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Enhancing international law enforcement cooperation, including extradition measures

Workshop 1: Enhancing International Law Enforcement Cooperation, including Extradition Measures**

Background paper

Summary

The present paper describes key trends, practices and recent developments in both law enforcement cooperation and international cooperation in criminal matters, including extradition and mutual legal assistance. It outlines the evolution of both informal and formal international cooperation, identifying challenges and problems to be addressed in each relevant field.

The paper reflects the most important developments both in terms of operational activities and international instruments and at the regional and international levels. Emphasis is given primarily to the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 and the United Nations Convention against Transnational Organized Crime. These representative examples of multilateral instruments contain comprehensive provisions on international cooperation. The paper also recognizes the need to strengthen international cooperation mechanisms, by capitalizing on past experience and moving forward from traditional concepts and policies that are no longer effective enough, in particular in fighting transnational organized crime and international terrorism. It concludes by highlighting the need for an integrated approach to international cooperation in criminal matters, so that its separate modalities are used in complementary ways. This helps avoid piecemeal arrangements or action that impedes the proper administration of justice.

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I. Introduction

1. Crime was traditionally treated as a local or at most national issue and therefore investigation and prosecution of crime was long considered to be confined within national boundaries. Consequently, criminal law remained almost wholly territorial, concerned only with acts or omissions that had been committed in the territory of the forum State. Offences committed abroad were not a concern of national authorities, which were correspondingly not willing to assist the authorities of another State to bring offenders to justice, nor to collect evidentiary material necessary for initiating or conducting criminal proceedings or to take away their crime-related property.

2. This view of law enforcement and criminal justice no longer holds true. Offenders may seek to evade justice by crossing international borders. Furthermore, economic, computer and environmental offences can have cross-border effects even if the offender does not leave his or her own country. Organized criminal groups and terrorist groups are becoming increasingly mobile and often deliberately take advantage of international borders, for example by planning their offences in one State, carrying out various elements of the offences in other States and perhaps ultimately transferring the possible proceeds of the crime to yet other States. Even where crime itself is not transnational in character, authorities have come to realize the advantage of exchanging information on the modus operandi of offenders and on investigative techniques.

3. Despite the fact that, in view of the above, international cooperation in criminal cases has become not only useful but even a necessity, the evolution of that cooperation has until recently been relatively slow, especially because it was considered difficult and time-consuming to try to bring a case together when the suspect, the victim, key evidence, key witnesses, key expertise or the profits of crime were located outside a State's jurisdiction. Dealing with such cases can be so daunting that the file may be put aside, perhaps with the fervent hope that the authorities in the other countries will take up the matter. If, however, judicial and law enforcement authorities continue to demonstrate such reluctance and remain passive in the face of transnational crime, this will only encourage offenders to continue their activity.

4. In order for a cross-border case to be pursued successfully, the investigator and the prosecutor need, above all, information, legal tools and resources. Information is needed on such matters as to which State he or she must turn (for example, in order to secure the necessary testimony or physical evidence, have the suspect apprehended and returned, have a competent court assume jurisdiction and initiate proceedings or have the proceeds of crime confiscated) and how the request should be made so that it leads to the hoped-for result in a timely manner. The mechanisms needed are, accordingly, related to certain modalities of international cooperation in criminal matters, namely, mutual legal assistance, extradition, transfer of proceedings in criminal matters and freezing and confiscation of the proceeds of crime.[1] The legal tools also include the domestic legislation that is necessary in order to ensure that the international agreements and arrangements not only have been incorporated into domestic law, but can work in practice. Finally, the resources include, above all, a sufficient number of well-trained personnel who are able to use the legal tools in an appropriate manner and have the necessary trust and confidence

in the operation of the law enforcement and criminal justice system of the foreign State in question.

II. The evolution of informal and formal international cooperation

5. During the 1700s and early 1800s, when the major transnational law enforcement concerns were related to piracy, the slave trade, smuggling and cross-border forays by bandits, the tendency was for some States to take unilateral action to make arrests and bring the offenders to justice. This could take the form of blatant incursions into foreign territory (with or without the support of law enforcement colleagues on the other side of the border). Examples were seizures of suspected pirate or slave-trade ships even when they lay in the territorial waters of a foreign State.

6. Such informal and unilateral actions were an unsatisfactory response to a growing problem. Unilateral action can create unnecessary tensions between nations. Furthermore, under international law, States may not intervene in the domestic affairs of other States. Today, unilateral action is very much the exception. It was replaced at first by informal cooperation in law enforcement and in the gathering of intelligence. Such informal cooperation continues to be in widespread use, especially between law enforcement agencies representing States with close political ties.

7. More structured forms of cooperation in law enforcement are much more recent. These include the posting of liaison officers; bilateral and multilateral agreements and arrangements on law enforcement cooperation and on the sharing of law enforcement information; and cooperation within such structures as the International Criminal Police Organization (Interpol), the European Police Office (Europol) and the Schengen Agreement.

8. Judicial cooperation in criminal matters was slower to emerge compared with the cooperation in law enforcement. The tools available are based on bilateral and multilateral agreements and arrangements or, in some cases and in the absence of such agreements and arrangements, directly on national law. The earliest international agreements and arrangements were concluded on a bilateral basis. The advantage of bilateral agreements is that they can be tailored to the specific needs of the States in question and can be expanded, amended or (if necessary) terminated relatively easily. They are adaptable to the specific interests of the two States, which is a particular concern if differences between legal systems must be overcome. Their disadvantages, on the other hand, are that they are very resource-intensive to negotiate, especially for smaller or developing States that cannot afford an extensive international negotiating programme and that their increased number inevitably entails lack of uniformity.[2]

9. Multilateral agreements (conventions) have several signatories. They are more difficult than bilateral agreements to draft, amend and terminate. The implementation of some multilateral agreements may require a permanent infrastructure (for example, a secretariat), which in turn requires the investment of additional resources. At the same time, however, multilateral agreements provide a greater degree of stability to international cooperation. By entering into multilateral

conventions, States parties are signalling their intention to establish lasting rules and institutions based on mutual solidarity and shared responsibilities. Moreover, accession to a multilateral agreement relieves the State in question of the need to enter into a number of different bilateral agreements, each of which may require different procedures. Finally, the extension of the geographical scope of multilateral agreements on cooperation in crime prevention and criminal justice lessens the possibility that offenders can evade justice by operating in or from, or escaping to, States that are not parties to such agreements.

10. A very recent and novel variation of a multilateral agreement has emerged within the framework of the European Union. Under articles 24 and 38 of the Treaty on European Union, as amended by the Treaty of Nice,[3] the Council of the European Union may conclude agreements with one or more States or international organizations also in the field of police and judicial cooperation in criminal matters. On this legal basis, agreements between the European Union and the United States of America were signed on 25 June 2003 on extradition and on mutual assistance.[4] Those agreements supplement and to a large extent update the existing bilateral agreements between individual member States of the Union and the United States.

11. International cooperation need not be based only on formal agreements between States, as domestic law may allow the authorities to engage in various forms of cooperation. Moreover, where the authorities of two States have worked in close contact with one another (for example because of extradition cases, requests for mutual assistance or general concerns about transnational crime), they generally build up a relationship of trust. This may again lead to less formal forms of bilateral cooperation between the central authorities (such as exchange of officials at departments or ministries of justice or of the interior) or for example between the local authorities on both sides of a border (in particular, police and customs authorities). Such forms of cooperation may in time be guided by bilateral executive agreements between the agencies involved.

III. Law enforcement cooperation

12. Because law enforcement is one of the more visible and intrusive forms of the exercise of political sovereignty, States have traditionally been reluctant to cooperate with foreign law enforcement agencies. That attitude has slowly changed with the growing understanding both of the shared interest in combating organized crime, drug crime and terrorism, in particular, and of the importance of cooperation as a response to transnational crime.

13. Both informal and formal law enforcement cooperation, however, have been hampered by a number of problems, such as the diversity of legal systems; the diversity of law enforcement structures; the absence of channels of communication for the exchange, for example, of basic information and criminal intelligence; and the diversity in approaches and priorities.

