don't think they really wanted him. And I would tell you, though, that very often people are given back, very often, historically. The record is quite extraordinary that when there, in fact, is no consent, these people are frequently given back politically, not because some federal district judge decided that a murderer or someone who participated in a murder, should be given some kind of human rights treatment.'

I just want to accept the hypothetical and let's face it right in the eye. I was the one who raised with Senator Specter this hypothetical of the British coming and taking an IRA suspect because Sprizzo wouldn't extradite him, and Herrhausen's killers would be another one, but not as fair because there we don't have an international treaty, and it isn't clear that they violated an international criminal law. And I think that's a very important thing that when some person who has violated international law concerning which the state involved a duty to extradite that adds a very important international legal dimension, but let's take that hypothetical and I would stand by my position.

I would think the Attorney General would join me, and Bill would

join me in saying we would not seek the exclusion of evidence in the case of a murderer in a foreign court to enable a person to be acquitted in a criminal prosecution for the murder of the banker Herrhausen, whose wife I met at dinner once in my travels around the world, who I sat with and heard her talk about their only child, and had to remember that for the rest of my life that this man was murdered like he was, as viciously and as mindlessly. I would not seek in any way, shape or form any alleviation of his problems even if he were picked up in the United States.

I would protest to the German government, and I would insist on something being worked out that was acceptable to the United States relating to him, but I would think that if he were punished criminally for a crime of that kind of seriousness, it would be perfectly acceptable.

DR. LOWENFELD: May I get in a quick word? Just a couple of quick remarks. I'm really anxious to feel how the parliament feels here. Bill Barr keeps using the word "customary" in front of international law as if that somehow weakens international law. I don't think that's right. I think traditionally customary international law has, if anything, a higher standing than treaty law, and I think without digressing too much, we've got 200,000 troops in the Persian Gulf right now to defend that principle of international law so I think it's a mistake to just depreciate it.

Now Judge Sofaer says, well, I don't like what the Supreme Court does. Of course, it's interesting that the Supreme Court has not heard a kidnapping case as this kind of a kidnapping case since *Frisbee* was a domestic case, and it came to the Supreme Court in 1952 before Earl Warren and before that whole revolution. It's interesting also that the Judge Rafeedie, a Reagan appointee, and as far as I know a conservative Southern California judge, looked at this whole controversy—I mean the whole conspiracy in the *Camarena* case which was certainly a brutal—and said I've had enough. This is the third or the fourth guy they've snatched and stop a minute. And finally Abe's plea about these terrible killers, that, of course, is the whole argument against the exclusionary rule in any case. We can deter the police by punishing them. Mr. Miranda and Mr. Escobedo were not lovely people either.

Somewhere along the line—I'm not a criminal law specialist, and maybe it was a mistake—but somewhere along the line over the last twenty, thirty years, we developed the position that it's better—that we have no other way to make the police behave properly than to say if you misbehave, the suspect walks no matter how evil he is. And I regret to say that I would like to have if Mr. Barr were able to say I'm

going to issue an order that this kind of thing stops, that's fine. I don't make this great plea for the exclusionary rule. My plea is that the United States government ought not to behave in a way that fights crime with crime.

MR. diGENOVA: Let's open it up to some questions from the floor in the little bit of time we have remaining. Perhaps we have generated some interest with this rather lively discussion. Can we speed it up here and ask as quickly as you can?

AUDIENCE PARTICIPANT: Mr. Barr, I believe you also authored an opinion earlier last year that the Posse Comitatus Act doesn't apply outside the United States. Can you put together that opinion with the opinion that you spent so much time talking about here, and I guess the question would be if the President has the authority to order the FBI to act outside the territorial borders of the United States in violation of customary international law, can he do the same thing with the 82nd Airborne? This is self-serving, I realize.

MR. BARR: Yes. The Posse Comitatus opinion dealt with the extraterritorial effect of the post-Civil War, the Reconstruction Era restriction on use of military for law enforcement purposes. And the conclusion of the opinion was that it was meant to be restricted to the territorial United States. That it really was intended to prevent federal troops from interfering in state law enforcement activity. It was never intended to have extraterritorial effect. That opinion was consistent with the only circuit court case that has been decided on the issue as well as a number of Defense Department opinions on the issue.

So under the Posse Comitatus opinion, the military overseas can be used for law enforcement purposes, if they are directed by the President to undertake law enforcement activities. Under our view of it, the President does have the authority to authorize military personnel to engage in law enforcement activities including arrests outside the United States, and, in fact, in the operation in Panama, the President did authorize the military to apprehend people who were indicted, members of the PDF who were indicted in the United States. Now those apprehensions were not made by military personnel, but they did have the authority at the time of the operation to do that.

JUDGE SOFAER: And the government, the legitimate government of Panama, accepted that, agreed to it.

AUDIENCE PARTICIPANT: But the rest of that question was based on that second question. Sir, could the President use the United States military as he could use the FBI in violating customary international law outside the United States?

MR. BARR: Well, strictly speaking, as a matter of law as opposed to whether that's good policy or appropriate from an international law standpoint, you could use as a matter of domestic law, it would be our view that you could use the military then in the same way you use the FBI.

Mr. diGENOVA: Yes, Sir. Please.

DR. ABRAMOVSKY: My name is Professor Abraham Abramovsky from Fordham Law School and I would like to ask you, Mr. Barr, let's assume—let's forget about Germany and England, for a second. Let's assume that you had an Iraqi unofficial delegation coming over to the United States saying that we don't like Aramco people because they have divested our soil against Iraqi law of natural resources, and consequently we're taking four of them with us as guests. Would you say that international law has no part to play over here, and would you rely strictly on the *Ker-Frisbee* doctrine?

MR. BARR: Well, obviously, you haven't been listening to what I said. I think it's clear that under customary international law, that would be a problem for the United States. That would be a violation of customary international law. So, yes, it does have international implications. It's violating international law. It's a serious business.

DR. ABRAMOVSKY: What would you say to the Iraqis when they said to you, and I believe they would, we're relying on *Ker-Frisbee* doctrine?

MR. BARR: Well, see, *Ker-Frisbee* is not a doctrine of international law. It's a doctrine of whether there should be an exclusionary rule in the U.S. courts for violations of law that bring about, you know, where the body has been produced before the court because of a violation of law. It's a domestic rule of law. I don't know whether the Iraqis have a *Ker-Frisbee* or not.

MR. diGENOVA: It would not apply, for example, in Iraqi courts, which I understand don't exist anymore.

(Laughter.)

MR. diGENOVA: It would not apply in Iraqi courts, if that's your question. There's also a secondary question.

JUDGE SOFAER: *Ker-Frisbee* is universally followed.

MR. diGENOVA: There's a secondary question which is that under the conditions which attend in the world today and have for the last decade at least, various terrorist groups from all kinds of countries, Arab and otherwise, have essentially declared war on the United States, in essence, without formal declaration of war, have acted as if they were at war with the United States, and have issued religious gen-

eral warrants of arrest for American citizens all over the world and have taken them into custody, have tortured them, have killed them, have denied them their rights and privileges as citizens of the world.

The United States has acted with exceeding restraint during that period of time, and has seen allies succumb to pressures, deal with terrorists, cut side deals, think they were insulated and subsequently find themselves the victims of terrorist activities notwithstanding their secret faustian arrangements.

JUDGE SOFAER: Our record is not perfect, Joe.

MR. diGENOVA: Indeed, I alluded to that during my own remarks with the regrettable reference to the Iran-Contra affair. The United States, however, retains the right of any free nation to defend its citizens wherever they may be even if, even if it violates the sovereign law of a nation which is, in turn, violating the sovereign rights of American citizens. It is regrettable, for example, that the United States has had in some instances to resort to rendition, but the truth is there are some countries which have purposely acted in violation of all international norms of conduct, and, in fact, if people had a little guts in the 1930s we might not have had the Holocaust.

DR. ABRAMOVSKY: Well, I would agree with you to a certain extent, and you're sort of preaching to the choir a little bit because I'm of Israeli background myself. But the thing is, what I'm trying to ask is this. In this particular situation, *Kerr*, would you agree was a fluke case?

MR. BARR: No, it's been followed repeatedly in the courts.

JUDGE SOFAER: You can look at the domestic law of every foreign country.

DR. ABRAMOVSKY: I know that it was followed by the American courts.

MR. BARR: It was also followed by foreign courts.

JUDGE SOFAER: I don't know of any foreign court that doesn't follow the same rule.

DR. ABRAMOVSKY: Well, I could think of a couple who don't, but the thing is, you know, let's get away from that for a second. Would you say that the *Toscanino* exception—

JUDGE SOFAER: It comes out of the Roman system. I mean it's not just something that was made up in the 1930s.

DR. ABRAMOVSKY: I understand. I just wanted—

JUDGE SOFAER: It's an old thing, you know.

DR. ABRAMOVSKY: Let's go one step at a time. You say that the *Toscanino* exception, although well meant, has never been applied

in any case in the United States, even when medical records have been presented—

MR. BARR: Well, as I said, the *Toscanino* case, I think, has been substantially narrowed, and now requires egregious conduct, and to the extent, and basically the United States has a good record. We don't engage in that kind of conduct.

JUDGE SOFAER: You know the reason all those people keep calling Andy to help him with their cases is because they figure Andy's only motive must be to be going in the business of criminal defense law. They can't understand any other purpose in his taking the position he takes.

(Laughter.)

DR. ABRAMOVSKY: I would believe that, and believe me that I'm not a spokesman for the Guadalajara cartel or any other. But the notion that I'm getting at is I think that there's a substantial difference when you're talking about the regular rendition, which is this sub rosa agreement on the bottom between two law enforcement agencies, which is either affirmatively supported by the asylum state or acquiesced to by the asylum state, or in the case of Alvarez, we're into Mexicans, who said, hey, this one is out. Now the question is, the next question that I have, do we have a little bit of a double standard over here saying, well, when it comes to Canadians and *Jaffe*, the Canadians are little bit more cultured? They're a little bit more humane? They're a little bit more trustworthy? They're a little bit more whatever?

Are we saying that, okay, but in the case of Mexicans, right, even though they feel that their sovereignty and their territorial integrity has been violated and they're saying—and I have no reason not to believe them—that they will prosecute Machain to the full extent of the law, here we're not going to repatriate a la *Jaffe*. Is there or do you feel that there is a sort of—and I'll ask Abe Sofaer the same thing at the same time—is there a little difference over here? Is there a double standard?

MR. BARR: Well, as I said, I'm not sure there's a double standard and I don't want to get into Mexico, but let me say generally that Abe raises a good question. Why should the consent of the state or whether in fact there was consent bear upon the jurisdiction in a subsequent criminal proceeding? That's really a matter for the sovereign states to deal with, and, you know, unfortunately we live in a world where sometimes it's very difficult to ascertain whether we have consent or not. We may hear: and that's why I wonder why that should be the pivotal rule for an exclusionary doctrine.

Suppose we're told by a country, look, you can have this guy, but



as a matter of, but publicly, we have to complain because we're going to get zapped by these terrorists? Our Arab brethren out there aren't going to like it if we're playing footsie with you. So you can take them but don't ask us. We may have to protest it just to cover ourselves on that. What are we supposed to do? Or you may have a situation where, in fact, we do get consent from an element of the government, and then there is a subsequent debate in the government and there is political embarrassment, and although they, in fact, legitimate officials consented, and we thought we were operating with consent, they changed their mind. Or in some cases you could have bribery of foreign officials, because in the drug area there's a lot of money washing around.

So it's very hard to go back and reconstruct exactly what the state of mind was. I think Abe's point was that as a matter of international law, if a country ultimately determines or wants to take a public position that its sovereignty has been violated, the remedy is between the states. That's what international law is all about.

DR. ABRAMOVSKY: So you think that Mexico should—

MR. BARR: There should not be an exclusionary rule in criminal law.

DR. ABRAMOVSKY: So you think that Mexico—rather than to the Justice Department, the courts, et cetera? Is that the answer?

MR. BARR: Excuse me. I didn't hear what you said.

DR. ABRAMOVSKY: What I'm saying is did Mexico do wrong or err?

MR. BARR: I didn't say anything about Mexico. I didn't say anything about Mexico.

DR. ABRAMOVSKY: No, but I'm talking about Mexico. Insofar as Alvarez is concerned, should they have gone directly to Baker and forgotten about supervisory powers of federal courts, forgotten about the fact that there is a right, you know, for an individual, albeit he's accused of nefarious offenses? I'm sure this is not a great human being. Is there some sort of a problem of going through the judicial system concomitant—

MR. BARR: Well, the issue is whether—I'm saying there should not be an exclusionary rule for the body of a criminal to enforce international obligations between states. Customary international law does not create individual rights. It deals with the rights between states.

DR. ABRAMOVSKY: Precisely. But the individual derivative right—

JUDGE SOFAER: Could I just say—

DR. ABRAMOVSKY: Just one second—derivative right, okay,

which is then followed by his government. Here you have the government saying—I'm sorry—but here it's not just Alvarez just like it was in *Toscanino*, like it was in all the other cases, here it is the Mexican government itself saying you violated our territorial integrity and sovereignty. We are not going to bring this guy and throw a bachelor's party for him. We are going to incarcerate the man. We're going to prosecute him to the fullest length of our laws. And now they're under the magnifying glass.

MR. BARR: Well, I'm not going to talk about the Mexico situation. As I say, again, there are two ways. I think Abe's point was correct that if there are violations of international law, there are remedies. We should not adopt an exclusionary, some exception to the *Ker-Frisbee* doctrine.

JUDGE SOFAER: And incidentally, we have given back people that were seized in Mexico several times in the last hundred years, several times.

DR. ABRAMOVSKY: Okay.

JUDGE SOFAER: In fact, generally we have given them back.

DR. ABRAMOVSKY: Thank you.

MR. diGENOVA: Thank you. Thank you very much, ladies and gentlemen. We appreciate it.

(Whereupon, at 5:15 p.m., the meeting adjourned, to reconvene at 9:00 a.m., Friday, October 12, 1990.)

# American Bar Association Standing Committee on Law and National Security and Center for National Security Law, University of Virginia School of Law

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A National Security Conference  
Strengthening the Rule of Law in the War against Drugs and  
Narco-Terrorism  
Day Two  
Friday, October 12, 1990, 9:05 a.m.  
International Center, 1800 K Street, N.W., Washington, D.C.

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## I. PARAMETERS FOR THE USE OF MILITARY FORCE

MR. SPURLOCK: It's a great pleasure for me to chair this panel,  
which I think is an extraordinarily significant one. Our hemispheric  
partners perception of our commitment to the rule of law will to a sig-

nificant extent be governed by the way in which we use our military forces in the hemisphere. And what complicates that issue for us is that we're dealing in our country with a multiplicity of agencies performing a multiplicity of functions under multiple legislative mandates, and we've heard some comments in previous panels about the lack of oversight or coordination in terms of those multiple functions and agencies.

And added to the equation as far as the use of military force is concerned is the fact that we've created some extraordinary capabilities within the Department of Defense which are capable of being used in the drug war and against narco-terrorism. Most specifically I'm referring to the new special operations command, which now has its internal intelligence or organic intelligence capabilities, and which has the capability of operating covertly.

Additionally complicating application of rule of law are the new technical means which have been developed during and in response to the Soviet threat and which are now capable of being used in these efforts. But U.S. persons are so intimately involved in hemispheric commerce and normal relationships that our intelligence capabilities can come under the same kind of scrutiny encountered during the late '60s and early '70s. The credibility of our commitment to the rule of law, I think, will be significantly determined at least in the eyes of our hemispheric partners by the way in which we use these military structures. The seriousness and meaning of this issue as it relates to the overall topic of this conference is exemplified by the responsibilities and the scholarship of the members of this panel.

