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M. Cherif Bassiouni

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INTERNATIONAL CRIMINAL LAW AND ORGANIZATION

ARTICLE

POLICY CONSIDERATIONS ON INTER-STATE COOPERATION IN CRIMINAL MATTERS

M. Cherif Bassiouni†

I. THE PECULIARITIES OF INTERNATIONAL CRIMINAL LAW

International criminal law¹ has always been a challenging subject, if for no other reason than its pluri-disciplinary nature.

† President, International Association of Penal Law; President, International Institute of Higher Studies in Criminal Sciences; Professor of Law and President, International Human Rights Law Institute, DePaul University. This article is being published simultaneously in Germany as part of the proceedings of an international workshop on "Principles and Procedures for a New Transnational Criminal Law", held at the Max-Planck Institute for Foreign and International Criminal Law, Freiburg, Germany, May 21-25 [1991].

¹ Although the term "International Criminal Law" may not have one universally agreed upon definition, the term embraces the following concepts: One, the application by an independent state of its criminal laws to acts committed by its own subjects or by foreigners outside the territory of the state. INTERNATIONAL CRIMINAL LAW 5-6 (Gerhard O. W. Mueller & Edward M. Wise eds., 1965). Two, the obligation of a state created by a bilateral or multilateral treaty or international customary law to sanction certain acts under its own national criminal law. *Id.* at 6-8. A quintessential example of the type of offence which a state has a duty to punish under treaties and international customary law is piracy. *Id.* at 8-9. Another such example is war crimes. A breach of the rules of warfare by the arm forces of one state may subject those persons captured by the enemy to punishment for the illegal acts committed prior to capture. *Id.* at 9-10. Three, crimes which, because of their character, are punishable in most civilized countries. *Id.* at 10-11. Such offences are said to be offences against the law of nations. *Id.* Four, modalities of co-operation between states to assist in the administration of justice. *Id.* at 11-12. An extradition treaty is one example.

Indeed, international criminal law is the convergence of international and regional law, and national criminal laws and procedures, with the addition of their respective related legal subjects. Today, international criminal law also includes the international, regional, and national protection of human rights.²

Perhaps the most important peculiarities of international criminal law are the different international, regional and domestic legal processes through which these multiple areas of the law interact. The techniques, modalities,³ structures and participants of these legal processes are radically different and no system or policy exists which regulates their interaction in the development and application of international criminal law.⁴ Thus, international criminal law is, all too frequently, the product of circumstantial opportunities.

The subject-matter of international criminal law encompasses: 1) crimes (both transnational and international)⁵, which constitute its substantive part, and 2) enforcement modalities which constitute its procedural part. The latter, however, does

² See, e.g., European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221, E.T.S. No. 5.

³ The term modalities refers to:

[the] ways and means of international co-operation in penal matters, such as extradition, various forms of investigative and judicial assistance, including letters and commissions rogatory, service of writs and record of decisions, appearances of witnesses abroad, transfer of proceedings, transfer of foreign prisoners and execution of sentences abroad, including supervision of the conditionally released in other countries

Seventh United Nations Congress on Prevention of Crime and the Treatment of Offenders at 16, U.N. Doc. A/Conf. 121/22/Rev.1 (1986).

⁴ M. Cherif Bassiouni, *Characteristics of International Criminal Law Conventions*, in 1 INTERNATIONAL CRIMINAL LAW: CRIMES 6-7 (M. Cherif Bassiouni ed., 1986).

⁵ Some distinguish international crimes as either transnational or international. Transnational crimes are predicated on the fact that their commission involves the crossing of state boundaries. Examples of transnational crimes include the theft of cultural property or the taking of hostages. International crimes, on the other hand, impact on the peace and security of humankind or substantially affect the common human values of the international community. Aggression, genocide, and torture are traditionally classified as international crimes.

The distinction between transnational and international crimes is obviously arbitrary and does not necessarily add much to the understanding of offenses that are internationally criminalized. Such criminalization may be predicated on certain policy factors. Defining a crime as either transnational or international, based upon the reason supporting its criminalization, is only relevant in determining the specific modalities of enforcement.

not only apply to international and transnational crimes, but also to the enforcement of national criminal law whenever it requires inter-state cooperation. Such a broad scope of international criminal law, coupled with diverse and multiple sources of law, requires at least a cohesive policy for this peculiar branch of the law.⁶

Substantive international criminal law is a product of international legal processes. Thus, transnational and international crimes are formulated by international and regional law-making bodies and are embodied in multilateral conventions.⁷ There are 315 international instruments, developed mostly on an *ad hoc* basis between 1815-1988, which cover twenty-two categories of offenses.⁸ Typically, substantive international criminal law in-

⁶ See Albin Eser, *Basic Issues Concerning Transnational Cooperation in Criminal Cases: A Problem in Outline*, Report of German Scientific Contribution to the Eighth United Nations Congress on Crime Prevention and the Treatment of Offenders, (Havana, Cuba, August-September 1990).

⁷ Customary international law also creates substantive international crimes as in the case of piracy and war crimes. Emphasis on customary international law and multilateral conventions to the exclusion of other such "general principles of law recognized by civilized nations" is a recognition of the need for international criminal legislation to satisfy the requirements of the principles of legality, which are part of domestic criminal law. Interestingly, these principles of law and principles of legality are cognizable to international law because they rise to the level of general principles of law, even though general principles of law recognized by civilized nations cannot be the basis for international crimes. For the sake of historical accuracy, there was only one instance where "general principles" were deemed to be creative of international criminal law and that was under the law of the London Charter of August 8, 1945 annexed to the Agreement for the Prosecution and Punishment of Major War Criminals of the European Axis, 82 U.N.T.S. 279, the IMT at Nuremberg interpreted the phrase "crimes against humanity" found in Article 6(c) as relying on "general principles of law recognized by civilized nations." See Roger S. Clark, *Crimes Against Humanity*, in *THE NUREMBERG TRIAL AND INTERNATIONAL LAW* 177, 193-4 (George Ginsburgs & Vladimir N. Kudriavtsev eds., 1990).

⁸ The twenty-two categories of offences are as follows: aggression; war crimes; crimes against humanity; unlawful use of weapons; genocide; apartheid; slavery and slave-related practices; torture; unlawful human experimentation; piracy; aircraft hijacking; threat and use of force against diplomats and other international protected persons; taking of civilian hostages; drug offenses; international traffic in obscene materials; destruction or theft of national treasures; environmental protection; theft of nuclear materials; unlawful use of the mails; interference with sub-marine cables; falsification and counterfeiting; and bribery of foreign public officials. See M. CHERIF BASSIOUNI, *INTERNATIONAL CRIMES: DIGEST INDEX OF INTERNATIONAL INSTRUMENTS 1815-1985* (2 vols. 1986) [hereinafter *DIGEST*], which provides 312 international instruments up to 1985. The three post-1985 instruments are: Montreal Protocol for the Suppression of Unlawful Acts of Violence at Airports Servicing Civil Aviation, adopted by the International Civil Aviation Organization, February 24, 1988, *reprinted in* 27 I.L.M. 627 (1988); Convention and Pro-

struments deal with any of the following ten mechanisms to combat criminality at the international level:

1. Explicit recognition of proscribed conduct as constituting an international crime, or a crime under international law;
2. Implicit recognition of the penal nature of the act by establishing a duty to prohibit, prevent, prosecute, punish, or the like;
3. Criminalization of the proscribed conduct;
4. Duty or right to prosecute;
5. Duty or right to punish the proscribed conduct;
6. Duty or right to extradite;
7. Duty or right to cooperate in prosecution, punishment (including judicial assistance);
8. Establishment of a criminal jurisdictional basis;
9. Reference to the establishment of an international criminal court or international tribunal with penal characteristics; and
10. No defense of obedience to superior orders.⁹

Of the above, six are among the very same modalities and techniques of inter-state penal cooperation which are also applicable to domestic crimes. They are as follows: recognition of foreign penal judgments, extradition, mutual legal assistance in penal matters, transfer of penal proceedings, transfer of prisoners, and most recently, the seizure and forfeiture of the illicit proceeds of crime.¹⁰

toocol From the International Conference on the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, March 10, 1988, I.M.O. Doc. SVA/CON/15, *reprinted in* 27 I.L.M. 668; United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, December 19, 1988, U.N. Doc. E/CONF. 82/15, *reprinted in* 28 I.L.M. 493 (1989) [hereinafter UN Drug Convention].

For the history of the UN Drug Convention, see United Nations Economic and Social Counsel, Final Act of the 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* United Nations, 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 (1985).

⁹ M. Cherif Bassiouni, *Characteristics of International Criminal Law Conventions*, in 1 INTERNATIONAL CRIMINAL LAW: CRIMES 7 (M. Cherif Bassiouni ed., 1986). Most recently, the seizure and forfeiture of assets from illicit activity has been instituted as an eleventh modality of international penal enforcement.

¹⁰ The seizure and forfeiture of the illicit proceeds of crime has been an element of inter-state penal cooperation since the 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, which contained such a provision. *See* UN Drug Convention, *supra* note 8, Art. 5. Article 5 of the UN Drug Convention provides, in pertinent part:

These modalities of inter-state cooperation are the very essence of enforcement and, without them, international, transnational, and even national crimes would be deprived of international enforcement methods. These mechanisms are found in substantive international criminal law conventions. Yet, they tend to be limited to one or a few provisions, are referred to in broad or general terms, and are ill-defined and lack specificity. This peculiarity can be explained in part by the lack of technical legal competence of the diplomats and other officials to whom the drafting of these instruments is entrusted. However, when these modalities are the subject of specialized or particularized conventions, it appears that states send more specialized officials to negotiate and draft these instruments. This practice results in more detailed and specific provisions,¹¹ and in part, explains

Each Party shall adopt such measures as may be necessary to enable confiscation of . . . proceeds derived from . . . narcotic drugs and psychotropic substances, materials and equipment or other instrumentalities used in [the manufacture or distribution of narcotic drugs]

Each Party shall also adopt such measures as may be necessary to enable its competent authorities to identify, trace, and freeze or seize proceeds, property, instrumentalities or any other things [used in or derived from narcotics manufacture or distribution].

Following a request made . . . by another Party . . . , the Party in whose territory [the things requested] are situated shall . . . submit the request to its competent authorities

Id.

The 1990 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, contains even more detailed and precise provisions governing the seizure and forfeiture of assets. E.T.S. No. 141, November 8, 1990, reprinted in 30 I.L.M. 148 [hereinafter COE Convention].

¹¹ This phenomenon is, perhaps, best illustrated by comparing the provisions on extradition and mutual legal assistance contained in the various Council of Europe instruments on European Inter-state Cooperation and the provisions contained in various multilateral instruments such as the following: the 1961 Single Convention on Narcotic Drugs and the 1972 Amended Protocols, 520 U.N.T.S. 151, 118 U.S.T. 1407, T.I.A.S. No. 6298; the 1971 Convention on Psychotropic Substances, 1019 U.N.T.S. 0, T.I.A.S. No. 9725; the 1979 Convention Against the Taking of Hostages, U.N. G.A.S G.A. Res. 34/145 (xxxix), 34 U.N. GAOR Supp. No. 46, 245, U.N. Doc. A/34/46, reprinted in 18 I.L.M. 1456 (1979); and the 1970 Hague Convention on Aircraft Hijacking, 860 U.N.T.S. 105, 22 U.S.T. 1641, T.I.A.S. No. 7192. A comparison of these instruments reveals that these provisions, as contained in multilateral instruments, are much more limited than similar provisions in single conventions. See M. CHERIF BASSIOUNI, INTERNATIONAL CRIMES: DIGEST INDEX OF INTERNATIONAL INSTRUMENTS 1815-1985 (2 vols. 1986). See also EKKEHART MULLER-RAPPARD & M. CHERIF BASSIOUNI, EUROPEAN INTER-STATE COOPERATION IN CRIMINAL MATTERS, LA COOPÉRATION INTER-ÉTATIQUE EUROPÉENNE EN MATIÈRE PÉNALE (3

why the eighteen Council of Europe Conventions on Inter-State Cooperation in Penal Matters are of a significantly higher technical legal quality than the international instruments elaborated both by the League of Nations and the United Nations.¹²

Considering, that the essence of international criminal law enforcement is the "indirect enforcement scheme,"¹³ which relies on states to carry out their enforcement duties by means of these enforcement provisions, the specificity of these modalities should be paramount. For the first time in a United Nations instrument, the 1988 Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances¹⁴ contains detailed provisions delineating a state's enforcement obligations. A broader regional convention, the 1990 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime contains equally as detailed provisions.¹⁵

Vols. 1987), reprinted in Vol. III appendix, pp. 1-30 in English and pp. 1-32 in French.

¹² The instruments generated by the Council of Europe are of a significantly better technical legal quality than other international instruments for three primary reasons. First, the 23 nations that comprise the Council of Europe are more cohesive than the 100-plus nations that participated in the drafting of the UN Drug Convention. As a result, the Council of Europe is not as concerned with maximizing the number of signatures as is the United Nations. Second, the Council of Europe, as with most regional law-making bodies, does not face the problem of conflicting legal and criminal justice systems. From a practical standpoint, the legal systems of the 23 nations that make up the Council of Europe are largely the same. Finally, the Council of Europe has the ability to spend more time, exert more effort, and expend greater resources in the conclusion of a treaty than does a body like the United Nations. Moreover, the Council of Europe is consulted by more experts than the United Nations and has the benefit of more general expertise and input.

¹³ The "indirect enforcement scheme" derives from the notion that states obligate themselves, through various regional and international instruments, to carry out the enforcement of international criminal law. The "direct enforcement scheme," on the other hand, presupposes the existence of an international criminal code, an international criminal court, and the existence of international enforcement machinery. For a thorough discussion of both schemes and the Draft International Criminal Code and the Draft Statute for an International Criminal Tribunal, see M.CHERIF BASSIOUNI, A DRAFT INTERNATIONAL CRIMINAL CODE AND DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL TRIBUNAL (1987).

¹⁴ *Supra* note 10.