Diversity of legal systems

14. Because of the diversity of legal systems, investigative techniques that have proved useful in one State may not be allowed in another. This applies, for example, to such techniques as electronic surveillance, controlled delivery, undercover

operations, the promise of immunity from prosecution or a reduced sentence in return for cooperation in the investigation and the use of anonymous witnesses. If an investigative technique is legal in one State (State A) but not legal in another (State B), this may result in at least two types of problem. The first is that State A will be frustrated by the inability of the law enforcement authorities of State B to use what State A regards as an effective tool. The second is that the judicial authorities of State B may not allow the use of any evidence that has been gathered through the use of what, for State B, are illegal techniques, even if the evidence has been obtained in a jurisdiction where the evidence was acquired legally.

15. In response to this problem, key United Nations instruments encourage State parties to allow for the use of certain special investigative techniques. For example, article 20 of the United Nations Convention against Transnational Organized Crime (General Assembly resolution 55/25, annex I), refers in this respect to controlled delivery, electronic and other forms of surveillance and undercover operations.[5] These techniques are especially useful in dealing with sophisticated organized criminal groups because of the dangers and difficulties inherent in gaining access to their operations and gathering information and evidence for use in domestic prosecutions or in other States parties in the context of mutual legal assistance schemes.[6]

Diversity of law enforcement structures

16. The diversity of law enforcement structures has resulted, for example, in confusion over which foreign law enforcement agency to contact, the duplication of efforts and, in some cases, competition between agencies, thus causing inefficiencies in the use of limited resources. The need for operational secrecy in, for example, electronic surveillance and undercover operations, especially when combined with a lack of confidence and trust, may lead to a lack of willingness to share criminal intelligence, both domestically and internationally.

17. A number of provisions in the key United Nations instruments focus on overcoming such diversities and deficiencies and on strengthening cooperation and assistance of an operational nature between law enforcement agencies, such as cooperation in conducting inquiries and establishing joint investigative bodies (see art. 9, para. 1 (c), of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988;[7] art. 19 of the Organized Crime Convention; and art. 49 of the United Nations Convention against Corruption (General Assembly resolution 58/4, annex)). These have been used on an ad hoc basis by the law enforcement agencies of a few States.[8] Joint investigative teams can be set up when a criminal investigation requires close cooperation among two or more States. They consist of representatives of law enforcement agencies or other competent authorities of the States in question. The question of competence that invariably arises when representatives of law enforcement agencies from different States come together to work on operational issues is dealt with by designating a representative of a law enforcement agency of the host State as the leader of the team and by requiring that the team carry out its operations in accordance with the law of that host State. Furthermore, in carrying out their tasks, the members of the team take into account the conditions that have been set by their own authorities.

18. Another law enforcement area where enhanced operational cooperation could be envisaged relates to the protection of witnesses. Article 24 of the Organized Crime Convention requires, inter alia, that States parties consider entering into agreements or arrangements with other States for the relocation of witnesses who give testimony concerning offences covered by the Convention, and, as appropriate, their relatives and other persons close to them.[9] The protection of witnesses is a particular difficulty in many small countries where even anonymous witnesses can be identified with relative ease and can then be subject to retaliation or intimidation.

Absence of channels of communication

19. The absence of channels of communication results in an inability to obtain both operational information (data that would be useful in responding to specific offences and offenders) and general information (for example, data on forms of, and the extent of, cross-border crime). Article 27 of the Organized Crime Convention encourages States parties to cooperate closely with one another, for example by enhancing and, where necessary, establishing channels of communication between their competent authorities, agencies and services in order to facilitate the secure and rapid exchange of information concerning all aspects of the offences covered by the Convention, strengthen the cooperation in conducting inquiries, provide items for analytical and investigative purposes, exchange information on offenders' modi operandi or exchange personnel, including the posting of liaison officers.[10]

Diversity in approaches and priorities

20. As a result, finally, of the diversity in approaches and priorities, law enforcement agencies from different States may fail to agree on how to deal with a specific cross-border form of crime or whether the limited law enforcement resources should be expended on certain types of investigation.

21. In an effort to overcome the problems mentioned above, the types of approach increasingly used include the posting of liaison officers, bilateral and multilateral agreements and arrangements, the provision of technical assistance and cooperation within the framework of international structures.

Liaison officers

22. The role of liaison officers in law enforcement is to provide a direct contact with the law enforcement and government authorities of the host State, develop professional relationships, and foster mutual trust and confidence between the law enforcement agencies of the two States.[11] Although liaison officers do not have any law enforcement powers in the host State, they can nonetheless use their contacts to gather information that may be of benefit in preventing and detecting cross-border offences and in identifying the offenders responsible and bringing them to justice. They can also use those contacts to advise the law enforcement and prosecutorial authorities of the host State, as well as their own corresponding authorities, on how to formulate a formal request for assistance. Once such requests are submitted, the liaison officer can then follow up on the requests in an attempt to ensure that the request is complied with successfully and in a timely manner. This is of particular value when the legal systems of the two States differ widely.

23. Because of the costs involved in posting a liaison officer to another State, liaison officers tend to be sent only to those States with which the sending State has already had a considerable amount of cooperation. In order to reduce costs, a liaison officer can be made responsible for contacts not only with the host State but also with one or more other States in the region. Another possibility is to have one liaison officer representing several States. For example, the Nordic States have collectively sent several liaison officers to select host States around the world.

Bilateral and multilateral agreements and arrangements

24. The growing number of bilateral and multilateral agreements and arrangements on law enforcement deal primarily with cooperation in law enforcement training and with the exchange of information. Such arrangements, understandably enough, have emerged primarily between and among the law enforcement agencies of States with close political ties and with mutual trust and confidence.

Technical assistance projects

25. In addition to more general agreements and arrangements, the law enforcement agencies of a number of countries have assisted in technical assistance projects designed to improve the law enforcement capacity of the target State. These technical assistance projects have been planned and carried out within the framework of international organizations (such as the United Nations, the International Monetary Fund, the Asian Development Bank, the World Bank, the Inter-American Committee against Terrorism and the Association of South-East Asian Nations), non-governmental organizations or Governments, or they have been planned and carried out directly between the law enforcement agencies of the two States concerned.

26. On a more informal level, individual law enforcement agencies exchange visits with law enforcement agencies from other countries. This type of person-to-person contact fosters mutual trust and confidence, as well as an international network of law enforcement personnel. The same function is served by international law enforcement associations, through their meetings, publications and web activities.

Cooperation within the framework of international structures

27. In view of the above, cooperation within the framework of international structures should be envisaged. Relevant examples include the work of Interpol,[12] Europol,[13] States of the Schengen Agreement[14] and the Southern African Regional Police Chiefs' Cooperation Organization.[15]

28. Generally, Member States need to focus on considering ways and means of increasing the efficiency and effectiveness of law enforcement cooperation mechanisms, in particular those for combating transnational organized crime. In that context, international cooperation could be enhanced through the development of more effective systems of information-sharing at the regional and international levels on significant trends in the development of organized criminal groups and their activities.[16] Moreover, regional databases could be established for the reliable analysis of data and sharing of information, either directly or through United Nations entities.[17] The European Union information-sharing system could also be used as the basis for similar action in other regions.[18]

29. The effectiveness of any information system, such as the Interpol system of notices and the Schengen databases, depends on the accuracy and timeliness of the information provided. At the same time, the acquisition, storage, use and international transfer of operational data give rise to questions of the legitimacy, transparency and accountability of law enforcement actions. If there is an absence of legal controls and judicial supervision, this may lead to a potential for abuse. Mechanisms for the effective gathering, analysis and use of operational data must take into consideration the need for full respect of fundamental rights. Wherever databases are created to assist law enforcement, attention needs to be paid to ensuring that national data protection legislation is adequate and extends to the operation of such databases not only nationally, but also internationally.[19]

IV. Extradition

30. For a long time, no provisions or international treaties existed on the conditions for extradition or on the procedure that should be followed for surrendering a fugitive to a requesting State for the purpose of prosecution or enforcement of a sentence.[20] Extradition was largely a matter of reciprocity or comity. The generally accepted view is that, in the absence of a binding treaty, there is no international obligation to extradite. However, there is a growing trend to recognize the duty to extradite or prosecute, in particular with certain international crimes (see below).[21]

31. The treaty-making practice in the field of extradition has been expanded since the late 1800s. In the period after the Second World War, the increase in the number of bilateral treaties or agreements, in particular, was significant. Common law States have made wide use of bilateral treaties, usually supported by national legislation to regulate the extradition proceedings. Civil law-based systems resort to national legislation, as well as treaties, reciprocity and comity. Furthermore, multilateral conventions on extradition have been prepared within the framework of the Organization of American States,[22] the League of Arab States,[23] the African and Malagasy Common Organization,[24] the Economic Community of West African States,[25] the Council of Europe,[26] the Commonwealth,[27] the Benelux countries,[28] the Nordic countries,[29] the European Union[30] and the Southern African countries.