Terrence O'Donnell is the Department of Defense (DOD) General Counsel. He's coming up on his anniversary, which I believe is October 30, in that position. He's a graduate of the United States Air Force Academy, Georgetown Law School. He served in Vietnam where he was honored as a recipient of the Bronze Star. He was a special assistant to President Ford and from 1977 to assuming his position in the Department of Defense he was a partner in Williams & Connolly. Mr. O'Donnell.

MR. O'DONNELL: Del, thank you. I was asked to address the program now in place at the Department of Defense with respect to the counter-narcotics mission, and to briefly address the legal parameters and limitations under which we operate on a day to day basis. Last month, as many of you know, the Department marked the first anniversary of its enhanced commitment to international counter-drug effort and counter-narcotics mission. The Secretary of Defense, Secretary Cheney, on September 18 of last year described the effort as a "high

priority national security mission.”

Those words in the department are extremely significant because, for the very first time, the leadership of the Department have identified and described this counter-narcotics effort as a national security mission. As all of you know, the military has been involved in counter-narcotics efforts for quite some time. But it's fair to say that involvement did not represent a full departmental commitment with the blessing of the Secretary and the President, as a national security mission.

I think we have made significant progress within the limitations that we must live with over the period of the year in attempting to define and pursue this mission assignment. Actual Department expenditures for counter-drug activities have increased from roughly 425 million in FY '89 to 875 million in FY '90, and DOD expects its budget for '91 counter-narcotics activities will exceed a billion dollars. The actual expenditures of the department in support of those activities in '91 will probably approach two billion when all training activities and related activities are taken into account.

The increase in the DOD counter-narcotics budget has been accompanied by a drastic increase in the level of DOD support to the counter-drug effort. The Department has placed particular emphasis on assisting the Andean nations of Colombia, Bolivia and Peru, the source of virtually the entire world's supply of cocaine. While much of the support currently being provided by the armed forces is classified, I can tell you, for example, that the Southern Command has sent some 49 mobile training teams to train South American counter-narcotics policy and military forces in such areas as air intercept, operations, riverline operations, the use of radar, communications, and intelligence.

Logistic support to various joint U.S.-host country operations has also increased significantly. The Department has emphasized its human intelligence and analytical intelligence capabilities in support of the U.S. counter-narcotics activities. In addition, DOD has provided approximately \$65 million in draw down of equipment, training and related services to Colombia under the Foreign Assistance Act, including C-130, A-37, and UH-1 aircraft, assault boats, fuel trucks, sidearms, ammunition and the like. The President recently directed delivery of another \$53 million in similar support to Colombia and five other nations in the region. During the past year, the United States armed forces have steadily increased their effort in the fight to intercept drugs in transit to the U.S., as well.

The Department has applied a wide array of technical assets in this mission including Airborne Early Warning and Control System

(AWACS), aerostat radar balloons, and an expanded interagency communications network. DOD reconnaissance activity since '89 has increased to over 3,800 ship steaming days and 40,000 flying hours in 1990, increases of approximately eighty percent and 100 percent respectively. AWACS flying hours dedicated to the counter-narcotics mission have grown from 38 percent to a high at one point during last year of approximately fifty-one percent of the total AWACS flying hours available to the Department of Defense.

A particularly important need of the many law enforcement agencies has been the challenge to find a way to communicate with each other and to transmit up to the minute intelligence. DOD is now over two-thirds of the way to completing a secure interoperable communications network called ADNET allowing federal law enforcement agencies to talk with and send data to each other instantaneously. Originally, eighteen ADNET sites around the country were planned. Due to the success of the system, 75 sites are now planned and 48 are currently operational.

Eventually, the system will be available to agents in the field who will be able to communicate in secure fashion from lap-top computers operating via cellular telephone. This communications ability is an area where the military has been able to help significantly. The agencies, I think it is fair to say, simply were not wired together in the past. Translating intelligence into operations and action quickly is essential in successful counter-narcotics operations. Along the southwest border, Joint Task Force Six was established in November, 1989 in El Paso, Texas to spearhead DOD support to the law enforcement agencies in this critical area of trafficking.

This is the third DOD Joint Task Force dedicated to counter-narcotics. Working closely with Operation Alliance, a consortium of federal, state, and local border state law enforcement agencies, the military has supported numerous requests by law enforcement agencies for assistance along the southwest border. DOD missions have included long-range border patrols, tunnel detection, surveillance, cross-training of military and law enforcement personnel, and improvements of border access roads. In May of this year, with the help of the tunnel detection equipment provided by DOD, a joint Customs-military mission uncovered a football field long concrete tunnel under the Mexican-American border: a major artery for transport of drugs from south and central America to the United States.

I visited Joint Task Force Six, and saw that they operate under significant problems. For example, on the inside of the Texas-Mexico

border, approximately ninety percent of the land immediately contiguous to the border is private property. The Immigration Service and border patrol can cross and access that property. The military cannot.

The question of whether Congress will provide legislation to permit the military to carry out its mission, which Congress has directed, to train to the maximum extent possible in border areas, is a difficult one. Should the military transgress private property? It's a difficult issue. Fifty percent of the entire border between Mexico and the United States is private property. So while DOD is permitted to conduct training missions and other activities on the border, we cannot access that property without permission of the landowners. And there is reasonable basis to believe and good intelligence to support the notion that private land is being used to receive narcotics that are being run through a very porous border.

If you ask a landowner for permission, and if that landowner is engaged in illegal activities, you can be sure that either the answer will be no, or if the answer is yes, he's not going to be running any operations during the period of time that the military is training with night vision capability on his property.

In addition to the operations conducted on the border, the Atlantic Command in the Caribbean, the Forces Command on the Southern Border and the Pacific Command in the Pacific have also been actively engaged in counter-narcotics activities. Those commands have been directed by the Secretary of Defense that counter-narcotics support is a mission—not an activity—that will be pursued. It is a high priority mission. These activities are indicative of the changing role of the Department in the fight against drugs. In recent years, we have witnessed as well a gradual expansion of DOD's legal authority to assist in the fight, both at home and abroad.

In 1982, Congress began to loosen the nineteenth century strictures of the Posse Comitatus Act, which prohibits the use of the Army or the Air Force to execute the law except where expressly authorized by the Constitution or by statute. Specifically, in the area of drug enforcement, it authorized a "slight narrow departure" by permitting DOD personnel to operate equipment in support of drug law enforcement operations. It also authorized the transportation of law enforcement personnel outside the United States to enforce the drug laws, but only in conditions determined by the Secretary of Defense and the Attorney General. However, the 1982 law prohibited military equipment from being used to interdict or interrupt the passage of vessels or aircraft and specifically prohibited military personnel from participating

directly in the interdiction of such traffic, or from participating in search, seizure, arrest or similar activity unless otherwise authorized by law.

DOD was further prohibited from providing assistance if it would adversely affect the military preparedness of the United States. From this cautious beginning, the opening in the *Posse Comitatus* wall and the principles behind it has increased, and has slowly widened as competing factions in Congress have struggled over the proper role of the military in the war on drugs. In the 1989 National Defense Authorization Act, Congress continued to expand the Department's role by making it the lead agency of the federal government for the aerial and maritime detection and monitoring of the transit of illegal drugs, rather than interception, interdiction, arrest, search and seizure.

Congress also established a requirement that the Department, to the maximum extent practical, as I mentioned before, take into account the needs of civilian law enforcement officials when planning and executing military training exercises. So we are attempting wherever possible to schedule training exercises using night vision devices and the like in border areas and to conduct reconnaissance training missions in a manner that serves the needs of the civilian law enforcement authorities.

The congressional conferees, however, rejected proposals that DOD directly participate in domestic law enforcement activities and termed that proposal a radical break with the historical separation between the military and civilian functions. The conferees noted that "the American experience has been marked by a traditional and strong resistance to any military intrusion into civilian affairs." Thus, the Department of Defense was instructed to continue providing indirect support in the form of intelligence, equipment, expertise, training, and the like. As international drug cartels gained prominence, and as countries in the Andean region were further subverted by their activities, we have received some additional authority in the international arena. As you know, in 1989 the Department of Justice issued a legal opinion which concluded that neither the *Posse Comitatus* Act nor the prohibitions of section 375 of Title 10 apply outside the territorial jurisdiction of the United States.

The significance of this opinion is that the criminal proscriptions against the use of the Army and Air Force to enforce criminal laws does not necessarily apply outside the United States. There are many other implications to military action outside the United States which were addressed by Mike Matheson. I'm going to skip over these so we



have time for questions and a discussion of domestic law as it pertains to some of our international operations. But note that the Department of Defense in the last year has taken so seriously the mission assignment from the Secretary of Defense that it is beginning to organize the effort as if it were a war effort; with intelligence communications cells within the Joint Staff and within the unified commands.

But make no mistake about it, the Department labors both domestically and internationally under numerous policy and legal restraints, which in significant ways undermine the type of assistance we can perform. We also operate with respect for the sovereignty and the expressions of that sovereignty of the countries in the region and with respect for their air space. We operate under limitations that have been negotiated and placed on the nautical mile standoff under which our ships can approach the land mass and perform intelligence, tracking, boarding operations and the like. These are very significant factors. The answer is one of continued pressure, negotiation, training, and working with these countries to make the effort more effective.

I think intelligence capabilities of the military are enormous and can perhaps be the single factor that can make the difference in this war on drugs. But intelligence has to be able to be translated into operational action, and we are not, we are precluded from going out and participating in specific operations in these countries to interdict laboratories and to interfere with the cartels' activities which are carried on with impunity in these countries. But we can train and support—and that training and support is much needed in those countries if they are going to effectively deal with the internal power and growth of the counter-narcotics activities within their borders. Thank you, Del.

MR. SPURLOCK: Thank you, Terry.

## II. ROUND TABLE DISCUSSION: TOWARD NEW LEGAL INITIATIVES

DR. MOORE: Let's begin this panel. The important objective of this conference is to begin to focus more specifically on what it is that we might do by way of new initiative that could make a difference. How can we have changes, either in policy or new articulations of policy, or changes in the legal structure and suggestions for such change, that might make a difference in this struggle against narco-terrorism?

We have a particularly distinguished and experienced panel with us today. I'm going to follow the order as they are appearing here on the program, and we'll start with my colleague on the Government and

Foreign Affairs faculty at the University of Virginia, Ambassador David C. Jordan. Ambassador Jordan was the United States Ambassador to Peru in March 1984 to July 1986. So obviously he has hands-on experience in this whole subject matter.

Long before he became an ambassador, he was a colleague that many of us in Virginia working in international affairs depended on particularly. He was, for example, the chairman of the Department of Government and Foreign Affairs at the University of Virginia from September 1, 1969 to August 31, 1977. He is certainly one of the nation's top experts in Latin American affairs. He was a member of the Founding Committee of the Latin American Studies Association. He has written extensively in the area of Latin American and national security affairs and international relations. I could go on and on as to all of his extensive qualifications, but I think it would be more appropriate to hear directly from one of the nation's top Latin American experts, Ambassador David Jordan.

AMBASSADOR JORDAN: Thank you, John. The more I looked into the problem of coming up with solutions, the more frightened I became at the magnitude of that problem. I thought what I might do briefly for you is to give you a very straightforward assessment of what I think is the scope of the problem and the problem of the United States government's political culture, the organizational deficiency in our government, the lack of political will, and our society's overall responsibility.

First of all, looking at the scope of the problem, everybody talks about this over and over again in the context of the supply and the demand sides of it. We all have seen from the discussions thus far in these various panels how many different agencies in the U.S. government are involved, and how many different aspects of the problems they face. Let me give you briefly, for example, the situation in one country such as Peru.

The United States historically had both a crop eradication program and an enforcement program. It was also trying to assist the country's economy, which was increasingly collapsing. It had a democratic problem trying to stabilize the nation's democracy. It was dealing with a country that might lead a debt cartel in terms of the United States in the context of a growing problem in terms of the payments of overseas debts. The United States faced all of these kinds of problems and, in effect, had multiple objectives with respect to its drug agenda and its other substantive policies without a way of absolutely working out a coordination between them.

My instructions, for example, included breaking the Soviet connection, which had over a \$3 billion military investment which required a whole series of purposes and policies on the part of the United States government. At the same time, we were supposed to stabilize the government and have it pay its debts and destroy its largest earning crop for the government, where you obviously were recognizing less than full desire to do that on the part of the government, even though it provided lip service to it.

Now that's just to briefly give you a sense of the problem of multiple objectives and multiple agencies. I would like to talk to you briefly about what I would call the U.S. government's political culture. The first acronym that I encountered when I went into the United States government was CIA. I like to put it this way: The greatest myth was the sign that was placed on President Truman's desk which says "the buck stops here." The whole objective that I encountered in the United States government is what I would call "destruction of the buck."

If there can be any problem, you will become a problem if you pass the buck. Buck is the main thing that has to be destroyed. For example, anyone who has had some experience probably watched with great interest the latest and probably one of the more recent public examples of buck I have seen. The buck suddenly seemed to fall for Saddam Hussein on the American ambassador. Then the buck went to the Assistant Secretary of State. That pretty well got passed up almost immediately to the Secretary of State and the President, which got sabotaged by an article in *The Wall Street Journal*. Then it got shifted to Congress, which got its transcripts published with respect to its visit, and the buck finally got destroyed by passing it on to the U.S. farmers.

What we have, in effect, is that you want to be part of the action, but you don't want to be responsible for it. And that requires knowing how to handle the buck. So our first issue here is the whole question of being able to have some responsibility, to have some action, but not being able to have responsibility for any of the adverse consequences.

That's why State can make progress, but the problem gets worse. DEA can make progress, but the problem gets worse. Every agency can report progress, but it gets worse. Another example for us was in terms of our crop eradication program. What I couldn't figure out was how we ever got to the figure of 60,000 hectares to eradicate. The target was 6,000 a year, and then obviously the problem would be over in ten years.

The problem, of course, was we would eradicate. We'd get 5,000, but the next estimate we had was 120,000, and, of course, then the

problem was how do you figure this out. So it was intelligence that became the problem because they haven't told us what the proper number of hectares was. So we passed this stuff around and around and around. So my first sort of general statement for you is that the government, in terms of the straight foreign policy line of the thing, has to have some idea of what its objectives are and someone has to get the buck. Ambassadors don't want it.

Now, the next aspect of the scope of this problem is the retreat or the flight to multinational issues. They say, well, we'll give it to the U.N. Don't hold your breath. The U.N. will take what it wants to take, which is what I would call the soft target. What we found the U.N. wanted to do was to get only involved a little bit with some kind of experimental program with alternative crops, but it didn't want to be linked in any way with enforcement or anything that might make it a target for anything else. So your problem is if you're going to rely on the U.N. for initiative, I am afraid you're in for a slight disappointment.

Also, in terms of the international dimension, I think one of the more promising areas is clearly the international financial regime. But if you look at that, and you go through and you look at Kerry Amendments and you look at Vienna Conventions, and you look bilaterally, the essential motivation behind it is some sort of coercive punishment pattern. Now the problem with the coercive punishment pattern, you can always see in the ABA reports is the bankers are saying, look, just when we're getting into the system of freer transactions and all the rest, along comes the government and wants to squeeze down on us and find and impute to us all kinds of motivations for why we're committing offenses to get around it.

Some of them will tell you it looks to them like a lawyers' employment act; that they will find out and have to be trying to protect themselves for how they are transmitting funds. I suggest, and this will be the general idea here for you, that what you've probably got to do with respect to greed is fight it with greed, and try to find some kind of incentives in there for them to get a piece of the money that they're going after to make sure that they would find, kind of a push to pick it up or track it.