¹⁵ COE Convention, *supra* note 8. The Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime sets forth specific measures that the signatory parties must adopt, such as confiscation measures, COE Convention, at Chap. II, art. 2, investigative measures, *id.* at Chap. II, art. 3, special investigative powers and techniques, *id.* at Chap. II, art. 4, legal remedies to preserve the rights of the accused, *id.* at Chap. II, art. 5. Chapter II, Article 6 describes the type of

Because substantive international criminal law is enforced indirectly by the cooperation of member-states and by their duties arising out of the various international instruments, one of the most important provisions in these instruments should concern criminal jurisdiction. Surprisingly, only seventy-one of the 315 international instruments contain a provision on criminal jurisdiction.¹⁶ While a few of these instruments identify ways to resolve jurisdictional conflicts, most fail to do so.¹⁷ For example, the 1988 International Maritime Organization International Convention on the Suppression of Unlawful Acts Against the Safety of Maritime Navigation, a treaty particularly concerned with issues of jurisdiction for offenses aboard civilian ships on the high seas, fails to resolve these problems.¹⁸

International criminal law instruments have also failed to recognize the importance of police cooperation to effective international law enforcement. Although a significant portion of mutual legal assistance and extradition treaties (and other instruments which contain such clauses) rely on police work and interstate police cooperation, international police cooperation has, thus far, been governed by informal arrangements based upon the traditional bonds of those engaged in police work.¹⁹

laundering activities that are to be criminalized.

Under Chapter III the signatory parties must assist each other in the identification and tracing of property used in the commission of any offences and the proceeds derived therefrom. *Id.* at Chap. III, § 2, art. 8. A party may transmit information to another state even if that information is not requested by the latter, if the information may provide assistance in the carrying out of criminal investigations. *Id.* at Chap. III, § 2, art. 10. Chapter III also contains detailed provisions concerning the request by one state to confiscate property used in the commission of a crime and the proceeds derived therefrom, which is situated in another state. *Id.* at Chap. III, § 3, art 11-12, § 4, art. 13-17.

¹⁶ M. Cherif Bassiouni, *Characteristics of International Criminal Law Conventions*, in *INTERNATIONAL CRIMINAL LAW: CRIMES* 10 (M. Cherif Bassiouni ed., 1986). For a thorough discussion of the issue of jurisdiction, see Christopher L. Blakesley, *Extraterritorial Jurisdiction*, in 2 *INTERNATIONAL CRIMINAL LAW: PROCEDURE* 3 (M. Cherif Bassiouni ed., 1987) and Haidong Li, *DIE PRINZIPIEN DES INTERNATIONALEN STRAFRECHTS* (1991).

¹⁷ Issues of criminal jurisdiction plagued the Achille Lauro incident. See Gerald P. McGinley, *The Achille Lauro Case: A Study in Crisis Law, Policy and Management*, in *LEGAL RESPONSES TO INTERNATIONAL TERRORISM: US PROCEDURAL ASPECTS* 323 (M. Cherif Bassiouni ed. 1988).

¹⁸ *Supra* note 8.

¹⁹ Jean Nepote, *The Role of an International Criminal Police in the Context of an International Criminal Court and Police Cooperation with Respect to International Crimes*, in 1 *A TREATISE ON INTERNATIONAL CRIMINAL LAW: CRIMES AND PUNISHMENT* 682 (M. Cherif Bassiouni & Ved P. Nanda eds., 1973).

Despite the steady rise in international police cooperation since the 1920's, not a single international convention governs or regulates inter-state cooperation among police agencies. Even ICPO-Interpol (Interpol),²⁰ with its limited jurisdiction and authority in the area of international law enforcement, has usually operated on a voluntary basis in agreements between domestic police agencies and Interpol. Since the 1960's, increases in drug trafficking, organized crime, terrorism, and transnational criminality have resulted in heightened interaction between Interpol and national police agencies.²¹ Nevertheless, such cooperation has been relegated to bilateral and informal arrangements which do not have the status of treaties.²²

The work done by police and intelligence agencies is crucial to the prevention, control and suppression of international, transnational and national criminality. However, absent regulation in international conventions, there are dangers inherent in unstructured and legally uncontrolled police activity across national borders. Likely dangers include: human rights abuses,²³

²⁰ The International Criminal Police Organization (ICPO-Interpol) came into existence in 1923 in order to promote mutual assistance and cooperation in law enforcement and the suppression of international crime. Mary J. Grotenroth, *INTERPOL'S Role in International Law Enforcement*, in LEGAL RESPONSES TO INTERNATIONAL TERRORISM: U.S. PROCEDURAL ASPECTS 375 (M. Cherif Bassiouni ed., 1988). For a discussion of Interpol's role in the suppression of terrorism, see BUDIMIR BABOVIC, *INTERPOL FACE AU TERRORISME* (1990). In 1971, the United Nations Economic and Social Council determined that Interpol should be considered an intergovernmental organization and should no longer be classified as a non-governmental organization. This classification was reiterated in 1982 in a letter from the United Nations legal adviser to the Interpol Secretary General. As of 1989, 150 nations were members of Interpol. See BUDIMIR BABOVIC, *COUNTRIES' DATES OF ACCESSION TO INTERPOL* 4-6, 35 (1990).

²¹ Mary J. Grotenroth, *Interpol's Role in International Law Enforcement*, in LEGAL RESPONSES TO INTERNATIONAL TERRORISM: U.S. PROCEDURAL ASPECTS 375-76 (M. Cherif Bassiouni ed., 1988)

²² In response to terrorism and international criminality, the European Economic Community, via the "Trevi Group" and "Pompidou Group," has engaged in the inter-state sharing of intelligence and police technology, exchange of police staff and information, and cooperation in public security. Like Interpol, both groups operate on the basis of operational police cooperation. Thus, neither group established a legal basis or an institutional structure for inter-state police cooperation. Ekkehart Müller-Rappard, *The European Response to International Terrorism*, in LEGAL RESPONSES TO INTERNATIONAL TERRORISM: U.S. PROCEDURAL ASPECTS 409-10 (M. Cherif Bassiouni ed., 1988).

²³ Of particular concern in the realm of human rights are incidences of torture and kidnapping. For a discussion of the role of human rights in international police cooperation, and in relation to Interpol in particular, see Budimir Babovic, *Interpol and Human Rights*, INT'L CRIMINAL POLICE REV. 4 (July-August 1990).

violations of privacy rights²⁴ and, at times, breaches of national sovereignty.²⁵

The absence of provisions governing inter-state police cooperation is particularly perplexing in that each of the six modalities of inter-state cooperation applicable to international, transnational and national crimes implicitly relies upon effective police cooperation. The inclusion of such a provision in mutual legal assistance and extradition treaties is important in two respects. First, a clause on inter-state police cooperation would increase the effectiveness of international law enforcement as a whole. Second, regulation of police authority would promote the observation of human rights norms and standards and would also prevent abuses. Another means of achieving the same goals would be the conclusion of a multilateral convention regulating the authority and role of the police in international law enforcement.