32. The most recent stage in the evolution in extradition is marked by the mutual recognition of arrest warrants, whereby an arrest warrant issued by a competent authority in one State is recognized as valid by one or more other States and is to be enforced.[31] At the beginning of 2004, a new procedure started being implemented within the European Union introducing the so-called European arrest warrant, which actually replaces the traditional extradition proceedings among member States.[32]

33. In addition to the general treaties on extradition, provisions on extradition have also been included in several international conventions that deal with specific types of crime. Perhaps one of the best-known examples is the 1988 Convention, article 6 of which deals with extradition. The extradition provision in the Organized Crime Convention (art. 16) was drafted largely on the basis of the 1988 Convention.[33]

34. Despite the existence of a number of bilateral and multilateral extradition treaties, the network is far from comprehensive. Further treaties continue to be

needed and existing treaties should be reviewed to see if their coverage could be expanded or their procedure brought up to date. In order to promote new extradition treaties and to provide guidance in their drafting, the United Nations has prepared a Model Treaty on Extradition (General Assembly resolutions 45/116, annex, and 52/88, annex). States should also consider adopting domestic legislation on extradition, which can be used in two ways: firstly, where extradition treaties or arrangements exist, as a procedural or enabling framework not with a view to replacing or substituting a treaty in force, but in order to support its implementation; and secondly, in the case of countries that extradite in the absence of a treaty, as a supplementary, comprehensive and self-standing framework for surrendering fugitives to the requesting State. The United Nations Office on Drugs and Crime (UNODC) has also drawn up a model law on extradition to assist interested Member States in drafting and implementing such legislation.[34]

35. Recent trends and developments in extradition law have focused on relaxing the strict application of certain grounds for refusal of extradition requests. Attempts have been made to ease, for example, difficulties with double criminality by inserting general provisions into treaties, either listing acts and requiring only that they be punished as crimes or offences by the laws of both States, or simply allowing extradition for any conduct criminalized and subject to a certain level of punishment in each State.[35] In view of that, steps should be taken at the regional level towards harmonization of national legislations, to the extent possible, in particular in connection with the provisions on criminalization set out in the Organized Crime Convention and its Protocols, so that the principle of dual criminality would not constitute an obstacle to developing more effective cooperative arrangements.[36]

36. The reluctance to extradite their own nationals appears to be lessening in many States. The Organized Crime Convention includes a provision that reflects this development: article 16, paragraph 11, refers to the possibility of temporary surrender of the fugitive on condition that he or she will be returned to the requested State party for the purpose of serving the sentence imposed.[37] In cases where the requested State refuses to extradite a fugitive on the grounds that the fugitive is its own national, the State is often seen to have an obligation to bring the person to trial. This is an illustration of the principle of *aut dedere aut judicare* (extradite or prosecute).[38] Where extradition is requested for the purpose of enforcing a sentence, the requested State may also enforce the sentence that has been imposed in accordance with the requirements of its domestic law.[39]

37. Recent developments also suggest that attempts are being made to restrict the scope of the political offence exception or even abolish it. The initial text of the Model Treaty on Extradition, as adopted in 1990, had clearly included this exception as a mandatory ground for refusal (art. 3 (a)), but the revised version included a further restriction to ensure non-application of the political offence exception in cases of heinous crimes for which States had assumed the obligation, pursuant to any multilateral convention, to take prosecutorial action where they did not extradite.[40] Furthermore, the increase in international terrorism has led to the willingness of States to limit the extent of the political offence exception, which is generally no longer applicable to crimes against international law.[41]

38. Different prosecutorial practices under both common law and continental law systems make effective interregional and international cooperation more difficult.[42]

In the field of extradition, such differences are even more acute when dealing with the documents required to be presented to the requested State and the relevant evidentiary requirements needed for granting an extradition request.

39. In view of the fact that the "prima facie evidence of guilt" has proved in practice to be a considerable impediment to extradition, not only between systems of different legal tradition but also between States with the same general traditions but differing rules of evidence, and given that several common law States have waived the requirement in prescribed circumstances, it is recommended that Member States keep the burden of proof in extradition proceedings to a minimum and take into account in their extradition relations the need for simplification of the evidentiary requirements (see also art. 16, para. 8, of the Organized Crime Convention and art. 44, para. 9, of the United Nations Convention against Corruption).[43]

V. Mutual legal assistance

40. As is the case with extradition, mutual legal assistance is generally based on bilateral or multilateral treaties, but it can also be based on national legislation even in the absence of such treaties. There appear to be significantly fewer bilateral mutual legal assistance treaties than treaties related to extradition. In addition, few States appear to have national legislation on the subject. On the other hand, where such legislation exists, in some cases it encompasses in a comprehensive manner all forms of judicial cooperation in criminal matters.[44]

41. Over the past few decades, some multilateral instruments have been drafted that deal with specific offences. These instruments generally include provisions on mutual legal assistance as well as on extradition. The sets of provisions included in some of these treaties are so extensive that they have been seen to constitute "mini-treaties" on mutual legal assistance. Such is the case, for instance, with the 1988 Convention (art. 7) and the Organized Crime Convention (art. 18). In addition, multilateral mutual legal assistance instruments have been drawn up within the framework of, respectively, the Council of Europe,[45] the Commonwealth,[46] the Organization of American States,[47] the Economic Community of West African States,[48] the Southern African countries and the European Union.[49]

42. The United Nations, in turn, has prepared a Model Treaty on Mutual Assistance in Criminal Matters (General Assembly resolutions 45/117, annex, and 53/112, annex I), which represents a distillation of the international experience gained with the implementation of such mutual legal assistance treaties, in particular between States representing different legal systems.

43. The Organized Crime Convention requires States parties to afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the offences covered by the Convention (art. 18, para. 1). Thus, each State party must ensure that its mutual legal assistance treaties and laws provide for assistance to be provided for cooperation with respect to investigations, prosecutions and judicial proceedings.[50] In addition, States parties are also obliged to reciprocally extend to one another similar assistance where the requesting State has reasonable grounds to suspect that one or some of these offences are transnational in nature, including that victims, witnesses, proceeds,

instrumentalities or evidence of such offences are located in the requested State party and that they involve an organized criminal group. By requiring only reasonable possibility and not evidence based on facts with respect to transnationality and involvement of an organized criminal group, thus establishing a lower evidentiary threshold, the Convention intends to facilitate mutual legal assistance requests for the purpose of determining whether the elements of transnationality and organized crime are present in a certain case and then assessing whether international cooperation is necessary and may be sought for subsequent investigative measures, prosecution or extradition.

44. The Convention also allows several forms of assistance that were not envisaged in earlier international instruments. Examples include the freezing of assets (art. 18, para. 3 (c)), video conferences (art. 18, para. 18) and what is known as the "spontaneous transmission of information", whereby the authorities are allowed, even without prior request, to pass on to the competent authorities of another State information that they believe might be of use (art. 18, paras. 4 and 5).

45. As States have become more familiar with the provision of mutual legal assistance and more appreciative of its importance, there has been a clear trend towards limiting the scope of any conditions and towards changing formerly mandatory conditions into optional conditions, in view of the fact that many of the existing grounds for refusal of a mutual legal assistance request in bilateral, regional or multilateral instruments are a carry-over from extradition treaties, legislation and practice, where life or liberty of the requested person is more directly and immediately at stake.[51] For example, the scope of the political offence exception has been curtailed, in particular with a view to combating terrorism, while the scope of bank secrecy as a ground for refusal has also been curtailed for the purpose of effectively dealing with money-laundering.