Within this, there's also an enormous aspect that involves American domestic responsibility. I'm convinced that the American public does not know, for example, the full implications of what the Marion Barry trial had for our standing with respect to going out there and pushing on governments to curtail economic activities and crack down

on people when they basically look at the United States' attitudes on the drug consumption situation as barely ludicrous.

So we have there, in terms of the spectrum of the problem, something that encompasses an enormously complex implementation side in the foreign field, a number of false starts probably in the multinational regime field, and a clearly inadequate domestic attitude toward the consumption and use of drugs. Now, the second area on this that I'd be talking about is in terms of taking some kind of initiative, since clearly this thing is organizationally fundamentally inadequate.

I do not mean to impugn individuals' or groups' efforts or attitudes. But the position that's been allocated for coordinating this effort does not even have Cabinet status. It has a primitive staff, and if you really look at the efforts that are going to be involved, they've got to have assets from everything from Education and Agriculture to Defense, Justice, State and the rest. So what you're really looking at here, from an organizational structure, is no clear indication that the United States is serious whatsoever in having some kind of a structure that would coordinate and provide a forum for discussing all these extraordinarily complex problems.

Thirdly on this—which is linked to my area—is the lack of political will. This is a very complicated problem. I suspect that what you really have when you determine will is budget allocation. It's sort of a standard political science measure to say that you've really allocated values in your political system when you fund them. Recently, we have had an opportunity to see what we do when we do go to war, or what we think we are about to get in the Middle East. Command and control is centralized. Assets are moved and mobilized, and in terms even of the conflict area, if you know the way the structure is, usually the ambassador would have overall command with respect to the problem of, let's say, Saudi Arabia. You put in a military operation. He doesn't run it. It's now directed in terms of the operations designed to meet that war or conflict, and it is something that is outside of the normal way you do things.

So you have some idea of what it is you do with respect to waging a war when you have political will and you go about deciding to do something about it. Now, normally what I think is the case when you have something like this—and you don't have the budget allocation—is that one month of Desert Shield is more than the entire budget for the war on drugs. You ask what's going on, and you say, well, obviously the issue is still a rhetorical one for your political leadership rather than one of fundamental commitment. So if you don't have the alloca-

tions that are made to the conflict that demonstrate the allocation of values, you do not have a full commitment. You are managing the problem, not attacking it.

Now in that regard, you get to the fourth area of where I see the responsibility lies. I suspect that most of us agree that politicians and leadership react to heat from below, and if there is not enough heat there, they're not going to do the things that they think are necessary for the policy agenda. So ultimately in this, if we are becoming serious about what this problem is all about, there is a societal responsibility, a responsibility for the elements of society to begin to address what this is all about.

Now let me just give you some ideas of how devastatingly dangerous this thing is to the United States. One of the things the Americans are still relatively unaware of, although Bennett has been putting this stuff out now increasingly, is what this is doing to American children. We are looking at better than ten percent of the American live births that are now addicted. When you start adding that up in terms of the cost to society, it is going to become absolutely astronomical.

If you look at the other aspects of it, one of the things in terms of education, and I'm just going to touch on this briefly because obviously I don't have a great deal of time for you, but if you're going to be serious about this, you've got to realize that the United States as a society has got to be supporting those values in the American population that are self-restraining. If you continue to support, and if the United States and if massive amounts of money and the popular culture continues to move towards self-indulgence, then the social structure, the social value system, and the rest, reinforce the problem that drug activity is exacerbating. And the society is failing in providing the moral structure whereby its own people are going to be able to provide the milieu to resist it.

And therefore, whether you realize it or not, you will also be undermining the pressure you're going to be generating on Congress because the more it sees its own society disintegrating, the less there will be a coherent expression of outrage and protest to what is happening in the culture at large. In addition to this, you have to stress the problem of what is occurring with respect to the security involvement. People are now aware, for example, of the Bloods and the Crips in Los Angeles. The Bloods and the Crips type problems are emerging into the smaller cities and towns of the United States and we are going to have an increasingly massive security problems inside as more and more groups move into this type of activity throughout our societal structure.

Very briefly, my sort of five categories of recommendations are as follows: one, there must be an organization to coordinate the complex interaction of the domestic and international anti-drug fronts. In other words, you have to have a system that coordinates the problems of multiplicities of objectives inside the program itself as well as with respect to the other agendas of the United States government. This structure must be able to use all the agencies, departments, and other U.S. assets in the coordinated way with direct support and accountability to the President and Congress. So I've been talking, and I'm really thinking here, in the context of a new type of National Security Council structure. The head of this, however, would not be someone like the NSC chief, who is not approved by Congress. You want to give him the same status in terms of his coordinating arrangements as you give an ambassador or you give a Cabinet head. It's a presidential appointment approved by Congress so everybody is on it. It's got to be a special organizing structure, and it's got to be the plug into and have access to every single one of these kinds of assets that impact in terms of the United States' domestic and international structures.

Two, the policy with respect to producing countries must have a coherent consensus on attacking the full range of producing problems. If the relative priorities, for example, the United States government *vis-à-vis* debt, democracy and development of drugs are not thrashed out, then each country's problems will be approached in terms of purely ad hoc settings of priorities. Most of you will see that this stuff is not done—and you don't have, in terms of the U.S. government, anybody to say, look, how do you handle the problem. I've got a government here. I know this guy is trying to stay, but he can't go after his growers right now, he's running for elections. What do you want me to do? So, it's got to be discussed. It can't be sort of hidden underneath so that the buck system works.

Three, we need as a promising area a coherent international financial regime. This has to be constructed. Most of what I've suggested of the existing net regime are based on penalties and punishments. What I think here is a necessity is to move this in terms of an incentive pattern or incentive system of some sort that will involve these guys in going after this stuff because of greed, not because of fear that you're going to haul them into court. Then they'll become increasingly, by abstraction, part of your problem because they're going to always be scared and they're not going to cooperate. It's sort of my view of the human nature of these things.

It's a sort of CIA in the State Department. These guys aren't cyn-

ics. They're scared. That's what they are. They don't want to have their throats cut, and they want to go up. You know, narcotics is a dead end. When we were in there, we tried to make it so that we were able to get one guy in INM to get an ambassadorship because most of them say if we get in there and nothing works, we're going to die.

Four, we've got a huge responsibility in our domestic sector where we've got to start networking all those groups in our society that are concerned about this. They can't keep operating alone. For example, we started worrying about kids in junior high school and watching the druggies and all of the crazy attitudes that were in there. It was creating an environment in terms of the way the teachers behaved and the students behaved in which you had to consciously fight drug value culture. Look what the UN is promoting. This whole John Lennon thing is part of the drug culture of our society. So we have got to get serious about this. In that context, we should start talking about drug testing. But when you have got all this permissiveness out there, you can't go anywhere with it because everybody says, God, my rights.

Five, we've got to recognize that our constitutional legal-political system cannot undergird the society to destroy the predominant value system in the United States of self-restraining activity. To the degree our system is increasingly encouraging a domestic social environment that is self-regarding and selfish, we are in trouble. Thank you.

(Applause.)

DR. MOORE: Our next panelist is Pat Renee Shapiro. Ms. Shapiro is a graduate of the Yale Law School where she served as the editor of the Yale Law Journal from 1982 to 1983. She has been in private practice in both the United States and Japan, and currently she is the attorney adviser in the Office of General Counsel for AID, and one particular area of responsibility of hers is narcotics-related legislation and policy issues. Pat Renee Shapiro.

[The following is a summary of Ms. Shapiro's comments:

Ms. Shapiro is with the Agency for International Development which is a foreign affairs agency of the U.S. government, involved in administering economic assistance programs overseas to developing countries. She spoke of the importance of dealing with the drug supply, since most of the illicit drugs consumed in the U.S. are coming from foreign countries, more specifically developing countries. These developing countries have very low per capita income and GNPs where economic production and sale of narcotics represents a major part of their income.

In order to deal with the narcotics problem the United States must



do two things: first, it must provide economic and financial assistance to these countries in order to free them from their dependence upon narcotic production. This may be done by reducing the restrictions that we traditionally have placed on promoting crops which would compete with the United States, and providing these countries with diversified crop alternatives as well as other economic income substitutes. Second, the United States must educate these countries as to how narcotic production adversely affects their own countries.]

DR. MOORE: Our next speaker is Kenneth Bleakley. Ken Bleakley is a senior Foreign Service officer now serving as the Senior Deputy Coordinator and Director for International Communications and Information Policy. Previously, he served as the Deputy Assistant Secretary of State for International Refugee Assistance and Deputy Director of the Secretary of State's Policy Planning Staff. He was the Deputy Chief of Mission at the U.S. Embassy in San Salvador from 1981 until 1984. Mr. Bleakley served in Washington as the Deputy Director of the State Department's Operations Center, as the Special Assistant for East Asia and Pacific Affairs, and in the Office of the Secretary of Defense. Other overseas assignments that he has had include Panama, Bolivia, Spain, and the Dominican Republic.

I will not go into a lot of the other very impressive background in his career. Let me just say that he has also served as a former President of the American Foreign Service Association, and is certainly one of the most highly thought of members of the Foreign Service of the United States. It is a great pleasure to introduce Mr. Kenneth Bleakley.

MR. BLEAKLEY: "A pound of gold, Señor, or an ounce of lead." That's the choice that many of the participants in criminal justice systems around the world face when they're dealing with narco-terrorism. It's not surprising that to a greater or lesser degree many systems fail when they're presented with that sort of a challenge, and we're seeing the results of it today in ways that Ambassador Jordan has outlined, I think, fairly impressively, as to what the impacts are on our own society and the societies around the world.

Meeting the challenge of the pound of gold offered to impoverished people everywhere is the type of work in which the Agency for International Development has been engaged. Ms. Shapiro, I think, has outlined very nicely some of the attempts we're making there. What I'd like to address today is this question of criminal justice systems of other nations. What happens when they fail? What can we do to support other nations' efforts to restore those systems to health? What can

they do for themselves?

My experience in El Salvador, where every element of the system failed with disastrous results for the people in El Salvador and for the rest of the world, demonstrates that when a system collapses it's not easily repaired. It's an enormous job. Even with the dedication of a government committed to reform, with the dedication of attorneys and other concerted citizens, with the support of friendly nations, attorney generals of the United States prepared to commit themselves to the effort and participate in it, and the United States to back it up with our own assistance funds—even then the system is hard to restore.

And so when we face nations around the world today who have to address the challenge of narcotics and terrorism, intertwined as they are, you face a problem that is, indeed, daunting, and that does require the sort of coordinated, integrated approach that was outlined by Ambassador Jordan a few minutes ago. Let's take it step by step and see what goes into this. These are my recommendations as to where we begin our initiatives.

First, the training and equipping of police and investigative units. We can't know that there's a problem of laboratories, of production of raw materials, of transit and trafficking unless law enforcement authorities are aware of it themselves and prepared to do something about it. We can help. Drug enforcement agencies and other agencies of the U.S. government participate directly in this effort. But ultimately, if we're going to succeed in knowing what's happening, it's going to require better training and better equipping of police investigative units in the host countries themselves. They have to be committed to it. We have to help them develop that commitment. We also have to supply the expertise and some of the background if it's necessary in order for those efforts to be achieved. And here we are legislatively constrained. Because legislative constraints were put in for good reason, they have to be looked at with care. When circumstances require, exceptions can be made as they were in El Salvador and have been done in other areas with respect to the narcotics process.

But that is step one. Step two, when you find there is a crime, how do you enforce putting a stop to the crime itself, detaining those who are responsible? I know that an earlier session addressed the role of the military in this. And indeed, we are dealing with a crisis of such broad proportions that the role of our military and that of other nations becomes essential, if there is to be enforcement against that ounce or several ounces fired from an automatic rifle of lead against those who would attempt to bring this about.

But enforcement has to take many forms. We've referred to this problem of buck passing, and indeed it is one. But let's not undervalue the impressive nature of this buck. In Bolivia, for example, to which we've heard some earlier reference, a new government comes into power, a government which indicates its intent to, for the first time, make illegal the production of coca anywhere in its national territory, except for a small amount for their traditional medicinal uses.

How do you go about enforcing that when you have over 300,000 people in your population who are solely dependent on it for their livelihood? We talk of programs like crop substitution. A hardy crop like coca is not going to substitute in terms of revenues. The best you can hope to do is to show people that they will not starve if they obey the law and leave that crop. How do you do that in the short run? Cash payments are what they were offered by the narco-traficantes. Can we match that?

I'll tell you it sticks in the craw of a lot of bureaucrats in Washington and a lot of concerned citizen taxpayers to talk about handing out piles of money to people not to produce coca. And yet if you're going to deal with the problem of enforcement and deal with the reality of a national government having to confront its own citizens, frequently in remote areas and frequently armed, you're going to have to offer them some alternative. It's got to be an alternative that is meaningful when compared to Jose going by and being able to put pesos in their hand before they ever plant the crop that might yield these kind of results. In El Salvador the problem was different. There you had an active insurgency going on, and it required direct military support in terms of training and assistance by the United States.

Step three in this process. Let's say we found out about the crime, we've captured the criminals. They then go into a criminal justice system, a criminal justice system which is suffering from a lack of funds and from the kind of threats to which we alluded before. Many of you are familiar with it. The justices of the peace trying to operate their offices on budgets of maybe ten dollars or so a month without typewriters, lacking skills and education themselves, lacking support staff or protection.

This can reach chronic proportions, as it does in many of the starving nations of the world. In the Caribbean, you just begin to see some of this deterioration taking place. AID did a study a couple of years ago. A fine criminal justice system in place left by some of the former powers in the area, but now beginning to crumble as books disappear from the library or grow out of date and national law libraries begin no

longer to be able to provide the support for attorneys. You see the same sort of deterioration of the justice of the peace system. And so the third element that has to be addressed is how you're going to go about strengthening the far reaches of the criminal justice system, the attorneys, the judges, who are responsible for making it work on a day to day basis.

Having taken that step, you then have the problem of evidence—of presenting convincing material that can be seen in courts. In many cases, the producing nations that we're talking about lack any sort of way of developing criminal tracing, being able to examine the materials that were involved, to determine that, in fact, an illegal controlled substance was involved. Fingerprinting, ballistics tests, all of those things require criminal laboratories. Nations that are lacking these techniques need help in developing them. They also need to be prepared to devote their own resources to this element of the process.

The next step is in many ways the toughest of all because it's where we require the real commitment of citizens. Amazingly, in my experience of over 25 years in the Foreign Service, mostly in areas in great conflict, developing nations, I've seen time and again that the people are always there. The courageous lawyers and prosecutors, individual citizens, who are willing to take jobs in government, willing to volunteer their own efforts frequently at tremendous costs to their own practices and their own time, in order to reform systems and make them work.

It's the nature of human beings that the good will always be there along with the bad and will react to it, and that's probably the greatest strength that we have in this battle overall. They have to be supported internationally: supported not just with money and with technical training, but equally important, with the kind of moral support that we have brought to so many of these conflicts. And their efforts have to be recognized, even when the efforts fail. We heard the example even within the United States government, that fighting this battle may not be career enhancing. It certainly isn't for those who are out on the front lines and risking their lives at it, and with very little in return.

The international community can recognize this, that it is to those people that falls the job of trying to reform their criminal laws, trying to reform the system in ways that makes it possible to put narco-traffickers behind bars, and not simply to find that the system that can be used and manipulated to their advantage. Having gotten this far in the process, and we've made a lot of steps to get this far, from enforcement through criminal systems that work to having the buildings and so on,

it then becomes necessary to answer that direct threat of the bullet.

