*Nova Law Review*

*Volume* 15, *Issue* 2 1991 *Article* 2

# Eight United NAtions Congress On The Prevention Of Crime And The Treatment Of Offenders

M. Cherif Bassiouni*

*

# Eight United NAtions Congress On The Prevention Of Crime And The Treatment Of Offenders

M. Cherif Bassiouni

**Abstract**

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.

**KEYWORDS:** offenders, treatment, crime

UNITED NATIONS

EIGHTH
UNITED NATIONS CONGRESS
ON THE PREVENTION OF CRIME
AND THE TREATMENT OF OFFENDERS
Havana, Cuba, 27 August to 7 September 1990

Dist.
GENERAL

A/CONF.144/NGO ISISC*
31 July 1990

ORIGINAL: ENGLISH/
FRENCH

*International Institute of Higher Studies in Criminal Sciences
Institut Superieur International des Sciences Criminelles
Istituto Superiore Internazionale di Scienze Criminali

---

# 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

---

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.

February 1, 1990
Corrected April 20, 1990
United Nations
Crime Prevention and Criminal Justice Branch
(Vienna)
*Report*

# 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

---

## 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.

---

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.

---

# PART A

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

## 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.[1]

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, *Prinzipen Der Internationalen Straafrechts* (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:[2]
   (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

---

*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 Pênal 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 Pênal International* (1952); S. Glaser, *Introduction à L'Etude du Droit International Penal* (1954); A. Quintano-Ripolles, *Tratado De Derecho Penal Internacional e International 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 Pênal* (1972); 1 M.C. Bassiouni & V.P. Nanda, *A Treatise on International Criminal Law* (2 vols. 1973); *La Belgique Et Le Droit International Pênal* (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 Statue 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.[3]

4. International crimes as evidenced by conventional and customary international law invariably contain one or both of the following elements:[4]
   (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.[5]
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.[6]
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[7] 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."[8]

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,[9] 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[10] and Protocols I and II of 1977.[11] 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.[12]
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*

---

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 crimin sine lege*[13] 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.[14]
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:[15]

---

13. Ancel, "LA RÈGLE *Nulla poena sine lege* DANS LES LEGISLATIONS MODERNES," in *Annales de l'Institut de Droit Comparè* 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 Pênal et de Criminologie* 889 (1966). For national approaches *see* R. Merle & A. Vitu, *Traitê 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 Morandiâre, *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 Vassali, "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.[16]

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,

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.[17]

## 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[18] and that

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,[19] 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

---

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.[20]

## 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).

---

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.[21] 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.[22] Most international criminal law conventions contain provisions on extradition and mutual judicial assistance.[23] 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.[24] They are: Latin America and

---

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 an 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,[25] the Arab states,[26] the Benelux countries,[27] the Scandinavian countries,[28] an agreement involving some African countries and France,[29] and the Commonwealth countries.[30] 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.[31] 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.

---

*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. Borgoñón, *Aspectos Procesales de la Extradicion en Derecho Español* (1984); H.A. Boukhriss, *La Coopération Pênale 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 AMERICAIN," 185 *Recueil des Cours, Academie 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 Tractanblad* 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,[32] the Federal Republic of Germany,[33] and Switzerland.[34] 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.[35] 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.[36] 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.

---

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), BGBI. Nr. 529/1979. *See also* K. Schwaighofer, *Auslieferung und Internationionales 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) "GESET 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 Rechtestellung des Auszuliefernden in der Bundesrepublik Deutschland*, (1987); T. Vogler, *Auslieferungsrecht and Gundgesetz*, (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.[37] 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

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.[38] 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.[39]

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:

---

38. *See* F. Mosconi, "L'ACCORDO DI DUBLINO DEL 4/12/1979, LE COMUNITA EUROPEE E LA REPRESSIONE DEL TERRORISIMO," *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, *Instituzioni 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 Counsel, 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.

---

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.

---