46. In addition, consideration should also be given to the retention or not of the double criminality requirement in mutual legal assistance schemes.[52] On this issue, positions and approaches vary considerably, with some States requiring dual criminality for all the requests, some for compulsory measures only, some having discretion to refuse on this basis and some with neither a requirement nor a discretion to refuse.[53] It is, however, recommended that, because of the problems that can arise from the application of this concept to mutual legal assistance cases, the competent national authorities consider restricting or eliminating its use, in particular where it is a mandatory precondition.

47. Aside from the various conditions placed by States on the granting of mutual assistance, the practitioner who seeks evidence abroad faces a number of practical problems. Even if the request can in theory be granted, often the practitioner simply receives no response whatsoever or the evidence is provided in a form that is not useful to the requesting authority or it is provided so late that it is of little practical value.

48. Practical problems also arise in relation to the transmission of the relevant requests. On this point, reference has to be made, first of all, to the traditional letters rogatory, originally for mutual legal assistance treaties, whereby a formal request from the judicial authority of one State is sent to a judicial authority of another State to perform one or more specified actions in the place of the first judicial authority.[54] In international practice, letters rogatory have typically been transmitted through

diplomatic channels. The request for evidence, usually originating from the prosecutor, is authenticated by the competent national court in the requesting State and then passed on by that State's foreign ministry to the embassy of the requested State. The embassy sends it on to the competent judicial authorities of the requested State, generally through the foreign ministry in the capital. Once the request has been fulfilled, the chain is reversed.[55]

49. Increasingly, mutual legal assistance treaties require that States parties designate a central authority (generally the ministry of justice) to whom requests can be sent, thus providing an alternative to diplomatic channels. The judicial authorities of the requesting State can then communicate with the central authority directly. Today, to an increasing degree, even more direct channels are being used, in that an official in the requesting State can send the request directly to the appropriate official in the other State.[56]

50. This tendency demonstrates the importance of a national central authority as a prerequisite for rendering mutual legal assistance more effective. The Organized Crime Convention makes its designation a mandatory requirement for ensuring the speedy and proper execution or transmission of the requests, without, however, prejudice to the right of States parties to use the traditional diplomatic channels (art. 18, para. 13).[57] Moreover, it is equally important to staff the central authorities with practitioners who are legally trained and have developed institutional expertise and continuity in the related practice,[58] as well as to ensure the dissemination of up-to-date information for them.

51. Given the wide and growing range of international instruments, each requiring States parties to afford one another the widest possible mutual legal assistance and to designate for that purpose a central authority, it is also important for States to ensure that their central authorities under these instruments are a single entity in order to facilitate greater consistency of mutual legal assistance practice for different types of criminal offence and to eliminate the potential for fragmentation of effort in this area.[59]

52. Since the procedural laws of States differ considerably, the requesting State may require special procedures (such as notarized affidavits) that are not recognized under the law of the requested State. Traditionally, the almost immutable principle has been that the requested State should follow its own procedural law. That principle has led to difficulties, in particular when the requesting and the requested State represent different legal traditions. For example, the evidence transmitted from the requested State may be in the form prescribed by the laws of this State, but such evidence may be unacceptable under the procedural law of the requesting State.

53. The modern trend is to allow more flexibility as regards procedures. According to article 7, paragraph 12, of the 1988 Convention, a request shall be executed in accordance with the domestic law of the requested State. However, the article also provides that, to the extent not contrary to the domestic law of the requested State and where possible, the request shall be executed in accordance with the procedures specified in the request. Thus, although the 1988 Convention does not go so far as to require that the requested State comply with the procedural form required by the requesting State, it does clearly exhort the requested State to do so. This same provision was taken verbatim into article 18, paragraph 17, of the Organized Crime Convention. In the same context, the Model Treaty on Mutual Assistance in

Criminal Matters provides for the execution of the request in the manner specified by the requesting State to the extent consistent with the law and practice of the requested State (art. 6).[60]

54. One of the major problems in mutual legal assistance worldwide is that the requested State is often slow in replying and suspects must be freed owing to lack of evidence. There are many understandable reasons for the slowness: a shortage of trained staff, linguistic difficulties, differences in procedure that complicate responding and so on. Nonetheless, it can be frustrating to find that a case must be abandoned because even a simple request is not fulfilled in time. The 1988 Convention does not make any explicit reference to an obligation on the part of the requested State to be prompt in its reply. The 1990 Model Treaty (art. 6), in turn, states that requests for assistance shall be carried out promptly. Section 6, paragraph 1, of the Commonwealth Scheme for Mutual Assistance in Criminal Matters calls upon the requested State to grant the assistance requested as expeditiously as practicable.

55. The Organized Crime Convention is even more emphatic about the importance of promptness and makes the point in two separate provisions. Article 18, paragraph 13, of the Convention provides that, if the central authority itself responds to the request, it should ensure speedy and prompt execution. If the central authority transmits the request to, for example, the competent court, the central authority is required to encourage the speedy and proper execution of the request. Article 18, paragraph 24, provides that the request is to be executed as soon as possible and that the requested State is to take as full account as possible of any deadlines suggested by the requesting State party and for which reasons are given.[61]

56. As similarly mentioned in relation to law enforcement cooperation, Member States could consider alternative ways for overcoming difficulties encountered in mutual legal assistance practice, such as outposting liaison persons to the central authorities of countries in the same region or of central countries in a region or continent with which there is enough volume or value of cooperation casework for justifying the placement.[62] Member States could also give serious consideration to already existing regional mechanisms that could serve as models for action in this area.[63]

VI. International cooperation for purposes of confiscation of proceeds of crime[64]

57. One of the main motivations for the commission of crime is illegal profit. Domestic criminal law has traditionally sought to ensure that offenders do not benefit from the proceeds of crime. In international cooperation, on the other hand, the focus has been on apprehending fugitives and bringing them to justice. Less attention has been paid, at least until recent years, to requests that other States take measures and provide assistance in relation to confiscation of the proceeds of crime.

58. Confiscation, both within a jurisdiction and internationally, is made more difficult by the complexity of the banking and financial sector and by technological advances. The modern demand for ease in financial transactions and an efficient (and often self-regulating) banking system, with a minimum of controls, and the

demand for the protection of the identity of the account holders come into conflict with investigative needs.

59. It has only been relatively recently that international agreements have begun to contain provisions on assistance in identifying, tracing and freezing or seizing proceeds of crime for the purpose of eventual confiscation (which can be regarded as a special form of mutual legal assistance).[65] The need to come to grips with the profit motive behind the rapid growth of drug crime led to the drafters of the 1988 Convention to include provisions obligating States parties to criminalize money-laundering and, subject to constitutional or other basic concepts of the applicable legal system, to criminalize the knowing acquisition, possession or use of property derived from offences established in accordance with the Convention. The 1988 Convention also requires States parties to create domestic mechanisms for the tracing, restraint and confiscation of the proceeds of drug-related crime. International cooperation was recognized in that States parties are also required to be able to respond to requests presented by other States for the tracing, restraint and confiscation of the proceeds of drug offences.

60. Several subsequent multilateral instruments also contain provisions on international cooperation. One of the most influential is the 1990 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime.[66] While the 1988 Convention focused on the proceeds of drug offences, the Council of Europe Convention contains provisions directed against the laundering of illegal proceeds derived from criminal offences in general. In addition, it offers a partially integrated approach to international cooperation in criminal matters, in view of the fact that it incorporates mutual legal assistance schemes, provisional measures and confiscation of assets and, at the same time, intends to work in concert with other Council of Europe conventions on judicial assistance.[67]

61. Both the 1988 Convention and the 1990 Council of Europe Convention contributed greatly to the formulation of the respective provisions in the Organized Crime Convention (arts. 12 and 13) and the United Nations Convention against Corruption,[68] as well as in the International Convention for the Suppression of the Financing of Terrorism (General Assembly resolution 54/109, annex).[69]

62. As regards the European Union, framework decision 2001/500/JHA on money-laundering, the identification, tracing, freezing, seizing and confiscation of instrumentalities and the proceeds of crime was adopted on 26 June 2001.[70] This is in effect supplemental to the 1990 Council of Europe Convention, providing that member States cannot make certain reservations against that Convention. In addition, framework decision 2003/577/JHA of 22 July 2003 on the execution in the Union of orders freezing property or evidence[71] established rules enabling a member State to recognize and execute in its territory a freezing order issued by a judicial authority of another member State in the context of criminal proceedings.