Enforcement Assumptions and Policies

As stated above, substantive international criminal law so far relies on the "indirect enforcement scheme" by establishing international duties upon states who have voluntarily accepted certain treaty obligations to enforce these obligations through their domestic criminal justice processes. The choice of one of two enforcement approaches is left to the state in what has now become the accepted maxim *aut dedere aut judicare*: to prosecute or extradite.²⁶ Some see them as alternative and others see

²⁴ The use, by national police agencies, of computer databases to compile data on offenders gives rise to personal privacy concerns and the need to protect personal data privacy. For an analysis of government use of computer databases in the battle against terrorism, see Yearwood, *Data Bank Control*, in *LEGAL RESPONSES TO INTERNATIONAL TERRORISM: U.S. PROCEDURAL ASPECTS* 249-76 (M. Cherif Bassiouni ed. 1988) and Budimir Babovic, *Interpol and Human Rights*, *INT'L CRIMINAL POLICE REV.* 4 (July-August 1990) (discussing computerization and the protection of personal privacy and individual rights).

²⁵ An example of this problem, which also implicates human rights and privacy concerns, is the cooperation between states in arranging the kidnapping or abduction of relatives across national orders as an alternative to extradition. See 1 M. CHERIF BASSIOUNI, *INTERNATIONAL EXTRADITION IN UNITED STATES LAW AND PRACTICE* 189-246 (2d ed. 1987).

²⁶ See 1 M. CHERIF BASSIOUNI, *INTERNATIONAL EXTRADITION IN UNITED STATES LAW AND PRACTICE* § 2-3 (2d ed., 1987). See also Decian Costello, *International Terrorism and the Development of the Principle aut dedere aut judicare*, 10 *J. INT'L L. & ECON.* 483

them as cumulative.²⁷

To effectively carry out these obligations, states rely on international criminal procedural law, which relies, in turn, on modalities and techniques of inter-state penal cooperation. Any obligations, however, are limited to the extent and the manner in which these modalities are embodied in a state's respective domestic legislation. The very obligation to prosecute or extradite is, therefore, dependent upon what a state's national criminal justice system permits and is capable of executing. In fact, no international standards, applicable to states, exist for carrying out the state's duty to prosecute. Furthermore, there are no penalties contained in international instruments for any international or transnational crime. There are, however, some guidelines in certain instruments such as the four Geneva Conventions of August 12, 1949 and the two Additional Protocols of 1977, providing that "grave breaches" receive a certain type of penalty which is different from other "breaches."²⁸ Thus, the implementation of international obligations is at best imperfect.

There are, however, other international implementation mechanisms which include non-penal modalities that do not em-

(1975); Edward M. Wise, *Some Problems of Extradition*, 15 WAYNE L. REV. 709, 720-23 (1969); Edward M. Wise, *Prolegomenon to the Principles of International Criminal Law*, 16 N.Y.L.F. 562, 575 (1970).

²⁷ See CHRISTINE VAN DEN WIJNGAERT, *THE POLITICAL OFFENSE EXCEPTION TO EXTRADITION: THE DELICATE PROBLEM OF BALANCING THE RIGHTS OF THE INDIVIDUAL AND THE INTERNATIONAL WORLD PUBLIC ORDER* 8, 158-62 (1980). See also Edward M. Wise, *Book Review*, 30 AM. J. COMP. L. 362, 370 n. 64 (1982). The issue was also discussed at the Eleventh International Congress on Comparative Law. See generally M. Cherif Bassiouni, *General Report on the Juridical Status of the Requested State Denying Extradition*, in *PROCEEDINGS OF THE ELEVENTH INTERNATIONAL CONGRESS OF COMPARATIVE LAW*, reprinted in 30 AM. J. COMP. L. (1982).

²⁸ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, signed at Geneva, 12 August 1949, 75 U.N.T.S. 31, 6 U.S.T. 3114, 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, signed at Geneva, 12 August 1949, 75 U.N.T.S. 85, 6 U.S.T. 3217; Geneva Convention Relative to the Treatment of Prisoners of War, signed at Geneva, 12 August 1949, 75 U.N.T.S. 135, 6 U.S.T. 3316, T.I.A.S. No. 3364; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, signed at Geneva, 12 August 1949, 75 U.N.T.S. 287, 6 U.S.T. 3516, T.I.A.S. No. 3365. Protocol I Additional to the Geneva Conventions of 12 August 1949, opened for signature at Berne, 12 December 1977, U.N. Doc. A/32/144 Annex I; Protocol II Additional to the Geneva Conventions of 12 August 1949, opened for signature at Berne, 12 December 1977, U.N. Doc. A/32/144 Annex II.

ploy domestic criminal justice processes.²⁹ These non-penal modalities are compliance-inducement mechanisms, whereas enforcement modalities rely on the coercive techniques of the domestic criminal justice processes of states and cooperating inter-governmental bodies like Interpol.

Integrating the Modalities of Inter-State Cooperation for the Prevention, Control and Suppression of International, Transnational and Domestic Criminality

The six modalities of inter-state cooperation, as described above,³⁰ arise under diverse law-making processes, namely: international, regional, and national ones.³¹ However, even within the context of these three law-making processes, the resulting prod-

²⁹ See Gerhard Mueller & Douglas J. Besharov, *Evolution and Enforcement of International Criminal Law*, in 1 INTERNATIONAL CRIMINAL LAW: CRIMES 59 (M.C. Bassiouni ed. 1986); Gerhard Mueller & Douglas J. Besharov, *The Existence of International Criminal Law and its Evolution to the Point to its Enforcement Crisis*, in 1 A TREATISE ON INTERNATIONAL CRIMINAL LAW 5 (M. Cherif Bassiouni & Ved P. Nanda eds., 1973).

³⁰ These modalities, which were listed on pages 3-4, are (1) recognition of foreign penal judgments (2) extradition (3) mutual legal assistance in penal matters (4) transfers of penal proceedings (5) transfer of prisoners and (6) the seizure and forfeiture of the illicit proceeds of crime.

³¹ See generally Ekkehart Mueller-Rappard, *The European System* 95 (Judicial Assistance and Mutual Cooperation in Penal Matters); Lech Gardocki, *The Socialist System* 133 (Judicial Assistance and Mutual Cooperation in Penal Matters); Alan Ellis & Robert L. Pisani, *The United States Treaties on Mutual Assistance in Criminal Matters* 151 (Judicial Assistance and Mutual Cooperation in Penal Matters); Dietrich Oehler, *The European System* 199 (Recognition of Foreign Penal Judgments); Helmut Epp, *The European Convention* 253 (Transfer of Prisoners); Julian Schutte, *The European System* 319 (Transfer of Criminal Proceedings); D. Spinellis, *A European Perspective* 351 (Securing Evidence Abroad); Dominique Poncet & Paul Gully-Hart, *The European Model* 461 (Extradition), in 2 INTERNATIONAL CRIMINAL LAW: PROCEDURE (M. Cherif Bassiouni ed. 1987). See also Gerhart Mueller, *Enforcement Models of International Criminal Law*, in NEW HORIZONS IN INTERNATIONAL CRIMINAL LAW 85 (1985); Julian Schutte, *Expanding Scope of Extradition and Judicial Assistance and Cooperation in Penal Matters*, in NEW HORIZONS IN INTERNATIONAL CRIMINAL LAW 79 (1985); UN Drug Convention, *supra* note 4, and the COE Convention, *supra* note 6.