And that means judicial protection units such as they have in Costa Rica, such as we tried to develop in El Salvador, so that the judges, the witnesses, those who participate in the process, can, in fact, exercise their integrity and bring criminals, whether they be in the narcotics field or in other areas, to justice without having to fear for their lives as they walk out the courtroom door.

If we've gotten this far, and if we've gotten the conviction, you then have the prison system. And we've seen in Colombia and elsewhere the problems that come up in trying to keep people in jail even when they have been convicted, and the lengths to which the narcotics business particularly with its bankroll, with its alliances, with the terrorists around the world, are prepared to go in order to break their cohorts out of prison.

And so the prison system needs to be strengthened, protected, enhanced, but also kept as something which is a legitimate instrument of national authority and not itself a part of a system of human rights abuses. Human rights abuses we approach usually from the point of view of what it means to our moral integrity as a country. But it also means something to the moral integrity of those countries which are affected, and countries which abuse human rights as a consistent pattern are not going to be able to enforce their laws against criminals in an effective and consistent manner.

If we can do all of those things, putting together the various steps that would go into an effective system, we must also recognize that above all else this must be an effort by the nations concerned, and not just an effort that's supported by the United States and the rest of the industrialized world. This has to be not just a concerted U.S. effort, it must be an international effort. If the U.N. can't play that role, then other organizations are going to have to play it. But we can't go it alone. We don't have the resources. We don't have all of the skills that are going to be necessary to make this work, nor do we have all of the solutions.

Europe and Asia are equally affected by this plague. And they, too, have to play their role in it. But together we can help to put these steps together for a criminal justice system. And so if we can have nations committed to the process, if we can take this step by step, then there are, indeed, legal initiatives that can work to begin to turn this program around. It is going to have to be coordinated.

Let me make one final pitch which is related to this in one way. When we talk about coordination, communications, my present job,

strikes me as being particularly important in the international control of narcotics. When we're dealing particularly in our north-south communication links, they're weak. They're particularly weak when it comes to transfer of data and large amounts of data.

Fiberoptic networks which are now going pretty much east to west around the world have not yet developed in north-south ways that make it possible to transmit pictures of terrorists, narcotic offenders, the massive amounts of data that are necessary in order to trace their movements, or to assist nations in integrating the effort between the rural areas where the crops are grown, where their laboratories and where the transit routes are, and the national capitals where they're trying to control this movement.

And so we are, in addition to the types of steps that I have proposed on a bilateral basis, also going to have to address, and we are trying to address this in association with our colleagues from AID and the multilateral institutions, what more we can do in order to develop better communications ties between north and south, between developed and developing nations so that the gap doesn't grow and the kind of circumstances that give rise to narcotics in the first place increase. I think everyone has probably said time and time again it won't be a process that's done overnight. That's obvious. It needs to be integrated. That's obvious.

It's multi-dimensional. That's obvious. We know a lot of the obvious things. The question is are we prepared to use the kinds of sophisticated strategies rather than simplified solutions that are necessary to bring this problem back under control? Thank you.

(Applause.)

DR. MOORE: Our final panelist is John O. McGinnis who is Deputy Assistant Attorney General in the Office of Legal Council. John McGinnis is a graduate of the Harvard College and Harvard Law School, where he was a member of the Harvard Law Review. He was also a M.A. degree in Philosophy and Theology from Balliol College, Oxford. He was a law clerk to Judge Kenneth Starr, and an associate at Sullivan and Cromwell in New York before joining the Justice Department in 1985.

I first met Mr. McGinnis at a conference that the ABA Standing Committee ran several years ago on the issue of treaty interpretation, and it is one of the clearest and most forceful presentations on the issue that I have heard to date. It was obvious that some of his training had been at Oxford, and indeed, it brought to my mind the famous comment that Lon Fuller made in his debate with H.L.A. Hart, which was

the one that was the English tradition: the clarity and the Oxford and the debating style and speaking was such that whether right or wrong, they were always clear. It seems to me that while John McGinnis from what I can tell was strongly right on that occasion, I have never had an occasion to disagree with him. He is also clearly right on those occasions.

So, John, we look forward to hearing from you.

MR. MCGINNIS: Thank you. Today I want to begin by disclaiming that what I am going to say is not in any way an official Department of Justice position. I've discussed it with no one at the department. It represents largely my own thoughts, and it is really a series of speculations, not a program of actions, but a prolegomenon to a program of actions.

My subject today will be essentially new legal initiatives to combat narcotics and narco-terrorism and the way that the United States can take these initiatives through shaping international law in what seems to me to promise to be a new age of international law. And before giving examples of such initiatives, it seems to me necessary to defend two theoretical propositions, which are both disputed by different groups.

First, that customary international law may be an effective weapon in any area, particularly in the war against drugs, and second, that the United States government is in a position to wield and shape it. As to the first issue, in the past decades, international law has correctly, in my view, been viewed as largely worse than ineffective. When the world was divided into two competing power blocks divided by fundamentally different ideologies, there was necessarily little space for fashioning rules of conduct.

Indeed, given that communist states while ostensibly expressing adherence to norms of international law systematically violated them, international law came to be seen, correctly in my view, as a one set of constraints on the West, a set of constraints which actually hampered its struggle against totalitarianism. Moreover, because of these divisions between East and West, there was little opportunity for effective enforcement even of shared norms. For instance, the U.N. acts as an enforcer only through its security council where the USSR had a right to a resounding "*nyet*." Even most regional blocs were themselves driven by the split between communists and the west.

With the demise of the Eastern bloc, it is perhaps not too much to say, however, that an opportunity for a new age of international law may be upon us. There no longer seem to be the irreconcilable differ-

ences between the two huge blocs that create inseparable obstacles to construction of orders and institutions to combat international problems. Moreover, as we have witnessed recently, there is dramatically an increased willingness on the part of the U.N. to play a useful enforcement role as well as an increase in the authority of regional associations.

Thus, I think we should look towards international law generally as a source of area for initiatives, and in particular, it seems to me an area of initiatives in the war against drugs and narco-terrorism where there is such a community of interest between East and West. Indeed, I think there may be no greater agreement on any proposition in the East and West today than that opiate is in danger of becoming the religion of the masses unless action is taken, dramatic action, to stop the growth in drug trade and narco-terrorism. In short, I think while we've long been used to watching international law being used as a shield to protect wrongdoing, we should think of it now as a sword to attack wrongdoers.

The second reason for turning to international law is that the executive branch—the branch which the framers created to act with, in the words of John Jay, “dispatch,” may take initiatives without, in many instances, waiting for authorization from Congress. As *Curtis-Wright* reminds us, “in the vast external realm of foreign affairs, the President alone has the power to speak or listen as a representative of the nation.” This vast external realm certainly includes international law, and thus, the President, through his agents in the executive branch, is the chief exponent of the United States’ view of international law before the world.

Moreover, the President’s exposition is not static but dynamic, *i.e.*, the President and his agents do not simply discover and follow norms of international law, but in large measure participate in their creation. The creative aspect of his role stems from the nature of international law itself. Customary international law is not a rigid canon or rules, but an evolving set of principles founded on common practices and understanding of many nations. It is understood that this evolution can occur by a state reshaping international law and creating rules that take account of new realities or even occasionally by departing from prevailing customary international law principles. Thus, a state may seek to promote a new understanding of an old rule or even a new rule of international custom or practice.

Thus, in essence, we should think of the President acting through the executive branch perhaps as a judge in a new golden age of the



common law of international norms with the power to create as well as to discover. Indeed, given the importance of the United States in shaping international law, the importance we have from being the most powerful country in the world, it is not too much to see the President as the Master of the rolls in international law.

The rest of this talk will be devoted to a brief discussion of the possible examples of the creativity that may be used in the struggle against drugs and narco-terrorism. I think there are already public examples of it. It may not have been noticed widely, however, but one of the justifications formerly given in both presidential statements and in legal briefs for the United States intervention in Panama was to restore a government that would be able to carry out its obligations under the Single Convention on Narcotics.

There is an obligation on countries to prevent their territories from being used as a haven for smuggling drugs into the United States. To be sure, this was not the only or the primary justification for United States intervention in Panama, but it serves as a precedent, at least in an extreme case, and a warning that willful failure to abide by the terms of the convention or other international norms can justify a proportionate response by the United States. In this regard, the doctrine of self-defense should be considered as also authorizing proportionate responses to territories where the government is failing in its obligation to prevent drugs from flooding into neighborhood countries.

This result, I think, can be derived directly from international law. The duty to use diligence in preventing attacks on neighboring nations from a country has been clearly established in international arbitral decisions for many years. As the arbiter recently stated in the *Island of Palmas* case:

territorial sovereignty involves the exclusive right to display the activities of a state. This right has a corollary duty, the obligation to protect within its territory the rights of other states and in particular their right to integrity and inviolability in peace and war together with the rights with which each state may claim for its nationals and foreign territories.

Now, prevention of the importation of drugs, which may cause much greater social damage than isolated terrorist attacks seems, should be evaluated under the same principle. As Judge Gee said in rejecting a claim that a drug pusher could not be punished more harshly than a murderer,

except in rare cases the murderer's red hand falls on one victim only, however grim the blow. But the foul hand of the drug dealer blights life after life, and like the vampire of the fable creates others in its owner's evil image, others who create others still, across our land and down our generations, sparing not even the unborn.

I think Judge Gee's remarks pungently show that a failure to curb drug trafficking in a state can be in many ways as damaging as failure to control terrorist attacks and have to be evaluated under the principles of self-defense and proportionality. Of course, I want to emphasize here that in considering proportionality and self-defense, I am not suggesting that the United States will be justified and certainly not prudent in declaring war against countries that do not control their drug trafficking problems. But once, however, it is recognized that self-defense and principles of proportionality are triggered in looking at drug trafficking and narco-terrorism, I think it becomes clear that sovereignty can be seen in a different perspective, and that perhaps the extraordinary efforts of the United States or the sort of multinational institutions that we may need to attack this program can be understood in a new perspective.

If nations that cannot control drug exportation are seen as having complete sovereign rights, which cannot be infringed upon at all, it may be much harder to create these multilateral institutions that may lessen the autonomy of such nations in order to control this problem. However, I think we see that in a new perspective when we understand that really drug trafficking can be understood as a threat to other nations to invoke the rights to self-defense, whether individual or collective, and thus create the foundation for the restructuring of international organizations to delimit sovereignty in a way that will perhaps effectively combat this problem.

Before discussing what sort of organizations they may be, I want to give a practical example of something short of war in which the principle of self-defense, I think, is important. For instance, there are instances in which Country A may consider assistance to another country's air interdiction program against drug trafficking. And in so doing, Country A must consider whether Country B's interdiction program complies with the relevant international agreements, such as the Chicago Convention on International Civil Aviation.

One of the salient principles of this convention is that its procedures entail warning and request to land and does not authorize the downing of civil aircraft. Indeed, you may recall this convention was at

issue in the KAL 007 dispute. And I think these principles are, of course, very sound. But the Chicago Convention on International Civil Aviation does not in any way trump the principles of self-defense, and when a country, Columbia for instance, is faced with essentially an insurrection from drug traffickers which have, we've heard on this panel, so much money that they essentially create an imperio in the country, I think there may well be justification for treating these not as civil aircraft but military aircraft or seeing drug traffickers as essentially an equivalent to a Barbary pirate state, and so essentially being able to treat these as military objectives, and so not having the Convention of International Civil Aviation apply at all. That's important because it then frees up a Country A, a country like the United States, to give aid to these countries even if they are undertaking a more vigorous and military response to such activities.

Finally, I'd like to just end with my point about legal institutions. Once it is seen that sovereignty has to be bound around by notions of self-defense against narcotics and narco-terrorism, greater authority for international organizations and institutions can be considered.

For instance, an international drug police force seems to me a real possibility under an international organization that would be at least the equivalent in power and size something like the Food and Agriculture Organization in which the UN nations would bring together and have access to a variety of funds. The organization would have international police that would go into various countries. I think this could have several advantages because it would not make the United States, which particularly in Latin America is not viewed in a favorable light, the central focus of enforcement. This would be seen as an international effort. The response to those who complained that this international police force infringed on their sovereignty would be the response that, yes, it does take away some sovereignty to some respect, but that only proportionately to the damage this is doing to other countries.

So I think this is an area in which we have to consider quite carefully the growth of new international organizations to take advantage of the growth of the new international enforcement norms that should be seen as arising out of the right of countries to not only individual but to collective self-defense. In other words, the collective self-defense under international law in the drug area, in the narco-terrorism area, should be reflected in a new structure of international organizations to implement that defense. Thank you.

(Applause.)

DR. MOORE: Thank you, John. Let me summarize a few of the

issues presented in this panel before opening the floor for questions or comments. One was a question as to whether we have in the United States an adequate mechanism to coordinate between the domestic and the international side and to coordinate all of the international components. I don't know the answer to that, but I can certainly say as one who chaired in the past an NSC task force that did exactly that for Law of the Sea, and Myron Nordquist who was the office director of that is here, currently the Deputy General Counsel of the Air Force, as he well knows also, that was an indispensable mechanism for carrying out United States Law of the Sea policy. Had we not had something like that, to do a good job we would have had to have invented it. So I don't know the answer to that, but surely that's one set of issues that ought to be open for discussion. Ambassador Jordan had raised that, I think he presented the issue very, very clearly.

Secondly, we've had a great deal of discussion particularly on the demand side in looking at the importance of education. One always looks at a complex system in terms of cost-benefit effectiveness, and my own instinct is, and this was certainly a recommendation of one panelist, that education may be one of the most cost-benefit effective things that we can do in this overall setting. To what extent do we have in place a program of education that every single American child in school will at some point encounter a very high level, high grade program explaining what the costs are to society, what the costs are to them, what personal use would mean, what the legal dimensions and what the moral dimensions of these kinds of decisions are. Again, I don't know the answer, but are these things that we ought to be looking at.

The third set of issues that have been raised concern public education. To what extent have we adequately informed the American people of the overall cost of this problem, of the continuing trends, of whether those trends are getting better or worse, and whether we are adding to the Just Say No campaigns information that enables people to really understand why at a personal level and at a community level decisions to use drugs are extremely harmful and damaging.

Fourth, we've had a series of suggestions that we ought to look much more carefully at a fuller use of United States intelligence assets and capabilities that are already in place and that are used in the national security side in general. Again, I don't know the answer to what extent those assets are currently being used. There may well be a series of policy issues that need to be carefully looked at, but surely if they are not being fully used, this an area that we ought to, at least, be

raising questions with respect to the use of such assets.

Fifth, we've had a whole series of suggestions made with respect to creating private incentives to deal with some of this. Could we, for example, involve the very helpful involvement one already sees at a community level? Could we enhance it by a much more effective program of rewards? Would that turn out to be quite cost effective, for example, to really create very substantial incentives in the private sector to turn in drug dealers and to turn in drug activities? With respect to the use of the law on that, all of us as lawyers have seen the use of treble damages in antitrust cases. Should we have a network of civil suits based on treble damages against drug dealers?

Should we be able to create something that operates across international boundaries that enables one to go after assets even internationally with respect to the involvement of drug dealers and any damage that may be done? Maybe there are other proposals, but to what extent might new civil litigation possibilities that would mobilize the private bar be something that would be possible here?

Sixth, there's been very strong arguments for assistance from a number of speakers for foreign assistance programs targeted on the judiciary and the rule of law, particularly strengthening the judiciary branch that is the one out on the front line and told to wear tennis shoes literally to run away, as we heard in terms of the degree of protection that can be offered in some of the front line countries on this. Is this an area that would be particularly fruitful for a country that supports the rule of law to have a greater rule of law engagement effort, and to support enhancement of the judiciary and other assistance in these countries.