63. Although they do not have legal effect, other significant international achievements in improved cooperation against money-laundering are the Forty Recommendations of the Financial Action Task Force on Money Laundering, issued in 1990 and modified in 1996, and the 1988 set of principles adopted by the Committee on Banking Regulations and Supervisory Practices (now the Basel Committee on Banking Supervision), comprised of representatives of the Group of 10 industrialized nations.

64. Measures against money-laundering have been found to be effective in depriving offenders of the proceeds of crime. The fact that a large number of States have become parties to the 1988 Convention, the Organized Crime Convention and the Financing of Terrorism Convention means that much international cooperation in this area can be based on multilateral instruments. Moreover, the recentness of all of these instruments and the fact that many key intergovernmental and non-governmental organizations have provided assistance in their implementation should in principle suggest that most States would have adopted much the same legislation and that national practice would follow broadly similar lines.

65. Nonetheless, international cooperation in confiscation poses difficulties of its own. These are due to several factors. One is that, despite the influence of, for example, the 1988 Convention and the Organized Crime Convention, considerable diversity remains in the domestic regimes in question.[72] A second factor is the need to ensure the cooperation of the banking and financial sector. A third element to be considered is that the concepts involved in this form of international cooperation are relatively new, tending to be unfamiliar to the authorities involved, thus causing problems and difficulties in practice.

66. Such problems can only be overcome by working closer together at the international level to align national law and practice, using as far as possible such international points of reference as the respective provisions of the Organized Crime Convention. At the national level, legislation and practice should be developed to allow greater flexibility in providing international cooperation in restraint and confiscation, with due regard to the legitimate interests of third parties. Many of the current difficulties can be dealt with by ensuring that the authorities are aware of the legal tools available for cooperation and are motivated to use them.

67. International cooperation in this field could be expanded further to include agreements or arrangements on the sharing of confiscated proceeds of crime or property, taking into particular consideration article 5, paragraph 5, of the 1988 Convention and article 14 of the Organized Crime Convention. In that context, an intergovernmental expert group, convened pursuant to Economic and Social Council resolution 2004/24 of 21 July 2004 in Vienna from 26 to 28 January 2005, has prepared a draft model bilateral agreement on disposal of confiscated proceeds of crime covered by the above-mentioned conventions, with a view to use by Member States as a framework for the conclusion of pertinent bilateral agreements (see E/CN.15/2005/7, annex).

VII. Transfer of proceedings in criminal matters

68. A relatively new option in transnational criminal justice is for one State to transfer criminal proceedings to another State. This would be an appropriate solution in cases where the latter State appears to be in a better position to conduct the proceedings or the defendant has closer ties to it because, for example, the defendant is a citizen or resident of this State. It may also be used as an appropriate procedural tool to increase the efficiency and effectiveness of domestic prosecutions initiated and conducted in lieu of extradition (especially in cases where extradition is denied because the person sought is a national of the requested State).[73]

69. One multilateral convention has been adopted dealing ad hoc with the transfer of criminal proceedings. Within the framework of the Council of Europe, the European Convention on the Transfer of Proceedings in Criminal Matters[74] was opened for signature in 1972 and entered into force in 1978.[75] It has been ratified by 21 of the 46 member States of the Council of Europe. The Convention in itself is complicated, but the underlying concept is simple: when a person is suspected of having committed an offence under the law of one State party, that State may request another State party to take action on its behalf in accordance with the Convention and the latter may take prosecutorial action under its own law. The Convention requires double criminality for that purpose.

70. The United Nations has sought to promote the development of bilateral and multilateral treaties on this subject by preparing a Model Treaty on the Transfer of Proceedings in Criminal Matters. This is only a framework treaty, which has to be adapted to the specific requirements of the two or more States that are negotiating such a treaty. At the normative level, both the 1988 Convention and the Organized Crime Convention include specific provisions on the transfer of criminal proceedings (arts. 8 and 21, respectively) enabling States parties to resort to this form of international cooperation where this is in the interests of the proper administration of justice, in particular in cases where several jurisdictions are involved, with a view to concentrating the prosecution.

VIII. Resources

71. As has already been noted, the efficiency of international cooperation depends on the existence of legal tools, including international agreements and national enabling legislation, that allow such cooperation. Practical experience has shown, however, that the simple existence of international cooperation instruments does not, as such, provide assurances and guarantees that such cooperation will be provided. What has to be further in place is a sufficient number of well-trained and motivated personnel who are able to use the legal tools in an appropriate manner, have the necessary support staff, have access to information and contacts and also have the necessary trust and confidence in the operation of the law enforcement and criminal justice system of the foreign State in question.

72. The need for a sufficient number of well-trained and motivated personnel is obvious enough, but this does not make the need any easier to fulfil. International cooperation departments must compete for resources with other agencies, which have equally pressing concerns. The salaries for such personnel should be generous enough to attract lawyers and other practitioners with the requisite language skills. The key personnel also require the assistance of support staff, such as translators and secretarial assistance. Moreover, resources are needed for such tools as computers and communications equipment. In the field of international cooperation, the authorities of more advanced countries have a tendency to overlook the basic difficulties faced by the authorities of many developing countries. Finding suspects and witnesses, for example, may be hampered by inadequate population registers or even by deficiencies in the local transport and telephone networks. Responding to requests for court records, in turn, may be hampered by outdated forms of information management.

73. Working with representatives of other legal systems should also help foster trust and confidence in those legal systems. It is perhaps understandable that all practitioners have an in-built preference for their own legal system, its techniques and approaches. For much the same reason, there may also be a reluctance to make adjustments for the requirements of foreign legal systems, even if domestic law would allow such adjustments. With greater trust and confidence, there may be a greater readiness to prepare and respond to requests for assistance and also to contact counterparts in the other country should any difficulties arise in the granting of that assistance.

IX. Conclusions

74. With the increase in international travel, the improvements in technology and communications, the greater likelihood that a crime can have an impact beyond national borders and the increased profits that can be made from organized crime, the need to obtain assistance from other States in bringing offenders to justice, gathering the necessary evidence or confiscating the proceeds of crime has expanded rapidly. The basic modalities of international cooperation that can be used as a response—in particular extradition and mutual legal assistance in criminal matters—continue to evolve, often struggling to keep pace with developments in crime.

75. Increased efforts have been made in recent years to expand and deepen international cooperation as a response to transnational organized crime by the conclusion of multilateral instruments. The pace of development quickened during the 1990s and the beginning of the new millennium. The 1988 Convention, the Organized Crime Convention and the United Nations Convention against Corruption are clear signs that multilateral instruments are assuming increasing importance. All these multilateral instruments call upon States parties to seek to conclude bilateral and multilateral agreements or arrangements to enhance the effectiveness of extradition and mutual legal assistance mechanisms and to promote cooperation between law enforcement agencies. Consequently, States will continue to expand their treaty network in the field of international cooperation by entering into bilateral agreements or arrangements with other States with which they share particular concerns and interests.

76. The plethora of bilateral and multilateral instruments and thus the availability of multiple provisions on international cooperation is not a panacea for overcoming problems and difficulties encountered in daily practice. Such international instruments may provide a satisfactory or even an autonomous and self-contained legal basis for cooperation, given that the recent United Nations instruments lay down a quite detailed and well-articulated framework for such cooperation. However, their provisions should be applied in a way that avoids piecemeal solutions and takes into account the need to ensure the proper administration of justice. It is therefore important to adopt and follow a holistic and flexible approach that renders the different modalities of international cooperation complementary to each other for the purpose of promoting cooperation among States and avoiding loopholes of impunity. In that sense, prosecution on the basis of the principle of *aut dedere aut judicare*, where, for example, extradition is denied on the grounds of nationality, can only be effective if mutual legal assistance or transfer of criminal

proceedings mechanisms are, at the same time, available and properly used. Member States should therefore envisage the adoption and implementation of the appropriate legal framework that will facilitate and promote the use of the full array of available forms of cooperation.