The COE Convention, unlike the UN Drug Convention, is not limited to drug related offenses. Rather, the COE Convention defines a "predicate offense" as "any criminal offense as a result which proceeds were generated that may become the subject of an offence as defined in Article 6 of this Convention." Art. 1(e). The COE Convention is intended to combat all forms of serious crimes; especially drug offenses, arms dealing, terrorism or other offenses which generate large profits. See Final Activity Report: Draft Explanatory Report on the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds From Crime, July 25, 1990, at 3.

uct differs in scope and legal technique while lacking consistency and systematization. What is needed, instead, is the integration of these modalities into a comprehensive codification that would permit the cumulative and alternative utilization of these modalities to ensure their enhanced effectiveness. In this respect the national legislative approach adopted by Austria,³² Germany³³ and Switzerland,³⁴ which integrates all of these modalities of inter-state penal cooperation, is a valuable model. Hungary, Czechoslovakia and other countries are also considering the integrated approach in their codification reforms. Under this approach, the modalities of inter-state cooperation operate like multiple gears in a single gear-box, allowing states to shift from one modality to the next instead of being limited to only one gear at a time. This self same approach is needed at the regional and international levels.

While a number of regional and sub-regional multilateral agreements have been developed, their elaboration has been piecemeal. None of these agreements integrate the various modalities into a comprehensive, codified form of inter-state penal cooperation.³⁵

³² Austrian Law on Mutual Assistance in Criminal Matters. Bundesgesetz vom 4 Dezember 1979 ober 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, et al., INTERNATIONALES STRAFRECHT (1981).

³³ Germany (Act Concerning International Mutual Assistance in Criminal Matters) "Gesetz ober die Internationale Rechtshilfe in Strafrecht" of December 31, 1982, entered into force January 7, 1983, *Bundesgesetzblatt* 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 OTTO LAGODNY, *DIE RECHTESSTELLUNG DES AUSZULIEFERNDEN IN DER BUNDESREPUBLIK DEUTSCHLAND* (1987); THEO VOGLER, *AUSLIEFERUNGRECHT AND GUNDGESETZ* (1970); Theo Vogler, *The Expanding Scope of International Judicial Assistance and Cooperation in Legal Matters*, *DIE FRIEDENS-WARTE*, BAND 66, Heft 3-4, 287 (1986).

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

³⁵ 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); EKKEHART MULLER-RAPPARD & M. CHERIF BASSIOUNI, *EUROPEAN INTER-STATE COOPERATION IN CRIMINAL MATTERS (LA COOPÉRATION INTER-ÉTATIQUE EUROPÉENNE EN MATIÈRE PÉNALE)* (3 Vols. 1987), reprinted in Vol. III appendix, pp. 1-30 in English and pp. 1-32 in French. A special Committee of Experts has since been established to work on this project.

At the regional level, 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. This committee convened twice at the International Institute of Higher Studies in Criminal Sciences in Siracusa, Italy. There, the Committee of Experts determined that the Council of Europe should integrate all of the European Conventions into a single, integrated code of inter-state penal cooperation. This conclusion was supported by a Resolution of the Council of Ministers of Justice in 1987. In addition, the Council of Arab Ministers of Justice developed such a model code in 1988.³⁶ Regrettably, it has not received attention by the Arab governments, as those states have not yet made international penal cooperation a priority.

The integrated approach has been accepted at a relatively slow pace within international and regional organizations. This hesitation stems from the familiarity and comfort which government representatives feel toward the bilateral approach and with the process of gradually strengthening modalities in a piecemeal fashion.³⁷ Efforts by a few scholars and government experts to spur the multinational integrated approach has met with some reluctance in international conferences because some government representatives feel that such an approach may not be politically acceptable to their superiors.

Due, in part, to diplomatic timidity, regional and international organizations have not advanced beyond the traditional modalities discussed above. Even these modalities have not been made to work well, as they are clearly inadequate in coping with increased international, transnational and national criminality, particularly with respect to the new international manifestations

³⁶ See Council of Arab Ministers of Justice: A Collection of the Council's Documents, No. 2, January 1988, 96-148.

³⁷ As an example, see the U.S.-U.K. Supplementary Treaty on Extradition of 1986; accord Abraham D. Sofaer, *The Political Offense Exception and Terrorism*, 15 DENV. J. INT'L L. & POL'Y 125 (1986). Other commentators opposed the treaty. M. Cherif 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 DENV. J. INT'L L. & POL'Y 255 (1987); Christopher L. Blakesley, *The Evisceration of the Political Offense Exception to Extradition*, 15 DENV. J. INT'L L. & POL'Y 109 (1986).

of organized crime, drug traffic, and terrorism.³⁸ Consequently, international, transnational, and national criminal phenomena are not controlled as effectively as possible due to unwarranted political and diplomatic considerations, which limit states in their international penal cooperation.

It must be admitted, however, that this state of affairs is mainly due to the fact that government officials, whether in ministries of foreign affairs or justice, are not sufficiently knowledgeable in the field of international criminal law to envision better and more effective means of international cooperation. Instead, they persist in traditional ways, with their concomitant weaknesses, or they seek to develop less than lawful methods of accomplishing that which they can not seem to accomplish lawfully.³⁹ These practices pose very serious problems in the world of international penal cooperation.

Furthermore, the administrative and bureaucratic divisions, which exist among the national organs of law enforcement and prosecution impair the effectiveness of inter-state penal enforcement. National criminal justice systems consist of different sub-systems. The most common divisions are among law enforcement, prosecution, judiciary, and corrections.⁴⁰ In addition, within each sub-system, there are still separate bureaucratic and administrative units. All too frequently, each of these sub-systems is a self-contained entity with its own peculiar bureaucratic and administrative exigencies with each having a life of its own.

As a result, each sub-system defends its respective turf and supports its own methods, goals and purposes; all of which leads to difficulties of integration, and ultimately, to the fragmenta-

³⁸ See M. Cherif Bassiouni, *Organized Crime and Terrorism*, 4 EMORY J. INT'L L. 90 (1990) adopted from the author's report to the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders (Havana, Aug-Sept. 1990) A/Conf.144/NGO 1. See also, effective national and international action against: (a) organized crime; (b) terrorist criminal activities A/CONF.144/15. Report of the Interregional preparatory meeting . . . on topic I: Crime Prevention and Criminal Justice in the Context of Development: Realities and Perspectives of International Cooperation, A/CONF.144/IPM.1.

³⁹ Consider instances of abduction or kidnapping when states are unsuccessful in attempts to extradite particular relators. See M. CHERIF BASSIOUNI, 1 INTERNATIONAL EXTRADITION IN UNITED STATES LAW AND PRACTICE 187-246 (2d rev. ed. 1987).

⁴⁰ A fifth possible sub-system is social services, although social services are usually part of some or all of the others.

tion of the criminal justice system.⁴¹ Conversely, criminal organizations and individual offenders are not similarly hindered by the inefficiencies of bureaucratic and administrative divisions.