To the extent that there is involvement of a nation such as Cuba, questions have been raised as to the extent to which the United States has sent protest notes, has lodged claims with respect to monetary damages under traditional international law, whether or not the claims are paid, and to publicize those claims and those activities so that the international community would know what they were. Issues have been raised in discussions with respect to synergy between the use of automatic weapons and drug dealing. Are we ending up with a series of these gangs all over the United States with access to automatic weapons that are beholden to a variety of foreign groups? To what extent does that have serious implications for U.S. national security over the years?

Is there right now some kind of particularized and very serious penalty for a combination of automatic weapons or semi-automatic

weapons and drug dealing? Nine points have been made about placing emphasis on training of police. And here Ken Bleakley has indicated, I think correctly from what I have seen, that there are a variety of legislative restraints that grew up in a different era, and it may well be time to, indeed, may well be past time to reassess those constraints, as yet another set of issues.

Tenth, we've had questions raised as to whether there are any legal constraints here that may be in place that would prohibit the use of highly sophisticated infrared radar or other military technologies, military intelligence or surveillance technologies that may be in existence now that might be brought to bear on the drug war.

One point might be raised with respect to ABA involvement. Given the potential for creation of new legal initiatives and use of the law creatively, should the ABA set up a task force of governmental and non-governmental legal experts to try to come up with new ways of placing legal constraints in the road of drug dealers and those involved in these operations, both at the international and at the national level?

To what extent could such a task force identify areas, for example, of current legal constraints that might be modified appropriately that are otherwise standing in the way of problems? John McGinnis has raised in a very provocative and thoughtful way simply the extension of the concept of self-defense to settings of intense threat from drug engagement activities in the territory of nations that are not fulfilling their obligations to make every effort to stop those activities. He has raised the issue as to whether we ought not to use the collective defense analogy, indeed the individual self-defense analogy in this case.

I might add that there is a rich body of literature on this applying it to the economic area, growing out of the first and second oil embargoes. This is not something that ought to be regarded as entirely new interpretation of the charter. Professor McDougal and others, for example, for many years have argued exactly this, that the level of intense threat, if it rises to a level that's sufficiently great, the attack does not necessarily have to be armed aggression as such. So that's a very interesting suggestion that John has made. I think it ought to be taken seriously in triggering an interesting discussion.

John made a suggestion for an international drug police force. Finally, we heard a superb presentation from Irving Tragen, the Inter-American Drug Abuse Control Commission, and one asked, given the importance of the OAS in all of this, whether the United States is doing enough to support the OAS; whether the OAS is doing enough in terms of what might be done and in a setting in which we have a very

strong national interest in supporting an organization that has been one of the most important historically of all regional organizations, the earliest one to be formed, and of great historical interest to the United States and importance to it over the years. Is this something we ought to do to continue to work cooperatively and to enhance that relationship in every way possible?

Those are a few of the things, it seems to me, that have been discussed so far as an agenda, and I will open it up for this point for question and answer. Yes, Sir?

MR. ANDERSON: John Anderson, a former member of Congress, now with the Nova Law Center. I was wondering, in connection with the suggestion that Mr. McGinnis just made, about the possibility of an international police force under the aegis of the U.N. Professor Jordan was a little bit dubious about inviting a great deal of hope and confidence in the ability of the international body to deal with that problem. It occurred to me, and particularly in line with the summary just given us, a very excellent summary by Professor Moore, about whether or not we are adequately deploying intelligence assets that are already in place, would it be possible at a time when we are very much thinking about a reconfiguration of the role of NATO to use perhaps NATO in some imaginative way? Even though it's the Andean countries that are the primary source of cocaine we do have the Sicilian connection. We have the French connection through Marseilles. We have, I suppose, the Dutch connection with the port of Rotterdam, all members of NATO. I wondered whether or not some thought could be given to the possibility of finding some role, particularly in the deployment of intelligence assets, of some new definition of a role for NATO in this area?

DR. MOORE: Who would like to answer that?

MR. MCGINNIS: Obviously, I don't know a great deal about NATO. But I think the resources that NATO has to use have to be turned into problems that are more pressing than the threat of aggression from the Soviet Union, which has disappeared. I think that this is a useful suggestion. I think, however, what is more crucial is that any initiatives involve the Andean countries in any international approach to the problem because, again, my concern is that in the past, it has been seen as simply gringos, I think, versus the Andean countries. And I'm not sure that simply greater public participation of NATO will help combat that perception.

AMBASSADOR JORDAN: Let me just make a brief comment. The problem with multilateral activity is that multilateral activity re-

quires leadership, and if the United States doesn't know what it's precisely out to do or to accomplish, it's very hard to get the multilateral organization to follow. We've had a particularly, I suppose, encouraging example for a lot of people in terms of the changing international environment, but it took an enormous amount of clear direction as to what the United States wanted to do in terms of the Desert Shield, the whole Saudi Arabia, Iraq thing. And you could mobilize people on this.

What I'm saying is that as a precondition for using multilateral and all of the rest, or hoping for them to pick up the slack, is that we know what we're doing ourselves. We've got that worked out. With respect, and in that context, the U.N. is far better than NATO is for Latin America, and the OAS, in my judgment, if it could be revitalized. It would be hard to use it to some degree, say, in Peru and Bolivia and perhaps less so for Colombia. But you would certainly not want to involve NATO in it. If you didn't use the OAS or U.N., you wouldn't have a multilateral arm that I think would—

MR. ANDERSON: Well, I thought I made it clear that I was saying that with respect to the Andean countries, I realized that this would not be the appropriate organization. We do have a hard drug problem involving heroin and other drugs that certainly are coming in from other parts of the world, through NATO countries.

DR. MOORE: We have time for one short question. At this point, I'm going to call on Irving Tragen of the OAS.

MR. TRAGEN: Thank you, Dr. Moore. I would like to make a comment at this point as well as a question. And it has to do with some of the recent comments about multilateralization. I think the most difficult problem that we face is not clearly identifying what it is that countries want to do. As the executive secretary of an inter-American organization, we've spent what appears to be an inordinate amount of time getting the issues framed. It's terribly important we get the issues framed. And I can take it almost item by item.

As Mr. Bleakley knows, in the area of law enforcement, one of the most difficult issues is defining what kind of law enforcement training you're talking about. What kind of organizations can be involved? Who does the training? What kind of training, and then once you've done that, how do you deal with issues like corruption and professionalization?

Now, unless you phrase the issues and define them precisely, we end up doing a series of repetitive efforts without being able to evaluate what we're doing or where we're going. I think in the course of our discussions over these two days, we dealt with a large number of issues,



extradition being a very important one. And extradition is in the eyes of many Latin American countries a cop-out because it isn't facing up to the legitimate questions of the strengthening and consolidation of their own law enforcement processes. In my first assignment in Latin America almost forty years ago, the first judge I dealt with was a fifth year law student who was assigned to what we would call a municipal court.

His one year of service, public service, before he received his law degree, was to be a judge. I don't want to go further than that. El Salvador has the same system. We're talking about strengthening legal systems. We have to strengthen them in terms that are meaningful to Latin Americans, not to us.

What I'd like to suggest is that some marvelous ideas have emerged, and I think part of what we need to do now is to engage the Andean countries in a dialogue. I think what's far better than the ABA, the bar associations of Latin America or the bar associations of the U.S., is that we have a good instrument we have in the inter-American bar, which will be meeting here in a couple of weeks. Maybe we could begin to focus some longer term questions through dialogue between these various institutions which can help us then to more precisely define how you apply these various instruments that you've been discussing. Thank you.

DR. MOORE: Thank you, Dr. Tragen. Those are, I think, certainly very pertinent and important comments, and I hope they will be taken to heart. We are now out of time, but let me just add two brief points. One is a point that Joe Douglass had made earlier that this latest discussion has reminded me of. I think it was an excellent suggestion that we try to have some effort, hopefully governmental. But one would also imagine even the private sector being useful in this, to go through the records of the fallen regimes in Eastern Europe and to put together, in fact, the trail and the story of the massive governmental involvement, because I think that is something that is very important for the public record to know as we move beyond governmental involvement.

So, Joe, I personally think that's an excellent idea. Here's an area that where our government can work with NATO. In fact, the German government is going to be in an excellent position to have all the access to the files of the East German Intelligence Service. It seems to me that this is an area that for the health of that new German union and for the health of all the new Eastern European governments, it would be useful for them to come clean, and to get this on the public record.

It would also help in such things as Cuban involvement, for example. So I think that's an excellent idea.

(Applause.)

(Whereupon, at 12:35 p.m., the meeting recessed)

### III. GENERAL CONFERENCE SESSION/AUDIENCE DISCUSSION

DR. MOORE: We are trying at this conference something a little different, which is an opportunity for audience discussion and participation that would be a little more focused; not simply a question and answer format, but an opportunity for a real discussion, a real generation of ideas, an opportunity to say here's an idea, what do we do about it. Have three people shoot it down if it's got weak parts, and on the other hand, if things are really good, get them picked up and widely disseminated around the government or in different areas where people have been participating. So this is really in your hands. I'm simply here to field the questions and to try to encourage the interaction among you.

DR. OLIVER: I'm Philip Oliver with the University of Arkansas at Little Rock Law School. I was interested, Professor Moore, in your listing of fourteen things. I think that the one that had at least been touched on that I think is worthy of greater consideration is that of legalization. I have thought for a great number of years that as desirable as it would be we were not going to win the war on drugs, and nothing that I've heard in the last couple of days has made me more hopeful that we will.

The war is an extremely expensive, costly war, costly for our institutions, costly for friendly governments, costly in resources. Certainly there seems to be little hope of winning greatly increased resource allocation. I think that the realities of the American political situation are that we're in a time of shrinking resource allocations from government and not increasing allocations. So I think we're ultimately going to lose the war anyway, and the costs of continuing it are quite high. I am not persuaded that legalization is the best course. Particularly, I'm disturbed about all of the emphasis on the approach with the Andean countries, when just yesterday I learned of developments with respect to developing synthetic drugs in this country, which seem to me make it largely irrelevant as to whether we can block production in foreign countries if people can go into a laboratory here and produce drugs.

DR. MOORE: Could I just clarify before you leave the microphone exactly what you are proposing, because legalization or

decriminalization can come in many different proposals. We heard one proposal the first day of decriminalizing marijuana, and a sharp rebuttal by a number from the audience on that. Are you proposing decriminalization solely of marijuana or of all substance abuse including cocaine, crack, heroin, PCP, all hard drugs, et cetera?

DR. OLIVER: Well, I do not have a fully developed comprehensive plan, but my idea would be full decriminalization. It's been my thinking that the most addictive drugs are the ones that most need to be decriminalized because they are perhaps going to be the most resistant to other kinds of restraints. I would envision a situation in which we would perhaps consider some sort of registration of drug addicts, which I think, while taking the profit element out, would also perhaps make it somewhat unlikely that people would find it worthwhile to go down and register as addicts in order to try out a new drug. We could then move toward a system of providing drugs at cost, which would leave, if indeed it is the highest and best use of certain lands, the Andean region's production of coca. I think this is not at all inconsistent with what I think I've been hearing: that one of the major things we need to do in fighting drugs anyway, is education of the American public. We could simply say we're going to deal with this as basically an American demand problem. And we're going to deal with this by trying to influence people into thinking that it's not a very good idea to take drugs. But, yes, it would be what I would envision across the board.

DR. MOORE: Let's open the floor for discussion at this point. Anyone else care to discuss the issue or raise it? Obviously, this issue has been joined in the public debate before by a number of people including Milton Friedman and George Shultz. We have one comment from David Martin. Yes, David?

MR. MARTIN: This, of course as you have pointed out, is not a new proposal. Bill Buckley, who is a very good friend, has been pushing this idea for a long time. There is a body of scientific literature which has direct bearing on this. In 1972, they had what they called, I think, the free access experiment. They took one body of students without any separate body for comparison. And they gave them free access to marijuana.

In short, you weren't persecuted. You were not taking forbidden fruit when you helped yourself to marijuana. Students who had used marijuana once a week, very occasionally, or twice a week, went up to one cigarette a day. Students who had used one cigarette a day went up to three or four cigarettes a day, all in the period of one month's time. Now, it's deducible from this, if you make drugs more available, more

easily available, they're going to be used more. And you have to then ask yourself what is going to be the effect of this greatly increased use of the quality of human life and the quality of society?

And there is absolutely no question that human beings are reduced to far less than their potential by abuse of drugs, and that the increase in drug use would have a disastrous effect on the quality of society as a whole.

DR. MOORE: Thank you, David. Yes, the gentleman from the OAS, Mr. Tragen.

MR. TRAGEN: I think we have a very difficult problem here. We have a difficult problem because I don't think we have yet in this country faced up to what the drug problem is, particularly in our cities. Now we have some experiences in the world with legalization. Britain, for example, ran through the experience of allowing those who were addicted to register with the health service and to receive heroin on demand. That has not, in any way, eliminated the black market in heroin in Britain.

We need a lot more analysis of what did happen in Britain. The Dutch, as we know, basically allowed the open use of marijuana, and you can get everything in coffee houses in Amsterdam from cakes made with marijuana to marijuana tea to the joints themselves. That was on the supposition that if you had marijuana, you would not go into the harder drugs. Anyone who has been in Europe recently knows that in cities like Arnhem which have a policy of acceptance of use, not legalization, you have rioting in the cities because the Germans and the French are coming up to buy their drugs and, they not only have brought with them the problem of drugs, but also all sorts of other criminal activity, including prostitution.

You have city councils all over the Netherlands facing revolt by citizens because of it. What I do think we need in all honesty is a much harder look at what we mean by legalization. As Congressman Rangel asked, are we going to legalize it for kids under the age of sixteen? Are we going to do it for kids under eighteen? Who's going to distribute it? Are we going to let Coca-Cola have a patent, or are we going to set up, as in the state of Virginia, state agencies where you're going to sell it?

What are the conditions under which you're going to sell it? What degree of purity? What are the standards you're going to apply? I think our major problem, and I've done a lot of reading of the articles by Mr. Friedman and Ethan Nadelman and so many very eloquent advocates who are as concerned as we are about the disorder in the streets, but they really haven't come to grips with either what the expe-

rience has been abroad or what the implications of legalization are.

Now we can look at this in two or three different ways. If we want to really make and have an impact on the use of drugs, maybe the answer isn't decriminalization. Maybe the answer is in the kind of penalties we impose for first use or second use or third use or the penalties and sanctions we use for the dealers. We haven't really thought much of this out.

That's one of the areas where as an inter-American community, shortly we're going to have to sit down and begin to think it through, because obviously if it is true that we have 25 million of our citizens, ten percent of our population, who are now regular drug users, whether they're marijuana or cocaine or heroin, we haven't got enough jails. And I wonder if the best use of our money is to build more jails when our real answer, our real challenge, is how do we rehabilitate and how do we eliminate the attraction of drugs? I think we made a lot of mistakes in social programs in the past. Maybe we've got to think through what we do in the inner city. Maybe we've got to go to some of the things Jack Kemp has talked about. Maybe we've got to go to some of the things that members of the Congress are talking about in reestablishing inner city programs. But I wonder if the answer is as easy as legalization because I don't think any of the experiences anywhere in the world indicate that legalization has eliminated the problem.

DR. MOORE: Thank you, Mr. Tragen, for as always an excellent statement. Others on this? Yes, yes, sir. And then if you would like an opportunity at rebuttal or further discussion, you're most welcome.

MR. MIKUS: I am Joseph A. Mikus, a professor emeritus, member of the American Society of International Law. I'd like to make some comments on this conference. Conference on narco-terrorism certainly is a highly specialized conference and deals only with one aspect of the public interest in the world. When we spoke about consumption and certain people tried to put the whole responsibility for the development of this traffic on our consumption in the United States. I believe this is a very false approach because this is not a private, I would say, law transaction like buying something in a drug store. This is a public interest issue.