X. Recommendations

77. In view of the above, and taking into account the recommendations of the regional preparatory meetings, the Eleventh Congress may wish to consider the following recommendations:

(a) Member States should treat the promotion of international cooperation in criminal matters as a key component and prerequisite for the full implementation of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988, the United Nations Convention against Transnational Organized Crime and the Protocols thereto and the United Nations Convention against Corruption. In that connection, Member States should review or expand their extradition, mutual legal assistance and law enforcement cooperation arrangements and/or adjust their relevant legislation with a view to ensuring compliance with the relevant requirements set forth in the United Nations instruments;

(b) Member States should enhance the efficiency of law enforcement cooperation mechanisms, in particular for combating transnational organized crime and international terrorism, by, inter alia, developing effective systems of information-sharing, establishing channels of communication between their competent authorities and concluding arrangements to foster assistance or joint activities of operational nature;

(c) Member States should continue efforts to ease difficulties arising from the strict application of traditional grounds for denying extradition and take appropriate measures aimed at simplifying and expediting extradition proceedings;

(d) Member States should ensure flexibility in their domestic law and practice to afford one another the widest measure of mutual legal assistance by, inter alia, minimizing the ambit of grounds for refusal in mutual legal assistance and enabling the execution of relevant requests in accordance with procedures that make possible the use of evidence in the foreign proceedings;

(e) Member States should further strengthen the effectiveness of designated central authorities involved in mutual legal assistance and maintain direct channels of communication between them in order to ensure timely execution of requests;

(f) Member States should continue their efforts to build and promote flexible and efficient schemes of international cooperation for purposes of confiscation by, inter alia, developing or reviewing domestic legislation or practice to enable greater flexibility in dealing with tracing, freezing and confiscation requests;

(g) Member States should bolster effective and flexible mechanisms of international cooperation in criminal matters whereby existing modalities of such cooperation could be used jointly to reinforce each other and further ensure and promote the proper administration of justice;

(h) Member States should ensure that appropriate resources are allocated to authorities or agencies involved in international cooperation in criminal matters. In that connection, tangible efforts should be made, to the extent possible, to enhance financial and material assistance for developing countries and countries with economies in transition with a view to strengthening their domestic capacity in this field;

(i) The United Nations should continue to provide technical assistance to requesting States, focusing on the improvement of domestic law enforcement and criminal justice system capacity in dealing with matters particularly related to international cooperation to combat transnational organized crime, corruption and international terrorism. Such technical assistance may range from the training of personnel involved in this field to the provision of the necessary expertise and guidance on adopting or reviewing appropriate legal tools for use in this area;

(j) Member States should ensure that the capacity of the United Nations to provide technical assistance services on international cooperation in criminal matters has adequate support and resources to meet the rapidly increasing needs in this field.

Notes

[1] Some legal mechanisms are relevant to specific types of crime and cannot be dealt with here. Examples include cooperation against illicit traffic at sea (art. 17 of the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988; and arts. 7 and 8 of the Protocol against the Smuggling of Migrants by Land, Air and Sea, supplementing the United Nations Convention against Transnational Organized Crime; as well as international cooperation for the repatriation of victims of trafficking in persons and the return of smuggled migrants (art. 18 of the Migrants Protocol and art. 8 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the Organized Crime Convention)). In addition, international judicial cooperation includes the recognition of foreign penal judgements and the transfer of prisoners. As the focus of Workshop 1 is on the investigation and prosecution of offences, these mechanisms are not considered here.

[2] Bassiouni estimates that if each Member State entered into a bilateral treaty with the other Member States, then there would be some 20,000 treaties among them. The United States of America alone has such treaties with over 110 States (see M. Cherif Bassiouni, *International Extradition: United States Law and Practice*, 4th ed. (Dobbs Ferry, New York, Oceana Publications, 2002), p. 46; see also Igor I. Kavass and Adolf Sprudzs, *Extradition Laws and Treaties*, vols. 1 and 2 (W. S. Hein and Company, 2001).

[3] *Official Journal of the European Communities*, C 80, 10 March 2001, p. 1.

[4] *Official Journal of the European Union*, L 181, 19 July 2003, pp. 27 and 34, respectively.

[5] See also article 11 of the Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances of 1988 on controlled delivery and article 50 of the United Nations Convention against Corruption.

[6] See *Legislative Guides for the Implementation of the United Nations Convention against Transnational Organized Crime and the Protocols Thereto* (United Nations publication, Sales No. E.05.V.2), part one, para. 384.

[7] United Nations, *Treaty Series*, vol. 1582, No. 27627.

[8] Recently, the European Union has sought to promote wider use of joint investigative teams by including a specific provision on the matter (art. 13) in the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union and by adopting framework decision 2002/465/JHA on joint investigation teams and recommendation 2003/C 121/01 on a model agreement for setting up a joint investigative team.

[9] See also articles 32 and 33 of the United Nations Convention against Corruption.

[10] See also article 9 of the 1988 Convention and article 48 of the United Nations Convention against Corruption.

[11] On the posting of liaison officers, see also the developments within the European Union, where decision 2003/170/JHA on the common use of liaison officers posted abroad by the law enforcement agencies of the Member States was adopted on 27 February 2003.

[12] Interpol provides a framework for cooperation between the law enforcement authorities of its 182 member States. Its activity is not based on any international instrument. Instead, the cooperation between national police officers, when decided, takes place within the framework of Interpol, namely through the national central bureaux established in each State. An essential part of Interpol's day-to-day work consists of its system of notices, which are used to help law enforcement agencies exchange information about persons who are wanted for committing serious crimes and about criminal modi operandi, as well as about missing persons and unidentified bodies.

[13] Europol was established in 1995 to deal with the special needs of law enforcement agencies in the European Union. As is the case with Interpol, Europol is non-operational. Its primary task is to facilitate information exchange among member States, gather, analyse and circulate information and reports, facilitate investigations and manage the relevant databases. It also develops expertise in key fields of crime and makes that expertise available to its member States when needed.

[14] Of the present 25 member States of the European Union, 13 have agreed to eliminate internal frontier controls on the basis of the Schengen Agreement and the Convention implementing the Schengen Agreement, both of them constituting the so-called "Schengen *acquis*". Allowing persons to cross borders without hindrance, however, inevitably raises special law enforcement concerns. This has been offset at least in part by including in the Schengen arrangements special provisions on more intensive forms of law enforcement cooperation. These include the possibility of cross-border supervision (allowing the law enforcement personnel of one State to conduct limited surveillance operations in another State), the limited possibility of hot pursuit of fugitives crossing a border into the territory of another State and controlled delivery (i.e. the surveillance of illegal activity, such as drug trafficking, from beginning to end of its route, in order to identify all the offenders, in particular the principal offenders). The Schengen arrangements also include the Schengen Information System, which provides data, for example, on persons who have been deported or for whom there is a valid arrest warrant. The law enforcement authorities of each participating State can directly enter data into the system. For more information see, inter alia, Steve Peers, *EU Justice and Home Affairs Law* (Harlow, Longman), 2000, pp. 209-219, and Ilias Bantekas and Susan Nash, *International Criminal Law*, 2nd ed. (London, Cavendish Publishing, 2003), pp. 277-279.

[15] The Southern African Regional Police Chiefs' Cooperation Organization was established in 1995 at the initiative of the chiefs of police of a number of Southern African countries, primarily in response to an increase in cross-border criminal activities. The Organization currently encompasses 12 countries and seeks to assist the law enforcement agencies of its member States in, among other things, the fostering of joint law enforcement strategies, the evaluation of crime trends, the facilitation of cooperation between agencies and the making of relevant recommendations to the Governments of member States.

[16] See the report of the African Regional Preparatory Meeting for the Eleventh Congress (A/CONF.203/RPM.3/1 and Corr.1), para. 8.

[17] See the report of the Asian and Pacific Regional Preparatory Meeting for the Eleventh Congress (A/CONF.203/RPM.1/1), para. 9.