The international response to criminal phenomena which do not stop at national boundaries is piecemeal, divided, and ineffective. More significantly, few states make the effort to use all the existing modalities of inter-state cooperation and even fewer states seek to develop new modalities of cooperation in other fields. Such new modalities could include the following:

- i. sharing law enforcement intelligence;
- ii. increasing teamwork in inter-state law enforcement cooperation;
- iii. tracing international financial transactions;
- iv. developing effective national financial controls to trace proceeds of illicit activities; and
- v. developing regional "judicial spaces."⁴²

None of the above, however, should be construed or applied in a manner that violates international and regional human rights

⁴¹ A thorough discussion of the effects of bureaucratic sub-systems on the administration of criminal justice is contained in a report, prepared by this writer and presented to the Seventh United Nations Congress on Crime Prevention and the Treatment of Offenders (Milan, Italy Aug. 26 - Sept. 6 1985) at 40-43, A/Conf.121/NGO 1 (1986).

⁴² This latter idea was floated within the Council of Europe by France in the late 1970's but was discarded within that regional context. It has survived in discussions during 1989 among certain countries within that region, namely the Benelux countries and 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. *Supra* note 3. See Christine Van den Wyngaert, *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); Christine Van den Wyngaert, *L'Espace Judiciaire Européen: Vers une Fissure au Sein du Conseil de L'Europe?*, 61 REV. DROIT PÉNAL ET DE CRIM. 511 (1981); de Gouttes, *Variations sur L'Espace Judiciaire Pénal Européen*, 33 RECEUIL DALLOZ SIREY 245 (1990); de Gouttes, *Vers un Espace Judiciaire Pénal Pan-Européen?*, 22 RECEUIL DALLOZ SIREY 154 (1991); 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); M. Marchetti, *ISTITUZIONI EUROPEE E LOTTA AL TERRORISMO* (1986); F. Mosconi, *L'Accordo Di Dublino Del 4/12/1979, Le Comunità Europee E La Repressione Del Terrorismo*, LA LEGISLAZIONE PENALE, 543 (No. 3, 1986) referring to the European Judicial Space. See also CONSIGLIO SUPERIOR DELLA MAGISTRATURA, *ESTRADIZIONE E SPAZIO GIURIDICO EUROPEO* (1979); SCHENGEN: INTERNATIONALIZATION OF CENTRAL CHAPTERS OF THE LAW ON ALIENS, REFUGEES, SECURITY AND THE POLICE (H. Meijers et al. 1991).

norms and standards.⁴³

A multilateral or regional integrated approach is an eminently desirable course of conduct and both the Council of Europe and the United Nations could significantly contribute to the field of international criminal justice by developing such a model. Any such model should also include new approaches to the problems of criminal jurisdiction.

The United Nations General Assembly adopted a set of measures approved by the Eighth United Congress on the Prevention of Crime and Treatment of Offenders (Havana, August-September, 1990) which included the following: measures for international cooperation for crime prevention and criminal justice;⁴⁴ a model treaty on extradition;⁴⁵ a model treaty on mutual assistance in criminal matters;⁴⁶ and a model treaty on the transfer of proceedings in criminal matters.⁴⁷ These model treaties are expected to provide a useful framework for states interested in negotiating bilateral arrangements in these areas; however, they are too general and are not integrated.⁴⁸

The Organization of American States has, in the last few years, followed in the footsteps of the Council of Europe and developed, *inter alia*: 1) the American Convention on Human Rights; 2) 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; 3) various instruments concerning extradition, asylum and international penal law; and 4) the establishment of the Inter-American Drug Abuse Control Commission via the Inter-American Program of Action of Rio de Janeiro Against the Illicit Use and Pro-

⁴³ See 49 REVUE INTERNATIONALE DE DROIT PENAL (No. 3 1978) and in particular the General Report of Professor Stefan Trechsel *id.* at 541.

⁴⁴ G. A. Res. 45/107 (1990).

⁴⁵ G. A. Res. 45/116 (1990).

⁴⁶ G. A. Res. 45/117 (1990).

⁴⁷ G. A. Res. 45/118 (1990).

⁴⁸ For a discussion of the differences in approach and effectiveness between the United Nations and regional bodies, like the Council of Europe, see *supra* note 12. Despite these institutional differences, and in recognition of the fact that the United Nations has not adopted an integrated approach, this writer has propounded such an approach in a report submitted to a Committee of Experts Meeting at ISISC (Siracusa) June 1990 and presented to the Eighth United Nations Congress on Crime Prevention and the Treatment of Offenders (Havana, Cuba, Aug.-Sept. 1990) A/Conf.144/NGO5, 31 July 1990, *reprinted in* 15 NOVA L. REV. 354 (1991).

duction of Narcotic Drugs and Psychotropic Substances and Traffic Therein.⁴⁹ Qualitatively, the European Conventions on Inter-State Cooperation⁵⁰ are moving into the stage of second generation, whereas the OAS and U.N. are still at the stage of first generation. However, we are now at a time when we need a third generation of international instruments.

II. PRINCIPLES AND POLICIES FOR THE INCREASE IN EFFECTIVENESS OF THE "INDIRECT ENFORCEMENT SCHEME"⁵¹

In order to render the international system of prevention, control and suppression of domestic, transnational and international criminality more effective, the following recommendations are offered:

1. Recognition of the rule *aut dedere aut judicare* as a *civitas maxima*⁵² and development of international minimum standards of compliance, including standards for effective, good faith prosecution and extradition;

2. Recognition of a ranking of criminal jurisdiction in this order: territoriality, nationality, passive personality, protected interest, and universality and development of rules and mechanisms for conflict resolution, including compulsory adjudication before an International Criminal Court, the International Court

⁴⁹ For a synopsis of OAS activities in the area of inter-state penal cooperation, see Dr. Hugo Caminos, Asst. Sec'y of Legal Affairs for the Organization of American States, Comments to the 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 (Siracusa, Italy June 24-28, 1990) (on file in the office of M. Cherif Bassiouni, DePaul University College of Law).

⁵⁰ See EKKEHART MULLER-RAPPARD & M. CHERIF BASSIOUNI, EUROPEAN INTER-STATE COOPERATION IN CRIMINAL MATTERS, LA COOPÉRATION INTER-ÉTATIQUE EUROPÉENNE EN MATIÈRE PÉNALE (3 Vols. 1987), reprinted in Vol. III appendix, pp. 1-30 in English and pp. 1-32 in French.

⁵¹ The author submitted a report on this topic to a Committee of Experts Meeting at ISISC (Siracusa) June 1990 and to the Eighth United Nations Congress on Crime Prevention and the Treatment of Offenders (Havana, Cuba, Aug.-Sept. 1990) A/Conf.144/NGO5, 31 July 1990, reprinted in 15 NOVA L. REV. 354 (1991). The International Law Commission has subsequently reported favorably on this position. See Report of the International Law Commission on the Work of its Forty-Third Session, 29 April — 19 July 1991, U.N. GAOR 46th Sess. Supp. No. 10, U.N. Doc. A/46/10 (1991).

⁵² 1 M. CHERIF BASSIOUNI, INTERNATIONAL EXTRADITION IN UNITED STATES LAW AND PRACTICE § 2-3 (2d rev. ed. 1987); Gerhard Mueller, *International Criminal Law: Civitas Maxima*, 15 CASE W. RES. J. INT'L L. 1 (1983).

of Justice or regional tribunals;⁵³

3. Granting individual victims the right to initiate prosecution as *partie civile*, including countries other than that of their nationality;⁵⁴

4. Codification of international and transnational crimes and their inclusion in the national legislation of all countries;⁵⁵

⁵³ See Christopher Blakesley, *Extraterritorial Jurisdiction*, in 2 INTERNATIONAL CRIMINAL LAW: PROCEDURE 3 (M. Cherif Bassiouni ed., 1987); HAIKONG LI, *DIE PRINZIPIEN DES INTERNATIONALEN STRAFRECHTS* (1991).