And, of course, it's not the only one. There are many other issues. I found in the book published just now by Professor Moore, National Security Law, an item called "global anarchy". We are living in a world really dominated by global anarchy. Narco-terrorism is only one aspect. Other aspects are arms, ecology, hunger, drought, refugees and so on, and wars. We are even now in the middle of an evolution which

may lead to war. So I believe these all are public interests and we should pay attention to the whole problem as such.

DR. MOORE: Could I just make an intervention for a moment? Are you suggesting that we can't take these to some extent one at a time and have to solve all the world's problems at one conference, or would it be enough to solve narco-terrorism in one conference?

MR. MIKUS: No, it means we have to come to a kind of global approach to the problem because this is only one section of it. I believe that treaties are simply agreements among private parties. There is no enforcement for it. There is no, for example, judicial enforcement of treaties. If somebody is not satisfied with the treaty, he would simply denounce it. And there is no way of enforcing the treaty. The International Court of Justice is practically not international. It's not a court. It's an opportunity for arbitration, and we know all that. The decision of the court depends on the consent of the parties, and certainly this institution doesn't have very much to do with the justice in the world. So I believe that we have to organize probably another global conference about these aspects.

I believe that the International Court of Justice and the United Nations, as voluntary organizations, don't really have great meaning. These are social conferences, permanent conferences. As lawyers, we know that in our country, which has a constitution which controls, for example, every state and every citizen, that states are not any more voluntary members of this country. If we speak about law, law is a pyramid, not an institution having simply a kind of horizontal dimension.

DR. MOORE: Can I interrupt a moment?

MR. MIKUS: Law is something with vertical dimensions.

DR. MOORE: And perhaps unfairly. Tell me if I'm being thoroughly unfair. I frequently am as a chairman. But the problem is I would like to try to—and indeed, I've been accused of being able to cut off speakers like Mr. Justice Holmes in the middle of the word "if," but as happened here, I really would like to focus precisely on the drug issue. I think your point is a very good one about the importance of a whole variety of problems. And I think you would find the audience very sympathetic to that.

But I've got several others that would like to get in, and we haven't really perhaps concluded the discussion on the decriminalization. You go ahead if you want to just wind up.

MR. MIKUS: I would like simply to bring in a new idea. Now we are really in the middle of a kind of a development which may lead to a

war in the Persian Gulf. I have published a book about world public order. There is a reality in this world, and that's the existence of the five nuclear powers. These powers really may become a kind of a world authority. I believe that as you know there is a dispute between Mr. Buchanan and Mr. Safire about that war, I believe that we just cannot be a policeman of the whole world. But these five nuclear powers which have absolute power, they should somehow come together, close a kind of closed circle and decide things by majority.

For example, in our Supreme Court some decisions are made by five members against four. So something like that should be used in, as I say, a closed circle of this pentarchy of five nuclear powers. I would like to propose this for discussion now.

DR. MOORE: Thank you very much. Let me add is there anyone else on the legalization issue before we close that off? Yes, go ahead. Did you want another chance at this?

DR. OLIVER: I would like, yes.

DR. MOORE: All right. Go ahead.

DR. OLIVER: I would just like to make clear that I am not advocating legalization in any sense. Assuredly, these drugs are terribly harmful, and I think that it is probable that we would have some degree of increase.

I think that we cannot gauge at all because we are sailing in completely uncharted waters. The world has unprecedented problems. In particular, the United States has unprecedented problems in these areas, but the comparison is not whether we want a drug-free world or a world with legal drugs. The question is between the comparison with the actual world and perhaps a world that we maybe can achieve through an outpouring of enormous resources, a continued destabilization of friendly governments and so forth, that possibly we can obtain a significant decrease, but very likely we will sustain all those costs without getting a significant decrease.

So it is between two highly imperfect worlds, and as long as we are dealing with a situation in which ten percent of our population, and probably something greater than ten percent of Peru's population, is engaging in this sort of activity, I think that it's going to be a rather intractable problem as this conference has demonstrated.

I don't think that it is necessary, at least to have a realistic debate, that all the details of legalization be worked out. Certainly not all the details of maintaining the present system have been worked out in advance, and I certainly do not think that this would be a panacea, but I do think that it would be quite an improvement.

DR. MOORE: Before we shift, anyone else on this subject? If not, let me, again, perhaps unfairly, but as the only one up here at this point, just add one additional word on this. We had one other person who wrote to me before this conference saying that they felt there was not an adequate opportunity to debate this issue, and they didn't see any advocate of legalization on the program. So I think it is certainly a fair set of issues given the range of people that have raised it. The last thing we want to do with our most serious problem is to cut off serious discussion about the options for dealing with it, and that is a serious option for dealing with it. And it seems to me it needs to be looked at very, very carefully.

My own view of it, as a non-expert in this area, and as a person who is normally very attracted to free market solutions, is unalterably opposed to legalization. I have personally not seen any legalization proposal that deals with, I think, the two major problems that seem to me to be left. One is, from what I can tell of legalization, it is highly likely that consumption would go up in a legalization setting. If we take as the starting point your concession that these are highly dangerous, and we live in a world that now understands that as opposed to the 1960s flower assumptions about the whole world and the taking of drugs, then it seems to me that is a very, very damning admission to any legalization program. I have two little daughters and I suppose I'm representative of all fathers in that respect. I do not want my daughters to be living in a world in which they get drawn into that, and my own view is if we had a setting of legalization, their chances of that would go up. I don't know by how much, but I suspect by significant amount. My second point is that I have never seen a program of legalization which would eliminate law enforcement problems and any law enforcement role in the process.

It seems to me that the points made by Mr. Tragen on behalf of his committee, and the OAS has looked at this very carefully, and David Martin and others, are really absolutely correct. So I'm inclined to think that the cost of that solution does, in fact, outweigh the things you get on the other side. Now having said that, let me say that one of my closest associates, Robert F. Turner, who is now sitting with me on the table up here may have entirely different views on this issue. I've talked to him privately from time to time on it. I don't know what his own views are, but I can tell you where I stand which is unalterably opposed to legalization.

And I guess the last thing that concerns me is that I think it's a completely false solution to the problem. One of the reasons I didn't



feature it at this conference is because I am personally concerned that the debate and the discussion about legalization is leading us to spend our energy on solutions that I suspect will not be helpful in dealing with something that is going to be very imperfect, that's going to be a perfectly miserable social fight against this thing for many, many years to come. But those are just very personal views. Robert F. Turner does want to express his personal views also.

DR. TURNER: I didn't until you said that. Can I join you?

DR. MOORE: Yes, please do, Bob.

DR. TURNER: Some of you know, last Sunday I came out in favor in the eyes of many to assassinating Saddam Hussein so why shouldn't I come out for legalizing drugs today just to be consistent. I don't favor legalizing drugs, and indeed I don't favor assassinating Saddam Hussein. What I do favor in both cases is not ruling out options without thinking them through.

One of the pluses to the legalization approach is that it may solve one of the biggest problems we have today; that is, crime caused by people who are trying to raise the money it takes to buy drugs at a price far above their cost because it's illegal. If legalization could get organized crime and disorganized crime out of the business of trying to hook kids on drugs for a profit, that would be a plus.

Another concern of mine is one I raised at lunch, and that is, I don't see us making much of a dent in this problem by attacking the supply because it's so easy to smuggle. The profits are so great that if we paved over all of Latin America, the Swiss would start doing it, and if we shot the Swiss, the Swedes would do it, and pretty soon there would be somebody down in the basement of the White House doing it because there is so much money in it. We have to deal with the demand.

I don't think we're doing enough to deal with demand, and I think one of the reasons is because the political forces that have responsibility for these decisions don't want to take the heat of angering the American people. There are too many Americans that want to have drugs, and there are too many other Americans that don't want to have to urinate in a bottle, if you'll pardon the crassness of that. But it seems to me that if we were to legalize, one of the things that we might accompany it with is the libertarian argument. I come at this as a libertarian by philosophy, not as an extreme, but as a moderate libertarian, of limited government, maximum individual freedom of choice within certain constraints.

It seems to me that one of the problems with normal libertarian

approach is that somebody has got to pay the cost of treating and supporting all these people. In a libertarian society, you suffer the consequences of your own wrongs. If you refuse to work, you go hungry unless somebody else wants to support you. But one of the things I've been thinking about at this conference is that if we were to take that approach and to combine it with an approach that says, however, in order to receive any government benefit which includes a job, which includes welfare benefits, which includes public housing and so forth, you have to take a urinalysis and if you flunk that, or some other better less intrusive test, you are ineligible unless you are engaged in a rehabilitation program.

So that at least the people that were on drugs would not be forcing the rest of us to support them, and then, of course, if engaged in drugs while in a crime, you would not make that a defense to the crime. The act of voluntarily taking drugs would be interpreted hopefully as wrongful conduct and not as—you know, you can't—it's like you're killing your parents and throwing yourself on the mercy of the court as an orphan at some point. And the other side of it would be a tremendous educational program aimed at educating school children, voters, everybody, of the horrible consequences of drugs. But even having said that, I'm not at this point prepared to come out in favor of legalization.

John and I have some fun debates among ourselves and on the CB radio to and from Charlottesville, and I have on occasion taken that as an advocate. But I continue to think the best approach is not that, but the best approach, if it's going to work, has to deal with the demand side.

Indeed, one more last point. I teach international law, and I like to get my students to think, and I was teaching a class on state responsibility right after a class on the use of force. And I said, let me give you a hypothetical: what if we learned that the Soviet government was paying billions of dollars to American citizens to kill our government officials and violate our laws, would that create state responsibility? Well, of course, it would. And would that allow us to use force in self-defense? Well, most of them thought it would. And I said, well, let's change it. What if a group of Soviet citizens with the knowledge of their government were doing the same thing, and their government was not acting effectively to stop it, would that create state responsibility? Everybody, virtually everybody agreed. Could we use force? Well, they were sort of split. They wanted to look at the book again.

And then I said, okay, now reverse it. Now we're a bunch of Colombians, and we find that private American citizens are offering

billions of dollars in bribes to our citizens to kill our judges, kill our president, violate our laws, so they can have this narcotic they want. Is that a violation of international behavior? Does it create state responsibility, and their eyes got real big, and they said wait a minute. We know the Colombians are the bad guys in this, but maybe this is more complex than it looks. I think we have a duty to the rest of the world, and I think one of the problems right now is our citizens are bribing the world to violate their laws and give us drugs.

There are a lot of politicians that want to portray that we have a problem here, that these horrible Colombians are up here and forcing our people to use drugs. That's now that's happening. It may be convenient to get reelected as a politician, but our people are begging them to give them those drugs, and are offering them billions of dollars in bribes. We're the problem. Sure, there are evil people down south making a buck on this, but until we face the fact that the United States is the primary market on this and start doing something to get control of that, I don't think we're going to win this thing. I think we're going to spend billions of dollars.

We have got drug people out there that have an incentive to hook children on drugs, and I've not heard all the conference. I've been in and out trying to defend my unfortunate assassination remarks, and let me stress I don't believe in assassination. I believe that a lawful exercise of self-defense may be a different situation. From what I've heard, and I've heard some wonderful material, it's been a great conference. But I've not heard an answer that makes me think we're going to win this fight, and that leaves me frightened. I'll not stay and participate in the debate. I apologize. I've tried to stay out of this one, but when John dragged me in by saying, by the way, he believes in legalizing this stuff, I thought I ought to say something.

DR. MOORE: I have two others on the list here, but I can't resist one comment, Bob, before doing that. That I think it's a very easy target in my judgment to say that the real problem is nothing but demand, and it is really the evil American people who are taking drugs. I think the reality, Bob, is that there is a double-barreled problem on this. It requires someone to supply it. It requires someone to take it. It's both sides. Any effort to deal seriously with drugs has to have a supply side component and a demand side component.

DR. TURNER: I think that you're right.

DR. MOORE: There is no magic bullet. I think it is an enormous mistake to try to focus the whole thing either on demand side or on supply side or try to allocate blame. The only blame in terms of the

setting, in terms of governmental setting, is when you get governments that are, in fact, not committed to the fight against this, and are, in fact, abetting it. The Cuban government involvement is one we ought to talk about in the worst kind of blame. The Colombian government is doing its damndest to fight this thing. The United States government is doing its damndest to fight this thing.

DR. TURNER: I'm not sure that's true.

DR. MOORE: Well, there's a lot more, I think, we can do, and I think all of us are in agreement of that at this conference. But there is not some kind of total moral lapse on the part of the American people, *etcetera*, in trying to deal with this issue. But I would argue very strongly that the effort simply to deal with it on either the demand side or the supply side alone is a major mistake. You've got to deal with it on both sides.

DR. TURNER: Let me concede on that, John, and say you're right, but we're neglecting the demand side, and that's important, too.

DR. MOORE: Well, I don't know that we are. This whole conference focused on it, and we have never, for example, decided that organized crime on the supply side should be something we would not focus on. All we would do is work on the demand side, for example, of other kinds of organized crime issues in this setting.

DR. MOORE: This gentleman here.

MR. APPLE: My name is James Apple. I'm counsel with the Federal Judicial Center here in Washington. I want to maybe focus away from the cultural aspects of the problem and discuss briefly one idea that was thrown out by you, Professor Moore, and perhaps some others, and that is one method of control using our civil liability system. I was just speculating as you made those remarks about what would happen, for instance, if we made corporations and banking institutions liable, imposed civil liability on them if it was disclosed through the imaginative discovery by our trial lawyers of America that they were engaged in some kind of drug activities or that the banking institutions were engaged in money laundering?

That kind of statute would send shivers through the general counsels of the corporations and banking institutions of this country. I think that statutes like that or ideas like that would begin to focus the corporate power of this country on this problem because it would be affecting their wallets and their pocketbooks and their profits. To carry that one step further, I could imagine some kind of system where even countries who are engaging in drug activities or not controlling them sufficiently would expose their assets in the United States to seizure by

some civil litigation process.

I think those kinds of legislation, if it were possible, would begin to focus on the problem in such a way that the corporate powers of this country would soon realize that it's a problem worth discussing.

DR. MOORE: Let's just build on that for a moment, if I could, and I'm going to draft someone for a moment from the audience, too, who has, I think, some unique information about this. I'm wondering, David Brink, as our past president of the ABA, has the ABA really looked into a way in which we could mobilize the considerable talents of lawyers in the United States in trying to devise innovative national and international laws that can try to combat some of this. Has the ABA, and there is no reason to pick on the ABA, but the ABA is one that has the potential here, I think, to mobilize this in a unique way that I think almost no other organization in the country does, at any time had some kind of blue ribbon presidential task force on the drug problem? Do you think that it might be useful if something of that sort were to be put together that would really innovatively look at new ideas, et cetera?

MR. BRINK: I think it would be very useful. I do not think that we have had a task force to design a total program. President Shovan [sic], the outgoing president of this last year, did have a program which, I think, was quite helpful in the schools. He went into the schools in company with the president of the AMA and they pointed out known consequences from a medical point of view and known problems from a legal point of view.

While that did not deal with these international problems of interdiction and the like, it certainly served some educational function on the primary level in the demand side, which I think is so important however you come out on the issue of drugs on demand or any of these other issues. The demand side, they're both important, but the demand side is the most important. If there were no demands, then we would have no supply problem. And conversely, as this gentleman has pointed out, if we expend all of our efforts and are able to shut off the Andean connection completely, some chemist will come up with something that comes from Minneapolis or somewhere else because there will always be an answer to the supply as long as there is a demand.