[18] See the report of the Latin American and Caribbean Regional Preparatory Meeting for the Eleventh Congress (A/CONF.203/RPM.2/1), para.12.

[19] See, for example, Ellen A. Yearwood, "Data bank control", *Legal Responses to International Terrorism: U.S. Procedural Aspects*, M. Cherif Bassiouni, ed. (The Hague, Martinus Nijhoff, 1988).

[20] However, Bassiouni notes that the first recorded treaty dealing with extradition dates back to 1280 B.C. (see Bassiouni, *International Extradition* ..., p. 32).

[21] See M. Cherif Bassiouni, "The need for international accountability", *International Criminal Law* (1999), vol. 3, pp. 3 ff.

[22] Inter-American Convention on Extradition (1981) (United Nations, *Treaty Series*, vol. 1752, No. 30597).

[23] Extradition Agreement of the League of Arab States (1952).

[24] Convention of the African and Malagasy Common Organization (1961).

[25] Economic Community of West African States Convention on Extradition (1994).

[26] European Convention on Extradition (1957) and its two Additional Protocols (1975, 1978).

[27] Commonwealth Scheme for the Rendition of Fugitive Offenders (1966, as amended in 1990). The Scheme is a set of principles agreed by Commonwealth ministers of justice and requires domestic legislation by each participating Commonwealth country to implement it.

[28] The Treaty concerning Extradition and Mutual Assistance in Criminal Matters (1962).

[29] The Nordic States Scheme (1962).

[30] Convention on Simplified Extradition Procedure between the Member States of the European Union and Convention relating to extradition between the member States of the European Union.

[31] This has also been referred to as the "backing of warrants". Such a bilateral arrangement has been used, for example, between the United Kingdom of Great Britain and Northern Ireland and the Republic of Ireland and between Australia and New Zealand.

[32] Framework decision 2002/584/JHA on the European arrest warrant and the surrender procedures between member States. This is the first specific measure in the field of criminal law implementing the principle of mutual recognition of judicial decisions rendered by the criminal justice organs of member States of the Union. It was adopted on the basis of the recommendations of the European Council at its meeting in Tampere, Finland, on 15 and 16 October 1999, according to which the principle of mutual recognition should become the cornerstone of judicial cooperation in criminal matters within the Union.

The framework decision removes the condition of verifying double criminality with respect to a very broad list of 32 generic types of offence, including terrorism and offences related to transnational organized crime.

The new surrender procedure based on the European arrest warrant is moved outside the realm of the executive and has been placed in the hands of the judiciary.

For more information, see Michael Plachta, "European arrest warrant: revolution in extradition?", *European Journal of Crime, Criminal Law and Criminal Justice*, vol. 11, No. 2 (2003), pp. 178 ff; Nicola Vennemann, "The European arrest warrant and its human rights implications", *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, vol. 63, 2003, pp. 103 ff; and Rob Blekxtoon, *Handbook on the European Arrest Warrant* (Cambridge, Cambridge University Press, 2004).

[33] A number of multilateral conventions on crimes against international law contain provisions on extradition. Examples include the Geneva Conventions, the Convention on the Prevention and Punishment of the Crime of Genocide and the Convention for the Suppression of Unlawful Seizure of Aircraft. The entire concept of international crimes raises important issues that cannot be dealt with in this connection. See, in particular, M. Cherif Bassiouni, *A Draft International Criminal Code and Draft Statute for an International Criminal Tribunal*, 2nd ed. (Boston/Dordrecht/The Hague, Martinus Nijhoff, 1987).

[34] For best practice recommendations to help minimize undue obstacles to just, quick and predictable extradition, see generally the report of the Informal Expert Working Group on Effective Extradition Casework Practice, chaps. 2 and 3 (at http://www.unodc.org/pdf/ewg_report_extraditions_2004.pdf).

[35] For the innovations introduced by the European arrest warrant process concerning the double criminality requirement, see note 32 above; see also the report of the Informal Expert Working Group on Effective Extradition ..., paras. 7-10.

[36] See the report of the Latin American and Caribbean Regional Preparatory Meeting for the Eleventh Congress (A/CONF.203/RPM.2/1), para. 17; see also the report of the Informal Expert Working Group on Effective Extradition ..., paras. 68 and 69.

[37] See also article 44, paragraph 12, of the United Nations Convention against Corruption; article 8, paragraph 2, of the International Convention for the Suppression of Terrorist Bombings; and article 10, paragraph 2, of the International Convention for the Suppression of the Financing of Terrorism. It is interesting to note that European Union member States can no longer refuse to surrender their own nationals. The framework decision does not include nationality as either a mandatory or optional ground for non-execution. However, article 5, paragraph 3, provides for the option of making execution conditional on a guarantee that, upon conviction, the individual is returned to his/her State of nationality to serve the sentence there.

[38] For example, article 4 (a) of the Model Treaty on Extradition; article 16, paragraph 10, of the Organized Crime Convention; article 6, paragraph 9 (a), of the 1988 Convention; and article 44, paragraph 11, of the United Nations Convention against Corruption. Regarding this concept, see in particular M. Cherif Bassiouni and Edward M. Wise, *Aut Dedere aut Judicare: The Duty to Extradite or Prosecute in International Law* (The Hague, Martinus Nijhoff, 1995); see also the report of the Informal Expert Working Group on Effective Extradition ..., paras. 48 and 49.

[39] See article 16, paragraph 12, of the Organized Crime Convention, article 6, paragraph 10, of the 1988 Convention and article 44, paragraph 13, of the United Nations Convention against Corruption.

[40] In addition, a new footnote was added for consideration by States wishing to exclude certain conduct, such as serious offences involving an act of violence against the life, physical integrity or liberty of a person, from the concept of political offence.

[41] See, for example, the relevant provisions of the United Nations counter-terrorism instruments, such as the International Convention for the Suppression of Terrorist Bombings (art. 11) and the International Convention for the Suppression of the Financing of Terrorism (art. 14), as well as the same approach in other instruments, such as the Convention on the Prevention and Punishment of the Crime of Genocide (art. III) or the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (arts. 7 and 8); see also the report of the

Informal Expert Working Group on Effective Extradition ..., paras. 39 and 40. The political offence exception is also not enumerated as mandatory or optional ground for non-execution of a European arrest warrant. The sole remaining element of this exception is confined to the recitals in the preamble of the framework decision (recital 12) and takes the form of a modernized version of a non-discrimination clause.

[42] See the report of the Latin American and Caribbean Regional Preparatory Meeting ..., para. 12.

[43] See also the report of the Informal Expert Working Group on Effective Extradition ..., paras. 41-43 and 46.

[44] See the examples of the Austrian legislation (ARHG 1979), the German legislation (IRG 1982), the Swiss legislation (1981) and the Finnish legislation (1994).

[45] European Convention on Mutual Assistance in Criminal Matters (1959) and its two Additional Protocols (1978 and 2001, respectively).

[46] The Commonwealth Scheme for Mutual Assistance in Criminal Matters (1986, as amended in 1990 and 1999).

[47] Inter-American Convention on the Taking of Evidence Abroad (1975) and its Additional Protocol (1984) and the Inter-American Convention on Mutual Assistance in Criminal Matters (1992) and its Optional Protocol (1993).

[48] The Economic Community of West African States Convention on Mutual Assistance in Criminal Matters (1992).

[49] European Union Act 2000/C 197/01 of 29 May 2000 establishing the Convention on Mutual Assistance in Criminal Matters between the Member States of the European Union and Act 2001/C 326/01 of 16 October 2001 establishing the Protocol thereto.

[50] The term “judicial proceedings” is separate from investigations and prosecutions and connotes a different type of proceeding. Since it is not defined in the Convention, States parties have discretion in determining the extent to which they will provide assistance for such proceedings, but assistance should at least be available with respect to portions of the criminal process that in some States may not be part of the actual trial, such as pre-trial, sentencing and bail proceedings (see *Legislative Guides* ..., p. 220, para. 465).

[51] See the report of the Informal Working Group on Mutual Legal Assistance ..., p. 11.