⁵⁴ This idea was accepted by the United Nations Committee on Crime Prevention and Control on the basis of a proposal made by a Committee of Experts meeting at ISISC (Siracusa) for the implementation of the United Nations Declaration on Basic Principles of Justice for Victims of Crime and Abuse of Power G.A. Res. 40/34, U.N. GAOR, 40th Sess., Supp. No. 53, at 213, U.N. Doc. A/40/53 (1985). See INTERNATIONAL PROTECTIONS OF VICTIMS, 7 NOUVELLES ETUDE PÉNALES (M. Cherif Bassiouni ed., 1988).

⁵⁵ See 60 REVUE INTERNATIONALE DE DROIT PÉNAL (No. 1-2, 1989) and in particular the General Reports of Professors Triffterer at 29 and Gardocki at 89. The Fifteenth International Penal Law Congress, held in Vienna, October 1989, adopted a resolution to that effect. See PROCEEDINGS OF THE FIFTEENTH INTERNATIONAL PENAL LAW CONGRESS (1991).

The Association Internationale de Droit Penal (AIDP) has been a leader in this effort since 1926. See 5 REVUE INTERNATIONALE DE DROIT PÉNAL 275 (1928). The Association's former president made contributions to this effort prior to 1926 in his work VESPASIAN V. PELLA, *LA CODIFICATION DU DROIT PÉNAL INTERNATIONAL* (1922). Subsequently the AIDP sponsored a project directed by the author, then its Secretary-General, which was presented to the Sixth United Nations Congress on Crime Prevention and The Treatment of Offenders (Caracas, Venezuela, Aug.-Sept. 1980) and published as M. CHERIF BASSIOUNI, *INTERNATIONAL CRIMINAL LAW: A DRAFT INTERNATIONAL CRIMINAL COURT* (1980), translated into French by Christine Van den Wyngaert as *Projet de Code Pénal International*, 51 REVUE INTERNATIONALE DE DROIT PÉNAL (vols. 1-2, 1980), which was followed by a symposium issue of commentaries, 51 REVUE INTERNATIONALE DE DROIT PÉNAL (vols. 3-4, 1980); the Draft Code was translated into Spanish by Professor Jose Luis de la Cuesta and was published as *DERECHO PENAL INTERNACIONAL PROYECTO DE CODIGO PENAL INTERNACIONAL* (1983); and it was translated into Hungarian by the Hungarian Ministry of Justice in 1984. A revised edition was published in 1987 as M. CHERIF BASSIOUNI, *A DRAFT INTERNATIONAL CRIMINAL CODE AND A DRAFT STATUTE FOR AN INTERNATIONAL CRIMINAL TRIBUNAL* (1987).

In 1947, the United Nations began working on the codification of certain international crimes and produced in 1954 a Draft Code of Offences Against the Peace and Security of Mankind, 9 U.N. GAOR Supp. No. 9 at 9, U.N. Doc. A/2693 (1954), reprinted in II YB INT'L L. Com. 112-22 (1954); since 1982, see the annual reports of the International Law Commission each reprinted in the Yearbook. For a recent assessment, see Hans-Heinrich Jescheck, *Developments and Future Prospects*, in 1 INTERNATIONAL CRIMINAL LAW: CRIMES 83 (M. Cherif Bassiouni ed. 1986); Edward M. Wise, *Perspectives and Approaches*, *id.* at 101; Sharon A. Williams, *The Draft Code of Offences Against the Peace and Security of Mankind*, *id.* at 109. See also FARHAD MALEKIAN, *INTERNATIONAL CRIMINAL LAW* (2 vols. 1991); Edward M. Wise, *International Crimes and Domestic Criminal Law*, 38 DEPAUL L.REV. 923 (1989); DIETRICH OEHLER, *INTERNATIONALES*

5. Developing means by which to detect abuses of power by those public officials who may commit international offences or who, by purposeful omission, are derelict of their duties to enforce international criminal law;⁵⁶

6. Integrating modalities for inter-state penal cooperation in a codified fashion. This should be done in specialized international and regional instruments and in national legislation for application to international and transnational crimes, as well as to domestic crimes requiring inter-state cooperation;⁵⁷

7. Development of a convention on inter-state cooperation between law enforcement agencies setting forth the means, methods and limitations of such cooperation, including the protection of fundamental human rights and the right to privacy. This systematized approach should be included in an integrated code of inter-state penal cooperation;

8. The consistent and specific inclusion of the integrated modalities of enforcement in all substantive international criminal law conventions;

9. Development of new modalities of inter-state cooperation and enforcement mechanisms similar to those outlined above;

10. Development of education and training programs in international criminal law at the level of legal education as well as within public agencies⁵⁸ and specialization programs for judges, prosecutors and law enforcement officials in international criminal law aspects of their work.⁵⁹ A specialized cadre of legal tech-

STRAFRECHT (2d. ed. 1983); CLAUDE LOMBOIS, DROIT PÉNAL INTERNATIONAL (2d. ed. 1979); STEFAN GLASER, LE DROIT PÉNAL INTERNATIONAL CONVENTIONEL (2 vols. 1977-79); Leslie C. Green, *An International Criminal Code Now?* 3 DALHOUSIE L.J. 560 (1976); Yoram Dinstein, *International Criminal Law*, 5 ISRAEL YEARBOOK OF HUMAN RIGHTS 55 (1975); OTTO TRIFFTERER, DOGMATISCHE UNTERSUCHUNGEN ZUR ENTWICKLUNG DES MATERIELLEN VÖLKRESTRAFRECHT SEIT NURNBERG (1966); ANTONIO QUINTANO-RIPPOLLES, TRATADO DE DERECHO PENAL INTERNACIONAL E INTERNACIONAL PENAL (2 vols. 1955-57).

⁵⁶ See *supra* note 54.

⁵⁷ See *supra* notes 32 through 35.

⁵⁸ See United Nations Guiding Principles for Crime Prevention and Criminal Justice in the Context of Development and a New International Economic Order adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders (hereinafter Guiding Principles from the Seventh United Nations Congress on Crime Prevention)(Milano, Italy, 26 August - 6 September 1985) A/Conf.121/22/Rev./1. For a Commentary on the "Guiding Principles," see 6 NOUVELLES ETUDES PÉNALES 121 (1985).

⁵⁹ Guiding Principles from the Seventh United Nations Congress on Crime Preven-

nicians should be developed in each government and within international, regional and inter-governmental organizations to draft instruments and provisions on international criminal law;

11. International, regional, inter-governmental and non-governmental organizations and academic institutions should develop educational, training, professional and practical materials in international criminal law which can be widely used by all professional categories;⁶⁰

12. Development of networks of information and criminal justice data-sharing within states and as between states;⁶¹

13. Providing and requiring increased technical assistance to states;⁶² and

14. Development of regional centers for the accumulation of specialized library materials, documents, and research with the capacity to provide technical legal advice to government and public agencies and to academic and scientific organizations.