However, back to your original point, I do think that the ABA could tackle this. I'm not sure everyone would then be satisfied with the result, but I think maybe the precedent started by President Shovan would be pretty good because the involvement of the medical profession to quantify whatever tests, remedies, chemistry, if you will, may be in-

volved and to put that into the solutions, might well be helpful. Perhaps a joint project.

DR. MOORE: Very helpful. I must say I'm very intrigued with the possibility of some of our best legal minds being brought together to look at innovative new proposals to try to make it more difficult for this trafficking to go forward. I had this gentleman and this one back here, then the lady.

MAJOR PREGENT: Sir, I'm Dick Pregent from the Office of the Judge Advocate General, U.S. Army. One comment I would like to hear is your response to the idea that Mr. McGinnis proposed, but before getting there, the title of the conference is "Strengthening the Rule of Law in the War Against Drugs and Narco-Terrorism." And it seems that the majority of the speakers have focused on the importance of international cooperation. At the same time, I've heard some extremely powerful people express ideas about unilateral action which are confusing and to some extent disquieting.

The idea of Mr. Barr's opinion and to some extent what Judge Sofaer had to say, but specifically with regard to Mr. McGinnis, do you buy off on the concept, Sir, of expanding the definition of attack to include justifying self-defense or collective self-defense to include the failure of the state, which is not supporting narco-terrorism or drug trafficking, but is simply failing in its effort to suppress it? Do you support that expanded definition of attacks, or do you think the international community would buy off on it? I would be amazed to hear how South American countries and Latin American countries would perceive this authority of the United States to reach out and touch?

DR. MOORE: Let me respond to that, not because this is something I proposed or have my heart in, by saying initially I think it's an incredibly peripheral issue. This is not the core of how we're going to deal effectively in my judgment with international narcotics trafficking. What I can talk about a little bit is something I spent a lot of time on which is the whole theoretical basis of individual and collective defense and aggression under the United Nations Charter. The starting point is that there is a debate among scholars in interpreting the scope of the defensive right in international law.

There is a large group, indeed by far the largest, that would include most scholars, most foreign offices, from virtually every country in the world other than the United States, that would take the view that the kind of attack which is contemplated for a response is the use of military force, the use of the military instrument. There is, however, in the United States at least a group of scholars, Professor Myres Mc-

Dougal would certainly be among them, who would take the position that what is really at stake here and what one really looks to in the scope of aggression is coercion from the territory of a state that is sufficiently intense as to give rise to expectations that in the absence of the use of the military instrument in response, that there is a very severe encroachment on territorial integrity and sovereignty, *etcetera*.

He has taken the position that economic coercion, for example, if intensive and extreme, and he doesn't mean peripheral kinds of things that are modest, but the degree of economic coercion that, in fact, is let's say ending the ability of a whole people to operate and threatening the starvation of the peoples of a country. That gives right to the rise of use of the military instrument in response.

I think that there is, and there have been a number of scholars that have written in support of that position, for example, in relation to the Arab embargo, the double oil shocks of the 1970s. I think there is a considerable policy argument in favor of that under the Charter of the United Nations if you take a purposive and functional approach. The thing that it's easy to be, that one has to be very careful about here, though, is shifting from a theoretical basis in saying, yes, it is possible to have certain kinds of things rise to an intensity that is sufficient, that the military force can be used in response, and then shifting to a conclusion that the ordinary setting in which a government is trying to some extent to stop drug trafficking from its territory and is not able to do it gives rise automatically to the use of military force.

I'm not sure of a single setting in the real world—I personally would not be able to find one that would justify the use of military force even if you accept the broader theoretical proposition in the case today. I would find it highly unusual, certainly that it would ever be applied in a setting where a country, the government itself is committed in the war against drugs. By the way, as a theoretical proposition, though, as you well know, in a setting even if a government were theoretically opposed to the use of its territory for attacks from insurgent groups, if it's the use of military force, and they're not effectively able to stop the insurgence groups from using their territory, you have a right of collective defense even against their consent to do it.

So it really does go back to that broader question. And I think that's just a debate, but after having gone into this whole theoretical discussion, let me just say when you really look at this, in the light of the reality and the facts in the world, I don't see a single case where that, it seems to me, is a serious issue in the real world. And for that reason, I can't find this a particularly important way of trying to re-

spond to this issue.

JUDGE DONOHUE: Just a response to somebody about the legalization of marijuana. Up in my area, the remark came out that they better legalize marijuana. Otherwise, we won't be able to get a judge, a federal Supreme Court judge or a state Supreme Court judge or any federal judge or state judge in about the next five to ten years when they ask them the question have you ever used drugs. And if they answer it, one of the law school deans told me, if they ever ask the students in his school, they'd all have to answer yes. So there won't be any judges if they use that question.

But going back to the real problem. For twenty-five years I was a judge, and I first met the drug situation back in 1965, and it emanated from the military. We have a military base next door to our place, and a corporal started the drug situation back there with codeine, codeine cough syrup. He started it in the high schools, passing it around to the kids, and they used to get codeine for a quick high for fifty cents. And that gradually escalated all the way up so we eventually became a major drug center, shall I say, in my area.

Thoughts started coming about how we should try to stall this or stop this. Judges originally started out sentencing people to jail for use of drugs, first offender. And the libertarians came out and thought that was too cruel, too hard. So they came out with what they call the rehab centers and that we should try rehabilitation and put people on probation. I remember a fellow, a strong drug user, who became a probation officer. He told me that the only reason he stopped using drugs was because he ran into a judge in Pittsburgh, Pennsylvania, who said to him, I'm going to give you a fifteen year suspended sentence for fifteen years. If you get caught using drugs again, you're going to do the fifteen years.

He said he got rehabilitated. He rehabilitated himself. I hate to say, I tried all sorts of programs, about everybody around, to try to find what the results were and what happened, and I came to one conclusion which is this. First of all, we have to start a program in the schools. We're trying to say no, the DARE program, just say no to drugs, but you have got to go a little further than just that. The kids now are changing from drugs. They're going back to cigarettes and tobacco. I hope you notice that. You notice we're finding eight and nine year old kids smoking. And back to that bad habit.

Now, we're going back to alcohol. Somebody said we legalized alcohol and that solved our problem. It didn't. All we did was create another problem. I mean what the hell? What's worse than an alco-



holic, and how tough it is for an alcoholic to get off the program? How tough it is for anybody to get away from cigarettes or smoking. It takes a lot of courage and a lot of gumption to do this. So we have got to start with the program, going back to the children in schools all the way through, either through using the medium, the television, and things like that and programs, and put them right in school with the best people we can get, the best teachers we can get, the best convincers we can get, to get out and start telling these students right in the classrooms that this is not good for you, you shouldn't use it, or at least weigh it before you do it.

Then we have got to start going back to the old property which some of you earlier alluded to in factors, we have got to start going back to respect, respect for people and property. We've forgotten that. Somebody said we're self-indulgent. We just want me. It's the me rule, the me rule. I'm going to take care of me first, and the hell with you. We have got to go back and start teaching some respect for people and property, and it's got to go back to the schools, and it's got to go back right into the families.

After I retired as a judge, I started a newspaper, and all I'm doing in my hometown is this thing, respect. I have what I call the empty game. I call it "excuse me, may I, please, thank you, you're welcome." Now simple little words, but let me tell you what's happened in one year in my community. I've got people saying those words. I've got people holding doors. I'm impressed down here in Washington. I walked around the streets. People say hello to me. I say hello back to them. My daughters tell me, I said to them it's amazing how Washington is so friendly. And she said, well, they're all people from out of town, they have no friends.

(Laughter.)

JUDGE DONOHUE: Now that's what my children tell me. But there's a lot to it, but we have got to go back to that. But now let me go back to the immediate past, which I think we have got to do about enforcement. We've been sitting on our duffs thinking rehabilitation is going to work, and it isn't. You can't pat people on the head and say, get on your way and go out to court, or if we send you to jail, we're going to send you in the front door and let you out the back door. You can push this down any way you want—but you have got to establish a national federal drug court, and basically we go out and if you want to do it, you have got to go out and staff it with a lot of retired judges.

(Laughter.)

JUDGE DONOHUE: They know how to put people in jail. They

don't want to come back and work because most judges, once you get away from the job, you say I don't want to go back and make decisions again. But bring them back in for a month, two months, three months, put them out in those—somebody mentioned using military camps. Put the courts in the military camps. And you got a jail right next to them that you can turn into a jail, and the jail is simple. People always say you have to put up big walls. All you've got to do is put up a fence. That's a jail. And most drug offenders are not violent people. They're drug users. They aren't violent people. All you've got to do is lock them up and say you get out of the habit and make it a drug-free environment, that's going to be your biggest problem.

But staff it with retired people, with retired judges and retired law men, so they work three months. For example, in Massachusetts we have a law for trafficking. It's a mandatory ten year jail sentence for trafficking in cocaine. In 1987, we had 800 arrests for trafficking in cocaine. We have eighty judges on the Superior Court to try the cases. Now to try a trafficking, with a mandatory case a lawyer has got to try it. He can't plea it unless they can make a deal to knock it down to a lower case, and if they try the mandatory drug case it's a ten year sentence. A lawyer has got to try the case. Otherwise, he's got a mal-practice suit when the guy goes away for ten years.

But to try a trafficking in cocaine case takes on the average of three to four weeks, and that's when everybody is working. So in Massachusetts, we have to take every one of our Superior Court judges for a whole year to try the 800 cases, and we still would have cases left over. They wouldn't do another bit of work. And that's why we've got to set up a special court, just handling drug cases. Now you could back it off if you want. The federal courts are backlogged the same way. They're horrible. All the courts all over the country are backlogged the same way. We put down hard sentences but you can't do that.

If you don't have the jails, they're going in the front door and out the back door. That's why I say take these military bases—somebody said Fort Dix is going to be closed—hell, you could turn that place and house 10,000 prisoners. You could keep them in company areas, small areas. You don't have to put them all in one big building. I went down to South Africa and watched how they ran a jail. All they do down there is they put three fences around a building. And they put dogs in between.

DR. MOORE: You're not citing this as a model for the United States now necessarily in how we set up our judicial system.

JUDGE DONOHUE: Well, I'll tell you what they said. They tell

me down in South Africa that crime dropped.

DR. MOORE: Well, we do have certain constitutional principles that are of fundamental importance in our system also--the whole question of how we treat people and some standards in doing that.

JUDGE DONOHUE: Oh, no question about it. I'm all for this.

DR. MOORE: I know that, Judge.

JUDGE DONOHUE: But I'm saying this thing here—I'm just saying how they run a jail. But the part I was going to go back and finish off with is this thing, and I'm done, and I've had enough to say, is if we don't establish a central federal drug court, a special federal drug court, forget the drug problem. We're never going to win if you're going to use the enforcement method. And I thank you kindly.

DR. MOORE: Judge, thank you very much, from the heart and very provocative.

(Applause.)

MS. BECKER: I'd like to make a comment, but not in regards to what he said.

DR. MOORE: Okay. Is there anyone that would like to respond to that? Go ahead.

MS. BECKER: My name is Donna Becker, and I'm a private attorney here in Washington, and I've been here for both days and listened to most of the speakers, and the first comment I'd like to direct is to the judge back there. He does have a hope of getting a judge who's never taken drugs. I've never taken drugs. I don't smoke. I don't drink. And I'm probably one of the younger people here. But there is some comments I would like to make, and it seems to me that a lot of the speakers don't seem to put the rule of law as the most important part of this conference.

I have heard a number of people who seem to feel that trampling the Constitution, shredding the Bill of Rights, is something that we should do without blinking. I don't agree. One person has suggested that he thinks that widespread drug testing is a good idea. I do not agree. If I applied for a job at any company that tried to submit me to drug tests, I would get up and leave, not because I'm a drug user because I'm not, but because it's a matter of dignity. And the same goes for protecting our rights and protecting international law.

If you treat people with dignity and maintain the value of our society and the rule of law, then you'll get it a lot faster than if you turn the place into a police state, and I thought that it was very important to make this point. Thanks.

DR. MOORE: Thank you very much. I think that's a very impor-

tant point indeed to remind us that one of the critical dimensions of the problem we're dealing with is, in fact, the full protection of something we as lawyers and we, more importantly in the democratic process hold as extraordinarily important, which are a set of guarantees relating to who we are and what we are and constitutionalism and the rule of law and the Bill of Rights. Those are things that are of great significance, great importance to us. They do interact with these problems.

Reasonable men and women may differ in the intersection of how some of these things interface and what the appropriate balance is, but we must never forget that those are very critical issues in front of us. Let me just make a comment. There really are a number of different ways in which the rule of law is relevant to this issue. One is precisely that. That on the one hand, we must not forget in the things we try to do that we set aside the basic guarantees of our own system and in any way be harmful and set a tradition that's harmful to that.

The second is in trying to mobilize the legal profession, to really get lawyers, as a group, to focus on this, and to say let's use our best legal brains, our best legal talent, to examine this problem, to expose them to the best experts on the nature of the problem from the supply side on one side all the way to the demand on the other, and say where are the pressure points in this system, in which new laws that are carefully crafted with appropriate processes might make a difference in the process.

Another is to call attention to how the rule of law itself is targeted in a very damaging, sinister way the kind of targeting, for example, that's going on against the rule of law in Colombia and Peru and Bolivia, to some extent, I suppose at this point. I'm less familiar with that. But that we learned from our luncheon speaker yesterday has already begun to creep over into the United States with the killing of judges and lawyers and prosecutors. That's something also that strikes at the very core of who we are and what we are in the overall process. So there are a number of respects where it seems to me the rule of law is very relevant as it intersects this subject matter.

Yes, the lady back here. And then Mr. Tragen again.

MS. NAGLE: Now, that we are talking about the rule of law, it struck me—last year I was talking with some of my professors down in Colombia, and the comment was that some lawyers up here from the United States have been going down to Colombia to learn a little bit about the culture, Spanish, and to learn about the rule of law, to be able to come back here and be able to defend those that are breaking the rule of law here in the United States by trafficking in drugs.

Now the whole purpose of this is trying to move lawyers to be aware of what is happening, and I think the whole purpose of this is to try to use the rule of law to corner those that are breaking it.

DR. MOORE: That's exactly right.

MS. NAGLE: So why don't we as lawyers try to have a whole movement around the United States, for the lawyers to be aware and say no, I'm not going to defend those that are breaking this rule of law that is threatening the future of the United States and to the whole world?

MS. BECKER: How do you know they're breaking it if they haven't been convicted? In this country, we're presumed innocent until proven guilty. You can't just point the finger and say that person is a drug dealer and then everybody abandons ship and leaves the person to their fate. That doesn't work.

MS. NAGLE: I'm talking about those Colombians, my fellow Colombians, that are caught *in flagrante*.

MS. BECKER: If they're caught *in flagrante*—

MS. NAGLE: I'm talking about those lawyers that already know and are aware of those that broke the law—

MS. BECKER: If they're caught *in flagrante*, there should be no trouble in convicting them according to the rule of law, but that's the whole point of what I was trying to say. You can't abandon the rule of law. The whole thing is the rule of law and drug addiction. If you abandon the Constitution, if you abandon international law, then what have you got left? Nothing. And if you abandon the rights of the accused, if you shred the sixth amendment, as Mr. Ratliff suggested, unfortunately yesterday, then you've got nothing.

(Laughter.)

MS. BECKER: You've got nothing. We do not have a leg to stand on, and then it becomes anarchy. So if you want to convict people, fine, convict them according to evidence, convict them according to rule of law. If they're caught *in flagrante*, it should be no problem to put them away. The fact that we have overcrowded jails would suggest that most people don't get off so easily. The fact that people want to turn all the abandoned military based into 10,000 person prisons—First of all, I don't think turning the United States into one big prison is a very good idea. Second of all, I don't think it is so easy for defendants to get off. It just simply is not.