[52] The Latin American and Caribbean Regional Preparatory Meeting for the Eleventh Congress recommended that the principle of dual criminality not be a requirement in cases of mutual legal assistance (see A/CONF.203/RPM.2/1, para. 17).

[53] See also article 18, paragraph 9, of the Organized Crime Convention and article 46, paragraph 9, of the United Nations Convention against Corruption.

[54] See, inter alia, the *Explanatory Report of the European Convention on Mutual Assistance in Criminal Matters* (comments under art. 3) (available at http://conventions.coe.int/Treaty/en/Reports/Html/030.htm); see also David McClean, *International Co-operation in Civil and Criminal Matters*, 2nd ed. (Oxford, Oxford University Press, 2002), p. 176.

[55] Legal scholars in this field have already pointed out that one of the main disadvantages of letters rogatory is their inefficient, costly and time-consuming transmission. See M. Cherif Bassiouni and David S. Gualtieri, “International and national responses to the globalization of money laundering”, M. Cherif Bassiouni, ed., *International Criminal Law: Procedural and Enforcement Mechanisms*, 2nd ed. (Ardsley, New York, Transnational Publishers, 1999), p. 682.

[56] At the regional level, and in particular in the context of the Council of Europe, a revision of the relevant text of the 1959 Convention by its Second Additional Protocol (2001) was deemed necessary in order to reflect the new trends concerning the channels through which mutual legal assistance requests are to be transmitted. According to the original text of article 15, paragraph 1, of the Convention, the normal channel for letters rogatory and for applications for transfers of persons in custody was to be from one ministry of justice to another. This cut through some of the delays and complexities associated with the use of the diplomatic channels, but still permitted a measure of governmental supervision. Beyond that, a more direct communication between the judicial authorities of the States concerned is allowed, but according to the original text only "in case of urgency". The reference to "urgency" vanishes in the new text agreed in 2001 through the adoption of the Second Additional Protocol. At the European Union level, the Schengen Agreement (1990) specifically allows the use of direct contacts between judicial authorities (art. 53). The same concept is embodied in the even more recent European Union Convention on Mutual Legal Assistance of 2000.

[57] Article 18, paragraph 13, of the Organized Crime Convention also allows the possibility that, in urgent cases and when the States in question agree, the request can be made through Interpol, if possible. See also article 7, paragraph 8, of the 1988 Convention and article 46, paragraph 13, of the United Nations Convention against Corruption.

[58] See the report of the Latin American and Caribbean Regional Preparatory Meeting for the Eleventh Congress ..., para. 12.

[59] See the report of the UNDCP Informal Working Group on Mutual Legal Assistance Casework Best Practice, p. 8 (at http://www.unodc.org/pdf/1ap_mlaeg_report_final.pdf).

[60] See the revised manual on the Model Treaty (E/CN.15/2004/CRP.11), pp. 96 ff.

[61] Other elements of "good practice" in mutual legal assistance have also worked their way into the Organized Crime Convention, making the life of the practitioner easier than under, for example, the 1988 Convention. According to article 18, paragraph 20, of the Organized Crime Convention, the requested State should respond to reasonable requests by the requesting State for information on progress of its handling of the request and the requesting State should promptly inform the requested State when the assistance sought is no longer required.

[62] See the report of the Informal Expert Working Group on Effective Extradition ..., paras. 68 and 69.

[63] Recent developments in the European Union could be considered effective examples of concerted action at the regional level geared towards promoting inter-state cooperation and coordination in combating transnational organized crime. In this context, Joint Action 96/277/JHA created a framework for the exchange of liaison magistrates to improve judicial cooperation between the member States of the European Union. Furthermore, the European Judicial Network was set up in accordance with the Joint Action 98/428/JHA. It is a network of judicial contact points among the member States created in order to promote and accelerate cooperation in criminal matters, paying particular attention to the fight against transnational organized crime. Finally, Eurojust was established on 28 February 2002 in accordance with decision 2002/187/JHA, aimed at stimulating and improving coordination of investigations and prosecutions in the member States, improving cooperation between the competent authorities of the member States, in particular by facilitating the execution of international mutual legal assistance and the implementation of extradition requests, as well as otherwise supporting the competent authorities of the member States in order to render their investigations and prosecutions more effective.

[64] See M. Cherif Bassiouni and David S. Gualtieri, op. cit., pp. 675 ff; William C. Gilmore, *Dirty Money: the Evolution of Money Laundering Counter-Measures* (Strasbourg, Council of Europe, 1993); Paolo Bernasconi, *New Judicial Instruments against International Business Crimes* (Amsterdam, Harwood, 1995); and Ernesto U. Savona (ed.), *Responding to Money Laundering: an International Perspective* (Toronto, Harwood, 1997).

[65] The Model Treaty on Mutual Assistance in Criminal Matters included in its 1990 version an Optional Protocol related to proceeds of crime and dealing with assistance in enforcing orders that authorize the tracing, seizing and confiscating of proceeds of crime. In the revised version of 1998, the Optional Protocol has been incorporated into the main text of the Model Treaty as article 18.

[66] United Nations, *Treaty Series*, vol. 1862, No. 31704.

[67] See Hans Nilsson, "The Council of Europe Laundering Convention: a recent example of a developing international criminal law", *Criminal Law Forum*, vol. 2, No. 4 (1991), p. 419.

[68] Issues related to international cooperation for purposes of confiscation under the United Nations Convention against Corruption are considered, however, jointly with asset recovery aspects (chap. V of the Convention) and are therefore not dealt with here.

[69] This Convention constitutes a part of a comprehensive web of international instruments by which States have committed themselves to combating terrorism. The combating of the financing of terrorism became a prominent component of that effort following the terrorist attacks in the United States in September 2001, as well as the subsequent adoption of Security Council resolution 1373 (2001), the Special Recommendations on Terrorist Financing of the Financial Action Task Force on Money Laundering and the establishment of the Counter-Terrorism Committee. In its resolution 1373 (2001), the Security Council required all States to adopt effective national legislation to trace illegal proceeds of crime with a particular view to tracking funding for terrorism activities. Resolution 1373 (2001) was instrumental in leading a number of States to adopt the necessary domestic legislation. It imposes on States an obligation to freeze without delay funds and other financial assets of persons who commit, or attempt to commit, terrorist acts or participate in or facilitate the commission of terrorist acts (para. 1 (c)). The Financing of Terrorism Convention is broader than resolution 1373 (2001) on this point, as it requires States parties to take measures for the identification, detection, freezing and confiscation of funds used or allocated for the purpose of committing the terrorist acts that States are required to criminalize under the Convention (art. 8), while the resolution requires only the freezing of assets of terrorists and those who support them (see, inter alia, International Monetary Fund, Legal Department, *Suppressing the Financing of Terrorism: a Handbook for Legislative Drafting*, 2003, p. 56). In its resolutions 1267 (1999) and 1333 (2000), the Council, acting under Chapter VII of the Charter, established an "autonomous" asset-freezing regime, whereby States parties were required to seize assets of persons and organizations that had been designated in lists issued under the authority of the Council (see International Monetary Fund, *Suppressing* ..., p. 22).

[70] *Official Journal of the European Communities*, L 182, 5 July 2001, p. 1.

[71] *Official Journal of the European Communities*, L 196, 2 August 2003, p. 45.

[72] For example, some legal systems provide for the confiscation of property found to be proceeds or instrumentalities used for the commission of crime. Others allow the "value-based" system by determining the value of proceeds and instrumentalities of crime and confiscating an equivalent value. Other variations relate to the range of offences with respect to which confiscation may take place, the required standard of proof (criminal standard or lower civil standard) and the nature of the process (civil, administrative or criminal) by which the forfeiture of proceeds of crime can be accomplished.

[73] See Lech Gardocki, "Transfer of proceedings and transfer of prisoners as new forms of international co-operation", Albin Eser and Otto Lagodny (eds.), *Principles and Procedures for a New Transnational Criminal Law* (Freiburg, Eigenverlag MPI, 1992), p. 318.

[74] Council of Europe, *European Treaty Series*, No. 73.

[75] See Julian Schutte, "Transfer of criminal proceedings: the European system", M. Cherif Bassiouni (ed.), *International Criminal Law* ..., pp. 647 ff.