All of the above recommendations must be applied in conformity with international, regional and national human rights norms and standards. This caveat is particularly important in light of some law enforcement branches. In this respect, it should be stated that the observance of human rights norms and standards does not reduce the efficiency or effectiveness of the criminal justice system. The inefficiency of criminal justice derives from a variety of other factors.

Suffice it to observe that if any successful industrial or commercial enterprise, in today's world of modern management techniques, was administered like many of the criminal justice systems, that enterprise would cease to be successful and would eventually become bankrupt. The symptoms of the bankruptcy of our criminal justice systems are all too evident, from law enforcement to corrections, as almost every aspect needs reform.

III. CONCLUSION

Since the end of World War II, international, transnational, and national incidents of crime and the number of offenders

tion, *supra* note 58.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

have consistently increased. The distinction between the increase in the incidents of crime and the number of offenders is critical because any system of criminal justice is based on substantial compliance with the law. Thus, the system is only equipped to deal with a particular, limited number of offenders. As the number of offenders increases, the criminal justice system's resources become strained. Eventually, the system becomes unable to handle the increased volume of offenders and ultimately breaks down.⁶³

At the inter-state level, other factors which have enhanced this phenomenon are the extraordinary ease of inter-state movement of persons and goods and the free-flow of financial transactions in a worldwide banking system that provides maximum flexibility and anonymity. National criminal justice systems, which are no longer capable of meeting their domestic challenges, must face the added difficulties of pursuing offenders, and seeking evidence in multiple states. However, the lack of expert personnel and the limited resources allocated by governments to such endeavors and to inter-state penal cooperation render these processes slow and ineffective.

Governments believe that the problems in extradition and other forms of international cooperation stem from approaches which tend to elevate the procedural rights of the requested person to the detriment of the process.⁶⁴ The argument is not entirely without merit, but it is limited to occasional effects and ignores endemic and operational causes. One of these causes is the limited number of experts among judges, prosecutors, and administrative officials working in this field. They face a large

⁶³ In fact, the increased number of offenders has caused many states to decriminalize certain activities in a variety of categories. These categories of offenses are, instead, treated in the administrative law rather than in the criminal law context. Such treatment has extended to the development of alternative modalities designed to ease the added strain on the criminal justice system, such as restitution, victim compensation, and arbitration in crimes which involve patrimonial and personal injury matters. For example, the Council of Europe's Committee of Ministers recently adopted a directive concerning the establishment of arbitral tribunals for claims arising out of the 1990 Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime. Rec. No. R (91) 12 (9 September 1991).

⁶⁴ See M. Cherif Bassiouni, *Introduction to Proceedings of the International Conference on Extradition held at ISISC (Siracusa)*, 62 *REVUE INTERNATIONALE DE DROIT PÉNAL* (Nos. 1-2, 1991).

volume of cases with limited resources and personnel.

Probably the most serious of all problems is bureaucratic divisions which burden the administration of criminal justice and sometimes paralyze the system. Even those law enforcement agencies which have exhibited increased capacity for inter-state cooperation have become less concerned with the proper application of the law. As some of these public officials engage in questionable or unlawful practices such as abduction, they compel greater procedural rigidity and tighter judicial controls. The cumulative effect of these and other systematic and operational deficiencies reduces the speed and effectiveness of the processes of inter-state penal cooperation.

Operational problems, though more visible, are not, however, the most serious causes of the systemic problems in inter-state penal cooperation.⁶⁵ Many states still favor bilateral treaties and make extradition and other forms of cooperation a consequence of, and contingent upon, their political relations. Thus, governments reduce procedural barriers to extradition and other forms of cooperation with friendly nations and increase these barriers with less friendly ones.⁶⁶ Extradition and other forms of cooperation are therefore still a process of political accommodation. They should be a judicial process based on an international *civitas maxima* free from political considerations.⁶⁷

A new approach is needed whereby modalities of inter-state cooperation are regarded as an objective and politically neutral international judicial process which preserves international standards of legality and human rights protections in its judicial and administrative workings. It is particularly important to under-

⁶⁵ Other problems derive from the fact that today's approach is the same as it was in 1268 B.C. when Ramses II and King Hatussilli included an extradition clause in their peace treaty. Not only was this the first extradition clause in the history of treaties, but it was also the first, and to the best of my knowledge, the only major peace treaty to contain such a provision. What was deemed a necessary component of peace between nations 3,260 years ago is still valid today; even though not entirely for the same reasons. See M. CHERIF BASSIOUNI, 1 *INTERNATIONAL EXTRADITION IN UNITED STATES LAW & PRACTICE* 6 (2d rev. ed. 1987).

⁶⁶ See M. Cherif 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 *DENV. J. INT'L L. & POL'Y* 255 (1987)

⁶⁷ See Albin Eser, Edward M. Wise & Christine Van den Wyngaert, in 62 *REVUE INTERNATIONALE DE DROIT PÉNAL* (Nos. 1-2, 1991).

stand that the protection of individual human rights is not and should not be placed in a confrontational relationship with the effectiveness of the process.

Multilateralism should replace the archaic inefficient and politicized bilateralism, and all modalities of inter-state penal cooperation should be integrated. Thus, multilateral treaties and national legislations should integrate the following modalities: extradition; legal assistance; transfer of criminal proceedings; transfer of prisoners; transfer of sentences; recognition of foreign penal judgments; tracing, freezing and seizing of assets derived from criminal activity; and, law-enforcement and prosecutorial cooperation. Only then will these complementary processes work to the benefit of ensuring efficiency without sacrificing proper legal procedures and violating individual human rights.⁶⁸ Lastly, we must not forget the need to establish an International Criminal Court.⁶⁹

Without the intellectual and technical contribution of scholars and experts and without the leadership of international and regional organizations, states will probably continue to pursue familiar courses charted by years of practice, even though that practice has proven unsatisfactory. Instead, states should explore new courses in the hopes of discovering the best route to a brave new world of effective inter-state penal cooperation.

⁶⁸ Stefan Trechsel, 49 *REVUE INTERNATIONALE DE DROIT PÉNAL* (No. 3, 1978); Resolution of Twelfth International Penal Law Congress in *ACTES DU XIIIE CONGRÉS INTERNATIONAL DE DROIT PÉNAL* (Hambourg, Sept. 22, 1979) 553-64 (Hans Heinrich Jescheck ed. 1980).

⁶⁹ See M. Cherif Bassiouni, *The Time Has Come for an International Criminal Court*, 1 *IND. INT'L AND COMP. L. REV.* 1 (1991). See also a report submitted to a Committee of Experts Meeting at ISISC (Siracusa) June 1990 and presented to the Eighth United Nations Congress on Crime Prevention and the Treatment of Offenders (Havana, Cuba, Aug.-Sept. 1990) A/Conf.144/NGO5, 31 July 1990 reprinted in 15 *NOVA L. REV.* 354 (1991) and M. Cherif Bassiouni, *Draft Statute: International Criminal Tribunal*, 15 *NOVA L. REV.* 373 (1991).