If you abandon that, if you say, for example, that lawyers cannot accept money because it might be tainted with drugs, then you effectively eliminate the assistance of counsel to the accused. The whole

point of our legal system is to make sure that everyone's rights are protected, even the most venal people as well as innocent people. You can't say only innocent people deserve legal defense. Once you do, you've abandoned everything that any lawyer should ever believe in, and in this country, all lawyers are required to say that they will protect and defend the Constitution. If you do what you're suggesting, then that is to violate your oath as a lawyer.

MS. NAGLE: So get better prosecutors. But I do indeed know for a fact that in L.A. I have talked with many a police person, and they said we have caught people *in flagrante*, and they have been released.

MS. BECKER: It won't happen every time. It might happen here or there, but that's part of the imperfection of the system. I mean you just have to accept that.

DR. MOORE: Okay. Could I intervene for a moment because, in a sense, you're debating what I happen to agree with you is an important part, but a smaller part of the message that our judge from Peru was trying to give to us, which was to welcome the importance of trying to educate the bar in general about the nature of this problem. I think that she's absolutely right. I would share that. Someone from Peru knows uniquely how judges themselves and the rule of law is targeted in this overall process. But let me say the only point where I think for those of us that are lawyers in this that we would differ, and I would share this difference, is we cannot say that lawyers do not and that people don't have a right to defend and the lawyers can't do it.

What we're really trying to do in mobilizing the bar is to get the bar to look at new legal initiatives and ways of dealing with this problem effectively that will be able to get it under control. I mean unless we have the absolute perfect legal system by some kind of accident in dealing with this problem, most new problems that arise need laws to be tailored to deal with the setting. All we're proposing is that this is a setting where we really need to assemble some of the country's best experts to get them fully briefed from the experts on the nature of the problem, and to begin to look at innovative solutions in which law can fight back at what we have a lot of experience now in knowing can ultimately become targeting itself, an attack itself, terrorism itself, directed against the rule of law. But I would share your very important point again about the Bill of Rights protection that everyone has a right in such a case to be represented by counsel. Any other?

DR. MOORE: Thank you, Bill. David. Irving Tragen and then David Martin.

MR. TRAGEN: I would merely like to comment on this last dis-

cussion. I think, it is typical and symptomatic of the problem. We're dealing with a transnational criminal activity. We talked about supply and demand, and what makes this different. Both ends of the equation are controlled by the same people. When we begin dealing with the characteristics of this problem, whether you're dealing with the cartel in Medellin or the Mafia in New York or the Mafia in Italy, we get down to a basic characteristic: seventy to eighty percent of the cocaine trade is controlled by four or five cartels in Colombia.

We're not talking about free enterprise. We're talking about a controlled market. We're talking about interlocking directorates that go across national boundaries. We're dealing with something that looks like some of the James Bond movies. You remember Goldfinger. They were sitting around the table. There is every bit of evidence from materials we've got, we have enough evidence to show the degree of interrelationship. You sit down and talk to the people from Interpol, and they tell us that the Italian Mafia controls seventy to eighty percent of the worldwide traffic in heroin including much of the production in Mexico, Colombia, and Guatemala.

What we've really got is something very atypical under our penal law. We're dealing with something that is a mixture of the Sherman Antitrust type case and normal criminal activity. What I was trying to point out before is if you're talking about law enforcement, what are we really talking about? In a country like Peru, we're talking about how the police effectively deal with the problem of controlling production. And here I suggest that if anybody wants to analyze this phase of the police problem, there is an excellent book by Dr. Edmundo Morales called, "Cocaine: White Gold Rush in Peru," published in 1989 by the University of Arizona Press. It's a fascinating book.

On the cover is a PL-480 bag filled with coca leaf. It explains the sociological environment in which illicit trafficking occurs. Now the role of the police in that setting is very different from what it has to be, say, on the streets of Lima where on most street corners you can get a joint of bazuka, which is the first stage of manufacturing cocaine, for less than you pay for a normal cigarette. Then, there is a different police role in interdicting, the movement of the cocaine under the control of the Medellin or Cali cartels from Peru to Colombia.

Now I think it's true that almost all of the shipment from Peru and Bolivia are controlled by the cartels of Medellin. There is very little indigenous control of the second stage of movement that is after the initial production by anyone but the Colombian organizations. So we've got an integrated monopoly. Then we get down, they move into

Colombia, and you've got another question then. You've got the question of the control of chemicals that are required to convert the cocaine, the coca leaf into cocaine. You've got another whole area of criminology that has to be dealt with. Then you get into interdiction again. Then you're into money laundering, and then you get into a whole range of highly sophisticated police techniques, and finally you're into what our colleague over here mentioned, getting the evidence, together.

I'm sure the judge from Colombia can verify that the most difficult problem she had as a judge was getting her hands on the evidence, partly because the police aren't trained to collect the evidence and partly because they're afraid to keep the evidence. In other words, what I'm trying to say is we're dealing with a transnational criminal activity controlled by an interlocking directorate. So it really isn't supply and demand in traditional terms. We have the same people controlling supply and promoting demand. And under those circumstances, the challenge, I think, to us as lawyers is to begin to look at the problem in different terms, analyze the dimensions, and then see to what degree we can begin, not working with ourselves alone, but with all the other countries in this chain.

Let's take a country like Bahamas which started out merely as a transient point, and probably today has the highest incidence of drug abuse, of drug use, cocaine use, in the world. Why is that? Because when they identify a corruptible official, they pay him once or twice in cash, and then they pay him in kind, and once you've established he's an SOB, who the hell cares? He isn't concerned about what he's doing. He's interested in the money. So you get these sociological human consequences coming out of this activity. What I'm suggesting really is we've got a package that in international penal law offers us one of the unique opportunities to be pioneers in examining a whole range of issues.

That's what I'd like to end with as my contribution because I think it ties together this last debate that we had because we don't want to violate the rules of law, but what we've got to do is understand the nature of the crime, the felony, that we're dealing with.

DR. MOORE: What I would like to ask you as perhaps our best expert on the real facts of this syndrome and problem, is what would be the most helpful way for lawyer groups in the United States and Latin America to be working together on this? Because I also personally share your sense that notions of blame or anything else are useless. We're in this thing together, and what we really need is for the top



levels of the bar and from Latin America and the OAS and top levels in the United States to be working very closely together to see how we mutually handle the problem. Are there possibilities here that the Inter-American Bar Association might take the lead or the OAS? Should the American Bar Association take the lead? Should private organizations seek to bring the two groups together and promote discussions that might be fruitful in this area? What do you think would be most helpful?

MR. TRAGEN: I want to start by saying I don't think the answer is exclusively one thing or another. I think we have different levels. At the OAS in the Inter-American Drug Abuse Control Commission (CICAD), as I explained yesterday, we have taken what we have called legal development one of our two or three top priorities. What we have done is we've brought together representatives of attorney generals, ministers of justice, from all of the member countries at that point. We had eleven member countries in CICAD, and we brought three or four more. Other countries were also represented. Now we have 22 countries that participate actively in CICAD, ranging from Canada to Argentina.

What we did was to bring them together and we said, look, what is it, how is it that we ought to focus on the problem, and obviously we can't do everything. They said the first thing we need to do is begin to get some legal standards common to all of us. What are the five or six areas that you gentlemen consider to be the most important? The first one they mentioned was the precursor chemicals because if we can cut that off, you stop the manufacture of coca leaf into cocaine, *etcetera*, and you stop the production of poppy into heroin, and you can stop the production of cannabis into marijuana.

Now this is very important because the U.S. is the largest producer of the chemicals. Mexico produces some. Canada produces some. Brazil produces some. CICAD convened a group of eleven inter-American experts from Canada to Argentina to develop rules and regulations. They took as their judicial framework, as I pointed out before, Articles twelve and thirteen, of the 1988 U.N. convention, and we designed a model regulation, which we are now working with countries to try to get applied. This is one level.

Now we are going through a similar exercise in money laundering and bank secrecy. These have to be dealt with by representatives of governments. That's one area in which government to government, in the OAS, really is the best inter-American instrument for this process.

Then we have another whole area that we haven't really looked at

which is judicial cooperation. As I think Judge Luz Nagle knows very well, Latin American and U.S. legal systems are very different. I graduated from Boalt in 1945, and I went to Chile to get my master's, and the first thing I had to do was unlearn much of the way in which courts proceed, many of the principles of our law go back to code law as distinct from, I remember I studied under Max Radin, when we were dealing with Roman law, and to go back to a whole new mind-set.

We've got to get judges talking to judges. We've got to begin to understand how their systems work, and we've got to begin to understand how we can begin to work together. If I were a judge in Colombia, not understanding the U.S. system, and I received a request for extradition, my instinct would be to say that doesn't look like an order that would come out of my court. It isn't done the same way. So I think one of the great things that the Inter-American Bar and the American Bar can do working with our Latin American colleagues is begin a dialogue outside of government among the principal leaders in jurisprudential thinking in the hemisphere and see how we can focus on these issues.

Fortunately, we have a great ally in the Italians, and they have a great school at Syracuse dealing with penal law, and I think we might find a way of building this tripartite relationship, Europe, the United States, Latin America, to begin to open up some dialogue. I think this is a very important part of this equation and not merely limited to the drug problem, but it would probably have a favorable impact on other elements of penal law as well as civil law.

I think a third party that we need to do is in terms of a different kind of exchange among legislators. We now have the inter-parliamentary fora and we have parliamentary groups from the U.S. that go to Latin America. They have the Latin American parliamentary forum. They have the Andean parliament forum. But we really haven't structured many of these things to get legislators to begin to talk to legislators with a different kind of setting.

I remember that there is an AID program aimed at—I don't know what they're calling it now—modernizing the judicial system or modernizing legislation. You can't use those words. We aren't modernizing. We're helping them to examine, as maybe we need to examine, some of the systems and processes we use. I think we could go on, but what I really believe is once again you disaggregate and you begin to identify different instruments for different purposes. I think you know from your many years of experience within the U.S. executive branch, there's a tendency to want simple, general answers, and they want to

put it all on one sheet of paper, and that doesn't really lend itself to the kind of thinking that we need to do.

I think if you start disaggregating what the issues are, then I think you can find a lot of different tools to use and maybe it ought to be the ABA that takes the lead in creating that kind of consortium view of the resources that we have available to do it.

Let me close by referring to an experience I had. As the AID Director in Bolivia in 1966 when Chief Justice Warren came to Bolivia, my first political experience had been ringing doorbells for him when he was running for governor in the mid-'40s. I was quite overwhelmed to have the Chief Justice of the United States as my charge in Bolivia. What I found was that by introducing a question here and a question there, a debate could be started, a discussion could be started, between the Chief Justice of the Bolivian Supreme Court and the Chief Justice of the U.S. Supreme Court, and they began to see how totally different their systems were. And that's part of what we have to do. But, if we're going to bridge the gap in this interdependent world dealing with this transnational kind of problem, then we've got to begin to understand what it is we're talking about.

DR. MOORE: Thank you. That was very helpful indeed.

(Applause.)

DR. MOORE: I'm going to take David Martin as the last question here. Yes, Sir. This gentleman will be the real last question. I tell you that. We'll take you now, and then I'll take David as the last question.

MR. WHITLOCK: Thank you, Professor Moore. I'm Bill Whitlock. Two things. I wanted to make an observation just to underscore what Mr. Tragen was saying. At lunch, Congressman Smith observed that he did not think that we were quite turning the corner, and I agree. In order to turn the corner we must get to a situation where we experience control. I think intrinsic to everything you were saying and some of the other observations is we cannot be too specific. When we want to get control, we get very specific in all your points which is whatever circle we're in, whatever opportunities we may have to address the problems, if we can be very specific when we address them and those fourteen points that you observed or set out as a challenge or suggestion to us earlier today, Professor Moore, every one of those elements gave us an opportunity to be very specific in our circle, and to say how best can we deal with it.

Once we get specific, we have control. Once we get a sense of control we start to be able to turn the corner, and that's, I think, what we're trying to do. If I may, just a brief report. Earlier I mentioned to

Professor Moore that I was down at the FIPSE, the Fund for the Improvement of Post-Secondary Education, and I thought it might be of interest to the conferees to know that the Department of Education is seeking proposals for a program entitled "Approaches to Accountability in Prevention Programs, Drug Prevention Programs at Higher Education," and they are seeking proposals. Their focus is on promising new theoretical approaches to the individual and institutional leadership and responsibility and encouraging the formulation of new theoretical ideas.

It's about fourteen or fifteen small grants, but it's an effort on the Department of Education—there are other projects that they have in the works—and back home or with some of your educational institutions, if it was something that you thought you wanted to pass on, you might want to suggest that they contact the Fund for Improvement of Post-Secondary Education, the Department of Education. Thank you very much.

DR. MOORE: Thank you very much. David Martin is our final speaker, final participant.

MR. MARTIN: I have one comment I want to make and one proposal. The comment has to do with Bob Turner's definition of the libertarian attitude. If people want to smoke, let them smoke. Well, I always believed that the heart of libertarian philosophy had to do with the right of the individual to decide for himself. This is the situation where you run into certain contradictions. You give people the right to decide whether they will indulge in narcotics or not, and in effect, if they decide the wrong way, you are denying them of the right to make a free choice, a choice of their own for the rest of their lives.

They become slaves thereafter of the particular drug they imbibed when they made this faulty decision. Certainly if they realized what would happen, they would not have done it. So I don't think freedom of choice can be considered as an absolute value in covering all cases, certainly not where the freedom of choice may be stripped from the individual for the rest of his intellectual life.

Then I spoke yesterday about the hearings on marijuana which I organized and conducted. And about the almost universal opinion of the experts who testified that one of the effects of marijuana was that it interfered with the process of maturation so that it affected young addicts who had been marijuana addicts perhaps more than two or three years. These were the critical years of their adolescence. They never matured. The doctor who headed up the Phoenix House in New York, which was the biggest national rehabilitation institute, Mitch Rosen-

thal, told us that he was very afraid that if we failed to stem the marijuana epidemic, we would find ourselves confronted not in the far distant future, but in the very near future, with a large population of young adults who had never matured and who would have to be in the society one way or another for the rest of their lives.

This evidence, as I say, was confirmed by the other experts who testified. Now there is such a thing as the crime of genocide, and if one believes that the punishment should bear some relationship to the gravity or scope of the crime, then obviously the crime of genocide deserves the maximum possible punishment. We have in the case of narcotic trafficking a crime which I believe is equivalent to the crime of genocide. It is a crime *sui generis*, as one might say, compared with other crimes for which people are sentenced to long terms in prison. It qualifies as genocide because every year at least several thousand people, possibly as many as 10,000, are killed in the United States as a result of narcotics overdoses, and much more important than that is it qualifies, in my opinion, as a crime of genocidal magnitude because it destroys human capacities and human abilities to make free judgments, judgments that reflect the personality, the true personality of the person who is making them.

I believe that if the expression genocide has validity, then there should be such a thing as narco-genocide as a crime punishable by death. So in this one case, I am certainly in favor of the enactment of legislation that would qualify narco-genocide, establish it as a crime, punishable by the death sentence. That's my proposal.

DR. MOORE: David, thank you very much for a very interesting proposal, and provocative new title to be attached to some of this behavior. I would like to thank all of our participants and experts who participated in the whole program, joined in the discussion with us. We are much indebted to you, and I certainly learned a great deal out of this, and hope that we'll be able to distribute some of these materials more widely, and if so, that it will make a contribution in dealing with this problem. So we are dismissed, and thank you very much.

(Whereupon, at 4:00 p.m., the meeting adjourned.)